Caputo v. Chester
UL v. Carteret
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NAACP
v.
Mt. Laurel

- Supplementary Brief of Amici Curiae - State Legislators

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SUPREME COURT OF NEW JERSEY
DOCKET NO. 16,455

JOSEPH CAPUTO & ALDO CAPUTO, Plaintiffs-Appellants, v. TOWNSHIP OF CHESTER, PLANNING BOARD OF CHESTER, Defendant-Respondents.	Civil Action ON CROSS APPEALS FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY Sat Below: Muir, A.J.S.C.

DOCKET NO. 16,492

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs-Appellants, v. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al, Defendants-Respondents.	Civil Action ON APPEAL FROM JUDGMENT OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Sat Below: Halpern, Ard and Antell, J.J.A.D.

DOCKET NO. 16,813

GLENVIEW DEVELOPMENT CO., Plaintiffs-Appellants, v. FRANKLIN TOWNSHIP, PLANNING BOARD AND ENVIRONMENTAL COMMISSION OF FRANKLYN TOWNSHIP, Defendants-Respondents.	Civil Action ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUNTERDON COUNTY Sat Below: D'Annunzio, J.S.C.

	DOCKET NO. 16,967
URBAN LEAGUE OF ESSEX COUNTY, Plaintiffs-Appellants, v. TOWNSHIP OF MAHWAH, Defendants-Respondents.	Civil Action ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY Sat Below: Smith, J.S.C.
	DOCKET NO. 17,041
SOUTHERN BURLINGTON COUNTY NAACP, et al, Plaintiffs-Appellants, and DAVIS ENTERPRISES, Intervenor, v. TOWNSHIP OF MT. LAUREL, Defendant-Respondent.	Civil Action ON CERTIFICATION TO THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BURLINGTON COUNTY Sat Below: Wood, J.S.C.
	DOCKET NO. 17,088
ROUND VALLEY, INC., Plaintiff-Petitioner v. TOWNSHIP OF CLINTON, TOWNSHIP COUNCIL OF TOWNSHIP OF CLINTON and PLANNING BOARD OF THE TOWNSHIP OF CLINTON, Defendants-Respondents	Civil Action ON CERTIFICATION TO THE SUPERIOR COURT, APPELLATE DIVISION Sat Below: Ard, Mathews and Polow, J.J.A.D.

SUPPLEMENTARY BRIEF OF AMICI CURIAE
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INTRODUCTION

In this Supplementary Brief, the Amici Curiae State Legislators address many of the points set forth in the Court's May 19, 1980 list of "Amended Questions." The Arabic-numbered questions correspond to the numbered questions contained within that list.

In addition to raising the arguments briefed herein, the Legislators reassert, in their entirety, all points argued in their Amici Curiae briefs previously filed with the Court.

"1. Discuss the application of the duty not to exclude, as first announced in Mt. Laurel, to all types of housing (i.e., regardless of level)."

I. THE MT. LAUREL LINE OF CASES DOES NOT IMPOSE A MUNICIPAL OBLIGATION TO ENACT ZONING WHICH PROVIDES FOR ALL TYPES OF HOUSING.

The Mt. Laurel and Oakwood at Madison "fair share" zoning obligation requires that municipal zoning reasonably accomodate regional planning concerns, (particularly, regional housing needs), in accordance with acceptable planning and zoning practice. See, Legislators' Amici Curiae brief in Urban League v. Carteret, 43-50. Regional housing needs are, however, only one facet of sound planning criteria; they should be reasonably accomodated by a municipality whose planning and zoning should also be consistent with: (1) natural features of the land; (2) existing and proposed development; (3) sound transportation planning; (4) sound utility service planning; (5) sound community service and recreational facility planning; and (6) sound conservation planning for the preservation and utilization of natural resources. N.J.S.A. 40:55D-28(b),-62(a) (requiring, with stated exception, substantial consistency between master plan and zoning ordinance).

The accomodation of housing needs, see N.J.S.A. 40:55D-28(b)(3), is thus only one isolated purpose of planning and zoning.

In this complex planning scenario, see generally Legislators' Amici Curiae brief in Caputo v. Chester Township, 43-45, 49, "a competent planner, as a matter of total professional discretion,

[would never]...recommend that each community in a region, no matter how large or small, no matter how blessed with or without certain natural features, no matter what its past and its present makeup, should be an exact (or even approximate) microcosm of the whole..." in any given respect. John M. Payne, "Delegation Doctrine in the Reform of Local Government Law: the Case of Exclusionary Zoning," 29 Rutgers L. Rev. 803, 812-13 (1976). In short, each and every municipality is no more well suited to accomodate all housing types, than each would be to accomodate all types of industrial or commercial development. See generally, Legislators' Amici Curiae briefs in Urban League v. Carteret, at 53-54, Caputo v. Chester Tp., at 55-57.

This proposition is well supported by, and consistent with, the rule that, "Even where Mt. Laurel is implicated..., a municipality, in carrying out the constitutionally and legislatively vested [zoning] power, is not compelled to provide for every use within its boundaries. ..." Washington Tp. v. Central Bergen Community Health Center, 156 N.J. Super. 388, 413 (Law Div. 1978) (emphasis in original) (dictum).

As this Court stated in Pascack Ass'n v. Washington Tp., 74 N.J. 470, 481 (1977), "it would be a mistake to interpret Mount Laurel as a comprehensive displacement of sound and long established principles concerning judicial respect for policy decisions in the zoning field. ... There is no per se principle in this state mandating zoning for multi-family housing by every municipality

regardless of its circumstances with respect to degree or nature of development. ..." The Court thus reaffirmed its earlier statements in Fanale v. Hasbrouck Heights, 26 N.J. 320, 325 (1958), that:

> It cannot be said that every municipality must provide for every use somewhere within its borders. Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509 (1949); Pierro v. Baxendale, 20 N.J. 17 (1955). Whether a use may be wholly prohibited depends upon its compatibility with the circumstances of the particular municipality, judged in the light of the standards for zoning set forth in R.S. 40:55-32. [Now N.J.S.A. 40:55D-62, -65, -67]

In Pascack, this Court expressly recognized that the vast diversity among New Jersey's municipalities dictates against the judicial imposition of any particular zoning scheme, and weighs heavily in favor of affording considerable discretion to local legislative bodies enacting zoning laws:

> It is obvious that among the 567 municipalities in the State there is an infinite variety of circumstances and conditions.... There must necessarily be corresponding breadth in the legitimate range of discretionary decision by local legislative bodies as to regulation and restriction of uses by zoning. [74 N.J. at 482.]

In accordance with this reasoning, the Appellate Division has explicitly stated that, "[i]t is now clear that a municipality need not provide for every use within its borders. ..." Swiss Village Assocs. v. Wayne Tp., 162 N.J. Super. 138, 145 (App. Div. 1978). Thus, in reversing the trial court's decision that a municipality violated the zoning enabling legislation by enacting an ordinance that failed to provide for high rise apartment develop-

ment, the Appellate Division specifically noted that it was for the Legislature, not the Judiciary, to make the planning judgment as to whether or not high-rise apartments must be accomodated in all municipalities. Even assuming that this form of housing was a "perfectly respectable form of housing accomodation," 162 N.J. Super. at 145, the court noted that:

> The judgment of the trial judge in regard to the "acceptability" of high-rise apartments, without more, must give way to the judgment of those elected to make that decision and into whose hands the Legislature has placed the power.... Id. (emphasis supplied).

One cannot say, as a matter of constitutional law, that every housing type must be provided for in every municipality, for "whether regulation rather than prohibition [is] the appropriate technique for obtaining a balanced and attractive community is to be left to 'discretionary decision by local legislative bodies.'" Id. at 145 (emphasis supplied).

It is thus a local legislative function, rather than a judicial function, to select the particular means of meeting purported low and moderate income housing needs. In this context, it has been explained by the courts that:

> The validity of high-rise housing projects as a governmental instrumentality utilized to help alleviate the shortage of low and moderate income living quarters is an issue to be debated and decided in a forum other than the courts....It is not for the courts to speculate upon or anticipate the social effects which will result from municipal or legislative action. In short, the social or economic belief of a court cannot be substituted for the judgment of officials who are either

elected or appointed to exercise that judgment.

Cervase v. Kawaida Towers, 124 N.J. Super. 547, 569 (Law Div. 1973), aff'd, 129 N.J. Super. 124 (App. Div. 1974) (emphasis supplied).

This court should therefore reaffirm the well settled principle that no municipality must zone to accomodate all types of development or all tpes of housing. Compliance with Mt. Laurel and Oakwood does not require the judicial imposition of any particular zoning scheme or housing mix. Moreover, for the courts to do so would represent a gross violation of the responsibility entrusted to the judiciary in our democratic system of government, whose very existence is ultimately dependent upon the proper respect paid by one Branch to the constitutional role of another.

"2. Discuss the appropriate procedural posture for the joinder of necessary/desirable parties in an exclusionary zoning suit (for example, neighboring municipalities in a particular county of region)."

II. JOINDER OF NEIGHBORING MUNICIPALITIES IS INAPPROPRIATE.

It is the Legislators' position that the joinder of neighboring municipalities in a given county or region will only further enmesh the courts in non-justiciable planning and social policy controversies, as set forth in the Legislators' original briefs filed in Urban League v. Mahwah Tp., at 63-72, and Urban League v. Carteret, at 64-73. As zoning litigation becomes more far-reaching, and less site-specific, the trial court will inevitably be called upon to resolve comprehensive planning and policy disputes which are non-justiciable controversies.

Moreover, the zoning power is to be exercised on a local basis by municipal, not regional or county, governing bodies. N.J. Const., Art. IV, §6, ¶2; N.J.S.A. 40:55D-62. The joinder of additional municipalities in an attempt to have the litigation "cover" an entire region will, however, inevitably put the court in the role of an irreversible regional zoning body in violation of the constitutional and statutory delegation of the zoning power to municipalities, id.

Furthermore, zoning legislation is required to be liberally construed in the favor of the enacting municipality. N.J. Const., Art. IV, §7, ¶11; Place v. Bd. of Adjustment of Saddle River, 42 N.J. 324 (1964); YWCA of Summit v. Bd. of Adjustment of Summit, 134 N.J. Super. 384 (1975), aff'd, 141 N.J. Super. 315 (App. Div. 1976). This constitutional requirement weighs heavily against the Court's adoption of a rule requiring the judicial scrutiny of the zoning of all towns in a county or alleged "region" merely because a plaintiff has decided to sue a neighboring town.

"3. Discuss the relevance of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1, et seq. (in particular, the general welfare requirement in N.J.S.A. 40:55D-2(a)) in exclusionary zoning cases."

-- Discuss those legislative enactments listed in the amicus curiae brief of legislators accepted by Court on April 16, 1980 that are responsive to the exclusionary zoning problem.

III. A. THE MUNICIPAL LAND USE LAW, NOT COURT-MADE POLICY, MUST GOVERN ZONING VALIDITY.

Under the zoning enabling legislation enacted pursuant to the Constitution, N.J. Const., Art. IV, §6, ¶2, a zoning ordinance

is to be adopted only after the local planning board has adopted a "land use element" of the master plan. The zoning ordinance is, in turn, required to "effectuate" or be "substantially consistent" with the land use element of the master plan. N.J.S.A 40:55D-62.*

The master plan's land use element is to include recommended standards of population density and overall development intensity for the municipality. N.J.S.A. 40:55D-28(c). These recommended standards should be specifically reflected in the land use plan's study of the existing and proposed location, extent, and intensity of various types of development, including: (1) residential; (2) commercial; (3) industrial; (4) agricultural; (5) recreational; and (6) other private and public forms of development. N.J.S.A. 40:55D-28(b).

These population and development standards are to be formulated in light of (1) natural conditions, including, but not necessarily limited to: (a) topography; (b) soil conditions; (c) water supply; (d) drainage; (e) flood plain areas; (f) marshes; and (g) woodlands. Their proposal is also to consider the other master plan elements, including: (a) the Housing Plan element; (b) the Circulation Plan element; (c) the Utiity Service Plan element; (d) the Community Facilities Plan element; (e) the Recreation Plan element; and (f) the Conservation Plan element. N.J.S.A. 40:55D-

* To the extent that a permanent zoning ordinance is inconsistent with the master plan, it must be approved by an affirmative vote of the full authorized membership of the municipal governing body which must record its reasons for so acting in its minutes. N.J.S.A 40:55D-62(a).

28(a), (b)(2), (b)(3)-(8).

