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Brief on Behalf of Defendant-Respondent, Township of Piscataway to the Supreme Court of NJ

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IN THE

# Supreme Court of New Jersey

DOCKET NO. 16,492

SEPTEMBER TERM, 1979

URBAN LEAGUE OF GREATER
NEW BRUNSWICK, et al.,

*Plaintiffs-Petitioners,*

*vs.*

THE MAYOR AND COUNCIL OF THE
BOROUGH OF CARTERET, et al.,

*Defendants-Respondents.*

CIVIL ACTION—ON APPEAL FROM JUDGMENT OF THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
SAT BELOW: HALPERN, ARD AND ANTELL, JJ.A.D.

## Brief on Behalf of Defendant-Respondent, Township of Piscataway

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## PRELIMINARY STATEMENT

This defendant's position is that the plaintiffs in the Urban League of Greater New Brunswick v. Carteret, 170 N.J. Super. 461 (App. Div. 1979), rev. 142 N.J. Super. 11 (C.D. 1976), failed to meet their burden of proof as to any of the defendants. The plaintiffs' case was inadequate and superficial. The Court is referred to the supplemental brief, 4 through 39, which was filed on behalf of the Township of Piscataway (hereinafter referred to as the supplemental brief, the other brief and the appendix shall be referred to as the appellate brief and appendix.). It appears that the companion cases which the Court will consider do not have much better trial records. These cases should not serve as the basis for an extension of the exclusionary zoning law. That type of decision should await a better presented case. As this court stated in Sente v. Clifton, 66 N.J. 204, 208 (1974):

> "A municipal enactment should neither be struck down nor validated when, as here, truly vital aspects have not been presented or considered."

Justice Hall, in his concurring opinion in Harvard Enterprises v. Board of Adjustment of the Township of Madison, 56 N.J. 362, 371 (1970), stated:

> "But reconsideration should not be undertaken by a court in the absence of a full record of competent, relevant evidence, from appropriate zoning and other material standpoints, thoroughly

> exploring the matter. Such a record being so patently absent in this case, we should not get into the question at all. We granted certification under the mistaken belief that the record would permit reconsideration."

The inadequate record in the case at bar and the companion cases precludes their viability as vehicles for extending the present case law.

## STATEMENT OF FACTS

This defendant relies upon the statement of facts which is found on pages 2 through 13 of the appellate brief and pages 4 through 39 of the supplemental brief.

## POINT I

## THE MEANING OF THE PRESUMPTION OF INVALIDITY AND THE SHIFTING BURDEN OF PROOF WHICH IS MENTIONED IN MT. LAUREL NEEDS TO BE CLARIFIED. (Supreme Court question number 10).

The presumption of invalidity was established in Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 180, 181 (1975), modifying 119 N.J. Super. 164 (L.D. 1972):

> "We have spoken of this obligation of such municipalities as 'presumptive.' The term has two aspects, procedural and substantive. Procedurally, we think the basic importance of appropriate housing for all dictates that, when it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action. (cite omitted). The substantive aspect of 'presumptive' relates to the specifics, on one hand, of what municipal land use regulation provisions, or the absence thereof, will evidence invalidity and shift the burden of proof and, on the other hand, of what bases and considerations will carry the municipality's burden and sustain what it has done or failed to do. Both kinds of specifics

may well vary between municipalities according to peculiar circumstances."

Unfortunately, the concepts of the presumption of invalidity and the shifting burden of proof have not been clarified by the court.

The courts can take judicial notice of the need for low and moderate income housing. This is a fact which should not have to be reproven in every exclusionary zoning case. Under Mt. Laurel, there is a presumption that each developing municipality has an obligation to zone for the construction of low and moderate income housing. Additionally, Oakwood at Madison v. Township of Madison, 72 N.J. 481 (1977) modified this presumption by requiring zoning for least cost housing.

What would constitute a reasonable amount of least cost housing for any municipality cannot be determined in a vacuum. One must be familiar with the municipality and its region in order to express an opinion on the exclusionary nature of the ordinance. There is no single least cost standard for all areas of the State; differences between rural, suburban and urban areas must be taken into account. Environmental constraints, existing development, infrastructure, and a host of other factors must also be considered.

Who should testify on the validity of an ordinance? (Supreme Court Question Number 23). In this author's viewpoint, such an opinion should be made by a professional

planner who is familiar with the municipality under attack. It is the planner's job to draft master plans and zoning ordinances, to make recommendations to private clients as well as governmental bodies, and to analyze all the facets of land use development. Therefore, this individual is in the best position to present evidence on exclusion.

Once the plaintiff establishes a prima facie case, then the burden shifts to the municipality to prove that its ordinance is reasonable. After the municipality substantiates its ordinance, then the burden shifts back to the plaintiffs to present a full case on the invalidity of the zoning ordinance.

This viewpoint comports with the court's pronouncements in Oakwood. The plaintiffs introduced testimony on the history of Madison Township's zoning, it's development, the transportation network, the limitations of the PUD zone, and the regional and local need for housing. The court found Madison Township to be "an archetypal 'developing' municipality." 72 N.J. 501. Most of the high density zoning was provided in three areas which were designated for PUDs. The zoning required the developers of the PUDs to construct a school large enough to accomodate 1/2 a child per dwelling unit and to dedicate the land for the school to the municipality. 72 N.J. 508. Two of the locations were remote sites which were not serviced by public water and sewers.

The development of these sites would require substantial road improvements and the extention of sewer and water mains which would benefit 1/3 of the municipality. 72 N.J. 522. Based on the prohibitive cost of improvements, the Middlesex County Planning Board opined that the two PUDs would not be developed within the next ten years. 72 N.J. 522. "Under the totality of the stated circumstances, it must be concluded that a prima facie case of exclusion has been made out with respect to the road and facility requirements, and the burden shifts to the municipality to justify these provisions of the ordinance." 72 N.J. 522, 523.

This approach is to be constrasted with the procedure which was followed by the plaintiffs in the case at bar. The supplemental brief discussed in detail the testimony which was presented by the plaintiffs. Suffice it to say, the only specific testimony on the alleged exclusionary aspects of the ordinance were presented by witnesses Ernest Erber and Alan Mallach. Erber made simplistic mathematical adjustments to the 1970 study of low and moderate income housing by the Department of Community Affairs which he called a fair share plan. His analysis was rejected by the court. Mallach perused the zoning ordinances of each of the defendant municipalities and made unsupported allegations as to so called exclusionary provisions.

It should be mentioned that, at the time of Mallach's review, most of the defendant municipalities had a substantial amount of existing least cost housing. He did not consider the existing housing, but merely reviewed the zoning of the vacant land. This procedure rewarded prior exclusionary zoning, punished those communities which had previously permitted affordable housing, and created a standard which could not be satisfied.

Assume that a municipality zoned one-half of its area for multi-family development in 1970. Since developers prefer to maximize their profits by constructing high density housing, by 1980 most of the multi-family units would be built. If Mallach were to investigate the ordinance in 1980, he would say that it was exclusionary because there was a limited area of vacant land zoned for multi-family housing. This is precisely the conclusion which Mallach drew in the Urban League of Greater New Brunswick case and which the court accepted. Carried to its logical extreme, municipalities would be zoned exclusively for apartments.

The alleged offending provisions of a zoning ordinance must be analyzed by competent planners, health experts, appraisers and developers in order to prove that those sections are improper. In the case at bar, Mallach, who has none of the requisite expertise, declared that numerous requirements in each of the ordinances were invalid because

they were unnecessarily cost generative. Mallach had not done a cost/benefit analysis, nor could he, as he was unaware of the cost of any of the provisions. His conclusions should not have been considered as establishing a prima facie case by the trial court. However, the trial court accepted Mallach's pronouncements to be presumptively correct, despite their lack of support, and ignored all rebutting testimony.

