Piscataway 1985

3/6/85

- Post-Trial Memorandum submitted on behalf of Piscataway
- Plaintiff's Response to the Post-Trial Memorandum of Piscataway
- Affidavit of Alan Mallach
- [redacted] Alan Mallach's Analysis of the Freehold Township Mount Laurel Settlement Proposal (Expert Report)

Attch: cover letter to judge

pgs. 94

p.i. 3147

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March 6, 1985

Honorable Eugene Serpentelli
Judge, Superior Court of New Jersey
Ocean County Court House
Toms River, New Jersey 08754

Re: Urban League of Greater New Brunswick
et al. vs. Township of Piscataway et al.

My dear Judge Serpentelli:

Your Honor may recall that, during the final week of Trial in the Piscataway Township matter, the Court permitted counsel to examine a report prepared by Allen Mallach relating to Freehold Township. Based upon my examination of that report, and leave of Court granted during the Trial, I hereby respectfully submit a Post-Trial Memorandum on behalf of the Township of Piscataway relating to various aspects of the production of a fair share number for Piscataway Township, which I believe is self-explanatory in all respects.

Simultaneously copies of the Memorandum are being forwarded to Barbara Williams, Esq., attorney for the Plaintiff, Urban League of Greater New Brunswick, and other counsel shown

on the attached service list.

Thank you for your courtesy and cooperation in this matter.

Very truly yours,

PHILLIP LEWIS PALEY

PLP:pmm

Enclosures

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URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL.,	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX COUNTY/OCEAN COUNTY
Plaintiffs,	:	
vs.	:	DOCKET NO. C-4122-73 MOUNT LAUREL
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, ET AL.,	:	
Defendants.	:	

POST-TRIAL MEMORANDUM SUBMITTED ON BEHALF OF THE TOWNSHIP OF PISCATAWAY

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During February, 1985 this Court extended leave to Piscataway Township to address a report entitled "An Analysis of the Freehold Township Mount Laurel Settlement Proposal: The Problem of Fair Share Credits", by Alan Mallach, the expert retained by the plaintiff Urban League (now "Civic League") of Greater New Brunswick. This memorandum seeks to analyze Mr. Mallach's report and apply his conclusions to Piscataway.

FACTUAL BACKGROUND:

Piscataway's area approximates 19 square miles. Per the 1980 census, Piscataway's population was 42,223; accordingly, Piscataway's population density exceeds 2,200 persons per square mile, substantially more than double the statewide 1980 population density (983 persons per square mile).

Piscataway's 1984 present need, both indigenous and reallocated excess, has been calculated to be 678 units by use of the prevailing fair share methodology (hereinafter referred to as "the methodology"). Piscataway's prospective need was calculated at 3,066 units; the 1984 fair share number, therefore, is 3,744 units. In addition, another 448

Check Figs # Correct?

units were staged for future rezoning. Therefore, Piscataway's total fair share obligation imposed by the methodology requires provision for 4,192 affordable housing units, in the aggregate.

Throughout trial, Piscataway has argued that the above calculation is unreasonable, for the following reasons, among others:

A. The methodology assigns a 20% increment to each municipality to compensate for those municipalities lacking sufficient vacant developable land. Obviously, as Piscataway has insufficient vacant developable land to meet its fair share, the application of the 20% increment is inappropriate in its case.

B. Piscataway is the site of the largest campus of Rutgers, the State University, and houses thousands of students in dormitories, single-student apartments, and family housing units. Piscataway sought credits against its fair share for such housing. While substantially disagreeing, plaintiff did accede to a "credit" to Piscataway's fair share number, representing the 348 family housing units, to be applied against Piscataway's requirement to provide for "low income" housing units.

C. Nearly 4,000 garden apartment units exist within the Township, [not less than 2,400 of which are currently affordable by moderate income households.] These affordable units [are substantially occupied by lower income households; at least one census district, comprised wholly of garden apartment units, bears a median household income dramatically lower than the regional median.] In addition, the median household income for tenants of multi-family units in Piscataway approximates $18,000, some $12,000 below the median household income for single-family units in the Township.].

How does one determine what an affordable unit is?

D. [Approximately 1,200 single family residences within the Township are affordable by low income households.]

While Piscataway contends that credits are appropriate for each category referred to above, Piscataway also suggests that the very existence of those categories demonstrates its historical commitment to the creation of a housing stock comprising numerous types of residential dwellings suitable for occupancy by a variety of income and earning classes.

ARGUMENT

MODIFICATIONS:

Clearly, all parties agree that Piscataway lacks sufficient vacant developable land to accommodate its fair share number. In light of that situation, Piscataway respectfully contends that the application of the 20% increment is inappropriate.

One further modification is relevant. The methodology assumes that 82% of presently existing substandard and overcrowded units are occupied by lower income households. This percentage is overstated by at least 25% and should be reduced. The effect of this modification, adopted by Judge Skillman in the Ringwood decision, is to reduce Piscataway's indigenous need by more than 100 units. Mr. Mallach's report clearly suggests that this modification should be adopted by the Court; Piscataway supports this position.

ADJUSTMENTS:

The above modifications will produce a fair share number before consideration of "credits" and "adjustments". An analysis of both "credits" and "adjustments" forms the bulk of Mr. Mallach's report on Freehold Township, treated below.

Mr. Mallach describes two areas of potential adjustment: first, adjustment for past non-exclusionary performance; second, adjustment to fair share allocations in consideration of settlement.

ADJUSTMENT FOR PAST PERFORMANCE:

As to adjustment for prior non-exclusion, Mr. Mallach's report states:

> "A sense of fairness suggests that there is merit to the idea that a community which has permitted a wide variety and type of housing in the past, prior to the Mount Laurel Decision and its strict standards, receive some recognition for that history."

Mr. Mallach's analysis addresses the comparison between municipal median household income and regional median household income, comprising a step in the methodology. He concludes that that comparison does not sufficiently reach the "sense of fairness" which he seeks. Piscataway agrees. Piscataway's median household income is 102% of the regional median income, a rather close ratio. In and of itself, that factor suggests that Piscataway is comprised of a substantial number of households of low and moderate income and confirms Piscataway's ante-Mount Laurel commitment to the creation of a variety of housing types.

Mr. Mallach's report discusses "at least three different factors" which he deems relevant in determining the extent to which a fair share number should be adjusted:

A. First: The extent to which past performance has created housing units which are currently available or which will shortly become available to lower income households. In Piscataway, at least 2,400 garden apartment units are currently affordable by moderate income households; 1,200 existing single family units and 348 student family housing units are currently affordable by low income households. The housing units in these categories comprise 32% of all Piscataway housing, without consideration of other existing units affordable by households of moderate income. This data, considered together with Piscataway's median income multiplier of 1.02 and the census data referred to above, demonstrates clearly that a substantial proportion of affordable housing units are occupied by households of low and moderate income. In addition, Piscataway has voluntarily rezoned substantial acreage to accommodate hundreds of anticipated Mount Laurel units. Clearly, Piscataway has credibly sought to have existing affordable housing made available to lower income households.

B. Second: The extent to which a municipality's past performance was a response to prior litigation seeking to make available affordable housing for lower income households. Prior to Mount Laurel I Piscataway had zoned hundreds of acres to permit the construction of high density (15 units to the acre) residential development in several areas of the Township. Further, in direct response to Mount Laurel I, substantial tracts of land formerly zoned for residential development were rezoned to permit residential development at higher densities, and substantial acreage was rezoned to permit housing at a density of 10 units to the acre. In addition, in direct response to Mount Laurel II, the Township commissioned a fair housing analysis, previously marked in evidence in these proceedings, and specifically rezoned one additional site for high density residential development consistent with Mount Laurel standards.

C. Third: The extent to which a municipality's past performance was "extraordinary". In Piscataway, garden apartments alone comprise more than 30% of the Township's housing stock; when the Rutgers family housing units are included, the ratio exceeds one-third. Upon development of the now vacant sites zoned for high density residential use, the proportion of high density housing in Piscataway

will obviously be even greater.

Piscataway has clearly demonstrated that it has both a substantial percentage of rental housing and a median income near or below the state or regional median. Accordingly, a substantial adjustment to Piscataway's fair share is not only appropriate but mandated by Mr. Mallach's report and his conclusions.

ADJUSTMENT FOR SETTLEMENT:

Mr. Mallach next analyzes potential adjustments based upon settlement. Piscataway respectfully submits that, as applied to it, a defendant in the "Mount Laurel II" litigation, such analysis is misplaced, for a number of reasons.

First, in its 1976 decision, the Court concluded that Piscataway had fully met its obligation to house indigenous low income households; to suggest that Piscataway should have sought a settlement of an obligation which it did not have is to be rather impractical. Second, Piscataway's 1976 fair share obligation was based upon an allocation process found inappropriate by the 1983 Mount Laurel II Court. Piscataway has long contended that it is inequitable and unjust to expect it to have accommodated an obligation which no one could have predicted prior to

Forum decided that it had no unmet indigenous need but it did have regional obligation

April, 1984, when the fair share methodology was refined into substantially its present complexion. Third, a settlement would have aborted Piscataway's contention that a municipality with insufficient vacant developable land should not be compelled to comply with a fair share number designed to accommodate municipalities with no land limitation and, therefore, unreasonable as to it. This contention fully conforms with the reasoning of this Court expressed in AMG, etc., vs. Township of Warren, authorizing any municipality to seek to reduce its fair share number because it lacks sufficient vacant developable land.

Mr. Mallach's report concludes by recommending that Freehold Township receive a thirty percent reduction in its fair share number.

The recommendation compels a comparison between Freehold Township and Piscataway, to determine whether a similar adjustment is appropriate. Freehold Township boasts a median household income which is 135% of the regional median; Piscataway's comparative statistic is 102%. Eighty-two percent of Freehold Township's housing is single family owner occupied; less than two-thirds of Piscataway's housing is single family owner occupied. Piscataway's proportion of tenant occupied dwellings, exceeding one third, is

similar to the state wide proportion, thirty-eight percent. Furthermore, it is unlikely that the Freehold Township population density approaches that of Piscataway, which, as earlier pointed out, is more than twice the overall state density.

This Court should not overlook the penalizing effect of the non-adjusted application of the fair share methodology. If the purpose of the process is to extend to each community a fair proportion of lower income households, how can the Court logically conclude that extraordinarily wealthy communities who have historically zoned for nothing but low density single family housing units are now obliged to rezone for fewer than 100 Mount Laurel households?* If Piscataway had zoned its vacant land in 1960 for low density single-family housing as those communities did, does the Court have any doubt that Piscataway's number would be dramatically lower? And if Piscataway had so zoned, is it not likely that those jobs created because Piscataway's zoning permitted such development might not have come to Central New Jersey (and, perhaps, not to New Jersey it-

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* Saddle River and Mendham, to name two.

self)? Would New Jersey have been the richer? Does not the fact that Piscataway has not been accused of over-zoning for industrial and commercial uses even by its most severe critics reasonably demonstrate a basic fairness in the Township's land use regulations requiring substantial reductions in its current Mount Laurel obligations? Does Piscataway's pre-1980 commitment to the establishment of a broad variety of land use now require that every vacant and suitable acre in Piscataway be "Mount-Laurelized"?

The answers to these questions have extraordinary significance to a State which many observers feel is now characterized by "wall to wall people." Piscataway has previous argued that the numbers derived by the methodology are simply too high for reasonable implementation. To some extent, the proposals to "adjust" and "credit" the fair share numbers proposed by a staunch advocate of the methodology should be viewed as methods to reduce the numbers to levels closer to reason without impeaching the basis of the methodology itself.

The above justifies a substantial adjustment to Piscataway's fair share number, at least to the extent recommended for Freehold Township, if not to a greater extent.

CREDITS:

The last part of Mr. Mallach's report deals with the concept of "credits"; only the first two sections of his analysis bear on Piscataway.

Mr. Mallach concludes that no "credit" should be provided for group housing facilities. His conclusion is reached in the context of a single group housing facility located in Freehold Township; the number of occupants of that facility are not indicated. In contrast, Piscataway hosts substantial numbers of college dormitories housing thousands of students. The quantum of such extensive "group quarters" should be given some consideration by this Court in terms of providing either a credit to, or an adjustment of, Piscataway's fair share obligation.

The second "credit" referred to in the Mallach report deals with garden apartment units in Freehold Township, fewer than one-third of which are considered affordable to moderate income households. Mr. Mallach does not extend any credits for those 247 affordable units, but his report does recommend credits for certain lower income units located within a mobile home park which are affordable within low or moderate income guidelines and likely to

remain affordable for the immediate future.

Two thousand four hundred garden apartment units within Piscataway are affordable by moderate income households, according to the uncontroverted testimony. Piscataway has in force and operating a rent leveling ordinance, administered by a rent leveling board, which places ceilings on annual rent increases. Therefore, most of the affordable apartments will continue to remain affordable to Mount Laurel households. The census data clearly demonstrates that the median income of apartment dwellers in Piscataway is substantially less than that of single family residential households and within moderate income guidelines. This suggests that substantial credits for existing apartment units should be extended to Piscataway in the determination of its fair share number.

FURTHER COMMENTS:

Two other areas deserve specific attention. First, the voluntary rezoning of substantial acreage, all deemed suitable for high density residential development by the Court appointed expert, underscores Piscataway's commitment to generate a variety of housing within its borders. While an adjustment for past performance, as Mr. Mallach

points out in his report, may be difficult to quantify, certainly Piscataway's entitlement to such adjustment is demonstrably clearer by such voluntary rezoning.

Second, with respect to the issue of settlement generally, it should certainly not be sufficient to inquire merely whether the municipality has settled or not. The tacit assumption, of course, is that it is more "reasonable" for a municipality to settle then to litigate. That assumption is correct only if the parameters of any proposed settlement are "reasonable." One test of reasonableness may well be to compare proposed settlement offers with existing settlements in other municipalities.

Most settlements which have been reached require the settling municipality to zone for a mere fraction of the fair share number. For example, Parsippany-Troy Hills, whose fair share number was computed to be 3100, settled (with the Office of the Public Advocate) upon a fair share number of 1500, permitting existing residential development to count as credits for 1200 of that number, and, therefore, rezoning for only 300 acres. If the Office of the Public Advocate concluded that such a settlement conformed to the public interest, why does the plaintiff persist in seeking a resolution requiring substantially greater rezoning for

Piscataway? Settlement might be an appropriate criterion only where the parties can effect reasonable compromises, on both sides.

At no time has Piscataway postured regarding settlement. Piscataway's position has been consistent: based upon whatever criteria, standards, modifications or adjustments apply, Piscataway has fairly complied with the mandates and the restrictions of Mount Laurel II. Piscataway has consistently argued that the application of the methodology to a community as densely populated as Piscataway with its limited vacant acreage will create untoward, unacceptable, unworkable and impractical results.

At least one municipality has "settled", only later to seek to vacate the settlement. Piscataway is hardly in that posture. (Piscataway took a leading role in the presentation of the defense on remand and has argued vehemently that its unique characteristics require unique treatment.)

Throughout the trial, plaintiff's witnesses have contended that it is important to treat of Mount Laurel development with a view towards conservatism. Indeed, methodological alternatives were chosen because they produced more conservative numbers. Keeping in mind the

necessity (as recognized by the Mount Laurel II Court) to retain appropriate planning strictures, and to develop Mount Laurel housing reasonably consistent with the character of the community so as not to subvert that existing character by overly dense development, Piscataway's existing zoning ordinance reasonably complies with the Mount Laurel II mandate.

Accordingly, Piscataway's fair share should be determined conservatively, based upon consideration of Piscataway's limited vacant land and diverse housing stock.

Piscataway, further, respectfully renews its request that the Court visit the Township, examine the vacant sites discussed at length during the course of the trial and view the existing housing stock. Piscataway remains convinced that such an examination will compel the conclusion that the Township has not treated of its zoning powers so as to be deemed "exclusionary" in any respect.

Respectfully and sincerely,

PHILLIP LEWIS PALEY

March 6, 1985

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs
v.
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants

Docket No. C-4122-73

PLAINTIFFS' RESPONSE TO THE POST-TRIAL MEMORANDUM OF THE TOWNSHIP OF PISCATAWAY

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On Behalf of the ACLU of New Jersey
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Of Counsel
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Eric Neisser, Esq.

On the Brief
Barbara J. Williams, Esq.

