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Morris County Fair Housing Council v Boonton Twp.

Trial Brief of the △, Borough of Mountain Lakes.

pgs 35

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
Docket No. L-6001-78 P.W.

MORRIS COUNTY FAIR HOUSING COUNCIL, ET AL,

Plaintiffs,

vs.

BOONTON TOWNSHIP, ET AL,

Defendants.

Civil Action

TRIAL BRIEF OF THE DEFENDANT BOROUGH OF MOUNTAIN LAKES

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INTRODUCTORY STATEMENT

It is quite easy for the witnesses and the Press and sometimes the parties to mistake this trial as cultural conflict between city and suburb, as a sociological problem of racial and class integration, as a political test of strength between competing authorities of the State, as an ecological defense of water quality against uncertain develop-- ment, and as an aesthetic last stand against urban sprawl. But this is a lawsuit. This Court's function is to test dispassionately plaintiff's evidence against the Court's interpretation of the Constitution and grant a remedy or dismiss the case.

Moreover, although it will likely be urged upon the Court that this is a housing suit, this is a zoning suit and must be for unlike the Education Clause, there is no Housing Clause in our State Constitution. Mount Laurel[1] was based upon an equal protection violation. The issue before this Court is whether any developing municipality has erected through zoning artificial barriers to the development of

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[1] Southern Burlington Cty. NAACP v. Township Mt. Laurel, 67 N.J. 151, app.dism. and cert, denied, 423 U.S. 803 (1975)' (herein Mount Laurel).

housing and as a result of these zoning barriers it is not realistically possible for the municipality to meet its fair share of the low and moderate income housing needs of the region.

Finally, this is not a lawsuit against Morris County. Before the Court are 25 individual lawsuits brought against 25 very different, very diverse municipalities. While the cases have been consolidated procedurally, in fact the circumstances relating to each municipality vary greatly from the predominantly agricultural western Washington Township, to the nearly undevelopable northern reaches of Rockaway Township, to the environmentally sensitive Great Swamp in western Chatham Township and to the completely developed Boroughs of Mountain Lakes and Madison. Each community's physical and topographical circumstances differ. Each community's history of development and potential for future development differ. Each municipality's access to sewers, roadways and other necessary elements of the infrastructure differ. Each municipality's housing market may be different. And as we think even the Advocate would concede, the substantive law applicable to each municipality is the same regardless of what defendants it has been joined with. Thus, this Court is obliged to address each of the municipalities separately.

PROCEDURAL HISTORY

This matter is to be tried generally pursuant to a Pretrial Order as amended entered by the Honorable-Robert M. Muir. Judge Muir held a conference with attorneys on October 16, 1980 and determined that the basic focus of that Pretrial Order, the creation of a Stipulation of Facts, was to be abandoned and what had been prepared to date was to be "inutile." He indicated that municipalities which had responded to the Public Advocate's Proposed Stipulations as of that date could move for summary judgment. Heretofore, Judge Muir would not entertain Motions for Summary Judgment. Pursuant to this oral determination, the Borough of Mountain Lakes is moving for Summary Judgment as to it on the ground that it is not a developing municipality.^

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2 The Court should note that Mountain Lakes, like most of the defendants in this action is acting pursuant to a very severe budget cap limitation which impairs its ability to bear the costs of this trial, and thus there is an important public purpose to be served if it can be dismissed prior to trial.

STATEMENT OF FACTS

1. History of Development

The Borough of Mountain Lakes is a small hilltop community and is a pleasant spot. It is blessed by a number of lakes which adorn the community. These factors-motivated a development company commencing in 1911 to acquire land in the area and develop it into an upper middle income community. The developer erected large and beautiful homes around the various lakes and marketed them at high prices. This planned development continued up until the Depression, with a brief interruption during World War I.

In the years after World War II, development resumed, but by 1960 the community's development was essentially complete. Since 1970, there has been less than one-tenth of one percent (.1%) of an increase in housing units in the Borough each year. The Borough's population, although it did increase somewhat from 1960 to 1970, has in fact declined 12% since 1970 and is approximately at its 1960 level. In short, in the past 20 years, there has been little or no development within this municipality.

Furthermore, this is not a balanced community. The Borough has only insignificant industrial uses, its commercial ratables are of a local service nature, and its office uses are limited. As a consequence, almost all of its citizens

must journey to other municipalities and indeed other counties to work. This inbalance is shown most dramatically in the statistic that although Mountain Lakes has by far the highest per capita income of any municipality in the County, its equalized assessed valuation per pupil is only slightly above the State average. See 1980 Legislative District Data Book (Rutgers College).