A prima facie case which will result in the presumptive invalidity of an entire ordinance, or specific provisions thereof, requires:

A. Testimony by a professional planner;

B. Proof that the municipality is developing, or if this requirement is lifted by this Court, then evidence on the suitable areas in the community for high density housing;

C. Analysis of the existing housing in the municipality;

D. Preliminary analysis of the development constraints; and

E. Detailed analysis, and not merely unsupported opinions, of the offending provisions of the ordinance.

The Mt. Laurel presumption and the shifting burden of proof has been an enigma to the bench and bar. It is hoped that the Court will clarify this issue along the lines mentioned in this brief.

## POINT II

THE RATIONAL ZONING PROCESS REQUIRES A TRIAL COURT TO REVIEW A MULTITUDE OF FACTORS BEFORE DETERMINING WHETHER A ZONING ORDINANCE IS EXCLUSIONARY. (Supreme Court Question Number 22).

It would be convenient for a court to employ a simple mathematical formula in order to determine whether a zoning ordinance is exclusionary. Unfortunately, this cannot be done. For a court to make a proper determination on the exclusionary nature of an ordinance, a multitude of factors must be considered. The items which are discussed in this section are representative and not all-encompassing. The review of the relevant factors is referred to in this brief as the rational zoning process.

### A. THE GOOD FAITH EFFORTS OF A MUNICIPALITY IN ATTEMPTING TO EITHER PROVIDE FOR LEAST COST HOUSING OR TO PRECLUDE THE CONSTRUCTION THEREOF. (Supreme Court Question Number 18).

The trial court in Mt. Laurel investigated the minutes of various meetings in order to determine the governing body's attitude toward low and moderate income housing. The minutes disclosed an intention to exclude modest income citizens from the municipality. 119 N.J. Super. 169, 170.

The Supreme Court in Oakwood, 72 N.J. 499, found

that good faith efforts were the best test of a non-exclusionary zoning ordinance:

> "We are convinced from the record and data before us that attention by those concerned, whether courts or local governing bodies, to the substance of a zoning ordinance under challenge and to bona fide efforts toward the elimination or minimization of undue cost-generating requirements in respect of reasonable areas of a developing municipality represents the best promise for adequate productiveness without resort to formulaic estimates of specific unit 'fair shares' of lower cost housing by any of the complex and controversial allocation 'models' now coming into vogue."

In a number of cases the courts have considered the purpose behind the adoption of a zoning ordinance. A review of municipal minutes took place in Schere v. Township of Freehold, 119 N.J. Super. 433, 436 (App. Div. 1972) and Wital Corp. v. Denville, 93 N.J. Super. 107 (App. Div. 1966). In Clary vs. Borough of Eatontown, 41 N.J. Super. 47, 72 (App. Div. 1956), it was stated:

> "We hold that the testimony of a member of a municipal planning board which submitted to and consulted with the members of the governing body concerning a proposed zoning ordinance, regarding the purposes and objects sought to be served and accomplished by the ordinance, is admissible, although, of course, in nowise controlling, when the issued is the reasonableness of the ordinance."

To the same effect is Finn vs. Wayne Township, 53 N.J. Super. 405, 410 and 411 (App. Div. 1959).

B. THE AMOUNT OF VACANT DEVELOPABLE LAND IN A MUNICIPALITY.

This criterion was considered by the trial courts in Mt. Laurel, 119 N.J. Super. 170; Oakwood, 117 N.J. Super. 11, 14 (1971); and Urban League of Greater New Brunswick, 142 N.J. Super. 28.

C. THE AMOUNT OF INDUSTRIALLY ZONED LAND. (Supreme Court Question Number 15, subparagraph 2)

The Supreme Court in Mt. Laurel indicated that 29.2% of the municipality was zoned for industrial use. 72 N.J. 162. The substantial industrial zoning was not justified by industrial development in the municipality. Only 100 acres of the 2800 acres which was zoned for industry was presently being utilized for said purpose. 67 N.J. 162, 163. Madison Township had also overzoned for industry. The municipality had zoned 4000 acres for industrial and office use, yet only 600 acres were industrially developed. Oakwood at Madison vs. Township. of Madison, 72 N.J. 504. Of the 2,297 acres in Clinton Township which were zoned for industrial use, only slightly more than 100 were developed for this use. Round Valley v. Township of Clinton, Docket No. L 29710-74 P.W. (L.D. 1978) (unreported) at 54.

The nexus between industrial and multi-family zoning is two-fold. In those communities where industrial

zoning produces industrial jobs, the muncipality should provide housing for the workers. Judge Furman found that Madison Township's responsibility for housing was based in part on its encouragement to industrial development. Oakwood at Madison v. Township of Madison 117 N.J. Super. 11, 17 (L.D. 1971). Where substantial amounts of a community's industrially zoned land are not being utilized, it should be rezoned for residences.

The amount of property which is zoned for industry in a municipality is one factor which should be considered. Its importance should not be magnified. It is ironic to note that the existence of the Ford plant in Mahwah inspired the filing of the complaint in Urban League of Essex County vs. Township of Mahwah, Docket No. L 17112-71 P.W., (L.D. 1978) (unreported) at 7. Does the closing of the Ford plant relieve Mahwah of most of its responsibility to zone for low and moderate income housing?

There is a real connection between zoning for industry and zoning for moderate income housing. However, it is not a one to one relationship. Each industrial worker cannot be guaranteed a dwelling unit in the community where he is employed. To require such a rule would discourage municipalities in New Jersey from industrial zoning. Given New Jersey's competitive disadvantage with the sun belt states, this requirement would limit industrial growth in the

state. The effect of this policy would fall most heavily on low and moderate income workers. Thus, in the name of low income housing, jobs for low income families would be reduced. To counteract this absurd result, municipalities must have an economic incentive for attracting industry. There must be some responsibility for municipalities to house the employees of their industry, but a one to one ratio for new facilities would be counterproductive.

D. THE NUMBER AND TYPE OF APARTMENTS, TOWNHOUSES, AND MOBILE HOMES WHICH ARE PERMITTED IN THE ZONING ORDINACE AND THE LIKELIHOOD OF THEIR BEING CONSTRUCTED.

The court in Mt. Laurel found that the municipality made no provision in the zoning ordinance for any of the aforesaid uses except within exclusive PUDs. 67 N.J. 163, 167 and 168. The Madison Township ordinance was invalidated in Oakwood on the basis of the illusory zoning for PUDs on two of the three parcels which were zoned for that use. Not only must the zoning for least cost housing be considered, but the court must also evaluate the prospect of its being developed.

E. DOES THE ZONING PERMIT THE DEVELOPMENT OF THE VACANT LAND IN THE MUNICIPALITY?

A zoning ordinance which zones property into inutility should be struck down by the courts. In Oakwood at Madison v. Township of Madison 117 N.J. Super. 11, 16 (L.D.

1971), the court discussed the difficulty in developing the one and two acre zones in the municipality. No two acre project had been developed since the 1930's and the last one acre subdivision to be proposed was in 1964. The lack of development in these zones was an indication that the property was not properly zoned. While, theoretically speaking, the inability to develop property because of restrictive zoning might be considered a due process issue rather than an exclusionary zoning question, in reality the considerations go hand in hand. Oakwood, supra.

F. A MUNICIPALITY'S STAGE OF DEVELOPMENT.

This subsection of the brief will not consider whether fair share obligations should be restricted to developing communities. That issue is discussed in Point IV. However, regardless of what position the Supreme Court takes on that question, the degree of development is relevant when assessing a municipality's housing obligation.