I. Introduction

The Township of Piscataway has filed with this Court a "Post Trial Memorandum" which purports to comment upon "An Analysis of the Freehold Township Mount Laurel Settlement Proposal: The Problem of Fair Share Credits" (hereinafter Freehold Report), authored by plaintiffs' expert witness in this case, Alan Mallach. This report was prepared and filed with the Court in the context of Mr. Mallach's appointment by the Court as its expert in American Planned Communities v. Township of Freehold -- a case in which Freehold submitted to the Court a proposal to settle without the extensive and protracted litigation which has transpired in the matter sub judice between plaintiffs and The Township of Piscataway since 1974.

Despite the extensive history of this litigation and the deficiencies of the ordinances of the Township, defendants contend they are entitled to "credits", "modifications" and "adjustments" to reduce, and in fact abolish, their obligation to provide low and moderate income housing under Mount Laurel. These assertions are allegedly based on the Freehold Report.[1] This brief and Mr.

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[1]While the Court granted the Township of Piscataway permission to respond to the Freehold Report, plaintiffs submit it is too late for Piscataway to attempt to reopen the record and make additional factual assertions by means of the vehicle of a post-trial memorandum. However, given the nature of the factual contentions made by Piscataway, plaintiffs have had no alternative but to file the Affidavit of Mr. Mallach and to affirmatively respond to the matters raised by defendants in this Memorandum.

Mallach's affidavit will show that defendants have not met their burden of establishing entitlement to such reductions. The deductions sought by defendants are not accurately premised on the Freehold Report, proper planning considerations, or the evidence in the record of this litigation.

For ease of consideration by the Court, this Memorandum will follow the order and format utilized by the Township of Piscataway and comment upon each issue raised seriatim.

II. Credits

(A) 2400 Garden Apartments and 1200 Single Family Residences

In the Freehold Report, Mr. Mallach specifies that a "unit which can count as a credit toward a community's fair share obligation is one which can legitimately substitute for a unit that would otherwise be provided through that community's Mount Laurel compliance program." (FR, p.2)(emphasis added). He stresses that a net increment in the housing stock must result. (FR, p.5). This net increment in the pool of sound housing available to the lower income population can result either by new construction, by rehabilitation of a substandard unit currently occupied by a lower income household, or at least in theory, through the filtering process, i.e., when a household moves from a substandard unit into

a sound unit not previously available to lower income households. (FR, p.5).

Mr. Mallach concludes that the most obvious legitimate credit is for housing constructed or rehabilitated within a community since 1980, the date of the census data which is used to calculate fair share. (FR, p.8). Significantly, nowhere in its Memorandum does the Township of Piscataway contend that the 2400 garden apartments or the 1200 single family residences for which it seeks a "credit" were constructed or rehabilitated subsequent to the 1980 cut-off date. More importantly, there is no such evidence in the record. As Mr. Mallach's affidavit shows, no multifamily units have been constructed in Piscataway since 1970. (Aff. Para. 12(b), p.7).

With respect to housing constructed prior to 1980, Mr. Mallach determines that an award of credit must be grounded on the premise that filtering does contribute to meeting those housing needs. Only if filtering exists and is a significant factor, can one assume that a unit becoming available in a pre-1980 housing project is part of a process resulting in a net increment to the lower income housing stock (FR, pps. 9-10). It must be underscored that he specifically states in the Report that: "The simple existence of a potentially affordable unit, therefore, is not of great

significance." (Id. at p. 10) (emphasis added). It is, at best, only to the purported existence of such units that the Township of Piscataway's contentions relate. The standards which Mr. Mallach indicates must be demonstrated by the Township have not been met:

> (1) Becomes available during the fair share period;
>
> (2) Is occupied, when it becomes available, by a lower income household, who is spending no more than an appropriate share of its income to live in that unit; and
>
> (3) Exists within a market in which additional units affordable to lower income households are being simultaneously made available through informal increments to the housing stock after 1980
>
> (FR, p. 10).

The Township of Piscataway merely states in its Memorandum in a conclusory fashion: "Nearly 4,000 garden apartment units exist within the township, not less than 2,400 of which are currently affordable by moderate income households. These affordable units are substantially occupied by lower income households; ..." (DM, p.3). As Mr. Mallach indicates in his Affidavit, 1980 Census data does not support this unsubstantiated blanket statement nor does the record in this case. (Aff. Para.8, p. 4-5). Moreover, the

defendant does not allude to, let alone establish, any of the criteria (1), (2) and (3) set forth above. It is to be noted that Mr. Mallach expressed a serious question about allowing credits for pre-1980 private market affordable housing in the Freehold Report. (FR, p.10). He found such a credit to be an "inherently unstable" solution to lower income housing needs even if the criteria were established (which in this case have not been established) in the absence of means to ensure continued lower income affordability or occupancy. Mr. Mallach, in his Affidavit (Para. 8, p. 4-5) clearly indicates that the existence of a rent levelling ordinance in Piscataway does not provide the requisite assurances. Accordingly, since the defendant has not satisfied any of the bases outlined in the Freehold Report, credit for the garden apartments should be disallowed by the Court. It is to be noted that no credits for such units were recommended by Mr. Mallach in Freehold.

The same situation is true for the 1,200 single family units which defendants claim as a credit. Again, only an assertion is made that: "Approximately 1,200 single family residences in the Township are affordable by low income households" (DM, p.3), without any evidence provided whether these units are pre- or post-1980 units. Even more significantly, if post-1980 units, there has been no evidence to show whether these units are (a) available for

purchase at the present; (b) would be affordable, if available, or (c) would be purchased by lower income households assuming such affordability. This provides another instance where the data supplied in Mr. Mallach's affidavit (Aff. Para. 9, p. 5) leads to the opposite conclusion. As a result, the 1,200 single family residences also provide no basis for a credit against the fair share of Piscataway.

B. Group Quarters

The Freehold Report provides no justification for defendants to allege that credit should be accorded for dormitories, single student apartments and family housing units of Rutgers University (DM, p.3). In point of fact, the Report argues against the application of credits for such a purpose:

> "Although they are a part of the population, there are good reasons for excluding the institutional population from the fair share calculation, as was done in the Warren methodology. They are, for the most part, dependent for a substantial part of their survival, not only their shelter, on others, and in most cases some form of public entity. Furthermore, their accommodations are not provided (as a general rule) through a marketplace process, but through the intervention of public or private nonprofit entities. Particularly to the extent that they are public facilities, it is likely that the provision of such institutional facilities as indicated above has not been significantly affected by municipal exclusionary zoning or other land use practices, which is the issue at the core of the Mount Laurel decision, which in turn is the starting point of this entire discussion. (Footnote omitted). The fundamental inconsistency between the

> notion of credits in this area and the essence of the fair share obligation becomes apparent if one bears in mind the underlying principle behind the granting of credits; namely, whether the unit in question can readily be substituted for a unit in the community's Mount Laurel compliance package." (FR, p. 11).

The record of the trial of this matter provides the data in support of plaintiffs' position that such group quarters do not constitute housing for purposes of fair share methodology or the census of housing.

However, the record does not reflect an admission by Mr. Mallach or the plaintiffs that "plaintiffs did accede to a credit to Piscataway's fair share number, representing the 348 family units ..." as asserted by defendants. Mr. Mallach, who testified as to this issue states:

> [W]hile acknowledging that these units might be considered fair share credits, plaintiffs noted that no evidence was submitted as to the extent to which these units were indeed occupied by lower income households, so that no basis was offered to determine how many, if any, of the 348 units should indeed be considered fair share credits. (Aff., Para. 7, p. 3-4).

In the absence of such evidence in the record, no factual basis exists for the Court to conclude the 348 units are to be credited against the fair share of Piscataway.

C. 20% Vacant Land Factor

While defendants place their contention regarding the 20% factor under the subheading of "credits", they seek to have the

Court totally disregard application of this factor on the grounds that since Piscataway has insufficient vacant developable land its application is "inappropriate." (DM, p.3). The 20% vacant land factor was established by this Court in AMG as a part of the methodology and thus serves as an integral element in its implementation. Such a wholesale elimination of a crucial part of the established methodology should not be accomplished absent objective evidence in the record which directly provides a basis as to support a deviation of this nature. Again, a dearth of evidence exists in the record to specifically support the necessity of a modification of this magnitude to the formula, and defendants cite none in their Memorandum. (See Mr. Mallach's Affidavit, Para. 4 through 6, p. 2-3).

III. Modifications

The defendants argue that the Court should apply the modification of the methodology adopted by Judge Skillman in the Countryside Properties, et al. v. Mayor and Council of the Borough of Ringwood, et al. decision. That modification consists of altering the method of determining the present and indigenous need more accurately to reflect in a different way the percentage of substandard housing that is actually occupied by lower income households (FR, p.21). Contrary to the defendants' assertions, Mr. Mallach in his report regarding Freehold Township, did not "clearly

suggest that this modification be adopted by the Court" (DM, p.4). Mr. Mallach stressed in his attached affidavit that the modification should not be adopted without first making a full evaluation and comparison of the alternative methodologies. (See Affidavit, para. 10, p.5.) Even if the Court agrees with the defendants' contention that the 82% assumption (82% of substandard housing is occupied by lower income households) is invalid, the Court would be ill-advised to adopt an alternative percentage figure without first conducting a full evaluation and comparison of the methodologies. Also, the Court should require the defendants to show both why the 82% figure is invalid as applied to it and what the percentage figure should be. It should be noted that the defendants failed to raise this issue at either the trial or the vacant land hearing. The defendants should not be permitted to raise an issue after the trial has run its course. Moreover, even if this "modification" were to be utilized, Piscataway still is a long way from meeting its fair share.

IV. Adjustments to Fair Share Other Than Credits

First, it should be noted that the adjustment section of the Freehold Report, upon which the defendants rely, was prepared by Mr. Mallach pursuant to a proposed settlement of the litigation in that matter. The only adjustments recommended in the Report concern adjustments awarded in consideration of Freehold Township's

good faith efforts to bring about a settlement and achieve voluntary compliance in the face of Mount Laurel litigation. That was the context in which Mr. Mallach's report was written and it would be misleading to contend that the character of the instant matter approximates the context within which the Freehold Report was produced.

As the Freehold Report indicates, there are potentially two areas of adjustment that exist: The first concerns an adjustment for the past non-exclusionary performance of a community. The second potential trigger of an adjustment is cooperative and non-obstructionist behavior on the part of a community in the form of efforts to achieve a negotiated settlement of the litigation and compliance with the constitutional mandate of Mount Laurel. Both of these serve the salutary public policy of encouraging voluntary compliance with the requirements of Mount Laurel.

A. Adjustment For Past Performance

1. The Past Performance of Piscataway

"The municipal obligation to provide a realistic opportunity for low and moderate income housing is not satisfied by a good faith attempt. The housing opportunity provided must, in fact, be the substantial equivalent of the fair share." Southern Burlington County NAACP, et al. v. Township of Mount Laurel, 92 N.J. 158, 219 (1983) [hereinafter "Mount Laurel II"]. "Good or bad faith ...

[is] irrelevant." Id. In order to make that determination, a court should look objectively at whether or not a "municipality has in fact provided a realistic opportunity for construction of low and moderate income housing." Where the court does not find evidence of such an opportunity, the municipality has failed to satisfy its Mount Laurel obligation. Id. at 221.

A municipality attempting to prove its satisfaction of a fair share obligation, or attempting to justify its failure has the burden of proof by a preponderance of the evidence. A "definite presentation of facts" must be made on the part of a defendant-municipality." Id. at 223. Defendant Piscataway has not met this burden.

Chief Justice Wilentz's introduction to Mount Laurel II explicitly states the thrust of the decision: "to provide a realistic opportunity for housing, not litigation." Id. at 200. The experiences of the plaintiff in its dealings with Piscataway have been precisely the opposite of the goal referred to by the Chief Justice. Not only has the Township of Piscataway been a defendant in this case for eleven years, but it has continued to generate litigation, rather than work towards compliance with the precepts of Mount Laurel.

Urban League v. Carteret was brought eleven years ago by the National Committee Against Discrimination in Housing, challenging

the zoning ordinances of 23 of the 25 municipalies in Middlesex County. During the first trial, a majority of the cases were settled, or it was determined that a fair share obligation did not exist. Id. at 343-46. Piscataway Township was one of the 23 municipalities included in that initial litigation. Eleven years later, the opportunity for affordable housing remains unmet in Piscataway.

Piscataway has continued to argue that their fair share has been satisfied, and to contend that their zoning ordinances were sufficient. These arguments were rejected as far back as Judge Furman's decision in 1976.

The trial court concluded that an unmet need for lower income housing existed in Middlesex County; and that the exclusionary practices of the defendant municipalities was largely responsible for that unmet need. Id. at 343.

In particular, Piscataway's exclusionary ordinances included:

1. severe restrictions on mobile homes;
2. restrictions on multi-family housing;
3. restrictions not necessary for health and safety, or required by good planning practices;
4. the limitation of apartments, efficiencies and one-bedroom units. Id. at 344.

Judge Furman found that the zoning practices of Piscataway

were in violation of Mount Laurel, and ordered that the Township take affirmative steps to encourage the construction of lower income housing. Such steps could be accomplished by utilizing mandatory set-asides and density bonuses, and pursuing federal and state housing subsidies. Id.

Piscataway, along with six other municipalities, appealed Judge Furman's decision. The Appellate Division reversed the trial court's Order, finding that the "region" utilized by the trial court was erroneous. 170 N.J. Super. 461 (1979). Mount Laurel II reversed the Appellate Division's decision remanding to the trial court for further proceedings regarding regional definition, regional need, establishment of fair share number, and revision of various ordinances. Mount Laurel II, 92 N.J. at 349.

Plaintiffs have sought and been granted restraints against the Township, preventing it from using up its developable land. Restraining Orders were issued against the Township of Piscataway on May 7, 1984, June 26, 1984, November 5, 1984, and December 11, 1984. Each request for restraints was instituted to prevent Piscataway from violating its constitutional obligation to provide realistic opportunities for the construction of low and moderate income housing. Each was brought against the Township because of its insistence on granting approvals for development despite the constraints imposed by its lack of vacant land. The plaintiffs

have continuously been in a position of potentially suffering irreparable injury and it has only been through the issuance of restraints by this Court that the status quo has been maintained. It is to be noted that Piscataway's interlocutory appeal with respect to the restraints was refused by the Appellate Division and the Supreme Court.

Defendants' Memorandum reflects a fair share number of 3,744 units of low and moderate income housing for Piscataway by applying the AMG methodology (AMG Realty Company, et al. v. Township of Warren, Docket Nos. L-23277-8 PW and L-67820-80 PW (July 16, 1984). The AMG methodology was held to apply to the Urban League case in the Court's Letter Opinion of July 27, 1984.

There has been an extraordinary growth rate in Piscataway in the past decade in both employment and rateables. Between 1972 and 1982, 16,761 jobs were added to employment stock, while during the period of 1970 to 1980, only 2,234 housing units were added. Id. During this period large amounts of land have been developed, and substantial land has become unsuitable for residential development as a result of its proximity to adjacent non-residential development. (Mallach Affidavit, 5/1/84, para. 5).

Despite its assertions that it is unable to meet its fair share obligation, Piscataway has provided opportunities for commercial and office development, exacerbating the need for

affordable housing, yet providing none. The Township's growth policy reflects the cavalier attitude of the township's governing body and its planning board toward its Mount Laurel obligations.

Moreover,Piscataway has not made sincere attempts to revise its zoning ordinances to guarantee realistic housing opportunities for low and moderate income households.

The only attempts by the Township to amend its zoning ordinances were made in 1978 when it established a planned residential development zone (Ordinance No. 78-27) and enacted another ordinance to regulate the new land use -- a Planned Residential Development Ordinance (Ordinance No. 78-28). Neither satisfies the requirements of Mount Laurel II.

In order to provide a "realistic opportunity" for the development of low and moderate income housing, municipal ordinances must include a mandatory set-aside. Id. at 267. (See A. Mallach, "Expert Report on Mount Laurel II Issues," prepared 12/83 - Sections A & B, [hereinafter "Expert Report"].)

A density bonus has been available in Piscataway since 1978, but it is inadequate. Its application depends upon a fluctuating, and often scarce supply of Federal and State housing subsidies. Id. at 263. The density bonuses are available if low or moderate income housing plans are included in planned residential zones. It does not provide an assurance that the Township will be able to

meet its obligation to fulfill those housing needs. Id. at 217.