2. Existing Land Use

Mountain Lakes is 3.1 square miles or 1,984 acres in area. Over 162 acres of the Borough consist of lakes and the Borough owns 554 acres. There are a number of semi-public uses in the community, schools, churches, YMCA's, etc. (Master Plan, "Semi-Public Uses" p. 7), and a large proportion of Borough land area is devoted to roadways and railroads. In all, these uses account for almost 900 acres or 45% of the Borough.

Of what remains, 37 acres are commercially zoned and almost entirely developed. Approximately 140 acres have been zoned for Economic Development of which 20 acres have been developed for a semi-public use. Approximately 110 acres in the Economic Development zone remain undeveloped, the only significant undeveloped area in the Borough. This is a tract bounded by Intervale Road on the east, Route 46 on the south, the railroad tracks on the northwest, and a partially developed residential subdivision on the northeast.

The remainder of the Borough is zoned for residential uses. Of the estimated 450 acres, according to Tax Map records 88 acres are vacant. However, this statistic may be misleading. Many of the "vacant" tax map lots mayjiot in fact be building lots but land which is used as part of one residential setting. In any event, most of this acreage is interspersed among existing residences. Nevertheless, assuming that 88 acres are truly vacant and developable and combining it with all other privately held vacant lands in the Borough and comparing that resulting total against the gross acreage of the Borough, it would appear that only 10% of the total acreage of the Borough is vacant.

3. Zoning

The Borough itself was incorporated in 1924, well after the basic patterns of this planned community had been established. Shortly thereafter, a zoning ordinance was adopted, and then, as now, the two dominating land use classifi-- cations were one-half acre (22,500 square feet) and one-third acre (15,000 square feet) single-family residential zoning with the land zoned for one-third acre comprising approximately twice the land area zoned for one-half acre. These zoning minimums were generally less than the patterns which then existed in the community. Indeed, today in most sections of the community, actual lot sizes exceed the zoning minimums

(p. 6, Master Plan "Residential Lot Sizes and Distribution"). Moreover, long before Mount Laurel was decided, the Borough zoned two areas for 10,000 square feet, and 8,000 square feet, minimum lot sizes. (Lake Arrowhead and Midville Acres).

The apparent basis for these zoning classifications was simple health protection as most homes in Mountain Lakes were, until only a few years ago, served by individual septic systems. Preservation of prevailing neighborhood patterns was also a factor. In any event, no one could regard one-third acre zoning in the 20"s, 30's, 40's, 50's, 60's or even in the 70's as "snob-zoning." Certainly, there were no areas reserved for three or five acre zoning. Nor can this pattern of land use classification be fairly described as "fiscal zoning" as industrial and commercial ratables were virtually excluded. In short, while zoning has served certain important purposes of the community, including the protection of health and preservation of neighborhood patterns, it has never been responsible for the development of Mountain Lakes as an upper middle income community.

At the time this action was brought, and as noted in its Answer, the Borough had already commenced a reexamination of its zoning ordinance. That process resulted in the adoption of a Master Plan on December 5, 1979 (annexed to the Affidavit of Tore Hultgren as an exhibit). The Planning Board is about to recommend to the Borough Council the adoption

of a revised zoning ordinance and there is every reason to expect its swift adoption. This proposed ordinance rezones the last two undeveloped residentially zoned tracts in the Borough for cluster development with a zero lot line option. And, as the Master Plan recommended, the proposed ordinance would rezone to residential use, 36 acres, of the undeveloped section of Economic Development Zone. This is the edge of the Economic Development Zone farthest removed from both Route 46 and the center of the aquifer recharge area. Of this 27 acres will be in a new cluster development zone which permits four unit per acre development.[3] While this area has water and slope problems, the Master Plan believes it can be developed to produce an additional 80 homes.

4. The Economic Development Zone.

This 110 vacant acres, the last sizable undeveloped area in the Borough, is an inappropriate location for low-cost housing. As indicated, the Borough is already acting to rezone as much of this land which is reasonably developable for a relatively high density single family residential use. But to rezone the balance has three very serious constraints. The first is that this area has been identified as a recharge area for the Buried Valley Acquifer. It is important that this tract be developed with special concern for soil recharging

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[3] The remaining 9 acres are on a particularly steep slope and the tract also has a severe access constraint.

and, in particular, the retardation of storm water runoff.[3] Intensive, least cost development of the area would impair the permeable surface area needed for this regional water resource. Moreover, such housing would be built under serious budget pressures and the developer would not be able to afford to give the kind of attention that this serious ecological problem deserves. Thus, there is potential for serious groundwater contamination. The second serious constraint is the land's location adjacent to Route 46, a heavily traveled highway. The inappropriateness of zoning land facing a highway of this sort for residential use, much less multi-family use, should be self-evident. Third, Intervale Road, which would of necessity constitute the only safe entrance and exit to such development is already congested and will be made more so by the lands which the Borough is rezoning for residential use and other development which is occurring in this area in Parsippany.

