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Brief in Support of Motion by Defendant Borough of Metuchen for partial Summary Judgment

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION:MIDDLESEX COUNTY
DOCKET NO. C-4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL

Plaintiffs,

vs.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, ET AL,

Defendants.

Civil Action

BRIEF IN SUPPORT OF MOTION

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STATEMENT OF FACTS

Plaintiffs bring suit against the Borough of Metuchen and 22 other municipalities in Middlesex County, claiming that the various zoning ordinances and other land use policies have excluded low and moderate income persons and minority groups from housing in the defendant municipalities. The specific exclusionary zoning claim against Metuchen, as set forth in the Appendix to the Complaint, is as follows:

"10. BOROUGH OF METUCHEN

Metuchen's zoning ordinance prohibits mobile homes and permits multi-family use on only an insignificant amount of land.

It subjects single-family detached units to minimum floor area requirements from 1,000 to 1,400 square feet.

Metuchen has not established a public housing authority."

In response to supplemental interrogatories (Interrogatory No. 1), plaintiffs have more specifically challenged the following zoning provisions of Metuchen as tending to exclude low and moderate income and minority families from living in Metuchen:

"1. At this time, plaintiffs state the following:

a) Art. III, Sec. 19(c) specifically prohibits trailer coach parks. (1)

b) Art. III, Sec. 21 requires minimum living areas in R-1 zones of 1,400 sq. ft. and in R-2 zones of 1,000 sq. ft. (2)

c) Art. VII-A, Sec. 5 modifies minimum yard requirements for moderate income senior citizens housing projects, but not for low and moderate income housing for families. (3)

d) Art. VII-A, Sec. 8 modifies maximum building height limits for moderate income senior citizens' housing, but not for low and moderate income housing for families. (4)

e) Additionally, plaintiffs challenge the deletion of municipal zoning for high-rise apartments and high-rise apartment developments. (5)

f) Art. VII-A, Sec. 6 exempts moderate income senior citizen housing from scheduled density requirements, but not low and moderate income housing for families." (6)

Since the Court cannot examine any challenged zoning provisions in a vacuum, counsel herein sets forth the following facts as to Metuchen's size, population, housing stock, family income, rental ranges, development and zoning changes supported by admissions, answers to interrogatories and affidavits.

SIZE

The Borough of Metuchen contains 2.9 square miles, (7) and is wholly surrounded by the Township of Edison. The total acreage of the community is 1,880, which, however, includes parks, playgrounds, streets, railroads, etc., leaving a net acreage for development of approximately 1416. The size of Metuchen has not

changed since its incorporation in 1900. (8)

POPULATION

According to the 1970 census, Metuchen's population was 16,031.(9) In 1960 the population was 14,041.(10) The black population of Metuchen increased from 434 in 1960 to 860 in 1970.(11) This percentage of black population is approximately the same as the percentage throughout Middlesex County.(12) Taking size and population into account, Metuchen is the sixth densest municipality in Middlesex County.(13)

VACANT LAND

Practically all of the 1416 acres which encompass all the private property in Metuchen are fully developed or built upon. The most accurate estimates obtainable reveal only approximately 40 acres of undeveloped land in the Borough. These include 24 industrial acres in the manufacturing zone, of which 20 are non-developable, because they consist of either old railroad rights-of-way, extremely marshy or hilly land, land in a flood plain or with no access in Metuchen. They also include 8½ acres in multi-family zones, with the balance scattered in small lots in the other residential and business areas.(14)

RESIDENCES

There are approximately 5,000 housing units in the Borough of Metuchen. Of these, about 3,650 are one family dwellings while the balance are two family and multi-family dwellings. Defining multi-housing as containing three or more families, there are approximately 894 multi-family units in Metuchen, which is almost 20% of the total housing units. Owner occupied units comprise about 3,500 of the 5,000 units, while the balance is renter occupied.(15) The R-1 and R-2 zones in which almost all of these one-family units are located, comprise approximately 1,000 acres of Metuchen, and give the Borough the appearance of being primarily a community of single family dwellings. However, the two family and multi-family zones (R-3, R-4, R-5 and B-1A) either have or permit two family and multi-family structures in at least nine different locations in the community. Few, if any, single family, two family or multi-family units exceed 35 feet or 2½ stories in height.(16)

BUSINESS AND INDUSTRY

The Borough is cross-crossed by three railroads: The Penn-Central which runs east to west across the center of town; the Lehigh Valley Railroad, and the Port Reading Railroad.

