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Analysis of ~~Freehold~~ Freehold Twp
ML Settlement Proposal: problem of
fair share credits.

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February 22, 1985

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Dear Phil:

Enclosed please find a copy of the Freehold Township report that you requested.

Yores truly,

A—_.

Alan Mallach

AM:ms /
enc. /
cc: B.Williams, Esq.

AN ANALYSIS OF THE FREEHOLD TOWNSHIP MOUNT LAUREL SETTLEMENT PROPOSAL: THE PROBLEM OF FAIR SHORE 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-02891S-84 P. W.)

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January 1965

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 Mill 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.

I/This category, generally referred to as "financial housing need" is a problematic one. Although the need is unquestionable, it *cart* 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 6 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 &3% 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 this 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 (£) the net increment projected in lower income households between 198® and 1990. ft 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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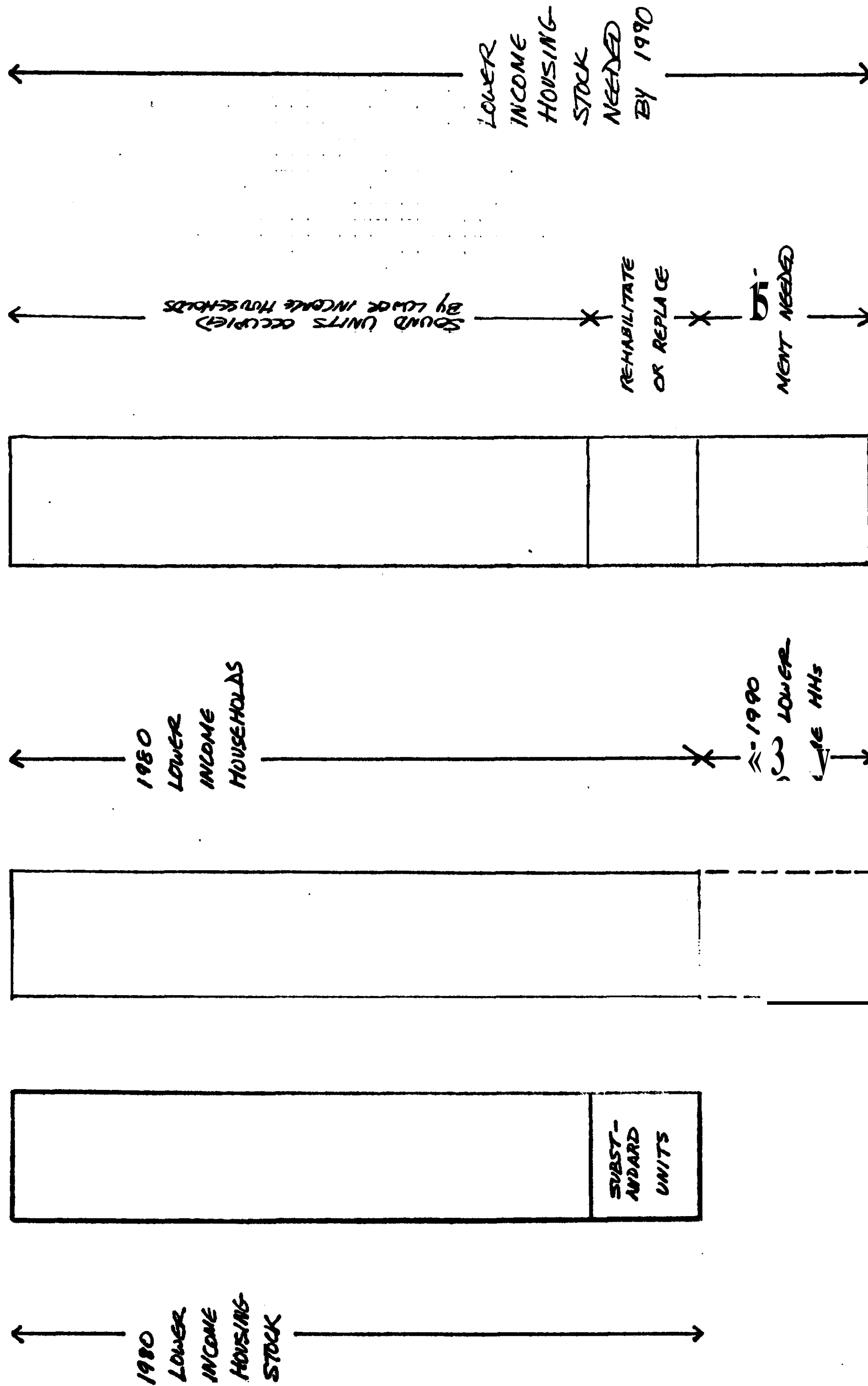
3/One question that remains is whether the household can be considered to have solved its housing problems if, by moving from substandard to sound housing, its housing costs increase to the extent that it is now paying an excessive share of income for its shelter costs (this is what happened to a large 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 antispeculation) controls be embodied in any such rehabilitation program.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1980 LOWER INCOME HOUSING STOCK