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3 The State Development Guide Plan (1977) at 54 specifically notes: "Attention should also be given to potential development impacts, particularly storm water runoff, that could affect the Rockaway watershed. This is a major supply source for north-eastern New Jersey."

POINT I

MOUNTAIN LAKES IS NOT A DEVELOPING MUNICIPALITY

The New Jersey Supreme Court in Mount Laurel expressly confined its ruling to "Developing Municipalities/"" As Justice Hall wrote on behalf of the Court:

> As already intimated, the issue here is not confined to Mount Laurel. The same question arises with respect to any number of other municipalities of sizeable land area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas (and surrounding some of the smaller cities outside those areas as well) which, like Mount Laurel, have substantially shed rural characteristics and have undergone great population increase since World War II, or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth. Most such municipalities, with but relatively insignificant variation in details, present generally comparable physical situations, courses of municipal policies, practices, enactments and results and human, governmental and legal problems arising therefrom. It is in the context of communities now of this type or which become so in the future, rather than with central cities or older built-up suburbs or areas still rural and likely to continue to be for some time yet, that we deal with the question raised. [67 N.J. at 160]

The Township of Mount Laurel was described by the court as a "flat sprawling township" of 22 square miles with 14,000 acres

of which 65% were vacant. It had experienced a startling population explosion starting in 1950 at 2,817 people increasing to 5,249 in 1960 and reaching 11,221 in 1970 and still it was only on the threshold of development.

Mount Laurel was not the first occasion that Justice Hall had expressed his conception of a developing community. He noted in his Vickers' dissent:

> The instant case, both in its physical setting and in the issues raised, is typical of land use controversies now current in so many New Jersey municipalities on the outer ring of the built up urban and suburban areas. These are municipalities with relatively few people and a lot of open space, but in the throes, or soon to be reach by the inevitable tide, of industrial and commercial decentralization and mass population migration from the already densely settled central cores. They are not small, homogeneous communities with permanent character already established, like the settled suburbs surrounding the cities in which planning and zoning may properly be geared around things as they are and as they will pretty much continue to be. On the contrary these areas are sprawling, heterogeneous governmental units, mostly townships, each really amounting to a region of considerable size in itself. Their present rural, semi-rural or mixed nature is about to change substantially and they are soon to become melded into the whole metropolitan area. Their political boundaries are artificial and hence of relatively little significance beyond defining one unit of local government. Their existing conglomeration of land uses is sectionally distributed—large or small scale agriculture, residences in separated communities and on good sized plot or acreage in the open country, business

> establishments in the populated sectors and along through highways, and perhaps a spot or two of industry much sought after to aid municipal tax revenues. Many differing land uses, both present and future, are and can be made comfortably compatible by reason of the distances involved and the varying characteristics of geographical sections. Present municipal services are not more extensive than necessary to serve a population scattered over a large territory.

Vickers v. Twp.Com. of Gloucester Twp., 37 N.J. 232, 253 (1962), cert, denied., 371 U.S. 233 (1963), quoted in (in part), Pascack Ass'n., Ltd. v. Mayor & Council of Washington Twp., 74 N.J. 470, 487 (1977).

In Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977), Justice Conford writing for the Court also addressed the issues before him within the "developing municipality" framework. Finding that Madison Township was a "archetypal developing municipality" the Court noted that its population had seen "explosive growth" during the past 25 years, 561%, had great potential for future growth, that of its 42 square miles and 25,000 acres, between 8,143 and 11,000 acres or 40% were vacant and developable. The court remarked that "the township is a sprawling municipality marked by little continuity and spotty development." 72 N.J. at 501.

The specific issue of whether a "developed" municipality's zoning ordinance was to be tested by the same standard

as that of a developing municipality was faced and decided only three years ago in our Supreme Court's most recent "Mount Laurel" pronouncement, Pascack Ass'n., Ltd. v. Mayor and Council of the Township of Washington, 74 N.J. 470 (1977). There Judge Conford, the author of Oakwood at Madison, finding that there was no per se rule mandating zoning for multi-family housing, 74 N.J. at 481, and noting that it was "a mistake to interpret Mount Laurel as a comprehensive displacement of sound and long established principles concerning judicial respect for local policy decisions in the zoning field," 74 N.J. at 481, stated:

> [Mount Laurel] required the combined circumstances of the economic helplessness of the lower income classes to find adequate housing and the wantonness of foreclosing them therefrom by zoning in municipalities in a state of ongoing development with sizable areas of remaining vacant developable land that moved this court to a decision which we frankly acknowledged as "the advanced view of zoning law as applied to housing laid down by this opinion." 67 N.J. at 192.