Also crossing in the center of town is a major traffic artery, New Jersey Route 27; Route 287 adjoins the southerly boundary line; while Route 1, the New Jersey Turnpike, and the Garden State Parkway are in very close proximity. The 200 fully developed industrial acres in town are primarily in the northwest and southwest sections of the community, adjoining either Route 27 or the Lehigh Valley Railroad and Penn-Central Railroad. The industry is small and can be characterized as light industry. The business section of town is primarily in the geographical center of the community, with two neighborhood offshoots on Central Avenue and South Main Street. Like the other sections, it is almost fully developed and is a typical small retail business community. As in the residential sector, there are hardly any buildings that do not conform to the 35 feet or 2½ stories height limitation. (17)

ZONING IN METUCHEN

The current zoning ordinance of the Borough of Metuchen was adopted April 17, 1962. The ordinance has been amended several times since that date.(18) In 1962 multi-family housing was permitted only in the R-4 residence district (garden apartments)(19)

There were only three areas so designated, two of which already contained garden apartment units, while the third, located on Amboy Avenue, had in diverse ownership, single family dwellings and vacant land in lots of unusual depth.(20) The height provisions permitted in the R-4 zone were 2½ stories or 35 feet.(21)

Based on a non-binding referendum held in November 1961, significant expansion of multi-family housing was permitted in the Borough.(22) The November 18, 1963 amendment to the zoning ordinance created R-5 and B-1A(23) zones in three locations throughout the community. The height limitation was raised to six stories and the use permitted in the two new zones was denominated high-rise apartments. Garden apartments were also allowed in the new R-5 and B-1A zones. In addition, a large garden apartment unit was built by variance in an R-1 zone in the northeasterly corner of the Borough (marked by pencil on one of the attached zoning maps).(24) Multi-family apartments also existed as non-conforming uses in the two R-3 zones on Main Street.(25) The only housing specifically prohibited in Metuchen was trailer coach parks; while the minimum living area only pertained to single detached houses as follows:

R-1	1,400 square feet
R-2	1,000 square feet
R-3	800 square feet (26)

From 1963 until 1972, no high rise apartments or garden apartments were constructed in the R-5, B-1A or R-4 zones. (27)

In 1968, the Mayor and Council of the Borough of Metuchen began a series of steps to bring moderate income senior citizen housing to Metuchen. (28) The Council appointed a non-profit Senior Citizen Housing Corporation, which after more than one year's search, discovered property which they considered suitable for development in a R-2 single family zone on Lincoln Avenue. Since proper zoning was a prerequisite to obtaining State and Federal aid, and based upon special requirements for senior citizen housing due to the type of occupancy and financing, the non-profit corporation requested a rezoning of the 2.3 acre Lincoln Avenue site as an R-5 zone and permitting certain modifications for "moderate income senior citizen housing projects developed pursuant to N.J.S.A. 55:14 et seq. and N.J.S.A. 55:16 et seq. The increase in height to eight stories, reduction of lot coverage to 20%, elimination of density requirements, and reduction of off-street parking because of some of the peculiar requirements of this specific type of housing, were then enacted by the Borough in the zoning ordinance amendment of December 18, 1972. (29)

Subsequent to the adoption of that amendment, the first application for a luxury high-rise apartment in a R-5 zone (Amboy

Avenue location) was considered for site plan in early 1973.[30] In April 1973, the Mayor and Council passed a nine month moratorium on high rise apartment building and launched a $10,000.00 study by planning consultants which became entitled, "Zoning and Multi-Family Use in Metuchen, New Jersey, 1973". Based on recommendations made in the study, and based on a non-binding referendum[31] held in November 1973 favoring the reduction of Borough height limitations from 6-8 to 3 stories, the Borough amended the zoning ordinance on December 17, 1973. This amendment did reduce the height of the stories in the R-5 and B-1A zones to 3, thereby eliminating high rise apartments in Metuchen.[32] It also created an additional R-4 zone for garden apartments on Prospect Street in the Borough from what had been vacant industrially zoned property.[33] In March 1974, also based on the recommendations of the study, the Borough created an R-2A zone for townhouses on Woodbridge Avenue in the Borough out of what had been a single-family R-2 zone.[34] Also in 1974, the Metuchen Senior Citizen Housing Corporation completed the acquisition of the Lincoln Avenue property with the aid of a 100% mortgage from the New Jersey State Housing Finance Agency, but was unable to start construction on the property because of the Federal moratorium on housing aid.[35]

Most recently, because of funds becoming available under the Federal Community Development Act of 1974, the Metuchen Senior Citizen Housing Corporation requested a zoning amendment to accommodate 120 senior citizen housing units approved by the State on the 2.3 acre Lincoln Avenue site.(36) Accordingly, the most recent Metuchen zoning ordinance amendment, June 16, 1975, increased height limitations for moderate income senior citizen housing projects developed pursuant to N.J.S.A. 55:14 et seq. and N.J.S.A. 55:16 et seq. only, from 3 stories to 4 stories, or 48 feet, and modified front yard, side yard and rear yard requirements to accommodate the needs of the specific project.(37) During the period from 1963 to date, no request had been made of the Planning Board of the Borough of Metuchen, or the Mayor and Council of the Borough of Metuchen, to make any zoning changes to accommodate low or other moderate income housing in general, or for any specific project.(38)

The building records of the Borough disclose that from 1963 to date, the following buildings permits were issued for residential units in Metuchen.