The courts should recognize that a host of communities are swept under the phrase "developing municipality." However, each locale is in a different stage of development and should be treated accordingly. The Court in Round Valley v. Township of Clinton, Docket No. L 29710-74 P.W. (L.D. 1978) (unreported) at 35 effectively made this point:

"It is apparent, however, that Clinton Township's population increase is not as explosive as was that of Mt. Laurel or Madison Townships for the same period of time. Studies of future growth by the Hunterdon County Planning Board indicate that Clinton Township will experience relatively constant population expansion reaching approximately 14,000 persons by the year 2000. As a result, it is fair to say that Clinton Township is a 'developing municipality' but it is hardly an 'archetypal developing municipality' characterized by explosive growth such as Mt. Laurel or Madison Townships. The difference is significant and while the principals enumerated in Mt. Laurel and Madison are valid in the instant situation, they will require less in quantitive terms from a municipality like Clinton Township to meet its obligations as set forth in the above named cases. The courts have already recognized the logic of this proposition.

> 'It may be that the rate at which a particular municipality is developing, a reflection of the need for housing in the area, should govern to some extent the amount of housing for which provision should be made in its zoning ordinance. A municipality undergoing development of less than explosive proportions, although considered developing in the Mt. Laurel context, may be required to make provision for fewer units of "least cost" housing than would a municipality resisting strong pressures for population influx by the exclusionary features of its zoning ordinance. Rate of development, and the need it reflects, may well be considered in the equation determining "fair share." The

> requirement for "least cost" housing may alter as rate of development changes; an ordinance is not immutable but must respond to changing needs and circumstances.' Middle Union Associates v. Holmdel Tp., Docket No. L 1149-72 P.W. (Law Div. 1975)(unreported)."

A rural community which lacks jobs and infrastructure may have a limited need for least cost housing. In the landmark case of Fisher v.Township of Bedminister, 11 N.J. 194 (1952), the defendant municipality was described as "distinctly a rural community with no industry, light or heavy and with little activity ..." 11 N.J. 196. It had a slow growth pattern, a limited water system, and no public sewers. 11 N.J. 198. "In short, the Township, although only 4 miles from New York, is essentially rural, as if it were 400 miles away, as its population of 62 per square mile demonstrates." 11 N.J. 198. Not only was the community rural, but so were the surrounding municipalities. 11 N.J. 198. Given this situation, the court found 5 acre zoning to be valid. Even Judge Furman recognized that a community with established residential character would have a different obligation from a developing municipality. Oakwood at Madison v. Township of Madison, 117 N.J. Super. 11, 19 (L.D. 1971).

The same principal was recognized in Glenview Development Co. v. Franklin Township, 164 N.J. Super. 563,

571 (L.D. 1978):

> "By any definition, Franklin is a rural community of low population with no major employment centers, no industry, no capital infrastructure, but with a dedication of most of its lands to agriculture. To be sure, it is on the threshold of change, and what applies to it now may not be applicable in ten or even five years. But while it is on the threshold, it has not yet crossed that threshold."

Justice Pashman, in his dissenting opinion in Pascack Association v. Washington Township, 74 N.J. 470, 512, 513 (1977), recognized that many undeveloped municipalities were not appropriate for substantial numbers of low and moderate income housing. "... a community which has vast open spaces but has yet to develop facilities to service that area may be ill-equipped to cope with an influx of new residents."

There is a valid reason for limiting the responsibility of developed communities. "Thus, maintaining the character of a fully developed predominantly single-family residential community constitutes an appropriate desideratum of zoning to which a municipal governing body may legitimately give substantial weight in arriving at a policy legislative decision as to whether, or to what extent, to admit multi-family housing in such vacant land areas as remain in such a community." Pascack Association, supra, 483, 484.

Distinctions between rural, developing and developed municipalities require different treatment in exclusionary zoning cases. These distinctions are not dependent upon limiting fair share responsibility to developing municipalities, but are grounded in rational planning considerations.

G. THE AMOUNT OF INEXPENSIVE HOUSING WITHIN A MUNICIPALITY.

Plaintiffs often attempt to show that a municipality is exclusionary by presenting testimony on the cost of one-family homes. The Hunterdon county multiple listing service records for 1976 were produced in the Round Valley case to show that 65% of the dwellings in the county, and 67.5% of the units in Clinton Township (which were reported to the multiple listing service) sold for more than $50,000.00. The SR1A forms showed that 78.8% of the homes in Clinton Township sold in 1976 for $50,000.00 or more. The figures were higher in Caputo vs. Chester Township, Docket No. L 42857-74 P.W. (L.D. 1978) (unreported) at 16 and 83. There the evidence disclosed that 87% of all sales of one-family homes in Chester Township in 1976 were for more than $50,000.00.

The importance of these figures can easily be exaggerated. It is common knowledge that the price of

one family homes has escalated. This was recognized in Urban League of Essex County. There the testimony disclosed that there were 36 new housing projects in Bergen County in 1978. The units in 27 of the developments had sale prices in excess of $100,000.00, while 9 of the projects had dwellings priced at under $100,000.00. Given these standards, the Mahwah townhouse condominium units, which sold at $74,900.00 in 1978, were considered least cost housing. Id. at 42 through 44.

Contrasted with the aforementioned statistics, the price of one-family homes in Piscataway Township is exceptionally modest. More than one-half of the one-family homes which were sold in Piscataway in 1975 had a purchase price of $45,000.00 or less. (appellate appendix, 3). The multiple listing service for March of 1976 showed that 29.2% of the homes in Piscataway were available at under $40,000.00, 45.4% were priced at between $40,000.00 and $50,000.00, and that only 25.49% were priced at over $50,000. (appellate appendix, 5).

H. THE AVAILABILITY OF PUBLIC WATER AND SEWERS.

The Supreme Court in the Mt. Laurel case, 67 N.J. 186, indicated that the lack of sanitary sewers was not an impediment to the construction of multi-family housing on relatively flat land. Even assuming that the statement was

true in 1975, it is not so today. The various 201 and 208 studies have delineated limits on the amount of effluent which each watershed may safely absorb. As a practical matter, this puts a ceiling on population growth.

A more realistic approach was taken by the Supreme Court in Oakwood. There, two tracts which were zoned for planned unit development were found to be unreasonably zoned because construction on the tracts would require the extension of existing sewer and water facilities. 72 N.J. 521 through 523. If the extension of water and sewer facilities precluded property from supporting least cost housing, then the installation of new facilities would totally prohibit the construction of least cost housing. The Caputo case recognized the importance of locating multi-family facilities close to existing sewer and water lines. Id. at 21. The specific property owned by the Caputos was found to be inappropriate for high density housing because it lacked public water and sewers. Id. at 40. The trial court in the Round Valley case found certain districts which permitted multi-family housing to be "camouflage" zoned because of a lack of water and sewer. Id. at 49. A basis for the decision in Glenview Development Co. v. Franklin Township, 164 N.J. Super. 563, 567 (L.D. 1978) was that the municipality lacked public water and sewers. According to Frederick C. Mezey, Esq., who represented the corporate plaintiffs in Oakwood,

"land not serviced by sewer and water facilities is frequently subject to a valid defense on the part of the muncipality based on health considerations, particularly when the project, as contemplated here, involves such high density uses as apartments and town houses," "Beyond Exclusionary Zoning-A Practitioner's View Of The New Zoning", Vol. 5, No. 1, The Urban Lawyer, 61, 10, (1973).