A number of other major flaws still exist in the Piscataway Township ordinances, inter alia:

1. They fail to provide resale or rental price controls to ensure that housing continues to be affordable to low and moderate income households.

2. There are no phasing-in requirements for low and moderate income units to balance developments.

3. There are no provisions for flexibility regarding residential mix, non-residential and open space requirements, and plan modifications.

4. The maximum gross density of eight units per acre is inconsistent with maximum gross densities for townhouses, garden apartments or other types of multifamily residential development. ("Expert Report", supra, paras. A & B, p. B2 & B3).

Another significant issue is the modest number of acres presently zoned for planned residential development. Piscataway's Fair Share Housing Study, prepared in May of 1983 by the Piscataway Township Division of Planning and Development, identified only 164 acres for PRD. Plaintiff's expert, Alan Mallach, in his December 1983 Expert Report on Mount Laurel II Issues in Urban League of Greater New Brunswick v. Borough of Carteret, et al., calculated

that only 492 units of low and moderate income housing could result from so few acres. ("Expert Report", p. B3). This number is only a fraction of Piscataway's fair share obligation.

The municipal ordinances in Piscataway also contain provisions that go beyond the Township's need to protect health and safety, and are also excessively cost-generating. Illustrative are the requirements that PRDs contain a minimum of 30 contiguous acres (New Jersey Municipal Land Use Law requires only a 5-acre minimum. N.J.S.A. 40:55D-6); buffers and screens be installed along the entire perimeter of land tracts; an Environmental Impact Assessment be prepared for each tract regardless of whether areas are classified as environmentally sensitive; preparation of an Educational Impact Statement which is an unnecessary expense of dubious value, and should be deleted, etc. (See generally, "Expert Report," supra, para. C, p. B3 to B5.)

Piscataway's zoning ordinances also prohibit the development of mobile home parks, a measure which may be necessary for the Township to satisfy its Mount Laurel obligation. See 92 N.J. at 275.

2. Piscataway's Claim for an Adjustment Based on Past Performance

The defendants purport to base their argument for such an adjustment on Mr. Mallach's treatment of the subject in his

Freehold Report. Upon careful scrutiny, however, one is able to detect a rather blatant manipulation of the analysis by the defendants. First, the defendants note that Mr. Mallach's Report cites three different factors that should be considered in determining whether an adjustment should be granted at all, and if so, to what degree. The factors as contained in the Mallach Report are as follows:

> (1) The extent to which the past performance has created units within the community which can be shown to be available at present to lower income households, or will become available during the fair share period under consideration.
>
> (2) The extent to which the past performance was a conscious or deliberate response by the community to the constitutional mandate set forth in Mount Laurel in 1975 and in Oakwood at Madison, Inc. v. Twp. of Madison, 72 N.J. 481 (1977). (Footnote omitted).
>
> (3) The extent to which the past performance for which an adjustment was sought was indeed extraordinary. (FR, p.15)

From the plain language of the Report, it seems logical that each of the above factors was intended to be applied to the particular element of past performance offered by

a municipality as grounds for awarding an adjustment in its fair share obligation. The defendants chose not to follow this logical approach, however. Instead, Piscataway's past performance is discussed somewhat haphazardly; the defendants neglect to apply each factor to the particular element of past performance. In contrast, we will evaluate each of the elements of past performance suggested by the defendants as warranting adjustments.

First, the defendants note the existence within Piscataway of 2,400 garden apartment units, 1,200 existing single family units and 348 student family housing units. (D.M., p.6) It should be noted that there has been some disagreement as to the current affordability level of these units (especially the single family units), not to mention their prospective affordability considering the possibility of conversion and the relative dearth of effective rent control and income qualification provisions. (See Affidavit, paras. 7 through 9, p. 3-5.) The student family housing cited by the defendants should not be considered within the Mount Laurel context because it is institutional in nature. (See discussion, supra p. 7-8.)

But, these considerations aside, before an adjustment can be awarded as recognition for these elements of past performance, the elements should be evaluated in light of the other two factors of

the three noted by Mr. Mallach. The second factor has to do with the extent to which the past performance under consideration was a conscious or deliberate action taken by the municipality in recognition of its constitutional obligation as construed in Mount Laurel I (1975) and Oakwood at Madison (1977). All of the garden apartment units cited by the defendants were constructed well before the Mount Laurel I decision. The single family units referred to by the defendants were not the result of any deliberate response to Mount Laurel I. The student housing cited by defendants is not even relevant under this factor because its creation was the result of actions taken by an independent entity, Rutgers University, and not those of Piscataway Township. And Piscataway tried to keep it out. See, Rutgers v. Piluso, 60 N.J. 142 (1972).

The third factor is the extraordinariness of the performance. Even if these units had been the result of Piscataway's response to its Mount Laurel obligation, which they clearly were not, it would be a rather strained argument to claim that this kind of response was somehow extraordinary. With regard to the garden apartments, as Mr. Mallach noted, "many, even most, suburban municipalities have approved at least some multifamily housing." (FR, p. 15) (emphasis in original).

The defendants also note the fact that Piscataway has a median

income multiplier of 1.02 (i.e., median income of Piscataway is 102% of the regional median). It is not reasonable to assume that Mr. Mallach meant to imply in his Report that because a municipality is near the regional median income level the municipality can be deemed to have gone out of its way to provide lower income housing. The median income level of a community is a result, for the most part, of historical patterns that developed well before the Mount Laurel era. (See Affidavit, para. 11, p. 6.) A town that possesses a median income level substantially below the regional median might be able to argue that that has some facial significance with regard to its commitment to providing affordable housing. However, given that Piscataway's median income level is not substantially below, but is, rather, above the regional median, the defendants are in any case not in a position to make such an argument. (Id.)

The defendants make a number of assertions regarding zoning and rezoning undertaken in Piscataway.[2] Unfortunately, and

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[2]"Piscataway has voluntarily rezoned substantial acreage to accommodate hundreds of anticipated Mount Laurel units." (DM, p. 6).
"Prior to Mount Laurel I, Piscataway had zoned hundreds of acres to permit the construction of high density (15 units to the acre) residential development in several areas of the township." (DM, p. 7).
"[I]n direct response to Mount Laurel I, substantial tracts of land formerly zoned for residential development were rezoned to permit residential development at higher densities, and substantial

inexplicably, the defendants fail in each case to specify the particular zoning ordinance or ordinances to which they refer. The only initiative taken by Piscataway in the way of zoning to meet its Mount Laurel obligation that could arguably be of any significance has been the amendment of its ordinances to establish "Planned Residential Development Zones" (PRDs).

Ordinance number 78-28 was enacted in 1978 to establish the PRD zones. As pointed out in Mr. Mallach's "Expert Report" of December 1983, (see, previous discussion, supra, p. 16-17), these ordinances are fraught with inadequacies: They do not include a mandatory set-aside; they do not provide for resale or rental price controls to ensure that units continue to be affordable; they do not require the construction of low and moderate income units with the balance of the development; they do not provide sufficient flexibility in terms of residential mix, non-residential and open space requirements and plan modifications. ("Expert Report", p. B2). Mr. Mallach noted that even if the entire PRD zone

> were available for high density residential development and, assuming a 20% mandatory set-aside and an average gross density of 15 units per acre, this amount of land could accommodate only 492 units of low and moderate income housing. ("Expert Report", p. B3).

This would fall far short of Piscataway's fair share obligation.

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acreage was rezoned to permit housing at a density of 10 units to

The defendants, by their vague references, may have also intended to offer their "RM" (multifamily residential) zoning for consideration. Mr. Mallach has noted that:

> The Township's present and proposed RM ... zones appear to be largely developed and designed to reflect existing garden apartments. In that event they would not be relevant to the satisfaction of the Township's fair share obligation. If the Township includes the RM zone as part of its fair share remedy, the provisions governing this district which contain a number of cost-generating features would have to be deleted or modified. ("Expert Report", p. B1, n.1).

It would appear that most of the units in the RM zone were built prior to 1980. The RM zone ordinances make no provision at all for lower and moderate income housing.

Neither of these zoning ordinances fare very well when measured by the three factor test recommended in Mr. Mallach's Freehold Report. First, neither can be said to have created to any significant degree units within the community that can be shown to be available at present or in the immediate future to lower income households. As noted above, even under the most generous extrapolation, the PRD zoning with its voluntary density bonus could be counted on for only a marginal total. The RM zone, as noted also, for the most part represents the already existing garden apartment stock and thus, without more, are not relevant for

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the acre." (DM, p. 7).

the satisfaction of Piscataway's fair share obligation.

Second, while the defendants might reasonably argue that this zoning was in some way a deliberate response to its Mount Laurel obligation, one could not credibly argue that these were sincere initiatives intended to fulfill the municipality's obligation to provide a realistic opportunity for the construction of low and moderate income housing. An objective assessment of this zoning would compel the conclusion that this was, to be sure, a "deliberate response by the community"; however, it was a response not to carry out its constitutional duty, but to create a mere illusion of compliance.

Third, since neither of the zoning actions taken can be said to have moved Piscataway in any significant way from the status quo -- these ordinances cannot be said to represent extraordinary initiatives on the part of the municipality.

The defendants contend that in direct response to Mount Laurel II they commissioned "a fair housing analysis," which resulted in the rezoning of one additional site for high density residential development. This action, as the defendants acknowledge, (DM, p. 7), was not taken in response to Mount Laurel I or Oakwood at Madison, but rather, in response to Mount Laurel II. Thus, under the second factor in the analysis it would not merit consideration for an adjustment. Significantly, the Report to which the

defendants apparently refer is that prepared by the defendants' expert, Lester Nebenzahl, in the context of this very litigation, and thus cannot be looked upon as being the kind of unilateral and selfless action that the defendants attempt to imply.

Finally, the defendants draw attention to the fact that the percentage of rental housing within Piscataway is substantial. (DM, pp. 7-8) As Mr. Mallach points out in his Affidavit, this level is not extraordinary for the region; four of the other nine similarly situated townships in Middlesex County are comparable to or greater than Piscataway in terms of their percentage of rental housing. (See Affidavit, para. 12, p. 7-8.) Again, as has been noted, (supra, p. 21), most of Piscataway's rental housing was created well before the Mount Laurel I decision -- and, therefore, was not a response to the Mount Laurel mandate. Also, as noted previously, there are serious questions regarding the affordability of this housing in Piscataway. (See Affidavit, para. 8, p. 3-4.)

B. Adjustments for Voluntary Settlement

As Mr. Mallach noted in his Report, "[t]here are strong public policy arguments in support of offering incentives for settlement." (FR, p. 16). Mr. Mallach lays out three different points at which voluntary compliance can be deemed to have begun:

(1) A settlement which is negotiated only after an an extended period of pretrial preparation, or even after

the beginning of trial (the distinction is not considered of great substantive weight);

(2) A settlement where negotiations begin expeditiously after a suit has been filed, before any substantial pretrial activity has taken place, and where a settlement is also reached expeditiously; and

(3) A community has enacted a program of voluntary compliance with Mount Laurel, without any lawsuit having been filed, and seeks court approval in order to have a formal determination of its fair share obligation, and to obtain the six-year period of repose offered in Mount Laurel II. (FR, p. 17)

The defendants' conduct in this matter cannot be said to correspond to any of these threshold levels of compliance. As Mr. Mallach has indicated in his affidavit the defendants have "rebuffed every effort to settle this litigation." (Affidavit, para. 13, p. 8). It bears repeating that the Freehold Report, from which the defendants attempt to wring their arguments, was produced in the context of a settlement. Like Freehold, six of the eight remaining original defendants to this litigation have reached at least partial settlement with the Urban League plaintiffs without the need for continued adversary proceedings. Those settlements involved a variety of arrangements negotiated between themselves

and plaintiffs so as to reasonably resolve the municipalities' Mount Laurel obligations. Piscataway made no such efforts; on the contrary, they have fought the imposition of a fair share for the better part of a decade. The defendants should not benefit from their recalcitrancy.

The defendants argue that in 1976 "the court concluded that Piscataway had fully met its obligation to house indigenous low income households." (DM, p. 8) The defendants go on to imply that this decision relieved Piscataway of any further obligation and, therefore, the defendants cannot have been expected to have sought settlement of an obligation that was non existent.

The fact of the matter is that Judge Furman did not decide only that Piscataway had no unmet indigenous need; he also ruled that Piscataway had to shoulder a portion of the regional need projected to 1985. Judge Furman determined in 1976 that Piscataway's share of that regional need was 1,333 units. Urban League of Greater New Brunswick v. Borough of Carteret, 142 N.J. Super. 11, 37 (Ch. Div. 1976). As was emphasized by the Supreme Court, Piscataway was required by the trial court to "do more than just refrain from zoning out their fair share allocation of lower income housing. Affirmative steps to encourage the construction of lower income housing, such as utilizing mandatory set-asides and density bonuses, and pursuing federal and state housing subsidies,

were required." Mount Laurel II, supra at 347 (emphasis supplied).

So, in effect, the defendants are arguing that Piscataway should receive an adjustment in consideration of the settlement that they would have sought to bring about had they not found the fair share calculated nearly nine years ago by Judge Furman to be so disagreeable. This is one of the more brazen examples of tortured logic that appears throughout the defendants' Memorandum.

V. Conclusion

Piscataway is not entitled under any circumstances to adjustments in its fair share, because it is not proposing, and never has proposed, settlement of this case on any plausible basis. Similarly, in theory, Piscataway might be entitled to some credits against its fair share, but it has not made the case for such credits on the record now before the Court.

However, should the Court deem Piscataway entitled to any credits or adjustments, the fair share base against which such credits may be taken is most important. The recent vacant land hearing concerned itself with only one component of Piscataway's fair share, that which permits new construction of potentially affordable units. However, as Piscataway concedes, its full fair share under the AMG formula is 3744 units. (DM, p. 1).

Vacant land alone is an insufficient measure of the limit of Piscataway's fair share for two reasons.

First, some of the vacant land might be developed at ratios higher than the 4:1 ratio of Mount Laurel to market housing that is commonly used. Mobile home developments, such as provided for in the East Brunswick, North Brunswick, and South Brunswick settlements, require substantially higher Mount Laurel set asides because the economics of these developments permit doing so. Moreover, even in the absence of federal and state subsidy programs, 100% lower income developments are possible if maximum advantage is taken of lower cost public bond issues, tax sheltering, development fee ordinances and similar innovative financing techniques. Thus, until the remedial process is completed, it cannot be assumed that any given quantity of available land will permit a maximum fair share based only on a 20% (4:1) set-aside.

Second, Mount Laurel compliance can frequently be achieved, at least in part, through techniques that do not require any building, or any vacant land, at all. Existing substandard building can be rehabilitated, for instance, large structures can be converted to two or three family residences, and unaffordable apartments can be made affordable by imposition of rent and occupancy controls or by subsidies. Again, no judgment can be made about the maximum fair share that is possible until these opportunities have been explored during the remedial process, assisted by the Master.

If the fair share obligation of Piscataway Township were to be determined based solely on vacant land at a 20% set aside, and if credits for existing housing or adjustments were then to be allowed against a fair share thus determined, Piscataway would be allowed to do less than it could. So long as the fair share derived from vacant land is less than the fair share derived from the AMG methodology, any credits for existing housing should not be allowed to reduce the obligation to use vacant land for Mount Laurel purposes until it is shown that the total AMG fair share cannot be achieved by the Township's overall compliance plan. In effect, given the discrepancy between Piscataway's true fair share and its relatively small inventory of vacant land, any credits for existing affordable housing should be set off only against the component of the AMG fair share that cannot be achieved through use of vacant land. To do otherwise would be to unfairly reward Piscataway for its past exclusionary behavior, by which it used up the land available for affordable housing and placed itself in a position where it was able to do less than other communities. Precisely because of Piscataway's unconstitutional land use practices, particular care must be taken to insure that it comes as close to satisfying its full fair share as possible.

We recognize, as a practical matter, that a realistic fair share compliance program for Piscataway will have to rely heavily

on the vacant land inventory, and we understand the Court's effort to determine a realistic obligation based on that land. We respectfully suggest, however, that the Court's judgment and order should also find and determine the full fair share applicable under the AMG methodology, and should require the defendant Township and the Master to explore means of meeting a larger portion of the full fair share, either by more intensive use of the vacant land available, or by solutions that do not require use of additional land at all. We most urgently request that the Court not allow unearned credits for existing housing to be taken against a partial fair share in a way that would reduce that partial solution towards de minimis, when more could be done.