Moreover, as a master plan element proposing development, N.J.S.A. 40:55D-28(b)(2), the land use plan element is to be the subject of a policy statement indicating (1) its relationship to the master plans of contiguous municipalities and of the county where the municipality is located, and indicating (2) its relationship to any comprehensive guide plan prepared pursuant to N.J.S.A. 13:1B-15.52, N.J.S.A. 40:55D-28(d). Accordingly, relevant planning concerns (including housing needs) are on a regional level, rather than on a purely local basis.

This planning and zoning process must serve to fulfill the purposes of the MLUL, as set forth in N.J.S.A. 40:55D-2. Indeed, this Court has acknowledged that unless patently unreasonable or arbitrary, zoning must be sustained so long as it is substantially related to promoting the general welfare "in one or more of the particulars specified" in the enabling legislation, Pascack Ass'n v. Washington Tp., 74 N.J. 470, 483 (1977) (emphasis in original).

The particulars specified by statute are:

a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;

b. To secure safety from fire, flood, panic and other natural and man-made disasters;

c. To provide adequate light, air and open space;

d. To ensure that the development of individual municipalities does not conflict with the

development and general welfare of neighboring municipalities, the county and the State as a whole;

e. 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;

f. To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies;

g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;

h. To encourage the sound location and design of transportation routes;

i. To promote a desirable visual environment;

j. To promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through improper use of land;

k. To encourage planned unit developments; and

l. To encourage senior citizen community housing construction;

m. To encourage the more efficient use of land.

N.J.S.A. 40:55D-2.

It would thus totally distort the statutorily required, and constitutionally authorized, zoning and planning process to focus only upon one concern (e.g. housing). The reasonableness

of planning and zoning for residential development cannot be determined merely by examination of the words of an ordinance itself to see if it is "exclusionary," in the Mt. Laurel sense, for in order to make such a determination, one must determine:

(1) Whether the zoning actually restricts demand, for "[t]he evaluation of the impacts of a zoning ordinance is no simple matter; an ordinance that appears on its face to be very restrictive may only prove to be a reflection of the land-use pattern that would have emerged in an unregulated housing market." Schafer, The Suburbanization of Multifamily Housing, at 100 (1974; and

(2) Whether the restriction is justified by sound planning principles embodied in the purposes of the MLUL, N.J.S.A. 40:55D-2.

Resort to subjective, judicial notions of substantive due process in evaluating the general welfare-related purposes of zoning, inappropriately overrides the Legislative determination of zoning purposes set forth in the MLUL, N.J.S.A. 40:55D-2. See So. Burlington Cty. NAACP v. Mt. Laurel, 67 N.J. 151, 193 (Mountain, J., concurring). This approach is, of course, consistent with the well-settled rule of law that a court should not unnecessarily reach constitutional questions. See Legislators amici curiae brief in Caputo v. Chester Tp., at 60-61.

Moreover, the Court's focus in Mt. Laurel upon housing, as a component of zoning and planning, to the virtual exclusion or, at least, subordination of all other relevant planning concerns, should not be allowed, by this Court, to amount to a re-ordering of the zoning purposes set forth in the MLUL, N.J.S.A. 40:55D-2, -28, -62. Housing is only one limited aspect of planning, id.; it is not

for the courts, which admittedly lack planning expertise, Oakwood at Madison v. Madison Tp., 72 N.J. 481, 535 (1977), to attempt to judge zoning validity by placing subjective value judgments upon the importance of the different zoning purposes in the MLUL, N.J.S.A. 40:55D-2. For example, if the Court acknowledges, as it must, that the Legislature has the sole constitutional authority to regulate zoning, then the Court should not subordinate environmental concerns to housing concerns, as it did in Mt. Laurel and Oakwood at Madison, supra, at 544-46, because the Legislature made them of equal importance as a policy matter. N.J.S.A. 40:55D-2(a), (e), (g), (j), (k).

Just as it would have been improper to put environmental concerns above all others; it was equally improper to subordinate environmental concerns to housing by judicially requiring the "real and substantial" environmental danger test. See e.g. 67 N.J. at 186-87; 72 N.J. at 544-46.

Since there can be no doubt that the purposes of the MLUL are proper legislative purposes, this Court should respond to "exclusionary zoning" claims by looking to whether, on balance, the subject zoning is reasonable in light of the MLUL purposes, N.J.S.A. 40:55D-2, -28. The Legislature has determined that sound, safe planning and zoning cannot be had by placing residential development concerns above all other relevant planning concerns. That the Court may disagree with such an approach to planning and zoning is not justification for holding, as a matter of state constitutional law, that a different approach be implemented in order better to meet low

income housing needs.

It is for the Legislature, not the Court, to determine, as a matter of social policy, how to meet whatever low income housing needs may exist. As set forth below, the Legislature has undertaken extensive, costly, and successful programs to meet these low income housing needs.

Zoning legislation must not be narrowly and inaccurately viewed as a means of meeting low income housing needs; there are other far more effective legislative programs to accomplish this worthy goal. See Point III. B., infra.

III.B. THE LEGISLATURE BOTH BEFORE AND AFTER THE MOUNT LAUREL DECISION HAS CONSIDERED AND HAS MADE POLICY DECISIONS CONCERNING THE HOUSING NEEDS OF NEW JERSEY CITIZENS.

At the outset, it should be emphasized that the Court recognizes the Mt. Laurel mandate, as modified by the Oakwood at Madison decision, will not result in the provision of "newly constructed housing for all in the lower income categories mentioned." Oakwood at Madison, supra, at 513. (emphasis in original). Rather, the Court notes that zoning for least cost housing

> will nevertheless through the "filtering down" process...tend to augment the total supply of available housing in such manner as will indirectly provide additional and better housing for the insufficiently and inadequately housed of the region's lower income population. (citation omitted).

Id. at 513-14. These Legislators are not unaware of certain studies which may lend some support to the efficacy of the filtering down process as a means of indirectly making available housing for

lower income persons. See J. Lansing et al., New Homes and Poor People (1969).*

But the validity or invalidity of the filtering down process as a means of providing safe and adequate housing for the state's lower income population is beside the point. The issue is that the filtering down process is but one of several policy alternatives that can be chosen and implemented to address the problem. It is respectfully submitted that the decision to choose or not to choose a particular policy alternative is, subject to constitutional restraints, a legislative prerogative which should not be asssumed by the courts. Bonnet v. State, 141 N.J. Super. 177, 196 (Law Div. 1976), aff'd, 155 N.J. Super. 520 (App. Div. 1978), aff'd mem., 78 N.J. 325 (1978).

To date, the Legislature has manifested its decision to provide directly new housing for the state's lower income population in legislation enumerated in Point II of the initial Amici briefs filed on behalf of these Legislators. As noted in Point II, the Legislature's decision to deal with the problem by directly pro-

* They are similarly not unmindful of the policy's critics. Mt. Laurel, supra at 205 (Pashman, J. concurring) (noting that the vacancies created by persons moving into new housing are mostly "absorbed by the enormous lag between population growth and new housing construction" and that the housing units that do filter down to lower income families are "often dilapidated and in deteriorating neighborhoods")(citations omitted); A. Mallach, "Do Lawsuits Build Housing?" 6 Rutgers-Camden L.J. 653, at 666, n.55 (the filtering down process "may take more than a lifetime to occur."); and J. Lansing et al., New Homes and Poor People, supra, at 68 (stating that, as market conditions stood at the time of that study, the filtering down process would not be effective in providing housing for poor blacks).

viding new housing for lower income persons through subsidization is based upon the fact that private, unsubsidized construction simply will not result in the construction of housing that is affordable to lower income persons.

The work of the Housing Finance Agency ("HFA"), created by the Housing Finance Agency Law, N.J.S.A. 55:14J-1 et seq., in 1967, exemplifies the success of the Legislature's efforts to address the housing needs of the State's lower income citizens.* The emphasis of the HFA's activities has been on providing housing in the state's "Urban Aid" cities,** of which there will be 39 by the year 1981. (See Appendix I for a listing of the diverse municipalities that qualify or that will qualify as Urban Aid cities under the statute). As of its 1978 Annual Report, HFA reported that 67 percent of its total mortgage portfolio was in Urban Aid cities. 1978 New Jersey Finance Agency Annual Report, at 7 (hereafter "HFA Annual Report"). Thus, one-third of the mortgages made available by the HFA for the construction of low cost rental housing was concentrated in areas other than statutorily determined Urban Aid cities.

As of 1978, the HFA had granted mortgages in the aggregate amount of $818,307,404 which mortgages were used or are being used to assist financing the construction of nearly 25,000 housing units

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* The methods by which the HFA provides financing for the construction of housing is discussed at 30-31 of these Legislator's initial Amici brief in Urban League v. Carteret.

** The formula used to determine what constitutes an "Urban Aid" city is provided by statute. N.J.S.A. 52:27D-178.

in 63 New Jersey communities. Id. (See Appendix II for a breakdown of the municipalities, by county, in which HFA funds have been used or are being used to finance housing construction).

In addition to raising funds through the sale of HFA bonds to finance housing construction for the state's lower income population, the HFA, in both 1977 and 1978, has also been the nation's leading producer among state housing agencies of new housing subsidized by the federal rent subsidy program, Housing Assistance Payments Program, commonly referred to as Section 8. 1977 HFA Annual Report, at 3; 1978 HFA Annual Report, at 3.* As of 1978, eligible tenants in HFA financed housing were receiving annual subsidies under the Section 8 program in the aggregate amount of $18,267,854. 1978 New Jersey Housing Finance Agency Annual Report, at 20.

The HFA also grants interest-free loans to nonprofit housing sponsors to assist them in paying the initial architectural, legal and consultant work necessary to prepare and submit to HFA a plan for a housing project to be considered for an HFA mortgage loan. Funds for these loans are derived from the Revolving Housing Development and Demonstration Grant Fund administered by the

* Under the Section 8 program, the difference between the fair market rental value of a housing unit and between 15 percent and 25% of a low income family's income is paid by the federal government on behalf of the tenant to the owner of the housing unit. Tenants whose income does not exceed 80 percent of the area's median income are eligible for the assistance. Between 70 percent and 75 percent of the money available under the Section 8 program is allocated to urban areas. Department of Community Affairs, State Development Guide Plan (Preliminary Draft)(September 1977) at 99.

Department of Community Affairs. This fund was created pursuant to the Community Affairs Demonstration Grant Law of 1967, N.J.S.A. 52:27D-63. In 1977 and 1978, the HFA granted loans in the aggregate amount of $2,768,507 to finance pre-construction expenses of nonprofit sponsors of 44 projects. 1977 HFA Annual Report, at 8; 1978 HFA Annual Report, at 9.

Whereas the HFA's primary emphasis is on making available funds for the construction of multi-unit rental housing, the Mortgage Finance Agency ("MFA"), created by the Mortgage Finance Agency Law, N.J.S.A. 17:1B-4 et seq., in 1970, has directed its efforts to providing mortgage loans to finance owner-occupied, one-to-four unit housing for New Jersey's lower income citizens and to providing home improvement loans to homeowners who cannot afford conventional loans. A discussion of the programs implemented by the MFA to attain these objectives is set forth at 31-33 of the Legislator's initial Amici brief in Urban League v. Carteret.

While the emphasis of the programs established by the MFA have also been on providing financing to construct or rehabilitate housing in the state's Urban Aid cities, (see Appendix I), it is noteworthy that, through its Loan to Lenders Program which was active between 1970 and 1976, the MFA provided mortgage loans to finance housing construction in both urban and suburban counties. (See Appendix III for a county-by-county breakdown of the counties in which MFA mortgages have been used to finance housing construction.)

Programs currently being implemented by the MFA are its Neighborhood Loan Program and its Home Improvement Loan Program. The former program is designed to make available mortgage funds in eligible neighborhoods* with a view toward "providing New Jersey residents the opportunity to become first time homeowners and of encouraging suburban families to return to urban neighborhoods, thereby creating a desirable mix of income groups." 1979 MFA Annual Report, at 6. As of 1979, nearly $131,000,000 in mortgage loans had been granted through the Neighborhood Loan Program. (See Appendix IV for a breakdown by municipality of the aggregate amount of mortgages allocated).