74 N.J. at 480-81. In Pascack the Court expressly rejected the view that the Mount Laurel approach should be applied to developed municipalities.

> The Public Advocate argues that the lesson of Mount Laurel * * * [is] that housing needs of all segments of the population are a priority charge on the zoning regulations of all municipalities, whether developed or not. There is no such implication in the cited cases, individually or collectively. None of them stands for the proposition that because of the conceded

> general housing shortage of multi-family housing the zoning statute has, in effect, been amended to render such housing an absolutely mandatory component of every zoning ordinance—as virtually contended for by the plaintiffs and the Public Advocate.

74 N.J. at 485-86.

There are very good reasons for this distinction to be drawn. As noted by Justice Conford in Pascack at footnote 5, 74 N.J. at 487, some experts find the "developing municipality" limitation a point of balance in the Mount Laurel decision in that it avoids forcing housing units into places where they are unsuitable. Rose and Levin, "What is a 'Developing Community[1] Within the Mount Laurel Decision," 4 Real Estate L.J. 359, 386 (1976). Moreover, the distinction recognizes the relatively greater importance of local concerns in the general welfare calculation where such housing must of necessity adjoin or at least seriously and immediately impact upon neighboring, developed neighborhoods. As the Pascack Court reasoned, "A moment's reflection will suffice to confirm the fact that such references ["to zone for an appropriate variety arid choice of housing"] contemplate fairly sizable developing, not fully developed municipalities * * *." 74 N.J. at 486. Moreover, this distinction permits the judiciary to act to remedy serious social problem. There is a danger in providing such relief, the

Courts may overstep their proper judicial role in a democratic society. As Justice Conford stated "the judicial branch is not suited to the role of an ad hoc super zoning legislature * * *." 74 N.J. at 487-88.

Also our judiciary traditionally has shown great deference to local decision making in the field of zoning. And for good reason. The State Constitution expressly requires "liberal construction" in favor of municipalities, Art. 4, §7, para. 11. The exercise zoning power itself has a constitutional basis Art. 4, §6, para. 2. And local officials are most aware of the practical problems with which a municipality must deal. Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335 (1973).

The facts of Pascack are relevant for the purpose of comparison. Curiously, Washington Township is exactly the same size as Mountain Lakes, 1,984 acres. Less of the total percentage of the land was in public ownership and as a consequence it had a higher population and population density. The municipality expected a population growth of only a few hundred from 1970 to 1978. There was no industrial or multi-family development, and only limited commercial development. But there were at least two areas of 30 acres or more which were undeveloped. See

also, Township of Washington v. Central Bergen Community Mental Health Center, Inc., 156 N.J.Super. 388 (Law Div. 1978).

Fobe Associates v. Mayor & Council of Demarest, 74 N.J. 519 (1977) was a companion case to Pascack. Demarest's size was 1345 acres; it was zoned for single family residential development with lot minimums of 10,000 square feet to 40,000 square feet; and there was no industry and few commercial uses. Only 34 acres were vacant, an additional 35.5 acres were privately owned and under utilized, and 228.5 acres were held by a privately owned school and privately owned golf course. Demarest was held to be a developed municipality.

In Windmill Estates, Inc. v. Zoning Bd. of Adj. of the Borough of Totowa, 158 N.J.Super. 179 (App.Div. 1978), rev'g, 147 N.J.Super. 65 (Law Div. 1976), the Appellate Division found Totowa to be a developed municipality. Its size was 3.9 acres, it was developed 30% as industry, 35% as single family residences, 30% as public or semipublic uses, and 5% undeveloped. In Nigito v. Closter, 142 N.J.Super. 1 (App. Div. 1976), certif. den., 74 N.J. 265 (1977) the Appellate Division held that Closter was a developed municipality. Closter is 3.2 square miles, was said to be 94% developed, did not permit multi-family uses but did provide for office use. And in Segal Constr. Co. v. Wenonah Zoning Board of Adj. 134 N.J.Super. 421 (App.Div.

1975), certif. den., 68 N.J. 496 (1975) the Appellate Division held that Wenonah was a developed municipality although 109 acres of its 600 acres (16.5%) remain undeveloped.

The Borough of Mountain Lakes is not a "sprawling township of sizable land areas." It is small, the same size as Washington Township, Demarest, Totowa, Wenonah and Closter. Its undeveloped land areas are small, less than 10%. Its population has stopped growing, indeed it declined 13% in the last ten years. Any new development in the Borough cannot help but have a substantial impact on already developed sections of the Borough.