	1963	1964	1965	1966	1967	1968
Single Family	93	79	36	21	17	31
Multi- Family	1	0	0	0	0	0

	1969	1970	1971	1972	1973	1974	1975
Single Family	18	30	29	29	16	3	3
Multi-Family	0	0	0	0	0	0	1

From these figures it is clear that even as of 1962, Metuchen was comparatively a built-up community with only slightly more than 10% of the 3,650 single family dwellings being built after 1962. Excluding the multi-family units for which a permit was issued in 1975 (townhouses), of the approximately 500 units built for which permits were issued, 100 or 20% was multi-family, as the one unit built in 1963 by variance on Middlesex Avenue contained 100 units. (39)

The zoning ordinance and amendments from 1962 to date as effecting multi-family units can be summarized as follows:

Year	No. of Zones	Locations	Use or Type
1962	1 (R-4)	3	Garden apartments
1963	3 (R-4, R-5, B-1A)	5	Garden apartments High rise apartments
1975	4 (R-2A, R-4, R-5, B-1A)	8	Garden apartments Townhouses Moderate income senior citizen housing (4 stories)

In addition thereto, as stated, apartments exist in three other locations on Main Street and on Middlesex Avenue either by non-conforming use or variance. (40)

HOUSING AS IT AFFECTS LOW AND MODERATE INCOME FAMILIES AND MINORITY GROUPS IN METUCHEN

The total number of housing units in Metuchen in accordance with the 1970 census was 4,912. Since approximately 100 building permits were issued since that date, at the present time it can be estimated that there are 5,000 housing units in the Borough. Also, according to the census of 1970, of the total housing units, 28.6%, or 1,368 were renter occupied. Of these renter occupied units, 369 were two family units, 894 multi-family units, and the balance single family units. The major portion of the 894 multi-family units comprise the four major garden apartments in the Borough; Metuchen Manor, Green Street, Redfield Village and Jefferson Park, of which the latter, Jefferson Park, has now been converted into cooperative apartments. (41)

The value of the single family homes in Metuchen can be obtained from the latest revaluation held in 1972 as follows:

(a) Single family homes under $15,000
31

(b) $15,000 to $25,000
286

(c) $25,000 to $35,000
1503

(d) Over $35,000
1955 (42)

The rental range for the renter occupied units in Metuchen, including multi-housing, two family and single family from the 1970 census was as follows on a monthly rental basis:

Under $100.	$100.00 to $149.00	$150.00 to $199.00	$200.00 to $299.00	$300.00 +
212	500	521	77	33 (43)

Since 1970, due to inflation the rental ranges have undoubtedly increased; for example, the Green Street and Metuchen Manor rentals exceed $200.00; the Jefferson Park Cooperative Apartments maintenance charges have been reduced and range between $162.00 to $182.00 per month, while the Redfield Village rentals range from a low of $150.00 to a high of $225.00 per month. Since late 1973, the Borough has had a rent control ordinance. (44)

According to the 1970 census, the median family income in the Borough of Metuchen was $13,703.00 for families totaling 4,218. (45) The number of low and moderate income families in the four census tracts comprising Metuchen was estimated to be 1,592, or in excess of one-third of the number of total families. (46) In terms of minority groups, the total number according to the 1970 census was 1,155, which included 860 blacks. (47) The minority population was approximately 7% of the entire community. (48)

In the absence of a complete housing inspection, the condition of the housing stock in Metuchen or anywhere is difficult to assess in accordance with the objective standards. However, 1970 census analysis indicates possibly 159 sub-standard units (49) in Metuchen and approximately 205 units which were over crowded. (50) The percentage of black families in such units varied very little with the percentage of blacks to the overall population. (51)

SUMMARY

The facts pertaining to Metuchen reveal a town with an established character: A fully developed community consisting primarily of one-family owner occupied residences, with significant multi-family housing spread throughout the community in well defined areas; a compact downtown business section, and comparatively small industrial area basically separated from the residential portions; and zoning regulations consistent with the actual uses in the Borough, with appropriate zones for single family, multi-family, business and industry. Physically, the Borough has a low profile where structures conform to the 2½ to 3 story or 35 feet height limitation; and the small amount of vacant land still available for residential use is primarily zoned for multi-family units. Population wise, the community represents a mix of high, moderate and low income people with a minority

group population differing very little from the percentage of minority group population within Middlesex County. (52)

ARGUMENT

POINT I

PLAINTIFFS HAVE NO CAUSE OF ACTION BASED ON ALLEGED EXCLUSIONARY ZONING AGAINST A FULLY DEVELOPED MUNICIPALITY, LIKE METUCHEN.