The Home Improvement Loan Program makes available to moderate income homeowners home improvement loans to assist them in maintaining and improving their homes. The purposes of the program are to encourage the preservation and improvement of the state's aging housing stock and to encourage energy saving improvements. Id. at 11. Priority is given to applicants seeking loans to make improvements to remedy building code violations and to those who seek funds to make energy saving improvements. Id. at 12. Signi-

* To become eligible a neighborhood must "be located within a municipality with urban characteristics, such as high population density and older properties; be primarily residential, with one-to-four family homes; contain basically sound housing stock; show evidence of disinvestment by the lending industry or by current residents in the neighborhood; have limited number of abandoned buildings; [and the MFA must] receive a commitment from the municipality to maintain or improve the area." 1979 New Jersey Mortgage Finance Agency Annual Report, at 7 (hereafter "MFA Annual Report").

cantly, a survey of those who received loans under the MFA's Home Improvement Loan Program after the program's first year in operation revealed that, of all borrowers, 71% would not have made the needed home improvements had the funds from the program not been available. 1978 MFA Annual Report, at 10.

Involvement of local housing authorities in assisting in the financing and maintenance of low-rent public housing cannot be overlooked. As of 1978, over 80 municipalities had established local housing authorities. Collectively, these authorities had assisted in financing over 45,000 low-rent housing units throughout the state. New Jersey Directory of Subsidized Rental Housing, Department of Community Affairs, Division of Housing and Urban Renewal (January, 1978), at 56-92 (extrapolation taken from cited pages. For a by-county breakdown of housing units that have been constructed with the financial assistance of local housing authorities see Appendix V). Under the Local Housing Authorities Law, N.J.S.A. 55:14A-1 et seq., these local housing authorities are empowered, inter alia, to exercise the power of eminent domain to acquire land for housing projects, N.J.S.A. 55:14A-12, and to borrow money or accept contributions from the Federal government, N.J.S.A. 55:14A-19. Furthermore, all property of a housing project of a local housing authority is exempt from all state taxes and special assessments, N.J.S.A. 55:14A-20.

While it is impossible to discuss each program created by legislation and still comply the length-of-brief requirements,

it is critical in assessing the housing legislation passed to date to understand the dynamics of the various legislative programs.* The legislation discussed in Point II of these Legislator's initial Amici briefs provide the means by which either a private association or corporation (see Limited Dividend Nonprofit Housing Corporations and Associations Law, N.J.S.A. 55:16-1; Redevelopment Companies Law, N.J.S.A. 55:14D-1 et seq.), or a public agency (See Local Housing Authorities Law, supra) can establish an organization whose very purpose, by statute, must be to provide housing affordable to lower income persons. Upon establishment of such organizations, legislation provides for the means by which funding for the initial planning of housing affordable to lower income persons can be obtained (see Community Affairs Demonstration Grant Law of 1967, supra) as well as the means by which to ensure that the cost of the housing remains low, either through direct financing (see Housing Finance Agency Law, supra; Mortgage Finance Agency Law, supra; Local Housing Authorities Law, supra) or through tax exemption or abatement (Local Housing Authorities Law, supra; Limited Dividend Nonprofit Housing Corporations and Associations Law, supra, N.J.S.A. 55:16-18; Senior Citizens Nonprofit Rental Housing Tax Law, N.J.S.A. 55:14I15; Redevelopment Companies Law, N.J.S.A. 55:14D-26). Furthermore, after a multi-dwelling housing project is constructed,

*For an example of the manner in which two or more programs created by the legislation discussed above can be used to implement the construction of housing, see Cervase v. Kawaida Towers, Inc., 124 N.J. Super. 547 (Law Div. 1973), aff'd, 129 N.J. Super. 124 (App. Div. 1974).

the Hotel and Multiple Dwelling Health and Safety Board, established by the Hotel and Multiple Dwelling Law, N.J.S.A. 55:13A-3,5, is empowered to inspect the premises to insure that the structure complies with the health and safety regulations, N.J.A.C. 5:10-1.1 et seq., promulgated by the Department of Community Affairs.

It can thus be noted that the Legislature, via legislation dating back 40 years, has provided the mechanics by which both the private and public sector can become involved in providing safe, sanitary and decent housing for the state's lower income citizens. As the above figures clearly illustrate, this legislation is more than mere words in a statute book. The legislation is pervasive. It provides the means to plan a housing project; to acquire the property on which to build; to finance the construction; to ensure that the housing remains low cost and available to those who cannot afford private, unsubsidized housing; and to ensure that the housing project, once built, is maintained in a safe and healthy manner. In short, the legislation provides the means for turning an idea - the construction of housing affordable to lower income persons - into a reality. That the legislation indeed works is dramatically illustrated by the programs discussed above.

The legislation is a manifestation of the Legislature's awareness and choice as to how to meet the needs of the state's lower income citizens. The emphasis is on subsidization of housing in the areas where the need exists in both urban and suburban areas of the state. Every developing municipality has not been reached,

but it is irrational to assume that, because there is a need for housing in a region or state, there is necessarily a demand for housing in each developing municipality in the region or state. See R. Schafer, The Suburbanization of Multifamily Housing (1974) at 91-100 (where a study of 23 suburban communities with facially "restrictive" zoning ordinances (did not allow apartments) revealed that in only 3 of the communities was there clearly an unmet demand for apartments). As Dr. Shafer noted, the theory that restrictive or so-called exclusionary zoning ordinances, "which on their face prohibit an activity, are the reason or cause that activity does not occur,...emphasizes the supply side of the housing market to the exclusion of the demand side." Id. at 91.

These Legislators submit that the Legislature has recognized the need to supply housing for the state's lower income population and has chosen to implement programs to supply such housing where the demand exists. That it has not chosen a least cost zoning approach, which only works indirectly via the "filtering down" process, if it works at all, should not give rise to the type of judicial legislation promulgated in the Mt. Laurel and Oakwood at Madison opinions.

In light of the foregoing, it is respectfully urged that the Court defer to the Legislature the policy decisions on the means of providing for the needs, including the housing needs, of low and moderate income families, and not "substitute [its]...judgment as to what is better policy...." Bonnet v. State, supra, at 196.

"4. Discuss the significance of Executive Order 35."

IV. EXECUTIVE ORDER NO. 35 CARRIES NO FORCE OF LAW, IS ILL-CONCEIVED, AND BORDERS ON AN ENCROACHMENT OF THE LEGISLATIVE FUNCTION.

Executive Order No. 35, issued by Governor Brendan Byrne in April 1976, authorized the Division of State and Regional Planning to conduct a housing survey and to set recommended housing goals as a means of providing planning assistance to local governments. The order states, however, that "it is the policy of the State that local government should be the primary authority for planning and regulating land use and...housing development." Executive Order No. 35. The Order reflected the legislatively authorized planning function of the Division of State and Regional Planning,* and the requirements of obtaining financial assistance from the federal government.**

Executive Order No. 35 was issued by Governor Byrne in reaction to the decision of the New Jersey Legislature not to enact the Voluntary Balanced Housing Plan Act which was introduced shortly after the Mt. Laurel decision.*** To the extent that the Governor was attempting to singlehandedly legislate what the Legislature as a

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* See N.J.S.A. 13:1B-15:52 (which provides generally that the Division assist and coordinate local, county, and regional planning activities).

** See Executive Order No. 35, April 1976, at 1.

*** See State Housing Programs and Policies: New Jersey's Housing Element, at 77 (1977) (Dept. of Community Affairs).

body chose not to enact, the Order is manifestly an encroachment by the executive department on the legislative function. Governor Byrne should have, instead, adhered to the proper legislative process by attempting to achieve enactment of the proposal he favored.

Several municipal officials and members of the Legislature viewed Executive Order No. 35 as an abuse of the "separate powers" doctrine. They brought an action requesting the court to declare the Order and its companion, Executive Order No. 46, an unconstitutional encroachment upon the legislative function of zoning. Markert v. Byrne, 154 N.J. Super. 410, 412 (App. Div. 1977). The court declined to pass on the merits of the issue until it could be seen how the Orders would be implemented. Id.

The issue has remained moot because no attempt was made to enforce the resultant housing allocations in the DCA Housing Allocation Report (May, 1978). In any event, the DCA Report is defective and unreliable for the reasons stated in the Legislators' Amici Curiae brief in Urban League v. Carteret, at 55-63.

"5. What practical effects have the decisions in Southern Burlington County NAACP v. Mt. Laurel, Oakwood at Madison v. Madison, Pascack v. Mayor and Council of Washington Tp., and Fobe v. Demarest, had on either zoning or housing in New Jersey?"

V. THE MT. LAUREL OPINION WILL NOT, AND CANNOT, PRODUCE LOW AND MODERATE INCOME HOUSING.

While the Mt. Laurel opinion may have increased municipalities' awareness of the regional impact of their zoning laws,

market realities dictate that any new housing produced by "Mt. Laurel" high density zoning will not be affordable by low and moderate income families.

"6. A. Is the underlying goal of Mt. Laurel - providing housing opportunities outside urban areas for low and moderate income New Jersey citizens - economicaly feasible?"

VI.A. ECONOMIC ANALYSIS OF LOWER INCOME HOUSING NEEDS CANNOT BE PROPERLY CONDUCTED IN THE INSTANT FORUM.

The necessity of posing this question is perhaps the best evidence of the fact that the Court's foray into "exclusionary zoning" litigation has thrust it into the center of zoning, and attendant planning and economic policy matters reserved to the Legislature. E.g. N.J. Const., Art. IV, §6, ¶2. If resolution of this policy question is to be undertaken by the government, it is the Legislature, rather than the Judiciary, which is to cope with it.

Thorough inquiry into these matters would require extensive factual investigation and testimony, and expert analysis. Such an exercise could not be effectively carried out in the forum of an isolated, adversary trial, see Oakwood at Madison, supra, at 534; and could certainly not be effectively carried out through the submission of a legal brief on appeal, where the record does not cover these issues.

"6. B. Will attainment of the [Mt. Laurel] goal affect another important goal of this state - to rehabilitate its cities?"

VI. B. IMPLEMENTATION OF THE MT. LAUREL OPINION WILL RESULT IN SPRAWLING, LEAPFROG DEVELOPMENT PATTERNS WHICH CONFLICT WITH STATE POLICIES ON URBAN REVITALIZATION AND OTHER MATTERS.

The Legislators addressed this problem in Point III of their amici curiae brief in Urban League v. Cateret, at 37-42.

"7. Discuss the wisdom of limiting the reach of Mt. Laurel to developing municipalities."

VII. THE RURAL, NON-DEVELOPING COMMUNITY CLASSIFICATION SHOULD BE LIBERALLY CONSTRUED.

In response to this point, the Legislators respectfully direct the Court's attention to Point VI of their brief in Glenview Development Co. v. Franklin Tp., at 62-84. For the reasons stated therein, the Legislators strongly urge that this Court liberally construe the classification of rural, non-developing communities, which have wisely been held to be beyond the reach of Mt. Laurel.

"8. Discuss the relevance of "fiscal zoning" to Mt. Laurel cases. Should the Mt. Laurel doctrine be dependent on a showing of fiscally exclusionary motive or purpose or is the effect of exclusion the only factor to be considered in exclusionary zoning litigation?"

VIII. FISCAL CONSIDERATIONS MAY WARRANT LIMITING "LEAST COST" ZONING OPPORTUNITIES.

The zoning enabling legislation in the Municipal Land Use Law, N.J.S.A. 40:55D-62, was enacted, in part:

> To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies...

N.J.S.A. 40:55D-2(f). The Legislature has thus clearly directed New Jersey municipalities to act in a fiscally responsible manner when enacting zoning laws. As this Court has held, "a developing municipality may properly zone for and seek industrial ratables to create a better economic balance for the community vis-a-vis educational and governmental costs engendered by residential development, provided that such was '...done reasonably as part of and in furtherance of a legitimate comprehensive plan for the zoning of the entire municipality.' Gruber v. Mayor and Township Committee of Raritan Township, 39 N.J. 1, 9-11 (1962)... ." Mt. Laurel, supra, at 185.

As Justice Hall, then a member of the Superior Court, stated in Newark Milk and Cream Co. v. Parsippany-Troy Hills Tp., 47 N.J. Super. 306,327-28 (Law Div. 1957), cited with approval in Gruber, supra, at 10-11, a municipality may, through its zoning, seek:

> to maintain the essential residential character of the community without great density of population, to encourage industry in appropriate areas...and thereby to secure a future balanced land use leading to a sound municipal economy... [emphasis supplied].

These principles of fiscally responsible zoning were endorsed in Mt. Laurel with the qualification that a municipality could not "exclude or limit categories of housing" for local financial reasons. 67 N.J. at 186 (emphasis supplied). If, however, municipalities are not given some reasonable, planning and zoning flexibility in at least limiting categories of land uses, including

categories of housing, then fiscal chaos and unsound development patterns will inevitably ensue, in derogation of the public, health, safety, and welfare. The evil to be condemned and eliminated is discrimination, not fiscal responsibility reasonably exercised.

