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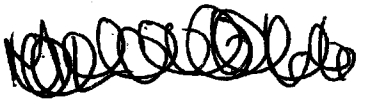

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
DOCKET NO. L-6001-78 P.W.

MORRIS COUNTY FAIR HOUSING COUNCIL, et al.,

Plaintiffs,

-vs-

BOONTON TOWNSHIP, et al.,

Defendants.

Civil Action

TRIAL BRIEF ON CERTAIN ISSUES COMMON TO ALL DEFENDANTS

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PRELIMINARY STATEMENT

Certain of the defendant municipalities have joined in submitting this brief on certain issues common to all defendants, in order to conserve the time and effort of both the Court and all counsel. We believe that the issues considered in this brief will, in one form or another, apply to all municipalities in exclusionary zoning cases.

Each individual town contends that its particular fact and land use planning situation is unique; each municipality has significant and important factors to consider in its land use decisions. Each municipality reserves the right to apply the arguments set forth in this brief to its own situation, and many towns will be submitting supplemental briefs detailing those considerations. Indeed, it is only in the particular factual and land use planning configuration of each municipality that the general principles articulated in this brief can be applied.

I

MT. LAUREL AFFIRMED THE MUNICIPAL DUTY TO PRACTICE COMPREHENSIVE PLANNING

Mt. Laurel and Madison were zoning decisions. They held that Municipalities may not erect barriers to housing in order to protect their own parochial interests. The opinion of the Court in Mt. Laurel said:

> "It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulations. Further, the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mt. Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality." Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 179 (1975).

The Court was critical of the land use regulations in Mt. Laurel and other municipalities. The basis of the criticism was the municipalities' failure to adopt a regional perspective in order to determine housing demand.

> "This [exclusionary] pattern of land use regulation has been adopted for the same purpose in developing municipality after developing municipality. Almost every one acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for the various kinds of housing." Mt. Laurel, 67 N.J. at 171.

The existence of regional demand coupled with restrictive development practices of some municipalities led the Court to formulate the Mt. Laurel doctrine:

> "...every [developing] municipality must, by

> its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of present and prospective regional need therefor. These obligations must be met unless particular municipalities can sustain the heavy burden of demonstrating particular circumstances, which dictate that it should not be required to do so." Mt. Laurel, 67 N.J. at 174.

In Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977) the Supreme Court reaffirmed and refined the general principles announced in Mt. Laurel. The Court explicitly recognized, however, that "sources extraneous to the unaided private building industry cannot be depended upon to produce any substantial proportion of the housing needed and affordable by most of the lower income population." Madison, 72 N.J. at 511-512. Therefore, the Court held that a municipality would meet its "fair share" obligation by adjusting its zoning requlations:

> "So as to render possible and feasible 'least cost housing', consistent with minimum standards of health and safety, which private industry will undertake..." Madison, 72 N.J. at 512.

Mt. Laurel relied on the concept of "general welfare"* defined in regional terms:

> "...it is fundamental and not to be forgotten that the zoning power is a police power of the

*"...a zoning enactment which is contrary to the general welfare is invalid." Mt. Laurel, 67 N.J. at 175, and cases cited therein.

> state and the local authority is acting only as a delegate of that power and is restricted in the same manner as the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served." Mt. Laurel, 67 N.J. at 177.

The principles of Mt. Laurel and Madison are sound and simple: Municipal zoning power must be exercised for the general welfare, including regional housing needs. The question before this trial Court is: what is the general welfare and what methodology will be used to define it. Defendants suggest that the answer lies in the principles of comprehensive planning. These principles demand that all needs of a community be considered before a growth and development strategy be adopted. According to the Municipal Land Use Law, comprehensive planning must include the entire range of factors contributing to the public health and safety and general welfare. N.J.S.A. 40:55D-28.

These factors include land characteristics (soils, water, etc.); population densities; development and redevelopment of housing; traffic and circulation; water, sewerage, waste disposal and related utilities; community facilities including schools, hospitals, libraries, firehouses, etc.; recreation and public space; and conservation of agricultural lands, environmentally sensitive lands, and wildlife. N.J.S.A. 40:55D-28 (b).*

Moreover, this statute requires that comprehensive planning at the local level consider the development plans of contiguous municipalities, the county, and the state. N.J.S.A. 40:55D-28 (c).

*See also the new amendment to the Land Use Law requiring consideration of energy efficiency, 40:55-D-1 et seq. amended C. 146, L. 1980, November 20, 1980.

Comprehensive planning provides the only reasonable, objective, and legislatively sanctioned standards for measuring municipal compliance with the rule of Mt. Laurel and Madison. These standards are embodied not only in the Municipal Land Use Law but also in the DCA's State Development Guide,* the Tri-State Regional Development Guide** and the 208 Water Quality Plan of D.E.P. This Court should look to those plans for guidance in assessing the adequacy of defendant's zoning ordinance.

Defendant's methodologies and strategies are consistent with comprehensive planning principles. Thus, for example, a journey-to-work analysis, a professionally recognized planning technique, is suggested as one reasonable way*** to determine the appropriate region as required by Madison:

> "The areas from which, in view of available employment and transportation, the population of the township would be drawn, absent invalidly exclusionary zoning." Madison, 72 N.J. at 537.