Moreover, any "allocation of housing units" to Mountain Lakes would be nothing more than a specific rezoning of a specific area of land as there is but one substantial area of land left undeveloped. Such judicial rezoning would here have adverse environmental, human safety and traffic impacts. Indeed, we think that were this Court charged with the responsibility of rezoning this last area of land, in light of these very serious constraints, it would find this land inappropriate for least cost housing.

The Borough Council made a thoughtful and reasonable determination that the development of lands along Route 46

should be primarily for an office use. It is now reconsidering that determination and probably will rezone 27 acres to clustered, four-unit per acre density but continuing to require single family residential development. As the Court in Pascack recognized:

> Thus, maintaining the chracter of a fully developed, predominantly single-family residential community constitutes an appropriate desideratum of zoning to which a municipal governing body may legitimately give substantial weight in arriving at a policy legislative decision as to whether, or to what extent, to admit multi-family housing in such vacant land areas as remain in such a community. * * *. There was thus nothing invidious about such development or about the decision of the township municipal planners in 1963 to continue that basic scheme of development in order to maintain the established character of the community.

74 N.J. at 483-84.

It is submitted that Mountain Lakes is a developed community and its zoning for single family residential uses on lot sizes similar to those presently existing in the community does not constitute exclusionary zoning as a matter of law.

POINT II

THE PLAINTIFF BEARS THE BURDENS OF PRODUCTION AND PROOF THAT MOUNTAIN LAKE'S ZONING ORDINANCE IS EXCLUSIONARY.

This defendant incorporates pages 1 through 19 of the Maxi-Trial Brief of the defendant, Township of Chester, and adds the following comments:

A. The Oakwood at Madison Approach. The Oakwood at Madison opinion directs a subtle but we think fundamental change in the conduct of Mount Laurel litigation. As Justice Mountain takes care to note in his concurring and dissenting opinion:

> In place of the fair share-regional approach, the majority now postulates a rule directing attention to the substance of the zoning ordinances and the bona fide efforts of those responsible for the administration of plans of land use regulation.

72 N.J. at 625. The legal standard adopted by Oakwood at Madison is whether there has been reasonable elimination of cost generating requirements in at least a reasonable area of a developing municipality, 72 N.J. at 499.

The "least cost housing" concept implements "elimination of cost generating requirements." The "fair share-regional approach" is but one, albeit an important imput in the quantification of "reasonable areas." In light of such factors, this

Court is directed to form a judgment concerning the substance of the Ordinance under attack and the bona fide efforts of municipal officials to determine whether such ordinance and such action taken together amount to an unconstitutional failure to zone in the general welfare of all citizens of this State.[5]

There was very good reason for the Supreme Court to have so stepped back from the logical follow-up of Mount Laurel, a more rigorous development of the "fair share-regional" approach. Experience has taught that the "fair share-regional" approach has produced principally "statistical warfare." See, e.g., Southern Burlington Cty. NAACP v. Twp. of Mt. Laurel, 161 N.J. Super. 317 (Law Div. 1978). In the words of Judge Conford in Oakwood at Madison; "The breadth of approach by experts to the factor of the appropriate region and to the criteria for allocation * * * is so great and the pertinent economic and sociological considerations so diverse as to preclude the judicial dictation or acceptance of any solution as authoritative." 72 N.J. at 499.

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[5] The danger that such an approach will result in ad hoc determinations rather than the uniform application of a well understood governing principle was expressly recognized. "Nevertheless there is probably nothing better to offer as a judicially devised alternative." 72 N.J. at 625 (Mountain, J., concurring and dissenting).

Moreover, even if they were judicially determinable, numerical housing goals are not translatable into zoning changes, much less the actual production of housing on any rezoned sites in accordance with methods which can be implimented pursuant to judicially manageable standards. 72 N.J. at 499.

B. Burden of Proof. Plaintiff bears burden of proving a constitutional violation. The Advocate here must quantify by proof, expert proof, for each municipality, what would constitute a "reasonable area" which should be rezoned for least cost housing, and also produce sufficient evidence concerning the substance of each zoning ordinance and the efforts of local officials, to show a lack of reasonable elimination of cost generating requirements and the lack of bona fide efforts by the responsible municipal officials toward that end.

Frankly, we do not believe that the Advocate has any intention of presenting such evidence; nor do we believe that the Advocate will offer competent expert zoners or planners who can testify concerning the substance of the Mountain Lakes zoning ordinance in relationship to Borough's topography and the actual uses presently in existence. Rather, what we believe will be offered will be speculative observations based principally

on the HUD minimum occupancy standards (developed for an entirely different purpose) by a supposed expert (see The Maxi-Trial Brief of the Township of Chester at 77) who has never even been to Mountain Lakes much less conducted a comprehensive planning study of it.