Assuming for purposes of argument, but certainly not admitting that Metuchen's development was shaped by some of the zoning provisions to which plaintiffs and the Court, in Mt. Laurel object; and even assuming, without certainly admitting, that Metuchen or other like built-up suburban municipalities, because of said provisions have not provided the balanced housing required in the Mt. Laurel case, it is counsel's contention that under the Mt. Laurel decision and subsequent ones, Metuchen is not liable to plaintiffs on an exclusionary zoning claim. In respect to exclusionary zoning, our Supreme Court in So. Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975), specifically phrased the exclusionary zoning legal issue as follows:

> "The legal question before us, as earlier indicated, is whether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its confines because of the limited extent of

their income and resources. Necessarily implicated are the broader questions of the right of such municipalities to limit the kinds of available housing and of any obligation to make possible a variety and choice of types of living accommodations.

The Court then held:

"We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor."

The basic assumption by the Court in Mount Laurel was that the defendant township contained vacant land, which instead of being fairly used to help satisfy a housing need for low and moderate income families, was being zoned through various restrictions (excessive industrial land, minimum size lot requirements, prohibition of mobile homes, limitation on bedrooms, lack of areas zoned for multi-family use, minimum floor area requirements, etc.), to exclude said families. Countless times in the opinion the Court limited its decision to what it termed "developing municipalities". While the Court no doubt intended its decision to apply to more municipalities than Mount Laurel itself, it made very clear the type of municipalities dealt with:

"The same question arises with respect to any member of other municipalities of sizeable land area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas (and surrounding some of the smaller cities outside those areas as well) which, like Mount Laurel, have substantially shed rural characteristics and have undergone great population increase since World War II, or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth. Most such municipalities, but with relatively insignificant variation in details, present generally comparable physical situations, courses of municipal policies, practices, enactments and results and human, governmental and legal problems arising therefrom. It is in the context of communities now of this type or which become so in the future, rather than with central cities or older built-up suburbs or areas still rural and likely to continue to be for some time yet, that we deal with the question raised."

The decision of the Court to limit its decision to developing municipalities as distinct from fully developed or built-up communities was not an oversight. Justice Pashman, in his concurring opinion, stated that the Court had chosen not to consider the degree to which the principles applicable to developing municipalities are also applicable to rural ones and to largely developed ones. He wanted the Court to rule that all municipalities, whether developed or not, have the affirmative and negative obligations to provide for housing needs. Justice Pashman in reviewing fully developed suburban municipalities, stressed the difficulties of applying the Mount Laurel decision to them, while

at the same time, he did not wish to absolve them of their responsibility in helping to fulfill regional housing needs. Again, the majority of the Court did not reach his conclusions or adopt his analysis.

There is no doubt that Metuchen is a fully developed community. Like five or six other small municipalities in Middlesex County, it has no vacant land left to provide housing for low and moderate income families and minority groups. Regardless of past history; regardless of any alleged imbalance in the variety of housing provided; it is the lack of vacant land, not exclusionary zoning provisions, which deprive plaintiffs of housing in developed communities. Mount Laurel Township was liable to plaintiffs because it limited future development on vacant land in a discriminatory manner, ignoring housing needs. The vacant land was the key factor and sine qua non of the entire decision. Not past sins, but present and future discriminatory exclusion is the crux of the case.

Defendant's contention that it is not liable to the plaintiffs as a fully developed municipality, and that its zoning ordinances cannot be struck down on the basis of the Mount Laurel case, is fully supported by the decision of Segal Construction Company vs. Zoning Board of Adjustment and Mayor and Council of

Borough of Wenonah, A-797-73, N.J. Super. Ct. App.Div. (decided May 5, 1975), wherein the court stated as follows:

> "We conclude that the Borough of Wenonah remains unaffected by Mount Laurel. Wenonah is not a municipality of "sizeable land area;" it occupies scarcely one square mile of space. (Mount Laurel was described as a "sprawling township, 22 square miles, or about 14,000 acres in area"). Of the 660 acres which comprise this tiny borough, only 109 acres have yet to be developed and the only sizeable tract available for multi-family construction is the 41 acre parcel upon which Segal, as contract purchaser, proposes to erect its 340 unit condominium complex. In the Township of Mount Laurel, 65% of the township's land area remains vacant or devoted to agricultural use. Wenonah cannot therefore be regarded as one of the developing communities of "sizeable land area" to which the requirements imposed by Mount Laurel apply.

Defendant's contention of non-liability is further buttressed by the recent case of Pascack Association, Limited vs. Mayor and Council of the Township of Washington, A-3790-72, N.J. Super. Ct. App.Div. (decided June 25, 1975), where the Court concluded:

> "that Mount Laurel means precisely what it says. Its mandate applies only to a municipality of "sizeable land area" which remains at the present open to substantial future development. Hence, the dictates of Mount Laurel are inapplicable to Washington Township, a small, almost completely developed municipality whose demographic, geographical and social profile sharply differs from Mount Laurel's."