There is admittedly a balance to be drawn between the Oakwood at Madison "least cost zoning" obligation and the consideration of fiscal criteria in zoning. However, by declaring it illegal for a municipality to even "limit" categories of housing for fiscal reasons, the Court has, in effect, proscribed financially responsible planning and zoning practices through which least cost zoning needs can reasonably be accommodated along with appropriate fiscal considerations.

In short, the Mt. Laurel court's qualified acceptance of fiscally responsible zoning principles was virtually no acceptance at all, for the acceptance was accompanied by a qualification (concerning the aforesaid impermissibility of "limiting" housing types) which is so large as to swallow the general principles (concerning fiscally responsible zoning).

The Legislators are not unaware of the fact that the Mt. Laurel court recognized the "increasingly heavy burden of local taxes" which could be worsened by the proposed patterns of unlimited residential development. In connection with its recognition of this problem, the Court simply stated that "relief from the consequences of this tax system will have to be furnished by other branches of

government. ..." 67 N.J. at 186.

This long-run fiscal problem does not, however, arise from any particular taxation structure concerning different "branches of government." Rather, these fiscal problems arise from the inefficient utilization of public funds spawned by unlimited residential development, and the consequent tax burdens imposed upon all citizens. The solution to the problem does not lie with obtaining funds from "other branches of government." Regardless of which government branch foots the bill, it is ultimately the citizen whose tax dollars will be wasted by inefficient government spending caused by inadequately controlled residential development patterns, which do not take proper advantage of existing government capital investment in roads, sewers, schools, hospitals, mass transit systems, etc....

To use a time-worn adage, "there is no free lunch" - to the extent that public funds are inefficiently spent, they are inexorably wasted. They cannot be recouped from "other branches of government" which, of course, are themselves dependent on tax revenues; unfortunately, they can only be replaced by an additional, otherwise avoidable, levy upon the citizenry.

It is therefore respectfully suggested that the Court take advantage of the instant opportunity to encourage municipalities to enact zoning legislation which appropriately balances perceived least cost zoning needs* and fiscal responsibility, reasonably

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* In light of the very attenuated link between least cost zoning and low/moderate income housing, Oakwood at Madison, supra, at 514, n. 22, a limitation upon a least cost zoning opportunity cannot be regarded as the denial of a low and moderate income housing opportunity.

accommodating both in furtherance of the purposes of the Municipal Land Use Law enacted, in part:

> To encourage the appropriate and efficient expendiure of public funds by the coordination of public development with land use policies.

N.J.S.A. 40:55D-2(f).

"9. Discuss the wisdom of a per se rule against large lot (e.g. 5 acre) zoning."

IX. LARGE LOT ZONING IS PERFECTLY PERMISSIBLE WHERE A MUNICIPALITY HAS COMPLIED WITH ANY MT. LAUREL OBLIGATION WHICH IT MAY HAVE.

For the reasons stated in their amici curiae brief in Caputo v. Chester Tp., at 66-67, the Legislators adhere to the position set forth above.

Moreover, in upholding the constitutional validity of the zoning ordinance of Tiburon, California, allowing only between one and five residences to be built on a five-acre tract, the United States Supreme Court recently acknowledged the efficacy of such zoning in furthering the public welfare by:

> 1. protect[ing] the residents of Tiburon from the ill-effects of urbanization. ...[and]
>
> * * *
>
> 2. assuring careful and orderly development of residential property with provision for open-space areas.

Agins v. Tiburon, 48 U.S.L.W. 4700, 4701 (June 10, 1980).

The Court found that the zoning "substantially advance[d] legitimate governmental goals" articulated by the State of Calif-

fornia which "determined that the development of local open-space plans will discourage the 'premature and unnecessary conversion of open-space land to urban uses.' Cal. Gov't. Code §65561(b)(West Supp. 1979)." Id. In short, the Supreme Court took no issue with the local legislative finding that this one to five acre zoning promoted the general welfare, for:

> ["It is] in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and the environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." Ordinance No. 124 N.S. §1(c).

Id. at 4701, n.8.

Thus, because large lot zoning:

(1) is not necessarily inconsistent or incompatible with Mt. Laurel goals; and because it

(2) promotes many of the purposes of the Municipal Land Use Law which governs zoning, for example:

a. provision of adequate light, air, and open space, N.J.S.A. 40:55D-2(c);

b. promotion of appropriate population densities for the well-being of people, neighborhoods, regions, and the environment, N.J.S.A. 40:55D-2(e);

c. promotion of a desirable visual environment through creative development techniques, N.J.S.A. 40:55D-2(i);

d. conservation of open space and valuable natural resources, and prevention of urban sprawl and environmental degrada-

tion, N.J.S.A. 40:55D-2(j); and

e. promotion of more efficient uses of land by deterring sprawl, N.J.S.A. 40:55D-2(m);

large lot zoning must not be the subject of a per se ban, for the appropriate use of large lot zoning substantially advances important governmental goals.

"9.A. Discuss the validity of a per se exclusion of mobile home housing (See Vickers v. Gloucester Tp., 37 N.J. 232 (1962)."

IX.A. NO NEW JERSEY COMMUNITY SHOULD BE COMPELLED TO ZONE FOR MOBILE HOME DEVELOPMENT.

The Legislators have explicitly addressed this point in their amici curiae brief originally filed in Southern Burlington County NAACP v. Mt. Laurel, at 43-69. For the reasons stated therein, it is the Legislators' position that the Court should not compel mobile home zoning or development in any New Jersey municipality.

"10. When, under Mt. Laurel, does the presumption of invalidity of an ordinance (based on particular exclusionary characteristics) attach and to what extent? What evidence will rebut such presumption?"

--What is the effect of such rebuttal (i.e., does the burden shift back to plaintiffs)?

--Where plaintiffs seek a builder's remedy, how should the burden of proof be allocated as to that remedy?

X. IN ORDER TO PREVAIL, A PLAINTIFF MUST PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT A ZONING ORDINANCE FAILS TO ACCOMMODATE REASONABLY REGIONAL HOUSING NEEDS, IN ACCORDANCE WITH SOUND PLANNING PRINCIPLES.

A. A presumption of invalidity should not be triggered by proof of less than the overall unreasonableness of the zoning ordinance in terms of meeting housing needs, but rather a plaintiff must, in order to prevent a directed verdict in defendant's favor, prove facts which show that a zoning ordinance fails to accommodate reasonably regional housing needs, in light of sound planning principles.

As argued in the Legislators' amici curiae brief in Urban League v. Carteret, at 43-50, a plaintiff has the burden of proving, by a preponderance of the evidence, that a zoning ordinance fails to reasonably accommodate regional housing needs, in accordance with sound planning principles. Without consideration of the often complex planning and economic considerations involved, there is no rational way of determining whether or not zoning is "exclusionary":

> The evaluation of the impacts of a zoning ordinance...is no simple matter; an ordinance that appears on its face to be very restrictive may only prove to be a reflection of the land-use pattern that would have emerged in an unregulated housing market.... [emphasis supplied]

R. Schafer, The Suburbanization of Multifamily Housing, supra, at 100, (1974). The use of unfair presumptions will not aid the process of rational inquiry into whether or not:

a. zoning actually has a restrictive impact, or whether it is simply a "reflection of the land-use pattern that would have emerged in an unregulated housing market"; and

b. whether any such restrictive impact is reasonable in light of sound planning principles concerning factors such as:

1. government policy favoring the direction of high density growth along transportation corridors;

2. regional open space needs, N.J.S.A. 40:55D-2(j)

3. regional needs for environmental protection, and agricultural preservation, N.J.S.A. 40:55D-2(g),(j);

4. the desirability of preventing sprawl development patterns, N.J.S.A. 40:55D-2(j);

5. encouragement of appropriate and efficient expenditure of public funds by coordination of public development and land use policies, N.J.S.A. 40:55D-2(f); and

6. promotion of safety from fire, flood, and other man-made or natural dangers, N.J.S.A. 40:55D-2(b).

It is disturbing to think that one would attempt to deal with zoning ordinance complexities by the use of presumptions of invalidity, rather than through thorough, analytical evaluation which compels a plaintiff to come to grips with the complex matrix of planning factors which should underlie the reasonableness of zoning ordinances. See Legislators' Amici Curiae Brief in Caputo v. Chester Tp., at 43-50.

The complex nature of zoning decisions in a regional planning context dictates against the use of arbitrary presumptions to determine zoning reasonableness. The Court's use of presumptions of invalidity would clearly put the Court in the forbidden role of a "second-guesser" of reasonable, local planning judgments, to the

extent that the presumption was triggered by a showing of less than the overall unreasonableness of zoning for the failure to reasonably accommodate regional housing needs in accordance with sound planning principles. See Pascack Ass'n v. Washington Tp., 74 N.J. 470, 481 (1977).

Moreover, our Constitution compels a court to liberally construe zoning ordinances, N.J. Const., Art. IV, §7, ¶11, Place v. Bd. of Adjustment of Saddle River, 42 N.J. 324, 328 (1964), which are locally enacted pursuant to the Constitution, Art. IV, §6, ¶2, and State legislation, N.J.S.A. 40:55D-62. This constitutionally compelled liberal construction of zoning laws, that deal with complex planning matters, requires that a plaintiff prove, by facts, and not by presumption, that a zoning ordinance fails to reasonably accommodate regional housing needs in accordance with sound planning principles.

B. A developer's success in establishing a Mount Laurel violation does not entitle him to an inappropriate zone change or variance.

C. In the event that the court does decide to hold that a developer is presumptively entitled to a building permit upon proving a Mt. Laurel violation, the presumption should be rebuttable by the municipality showing that it is not arbitrary and capricious not to zone for the proposed high density development on the developer's tract.

The Legislators presented argument in support of these Points "B" and "C" in their amici curiae brief in Caputo v. Chester Tp., at 43-58.

"11. Discuss the proper function of the Housing Allocation Plan of the New Jersey Department of Community Affairs Division of State and Regional Planning (Division on Planning) in exclusionary zoning litigation."

> Should a demonstration of satisfaction of a particular Division on Planning allocation constitute prima facie evidence of compliance with Mt. Laurel?
>
> Should fair share orders imposed on non-complying municipalities adopt the Division on Planning's allocation unless the municipality demonstrates that such allocation is inappropriate.
>
> What effect should changed allocation have on a finding of previous compliance?

XI. THE DEPARTMENT OF COMMUNITY AFFAIRS' HOUSING ALLOCATION PLAN SHOULD NOT BE GIVEN PRIMA FACIE JUDICIAL ACCEPTANCE.

It is the Legislators' position, for the reasons stated in their amici curiae briefs filed in Urban League v. Carteret, at 64-73, and in Glenview Development Co. v. Franklin Tp., at 43-52, that the Department of Community Affairs (DCA) Housing Allocation Report is so riddled with inadequacies that it should not be given any consideration in evaluation of a municipality's zoning legislation. Certainly, the Housing Allocation Report's gross defects cited in the Legislators' original briefs on this point mandate against having the Report serve as the basis for prima facie compliance or non-compliance with the Mt. Laurel and Oakwood at Madison obligation.

Zoning and planning processes are too complex and qualitative to be evaluated by the simplistic, and irrational arithmetic

exercises which serve as the basis for the DCA's housing allocations. Not only should these allocations not be used as the basis of any "fair share orders," but it is the Legislators' position that the courts should not impose numerical "fair share" allocations as a so-called "remedy" to exclusionary zoning problems. See question 22, infra.

"13. What is the function and relative importance of defining the appropriate region in a court's determination and disposition of cases challenging municipal land use regulations as unconstitutionally exclusionary?"

XII. A ZONING ORDINANCE SHOULD BE SUSTAINED IF IT MEETS THE HOUSING NEEDS OF ANY REASONABLY CONSTITUTED HOUSING REGION.

This point was explicitly addressed by the Legislators in their amici curiae brief filed in Urban League v. Carteret, at 43-50.

14. Discuss the relevance of an existing countywide percentage of low and moderate income housing in an analysis of a particular municipality's compliance or non-compliance with Mt. Laurel.

XIII. THE EXISTING COUNTY-WIDE PERCENTAGE OF LOW AND MODERATE INCOME HOUSING IS NOT, IN AND OF ITSELF, RELEVANT TO "EXCLUSIONARY ZONING LITIGATION."

In response to this question, these Legislators initially wish to point out its similarity to the argument advanced in Point VI of their amici curiae brief in Urban League v. Carteret, at 53-54, i.e. that no municipality should be required to enact zoning to accommodate the same proportion of low and moderate income

households as is expected will be found within the "region." The same factors which dictate against evaluating municipal zoning for Mt. Laurel compliance according to whether the municipal proportion of low and moderate income households will match the region's, also dictate against using the county-wide percentage of low and moderate income housing as an indicator of zoning validity. Sound analysis of zoning laws will not be furthered by comparisons between isolated housing or population statistics which entail no consideration of the planning processes and principles underlying zoning legislation.