In short, we believe that the presentation of a fair share study, the articulation of what is asserted to be "least cost" housing principles, and a facial review of a municipality's zoning ordinance does not constitute that sufficient quantum of proof required to make out a plaintiff's prima facie case in a Mount Laurel action and therefore this case must be dismissed at the close of plaintiff's proofs.

A dismissal in this context should be seen for what it is, a failure to present to this Court the basic information necessary for this Court to find constitutional violation. Assume for a moment that the Advocate has been successful here and that this Court granted a remedy which ultimately culminated in a finding after Court supervised revision to the Mountain Lakes ordinance that as revised the Mountain Lake's ordinance met its fair share obligations. Would that finding estop a builder or any other public interest plaintiff from pleading and proving based upon more specific and detailed proofs that the ordinance even as so revised still failed to meet Mount Laurel

standards. It is inherent in the nature of a Mount Laurel case that even substantive decisions are always subject to reexamination. Thus a procedural dismissal of this case will not estop builders or other public interest plaintiffs from bringing similar suits based upon the presentation of adequate proofs. Nor will it lessen by one iota each developing municipality's affirmative and constitutionally mandated obligation to zone in good faith for the general welfare of all citizens of this State.

POINT III

THE DCA HOUSING ALLOCATION REPORT IS NOT INDICATIVE OF MOUNTAIN LAKES'S FAIR SHARE OF THE REGIONAL HOUSING NEED.

Pages 20 through 102 of the Maxi-Trial Brief of the Township of Chester are incorporated by reference, and we add the following comments:

A* Authority. There is no legislative authority in this State for the adoption of a fair share housing plan and in the absence of such authorizing legislation, no municipality, whether it is developing or not, is obligated by law to abide by any plan promulgated by any agency of state government.

The DCA Allocation Report purports to be no more than a study, entitled to what ever evidential weight or merit it

may have but nor more. It is certainly not the kind of legislatively authorized and administratively adopted plan which the Supreme Court in Oakwood at Madison, 72 N.J. at 538, suggested might be given prima facie judicial acceptance (and for that matter only prima facie acceptance). It is not even a regulation adopted by the Department of Community Affairs, no municipality is "affected" by it, and no municipality would be entitled to appeal even though it contained some improper or arbitrary and capricious elements as it is contended here. It has not been "adopted" by the Department of Community Affairs, nor does the Department of Community Affairs have any intention of adopting it. Amicus Brief of Department of Community Affairs, Urban League of Greater New Brunswick v. Mayor and Council of Carteret, Docket No. 16, 492 at 11 (herein "Urban League Community Affairs Brief"). Indeed, as the Department of Community Affairs has indicated in its supplementary brief in the same action dated October 24, 1980 at p. 5, "The Housing Allocation Report is not presently intended to have the binding force and effect of law with respect to the matters discussed therein." In short, the DCA Report represents only the view of a handful of planners in one agency of government.

B* Methodology.

!• Region. The DCA Report, not only being county based, expressly rejects the journey to work criterion in the delineation of regions in northern New Jersey, Oakwood at Madison, 72 N.J. at 540, n. 44. Justice Conford has described the judicial or constitutional concept for testing whether a zoning ordinance is exclusionary saying:

> The present significance of the cited plans is that the regions are of such size that it is difficult to conceive of a substantial demand for housing therein coming from any one locality outside the jurisdictional region, even absent exclusionary zoning.
>
> But in evaluating any expert testimony in terms of the Mount Laurel rationale, weight should be given to the degree to which the expert gives consideration to the areas from which lower income population of the municipality would substantially be drawn in the absence of exclusionary zoning.

72 N.J. at 539 [emphasis in the original].

The simple fact is that the opening or closing of a large industrial facility in Bergen County, Hudson County or Middlesex County will have no "substantial" affect upon the demand for housing in Mountain Lakes or for that matter anywhere in Morris County. For example, when Ford's Mahwah plant closed,

one of the largest industrial facilities in the State, employing thousands of workers whose closing so devastated its local economies that it received national press attention, what affect did it have on housing demand in Morris County? None of which we are aware. Indeed, we think it fair to state that the municipalities in Morris County have been far more affected by the growth occurring in Sussex County and in the northern tier of municipalities in Hunterdon County (some of whom have already been adjudicated developing communities). Bergen, Hudson and Middlesex counties on the other hand are distant and difficult areas to commute to. Evidence will be presented on defendant's case concerning the degree of congestion on the existing roadway system in Morris County during rush hour making daily commutation to these distant counties ever increasingly more difficult.