Dated: April 17, 1985

Respectfully submitted,

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The assistance of Jeffrey Houlihan, Cynthia Cappell and David Shin in the preparation of this Memorandum is gratefully appreciated and acknowledged.

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SUPERIOR COURT OF NEW JERSEY
MIDDLESEX COUNTY/OCEAN COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK et al., Plaintiffs vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al Defendants	Docket no. C-4122-73 Civil Action AFFIDAVIT OF ALAN MALLACH

MONMOUTH COUNTY :
: :ss:
NEW JERSEY :

ALAN MALLACH, of full age, being duly sworn according to law, deposes and says:

1. I am a housing and development consultant retained by the Urban League plaintiffs to consult on issues related to the above-mentioned litigation, including determination of fair share goals and compliance with those goals. In that context, I have dealt extensively with the issue of fair share "credits"; i.e., existing housing units in a municipality which can be applied to offset that municipality's fair share obligation.

2. I have, furthermore, been appointed as the court's expert in the matter of American Planned Communities v. Township of Freehold, which is a Mount Laurel case. In that capacity, I was submitted a report to the court in January 1985 making

recommendations with regard to the extent of fair share credits which could be applied against Freehold Township's fair share obligation, and, inter alia, discussing in detail the theoretical as well as practical considerations governing this question. In view of the comprehensive nature of that discussion, I will not provide a similar background discussion in this affidavit, but will refer to the Freehold report where background information appears to be relevant to a specific point made in the affidavit.

3. In my capacity as consultant to the Urban League plaintiffs, I have reviewed the post-trial memorandum submitted by counsel for the Township of Piscataway dated March 6, 1985, dealing with the subject of fair share credits, and purporting to rely in large part on positions taken and arguments made in the Freehold report. This memorandum claims (at 1) to "analyze Mr. Mallach's report and apply his conclusions to Piscataway". On the contrary, as I will explain in detail below, the memorandum utterly misrepresents the positions and arguments of the Freehold report, and either misunderstands, or distorts, both the clear language and the logic of the fair share housing allocation process. In the balance of this affidavit, I will comment on the specific contents and assertions of the memorandum, following the sequence in which those assertions appear in that document.

4. The memorandum argues (A, at 2) that "as Piscataway has insufficient vacant developable land to meet its fair share, the application of the 20% increment is inappropriate in its case". This is not correct. The 20% adjustment is an integral element in the fair share methodology, and represents a "real" housing need as

much as any of the other need categories in the formula. The argument in the memorandum appears to be grounded in the premise that the 20%, unlike indigenous need categories, present need categories, or prospective need categories, is extraneous to the "true" fair share, and thus can be lightly discarded.

5. Furthermore, while there is no dispute that, to the extent it can be demonstrated that Piscataway cannot accomodate its fair share (a number which includes the 20% adjustment), its fair share obligation should be reduced, there has been no definitive finding to this point as to the extent to which Piscataway can or cannot meet the fair share obligation generated by the consensus methodology. Thus, there is as of yet no established factual basis for any such adjustment, on any grounds.

6. Finally, with regard to this issue, should it be determined that Piscataway's fair share should be reduced, that reduction should be on the basis of objective evidence; in other words, a lower income housing goal should be established for the township by working upward on the basis of suitable sites and other realistic means of providing lower income units, not by eliminating a category of need from the fair share allocation. Thus, in the final analysis, this particular adjustment is not only inappropriate, but clearly academic.

7. As the memorandum notes (B, at 2), plaintiffs objected to any credit for dormitory housing at Rutgers University, largely on grounds that these were group quarters, and not housing in the meaning of either the Census of Housing or the fair share methodology. The argument made later in the memorandum (at 12) that the large number of such group quarters in Pisctaway should justify

a credit (while smaller numbers might not) is without merit, since the reasons for not crediting these accomodations go to the basic nature of the facilities provided. The memorandum errs in stating that plaintiffs agreed to a "credit" for all 348 graduate student family units; while acknowledging that these units might be considered fair share credits, plaintiffs noted that no evidence was submitted regarding the extent to which these units were indeed occupied by lower income households, so that no basis was offered to determine how many, if any, of the 348 units should indeed be considered fair share credits.

8. No objective basis was ever provided to prove the assertion (C, at 3) that "not less than 2,400 [garden apartments] are currently affordable by moderate income households. These affordable units are substantially occupied by lower income households". On the contrary, there is objective evidence, including data from the 1980 Census, which shows:

a. Of the so-called "affordable" garden apartments, roughly 2/3 are only affordable to households at the very ceiling of the moderate income range, and thus are of dubious value to the overwhelming majority of the lower income population;

b. Substantially less than half of the occupants of rental housing in Piscataway, based on 1980 Census data, were lower income households;

c. Of those lower income households occupying these units, the overwhelming majority were spending over 30% of their income for rent, thus establishing that these units were not "affordable" by a reasonable definition.

Applying the analysis used in the Freehold report, one concludes that at most 10 percent of the garden apartments in Piscataway are both affordable to, and occupied by, lower income households. Furthermore, the face that a rent levelling ordinance exists in

Piscataway (at 13) is of only limited relevance; the history of rent control in New Jersey municipalities makes clear that such ordinances come and go, and that rental housing, in any event, may be converted to condominium or cooperative ownership at any time. In the absence of market conditions likely to ensure continued lower income affordability (which conditions, almost without doubt, do not exist in Piscataway), there is no sound basis for any credits being provided for these units.

9. The argument that credit should be provided for 1,200 single family houses "affordable by low income households" is completely without merit; no evidence was provided that any of these units are (a) available for purchase at the present; (b) would be affordable, if they were on the market; or (c) would be purchased by lower income households, even if affordable. Indeed, common sense, as well as such data as is available, dictate precisely the opposite. Data from the New Jersey Division of Taxation for calendar year 1983 showed that a total of 8 single family units were sold that year in Piscataway at prices under $40,000, the upper limit of even theoretical lower income affordability. Since there were far more non-lower income households who could potentially afford those units than lower income households, it is unlikely that more than a handful of that small number were indeed purchased by lower income households. No evidence, however, to support an argument that <u>any</u> of these units were made available to lower income households was ever offered by the defendants.

10. The memorandum argues for an adjustment in present need based on the modification made by Judge Skillman in the <u>Ringwood</u>

decision, and states that "Mr. Mallach's report clearly suggests that this modification should be adopted by the Court" (at 4). This is a blatant misrepresentation of an explicit position taken in the Freehold report; while I acknowledge that the modification made by Judge Skillman is grounded in a rational basis, and is thus worthy of consideration by this court, I explicitly state (Freehold, at 22 and at 35) that no such adjustment should be made until or unless a full evaluation and comparison of the alternative methodologies has been made. I believe an objective reading of my report would make clear that the modification proposed by Piscataway is totally inconsistent with the position advocated therein.

11. The memorandum argues that the fact that the median income in Piscataway is 102% of the regional median "in and of itself....confirms Piscataway's ante-Mount Laurel commitment to the creation of a variety of housing types (at 5)." This is not so, in any true sense, and is clearly unsupported by any explicit statement in the Freehold report, or any inference drawn from the report. While the unusually high median income of Freehold Township tended to suggest that that municipality was not extraordinary in its commitment to affordable housing, nothing about Piscataway suggests the contrary. As discussed in the Freehold report (at 13-14), the median income level of a community is largely determined by historical patterns not only predating the Mount Laurel decision, but zoning itself. The use of median income ratios in this part of the memorandum is wholly inconsistent with the logic of the Freehold analysis.

12. Although perhaps not explicitly set forth, I believe that the thrust of the Freehold analysis is that adjustments for prior performance are clearly more appropriate in the context of settlement than where the matter is being adjudicated after extended and uncompromising litigation. Furthermore, if, as Piscataway claims, the township is physically unable to accomodate more than a modest part of their fair share obligation, the entire matter is likely to be academic. With regard to the substance of the township's claim (at 6-8), some points should be made:

a. While the percentage of rental housing in Piscataway is substantial, it is not unusually so; as shown in the table on the following page, the percentage of rental housing in four of the other nine townships in Middlesex County is comparable to or greater than that of Piscataway/1.

b. Nothwithstanding the percentage of rental units, the fact remains that all of these units were constructed not only prior to the Mount Laurel decision, but prior to 1970; from 1970 to the present, no new rental housing has been constructed in the Township/2.

c. The ordinance adopted subsequent to Mount Laurel I, was limited to offering a voluntary density bonus for production of lower income housing, which density bonus was substantially less generous than other ordinances enacted by other communities during the same period (see Inclusionary Housing Programs, at 114-115. No lower income housing was built as a result of this ordinance, an outcome that any objective analyst could easily have anticipated.

In conclusion, the evidence in support of adjustments for prior

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1/I have chosen to compare the percentage of rental housing in Piscataway with that of the other townships in Middlesex County, rather than with the other municipalities in Middlesex County so that the comparison would not be biased by the inclusion of the many older communities with large percentages of rental housing such as New Brunswick (68%), Highland Park (59%), Perth Amboy (56%), and the like.

2/Indeed, no multifamily housing at all has been built, with the exception of one development approved as a result of court order.

RENTAL HOUSING AS A PERCENTAGE OF OCCUPIED HOUSING STOCK IN MIDDLESEX COUNTY TOWNSHIPS

PLAINSBORO	84%
NORTH BRUNSWICK	42
OLD BRIDGE	36
PISCATAWAY	34
EDISON	33
WOODBRIDGE	23
CRANBURY	23
SOUTH BRUNSWICK	17
EAST BRUNSWICK	15
MONROE	7

performance, applying the criteria set forth in the Freehold report, while not entirely nonexistent, is highly equivocal, as is the evidence in support of the township's argument that it sought in good faith to comply with Mount Laurel I and Mount Laurel II.

13. The township further argues that, notwithstanding its having rebuffed every effort to settle this litigation, it is entitled to an adjustment to its fair share analysis for precisely what it has refused to entertain (at 8-9). This is clearly inappropriate, and not worthy of detailed comment. It should be noted, however, that the township's claim that "a settlement would have aborted Piscataway's contention that a municipality with insufficient vacant developable land should not be compelled to comply with a fair share number designed to accomodate municipalities with no land limitations...(at 9)" is in error; having participated in many of the meetings at which the subject was discussed, I can state on the basis of my own knowledge that all of plaintiffs' settlement proposals were grounded in the premise that Piscataway's fair share number for settlement purposes, in recog-

nition of limited land availability, would be substantially less than the the fair share number derived through the consensus methodology. Indeed, the manner in which the memorandum goes to great lengths to shift the onus for the absence of settlement to the plaintiffs (at 14-15) is irresponsible, and wildly at variance with the record in this matter. Whatever Piscataway's reasons for having rebuffed plaintiffs' settlement efforts may be, the arguments given in the memorandum, including the one cited above, do not hold water.

14. Furthermore, records filed with the court demonstrate that the Urban League has reached full or partial settlement of this litigation with six of the nine municipal defendants, including East Brunswick, North Brunswick, Old Bridge (with regard to fair share), Plainsboro, South Brunswick, and South Plainfield. The other two cases in which no settlement has been reached, it should be noted, are complicated by the presence of large numbers of builder plaintiffs and intervenors. In all of these settlements, the Urban League has consistently shown flexibility and responsiveness, in the interest of meshing the achievement of realistic lower income housing goals with the planning concerns of each municipality.

15. In conclusion, the memorandum adds little or nothing to arguments that the township has already made, in support of fair share credits or adjustments to their fair share obligation. Instead, the memorandum raises a host of irrelevant points, and irresponsibly misuses this author's Freehold report in a blatantly self-serving manner. In the final analysis, the only real issue

that must be confronted in resolving Piscataway's lower income housing obligation is that of the realistic physical capacity of the Township to accomodate such housing. Efforts such as this memorandum seek to redirect attention from that determination into unproductive and irrelevant blind alleys.

Alan Mallach

Sworn to before me this
7th day of April, 1985

Attorney at Law
State of New Jersey

AN ANALYSIS OF THE FREEHOLD TOWNSHIP MOUNT LAUREL SETTLEMENT PROPOSAL: THE PROBLEM OF FAIR SHARE CREDITS

Prepared pursuant to order of Hon. Eugene D. Serpentelli, J.S.C., in matter of American Planned Communities v. Township of Freehold (Docket No. L-028912-84 P.W.)

Alan Mallach
Roosevelt, New Jersey

January 1985

AN ANALYSIS OF THE FREEHOLD TOWNSHIP MOUNT LAUREL SETTLEMENT PROPOSAL: THE PROBLEM OF FAIR SHARE "CREDITS"

Prepared by Alan Mallach pursuant to order of Hon. Eugene D. Serpentelli in matter of American Planned Communities v. Township of Freehold et al (Docket No. L-028912-84 PW)

INTRODUCTION

The Township of Freehold, in a proposal to settle the above litigation, has submitted a plan to the court which proposes that it be given substantial credit, in the form of a reduction of its fair share obligation, for a number of existing housing and related facilities within the community, including garden apartments, a mobile home park, and a nursing care facility for indigent senior citizens. Specifically, from a total fair share obligation of 1465 units, determined under the AMG methodology, the Township proposes to subtract 744 units in the form of credit for various existing housing resources within the Township, so that the residual fair share obligation of the municipality, which provides the basis for settlement, becomes (1465 - 744) 721 units.

The immediate purpose of this report is to make a recommendation to the court with regard to the extent to which it is appropriate, within the standards set by the Mount Laurel II decision, for Freehold Township to receive credit as it proposes against its fair share obligation. That is, however, a more difficult question than it may appear. To begin, there is no established frame of reference in which to establish which credits can and which cannot be reasonably awarded. While, as we will discuss below, the Mount Laurel decision provides some guidance in developing such a framework, it provides no explicit direction; in order to arrive at an intellectually consistent approach to this problem, as well as one that will be consistent with the objective of producing genuine lower income housing opportunities, it is necessary to undertake a detailed analysis of the nature of the housing need, and the range of potential responses to that need. It is only through such an approach that it will be possible to answer the question posed by Freehold Township's submission in a manner that is both consistent with the Mount Laurel decision, and, as important, is capable of being replicated in other communities with a substantial degree of consistency.

There is a further issue, even more fundamental, which is the nature of different proposed adjustments to the municipal fair share housing allocation. //A "credit", in the literal sense, refers to a unit, provided in some fashion, and predating the present litigation, which can directly substitute for a unit to be built as a part of a Mount Laurel compliance program.// Clearly, a court may adjust the number of units to be included in the compliance program on the basis of other considerations as well. As has been widely publicized, the courts have been ready to adjust the fair share number in recognition of the benefits of a voluntary settlement. As will be discussed below, there may be room for other adjustments as well; indeed, there may be cases where common sense dictates that

such adjustments be made, and yet to use the "credits" approach may unreasonably strain the logic of the Mount Laurel holdings.

In view of these issues, the initial sections of this report do not deal, except perhaps by inference, with the Freehold Township settlement proposal, but rather with the general issues raised above. By discussing, and, it is hoped, resolving those general issues, it is anticipated that it will be possible to frame a sound and logical recommendation with regard to the Freehold Township proposal.

I. HOUSING NEEDS, HOUSING PRODUCTION, AND FAIR SHARE CREDITS

A unit which can count as a credit toward a community's fair share obligation is one which can legitimately substitute for a unit that would otherwise be provided through that community's Mount Laurel compliance program. In order to determine what units may potentially qualify for such substitution, it is necessary first to determine what the housing needs are toward which the compliance program is directed; and second, what forms of housing production can meet those needs.

A. Housing Need and Housing Production

It must be stressed that the need assessment that serves as the basis of the fair share housing allocation process is limited to certain categories of housing need, and is not inclusive of everything that can reasonably be categorized as a housing need of some sort. One area that has been deleted is the category of financial housing need; i.e., households spending excessive amounts of their income for shelter. For a variety of reasons, households spending excessive amounts for shelter, but living in otherwise acceptable housing conditions, were not included in the need base for fair share housing allocation/1; as a result, measures that deal with this problem, such as housing certificates under the Section 8 Existing Housing program, are not considered elements of a compliance program, or by extension, "credits" against a fair share obligation/2.