I. THE PROXIMITY OF MAJOR HIGHWAYS AND OTHER TRANSPORTATION FACILITIES.

The existence of highways has been recognized by the courts as being an important zoning consideration. Wilson vs. Mountainside, 42 N.J. 426, 448 (1964). Highways and other transportation facilities are important in exclusionary zoning cases on two grounds: first, they make commuting easier; and second, highways attract industrial and commercial users which increase the housing need in an area. The latter factor was recognized by the trial court in Oakwood at Madison v. Township of Madison, 128 N.J. Super. 438, 441 (L.D. 1974) and the New Jersey Supreme Court in Oakwood, 72 N.J. 500. The municipal planner in the Round Valley case admitted that the construction of Route 78 made Clinton Township a growth area. 36. On the other hand, the absence of major transportation facilities will diminish a municipality's responsibility for housing. Judge Muir stated in the Caputo case:

> "It is true that Chester is a rural area. It is not strategically located for purposes of transportation that would be required of low income groups. It has no bus lines. The available train station is [sic] in Peapack, Morristown and Dover require automobiles to be reached. Additionally, the railroad lines are an expensive type of transportation going east to the edge of Union County and to Essex County and then to Hoboken and requiring connections with other transportation facilities to get to New York City. It is not the type of transportation required by lower income groups and thus the area is too remote in that sense." 81.

J. ENVIRONMENTAL CONSTRAINTS.

The environment has been recognized as an important consideration in exclusionary zoning cases by the Supreme Court in Mt. Laurel, 67 N.J. 186 and 187, and in Oakwood, 72 N.J. 543. Justice Hall has stated that:

> ".... ecological and environmental factors may lessen the extent of a given municipality's obligation ...." Hall, F.W., "A Review of the Mount Laurel Decision,"43, After Mount Laurel: The New Suburban Zoning (Edited by Rose, J.G. and Rothman, R.E. 1977)

The court in Allan-Deane Corporation v. the Township of Bedminster, Docket Nos. L 36896-70 P.W. and L 28061-71 P.W. (L.D. 1979) (unreported) at 27 recognized the futility of constructing least cost housing on land encumbered with steep slopes. Flood plains and steep slopes were found to be impractical areas to develop in Urban League of

Essex County, 4 and 5. The court in Caputo said that the plaintiff's property was not suitable for high density housing because of the environmental impact on surface and underground water. The steep slopes on the property created potentional erosion problems. Id. at 95, 101.

A municipal master plan is the basis for a community's zoning ordinance. If the land use element of the master plan is not followed by the governing body when adopting a zoning ordinance, then the reason for the deviance must be stated on the record and the ordinance must be adopted by an affirmative vote of the majority of the full membership. N.J.S.A. 40:55D-62. The land use element of the master plan must take into account the "natural conditions, including, but not necessarily limited to, topography, soil conditions, water supply, drainage, flood plain areas, marshes, and woodlands." N.J.S.A 40:55D-28(b)(2). Thus, consideration of the environment is mandated by state statute.

K. THE COUNTY MASTER PLAN.

N.J.S.A. 40:27-2, provides:

> "The county planning board shall make and adopt a master plan for the physical development of the county. The master plan of a county, with accompanying maps, plats, charts, and descriptive and explanatory matter, shall show the county planning board's recommendations for the

> development of the territory covered by the plan, and may include, among other things, the general location, character, and extent of streets or roads, viaducts, bridges, waterway and waterfront developments, parkways, playgrounds, forests, reservations, parks, airports, and other public ways, grounds, places and spaces; the general location and extent of forests, agricultural areas, and open-development areas for purposes of conservation, food and water supply, sanitary and drainage facilities, or the protection of urban development, and such other features as may be important to the development of the county."

When adopting a municipal master plan, the community's planning board must take the county master plan into account. N.J.S.A. 40:55D-28(d). Since the county planning board has a permanent staff which reviews development within its borders, and since the county planning board is not usually a party to zoning litigation, the courts have often relied upon the county master plan in exclusionary zoning cases. The opinion in the Caputo case mentioned the Morris County Master Plan on pages 13, 63, 65 through 69, 73, 76, 82, 84, 86, 96, and 97. In the Allan-Deane case the county master plan was cited on pages 12 through 15. In the Urban League of Greater New Brunswick case, the plaintiffs called county planner, Douglas Powell, as a witness. While Powell testified, his principal task was to authenticate the reports which the planning board had prepared. This precluded effective cross-examination.

L. TRI-STATE PLANNING COMMISSION.

Tri-State statistics were quoted by the Supreme Court in Oakwood, 72 N.J. 500. The importance of the Tri-State Planning Commission was attested by the Somerset County Planning Director in the Allan-Deane case:

> "The Tri-State Regional Planning Commission is the official regional planning agency for the region, and because it is such a complicated region, the Tri-State Regional Planning Commission -- to comply with their planning requirements -- they require the counties in New York and New Jersey to comply with their planning requirements, and the regions in Connecticut. Tri-State must adopt plans. Counties must adopt plans. And then they must be compatible, and they must be cross-examined by the respective constituent agencies... H.U.D. carries a club of rejecting any municipal application for any federal grant, for more than 100 federally funded programs. In other words, if we haven't done what they said we should do, if (a municipality) applies for a storm drainage grant, they would tell (the municipality), 'you can't have this storm drainage grant becuase Somerset County has not gone through the planning operation as we have required.' So it is a big club they carry." 9.

In March of 1978, Tri-State published the "Regional Development Guide, 1977-2000." In the report's covering letter to the Governors of Connecticut, New Jersey, and New York, the major goals of Tri-State were set forth as follows: "(1) to enhance our older cities as desireable places to live and do business, (2) to protect our farms, wetlands,

mountains, stream valleys, watersheds, and forests, and (3) to coordinate the location of homes and work places with public utilities, facilities, services and public transportation in order to conserve energy and promote social equity. This plan is a break from the commission's earlier land-use plans, which were based on expectations of continued rapid growth. Now we must husband our resources and get the most out of what is already in place."

The study made a number of specific recommendations:

1. Older cities - the deterioration of the older cities should be stopped. Instead of losing population, it was projected that the cities would grow by 10%.

2. Critical lands - wetlands, watersheds, prime farmlands, flood plain and other natural sites should not be developed.

3. Transportation supporting densities - resist suburban sprawl and encourage higher densities in appropriate areas. A density of 7 dwelling units per acre is required for a local bus service.

4. Sewered areas - the extension of public sewers and water into rural lands should be stopped. Development should be contained in those areas already served by public utilities.

5. Jobs - housing balance - each region should have a rough balance between households and jobs. New jobs would be encouraged in the central cities and away from the suburbs.

6. Multiple centers - higher densities in outlying regions would be restricted to centers. Id. at 10 through 12.

Tri-State has also prepared maps which indicate where intense and limited development should occur.

Justice Hall recognized that a court could consider county and regional environmental plans and direct growth to those areas which the plans designated for more intense residential development. "A Review of the Mount Laurel Decision," supra 43.

K. STATE DEVELOPMENT GUIDE (Supreme Court Question Number 12).

The best background statement on the State Development Guide is found in the Allan-Deane case:

> "N.J.S.A. 52:27D-1 et seq., enacted in 1966. effective March 1, 1967, established the New Jersey Department of Community Affairs. The Deparment is charged with the duty of assisting in the coordination of state and federal activities relating to local government, maintaining an inventory of data and acting as a clearing house and referral agency for information on state and federal services and programs. N.J.S.A. 52:27D-9. Through the Office of Community Services, the department is to collect, collate and disseminate information pertaining to the problems and affairs of local government, including information as to all available state, federal and private programs and services designated to render advice and assistance in furtherance of community development projects and other activities of local government. N.J.S.A. 40:27D-17."
>
> "The department includes the Division of State and Regional Planning, N.J.S.A. 52:27D-26, which has the responsibility

of promoting programs to insure the orderly development of the State's physical assets by, among other things, stimulating, assisting and coordinating local, county and regional activities. N.J.S.A. 13:1B-15.52. See also N.J.S.A. 52:27C-21, N.J.S.A. 13:1B-6, 7, and N.J.S.A. 40:27-9."