2. Allocation Formula. In the absence of exclusionary zoning barriers the question of housing location would turn on supply and demand. And in the absence of a legislative declaration of policy that some other basis should be used to determine fair share allocations the judiciary should avoid reliance upon any other allocation factor in attempting to identify an Equal Protection violation of the State Constitution.

On the supply side there is the factor of the existence of privately owned, vacant or redevelopable land. As the Supreme Court noted in Oakwood at Madison, discussing the various allocation criteria that have been put forward:

> The most important single criterion emerging from fair share literature is the amount of vacant developable land, as "access to land is the basic issue in exclusionary zoning." Rubinowitz, "Exclusionary Zoning: A Wrong in Search of a Remedy," 6 Mich.L.J. Reform 625, 661 (1973).

72 N.J. at 542, n. 45. Not all such land should be equally weighed. Some is subject to evironmental constraints, and other infrastructure constraints, and all land has varying utility for housing in accordance with its distance from employment centers. The DCA Report attempts no such differentiation.

On the demand side there is growth in employment. Certainly jobs have been moving to the suburbs,[6] but growth has not been located exclusively in the suburbs. The DCA Report

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[6] The creation of 1,000 jobs in the suburbs never required the creation of 1,000 housing units. Most such events are "relocations" from outgrown but regionally located job sites and the relocation site chosen to minimize its impact upon employees, indeed often to convenience them. Also the social revolution of the two wage earner household, without increasing housing requirements, has created a pool of suburban workers who will not commute long distances.

uses relative employment growth not actual growth as its measure and thus distorts the demand of actual employment growth on the need for housing.

The DCA Report, however, relies on two other factors which are equally weighed with its supply and demand factors which create far more serious distortions:

(1) Nonresidential Ratable Growth. This is said to be a measure of fiscal capacity to absorb additional housing. The current distribution of ratables throughout a region or, if available, projected ratable growth during the covered period may be a reasonably fair measure of the capacity of the tax base to assume disproportionately contributing individuals. However, relative nonresidential ratable growth, in the formula measures only where comparative commercial and industrial growth has occurred; it is a poor predictive measure of fiscal capacity and in any event is unfair. The suburbs typically lead in the development of housing, typically they also lag in the development of industrial ratables. A suburban municipality will be unfairly burdened by the use of such a statistic as it will have a smaller nonresidential ratable base relative to its overall ratable mix. Moreover, in small communities such as Mountain Lakes, the mere building of one small office

building would constitute substantial nonresidential ratable growth notwithstanding the fact that it produces a de minimus impact on a community's aggregate ratables.

(2) Personal Income Per Capita. While personal income per capita might well be a poor and second rate measure of a municipality's fiscal capability, (ratables per capita is much better), in the context of this formula it has an entirely different function—social dispersion.[7] The Court must recognize that there is a social theory which guided the choice of allocation factors for this formula. It is respectfully submitted to the Court that while social dispersion might well be a goal which a Legislature might (or might not) settle upon in devising a fair share housing plan, social dispersion per se has no basis in a formula purporting to articulate a constitutional standard which intended to identify a violation of equal protection. "Fairness" in "Fair Share" may indeed cover a broad range of concepts, as it has been little discussed in either Mount Laurel or Oakwood at Madiion opinions. We nevertheless take it as fundamental that a community in this State, at least after its fiscal capacity to absorb low income housing has been taken into account, should not as a matter of constitutional law thereafter be required to absorb additional

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[7] Municipal Fiscal capacity is said to be measured by non-residential reliable growth.

least cost housing based only upon personal income characteristics of the residents.

Mountain Lakes has a large allocation under the DCA formula not because it is adjacent to low and moderate income employment centers or because it is such a center itself or because there are large tracts of vacant land which low income citizens are demanding access to or because it has ratables to support such housing, but rather because it has a very high per capita income, due to the community's small size and upper middle class character. This formula is biased by a social theory having no basis in constitutional law that rich and poor must be made to live together and its use by this Court in attempting to identify a violation of equal protection would be manifestly improper.

C. Outdated Statistical Base. As recent newspaper reports have suggested, the Preliminary 1980 Census population statistics indicate that New Jersey as a whole has during the past ten years experienced no appreciable growth despite the large population gains of Ocean and Atlantic Counties. Morris County's population, unlike Mountain Lakes, has at least not declined. These patterns are in marked contrast to the projections relied upon in the DCA Report. Mountain Lakes insists that more current population projections and growth statistics be incorporated

in any fair share model admitted into evidence at trial particularly one which relies upon the DCA methodology.