1/This category, generally referred to as "financial housing need" is a problematic one. Although the need is unquestionable, it can not unreasonably be argued that it is more fundamentally an income problem rather than a housing problem, and can therefore be more effectively addressed through income supplements, such as the Section 8 certificate program, or the proposed housing voucher program. It should also be noted that the number of lower income households in financial housing need is vast; in 1980, it is estimated that 83% of low income households, and 31% of moderate income households, for a total of over half a million households, were spending over 30% of their gross income for shelter.

2/This point was recognized by Judge Smith in his recent decision in the Mahwah case, in which he rejected a proposal by the Township that they be granted fair share credits for units in its program.

The housing needs addressed in the fair share obligation are twofold: (1) lower income households living (as of 1980) in substandard housing conditions; and (2) the net increment projected in lower income households between 1980 and 1990. A schematic representation of the components of housing need is shown in the table on the following page. It is not difficult, simply as a matter of logic, to define what must take place in order for the needs of each category of household to be met.

The needs of households living in substandard housing conditions are met by enabling them to live in sound housing fully meeting their housing needs. This can take place either by virtue of their moving into new housing affordable to them, moving into a sound existing unit, or through the rehabilitation of the unit that they presently occupy/3.

If either the first or third option takes place (new unit or rehabilitation) there is no question that a lower income housing unit has been provided, and that it counts toward a community's fair share obligation/4. The second option, however, raises some questions. Among the existing body of lower income households some live in substandard housing, and some live in sound units. If a household living in one of the substandard units moves into an existing sound unit, but no additional units are created affordable to lower income households, as long as the number of lower income households remains the same, there has been no net improvement in

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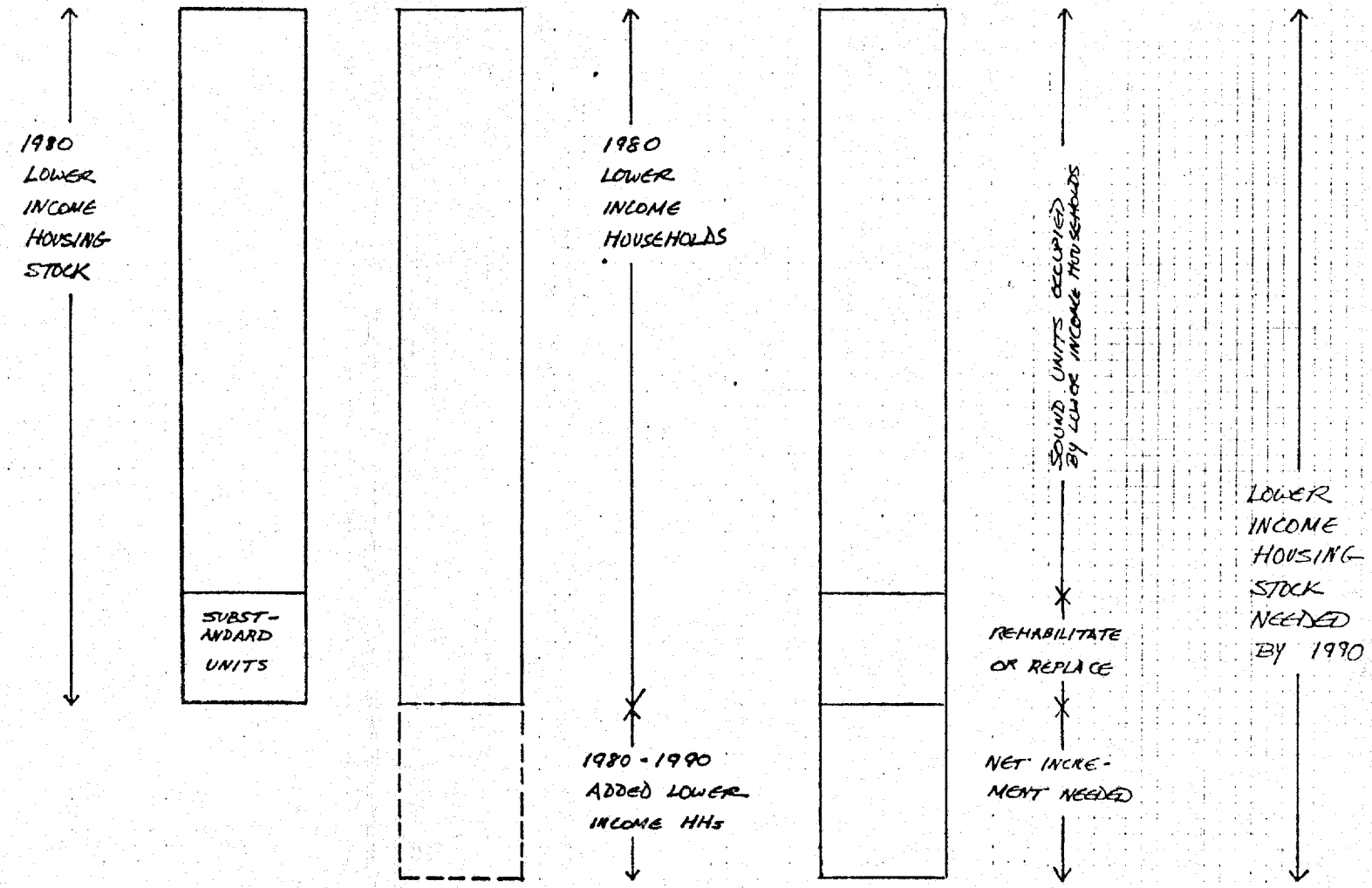
3/One question that remains is whether the household can be considered to have solved its housing problems if, by moving from substandard to sound housing, its housing costs increase to the extent that it is now paying an excessive share of income for its shelter costs (this is what happened to a large number of lower income households between 1970 and 1980). From a fair share standpoint, however, its problems have arguably been solved, since it is no longer in a defined fair share need category. This begs the question, of course, of whether the household still suffers from a genuine housing need. We would argue that, notwithstanding their exclusion from the fair share calculation, they do, and that any fair share compliance "solution" which assumes the contrary is on its face invalid. While this may appear to be inconsistent with the original decision to exclude financial need from the fair share totals, it should be stressed that that decision was made on policy grounds, and did not imply that no such need existed.

4/A residual question remains as to whether it is appropriate to consider rehabilitation as meeting fair share goals when there is no provision to ensure continued lower income occupancy, and local market conditions suggest that the buyers of the rehabilitated unit on subsequent resale are unlikely to be lower income households. In view of the fact that the rehabilitation is clearly meeting a defined present housing need, one must argue that it should be counted notwithstanding the resale problem, but sound public policy would strongly suggest that some form of continued occupancy (or at least affordability) controls be embodied in any such rehabilitation program.



SIMPLIFIED REPRESENTATION OF RELATIONSHIP BETWEEN LOWER INCOME HOUSING NEED (FAIR SHARE) AND NEED FOR PRODUCTION AND REHABILITATION OF LOWER INCOME HOUSING

the housing conditions of the lower income population. The sound unit into which the household moves has been made available by the displacement of another lower income household. That household may move into a substandard unit, may move into housing which it can only occupy by spending an excessive income share for shelter, or may leave the region. If it leaves the region, then the household taking its place (moving into the region) will only be able to find either (a) substandard housing, or (b) overly expensive housing. In either case, the overall picture remains the same.

There is one exception to this last statement; specifically, when the family moving into the sound unit moves into a unit that was not previously available to lower income households, but became available through the working of the filtering process. In this situation filtering has created a net increment in the lower income housing stock, therefore enabling the sequence of moves described above to be considered a net benefit to the lower income population. Although there is little doubt that such a process exists, as is discussed below, it is impossible to quantify with any reliability.

Thus, the only circumstances in which the fair share is clearly being met is where there is a net increment in the pool of sound housing available to the lower income population, either by new construction, by rehabilitation of a substandard unit currently occupied by a lower income household, or, at least in theory, through the filtering process. The same is even more clearly true with regard to meeting prospective housing needs; since the prospective housing need is by definition the net increment in lower income households, it can only be addressed by a net increment in housing units available to such households.

The point of net increment should be stressed. It is clear that many households who were lower income in 1980 will not be in 1990, and that at least some of them will vacate units which will then be occupied by new lower income households; i.e., prospective need households. That is, however, immaterial. Prospective need does not represent the number of newly formed lower income households; it is the total number of lower income households projected to exist in New Jersey in 1990 less those known to exist in 1980. If it were simply the number of "new" lower income households; i.e., all of those households existing in 1990 who did not exist in 1980, it would be a much larger number of households.

It is clear from observation of reality, however, that the principle of net increment does not simply translate into new construction on vacant land, and the rehabilitation of clearly substandard structures. Indeed, it is important to try to translate this general principle into some more specific illustrations, to show how it is reflected in how the housing market actually does or does not work for lower income households (remembering that the eventual objective of all of this is to provide a basis for assigning fair share "credits"). The Fair Share Methodology projects

prospective need, or the increase in lower income households from 1980 to 1990, at approximately 150,000 households. Since 1985 has arrived, it can be assumed that a substantial number of those households have formed already. Even if we assume that a substantial number of household formations have been prevented owing to lack of affordable housing, it is still likely that as many as 50,000 of the total number of households have already formed, and been independently housed, whether poorly or well.

This number, of course, is simply a rough estimate, presented here for purposes of illustration alone. Furthermore, since a substantial part of the lower income household increment grows out of the aging process/5, the formation of lower income households does not always trigger a like need for housing units.

That notwithstanding, however, it is clear that nothing even remotely like 50,000 units affordable to lower income households were newly built between 1980 and 1985, just as we know that new construction of units affordable to lower income households between 1970 and 1980 does not account for more than a fraction of lower income household increase during that period. Clearly, other factors are at work in the housing market. There are at least four separate elements affecting the housing of lower income households, over and above the construction of Mount Laurel units:

(1) Frustrated household formations clearly reduce the overall demand for affordable housing; e.g., young single individuals and couples continuing to live with their parents despite their desire, or need, for a unit of their own;

(2) Additional units affordable to lower income households, and occupied by them, are created within the existing housing inventory through informal means, most notably through conversion of single family houses; i.e., the creation of accessory apartments/6.

5/Specifically, much of the lower income household increment arises from a transformation process; a household which was not lower income as long as it contained an employed wage earner may become lower income when that earner retires; similarly, a retired couple may not be lower income, but the widowed survivor may become a lower income household by virtue of loss of pension rights, etc.

6/There is evidence that this mechanism represented a significant share of the national increment in housing units between 1974 and 1980; see Duane T. McGough, U.S. Department of Housing & Urban Development, "Additions to the Housing Supply by Means Other than New Construction" (1982). Programs to encourage creation of accessory apartments have been accepted, although reluctantly, by the courts in two Mount Laurel compliance packages, in Mahwah and in Morris Townships. While there is no question that such conversions can provide housing affordable to lower income households, in areas of strong demand they are likely to rent above lower income levels, and be occupied, as often as not, by non-lower income households. In addition, conversions (as a Mount Laurel remedy) raise difficult questions of tenant selection, screening and verification, and fair housing compliance.

(3) Substantial numbers of households, in order to be able to occupy a unit, spend substantially more than is generally considered reasonable for that unit, either in purchase price or rent. As noted earlier, this problem is not considered a component of housing need for fair share purposes.

(4) Filtering creates a net increment of units available to lower income households, thereby creating at least some net increment over and above the production of newly constructed units.

The existence of at least two of the above mechanisms; namely, filtering of existing units, and the creation of new housing within the existing stock, suggest that there is considerably more flexibility within a reasonable lower income housing market model than was initially suggested. Indeed, a preliminary analysis conducted by the author suggests that, between 1970 and 1980, between 140,000 and 200,000 additional housing units were created within the State of New Jersey as a result of informal means, most of which (if not all) were the result of manipulation of the existing housing stock.

Still, one should not exaggerate the extent to which these mechanisms work. While there is no question that there is some filtering taking place, it is likely that it is disproportionately concentrated in the inner cities of New Jersey, and in those inner suburbs which are in the process of becoming core cities. Filtering, almost by definition, is largely ineffective in suburban areas where market demand is strong, and the cost of the existing housing stock is being bid upward/7. The analysis referred to immediately above suggests that the same is true of informal additions to the housing stock; namely, that such additions take place disproportionately in the urban areas of the State/8. Thus, it is likely that one significant side effect of the filtering process is the increasing concentration of the poor in central cities, and the increasing disparity between rich and poor communities, two patterns typical of New Jersey which the courts had hoped to combat in the Mount Laurel decision.

7/One exception to the absence of filtering in suburban settings is the experience of garden apartment developments under stringent rent controls; in some such cases the rent levels have increased at a substantially lower rate than the increase in household incomes in the area, thus rendering the units progressively more and more affordable to lower income households.

8/Specifically, it is estimated that roughly 45% of the informal additions to the housng stock statewide took place in Essex and Hudson Counties, where such additions represented roughly 2/3 of the total increment in the housing stock.

B. The Legitimate Scope of Fair Share Credits

The extent to which certain types of housing opportunity can be considered "credits" for Mount Laurel compliance hinges significantly on the extent to which one can accept filtering as an element in meeting the housing needs of the lower income population. While it should be clear that, barring extraordinary evidence of the effectiveness of filtering in a particular community, filtering itself would not be given credit in a suburban setting, it nonetheless has a significant effect on other, more visible, manifestations of the housing market. The issue, therefore, is to distinguish between those types of credit which do not depend on filtering, and those which do. All of this is grounded, of course, in how one defines the concept of a "net increment" in housing available to the lower income population.

The most obvious legitimate credit is for clearly defined lower income housing constructed or rehabilitated within a community since 1980. Many suburban communities have seen in recent years the construction of low income senior citizen housing under either the Section 8 or the Section 202 subsidy program. Those units not only count as Mount Laurel credits generally, but as credits toward meeting the low income component of the overall lower income housing need/9. Rehabilitation under the Community Development Block Grant program is also widely carried out in New Jersey suburbs. While this program is rigorous in limiting its beneficiaries to the lower income population, much of the rehabilitation work that takes place under the program is relatively minor in nature, and does not truly represent the conversion of a substandard unit into a sound one. It is possible, however, and generally not difficult, to review program records and arrive at a well-grounded judgment as to how many of the "rehabilitated" units should should be given credit toward a municipality's fair share obligation.

This principle could possibly be extended to housing affordable to lower income households constructed after 1980, although not under a governmental subsidy program. If, for example, a rental project was constructed in which the rents of some of the units were affordable to moderate income households spending under 30% of their income for shelter, it might be possible to develop an analysis which would estimate what percentage of those units would indeed be occupied by lower income households. An argument could be made that a community would be entitled to fair share credit for that number of units. The legitimacy of such credits, however, would be enhanced by a showing that, by virtue of rent controls, market conditions, or other factors, there was a substantial like-

9/Under current HUD guidelines, the overwhelming majority of occupants of new Section 202 projects for the elderly must fit into the "very low income" category as defined by that agency, a standard which is the same as the low income category under Mount

lihood that those units (or that percentage of them determined to be occupied by lower income households) would continue to represent a lower income resource over an extended period.

One major reservation regarding credit for such a development would be the absence of controls ensuring continued lower income occupancy, over the "extended period" called for in the Mount Laurel decision. This problem could perhaps be remedied through the imposition of rent controls by the municipality, or by a finding that the (moderate income) rent levels were indeed consistent with market rents. Such a finding would be unlikely, but not completely inconceivable/10.

A variation on the above, still limiting the discussion to units created after 1980, which may be slightly more plausible, would be the establishment of a new mobile home park of a modest nature after 1980. Depending on the price at which the owner sold the units, and given that market conditions tend in most parts of New Jersey to limit pad rentals to the vicinity of $200 to $300 per month, it is not inconceivable that some percentage of the buyers moving into the park would be moderate income households. A question would arise, however, as to how to treat the typical buyer in a modest mobile home park for fair share purposes; i.e., a lower income senior citizen household with enough assets to purchase their unit entirely or largely on a cash basis/11..

The award of credits to the various types of housing described above, although raising a variety of technical question, can be justified whether or not one accepts that filtering, and other informal means of producing affordable housing, make a significant contribution to meeting lower income housing needs. In contrast, any award of credits for units constructed prior to 1980 must be grounded in the premise that filtering does contribute

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10/From a practical standpoint, the issue of credit for this type of development is unlikely to arise often, if at all, since what little rental housing that has been built since 1980 in suburban New Jersey generally rents at levels well above what is affordable to a household even at the ceiling of the moderate income range.