The Borough of Metuchen is even more fully developed than the municipality of Wenonah and Township of Washington discussed

in the above two cases. For example, Metuchen, a larger community than Wenonah, has approximately 40 vacant acres compared to 109; while the Township of Washington, approximately the same size as Metuchen, had 106 acres "readily and quickly available for development." Even more significant, irrespective of the applicability of the Mount Laurel case, the Court, in Pascack Association, Ltd. vs. Township of Washington, upheld the township's ordinance which failed to zone a large 34 acre tract for multi-family construction.

Initially, for the purposes of argument, counsel assumed that Metuchen or any other developed municipality, did not provide balanced housing. Of course, as to Metuchen, this is untrue. Counsel merely asks the Court to compare the description of the demographic, geographical and social profile of Mount Laurel, Wenonah and Washington Township, as presented in those three cases, with conditions obtaining in Metuchen. The Borough provides a variety of housing in one-family, two-family and multi-family zones and dwellings throughout the community. The percentage of rental to ownership units is in excess of 25%, while actual multi-dwelling units comprise approximately 20% of the dwellings existing in the Borough's 2.9 square mile area. Neither the rental ranges, the income ranges, nor the value of the dwellings compared to the

facts set forth in the above three cases, make Metuchen an "exclusive community" by any legal or socially popular conception. As a realistic matter, the principal cause excluding anyone from Metuchen is the Borough's limited physical area of 1416 acres, almost all of which are fully developed. A simple lack of space to provide housing does not make Metuchen liable to plaintiffs.

POINT II

AS A FULLY DEVELOPED COMMUNITY WITH AN ESTABLISHED CHARACTER PROVIDING A VARIETY OF HOUSING, METUCHEN CANNOT BE COMPELLED TO ZONE FOR HIGH RISE APARTMENTS TO ACCOMMODATE LOW AND MODERATE INCOME PERSONS AND MINORITY GROUPS IN ACCORDANCE WITH ANY REGIONAL FAIR SHARE HOUSING FORMULA.

Physically, the character of Metuchen as set forth in the summary contained in the Statement of Facts has been established as follows:

> "A fully developed community consisting primarily of one-family owned occupied residences, with significant multi-family housing spread throughout the community in well defined areas; a compact downtown business section, and comparatively small industrial area basically separated from the residential portions; and zoning regulations consistent with the actual uses in the Borough, with appropriate zones for single family, multi-family, business and industry. Physically, the Borough has a low profile where structures conform to the 2½ to 3 story or 35 feet height limitation; and the small amount of vacant land still available for residential use is primarily zoned for multi-family units."

A brief comment on each of plaintiffs' objections to specific Borough zoning ordinance provisions, would in counsel's opinion be helpful to the Court, to put in focus the argument under Point II. The objections are taken from the plaintiffs answers to interrogatories and Paragraph 10 of the Appendix to the complaint.

1. Art. III, Sec. 19(c) specifically prohibits trailer coach parks.

While Metuchen's ordinance does not specifically prohibit trailers or mobile homes, it does prohibit ttailer coach parks or mobile home parks. In 1962, such prohibition had been ruled valid in the case of Vickers v. Township Committee of Cloucester Township, 37 N.J. 232, 250, 181 A.2d 129 (1962), cert. den. 371 U.S. 233, 83 S.Ct. 326, 9 L.Ed.2d 495 (1963), As set forth in Point I supra, the exclusionary aspect of that provision is of no relevance in a built-up community,and such provisions would only be considered invalid in a Mount Laurel type community. Furthermore, since Metuchen does provide a variety of housing (single family, two family, garden apartments, townhouses, moderate income senior citizen) there is no legal compulsion to provide every possible type of housing. See Pascack Association, Limited vs. Mayor and Council of the Township of Washington, supra, where denial of multi-family housing on the last large tract in town was ruled valid. In any event, no one can seriously argue that the deletion of the above provision from the zoning ordinance would provide mobile parking housing in Metuchen.

2. Art. III, Sec. 21 requires minimum living areas in R-1 zones of 1,400 sq. ft. and in R-2 zones of 1,000 sq. ft.

Again, minimum floor area requirements were held to be valid by the New Jersey Supreme Court in Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 172-173, 89 A.2d 693 (1952) appeal dismissed 344 U.S. 919, 73 S.Ct. 386, 97 L.Ed. 708 (1953). It is only in developing communities, as set forth under Point I, that such zoning provisions become invalid. As in the case of mobile homes, the deletion of the minimum floor area requirement in the R-1 and R-2 zones would have no affect in accommodating low and moderate income families and minority groups to Metuchen, as practically all of the land in those two zones are built upon.