"These statutory provisions appear to implement the policy set forth in N.J.S.A. 13:1B-5.1 which reads in part as follows:

> 'The Legislature hereby finds and determines that:
>
> a. The rapid urbanization and continuing growth and development of the State and its regions... have created, and are creating a need for continuing assembly and analysis of pertinent facts on a Statewide basis pertaining to existing development conditions and trends in economic growth, population change and distribution, land use, urban, suburban and rural development and redevelopment, resource utilization, transportation facilities, public facilities, housing and other factors, and has created and will continue to create a greater need for the preparation and maintenance of comprehensive State plans and long term development programs for the future improvement and development of the State.
>
> ....
>
> c. Local, county and regional planning assistance is a function of State Government and a vital aspect of State planning...There is also a

> vital need for stimulating, assisting and coordinating local, county and regional planning activities as an integral part of State development planning to insure a permanent and continuing interaction between and among various governmental activities." 6 through 8.

The State Development Guide was considered by the trial courts in Round Valley, 7, 8 and 34; Glenview Development Co., 573 through 575; and Allen-Deane, 6-8, and 27; and many unreported cases. The Guide is an attempt to rationalize the zoning process. It is a plan for the development of the State. Factors taken into account include open space, environmental constraints, agriculture, water supply, sewers, highway and rail systems, intensity of employment and existing development. The Guide suggests that no development take place in flood prone areas and steep slopes. 36 through 42. It delineates growth areas, limited growth areas, agricultural areas, and open space. The plan recommends that expenditures for sewers and roads in limited growth areas should be kept at a level which will not encourage population expansion. 110, 111. One of the plan's implied conclusions is that there is enough land in the growth areas to accomodate most of the State's developement into the next century. Glenview Development Co., 574.

N. EXISTING LOW AND MODERATE INCOME HOUSING.

Planning cannot be done in a vaccum, it must take existing development into account. Where one is attempting to allocate housing units, one must analyze the existing development in the municipality. The Supreme Court recognized this in Oakwood, 72 N.J. 530.

It is the thesis of this brief that there are certain developing municipalities in this State that have made ample provision for low and moderate income housing and that are not subject to judicial interference in zoning matters. A substantial allocation from the court might preclude the future development of anything but least cost housing in these locales. (Supreme Court Question Number 14). It is suggested that Piscataway Township is one of these communities. Any municipality that has over 67% of its existing housing stock in low and moderate income housing should be exempt from exclusionary zoning attacks. (appellate appendix, 4). If the Court finds that Piscataway Township is an exclusionary municipality, then what developing municipality is exempt from judicial interference?

O. SPECIAL FEATURES.

A municipality may have special features which should be considered by the court when assessing its low and moderate income housing obligation. Rutgers University owns approximately 1500 acres in Piscataway which cannot be

regulated by local zoning. Rutgers v. Piluso, 60 N.J. 142 (1972). Rutgers University has 420 family apartments and 4346 beds for single students in Piscataway Township. Piscataway Township should have been given credit, but was not, for the Rutgers housing and University owned land within the municipality. (appellate brief, 19 and 20). There are other municipalities with special situations which should be considered by the courts.

A court must review each of the foregoing conditions as well as other relevant factors before ruling on the validity of a community's zoning ordinance. Each municipality is unique and its particular attributes must be considered by the court. It is only with the rational zoning process that a reasonable result can be reached.

The State Development Guide suggested that each of the factors which it analyzed was important, but that none was dominant. 50 through 53. Judge D'Annunzio in Glenview, 571 stated that the Mt. Laurel criterion required "the exercise of judgment, not merely a calculation." A cogent statement on this issue was made by Justice Schreiber in his concurring and dissenting opinion in Oakwood, 72 N.J. 622:

> "The general welfare calls for adequate housing of all types, but not necessarily within any particular municipality. (cite omitted) Environmental, ecological, geological, geographical, demographic,

regional or other factors may justify exclusion of certain types of housing, be it two acre or multi-family."

In his concurring and dissenting opinion in Oakwood, 72 N.J. 629, Justice Mountain stated: "From a purely rational point of view, it makes little sense to apportion the regional obligation, willy-nilly, among some number of diverse political entities, set off from one another by boundary lines placed where they are by historical accident."

The Municipal Land Use Law in N.J.S.A. 40:55D-2(e) adopted the rational planning process as one of the purposes of zoning: "To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment." (Supreme Court Question Number 3). Justice Hall recognized that while the legislature did not adopt a mandatory provision for regional zoning it did enact provisions of the Municipal Land Use Law which supported Mt. Laurel.[1] Municipalities were to develop

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[1] Senate Bill 803 was introduced on May 12, 1969, but was not adopted. It was far more inclusionary than the Municipal Land Use Law. The bill required a master plan to consider the needs of the municipality and the region for housing for all economic and social groups. Article 3, Section 11(e)(2). A Municipal zoning ordinance was required to consider "the need for various types of housing for all economic and social groups in the municipality, and in the surrounding region including but not

continued

in a manner which would not conflict with the general welfare of neighboring municipalties, the county, and the State. N.J.S.A. 40:55D-2 (d). Communities were directed to provide sufficient space "in appropriate locations" for agricaltural, residential, recreational, commercial and industrial uses and open space to meet the needs of the citizens of the State. N.J.S.A. 40:55D-2 (g). Hall, F.W., "The Judicial Role in Land Use Regulation," 309, 310, Land Use Litigation, Critical Issues for Attorneys, Developers, and Public Officials, ALI/ABA/ULI course of study materials (1977). The last cited statute would also support the rational planning approach.

Professor Rose has advocated the same process, which he calls a balanced community. With this community, the ratables, ecology and region would be in balance.

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continued

1 housing for families of persons employed within the municipality and persons whose displacement is caused by public projects within the region or adjoining regions." Article 7(1).

An ordinance which had the affect of excluding any national, religious or ethnic group was presumed to be invalid. Article 7(5)(c).

The Department of Community Affairs was given the right to enter any case where the commissioner found that the determination on a proposed development would have a substantial impact on the implementation of the purposes of the act or if the controversy had an impact which would go beyond the borders of the individual municipality in question. Section 10.11.

> "Balance within a community is not static; it is always in a dynamic and changing state. The forces of social, economic, political, and physical change constantly interact upon each other along a continuum of time. Today's community balance may become tomorrow's imbalance. Today's placid and fallow fields may become a center of tomorrows teaming activity. All components of community structure do not grow and develop with equal and uniform progress. Houses, streets, utilities, water supplies, schools, and recreational facilities do not emerge abruptly as a monolithic community infrastructure in the required proportions of a balanced community." Rose, J.G., "The Courts and the Balanced Community," After Mount Laurel, supra.

This comment is similar to that enunciated in Fischer v. Township of Bedminster, 11 N.J. 194, 205 (1952):

> "It must, of course, be borne in mine that the ordinance which is reasonable today may at some future time by reason of changed conditions prove to be unreasonable. If so, it may then be set aside (cite omitted)."