Moreover, for the reasons discussed below, the existing county-wide percentage of low and moderate income housing is, even apart from these planning considerations, irrelevant to exclusionary zoning litigation under the case law structured by this Court.

The existing (1) county-wide percentage of (3) low and moderate income (4) housing is not, in and of itself, relevant to an analysis of a municipality's compliance or non-compliance with Mt. Laurel for:

(1) The focus is to be upon appropriate regional boundaries, rather than upon the confines of a particular county;

(2) The focus is to be upon the provision of least cost zoning, rather than upon housing necessarly affordable to "low and moderate" income families; and

(3) The focus is to be upon provision of realistic

housing opportunities through appropriate zoning, rather than upon the actual construction of housing over which a municipality has no control.

1. Focus Upon the Region.

The Mt. Laurel zoning obligation is, of course, to enact zoning which reasonably accommodates the region's need for housing. E.g. Oakwood at Madison, supra, at 495; Mt. Laurel, supra, at 174. This Court has determined that a municipality's housing "region" is the area from which, in view of available employment, transportation, shopping, schools, and "other amenities," a municipality would substantially draw for its population, in the absence of invalidly exclusionary zoning. Oakwood at Madison, supra, at 539-41.

In arriving at this definition of "region," the Court expressly realized that the definition's implementation would not yield as single, authoritative "region" for a given municipality. The Court did not, however, allow this uncertainty to cause it to adopt a more clear-cut (albeit, arbitrary) rule in selecting a housing "region":

> The composition of the applicable "region" will necessarily vary from situation to situation and probably no hard and fast rule will serve to furnish the answer in every case....

Id. at 537 quoting Mt. Laurel, supra, at 189.

In this vein, the Court explicitly rejected the "concept of a county per se as the appropriate region," as it noted that:

> "Confinement [of the region] to or within a certain county appears not to be realistic,..."

Id. at 537, quoting Mt. Laurel, supra, at 189-90. Similarly, in discussing the employment and transportation factors underlying the Oakwood at Madison definition of "region," the Appellate Division has concluded that:

> Obviously, the mere physical boundaries of the State's political subdivisions in no way respond to these [regional] criteria. ...

Urban League v. Carteret, 170 N.J. Super. 461, 473-74 (App. Div. 1979), certif. granted, ____ N.J. ____ (1980).

Thus, because the definition of a municipality's housing region is generally not co-extensive with the boundaries of the county in which the municipality is located, one should not focus upon county-based statistics in exclusionary zoning litigation. If zoning is to be an implementation of sound regional planning, then it is foolish to sidetrack zoning litigation by the introduction of county statistics which distort the regional planning process, by virtue of the failure to accurately reflect a condition of the housing "region".

In a plaintiff's required attempt to prove an adequately quantified "true regional [housing] need," Oakwood at Madison, supra, at 541, consideration of the region's existing supply of different housing types may be relevant. However, because the focus must be upon the resources of the region as a whole, county-based housing statistics will serve only to distort and confuse the analysis.

2. Least Cost Housing.

As set forth in the Legislator's Amici Curiae brief in Urban League v. Mahwah, at 43-52, the Mt. Laurel obligation to provide an "appropriate variety and choice of housing", Mt. Laurel, supra, at 174, is to be fulfilled by the enactment of zoning which allows construction of the least cost, unsubsidized housing which a private developer will actually build in light of market conditions, the construction of which will comport with minimum health and safety standards. As pointed out in that brief, at 48-49, it is of no legal import that this least cost housing may not be affordable to low and moderate income families. It is therefore irrelevant to consider the differences between county-wide low and moderate income housing figures with those of a municipality. Rather, in order to determine the Mt. Laurel validity of a zoning ordinance, one should, inter alia, attempt to ascertain whether the zoning in question provides for adequate opportunity for the construction of "least cost housing", regardless of affordability by particular income groups.

3. Housing Opportunities Through Zoning.

The Mt. Laurel obligation is, of course, a zoning obligation, and nothing more. It is not for courts or municipalities to build housing; it is, instead, unsubsidized, private industry which must be depended upon to perform this function, Oakwood at Madison, supra, at 511-12.

Any consideration of regional housing statistics must, therefore, be complemented by a consideration of the regional opportunities, afforded by existing municipal zoning, for the construction of least cost housing. A municipality's least cost zoning obligation cannot be determined in a vacuum, without reference to the least cost housing opportunities created by the zoning ordinances of other municipalities within the region.

Municipalities cannot control the private, unsubsidized construction of housing. Apart from zoning, factors such as inflation, interest rates, housing demands, existing housing supply, employment availability, transportation availability, recreational facility availability, and taxes imposed by authorities outside the municipality all affect the prospects for the construction of housing.

It is thus most appropriate to focus upon housing opportunities created by zoning, which a municipality can control. More important than the location of existing housing to any attempted "fair share" analysis is the location of prospective housing opportunities to be afforded by municipal zoning within the region.

"16. Discuss the function of the 'time of decision' rule (which, when applicable, requires judicial review of a law or ordinance to focus on the version of the law in effect at the time the judicial decision is made).

A. Is the rule applicable?

B. If so, should a time limitation on the right to submit amendments to a zoning ordinance be placed on defendant municipalities to avoid dilatory action?

C. How does the rule affect the shifting burden of proof in exclusionary zoning cases once a prima facie showing of exclusion is made -- does submission of an amended ordinance during trial return the burden of proving invalidity to plaintiffs? on appeal? after final appellate review when complaince with a final judgment is questioned?

D. How can time-consuming remads triggered by submission of amended ordinances be avoided?

E. How can the problems stemming from outdated statistics be avoided?

F. When, if ever, should a trial court ignore amendments submitted during litigation and look only at the original ordinance?"

XIV.A. THE TIME OF DECISION RULE APPLIES TO CASES INVOLVING JUDICIAL REVIEW OF ZONING ORDINANCES.

It is well settled in this State that the "time of decision" rule applies generally to pending judicial determinations. Hynes v. Mayor of Oradell, 66 N.J. 376, 379 (1975); Walker v. N.J. Dept. of Institutions and Agencies, 147 N.J. Super. 485, 489 (App. Div. 1977); Westinghouse Electric Corp. v. United Electrical Workers Local 410, 139 N.J. Eq. 97, 105-07 (E.&A. 1946). See Carpenter v. Wabash Railway Co., 309 U.S. 23, 27 (1940). Cf. Ziffrin, Inc. v. United States, 318 U.S. 73, 78 (1942) (administrative agency must apply law at time of its decision). The rule applies equally to municipal zoning actions, and New Jersey courts have repeatedly affirmed the principle that "the zoning ordinance in effect at the time the case is ultimately decided is controlling." Hohl v. Readington Tp., 37 N.J. 271, 279 (1962); Kruvant v. Mayor of Cedar

Grove, ___ N.J. ___, slip op. at 7 (May 12, 1980).

XIV.B.

NO TIME LIMITATION ON THE RIGHT TO SUBMIT AMENDMENTS TO A ZONING ORDINANCE SHOULD BE PLACED ON DEFENDANT MUNICIPALITIES.

In New Jersey the power to zone has been delegated to municipalities under the Municipal Land Use Act, N.J.S.A. 40:55D-1, et seq. (1976). Although recent cases, So. Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975) and Oakwood at Madison, Inc. v. Tp. of Madison, 72 N.J. 481 (1977), have specified some judicial guidelines for evaluating municipal zoning ordinances, these cases do not displace "sound and long established" principles concerning "judicial respect" for the local, legislative zoning function. See Pascack Ass'n v. Washington Tp., 74 N.J. 470, 481 (1977). See also Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). Thus, municipal zoning powers remain essentially unchanged after Mt. Laurel. Pascack, supra, at 481. The presumption of validity to be accorded municipal zoning decisions continues post-Mt. Laurel to limit judicial review to a determination of whether or not the municipal action was arbitrary or unreasonable, e.g. whether its ordinance reasonably accommodates regional housing needs.

Amendments to zoning ordinances are also presumed valid unless proven to be arbitrary or unreasonable. Kruvant v. Mayor of Cedar Grove, supra, slip op. at 10; Allendale Congregation of Jehovah's Witnesses v. Grosman, 30 N.J. 273, 277 (1959), appeal

dismissed, 361 U.S. 536 (1960). Therefore, no time limitation on the right to submit amendments during litigation should be placed on defendant municipalities.

New Jersey courts have adhered to the time of decision rule in a variety of zoning contexts. See, e.g., Burcam Corp. v. Planning Board, Tp. of Medford, 168 N.J. Super. 508, 512 (App. Div. 1979)(builder required to comply with terms of ordinance enacted subsequent to builder's application for site plan approval); Dimitrov v. Carlson, 138 N.J. Super. 52 (App. Div. 1975) (variance granted, but before acted upon ordinance revised to preclude proposed use; prohibition upheld). The courts have stated that the amendment to an ordinance should be given current effect even where the zoning revision was enacted solely in response to matters brought to the governing body's attention through the application for a permit. Burcam Corp. v. Planning Board, Tp. of Medford, 168 N.J. Super. 508, 512 (App. Div. 1979); Crecca v. Nucera, 52 N.J. Super. 279, 284 (App. Div. 1958); Guaclides v Borough of Englewood Cliffs, 11 N.J. Super. 405, 415 (App. Div. 1951).

Often, the time of decision rule has been applied in part because the developer had been denied a building permit or use variance and was, therefore, on notice that the municipality intended to prohibit the proposed use from the zone even before the amendment incorporating the particular prohibition was enacted. See, e.g., Socony-Vacuum Oil Co. v. Mt. Holly Tp., 135 N.J.L. 112 (1947). The time of decision rule is even more appropriate to the

situation in which a municipality, in the midst of a judicial challenge to its zoning ordinance, amends its ordinance to permit a greater variety of uses. The developer is not taken by surprise, as his proposed use was not initially permitted. Moreover, the judicial challenge in such a case is directed at insuring constitutional conformity, and, therefore, contemplates relief which is entirely in futuro. Failure to consider an amendment which might render the challenge moot could result in the court giving only an advisory opinion. Westinghouse Electric Corp. v. United Electrical Workers Local 410, 139 N.J.Eq. 97, 106 (E.&A. 1946) (plaintiff's right to injunction against enforcement of former law disposed of according to law as amended).

A court which refused to look at a municipal zoning amendment enacted during trial or appeal, and subsequently found the unamended ordinance invalid, would face two avenues of response. On the one hand, the court could order the municipality to amend its ordinance within a certain period of time. See, e.g. Kruvant, supra. Obviously, the municipality would then offer the amendment which the court previously refused to consider. Had the court considered the amendment originally, much valuable time and litigation expense might have been saved.

The other avenue opened to the court upon a finding of invalidity would be for the court itself to rezone. This type of relief constitutes a direct violation of the separation of powers doctrine by which the courts are bound. New Jersey courts have

explicitly held that the process of effecting a change in zoning is legislative. Wollen v. Fort Lee, 27 N.J. 408, 422 (1958); Girard v. Alverez, 144 N.J. Super. 259, 262 (App. Div. 1976); Smith v. Tp. of Livingston, 106 N.J. Super. 444, 454 (Ch. Div. 1969), aff'd, 54 N.J. 525 (1969). If zoning revisions are to properly serve the needs of local citizens, decisions must be made by a governing body which is informed of the relevant demographic, environmental, and economic conditions. Judicial review of this legislative process must be carefully circumscribed to prevent the courts from assuming a legislative function. Thus, the court should not infringe upon the right and power of the municipality to amend its ordinance.

Even where courts have taken the unusual step of granting specific relief to a plaintiff in zoning litigation, they have generally followed the principles underlying the "time of decision" rule. For example, in First National Bank of Skokie v. Skokie Village, 85 Ill. App. 2d 336 , 229 N.E. 2d 378 (1967), the trial court enjoined the municipality from enforcing either the prior or any subsequently amended zoning ordinance against the plaintiff. The decision was affirmed on appeal, but the appellate court explicitly stated that it was beyond the power of the court to bring a halt to the legislative function of zoning. Id. at 383. The court stated that the decision below was not defective on that account because "it applies only to the rights of the plaintiffs regarding this specific use and does not affect future exercise by

the village of its legislative rights and duties." Id. Kruvant, supra, cited Skokie to support its refusal to consider an amendment enacted subsequent to a decision of invalidity. In so doing, Kruvant misapplied the Skokie holding, for Skokie clearly indicates that a court has no power to halt legisative zoning actions.