11/There is no question that households of this sort are included within the prospective need totals, since there is nothing in the methodology by which prospective need is determined which would screen out households with substantial assets. This would suggest, therefore, either (1) developments such as the above can legitimately be given credit for Mount Laurel purposes; or (2) some adjustment should be made (if technically feasible) to the prospective need figures to reflect households who, notwithstanding their technically lower income status, have assets which enable them to complete effectively for housing in the marketplace. Although it is both feasible and appropriate, in selecting tenants or buyers for units in Mount Laurel developments, to screen out households with substantial assets, it is realistically not possible to do so with regard to the overall housing need totals.

significantly to meeting those housing needs. Only if filtering exists, and is a significant factor, can one assume that a unit becoming available in a pre-1980 housing project is part of a process resulting in a net increment to the lower income housing stock. Furthermore, to the extent that one makes that assumption, it can only be made with regard to units that are not only affordable to the lower income household, but occupied by such a household, and occupied by that household without requiring that that household spend an excessive percentage of its income in order to live there.

The simple existence of a potentially affordable unit, therefore, is not of great significance. It must be demonstrated that the unit, at a minimum:

(1) Becomes available during the fair share period;

(2) Is occupied, when it becomes available by a lower income household, who is spending no more than an appropriate share of its income to live in that unit; and

(3) Exists within a market in which additional units affordable to lower income households are being simultaneously made available through informal increments to the housing stock after 1980.

It is possible, as will be discussed below, to estimate the first two factors with relative accuracy in many cases. The third, however, will inevitably require the exercise of considerable judgement. In that regard, it appears logical (operating within this premise) to look more favorably on credit for turnover in subsidized housing than affordable market housing, particularly housing with direct subsidies, such as Section 8 or Public Housing. Among the reasons in support of this position are (1) it is known, rather than just assumed, on the basis of some at least partially speculative analysis, that the households moving into available units will be lower income units, spending no more than a reasonable share of income for shelter; and (2) it is also known that the units will continue to be both affordable to and occupied by a lower income household over an extended period, a consideration, as noted earlier, given explicit attention in the Mount Laurel decision.

This latter problem raises a serious question about the subject of credit for pre-1980 private market affordable housing in general. Assuming that it satisfies the criteria set forth above, but contains no means to ensure continued lower income affordability or occupancy, it is an inherently unstable solution to lower income housing needs. It would indeed logically follow that, if a community is given credit for such units at one point, and the units are subsequently shown to have become no longer affordable to lower income households, the community should then be given a

debit; i.e., their fair share obligation would be increased by the number of previously credited units lost. This is not being proposed here as a practical approach; it is mentioned, rather, to point out the problem inherent in this type of "credit". Thus, it becomes clear that the more one moves away from, on the one hand, subsidized, or at least price-controlled housing; and on the other, the period beginning with 1980, the more tenuous the basis for fair share credits becomes.

There is one further area that is proposed for consideration in a number of cases which is even more tenuous; namely, credit for accomodating populations in group quarters. The need assessment at the core of the fair share process is, of course, limited to households; i.e., units of one or more people living independently as a noncommercial, noninstitutional, entity. While the great majority of the population lives in households, a substantial although much smaller part live in group quarters, also referred to as the institutional population. This includes the population of college dormitories, military barracks, nursing homes, mental institutions, and the like.

Although they are a part of the population, there are good reasons for excluding the institutional population from the fair share calculation, as was done in the Warren methodology. They are, for the most part, dependent for a substantial part of their survival, not only their shelter, on others, in most cases some form of public entity. Furthermore, their accomodations are not provided (as a general rule) through a marketplace process, but through the intervention of public or private nonprofit entities. Particularly to the extent that they are public facilities, It is likely that the provision of such institutional facilities as indicated above has not been significantly affected by municipal exclusionary zoning or other land use practices, which is the issue at the core of the Mount Laurel decision, which in turn is the starting point of this entire discussion/12. The fundamental inconsistency between the notion of credits in this area and the essence of the fair share obligation becomes apparent if one bears in mind the underlying principle behind the granting of credits; namely, whether the unit in question can readily be substituted for a unit in the community's Mount Laurel compliance package.

The foregoing discussion, limited to "credits" in the strict sense the term is used here, has suggested the legitimate scope of that concept, as well as some of the problems or inconsistencies which arise when the issue is evaluated in a systematic manner. As

12/This is not to suggest that there have not been at times zoning barriers created against certain institutional facilities, such as group homes for developmentally disabled or other individuals. It should be noted, however, that (1) these tend to be the exception, rather than the rule, among institutional facilities; and (2) when these barriers arise, the Legislature has been far more forthright in accomodation than has been the case with regard to the more fundamental patterns of exclusionary zoning.

was indicated at the beginning of this report, however, it is our position that the scope of potentially reasonable adjustments to a community's fair share allocation may well be substantially greater than that of credits against the same fair share. It is appropriate now to discuss this broader issue, before turning to the specific facts presented by Freehold Township.

II. ADJUSTMENTS TO FAIR SHARE OTHER THAN CREDITS

Two areas of potential adjustment exist that should be adressed in this section; first, the concept of adjustment for past non-exclusionary performance by a community, as distinguished from "credits" for specific units which are affordable to lower income households today; and second, the issue of adjustments to fair share allocations as a part of a voluntary settlement. As the discussion below will demonstrate, it is not difficult to establish a logical basis for such adjustments, as well as for some variation between communities with regard to each. It is more difficult, however, to quantify these adjustments for purposes of establishing a municipality's final fair share obligation.

A. Adjustments for Prior Performance

It is apparent that many municipalities which argue that they should receive "credits" for specific units against their fair share obligation are inadvertently confounding two separate issues: first, whether there are specific existing units in the community which can legitimately be substituted for units in their compliance program; and second, whether they are entitled to recognition for relatively open land use practices in the past, whether or not those practices resulted in units that are directly substitutable for forthcoming Mount Laurel units.

A sense of fairness suggests that there is merit to the idea that a community which has permitted a wide variety and type of housing in the past, prior to the Mount Laurel decision and its strict standards, receive some recognition for that history. Although such a community may not have provided directly for the poor to any great extent, by providing housing for middle class and working class populations, it has clearly better responded to regional housing needs than those who have been consistently exclusionary, and have little or no housing other than expensive single family homes. Furthermore, given the relative lack of specificity about remedy in Mount Laurel I, and, indeed, the endorsement of the (admittedly nebulous) principle of "least cost housing" in Madison, a community can reasonably argue that by

providing relatively open zoning, they met the mandates of those earlier decision, whether or not their zoning resulted in any truly lower income housing units, then or now.

While the AMG methodology makes a gesture at recognizing past performance, it does so indirectly, in ways that appear to have little effect on the fair share determination. The methodology includes two elements which can be construed as recognizing past performance:

> (1) By incorporating an adjustment for wealth, in the form of the ratio between the municipal median household income and that of the region, it increases the fair share of those communities with a wealthier population than the region as a whole, and decreases it for the less affluent communities. It can be argued that a community's affluence is at least in part a function of the extent to which it has been exclusionary in its land use practices.
>
> (2) Since indigenous need is a component of the fair share, communities which have acted to meet local housing needs will have a lower indigenous need total, and therefore a lower overall fair share, than if they had done nothing.

While both of these considerations are legitimate, they are far more strongly determined by the historical character of the community, largely set in place decades before the term "exclusionary zoning" was coined than by explicit zoning practices, particularly during the past decade/13. The number of substandard housing units in a community (the measure of indigenous need) is largely determined by the type of housing that was built in the community prior to World War II, in some cases prior to the twentieth century. Although, typically, the communities with the greatest amount of such housing will have made the greatest (although in all cases woefully inadequate) efforts to deal with the problem, they are still likely to have substantially more substandard housing than communities which were fortunate enough to be born wealthy. Although they would have had a still larger indigenous need, as noted earlier, if they had done nothing, they still have a bigger number than their neighbors. Historical settlement patterns largely

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13/Indeed, a notable irony present in this entire subject is that many of the communities seeking credit, or at least some recognition, for previously provided affordable housing are communities in which that housing was largely built during the 1960's or earlier. Many of these communities, after a substantial number of multifamily units had been built, then revised their land use ordinances to prohibit any more such development, and in some cases, to become blatantly exclusionary. Many of these communities, notwithstanding their earlier history (or perhaps because of it) were consistently hostile to any form of inexpensive or multifamily housing development during the years following the Mount Laurel decision.

determine a community's household income level as well. As is well known in the real estate world, communities develop from their earliest years a "character" which substantially dictates the type of housing built in the community, and the type of people who move there. While exclusionary zoning may be able to influence that character, its effect is likely to be modest. If a community of a working class character zones large tracts for large single family houses on two acre lots, it is less likely to see expensive housing built than to see the land sit vacant. Indeed, some of the most blatant efforts at exclusionary zoning have come in communities of generally modest socioeconomic character, who have seen it as a way of getting a higher class of development. It rarely if ever works.

In short, both the method of calculating indigenous need, and the use of the median income adjustment, provide at most a modest recognition of a community's past performance. If past performance is to be given serious consideration, that must be done in some way over and above the adjustments now found in the AMG methodology.

We would argue that past performance, appropriately defined, is worth such serious consideration. To begin, it should be clear that the fair share numbers themselves, as generated by the AMG or any similar methodology, represent what can best be characterized as an idealized goal for the housing of the lower income population. By adopting the premise that the fair share allocation process should deal with the entirety of both present and prospective lower income housing needs, the methodology generates numbers that are substantially larger than the realistic prospects for either construction of new units or substantial rehabilitation of substandard housing. It provides, therefore, substantial scope for adjustments (over and above "credits") to individual municipalities' fair share numbers without materially affecting the number of new or substantially rehabilitated units likely to be provided, either in the municipality or in the region/14.

It should be noted, perhaps parenthetically, that if the fair share allocation methodology were modified, to reduce from the total amount to be allocated a number which reflected projected gains through filtering or other informal means, the opportunity to provide adjustments, and to "reward" communities, either for past performance or for voluntary settlements (discussed below), would be lost. Under such a modified methodology, any such adjustments would materially reduce the number of units that would become available to the lower income population, not only in the munici-

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14/It is possible, by providing a substantial adjustment to the fair share allocation of a particular community in which market demand was exceptionally high, the adjustment could result in a reduction in the number of lower income units that might actually be built in that community. Since, in all likelihood, the total called for in the cumulative total of fair share allocations within the region will still be well in excess of realistic production rehabilitation (looking at the region as a whole), any shortfall in one community will in all probability be made up elsewhere in the region.

pality, but in the region as a whole. Such an outcome would clearly fly in the face of meaningful compliance with the mandate set forth by the Supreme Court in the Mount Laurel II decision.

With regard to adjustments to fair share for past performance, accepting the above premise with regard to the fair share allocation process, at least three different factors should be evaluated in an effort to establish both whether an adjustment should be considered at all, and if so, to what extent:

(1) The extent to which the past performance has created units within the community which can be shown to be available at present to lower income households, or will become available during the fair share period under consideration.

(2) The extent to which the past performance was a conscious or deliberate response by the community to the constitutional mandate set forth in Mount Laurel in 1975 and in Madison in 1977/15.

(3) The extent to which the past performance for which an adjustment was sought was indeed extraordinary; as will be shown below, many, even most, suburban municipalities, have approved at least some multifamily housing.

Furthermore, since by its nature the adjustment for past performance is meant to require a lower threshold of compliance than a fair share "credit", the magnitude of the adjustment (for a given number of units) should be less than if the same number of units were able to meet the standard required for them to be treated as fair share credits.

A final consideration is that of the consistency between the past performance claimed and the character of the community, both with regard to its demographic features and the overall nature of its housing stock. A community which has, overall, a substantial percentage of rental housing, for example, and a median income near or below the state or regional median, arguably should be able to seek and obtain adjustments on the basis of a more modest standard of proof than one whose character is overwhelmingly affluent and single family oriented. This argument is based on the premise that, if the community's "openness" has indeed been consistent and substantial, it should be reflected in the overall character of the community. If it is not, it is likely that the "openness" being argued as a basis for an adjustment to the fair share is more of an exception to the community's historic land use practices, rather than a example of a consistent approach.

15/It could be argued that the opposite should be true as well; i.e., that a community which became significantly more exclusionary during the 1970's should be less entitled to credits or adjustments for otherwise acceptable units. We do not see matters in that light. Mount Laurel is not meant to be punitive, and should not be considered as such.

B. Adjustments for Voluntary Settlement

The second area of adjustment under consideration is that provided in the context of a voluntary settlement of Mount Laurel litigation initiated against a community. There are strong public policy arguments in support of offering incentives for settlement; a settlement substantially reduces the amount of time between the initiation of litigation and the construction of lower income housing units; it substantially reduces the amount that both plaintiff and defendant must spend in litigation costs, expenditures which would be far better spent in facilitiating the development of lower income housing. Finally, a settlement makes the municipality a partner in the provision of lower income housing, rather than an antagonist. This may well be the single most important reason for encouraging settlements of Mount Laurel disputes.

In view of the strong public interest arguments in favor of settlement, it logically follows that incentives can reasonably be offered, most particularly in the form of a reduction in the number of lower income units encompassed in the community's fair share. Since it can reasonably be argued that a settlement increases the probability of the municipality's obligation actually being built, that increase more than justifies a trade-off in the form of a lower number, particularly in view of the practical limitations on achivement of fair share goals discussed earlier. The appropriateness of adjusting a municipality's fair share obligation in the interest of obtaining voluntary compliance with Mount Laurel has recently been stated by this court in its decision in Field et al. v. Franklin Township et al. decided January 3, 1985 (at 9).

The figure of 20 percent; i.e., a reduction of the fair share by 20 percent from the number generated by the AMG methodology, has been widely discussed, and applied in a number of cases. Although there is no scientific basis for that particular percentage, it appears reasonable/16. Specifically, it is large enough so that it does represent a meaningful incentive, while being small enough so that it is unlikely to result, at least at the regional level, in any actual loss of lower income housing production. This last point is predicated on the assumption that the sum of municipal fair share allocations represents a number substantially larger than the total amount of new production (and substantial rehabilitation) of lower income housing that one can realistically anticipate being constructed.

Two issues have been raised with regard to this approach. First, whether there should be a cut-off point for the adjustment;

16/It has been suggested that the 20 percent adjustment appropriately represents the deletion of the 20 percent upward adjustment in the fair share allocation made in the AMG methodology. Since there were reasons for that upward adjustment to be made, which are not significantly effected by whether a community does or does not settle a Mount Laurel case, there is no rational basis to see its deletion as a sound "trade-off" for settlement.

i.e., whether a community forfeits its opportunity to get this adjustment if it fails to settle by some predetermined point in the litigation process, such as the beginning of trial, or some other point; and second, whether there should be different levels of adjustment permitted, depending on the point at which voluntary compliance began. The first area can be dealt with quickly. If the logic of offering incentives for settlement is as suggested above, the incentives should be available for a settlement reached at any point up to the issuance of an order finding non-compliance, setting the fair share, and establishing a timetable for the municipal ordinances to be brought into compliance with Mount Laurel. After all, it is clear that a difference of a few weeks or months does not significantly affect the benefits that are anticipated from a settlement.

The second issue is more complicated. There are, at a minimum, three different points at which voluntary compliance can begin:

> (1) A settlement which is negotiated only after an extended period of pre-trial preparation, or even after the beginning of trial (the distinction is not considered of great substantive weight);
>
> (2) A settlement where negotiations begin expeditiously after a suit has been filed, before any substantial pre-trial activity has taken place, and where a settlement is also reached expeditiously; and
>
> (3) A community has enacted a program of voluntary compliance with Mount Laurel, without any lawsuit having been filed, and seeks court approval in order to have a formal determination of its fair share obligation, and to obtain the six year period of repose offered in Mount Laurel II.