According to Professor Rose, the role of the professional planner would be enhanced by a judicial declaration of support for the balanced community concept. (Supreme Court Question Number 23). "Such a decision would constitute judicial affirmation of the philosophy of the planning professional that the quality of life may be improved by planning in a rational manner for the allocation of available resources for the satisfaction of community needs. Such a decision would affirm the judicial

recognition of the pertinence and probity of planning studies and of the planning process by which those studies may be used to measure the impact of zoning proposals upon community balance." Rose, J.G., "The Courts and the Balanced Community," 31, supra.

## POINT III

### EACH COMMUNITY SHOULD BE REQUIRED TO TAKE CARE OF ITS OWN. (Supreme Court Questions Numbered 14, 15, 18, 22).

One of the most difficult issues facing this Court is the assessment of a standard by which municipal zoning may be judged. Point II of this brief urges the Court to adopt the rational zoning process. However, the Court may want a simpler test.

Judge Furman in Oakwood and Urban League of Greater New Brunswick held that municipalities should preserve the existing number of low and moderate income families in the region by appropriate zoning. As a practical matter, it is unlikely that a municipality can control the income level of its future citizens through manipulating denisities in a zoning ordinance. As a theoretical matter, that approach also fails. Judge Furman's criterion would disregard the suitability of areas for high denisty housing. The theory presupposes that regions have historically had constant percentages of low and moderate income families. This is not so. The affluence of the residence is a dynamic variable which constantly changes. Therefore, the base year is of utmost importance. In the Urban League case, Judge Furman used as a base year the 1970 census figures, which were more than six years old at the end of the trial. Should not the

plaintiffs be required to produce more up-to-date statistics?

Equally perplexing for this analysis is the creation of a region. With the aforementioned test, municipalities would place themselves in a more affluent region and plaintiffs would place the community in a poorer area. The formula led to Erber's comparison of Middlesex county with Union, Essex, and Hudson counties, and required the rulings which precluded comparisons with the more affluent and geographically closer counties of Monmouth, Somerset, and Morris. The other problem with this concept is that it rewards communties which had previously been exclusionary by freezing the allocation at an unrealistically low figure.

There has been little original thinking by the commentators who have analyzed exclusionary zoning. One of the few imaginative individuals who has written extensively in this area has been Professor Jerome G. Rose, who is the Chairman of the Department of Urban Planning at Livingston College. Professor Rose has analyzed the various allocation schemes which had been advocated. Based on his study, Professor Rose suggested that each municipality has the obligation of taking care of its own citizens.

> "This plan rests upon the assumption that most fairminded people recognize the need to provide housing for themselves, when they become elderly, for their children, for the policemen, firemen, teachers,

> and other municipal employees who provide essential government services, and even to those who work within the community or who have recently left because of an inability to find satisfactory housing within their means. All judicially proclaimed ideas to the contrary notwithstanding, local opposition to apartments and less expensive housing becomes manifest only when it is possible for local residents to conjure up the threat of invasion of hords of outsiders whose numbers and presence may threaten safety, security and amenities of the community they seek to preserve. There is no need to call forth such images to correct the inequities of restrictive zoning ordinances. " Rose, J.G., "Fair Share Housing Allocation Plan: Which formula will pacify the contentious suburbs?", 12 Urban Law Annual (1976)

The same recommendation was made by Harry E. Bernstein, the chairman of Governor Cahill's Housing Task Force and a member of the committee which drafted the Municipal Land Use Law:

> "Thus, as is implied in this approach, I believe that housing should be determined on a municipal basis rather than a regional basis. Municipalities that desire industrial and commercial ratables should be obligated to provide appropriate housing for the employees. Each municipality should have the responsibility 'to take care of its own.'" A speech by Harry E. Bernstein to the Housing and Urban Affairs Committee of the New Jersey Bar Association at the Bar Association's annual meeting, May 22, 1976

The rational zoning process is the best method of judging the reasonableness of a zoning ordinance. Taking

care of one's own is not an ideal test, however, it is a good solution.

It is suggested to the Court that municipalities be given the option of satisfying their responsibility for least cost housing by either the rational zoning process or through each municipality taking care of its own citizens.

## POINT IV

## SHOULD DEVELOPING COMMUNITIES BE THE ONLY MUNICIPALITIES LIABLE FOR PROVIDING LOW AND MODERATE INCOME HOUSING?

While the author of this brief has only participated in one of the cases which is presently being considered by the Court, it is his opinion that none of the defendant municipalities have rigorously argued that it was a developed community which had no fair share burden under Mt. Laurel. A decision on the type of communities which are subject to a fair share requirement would be of great interest to attorneys, planners, government officials, and all those interested in the local planning process. However, a determination at this time might be premature in the absence of a municipality which had argued below that it was developed. In the event that the Court intends to review the issue, this author's opinion follows.

The court in Mt. Laurel ruled that all developing municipalities must provide in their zoning for low and moderate income housing to meet the needs of the citizens in the municipality and the region. 67 N.J. 173 and 174. The court made no ruling on predeveloping or developed municipalities. In an address on Mt. Laurel, Justice Frederick W. Hall stated: "a Court can't deal with everything in one opinion, whereas the legislature can. In Mt.Laurel, we had

before us a developing municipality, so that is what the case talks about. The case did not say that it does not apply to central cities, or that it does not apply to suburbs, or that it does not apply to rural areas with a need for low and moderate-income housing. It dealt with developing municipalities ... " Hall, F.W. "An Orientation to Mt. Laurel," 10, After Mount Laurel, supra.

On a rational planning basis, it is difficult to justify the absolution of communities from a housing burden on account of their development status. Obviously, a developed municipality will have less land area for dwelling units than a developing community. A predeveloping municipality will have a smaller obligation than a developing one. However, the decreased liability should not completely exonerate these municipalities. Justice Schreiber cogently stated this position in his concurring opinion in Pascack Ass'n v. Washington Township, 74 N.J. 470, 494 (1977):

> "The Mt. Laurel, principle, as I view it, of prohibiting a municipality from utilizing its zoning power to exclude low and moderate income families in order to escape an adverse financial impact, should be applicable to all municipalities. (cite omitted). Equitably I cannot envision any sound policy which would justify a differentiation in the duty owed by a developing or a fully developed municipality."

It is significant that Justice Schreiber found that Washington Township's zoning ordinance, which did not permit

multi-family housing, was reasonable in the light of all of the circumstances. However, he would not have exempted the municipality from the requirements of Mt. Laurel merely because it was developed.

At the present time, it is an all or nothing proposition. If a muncipality is found to be developing, then it has an obligation to provide low and moderate income housing not only for its residents but the citizens of the region. A non-developing community has no burden. Justice Pashman, in his dissenting opinion in the Pascack case, 505, asserted:

> "The Court's characterization of some communities as 'developed' allows municipalities which have already attained 'exclusionary bliss' to forever absolve themselves of any obligation for correcting the racial and economic segregation which their land use controls help to create."

Municipalities should not automatically be exempt from any obligation merely because of their stage of development. However, multi-family zoning in such communities might not be warranted under a rational zoning approach. Fischer, supra.

## POINT V

THE COURTS SHOULD DISCOURAGE PLAINTIFFS FROM CHALLENGING THE EXCLUSIONARY ASPECTS OF MORE THAN ONE MUNICIPALITY'S ZONING ORDINANCE IN A SINGLE LAWSUIT. (Supreme Court Question Number 2).

Point II of this brief dealt with those issues which must be considered by the court in order to determine if a municipality has an exclusionary zoning ordinance. Where a plaintiff challenges a single zoning ordinance, the preparation and trial is an onerous and burdensome undertaking. Where a plaintiff challenges ordinances in more than a single municipality, the attorney's task is impossible.