Justice Pashman, in his concurring and dissenting opinion in Oakwood, supra, stated that two jurisdictions have refused to consider zoning amendments enacted subsequent to a determination that the ordinance is invalid. Oakwood, 72 N.J. at 564. The cases cited by Justice Pashman, however, do not support this proposition and do not provide guidance for similar determinations in New Jersey.

In Illinois, for example, the court in each case had granted specific relief, and consideration of the subsequently enacted amendment was unnecessary to the disposition of the case. See First Nat'l Bank v. Village of Skokie, 35 Ill. App.3d 545, 342 N.E.2d 448, 451 (App. Ct. 1975); Fiore v. City of Highland Park, 93 Ill. App.2d 24, 235 N.E.2d 23, 26-28 (App. Ct. 1968), cert. den., 393 U.S. 1084, 89 S.Ct. 867, 21 L.Ed.2d 776 (1969); First Nat'l Bank v. Village of Skokie, 85 Ill. App.2d 326, 229 N.E.2d 378, 381-384 (App. Ct. 1967).

Moreover, the Illinois courts were not unaware of the need for restraint in their judgments. In the first Skokie case, the Chancellor decided below that not only could the plaintiff build its proposed multi-family housing, but the city regulations governing multi-family structures should be waived to permit plaintiff to

build a taller structure than would otherwise be allowed in the town. On appeal, this judicial legislation was reversed, with the warning:

> A court cannot substitute its judgment for that of the county board and, in effect, make a zoning classification of its own. The factors or reasons which make appropriate a particular zoning restriction are matters for legislative policy.

85 Ill. App. 2d 336, 229 N.E. 2d 378, 385 (1967), citing National Brick Company v. The County of Lake, 9 Ill.2d 191, 137 N.E.2d 494,497 (1956). See also, Mangel & Company v. Village of Wilmette, 15 Ill. App.2d 383, 253 N.E.2d 9, 14-15 (1969).

The cases cited from Pennsylvania, the second jurisdiction to which Justice Pashman refers, show a similar focus on the relief to be granted the specific plaintiff;* in each case the court's discussion of subsequent zoning amendments was unnecessary to the outcome.** For example, in Casey v. Warwick Tp. Zoning Hearing

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* Pennsylvania has made particular provision for specific relief in its Municipalities Planning Code, 53 P.S. §11004, as amended in 1972, which provides that a landowner may offer a zoning amendment in conjunction with a challenge to the zoning ordinance. If rejected by the governing body, and a court subsequently finds the ordinance invalid, specific relief is statutorily authorized. 53 P.S. §11011, as amended in 1978. The New Jersey Legislature has not enacted a statutory provision for such relief, thus the Pennsylvania cases must be viewed with this distinction in mind.

** It should be noted that in Bd. of Supervisors of Willistown Tp. v. Walsh, 20 Pa.Cmwlth. 275, 341 A.2d 572 (Cmwlth. Ct. 1975), not only did the court focus primarily upon the specific relief question, rather than upon a "time of decision" rule question, but the court also stated that consideration of the subsequent amendment was irrelevant because the amended ordinance had been found unconstitutional in a prior decision. 341 A.2d at 574-75.

Bd., 328 A.2d 464, 467-468 (Pa. Sup. Ct. 1974), the appellate court was concerned only with correcting the trial court's erroneous belief that specific relief could not be granted, although the court found that the Casey plaintiff did not merit this extraordinary relief. 328 A.2d at 469-70. In its discussion, the appellate court made it clear that municipalities not only may, but indeed are expected to amend invalid ordinances to bring them within constitutional compliance. Id. at 468-69.

It is clear, then, that a court may not halt the legislative activity of zoning. If an ordinance is held invalid by a court, it cannot enact a new ordinance nor prevent a local legislative body from rezoning in an effort to achieve compliance. In special situations, courts have granted specific relief in the form of a variance or an order to permit a specific use on the disputed property. In such cases, the court's failure to consider subsequent amendments was only indicative of the fact that the amendments did not affect the court's holding. These cases cannot be interpreted as exceptions to the time of decision rule.

New Jersey courts may not, however, decline to re-evaluate a variance application in light of a subsequent zoning amendment enacted while the litigation is pending, for a use variance can be granted only if the use "will not substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70(d).

XIV.C. SUBMISSION OF AN AMENDED ZONING ORDINANCE RETURNS THE BURDEN OF PROVING INVALIDITY TO PLAINTIFFS.

The effect of the time of decision rule on the shifting burden of proof in exclusionary zoning cases must be to return the burden of proving overall zoning invalidity and unreasonableness to the plaintiff. This must be the effect not only during the course of the trial, but on appeal and after final appellate review as well, since a zoning amendment is presumptively valid. That an ordinance has been declared invalid in the final judgment of an appellate or trial court does not relieve plaintiff of his burden of proving the invalidity of a subsequently enacted, presumptively valid ordinance. The burden remains with the plaintiff to prove that an ordinance fails to comply with the applicable law, including the prior law of the particular case. Moreover, if the amendment directly addresses the pending litigation, it would be illogical, and unfair to a municipality, to ignore the amendment's impact upon plaintiff's attempt to establish a prima facie case.

The Municipal Land Use Act requires municipalities to make periodic revisions of zoning ordinances. Under N.J.S.A. 40:55D-89, it is mandatory that municipalities re-examine their master plan at least once every six years and make findings as to changes in density, land uses, housing conditions, conservation of natural resources, and changes in state, county, and municipal policies and objectives. Under N.J.S.A. 40: 55D-62(a), a zoning ordinance must be "substantially consistent with the land use

plan element of the master plan or designed to effectuate such plan." It is necessary, therefore, that if re-examination of the master plan results in its revision, the zoning ordinance would also generally need to be changed to conform with the revised master plan.

It would be anomalous for a court, initially or on appeal, to rule on the validity of a zoning ordinance without considering a municipal revision enacted in compliance with N.J.S.A. 40:55D-62(a) and 89. For a court to refuse to accord a presumption of validity to the amendment would defeat the clear intent of the New Jersey Legislature, embodied in the Municipal Land Use Law, that zoning ordinances reflect current conditions.

In a similar situation involving a challenge to municipal rent controls, the court explicitly extended the presumption of validity to an amendment adopted after trial hearing but before decision. Albigese v. City of Jersey City, 127 N.J. Super. 101, 106-09 (Law Div. 1974), modified and aff'd, 129 N.J. Super. 567 (App. Div. 1974). It is notable in Albigese that although rent control laws depend for their validity upon certain factual findings, the court accepted the municipality's allegation that the amendment rested on the proper factual foundation, and did not order a rehearing on that issue before proceeding to its decision. 127 N.J. Super. at 109. The same considerations of presumptive validity which persuaded the court in Albigese to recognize as the law an amendment enacted during trial dictate also that amendments

be given full effect if enacted during or after appeal.

XIV.D. TIME-CONSUMING REMANDS WILL BE AVOIDED BY REQUIRING THAT PLAINTIFFS PROPERLY MEET THEIR INITIAL BURDEN OF PRESENTING A COMPLETE FACTUAL RECORD.

Plaintiffs in zoning challenges have a comprehensive burden of establishing an initial factual record by which the court can evaluate plaintiffs' allegations of unreasonableness of the zoning ordinance as a planning implementation of regional needs. If this factual record is properly established by plaintiffs, it should serve equally well in evaluating the reasonableness of amendments enacted during litigation and appeal. Thus, the need to remand would be obviated, as plaintiffs would not need to prove additional facts to support their allegations.

Likewise, there would be no need to remand for the town to prove additional facts to justify its amendment. The amended law must be accorded the same presumption of validity that the original ordinance was given, absent clear and convincing evidence that a municipality is attempting to evade a judicial decree or disregard, without excuse, a court order to act within a specified period of time. This presumption of validity includes both an acceptance of the legislative findings of fact and judicial deference to the policy choices made on the basis of those factual findings embodied in the zoning ordinance or amendment. Albigese v. Jersey City, 127 N.J. Super. 101, 108-09 (Law Div. 1974), mod. and aff'd., 129 N.J. Super. 567 (Law Div. 1974). The appellate court may thus apply the

amended ordinance without returning the case to the court below, as the plaintiff should have developed an appropriate factual record in the initial trial, and the municipality's actions should be presumed to rest on an appropriate factual basis.

XIV.E. PROBLEMS STEMMING FROM OUTDATED STATISTICS WILL BE AVOIDED BY GRANTING TIME TO MUNICIPALITIES TO ADJUST ORDINANCES TO CHANGING CONDITIONS.

In order to avoid problems stemming from outdated statistics, the court is urged to permit some flexibility in the time granted muncipalities to adjust their ordinances to changing social, economic and environmental conditions. Many ordinances have, undoubtedly, relied upon U.S. Census data which are now ten years old. The 1980 census data, soon to be published, may reveal significant changes which municipal zoning boards should address. Granting time to make evaluations and necessary changes should be a major consideration of the court in any pending or future zoning cases. It would be far wiser to encourage revision in light of current information, rather than to force the enactment of an irrational or less than optimal ordinance.

If this additional study is not accomodated initially, it may be discovered later that an ordinance enacted hastily has led to unsound development patterns, and must be revised again because it does not properly take into account relevant planning criteria. Zoning cannot be static: it must recognize changing conditions and incorporate reasonable predictions of future conditions. Bartlett

v. Tp. of Middletown, 51 N.J. Super. 239, 262 (App. Div. 1958); Lionshead Lake, Inc. v. Tp. of Wayne, 10 N.J. 165, 172-73 (1952).

Conclusion

Thus, the principles of separation of powers, N.J. Const. Art. III, ¶1, and home rule, N.J. Const. Art. IV, §7, ¶11; see also art. IV, §6, ¶2, as well as fairness to conscientious municipalities attempting to rectify defects in their zoning ordinances, dictate that a court should give full consideration to zoning amendments. This is not to say that municipalities have a right to delay litigation without cause, or to ignore the substance of a court order. But no court is warranted in refusing to accord a presumption of validity to a municipality's good faith attempts to comply with the law, whether during pending litigation, or on appeal, or after final appellate review.

"19. Discuss the validity of a "trickling down" theory in the current housing market."

See Point III B., supra.

"21. Discuss the legal and practical implications of the following remedial devices a court might employ in exclusionary zoning cases."

"A. Presumptive variances as suggested by Justice Pashman in Pascack and Fobe.

B. An order for specific rezoning of plaintiffs' land for multi-family development (Builder's remedy).

C. Orders to seek subsidies, provide density bonuses, institute rent-skewing.

D. Specific rezoning for high-density development accompanied by automatic reverter if the development planned is not for low and moderate income units."

XV.A. UNDER NO CIRCUMSTANCES IS A DEVELOPER PRESUMPTIVELY ENTITLED TO A VARIANCE FOR THE CONSTRUCTION OF A NEW, NON-CONFORMING STRUCTURE.

In order to build a structure for which an area is not zoned, a developer may initially attempt to prove that the zoning ordinance is invalid and that he is entitled to specific relief. The ordinance will be upheld if the court finds that the municipality's zoning choice is reasonable, and the developer's recourse is then to seek a variance. The New Jersey Supreme Court has held, however, that "[v]ariances to allow new nonconforming uses should be granted only sparingly and with great caution since they tend to impair sound zoning." Kohl v. Mayor of Fair Lawn, 50 N.J. 268, 275 (1967). See Fobe Associates v. Mayor of Demarest 74 N.J. 519, 535 (1977).

Justice Pashman, apparently concerned that this court's determination that Mt. Laurel/Oakwood requirements do not apply to developed municipalities, see, e.g., Pascack Ass'n., Ltd. v. Mayor of Washington Tp., 74 N.J. 470 (1977); Fobe Associates v. Mayor of Demarest, supra, suggested in his dissenting opinion in Fobe that the court should shift the burden of proof in establishing the statutory factors of a variance determination. 74 N.J. at 547-48.

The Municipal Land Use Law provides that a variance be

granted if: (1) there is a "special reason" for permitting the use, and (2) the use will not create a substantial detriment to the public good or substantially impair the purpose of the zoning ordinance. N.J.S.A. 40:55D-70(d). As a result of the presumption of validity accorded legislative actions, see, Place v. Bd of Adjustment of Saddle River, 42 N.J. 324, 328 (1964); Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965), a variance applicant has the burden of proving that both of these requirements are met. Bove v. Bd. of Adjustment of Emerson, 100 N.J. Super. 95, 101 (App. Div. 1968); Holman v. Bd. of Adjustment of Norwood, 78 N.J. Super. 74, 81 (App. Div. 1963).