3. Only an insignificant area of Metuchen is zoned for multi-families.

Again, based on the Mount Laurel decision, the significance of land zoned for multi-family use is only relevant in a developing municipality. For people can only be excluded on that basis where vacant land zoned industrially or for one-family dwelling has eliminated the possibility of multi-family use. As set forth in the Statement of Facts and in Point I, this is not the case in Metuchen. There is no significant land to zone multi-family, and of the land that can be developed, much of it

is already in the multi-family districts in the Borough. Zoning built-up single dwelling or industrial areas for multi-family use would not only be useless, but clearly improper. As stated in Meridian Development Co. v. Edison Tp., 91 N.J.Super. 310, (Law Div. 1966):

> "Restrictions against multiple dwellings in residence zones have had judicial endorsement in a succession of reported decisions. Fanale v. Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958); Shipman v. Town of Montclair, 16 N.J. Super. 365, 84 A.2d 652 (App.Div.1951); Izenberg v. Bd. of Adjustment of City of Paterson, 35 N.J. Super. 583, 114 A.2d 732 (App.Div. 1955)."

See also Guaclides v. Borough of Englewood Cliffs, 11 N.J. Super. 408 (App.Div. 1951), where multiple family units were zoned out completely when same had not been built in the township, as well as Pascack Association, Ltd. v. Township of Washington, supra. No where does the Mount Laurel case mandate, even in developing municipalities, that areas cannot be separately zoned for multi-family dwellings and single family dwellings, or that zoning provisions promoting certain density are invalid.

4. Metuchen has not established a Public Housing Authority.

Counsel contends Metuchen has no legal obligation to establish a Public Housing Authority. The Supreme Court did not even impose such a legal obligation upon Mount Laurel, but merely

stated in parenethsis:

> ("We have in mind that there is at least a moral obligation in a municipality to establish a local housing agency pursuant to state law to provide housing for its resident poor now living in dilapidated, unhealthy quarters.)"

If Metuchen need not answer to plaintiffs because of its built-up established character, then, of course, the existence of a Public Housing Authority is irrelevant. Even if the Court determines Metuchen has an affirmative obligation to provide low and moderate income housing, then, at most, such would be only a moral obligation under the Mount Laurel case, and certainly would not justify keeping the Borough as a defendant in this litigation. Significantly, the Mount Laurel court saw the obligation to the resident poor of Mount Laurel to get them out of unhealthy and dilapidated housing, and not necessarily to provide the regional fair share. There is nothing in the discovery process to date to indicate such an unhealthy and dilapidated condition in Metuchen which would justify even the moral obligation to establish a Public Housing Authority.

5. Additionally, plaintiffs challenge the deletion of municipal zoning for high-rise apartments and high-rise apartment developments.

The above objection obviously refers to the December 17, 1973 amendment to the zoning ordinance wherein the height

restrictions permitted in the R-5 and B-1A multi-family zones were reduced from 6 stories (8 for moderate income senior citizen housing) to 3 stories or 35 feet. The defendant, Borough of Metuchen, maintains that it has a right to limit the height of buildings in its community consistent with the existing low profile. Absent vacant land, the only direction for development in a built-up community is --- up. While Metuchen contends it need never be compelled to permit high rise apartments in the Borough, certainly at this point in time, considering the Mount Laurel decision, and the amount of vacant land throughout Middlesex County, the reduction in the height limitations for multi-family dwellings is perfectly legal.

As stated supra, page 25, New Jersey courts have long sustained separate zoning classifications, locations and restrictions for multiple family dwellings as compared to single family dwellings. The Mount Laurel decision simply prevented a discrimination against multiple dwellings by developing municipalities which would exclude fair share housing for certain groups, and prevent a growth of a balanced community with a variety of housing. Prior to 1962, Metuchen did not permit high rise apartments. From 1963 to 1973, it did zone for high rise apartments. None were built. In 1973, it eliminated zoning for high rise apartments

(4 stories or 48 feet were later allowed specifically and only for moderate income senior citizen housing projects in 1975). There can be no doubt that a municipality can change its zoning ordinance even if it is 90% developed. Fanale v. Hasbrouck Heights, supra. In fact, in that case, Chief Justice Weintraub specifically stated:

> "Hence although apartment houses were initially desirable, a municipality may later conclude that more of them would be inimicable to its total welfare. Shipman vs. Town of Montclair, 16 N.J. Super. 365, 84 A.2d 652 (App.Div. 1951). It may change its ordinance in pursuit of a well-balanced community."

In Guaclides v. Borough of Englewood Cliffs, supra, Judge William Brennan, Jr., now Supreme Court Justice, in permitting the municipality to prohibit multi-family dwelling in a particular area, emphasized that the Borough could preserve the long standing character of the affected areas "particularly as there is not and never has been any apartment type building in such areas and the ordinance permits their construction elsewhere in the borough."

In those two cases, the preservation of the character of the municipality was upheld despite the existence of vacant land in which apartment houses could have physically been built. The legislation approved by the municipality of Englewood Cliffs and

Hasbrouck Heights, applied to all multiple dwellings and went far beyond Metuchen's 1973 amendment, which while reducing the height limitation, added additional vacant industrial acreage (Prospect Street) for garden apartments. It is clear that a limitation on height is in accord with the statutory purposes of zoning lessening congestion in the streets, prevention of overcrowding of land or buildings, avoidance of undue concentration of populations, as well as promotion of the general welfare. Meridian Development Co. v. Edison Tp. supra. It is further clear that a municipality may change its zoning ordinance in respect to multiple dwellings; Fanale v. Hasbrouck Heights, supra, and that a municipality can preserve its residential character by zoning. Guaclides v. Borough of Englewood Cliffs, supra.