The supplemental brief showed that the plaintiffs failed to meet their burden of proof in the Urban League of Greater New Brunswick case. It implicitly stated that a plaintiff could not adequately present an exclusionary zoning suit against a group of municipalities. If one accepts point II of this brief that each municipality is entitled to have its particular characteristics considered in such litigation, then the plantiffs' proofs in the Urban League of Greater New Brunswick were totally inadequate.

Judge Furman's decision proves this point. Rather than assessing the individual attributes of each municipality in any detail, the trial Judge resorted to a judicial numbers

game in order to assess liability for low and moderate income housing. Judge Furman was forced to go de hors the record in order to derive a formula for each municipality's obligation.

This type of problem is inevitable in litigation where the exclusionary features of ordinances from more than one community are considered in a single lawsuit.

There is a very simple solution to this problem. The court in the Urban League of Essex County granted the defendants' motion to sever the case against each of the municipalities. A similar motion was denied in the Urban League of Greater New Brunswick. It is suggested to the Court that the granting of severance motions will clarify future exclusionary zoning litigation.

## POINT VI

### THERE IS NO FORMULA WHICH CAN EQUITABLY ALLOCATE LOW AND MODERATE INCOME DWELLING UNITS. (Supreme Court Questions Numbered 11, 13, 14, 15, 22).

Much interest is centered on schemes for allocating low and moderate income dwelling units to each municipality in a region. It is argued that a formula can equitably distribute the units. However, any formula would be overly simplistic and would preclude serious analysis. If simple formulas were a panacea, then why has the judiciary failed to impose such standards in other areas of the law? One could make a simple definition of pornography which could easily apply to all cases. However, the United States Supreme Court has required proof that the average person, applying contemporary community standards, would find the work to appeal to a prurient interest. Miller v. California, 413 U.S..15; 93 S. Ct. 2607 (1973); Jenkins v. Georgia, 418 U.S. 153; 94 S. Ct. 2750 (1974). Equitable distribution in a matrimonial case is merely concerned with the division of the spouse's assets. It had been suggested that there be a presumption that the property be equally divided between the parties. The court dismissed this approach in Rothman v. Rothman, 65 N.J. 219, 232, 233, 6 (1974). "Rejecting any simple formula, we rather believe that each case should be examined as an

individual and particular entity." The Supreme Court in Painter v. Painter, 65 N.J. 196, 209, 210 (1974), stated that equitable distribution required a matrimonial judge to apportion the assets in a just manner. The Court cited numerous cases where an equitable standard was employed. If the courts cannot establish a formula in relatively simple cases dealing with pornography and equitable distribution, how can the courts establish formulaic fair share allocations for an entire region which would require extensive knowledge of economics, housing, transportation, environmental constraints, community development patterns, and a host of other factors. The litigants in other matters are entitled to full plenary trials with decisions based on the record. Should zoning be treated as the step-child of the law, with its disputes settled by a formula?

On a practical basis, a judicially imposed housing allocation plan must fail for a number of reasons. First, the allocation cannot take each of the municipalities attributes into account. Point II of this brief indicates some of the relevant factors which should be considered by the court. It is submitted that no formula can accurately reflect each of these attributes. Secondly, what weight is to be given to each of the factors. Thirdly, what period should be used in computing the allocation. Even those commentators who advocate fair share allocations suggest a

time period of one, two, or five years. Accurate projections cannot be made for a longer period of time. Franklin, H.M.; Falk, D; Levin, A.J.; In-Zoning, 155, 156, (The Potomac Institute, 1974). The Municipal Land Use Law makes the land use element of the master plan the basis for municipal zoning. N.J.S.A. 40:55D-62. The law requires a municipal planning board to review a master plan and to make the necessary revisions every six years. N.J.S.A. 40:55D-62. Can a court impose an allocation plan for a longer period of time? Lastly, in those few instances where fair share allocations have been implemented, they have been done as a result of the political process rather through litigation.

Tschangho John Kim, who was the principal planner for the Middlesex County Planning Board, prepared a study on "Low and Moderate Income Housing in Middlesex County, New Jersey, Analysis, Forecast with Allocation for 1975." (Oakwood, 72 N.J. 525 through 527.). Kim is an adherent of housing allocations. His report discussed various methodologies. Kim believed that an objective formula could be obtained.

> "However, what has been formulated and reported in this study is simply the first stage in adequately responding to this vitally important task. The basic model structure should only be considered a first approximation to be used to establish community dialogue. These data should form the basis for discussions

> that will result in the actual allocations, which in the end is a political decision." Id. at 86.

The New Jersey Department of Community Affairs prepared allocation plans for 1970, 1976, and 1978. The allocations to particular municipalities for the three plans are widely divergent. If the Department of Community Affairs, which has the manpower and expertise, keeps changing its plans, how can a court expect to allocate housing over a long time frame. Judge Furman's allocations for Cranbury and Plainsboro to 1985 are susbtantially larger than the D.C.A.'s allocations for both of these communities to 1990. The Department of Community Affairs showed substantially larger existing housing needs for New Brunswick and Perth Amboy in the 1970 study than was allocated by the 1976 and 1978 studies for 1990. While Erber and the three Department of Community Affairs studies allocated housing units to New Brunswick and Perth Amboy, Judge Furman dismissed the cross-claims against both communities and gave neither an allocation. One has to wonder about the reliability of such methodology when the five plans which are considered come to such diverse results.

If this Court is to recommend housing allocation plans, than the efficacy of trials is questioned. It is submitted that Judge Furman could have garnered far more knowledge by spending six weeks in the Middlesex County

Planning Board Library studying housing allocation plans rather than in the trial.

Judge Furman submitted his allocations to the eleven developing communities based on a formula which was de hors the record. None of the testimony which was submitted by any of the developing communities had any effect on that phase of the judgment. One must question the validity of such an allocation plan which failed to consider a single point which was raised by the defendants. It must be recognized that Judge Furman is an exceptionally capable trial judge who is expericenced in zoning matters. If Judge Furman has trouble with allocations, how would they be treated by trial judges of lesser ability?

The Oakwood decision should have layed judicially imposed formulaic fair share allocations to rest:

> "...It would not generally be serviceable to employ a formulaic approach to determination of a particular municipality's fair share." 539.
>
> "However, we deem it well to establish at the outset that we do not regard it as mandatory for developing municipalities whose ordinances are challenged as exclusionary to devise specific formulae for estimating their precise fair share of the lower income housing needs of specifically demarcated region. Nor do we conceive it as necessary for a trial court to make findings of that nature in a contested case. Firstly, numerical housing goals are not realistically translatable into specific substantive

changes in a zoning ordinance by any technique revealed to us by our study of the data before us. There are too many imponderables between a zone change and the actual production of housing on sites as zoned, not to mention the production of a specific number of lower cost units in a given period of time. Municipalities do not themselves have the duty to build or subsidize housing. Secondly, the breadth of approach by the experts to the factor of the apppropriate region and to the criteria for allocation of regional housing goals to municipal 'subregions' is so great and the pertinent economic and sociological considerations so diverse as to preclude judicial dictation or acceptance of any one solution as authoritative." 498 and 499.

"We take this occasion to make explicit what we adumbrated in Mount Laurel and have intimated above -- that the governmental-sociological-economic enterprise of seeing to the provision and allocation throughout appropriate regions of adequate and suitable housing for all categories of the population is much more appropriately a legislative and administrative function rather than a judicial function to be exerciseed in the disposition of isolated cases." 534.

"Quite apart from the uncertain efficacy of this newly formulated rule, there are a number of reasons why courts should abstain from seeking ultimate solutions in this area, but should rather urge a legislative, or legislative-administrative approach. In the first place courts are not equipped for the task. If a court goes beyond a declaration of validity or invalidity with respect to the land use legislation of a particular municipal body, it invites the fairly certain prospect of being required itself to undertake the task of rezoning. Of course, it has neither the time, the

> competence nor the resources to enter upon such an undertaking. " Justice Mountain, concurring and dissenting opinion, 625 and 626.