Acceptance of Justice Pashman's "presumptive variance," 74 N.J. at 547-48, 556 (Pashman, J., dissenting), would constitute an unprecedented departure from sound principles of judicial review. It would also place an unreasonable burden upon municipalities charged with the responsibility of planning and overseeing sound municipal growth.

Justice Pashman begins with the assumption that multi-family housing is per se a special reason for granting a variance, given an "exclusionary" zoning ordinance. However, even given such an adjudication of zoning invalidity, one should carefully examine the facts concerning the developer's particular proposal for multi-family housing to decide it is indeed a "special reason." Multi-family housing is not necessarily least cost housing. At the very least, the burden should be upon the developer to prove by

facts, not presumption, that his project will have a significant number of "least cost" units. Moreover, as discussed by this Court in Fobe, the provision of such private housing may very well not inherently serve the general welfare, so that it is not a per se "special reason" for a variance. 74 N.J. at 534-35. Thus, in order to meet the "special reason" requirement, plaintiff must prove facts showing that his proposed use "'is peculiarly fitted to the particular location for which the variance is sought.'". Id. at 534 (citation omitted).

Furthermore, the Mt. Laurel question is very different from the question of whether the particular proposed use will create a substantial public detriment by virtue of the relevant planning concerns affecting the developer's parcel. Thus, the burden should remain on the plaintiff to prove the absence of such harm. See Legislators' amici curiae brief in Caputo v. Chester Tp., at 43-58.

Imposition of "presumptive variances" will lead to spot zoning - an abuse of the zoning power to benefit particular private interests rather than the interests of the community, disregarding the comprehensive planning purposes of the Municipal Land Use Law. Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 18 (1976). See N.J.S.A. 40:55D-2(a) et seq. Mt. Laurel was not so intended to subvert rational municipal planning, Oakwood at Madison, 72 N.J. at 545, and does not compel rezoning of any particular tract. Mt. Laurel, 67 N.J. at 213-14. (Pashman, J., concurring).

It is even more apparent that where a zoning ordinance has not been found invalid, the developer must not be relieved of his burden of establishing the reasonableness of his proposed use. In light of the special consideration he is seeking in the form of relief from a presumptively valid zoning ordinance and underlying plan, see, N.J.S.A. 40:55D-28 to 62, the developer should be required to establish both that his proposed use is a "special reason" and that it does not constitute a detriment to the public good or impair the intent of the zoning statute.

The Mt. Laurel opinion should be implemented as a remedial device to promote sound planning, and not as a punitive device to render New Jersey's citizens vulnerable to the problems caused by uncontrolled and unsound development patterns.

XV.B. A DEVELOPER'S SUCCESS IN ESTABLISHING A MT. LAUREL VIOLATION DOES NOT ENTITLE HIM TO AN INAPPROPRIATE ZONE CHANGE.

This point, concerning the specific rezoning of a plaintiff's land, was argued by the Legislators in their amici curiae brief in Caputo v. Chester Tp., at 43-58.

XV.C. A MUNICIPALITY CANNOT BE COMPELLED TO PARTICIPATE IN HOUSING SUBSIDY PROGRAMS.

This point was argued by the Legislators in their amici curiae brief in So. Burlington County NAACP v. Mt. Laurel, at 75-76.

XV.D. SPECIFIC REZONING FOR LOW AND MODERATE INCOME HOUSING IS UNREALISTIC, IMPRACTICAL, AND CONTRARY TO EXISTING CASE LAW.

The Mt. Laurel decision, as modified by Oakwood at Madison, supra, at 510-14, requires only that a town zone for the least costly, safe housing which an unsubsidized private developer will build in light of market conditions. The Mt. Laurel court sought, in 1975, to require zoning for low and moderate income housing and found, in 1977, on the occasion of the decision in Oakwood at Madison, that such zoning was incapable of producing housing for low and moderate income citizens because of market conditions. Since then, conditions have not changed for the better and there is no reason to beleive that such housing would be produced today as a result of specific rezoning. In any event, the answer to low income housing needs lies not in "exclusionary" zoning litigation, but, rather, the answer lies with legislative remedies and programs. See Point III.B., supra. Furthermore, "specific rezoning" is a legislative prerogative to be exercised by the municipal governing body, not the Court.

"22. Should all remedies developed in these cases be tracked to the level of need in the region and/or municipality, or does Oakwood suggest the possibility of "numberless" (as opposed to fair share/regional need) remedies?"

XVI. THIS COURT SHOULD NOT REQUIRE MUNICIPAL ZONING IMPLEMENTATION OF NUMERICAL ALLOCATIONS OF LOW AND MODERATE INCOME FAMILIES.

The Legislators addressed this point in their amici curiae brief in Urban League v. Carteret, at 53-54.

The Appellate Division of New York's Supreme Court recently ruled on this issue in Berenson v. New Castle, 415 N.Y.S. 2d 669 (App. Div. 1979), and found that the trial court "erred in mandating a 'fair share' unit goal." The court said that a finding of zoning unreasonableness because of the failure to meet housing needs does not "authorize the court to go even further and remedy the deficiency by specific judicial fiat" of a numerical, "fair share goal." 415 N.Y.S. 2d at 679. It was, of course, the ground-breaking Berenson case in which the New York Court of Appeals, in 1975, first adopted the regional approach to the analysis of zoning and low income housing needs. 38 N.Y. 2d 102, 378 N.Y.S. 2d 672 (1975). Nevertheless, in its review of New Jersey, Pennsylvania, and New York case law, the Appellate Division correctly noted that:

> The use of a "fair share" goal has never been judicially approved in the context of the housing needs of the population at large. ...
>
> * * *
>
> [A] specific, mandatory "fair share" quota is unsupported by case law and contrary to the public policy considerations therein. ...

415 N.Y.S. 2d at 678 (emphasis in original).

"23. Discuss the function of expert planners in exclusionary zoning litigation:

A. At what stage of such litigation should expert

planners be utilized?

B. Should a trial judge delegate rezoning authority to such expert, and embody the product of such rezoning in the trial court judgment?

C. How should such expert be selected and paid?"

XVII.A. IN ORDER TO INVALIDATE A ZONING ORDINANCE ON MT. LAUREL GROUNDS, A PLAINTIFF MUST OBTAIN THE SUPPORTING TESTIMONY OF A PROFESSIONAL PLANNER WHO IS LICENSED UNDER NEW JERSEY LAW.

1. Statutory Requirements.

As will be set forth below, analysis of the interface between (1) zoning and master plan requirements, and (2) professional planning and licensing requirements leads to the conclusion that, in order to prevail in "exclusionary zoning" litigation, a plaintiff must have the supporting testimony of a New Jersey-licensed professional planner. See N.J.S.A. 45:14A-2(c).

Under the zoning enabling legislation enacted pursuant to the Constitution, N.J. Const., Art. IV, §6, ¶2, a zoning ordinance is to be adopted only after the local planning board has adopted a "land use element" of the master plan. The zoning ordinance is, in turn, required to "effectuate" or be "substantially consistent" with the land use element of the master plan. N.J.S.A 40:55D-62.[1]

1. To the extent that a permanent zoning ordinance is inconsistent with the master plan, it must be approved by an affirmative vote of the full authorized membership of the municipal governing body which must record its reasons for so acting in its minutes. N.J.S.A 40:55D-62(a).

The master plan's land use element is to include recommended standards of population density and overall development intensity for the municipality. N.J.S.A. 40:55D-28(c). These recommended standards should be specifically reflected in the land use plan's study of the existing and proposed location, extent, and intensity of various types of development, including:

1. residential;
2. commercial;
3. industrial;
4. agricultural;
5. recreational; and
6. other private and public forms of development.

N.J.S.A. 40:55D-28(b).

These population and development standards are to be formulated and proposed in light of:

1. natural conditions, including, but not necessarily limited to:
   (a) topography;
   (b) soil conditions;
   (c) water supply;
   (d) drainage;
   (e) flood plain areas;
   (f) marshes; and
   (g) woodlands; and in light of
2. the other master plan elements, including:
   (a) the Housing Plan element;

(b) the Circulation Plan element;

(c) the Utiity Service Plan element;

(d) the Community Facilities Plan element;

(e) the Recreation Plan element; and

(f) the Conservation Plan element.

N.J.S.A. 40:55D-28(a), (b)(2), (b)(3)-(8).

Moreover, as a master plan element proposing development, N.J.S.A. 40:55D-28(b)(2), the land use plan element is to be the subject of a policy statement indicating (1) its relationship to the master plans of continguous municiplaities and of the county where the municipality is located, and indicating (2) its relationship to any comprehensive guide plan prepared pursuant to N.J.S.A. 13:1B-15.52. N.J.S.A. 40:55-D-28(d).

A zoning ordinance thus represents the implementation of a master plan's land use element whose preparation entails the consideration of a complex matrix of relevant planning criteria. The Legislature has recognized the difficulty of planning problems and the need for their competent, professional resolution in order to provide a sound basis for plan-based zoning law.

The Legislature passed the Professional Planners Licensing Act, N.J.S.A. 45:14A-1, et seq. (hereafter, the Act), to protect the public from harms occasioned by inadequately planned development:

> In order to safeguard life, health, and property, and promote the public welfare, any person practicing or offering to practice professional planning in this State shall hereafter be required to submit evidence that he

> is qualified so to practice and shall be licensed as hereafter provided....

N.J.S.A. 45:14A-1.

In upholding the constitutionality of this legislation, this Court, through Justice Francis, expressly acknowledged the importance of the protection of the public interests underlying the Legislature's action requiring the licensing of professinal planners.

> The public interest and welfare are substantially involved in the creation of sound master plans for the orderly development and redevelopment of land areas in municipalities, counties, regions and the State, as well as in the effectuation of such plans in an orderly physical and financially feasible manner. Expenditures of large sums of public money frequently are required over considerable periods of time in pursuing the planned ends, and the welfare, tranquility and ordered living of the citizen are promoted by the achievement of those ends.
>
> * * *
>
> [The relevant legislative background] suggest[s] the view that the Legislature felt the current need in the field of community planning was for regulation of those persons who wished to engage in the practice [of planning] but who had not demonstrated to any agency that they had sufficient qualifications to do so.

N.J. Chapter, Am. Institute of Planners (AIP) v. N.J. State Bd. of Prof. Planners, 48 N.J. 581, 600, 610 (1967).

The Act requires, of course, that all those who practice professional planning in New Jersey be licensed by the Division of Professional Boards of the Department of Law and Public Safety. N.J.S.A. 45:14A-1,-4. The unlicensed practice of professional

planning is subject to a fine of up to $200 for the first offense, and up to $500 for subsequent offenses. N.J.S.A. 45:14A-16.

The statute defines the "practice of professional planning", for which licensing is required, as:

> [1] the administration, advising, consultation or performance of professional work in the development of master plans in accordance with the provisions of chapters 27 and 55 of Title 40 [N.J.S.A. 40:27-1 et seq., (county master plans); 40:55D-1 et seq., (municipal master plans)] ...; and
>
> [2] other professional planning services related thereto intended primarily to guide governmental policy for the assurance of the orderly and co-ordinated development of municipal, county, regional, and metropolitan land areas, and the State or portions thereof....

N.J.S.A. 45:14A-2(c).

Moreover, the obtaining of a license to engage in professional planning activity related to master plan development is no mere formality. The Act sets forth strict licensing conditions and requirements concerning:

(a) license applications, N.J.S.A. 45:14A-8;

(b) moral character, N.J.S.A. 45:14A-9;

(c) citizenship, id.;

(d) educational requirements, id.;

(e) professional experience, id.;

(f) a written examination covering:

(1) History of urban, rural, and regional planning.

(2) Fundamental theories, research methods and common basic standards in professional planning.

(3) Administrative and legal problems, instruments and methods.

(4) Current planning design and techniques.

(5) History, principles and requirements of planning and zoning procedures in the State of New Jersey. Id.;

(g) issuance of "planner-in-training" certificates, N.J.S.A. 45:14A-10, 13;

(h) payment of license fees, N.J.S.A. 45:14A-14;

(i) creation of an examination board in the Division of Professional Boards of the Dept. of Law and Public Safety, N.J.S.A. 45:14A-4,-7;

(j) revocation or suspension of licenses for fraud or incompetence, N.J.S.A. 45:14A-15;

(k) violations for unlicensed practice, N.J.S.A. 45:14A-16; and concerning

(l) the hiring of professional planners by government bodies, N.J.S.A. 45:14A-17.