In 801 Avenue C, Inc. v. City of Bayonne, 127 N.J. Super. 128 (App.Div. 1974), the following issues were raised, but never answered:

> "The question before us, then, is not whether a fully developed municipality with over 1,000 dispersed apartment houses, many of which exceed three stories, must provide for more; nor is it necessary to decide whether such a municipality may at some point by zoning ordinance draw a line as to height or density requirements with respect to further multi-family dwellings. "

The Bayonne ordinance was invalidated solely because it attempted to meet high rise apartment needs on an ad hoc administrative basis, rather than in accordance with a comprehensive plan or other permissible objective zoning criteria.

Of course, Metuchen is not Bayonne; and the basic contention of the Borough is that it is not compelled to become Bayonne, or Kew Gardens or Forest Hills, but rather it can preserve its residential and low profile character through permissible zoning mechanisms. Neither the Mount Laurel decision or any other case requires the Borough to switch from a fully developed low rise town to a high rise community.

6. Modifications for moderate income senior citizen housing projects developed pursuant to N.J.S.A. 55:14 et seq. and N.J.S.A. 55:16 et seq. but not for low and moderate income housing for families as follows:
   A. Article VII-A, Sec. 5 - Minimum yard requirements.
   B. Article VII-A, Sec. 6 - Density requirements.
   C. Article VII-A, Sec. 8 - Maximum Building Height limits.

By resolution adopted November 16, 1970, the Mayor and Council of the Borough of Metuchen set up a non-profit group, the Metuchen Senior Citizen Housing Corporation, in an effort to meet citizen demand for senior citizen housing in Metuchen. The corporation determined the route for obtaining the land and developing the project. It chose to comply with the moderate

income housing provisions and limited dividend housing corporation provisions of N.J.S.A. 55:14 et seq. and N.J.S.A. 55:16 et seq. The corporation had to cooperate with the New Jersey State Housing Finance Agency and comply with the latter's regulations, as well as the Federal regulations, to obtain financing and rental subsidies for the project. The sine qua non for any project besides the obtaining of land was conformity with zoning regulations.

Of course, the task of obtaining land for such purposes in a fully developed community and securing zoning classifications to enable the project to be built, is almost monumental. The modifications for height, density and minimum yard requirements (as well as parking, not mentioned by plaintiffs) were requested by the Metuchen Senior Citizen Housing Corporation, (affidavit attached) and designed to meet the unique and peculiar needs of the project. Obviously the number of units required for the specific type of housing to meet State and Federal standards had to be molded in to the actual size of the site, resulting in the zoning adjustments for this type of housing set forth above. While the zoning provisions could have remained unchanged, and the project considered by variance, the timing required the choice of zoning amendment. It is defendant's contention that the DeSimone v. Greater Englewood Housing Corp. No. 1, 267,

56 N.J. 428 (1970) case justifies either procedure (variance or zoning change) to permit this type of housing.

Seen in this proper light, the modifications of which plaintiffs object actually promote a significant portion of the housing sought be plaintiffs, rather than exclude or discriminate against low and moderate income housing generally. In fact, the term "moderate housing" in the ordinance, merely refers to the statutory term; tenants of the project may well be in the lower income range and obtain rental subsidies.

The alleged exclusionary or discriminatory aspects of these "senior citizen modifications" are more semantic than real. Low and moderate income families are gaining from them, not losing because of them. If, of course, there are other proposed housing projects which take advantage of other governmental provisions for low and moderate income families which would require relaxation of other zoning restrictions, these can always be considered at the appropriate time for action either by way of variance or zoning change under the DeSimone case. Since plaintiffs make no claim that the modifications are unreasonable in respect to satisfying the need for the specific type of housing sought, the zoning effort to secure senior citizen housing should be upheld.

SUMMARY AND CONCLUSION

As a matter of law, Metuchen does not fit into the Mount Laurel mold. For practical purposes, it has no vacant land. Its zoning provisions of which plaintiffs take umbrage, either do not exclude low, moderate and minority group families (the dearth of land does that); or legitimately under the recognized zoning criteria under N.J.S.A. 40:55-32 and interpretive case law, preserve the character of the community. Metuchen meets the Mount Laurel standards by providing an appropriate variety and choice of housing for all categories of people. No one has ever seriously claimed that the Borough's modicum of sub-standard or over crowded dwellings constituted slums. The income range of its residents, the value of the dwellings, the rental ranges of its multiple family units, the percentage of renters to owners, the locations provided for townhouses and garden apartments, and its minority group percentage all are admitted. . . Consequently, where there is no dispute as to any genuine issue of fact, and where the issues are clear as a matter of law, as in this case, Metuchen is entitled to summary judgment resulting in the dismissal of plaintiffs complaint against the Borough. Judson v. The Peoples Bank, 17 N.J. 67 (1954).