Mountain Lakes is not alone in the view that updated statistics should be used. The Department of Community Affairs in its brief to the New Jersey Supreme Court in Urban League Community Affairs Brief at p. 12 advises the Court:

> In assessing the usefulness of the allocation report in a case arising under the Mount Laurel doctrine, there are several potential weaknesses in that document which must be recognized. In particular, the specific housing allocation number as assigned to each municipality suggests a precision which may not be warranted, especially given the fact that the data utilized in such critical calculations as population projects, housing conditions, personal income and vacant developable land, are somewhat out of date and not necessarily closely representative of the current circumstances.

A DCA at footnote "**" on page 12 of this same brief recommends no more than the use of methodology with updated statistics.

Even the Advocate in his brief in this same action at p. 54 and concedes that imput statistics in the report may be proven obsolete and that the new or revised data could be plugged into the DCA formula, noting specifically population projections.

POINT IV

FAILURE OF THE BOROUGH COUNCIL OF MOUNTAIN LAKES TO ZONE THE ECONOMIC DEVELOPMENT ZONE FOR RESIDENTIAL USE IS FULLY JUSTIFIED

Even when a prima facie Mount Laurel violation has been proven, a municipality may yet sustain a burden of proving justification. 67 N.J. at 174. There is a very unique and compelling environmental reason why the 110 acre Economic Development Zone cannot be developed for least cost residential development. The Borough will present evidence from a geologist who will show the Court that this particular land along Route 46 lies above the main channel of the Buried Valley Aquifer. Nearby is the recommended site for a regional well which is planned to serve the future needs of the Rockaway Valley communities.

This property must be conservatively developed consistent with the importance of preservation of this regional asset, see p. 54 of the Guide Plan. A least cost developer cannot be expected to exercise that degree of care. Moreover, the substantial disturbance of the surface land, together with the intensive development which least cost housing implies will destroy the permeable surface area, cause water runoff, and be destructive of this particular soil's recharging capacity.

Indeed careless development quite possibly could contaminate the aquifer, an ecological disaster.

The Court in Mount Laurel did not restrict the right of municipal justification solely to ecological defenses. Quite frankly, in a truly developing community such as Mount Laurel or Oakwood at Madison, it is hard to conceive of any justification other than an environmental problem which would have the effect of rendering a municipality unable to meet its Mount Laurel obligation. But, in what is essentially a developed community such as Mountain Lakes, others factors most certainly do come into play. Here, it should be apparent that to require the development of property facing on Route 46 for a multi-family or least-cost, highly intensive development is to knowingly create serious human risks of injury if not death. Not only are the physical dangers of Route 46 a constraint, the capacity of Intervale Road to handle traffic flows is a serious planning constraint and cannot be ignored. We submit to the Court that any one of these items and certainly all three collectively are sufficient to meet the Borough's "heavy burden" of justification.

POINT V

THE PLAINTIFFS AND THE PUBLIC ADVOCATE SHOULD BE REQUIRED TO PAY THE DEFENDANT'S LEGAL AND OTHER REASONABLE EXPENSES OF THIS LITIGATION.

It is particularly appropriate that the legal expenses of Mountain Lakes be borne by the Public Advocate here. Mountain Lakes, plainly, is a developed community. Simple inspection would easily have determined this and the Advocate made no such inspection. Moreover, a simple inquiry would have determined that the Borough of Mountain Lakes had already, at the time this suit was brought, commenced the process of reviewing its ordinance and adopting new land use elements. Oakwood at Madison is squarely based on good faith implementation of its constitutional precepts by local officials.

The Borough was named a defendant in this litigation for one reason and one reason alone, it has the highest per capita income in Morris County. Thus acting, Advocate was reckless in naming Mountain Lakes as a defendant and under the "bad faith" exception to the American Rule, should be charged with its counsel fee and reasonable expenses of litigation.

Also, this is a case where different and competing public interests are involved. It was for just such occasion the legislature expressly empowered the Advocate to choose to

represent one such interest and thereafter provide for payment of expenses of representation of the remaining inconsistent public interest. N.J.S.A.: 52:27F-31. Yet the Advocate has refused to provide for the expenses he has imposed upon the defendant municipalities by the position he has taken in this litigation.

CONCLUSION

This case in fine is one of whether the Constitution of the State of New Jersey requires the Borough of Mountain Lakes, given its current state of development and the current needs of the region, to rezone the last substantial tract of undeveloped land in the Borough notwithstanding the fact that it is unsuitable for least cost development. Indeed, that this issue can be so narrowly drawn can offer no greater proof that in fact Mountain Lakes is a developed community.

Respectfully submitted,

DILLON, BITAR & LUTHER

By _____
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Dated: December 1, 1980

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