There are significant differences, in terms of the reasons offered for providing incentives for settlement, between these three alternatives. There are potentially significant differences in time between the alternatives, and (particularly with regard to the third) significant differences in the level of affirmative effort embodied in municipal policies. Thus, if we somewhat arbitrarily set the incentive for a settlement under alternative (1) at 20 percent, it could be increased as one moves toward alternative (3), perhaps reaching as much as 40 percent for a wholly voluntary compliance program/17. Having said that, however, it must be recog-

17/We would argue that both substantively, and in terms of its reflection of true municipal cooperation, the difference between alternative (3) and either (1) or (2) is substantially greater than the difference between alternatives (1) and (2). Given that nearly two years have passed since the Mount Laurel II decision, during which time the great majority of growth area townships have either complied, settled, or are in litigation, any community not yet in litigation which has not yet undertaken a program of voluntary (footnote continued at bottom of following page)

nized that such a gradient is by its nature highly arbitrary; despite extensive analysis and discussion, we have been unable to arrive at any clearly or even implicitly objective basis on which to construct such a gradient/18.

One final question remains; namely, the extent to which it is appropriate to make cumulative adjustments to fair share goals, for example, through the pyramiding of adjustments for voluntary compliance onto further adjustments for past performance, and so forth. The short answer is that adjustments should only be considered to the extent that they do not significantly impair the extent to which realistic lower income housing production, on the regional level, can take place.

It must be remembered that, under the AMG methodology, a substantial part of the total fair share goal is allocated to communities which will not be able to provide for construction of more than a minute fraction of their total obligation. These include both the small, relatively built-up, boroughs such as Princeton Borough, Highland Park, Metuchen, and the like. The list also includes many townships which still contain some vacant developable land, but nonetheless receive fair share allocations vastly beyond their capacity. This includes Piscataway, Edison, Woodbridge and many others. Even with the 20 percent upward adjustment that is incorporated into the methodology it is very likely that a large part of the fair share goal will simply be lost, by allocation to communities incapable of accomodating it. The units lost through adjustments to fair share goals in communities capable of accomodating larger numbers of units will represent a further deficit over and above that number.

The extent to which cumulative adjustments should be entertained, in the absence of a precise statistical basis for making such adjustments, should reflect the extent to which the adjustment will truly impair the production of real housing units, as contrasted with the elimination of what have been characterized as "phantom units"; i.e., units which exist solely as an element in fair share calculations, but are not realistically expected to be constructed, for any of a variety of reason. Thus, rather than suggest a mathematical cut-off here, this question will be left with the suggestion that its resolution vary on a case-by-case basis, in light of the facts of each individual case.

(footnote 17 continued) compliance is likely to be either strongly antagonistic to any program to meet lower income housing needs, or else extremely foolish.

18/The formulation of standards such as these must, somehow, balance the desire of the parties for clearly-stated ground rules with an effort to avoid reducing complex issues to the level of mathematical formulae; sometimes, however, there may be no sound alternative available.

Any limitation on adjustments, however, would not apply to fair share credits, which would, as discussed earlier, be awarded only for those units which can clearly be shown to be substitutable for units that would be provided through the compliance process. Since any unit for which credit is awarded can, therefore, be considered itself a Mount Laurel unit, there need not be any limit to the number of credits, as distinct from adjustments, that can be awarded on the basis of adequate substantiation.

III. APPLICATION OF FAIR SHARE ADJUSTMENT PRINCIPLES TO FREEHOLD TOWNSHIP

In the preceding sections, we have discussed, perhaps in excessive detail, the principles that should be applied in order to determine the extent to which a community may qualify for credits, or for adjustments, to its fair share housing obligation. This section, then, will seek to apply these principles to Freehold Township. Specifically, Freehold Township argues that their fair share allocation should be reduced on the basis of lower income housing units created, through a variety of means, in the past within the Township/19. Four types of accomodation are cited as being worthy of such credit, as follows:

(1) A county facility for the indigent aged;

(2) Private market rental apartment units;

(3) Condominium units created through conversion of existing rental units; and

(4) A mobile home park.

Each one of these facilities will be discussed in turn. Before discussing the specific facilities, however, two more general issues must be touched upon; first, the determination of Freehold Township's gross fair share, leaving aside for the moment questions of credit or adjustment; and second, some overview of the past performance issues discussed above, as they apply to the Township.

A. The Determination of Freehold Township's Fair Share Obligation

Any examination of adjustments or credits to a community's fair share obligation must begin with an examination of the way in which the obligation is initially determined. In the case of Free-

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19/ Throughout this report, whenever the terms "Freehold" or "the Township" are used, they will refer to Freehold Township.

hold Township, the municipality has proposed that their lower income housing obligation be determined according to the AMG methodology, with one proposed modification. Specifically, the Township proposes that the amount of the Township's Growth Area, for purposes of fair share calculation, be reduced by 1,602 acres from the amount encompassed within the State Development Guide Plan (SDGP) growth area.

In essence, the Township's argument is that an area in the southeastern part of the Township, which was included within the Growth Area boundaries by the SDGP, is significantly less suitable for development, by virtue of both soil characteristics as well as the absence of public sewer systems, than the balance of the Growth Area within Freehold. There are legitimate points made in the argument; we recommend, however, that it not be accepted, for a number of reasons:

(1) In essence, the Township is arguing for a shift in the SDGP Growth Area boundary, or, as given in the Mount Laurel II decision (at 240) "a ruling that varies the locus of the Mount Laurel obligation". As such, it would appear that such a ruling, just as would be the case where arguments have been made that a community's Growth Area should be expanded, must meet a higher test than simply being reasonable.

Without wanting to presume to argue legal issues, it appears that the courts have, up to now, been extremely reluctant to modify the lines drawn by the SDGP/20. To our knowledge, no challenge by a developer to the SDGP Growth Area delineations has been successful, notwithstanding some eminently reasonable arguments put forward in such challenges. There is nothing so compelling about the arguments brought forward by the Township to suggest that this would be an exception.

(2) While the submission by the Township documents the unsuitability of the area for development with septic systems, it is generally acknowledged that higher density development, such as that which would incorporate lower income housing, must be developed with public sewer systems. A review of the soil types characteristic of the area proposed for exclusion from the Growth Area (Freehold Township submission, p.28) indicates that many of those soils are considered suitable for development, although they may not be considered suitable for development without public sewer. There is no reason to assume that public sewer cannot

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20/It is conceivable that that could change in 1985, in view of the more permissive language used by the Supreme Court regarding cases arising after January 1, 1985 (at 240). Not only is the 1985 [illegible] not particularly germane to the issue at hand, but it would be highly presumptuous to speculate in advance on its specific application to a proposed settlement.

be made available to that area, if it is determined that it is appropriate for development. Thus, without suggesting that this area necessarily should be developed, there does not appear to be a basis to conclude that it is so inappropriate for development as to be excluded entirely from consideration.

(3) Even if one assumes that the technical basis for the adjustment is compelling (which it is not), a major methodological problem remains. There may be thousands of acres in other municipalities, also included within the SDGP Growth Area, meeting the same or even more stringent standards for exclusion from the Growth Area. To delete one such area, in Freehold Township, without simultaneously adjusting the regional total of land within the Growth Area, is clearly unreasonable/21. It is impossible to determine what Freehold's Growth Area percentage would be if the adjustment they are proposing were to be made in every similarly situated community within the region.

In conclusion, then, it is our recommendation that the (unadjusted) fair share allocation for Freehold Township be recomputed and established on the basis of the AMG methodology without the modification proposed by the Township. We have recalculated the fair share allocation by restoring the 1602 acres to Freehold's growth area total. Freehold's Growth Area increases from 3.7042% to 4.0138% of the total of its Present Need Region, and from 1.6899% to 1.8315% of its Prospective Need region. The revised fair share allocation is shown in the table on the following page.

A further fair share adjustment is discussed in the Appendix to the Freehold Township Submission; namely, the modification to the method of determining present and indigenous need advocated by personnel at the Rutgers Center for Urban Policy Research, and adopted by Judge Skillman in the Ringwood decision. This modification, in large part, arises from a reduction in the percentage of all substandard housing which is held to be occupied by lower income households. Specifically, there appears to be some basis to challenge the assumption that 82% of the substandard and overcrowded units identified are indeed occupied by lower income households; as noted in the Freehold submission, the number may well be in the area of 60%.

21/It has been argued in the past that there is at least one set of circumstances where a Growth Area adjustment can be made even though it is not possible similarly to adjust Growth Areas throughout the region; specifically, where the proposed Growth Area adjustment arises as a result of development approved by the municipality outside the Growth Area. Since the adjustment flows from the policies and practices of the municipality, such an adjustment may be justifiable even without an overall regional adjustment. In the case of Freehold Township, the proposed adjustment arises from the existence of natural features independent of any municipal action.

TABLE 1: REVISED FAIR SHARE HOUSING ALLOCATION FOR FREEHOLD TOWNSHIP

INDIGENOUS NEED	94
REALLOCATED PRESENT NEED	50
PROSPECTIVE NEED	1364
TOTAL FAIR SHARE HOUSING ALLOCATION	1508

SOURCE: Analysis by Alan Mallach, modifying information contained in Freehold Township Submission, pp. 18-23

A review of some of the relevant materials strongly suggests that it may well be appropriate to consider adjusting the AMG fair share methodology to reduce the formula percentage of lower income occupancy that is used to convert the total number of substandard units to the present need figure. This would be, however, an adjustment that would affect all municipalities, not only Freehold Township, since it would change the methodology generally, not only in its application to this one municipality. As such, any such adjustment in one case could be seen as setting a precedent which could then be applied in other circumstances. In view of its potential significance, it would be inappropriate to recommend here that such an adjustment be made.

B. An Overview of Freehold Township Characteristics

Although not directly affecting the specific number of units claimed as credits for fair share purposes, we have argued earlier that the general character of the community, with regard both to housing and demographic features, is a relevant factor in evaluating that claim. In other words, to the extent that a community has accomodated a larger share of lower income housing, or multifamily housing, than the regional average, or has a less affluent population than the regional average, such factors establish the context in which specific credits or adjustments can be considered.

Freehold Township, it must be acknowledged, does not demonstrate that it is different from what might be characterized as a typical affluent suburb in this regard. As determined for purposes of fair share calculation, the 1980 median household income in Freehold Township was 135% of the regional median, $27,878 compared to $20,637. Furthermore, in 1980, a substantially smaller percentage of Freehold's housing stock was either renter or multifamily than in the region as a whole; 82% of Freehold Township's housing was in single family owner-occupied stock/22. By contrast, 31% of

/22 It should be noted that the 82% figure represents only conventional single family units. Freehold's mobile homes are included in the remaining 18%.

the units in Monmouth County, and 38% of the units statewide, were renter occupied.

With regard to approval of multifamily housing units, again, there is no basis to distinguish Freehold from suburban communities generally. Contrary to some impressions, a substantial amount of multifamily housing has been approved in suburban New Jersey during the past decades. Table 2 on the following page lists municipalities of generally suburban character by the number of multifamily building permits issued between 1970 and 1979. The picture that emerges is at some variance with the image of suburbia as an area exclusively of single family homes, with only a handful of communities in which any multifamily housing at all has been permitted/23.

The picture in the table is complemented by a closer look at which years during this period saw the multifamily permits issued in Freehold. All of the roughly 500 permits were issued between 1970 and 1973; between 1974 and 1980, during which time the Supreme Court was establishing new rules for the conduct of local government in this area, no multifamily permits were issued in Freehold Township.

It should be made clear that we are not suggesting that Freehold Township acted in an irresponsible or improper manner. Indeed, it appears that during much of the period under question the Township was affected by a sewer moratorium. This information does indicate, however, that there is no apparent basis to suggest that Freehold Township was acting in a manner different from the typical suburban municipality throughout this period.

C. Freehold Township's Proposals for Fair Share Credit

As noted earlier, Freehold Township has cited four different areas of its housing stock as being appropriate for the granting of fair share credit. Each of these areas will be discussed in turn.

(1) The John L. Montgomery Home

The Montgomery Home is a "dormitory style" facility operated by Monmouth County for indigent and chronically ill individuals. As such it is clearly an institutional facility, such as a hospital, mental institution, or college dormitory. There is little question that its occupants are characterized for Census purposes as residents of group quarters, and not as members of

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23/This is not to suggest that all, or even much, of this housing was lower income housing, or even "least cost" housing. It will be noted that many of the most well known exclusionary communities, including Mount Laurel Township itself, will be found on the table.

TABLE 2: RANKING OF MUNICIPALITIES OF SUBURBAN CHARACTER BY NUMBER OF MULTIFAMILY BUILDING PERMITS ISSUED 1970-1979

MANCHESTER (O)	6236	EDGEWATER PARK (BER)	936
MT OLIVE (MOR)	3694	LAWRENCE (MER)	926
EDISON (MID)	3516	EWING (MER)	920
FORT LEE (BER)	3442	MEDFORD (BUR)	870
BRICK (O)	3260	EATONTOWN (MON)	857
MAPLE SHADE (BUR)	3194	CLEMENTON (CAM)	821
WOODBRIDGE (MID)	3098	MT. LAUREL (BUR)	806
GLOUCESTER (CAM)	2962	WINSLOW (CAM)	777
PLAINSBORO (MID)	2880	SOMERS POINT (A)	765
HAMILTON (MER)	2822	WEST ORANGE (ES)	733
CLIFFSIDE PARK (BER)	2469	PALMYRA (BUR)	709
VOORHEES (CAM)	2297	E. WINDSOR (MER)	704
LINDENWOLD (CAM)	2248	UNION (U)	687
W. DEPTFORD (GL)	2024	EDGEWATER (BER)	672
NO. BRUNSWICK (MID)	1844	PALISADES PARK (BER)	662
PINE HILL (CAM)	1746	WASHINGTON (GL)	644
OCEAN (MON)	1637	LOWER (CM)	614
HILLSBOROUGH (SOM)	1264	MONROE (GL)	568
MANALAPAN (MON)	1189	ABERDEEN (MON)	563
HAMILTON (A)	1132	BARNEGAT (O)	551
MANSFIELD (WAR)	1106	BURLINGTON TWP (BUR)	520
FRANKLIN (SOM)	1073	MONROE (MID)	517
DEPTFORD (GLO)	1051	SCOTCH PLAINS (U)	507
DOVER (O)	1042	FREEHOLD TWP (MON)	504
LODI (BER)	997		

SOURCE: New Jersey Department of Labor, New Jersey Residential Building Permits: Historical Summary 1970-1979

households. They do not, therefore, represent an element of lower income housing need for fair share purposes (for reasons discussed earlier), and are not an appropriate fair share credit/24.

This is not to suggest either that the Montgomery Home does not meet a legitimate, even important, social need, or that

24/The comment in the Submission (at 35) "If these persons did not live in the Home, they would have to be accomodated in housing units somewhere", is incorrect. It is unlikely in the extreme that any of the inhabitants of the Home would occupy housing units, as that term is generally used. They would, however, occupy institutional facilities elsewhere; indeed, under the Finley rule, private nursing homes are required to accept certain percentages of Medicaid patients, people essentially similar to those accomodated by the Montgomery Home.

FREEHOLD (25)

Freehold Township has not acted responsibly and decently in providing services to the Home, and approving expansion of the home, notwithstanding the fact that it receives no tax revenues from the facility. Both considerations, of course, would apply equally to a wide variety of socially desirable facilities; schools, hospitals, and the like. Freehold Township may well be entitled to some consideration for its socially responsible behavior, a question which is well beyond the scope of this analysis. The fair share context, by its nature, must narrow the scope of discussion to a defined pool of housing need, which does not encompass facilities such as this one.

(2) Rental Garden Apartment Units

This area poses far more serious issues than the preceding one. Leaving aside, for the moment, the "filtering" issues discussed earlier, it is still necessary to determine a number of elements:

a. The extent to which the garden apartment units are indeed occupied by lower income households;

b. The extent to which those lower income households are spending no more than 30 percent of gross income for shelter;

c. The rent levels, at the present time, on the basis of which a unit can be considered "affordable" to the lower income population.

The first two questions, in general terms, can be answered through the analysis of data provided in the 1980 Census of Housing. This data provides a breakdown for each community, for rental housing units, of the income distribution of the occupants and the percentage of income spent for shelter. While the income and expenditure ranges are not precisely on target with the Mount Laurel definitions, they can easily be adapted to that purpose. The income range from 0 to $9,999 closely parallels the "low income" range, and that from $10,000 to $14,999 the "moderate income" range, based on 1980 median income levels. While the breakpoint of 30% is not, regrettably, provided in the Census tabulation, it is possible to interpolate within the "25% to 35%" range in order to arrive at a reasonable estimate. The table on the following page presents an analysis of Census data with regard to Freehold Township.