In this author's view, since there is neither the necessity nor the desirability for housing allocation schemes, then the necessity of determining an appropriate region is a far less serious charge. (Supreme Court question number 13). In the rational zoning process, it is important to examine the region as well as the municipality. However, the creation of the region is not of paramount concern. Therefore, the court could either use a 20-mile radius from the center city as a region, as was done in Mount Laurel, 67 N.J. 190, or the county, as was done in Urban League of Greater New Brunswick, 142 N.J. Super. 20 through 22, or the region from which people would come, absent exclusionary zoning, as was employed in Oakwood, 72 N.J. 539, 543.

The plaintiffs in the Urban League of Greater New Brunswick case called Dr. Lawrence Mann, who was a professor of planning. Mann testified that there were at least 136 methods of determining regional demarcation, thus leading to the conclusion that the only true region was the world. (4T, 629-19).[2] He stated that any concept of region "always gets fuzzy at the borders." (4T, 660-22).

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[2] The citations in this brief follow the abbreviations described on page iii of the appellate brief.

The witness suggested that the implementation of a region's fair share plan should be handled by the legislature rather than the judiciary. (3T, 542-15). Mann admitted that a fair share plan for a particular area might end up by adding more people to those communities which were already heavily populated. (4T, 679-17).

A comprehensive master plan would be necessary in order to consider an areawide solution. (3T, 574-11). A mere determination of the housing needs or fair share allocation would not solve the problem. (3T, 574-13). Mann admitted, "...that there is not any one formula that has stood up, that is there are some considerable differences of opinion exactly how much weight to put on this factor as opposed to the other, the present amount of build-up and available land, the resources of various communities, and so forth." (3T, 490-3).

Mann's appraisal of population predictions and projections was that the "margin of error is going to be large, including the present Middlesex projections." (3T, 535-19). An example used was the 1969 Vernon Study which predicted that the 1985 population for Middlesex County would be in excess of one million while present County Planning Board predictions suggest that the figure would be closer to 750,000 (3T, 534-7, 535-3).[3] After a review of a number of

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[3] The accuracy of long term projections was also questioned in the standard zoning text "Urban Land Use Planning", Chapin, F.S. Jr. (Second edition, 1972) at 212, 213.

resource assessment studies, Mann termed the state of the art "in a word, pretentious" (3T, 579-12).

Mann was asked what a planner would have to study in order to determine if a zoning ordinance was exclusionary. He replied:

> "It really requires understanding how the zoning ordinance is going to fit into the total fabric of the way that a town runs its process of controlling land use changes." (3T, 567-6).

Mann said that each municipality's specific attributes must be examined in detail in order to determine if an ordinance is exclusionary. This cannot be accomplished with any fair share plan.

The problems with fair share plans are illustrated by the table which is found on the next page of this brief. It compares the housing allocation plans which were made by Judge Furman in the Urban League of Greater New Brunswick case, Ernest Erber as the plaintiffs' unlicensed planning witness in the Urban League case, and the three Department of Community Affairs studies, for each of the municipalities which remain in the Urban League of Greater New Brunswick case.

| | DCA 1970 Need | Ernest Erber's allocation to 1980 | Judge Furman's allocation to 1985 | 1976 DCA allocation to 1990 | 1978 DCA allocation to 1990 |
|---|---|---|---|---|---|
| Cranbury | 172 | 761 | 1351 | 561 | 679 |
| East Brunswick | 745 | 4451 | 2649 | 2800 | 3083 |
| Monroe | 341 | 2982 | 1356 | 1948 | 2325 |
| New Brunswick | 4436 | 5326 | 0 | 2275 | 1321 |
| Perth Amboy | 4265 | 5194 | 0 | 1789 | 1352 |
| Piscataway | 1586 | 4337 | 1333 | 4071 | 5299 |
| Plainsboro | 80 | 677 | 1333 | 494 | 624 |
| South Brunswick | 451 | 3061 | 1489 | 2672 | 3213 |
| South Plainfield | 636 | 2026 | 1749 | 2371 | 3000 |

## POINT VII

## THE COURT SHOULD NOT ESTABLISH PER SE RULES WITH REGARD TO LARGE LOT ZONING OR MOBILE HOMES. (Supreme Court Question Number 9).

The courts have been reluctant to estalish per se rules with regard to zoning. In United Advertising Corp. v. Borough of Raritan, 11 N.J. 144 (1952), the court upheld an ordinance which prohibited off-premises signs throughout the municipality. A similar issue was presented in United Advertising Corp. v. Borough of Metuchen, 35 N.J. 193 (1961). The defendant municipality argued that a ban on off-premises signs was judicially approved, and the trial court granted summary judgment. The Supreme Court reversed and remanded the case. It found that the plaintiff was entitled to challenge the validity of the ordinance as it applied to Metuchen.

Two of the defendant municipalities in the present cases before the Supreme Court had five acre zoning. The plaintiff in Glenview did not contest the entire five acre zone. It merely challenged the five acre zoning insofar as it affected the plaintiff's property. Glenview could not be cited for the proposition that five acre zoning is per se invalid. The Caputo case, 93 found that five acre zoning was not justified in Chester on ecological or environmental

grounds. That does not mean that five acre zoning cannot be justified on an environmental basis.

The author of this brief represents Mendham Township in the Public Advocate's lawsuit which was brought against a number of municipalities in Morris County. Five acre zoning is justified in Mendham Township on the following grounds.

a) steep slopes;

b) head water areas;

c) severe soil limitations which limit septic tanks and wells (there is limited public water and no sanitary sewers);

d) historical development on large lots prior to the advent of zoning;

e) substantial existing development on large lots;

f) strong demand for three and five acre lots;

g) location of large residential lots in neighboring communities.

Can this Court say that Mendham Township is not entitled to its day in Court with regard to its five acre zone?

Most municipalities would have difficulty in justifying large lot zoning over their entire area. However, specific large lot zones often have a rational zoning underpining.

A ruling against all large lot zoning will not necessarily promote least const housing. Communities can make provisions for all types of housing. Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 161 N.J. Super. 317, 345, 346 (L.D. 1978).

The exclusion of mobile homes takes two forms. In some communities mobile homes are prohibited. It could be argued that this type of ordinance is improper because mobile homes have been approved as a one family dwelling in the State Uniform Construction Code. However, even this exclusion may be rational in certain communities. There was testimony in the Urban League of Greater New Brunswick case that the narrow streets and congested areas of some urban communities made the placement of mobile homes on residential lots impractical. Other municipalities permit mobile homes but prohibit mobile home parks. This exclusion may be reasonable in the light of the municipality's development, character, environmental constraints, existing housing and zoning. Obviously, areas which lack public water and sewer would not be favorable for mobile home parks. It is suggested that not every community should be required to permit mobile home parks.

## CONCLUSION

Piscataway Township has more least cost housing than most municipalities in the state. It probably has more low cost housing than any of the municipalities which are before the Court with the present appeals. The Court should not direct a housing allocation to Piscataway Township.

The trial court's decision in the Urban League of Greater New Brunswick case should have been reversed, although possibly for different reasons than those given by the Appellate Division. The plaintiffs failed to meet their burden of proof. They failed to use the rational zoning process or any other reasonable method in order to prove the invalidity of the defendants' zoning ordinances.

The record in the case is inadequate and outdated, therefore no purpose would be served by a remand.

Respectfully submitted,

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