Respectfully submitted,

MARTIN A. SPRITZER
Attorney for Defendant,
Borough of Metuchen

APPENDIX I

REFERENCES FROM STATEMENT OF FACTS KEYED TO INTERROGATORIES, ADMISSIONS, AFFIDAVITS AND EXHIBITS, LISTED IN APPENDIX II

(1) Exhibit 1

(2) Exhibit 1

(3) Exhibit 2

(4) Exhibit 2

(5) Exhibit 3

(6) Exhibit 3A

(7) #1 Admission by plaintiff certified 7/11/75

(8) Affidavit of W. Franklin Buchanan

(9) Answer #1 of Interrogatories answered by defendant

(10) #14 Admission by Defendant dated 6/9/75

(11) #10 Admission by Defendant dated 6/9/75

(12) Exhibit 18

(13) #4 Admission by plaintiff certified 7/11/75

(14) Affidavit of W. Franklin Buchanan and answer #9 defendant's interrogatories and letter amendment 6/23/75.

(15) #5 Admission by plaintiff, not answered, sent 6/26/75
Letter from attorney amending defendant's answer to Interrogatory #3
Affidavit of Borough Clerk attaching Table II of Zoning for Multi-Family Housing in Metuchen, N.J. 1973

(16) Affidavit of W. Franklin Buchanan
Affidavit of George Terwilliger, Jr.

(17) Affidavit of W. Franklin Buchanan

(18) Affidavit of Borough Clerk

(19) Exhibit 4

(20) Exhibit 5 - 1962 Zoning Map
Affidavit of W. Franklin Buchanan

(21) Exhibit 4

(22) Exhibit 6 as certified to by Borough Clerk's affidavit.

(23) Exhibit 7 - 1963 zoning amendment and map

(24) Exhibit 8 - Current Zoning Map
Affidavit ofGeorge Terwilliger, Jr.

(25) Affidavit of George Terwilliger, Jr.

(26) Exhibit 1

(27) Affidavit of George Terwilliger, Jr.

(28) Affidavit of Donald J. Wernik

(29) Affidavits of Howard Goodenough and Donald J. Wernik
Exhibit 9 - 12/18/72 Amendment to Zoning Ordinance.

(30) Affidavit of Donald J. Wernik

(31) Exhibit 10 - Non-Binding Referendum 1973

(32) Exhibit 11 - 12/17/73 Amendment to Zoning Ordinance.

(33) See current Zoning Map - Exhibit 8

(34) Exhibit 12 (March 1974 Zoning Amendment) and Exhibit 8.

(35) Affidavits of Howard Goodenough and Donald J. Wernik
Also See resolution-Exhibit 19, supplementing answer to 13(b) of defendant's interrogatories.

(36) Affidavit of Howard Goodneough and Donald J. Wernik and letter from consultant in Exhibit 20.

(37) Exhibit 13- 6/16/75 Zoning Ordinance Amendment (Senior Citizen)

(38) Affidavits of Howard Goodenough and Donald J. Wernik

(39) Affidavit of George Terwilliger, Jr.

(40) Exhibits 5, 7, 8, 11, 12, 13
Affidavit of George Terwilliger, Jr.

(41) #5 Admission by plaintiff not answered, sent 6/26/75
Affidavit of Borough Clerk attaching Table II of Zoning for Multi-Family Housing in Metuchen, N.J. 1973
Affidavit of George Terwilliger, Jr. Building Inspector

(42) Letter from attorney amending defendant's answer to Interrogatory #3.
Affidavit of Borough Clerk

(43) #4 of Interrogatories answered by defendant.

(44) Affidavit of Borough Clerk

(45) #7 Admission by plaintiff not answered, sent 6/26/75

(46) #3 Admission by plaintiff not answered, sent 6/26/75

(47) #9 Admission by defendant dated 6/9/75
#2 Admission by plaintiff not answered, sent 6/26/75
See also Affidavit of Borough Clerk including Exhibit 17- Remainder of Census Tracts as to Total of Minority Persons as part of Admission #2, and Exhibit 18 - Population by Race-1970 Census, as prepared by Tri-State Transportation Commission

(48) #2 Admission by plaintiff not answered, sent 6/26/75

(49) Exhibit 14-Analysis of Sub-standard Housing, 1970 Census Middlesex County, attached to affidavit of Borough Clerk

(50) Exhibit 15 - Overcrowded Housing Units, 1970 Census, Middlesex County, attached to Affidavit of Borough Clerk

(51) #5 Admission by plaintiff not answered, sent 6/26/75

(52) #3 Admission by plaintiff not answered, sent 6/26/75 Affidavit of Borough Clerk attaching remainder of census tract figures as Exhibit 16, not included in Admission 3