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 defining fair share "credits"). The consensus 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 I960 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 <u>Mount Laurel</u> 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;
>
> <£> 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 *BarrtBr* 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" (198£). Programs to encourage creation of accessory apartments have been accepted, although reluctantly, by the courts in two <u>Mount Laurel</u> 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 <u>Mount Laurel</u> 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.
a/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. Pill 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 i960. Many suburban communities have seen in recent years the construction of low income senior citizen housing under either the Section 6 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 Laurel.

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 <u>Mount Laurel</u> 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.

ft variation on the above, still limiting the discussion to units created after I960, 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 $£00 to $300 per month, it is not inconceivable that some percentage of the buyers moving into the park would be moderate income households. ft 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 <u>must</u> 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 <u>Mount Laurel</u> 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 <u>Mount Laurel</u> 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 minimums

(1) Becomes available during the fair share period;

(£) 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 (£) 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 *&re* 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 Mould 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 &re 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

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1£/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 (£) when these barriers arise, the Legislature has been far more forthright in addressing them 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 nova 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 ar& 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 flMG 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.

(£) 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 1968'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 first 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 flMB 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 flMG 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[9] 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 capabilities (looking at the region as a whole), any shortfall in one community will in all probability be made up elsewhere in the region.

pal ity, 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 extents

<1) The extent to which the past performance has created units within the community which *c&n* 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.

ft 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. ft 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 197(9'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 implemented to that end.

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 facilitating 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 £0 percent; i.e., a reduction of the fair share by £0 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 £0 percent adjustment appropriately represents the deletion of the £0 percent upward adjustment in the fair share allocation made in the ' AMB methodology. Since there were reasons for that upward adjustment to be made, which are not significantly affected 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 £0 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-

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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 (£). 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, Me 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 f1MG 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 £0 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.
1a/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 &n examination of the way in which the obligation is initially determined. In the case of Free-

19/Throughout this report, wherever 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 QMG 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 248) "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, 1965 (at 240). Not only is the 1985 exception not particularly germane to the issue at hand, but it would be highly presumptious to speculate in advance on its possible 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 considerat ion.

(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 SD6P 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.G138* 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 Rinnwood 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	5®
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; &2% 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 IB%,

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

Municipality	Permits	Municipality	Permits
MANCHESTER (0)	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 (0)	3260	EATONTOWN (MON)	857
MAPLE SHADE (BUR)	3194	CLEMENTON (CAM)	821
WOODBRIDGE (MID)	3098	MT. LAUREL (BUR)	806
GLOUCESTER (CAM)	2962	WINSLOW (CAM)	111
PLAINSBORO (MID)	2360	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 (0)	551
MANSFIELD (WAR)	1106	BURLINGTON TWP (BUR)	520
FRANKLIN (SOM)	1073	MONROE (MID)	517
DEPTFORD (GLO)	1051	SCOTCH PLAINS (U)	507
DOVER (0)	1042	FREEHOLD TWP (MON)	504
LODI (BER)	997		

SOURCE: New Jersey DeDartmerit of Labor, New Jersev Residential **Bui Idinn 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 Finlev rule, private **and proprietary nursing homes are required to accept certain percentages of indigent patients, people essentially similar to those accomodated by the Montgomery Home.**

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 I960 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 i960 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 community, they will actually meet lower income housing needs.

TABLE 3s 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 AMS 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-

£5/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 Submission is, to say the least, highly dubious). It raises the further question 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
£ 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 9446, 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 4s 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	C 10]	C 103	C 153	C 203
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	C 103	C 103	[153	C 203
MAXIMUM AFFORDABLE RENT	**388**	**446**	**497**	**585**

SOURCE: Maximum income figures from U.S. Department of Housing and Urban Development! analysis by Alan Mallach

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

Of the total of 690 rental units submitted by Freehold, therefore, £47 (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 £47 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 £0% rather than 14%, we find that this pool of units provides a realistic housing opportunity to (£47 x .£) or 49 lower income households/£6. Whether these should be considered credits, or adjustments, or neither, will be discussed below/£7.