The data in the table clearly that (1) most rental units in Freehold are occupied by non-lower income households; and (2) most lower income households living in Freehold rental units spend over 30% of their income for shelter. Only 126 out of 891 units, or 14.1%, are occupied by lower income households who do not spend more than 30% of their income for shelter. The significance of that statistic is that it provides a starting point to estimate the extent to which, of a given pool of "affordable" units in the [illegible] will actually need lower income households.

TABLE 3: DISTRIBUTION OF RENTER HOUSEHOLDS IN FREEHOLD TOWNSHIP BY INCOME AND PERCENTAGE OF INCOME SPENT FOR SHELTER

	LOW INCOME	MODERATE INCOME	OTHER	TOTAL
30% OR LESS	12	114	548	674
OVER 30%	148	61	8	217
TOTAL	160	175	556	891

SOURCE: 1980 Census of Housing, STF-3, Table XI, no. 30. Analysis by Alan Mallach (see discussion in narrative)

The next step is to estimate rents at which units can reasonably be considered affordable to lower income households. In this regard we recommend that a number of procedures be followed that differ in certain regards from those adopted in the Freehold Township submission (pages 37-38):

a. "Midyear" adjustments in the lower income ceilings as published by the U.S. Department of Housing and Urban Development are inappropriate/25;

b. It is important, as was done in the Lerman report which served as the basis for the AMG methodology, to correlate specific household sizes with dwelling unit sizes.

c. The affordability standard must be targetted at an income level some degree below the ceiling, in order to provide at least a minimal range of affordability within the lower income population.

d. Since heat/hot water are included, but electricity is not, within the rents charged, a minor deduction from gross rent must be made so that gross rent + electricity do not exceed 30 percent of gross income.

Following the Lerman report we have assumed the following relation-

25/The practice of making interim adjustments keyed to the precise month at which time the analysis was done, and, presumably subject to monthly updating during the course of litigation, is likely to generate innumerable potential inconsistencies and technical conflicts, between parties in litigation, among different cases progressing at different timetables, etc. This is particularly the case in view of the fact that such short-term updating is methodologically highly uncertain and subject to considerable disagreement between analysts (the methodology used in the Commission's [illegible] report is highly subject to [illegible] whether adjustments should be made to potential credits whenever rent levels in a development change.

ships between household and unit size:

0 bedroom	1 person
1 bedroom	2 person
2 bedroom	3 person
3 bedroom	5 person

The maximum rent levels considered realistically affordable to the lower income population, and their derivation, are set forth in the table immediately below. When these rents are compared with the rent levels cited for the two housing developments in Freehold (Chesterfield and Stonehurst), we find that only the Chesterfield units clearly fall within the affordability range. For purposes of this analysis, however, we have also decided to include the 1 bedroom units in Section I of Stonehurst, since these units rent for $450, while the ceiling "affordable" rent for the category in which they fall has been determined to be $446, a non-significant difference. The other units are either clearly not affordable to a lower income household, or so close to the absolute affordability ceiling (the rent level affordable only to a household at the ceiling of the income range) as to make the likelihood of their

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TABLE 4: DETERMINATION OF MAXIMUM AFFORDABLE RENT LEVELS FOR LOW MODERATE INCOME HOUSEHOLDS IN FREEHOLD TOWNSHIP

	STUDIO	1 BR	2 BR	3 BR
LOW INCOME				
MAXIMUM INCOME	$11050	$12650	$14200	$17050
X .30	3315	3795	4260	5115
X .90 (MAXIMUM ANNUAL SHELTER AMOUNT)	2894	3416	3834	4604
/12 (MAXIMUM MONTHLY SHELTER AMOUNT)	249	285	320	384
LESS ELECTRICITY	[10]	[10]	[15]	[20]
MAXIMUM AFFORDABLE RENT	239	275	305	364
MODERATE INCOME				
MAXIMUM INCOME	$17700	$20250	$22750	$26900
X .30	5310	6075	6825	8070
X .90 (MAXIMUM ANNUAL SHELTER AMOUNT)	4779	5468	6143	7263
/12 (MAXIMUM MONTHLY SHELTER AMOUNT)	398	456	512	605
LESS ELECTRICITY	[10]	[10]	[15]	[20]
MAXIMUM AFFORDABLE RENT	389	446	497	585

SOURCE: Maximum income figures from U.S. Department of Housing and Urban Development; analysis by Dean Dalkon

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adequately accommodating lower income households (without their paying an excessive amount for shelter) minimal.

Of the total of 690 rental units submitted by Freehold, therefore, 247 (171 in Chesterfield and 76 in Stonehurst) can be considered affordable to moderate income households. We have previously noted that, of all rental units in Freehold, only 14% house lower income households spending 30% or less for shelter. Since these 247 units rent for less than the average unit in the Township, it is at least arguable that a larger percentage would be likely to be satisfactorily housing lower income households. If we assume that that percentage is 20% rather than 14%, we find that this pool of units provides a realistic housing opportunity to (247 x .2) or 49 lower income households/26. Whether these should be considered credits, or adjustments, or neither, will be discussed below/27.

(3) Condominium Conversions

All but one section of the Stonehurst development has been converted to condominiums and all or most of the units sold. The majority of the units have been sold to investors, who rent the units back; as has been noted earlier, none of these rental units are considered lower income housing for purposes of this analysis.

It is possible to determine, in a manner similar to that used for rental housing, the maximum sales price of a condominium unit that would be affordable to a lower income household, still using the standard that such a unit must be affordable to a household earning 90% of the ceiling income for the appropriate income and household size category. The analysis was based on the following assumptions:

a. Units would be financed at 13% for 30 years, with a 10% down payment;

b. Property taxes were 2.40% of market value (this figure is from the Freehold Township Submission);

26/This is optimistic, since it appears on the basis of a comparison of Census data with that in the Submission that rents, on the whole, have risen substantially faster than incomes in Freehold Township since 1980; thus, the average level of lower income benefit obtained from the rental stock as a whole is likely to be less than 14% today.

27/It is unlikely, in a development of this nature, that this figure would have to be further modified for turnover. Since turnover in garden apartment developments is consistently in excess of 10% per year, the effect of turnover, therefore, is likely to result in at least as many units as there are in the pool becoming available over a four year period.

c. Condominium fees, after deduction of utilities included in the fee, will average $61/month for 1 and 2 bedroom units, and $71/month for 3 bedroom units/28.

Based on these assumptions, the following maximum affordable prices were established (all figures have been rounded to the nearest $500):

1 bedroom units	$30,500
2 bedroom units	35,000
3 bedroom units	41,000

Using these figures, and information on the actual prices of condominium sales in the development during the past 12 months provided by the Township, it was possible to determine that 50% of all sales (81 of 162) were within the affordability range established/29. A further analysis, based on information contained within the Freehold Township Submission, established that 178 of the condominium units have been sold to owner-occupants, with the balance to investors/30. Assuming that price distribution of the units sold to owner-occupants was the same as that for the total pool of units sold (in other words, that half of those were affordable to lower income households), it would then reasonably follow that (178 x .5) 89 condominium units were sold at prices which could have been afforded by a moderate income household.

It is clearly unlikely in the extreme that all of these units were purchased by lower income households spending no more than 28% for mortgage, taxes, and condominium fees. Notwithstanding the existence of condominiums on the market at moderately higher prices which might be attractive to middle income households, the number of lower income households potentially capable of buying these units, as a percentage of the total market, is very small. Furthermore, during most of the selling period (in 1981 and 1982) interest rates were such that affordability was much less than it is today,

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28/Heat and hot water are included in the condominium fees. Information on condominium fees was provided by Mr. Davison (communication of 12/18/84).

29/A substantial number of the 1 bedroom units were sold for $30,625; in view of the proximity of this number to the maximum established above, all such sales have been considered affordable.

30/Based on information in the submission, the breakdown of owner-occupants and investors in Stonehurst has been estimated as follows:

SECTION	UNITS	INVESTOR %	INVESTORS	OWNER-OCCUPANTS
2	85	67%	57	28
3	233	57	133	100
4	92	54	50	42
TOTAL	418		240	178

based on a 13% mortgage interest rate. If we assume, optimistically, that one third of these units were indeed bought by lower income households spending no more than 28% of income for appropriate housing costs, we find that the extent to which lower income housing needs were met through this part of the development was (89 x .33) 30 units.

While recognizing the above, one must still raise a question about the extent to which condominium conversions affect lower income affordability on a long term basis, and therefore, the extent to which even such affordable condominium sales as these can realistically be considered to contribute to lower income housing opportunity. While the initial sales price of the condominium unit may be affordable, these units, in the absence of price controls, are likely to appreciate out of the affordable range substantially faster than rental units. It is widely held, not without reason, that the process of condominium conversion, on balance, generally exacerbates the housing needs of lower income households. Notwithstanding some benefit to approximately 30 moderate income households, that benefit may be outweighed by the longer term negative effects of the con-version process on the lower income housing stock.

(4) Silvermead Mobile Home Park

The Silvermead mobile home park is an age restricted (one member must be 52+ years old) mobile home park, containing 203 pads for singlewide units and 142 pads for doublewide units, renting at various levels. Sales prices for singlewide units range from $11000 to $19000, and the doublewide units from $28000 to $42000.

In order to analyze the affordability of these units, it is necessary to reconstruct the carrying costs of these units, based on financing available to purchasers of mobile homes to be set on a rented pad, as distinct from those located within a subdivision (in which the unit owners also own the land under the unit). An estimate of currently available terms indicates that a rate of 15% for 15 years is reasonable, up to no more than 80% of the purchase price/31. Assuming an additional $40 per $10,000 value for insurance, we obtain the following annual carrying costs, based on unit price:

$11,000	$1522/year
15,500	2145/year
19,000	2630/year
28,000	3875/year
36,000	4982/year

31/Or 125% of the invoice price (the price at which the mobile home park owner buys the unit from the factory) whichever is less. Under most circumstances, where the owner markup is high, this factor will result in the maximum mortgage loan to substantially less than 80% of the actual purchase price.

TABLE 5: CARRYING COSTS FOR MOBILE HOME PARK UNITS

MONTH/ANNUAL PAD RENTAL	UNIT CARRYING COST $11000	$15500	$19000	TOTAL CARRYING COST $11000	$15500	$19000
SINGLE WIDE UNITS						
$219/2628	1522	2145	2630	4150	4773	5258
$235/2820	1522	2145	2630	4342	4965	5450
$242/2904	1522	2145	2630	4426	5049	5534
$258/3096	1522	2145	2630	4618	5241	5726
DOUBLE WIDE UNITS						
		$28000	$36000		$28000	$36000
$242/2904		3875	4982		6779	7886
$258/3096		3875	4982		6971	8078
$269/3228		3875	4982		7103	8210
$294/3528		3875	4982		7403	8510.

SOURCE: Analysis by Alan Mallach, based on sales prices and pad rentals as reported in the Freehold Township Submission

It should be noted that there are no formal resale or other controls governing this mobile home park which would ensure that the units which are affordable to lower income households today will remain so over time. Although, in the abstract, such controls would be desireable, in practice it is debatable whether they are really necessary. This mobile home park would appear to be an example of the type of development in which the price of the units in the marketplace is such that they are affordable to lower income households. Given the nature of the development and its apparent clientele, there is no reason to expect this to change substantially in the future. For that reason, they can be considered for purposes of fair share credit even in the absence of formal controls on resale.

The above discussion has evaluated each of the elements of the housing stock proposed by Freehold Township to be considered as credits toward meeting their fair share obligation. With regard to one facility, the Montgomery Home, we have concluded that it does not provide housing, in the sense that that term is used for fair share purposes. With regard to the others, in each case we have determined, acknowledging a substantial margin of error in our estimates, the approximate extent to which lower income households benefit from these housing developments. The term "benefit" refers to the extent the developments house lower income households without creating a need for them to spend more than a reasonable share of their income for shelter. This benefit has been estimated

as being made up of 49 rental units, 30 condominium units, and 43 mobile home units, for a total of 122 units.

It is doubtful, however, that most of even these units can be considered fair share "credits". Many of the units, including the rental units at Stonehurst and many of the condominiums, are already at the edge of affordability. In the absence of either rent controls or other limitations, there is at least a substantial possibility that they will not remain affordable to lower income households after their next turnover, and certainly not over the extended period called for by the Supreme Court.

Although beyond the scope of this analysis, it is worth pointing out that the municipality may want to consider efforts to stabilize lower income occupancy in some or all of these units. A number of municipalities around New Jersey are seriously contemplating programs under which garden apartment rental units would be "retrofitted" as lower income housing, through a combination of rent and occupancy controls. It may be possible to apply such a program in Freehold, and perhaps to extend it to some of the condominium units, which we have established are selling within a range affordable to lower income households. Such programs are a legitimate element within a Mount Laurel compliance scheme, and make it possible for a community to meet its fair share goals without the need to construct new units.

One final point should be made. The critical character of the foregoing discussion has not been meant, and must not be taken as, a criticism of Freehold Township, or of its housing and land use policies. Indeed, we feel that many aspects of the Township's position are worthy of praise. It is, rather, that we feel that effective compliance with Mount Laurel, and effective programs which will truly meet lower income housing needs, will only come about through a clear understanding of how those needs are met, and a rigorous distinction between lower income housing opportunities and other housing or non-housing ventures, however reasonable they may be in themselves. The entire thrust of the Mount Laurel II decision dictates that such distinctions be clearly made.

IV. RECOMMENDATIONS

Notwithstanding that, in our judgement, it would be inappropriate to award fair share "credits" on the basis of the Freehold Township submission, with one modest exception noted below, we consider it completely appropriate to adjust the Township's fair share obligation. Freehold Township has shown itself, not once but twice, to be willing to act responsively to meet its Mount Laurel obligations. The Township rezoned a substantial parcel of land, without litigation, for multifamily housing at reasonable densities, incorporating a lower income [illegible] as a result of negotiations with the Affordable Housing Corporation in 1983. When the litigation which is now proposed for

settlement was filed, by American Planned Communities, it is our understanding that Freehold moved expeditiously toward bringing about that settlement, and toward obtaining a judgement of compliance from the court.

It is clear, therefore, that Freehold has acted in a substantially more forthcoming manner than the great majority of New Jersey municipalities. While many (in all probability most) Mount Laurel cases have been settled or are in the process of being settled, most of the settlements have not come except after protracted legal proceedings; in some cases, the settlements have not occurred until after the trial itself had begun. If it is the case that a 20 percent adjustment to a community's fair share has come to be considered the "standard" adjustment for settlement, we believe that Freehold Township can legitimately argue for a more substantial adjustment.

Since there is no precise mathematical basis on which to ground such a larger adjustment, it must be, in the final analysis, based on a subjective standard of fairness. That standard must be applied as well to the "bottom line" number; in other words, is the ensuing fair share number, after adjustments, large enough so that (1) there is little risk that real, as distinct from phantom, units are being lost; and (2) the magnitude of the community's obligation appears reasonable by comparison with other at least roughly comparable communities. It is our belief that the number that results from the adjustments proposed in this report meets those criteria.

In light of the above consideration, our recommendations with regard to the fair share obligations of Freehold Township are as follows:

(1) Freehold Township's fair share allocation, prior to adjustments, is 1,508 low and moderate income housing units.

(2) Freehold Township should receive a 30 percent adjustment in its fair share allocation in reflection of its expeditious efforts, both with regard to Affordable Living Corporation and the current litigation, to move toward settlement and toward Mount Laurel compliance.

(3) Freehold Township should receive a further credit of 43 units for lower income units located in the Silvermead mobile home park, which units are (a) affordable to moderate income households; and (b) likely to remain affordable as a result of market constraints at least for the immediate future.

The resulting fair share obligation of Freehold Township can be

summarized as follows:

FAIR SHARE ALLOCATION (AMG)	1508
less settlement adjustment	[452]
less mobile home units credit	[43]
ADJUSTED FAIR SHARE OBLIGATION	1013

This recommendation, it should be noted in closing, is not meant to discourage the Township from pursuing its argument that the method of determining present need under the AMG methodology should be modified. Again, as noted earlier, it is our opinion that to recommend a reduction in Freehold Township's fair share for that reason, in the absence of an explicit instruction from the court to consider basic changes in the underlying fair share methodology, goes beyond the scope of the assignment, so that such a recommendation would clearly be inappropriate here.