It is therefore apparent that, given the public importance and technical complexity of the planning and zoning relationship, e.g., N.J.S.A. 40:55D-28, -62, the Legislature has decided that only licensed professional planners should be permitted to engage in the development of master plans which serve as the basis of zoning laws. N.J.S.A. 40:55D-28, -62; N.J.S.A. 45:14A-1, et seq.

2. "Exclusionary Zoning" Litigation Expert Witnesses.

In "exclusionary zoning" litigation, a plaintiff is, of course, attempting to prove that a zoning ordinance, by virtue of its failure to accomodate "least cost" housing needs, is not a

reasonable implementation of planning, so that it is unconstitutional by virtue of the failure to promote the regional, general welfare. See, Oakwood at Madison, supra, at 495, 510-14; Mt. Laurel, supra, at 174-78. See generally, N.J.S.A. 40:55D-62 (concerning zoning ordinance and master plan compatibility). In order to prevail, plaintiff must therefore prove either that:

> (a) the master plan, with which the zoning is consistent, does not reasonably accomodate the "least cost" housing needs of the region; or that
>
> (b) although the master plan does reasonably accomodate regional "least cost" housing needs, the zoning ordinance is defective for its failure to implement this aspect of the master plan.

In either event, it is clear that, through the necessary analysis of the zoning and planning interface, the plaintiff's case will inevitably be "intended primarily to guide governmental policy for the assurance of the orderly and co-ordinated development of municipal, county, regional, and metropolitan land areas... ." N.J.S.A. 45:14A-2(c) (defining the "practice of professional planning"). In "exclusionary zoning" litigation, the plaintiff is thus attempting to supplant the municipality's master plan, and implementing zoning ordinance, with planning and zoning changes which it must proffer.

It is clear that if the plaintiff, or its witnesses, in a non-litigation context, offered planning services to the municipality, on which zoning would be based, then the plaintiff or its witnesses would have to be licensed in order to perform these

services for the development of master plans. N.J.S.A. 45:14A-1, -2(c). In litigation, the plaintiff is simply attempting to substitute its witnesses' planning and zoning judgment for that of the municipality's master planner, and is attempting to have the court serve in the role of the local planning board and governing body. Assuming that the plaintiff is successful, the end result will be a new zoning ordinance and a master plan which reasonably accomodates regional "least cost" housing needs.

Through the process of litigation, the plaintiff should not be allowed to skirt the licensing and professional qualifications required of all those who engage in the practice of professional planning by advising, consulting, and performing other services to develop master plans or guide orderly development of the State or portions thereof. N.J.S.A. 45:14A-2(c). If a plaintiff or its witnesses lack the professional qualifications to advise, consult, and perform other services to develop master plans in a non-litigation setting, then they should also be proscribed from performing these services in the courtroom. The litigation process should encourage, rather than frustrate, the legislative goals of having municipal zoning implement sound planning principles. One of the ways that the Legislature has seen fit to accomplish this goal is to allow only licensed, professional planners to engage in the master planning upon which zoning should be based. In order to promote the sound planning and zoning which so-called "exclusionary zoning" litigation will hopefully produce, the Courts should not

ignore this Legislative licensing and professional qualification requirement.

While a trial court may, in its discretion, require certain planning experience and qualifications above and beyond the minimum licensing requirements, see N.J.S.A. 45:14A-11 (providing for the professional planning licensing of professional engineers, land surveyors, or registered architects, without specific planning experience), a professional planning license must be the minimum qualification to engage in the master planning analysis involved in "exclusionary zoning" litigation where the expert's aid is enlisted "to guide governmental policy for the assurance of the orderly and co-ordinated development of *** the State or portions thereof." N.J.S.A. 45:14A-2(c).

In making this argument, the Legislators do not mean to imply that every witness who testifies on behalf of a plaintiff attacking a zoning ordinance as "exclusionary" must be a licensed, professional planner. The argument does not preclude a trial court from hearing the testimony of other expert witnesses (e.g., ecologists, traffic engineers, economists and real estate appraisers, etc.) and other fact witnesses who are able to supply information relevant to determining the validity of zoning. However, at least one of the plaintiff's witnesses must be a liensed, professional planner who would be able to draw upon the testimony of other expert and fact witnesses, see N.J.S.A. 45:14A-9, 40:55D-28, and give an opinion on the validity of the zoning as an implementation of sound

planning principles.

Without such expert testimony, by a qualified, licensed professional planner, a plaintiff will be unable to sustain a claim that the zoning ordinance is not a reasonable implementation of the sound planning required by statute, N.J.S.A. 40:55D-28, e.g. that it does not reasonably accommodate regional housing needs.

XVII.B. EXPERT PLANNERS SHOULD BE UTILIZED DURING THE TRIAL OF THE ACTION, RATHER THAN IN EFFECTING RE-ZONING.

In accordance with the argument set forth above, the testimony of expert, licensed professional planners should be utilized during the trial in order to enable the court to determine whether a zoning ordinance reasonably accomodates regional housing needs in the light of sound planning principals. If any rezoning is necessary, it should be effected by the municipal governing body, as required by separation of power principles. E.g., N.J. Const., Art. III, ¶1, Art. IV, §6, ¶2. In short, because rezoning is beyond the proper scope of judicial authority, the court cannot delegate such authority to an expert; the court cannot delegate that which it does not have.

XVII.C. EACH PARTY SHOULD HAVE THE FREEDOM TO HIRE (AND PAY) ITS OWN EXPERT PLANNER TO TESTIFY AS TO THE REASONABLENESS OF THE ORDINANCE.

The ultimate issue in an "exclusionary zoning" action is whether the zoning ordinance reasonably accomodates regional housing needs in light of sound planning principals. Each party to the

litigation should be allowed to present the necessary expert testi= mony on that point.

A court-appointed witness is unnecessary because the court need not resolve planning controversies and disputes raised by the parties' respective experts. So long as the court finds that the defendant's zoning ordinance can be sustained by a competent, professional planner who believes that it represents a reasonable accomodation of regional housing needs in light of sound planning principals, then the ordinance should be sustained. The court should not become embroiled in the appropriateness of a municipality adopting certain reasonable planning theories, over which "experts" may differ, for "the social or economic belief of a court cannot be substituted for the judgment of officials who are either elected or appointed to exercise that judgment." Cervase v. Kawaida Towers, 124 N.J. Super. 547, 569 (Law Div. 1973), aff'd, 129 N.J. Super. 124 (App. Div. 1974).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should not promulgate remedies in zoning litigation.

Respectfully submitted,

SHANLEY & FISHER, ESQS.
Attorneys for Amici Curiae
State Legislators

By_____
J. WILLIAM BARBA

A P P E N D I X I*

Qualified Municipalities

Asbury Park
Atlantic City
Bayonne
Bloomfield
Bridgeton
Camden
East Orange
Elizabeth
Hoboken
Irvington
Jersey City
Keansburg Borough
Lakewood Township
Long Branch
Millville
Montclair
Neptune Township
Newark
New Brunswick
North Bergen Township
Ocean City
Passaic
Paterson
Perth Amboy
Plainfield
Rahway
Trenton
Union
Vineland
West New York
West Orange

New Urban Aid Qualifiers

Belleville Borough
Glassboro Borough
Lindenwold
Old Bridge Township
Pennsauken
Roselle Borough
Willingboro Borough

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* Source: Director of the Division of Local Government Services (Department of Community Affairs) annual recalculation of Urban Aid Cities.

APPENDIX II*

County	Municipality	Housing Units
Atlantic	Atlantic City	442
Atlantic	Ventnor	198
Bergen	Englewood	370
Bergen	Fort Lee	225
Bergen	Leonia	77
Bergen	Teaneck	158
Bergen	Wallington	375
Camden	Audubon	124
Camden	Camden	627
Camden	Cherry Hill	145
Camden	Haddon Heights	124
Camden	Lindenwold	200
Camden	Pine Hill	660
Camden	Voorhees	267
Cape May	Cape May	206
Cumberland	Bridgeton	200
Cumberland	Millville	211
Essex	Bloomfield	148
Essex	East Orange	1,481
Essex	Maplewood	114
Essex	Montclair	213
Essex	Newark	5,284
Essex	Orange	276
Essex	West Orange	183
Hudson	Hoboken	941
Hudson	Jersey City	2,099
Hudson	Union City	471
Hudson	West New York	1,284
Mercer	Hamilton	321
Mercer	Lawrence Township	261
Mercer	Princeton Township	239
Mercer	Trenton	1,162
Middlesex	Metuchen	122
Middlesex	New Brunswick	206
Middlesex	North Brunswick	205
Middlesex	Perth Amboy	96
Monmouth	Asbury Park	571

* Source: 1978 New Jersey Housing Finance Agency Annual Report, at 15.

A P P E N D I X II (cont'd)

County	Municipality	Housing Units
Monmouth	Freehold	164
Monmouth	Hazlet	212
Monmouth	Keyport	209
Monmouth	Long Branch	248
Monmouth	Matawan Borough	108
Monmouth	Middletown	285
Monmouth	Ocean Township	93
Monmouth	West Long Branch	150
Morris	Pequannock	100
Passaic	Passaic	187
Passaic	Paterson	939
Passaic	Pompton Lakes	100
Passaic	Wayne	242
Salem	Penns Grove	120
Somerset	Bernards Township	248
Somerset	Somerville	154
Sussex	Newton	222
Sussex	Sparta	150
Union	Cranford	131
Union	Elizabeth	193
Union	Plainfield	247
Union	Rahway	484
Union	Roselle	170
Union	Springfield	137
Union	Union Township	388
Union	Westfield	172
	TOTAL	26,139

A P P E N D I X III*

County	Housing Units Financed By Loan To Lenders Program
Atlantic County	1,396
Bergen County	265
Burlington County	1,862
Camden County	1,929
Cape May County	207
Cumberland County	958
Essex County	1,650
Gloucester County	714
Hudson County	1,241
Hunterdon County	89
Mercer	1,452
Middlesex County	893
Monmouth County	1,548
Morris County	424
Ocean County	2,760
Passaic County	472
Salem County	147
Somerset County	224
Sussex County	386
Union County	1,078
Warren County	282
TOTAL	19,977

* Source: 1976 New Jersey Mortgage Finance Agency Annual Report, at 8.

A P P E N D I X IV*

City	Aggregate NLP Mortgage Loans
Asbury Park	$2,732,300
Atlantic City	1,464,760
Bayonne	278,500
Bridgeton	781,530
Burlington	309,400
Camden	1,772,500
Carteret	1,290,500
Clifton	735,050
Dover	3,372,200
East Orange	13,943,150
Elizabeth	2,898,150
Englewood	43,250
Guttenberg	199,000
Hoboken	199,300
Jersey City	6,598,290
Lakewood	3,030,050
Linden	433,150
Long Branch	3,962,500
Millville	827,650
Montclair	2,636,600
Neptune	1,729,050
Newark	6,334,760
New Brunswick	4,183,450
North Bergen	1,497,150
Orange	4,771,650
Passaic	6,639,864
Paterson	27,205,948
Perth Amboy	8,191,560
Phillipsburg	1,060,700
Plainfield	5,502,010
Pleasantville	1,589,750
Red Bank/Tinton Falls	234,550

* Source: 1979 New Jersey Mortgage Finance Agency Annual Report, at 5.

A P P E N D I X IV (cont'd)

City	Aggregate Mortgage Loans
Sayreville	$ 118,200
Somerville	263,500
Trenton	9,445,575
Union City	17,500
Vineland	2,728,375
West New York	1,994,850

APPENDIX V*

County	Housing Units
Atlantic County	1,832
Bergen Coutny	1,672
Burlington County	140
Camden County	2,333
Cape May County	376
Cumberland County	1,095
Essex County	14,564
Gloucester County	140
Husdon County	9,036
Mercer County	2,184
Middlesex County	2,291
Monmouth County	2,235
Morris County	535
Ocean County	338
Passaic County	2,885
Salem County	411
Somerset County	100
Union County	2,491
Warren County	512
TOTAL	45,170

* Source: Extrapolation of information contained in the New Jersey Directory of Subsidized Rental Housing, New Jersey Department of Community Affairs, Division of Housing and Urban Renewal (January, 1978) at 56-92.

STATE OF NEW JERSEY)
)SS: AFFIDAVIT OF MAILING
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I, ANNETTE COVERT, of full age, being duly sworn, says:

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Sworn and Subscribed to
before me this 16th day
of June, 1980.

Mary McCann-Maier

MARY McCANN MAIER
A Notary Public of New Jersey
My Commission Expires July 30, 1984