(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 £.40% of market value (this figure is from the Freehold Township Submission);

£6/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.

£7/It is unlikely, in a development of this nature, that this figure would have to be further modified for turnover. Since turn-over 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 ten year period.

c. Condominium fees, after deduction of utilities included in the fee, will average $61/month for 1 and £ bed-room 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	6776	57	28
3	233	57	133	100
4	100	50	50	50
TOTAL	418		240	178

based on a 13% mortgage interest rate. If we assume, optimistically, that one third of these units Mere 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 (69 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 prices

$11,000	$1522/year
15,500	£145/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 many circumstances, where the owner markup is high, this factor will result in the maximum mortgage being substantially less than 80% of the actual purchase price.

Total annual costs which should not exceed £8% of income are obtained by combining the above costs with the annual pad rents, which are presented in the Submission. Rather than replicate that report for all pad rents, we have limited the analysis to those which apply to the majority of the units. This information is presented in the table on the following page. This table shows, for example, that if a unit selling for $15,50® (the average for a singlewide unit) is placed on a pad renting for $242/month, the annual carrying costs to the owner/tenant will be $5049.

The maximum annual costs sustainable by moderate income households for these units are as follows:

3 person household: $£2750 x .9 • £0475 x . 28 « $5733
£ person household: $20250 x .9 • 18225 x .28 » $5103

Thus, the example given above would be affordable either to a two or three person moderate income household. We have used two and three persons here (and in fact suggest that two be used exclusively), since the age restricted nature of the development strongly suggests that families with children will be rare, and the typical occupant will be a couple, or perhaps even a single person.

The analysis indicates (a) that a two person moderate income household could afford a singlewide unit, priced at or below the average price of $15,500, on pads renting for $245 per month or less; and (b) no moderate income household can afford any of the doublewide units offered in this mobile home park. It may be argued that this is perhaps misleading, inasmuch as many of the units will be bought by households on a cash basis. Still, it reasonably reflects the extent to which this mobile home park provides housing for lower income households.

Assuming that half of the singlewide units sold below the average price, and that units are evenly distributed by price among pads of varying rentals, it is possible to estimate the number of affordable units. There are 173 pads renting at $242 per month or less, so that the number of affordable units is (173 x .5) 87. If we assume, in turn, that half of these are occupied by lower income households, that number would be (87 x .5) 43. The actual number of lower income households occupying these units could be higher, since, as noted earlier, households with low incomes but with substantial assets from the sale of a home could afford to buy many of the more expensive mobile homes in the park, using their funds to reduce or eliminate the need for mortgage financing. Notwithstanding the ambiguous nature of their lower income status, such households are included in the calculation of prospective need, so that some consideration of them is not completely unreasonable/32.

32/ft further consideration is that many purchasers of mobile home units are vacating relatively modest homes or apartments that they previously occupied, and in most cases, owned. To the extent that filtering is taking place at all, this is logically one setting in which it is likely to be present.

TABLE 5: CARRYING COSTS FOR MOBILE HOME PARK UNITS

MONTH/ANNUAL	UNIT CARRYING COST			TOTAL CARRYING COST		
PAD RENTAL	$11000	*155130	$19000	$11000	$15500	$19000
SINGLE WIDE UNITS						
$£19/£6£8	15££	2145	2630	4150	4773	5258
$£35/£B£0	15££	2145	2630	4342	4965	5450
$£42/2904	15££	2145	2630	4426	5049	5534
$£58/3096	1522	2145	2630	4616	5241	5726
DOUBLE WIDE UNITS						
		$28000	$36000		$28000	$36000
$242/2904		3875	4982		6779	7886
$258/3096		3875	4982		6971	8078
$269/3££8		3875	498£		7103	8210
$£94/35£8		3875	498£		7403	8510

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

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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 12£ 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 setaside, as a result of negotiations with the Affordable Living Corporation in 1983. When the litigation which is now proposed for

settlement Mas 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 £0 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.
>
> (£) Freehold Township should receive a 3(9 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	C 4523
less mobile home units credit	C 433
ADJUSTED FAIR SHARE OBLIGATION	1013

This recommendation, it should be noted inclosing, 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.