Likewise, defendants adopt a "numberless fair share" concept. This concept allows housing goals to flow from planning considerations rather than having planning considerations be dictated by housing goals. It is obvious that housing needs should be one of the considerations in developing a zoning plan, but they cannot be the starting point. This is the meaning of the Supreme Court's finding in Madison that "housing goals are not realistically

*Department of Community Affairs, "State Development Guide Plan, Revised Draft," (May, 1980).

**Tri-State Regional Development Guide Planning Commission, "Regional Development Guide 1977-2000" (March, 1978).

***See Point IV, infra.

translatable into specific substantive changes in a zoning ordinance by any technique revealed to us by our studies..." Madison, 72, N.J. at 499.

Plaintiffs ingnore the broad mandates of comprehensive planning. Instead, they pursue the narrow policy of dispersing large numbers of low and moderate income units throughout the state. Plaintiffs' methodologies reflect this policy. For example, their concept of "region" ignores valid planning concepts such as journey-to-work and employment location. They concentrate, instead, on defining a region large enough to encompass densely populated urban areas and very sparsely populated exurban areas. Likewise, plaintiff's fair share methodology looks to such factors as vacant developable land and municipal wealth and ignores important planning considerations such as infrastructure availability and public policies favoring the redevelopment of urban areas.

Issues have recently been raised before the New Jersey Supreme Court questioning the wisdom and propriety of the Mt. Laurel holding. For example, broad separation of powers questions were raised as to whether the decision amounted to "judicial legislation." Likewise, the basic question of whether zoning and land use powers can have any impact on providing housing for lower income persons, given economic realities, was discussed. These broad questions are not directly before this trial court, but these and other broad issues must be noted as this court attempts to

reasonably interpret and implement Mt. Laurel and Madison. For example, the cases should not be interpreted to require action which is clearly outside the traditional role of the judiciary or which demands wholesale revisions of social and economic structures in this society.

Plaintiffs advocate such unreasonable interpretations of the Supreme Court decisions. They are attempting to use Mt. Laurel and the municipal zoning power to solve the housing shortage problem in New Jersey. Mt. Laurel could not have intended this result.

Conversely, defendants look to comprehensive planning principles as the way to implement Mt. Laurel and Madison. This approach will satisfy the mandate of these cases while protecting other legal doctrines* and preserving the integrity of land use principles.

*See briefs filed by Amici Legislators in the six consolidated zoning cases recently argued before the Supreme Court. These briefs will be supplied under separate cover.

II

PLAINTIFFS BEAR A HEAVY BURDEN OF PROOF IN MT. LAUREL LITIGATION

A. Burden of Proof - General Considerations.

In Mt. Laurel litigation, a plaintiff's burden of proof is no different than any other challenge of a legislative enactment. The plaintiff still retains the burden of persuasion and the initial burden of producing evidence. He must overcome the strong presumption favoring the constitutionality of the challenged zoning ordinance. Only the municipal defendant's burden is changed by Mt. Laurel, which requires the defendant to come forward with a greater quantum of evidence than ordinarily required to rebut plaintiff's prima facie case.

The term "burden of proof" refers to two distinct concepts: the burden of persuasion and the burden of going forward with evidence. See, e.g. Wigmore on Evidence, third edition, § 2485 et seq. Wigmore's now classic analysis refers to the burden of persuasion as "the risk of non-persuasion of the jury." Wigmore, supra, § 2485. It refers to the elements of a case that must be proved to have the fact finder decide in favor of the proponent. This burden is allocated by terms of the substantive law or by procedure (pleadings). Id.

The New Jersey Rules of Evidence refer to this burden as the "burden of proof." Evid. R. 1 (4) provides:

> "Burden of proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable

> doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion."

Wigmore refers to the second burden of proof as the "duty of producing evidence to the judge," Wigmore, supra, § 2487. It refers to the duty of the proponent to satisfy the judge that he has a sufficient quantity of evidence fit to be considered by the jury. Id.

New Jersey Evid. R. 1(5) defines this as the "burden of producing evidence":

> "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a judgment or preemptory finding against him on a material issue of fact."

The relationship between the burden of persuasion and the burden of producing evidence is that:

> The party having the risk of non-persuasion (under the pleadings or other rules) is naturally the one upon whom first falls this duty of going forward with evidence.

Wigmore, supra. § 2487 (emphasis in original).

The concept of "presumption" is related to the burden of proof. Wigmore says that a presumption;

> signifies a ruling as to the duty of producing evidence. The essential character and operation of presumptions, so far as the law of evidence is concerned, is in all cases the same, whether they be called by one name or another; that is to say, they throw upon the party against whom they work the duty of going forward with the evidence...

Wigmore, supra, § 2487 (emphasis supplied).

The New Jersey rules of evidence treat presumptions similarly. Evid. R. 14 provides:

> If evidence to the contrary of a presumed fact is offered, the existence or non-existence of such fact shall be for the trier of fact, unless the evidence is such that the minds of reasonable men would not differ as to the existence or non-existence of the presumed fact.

A 1967 Commission Note to this rule noted the effect of the rule:

> ...if there is no evidence to contradict either the underlying fact or the assumed fact, the assumed fact must be taken to exist and the jury should be so instructed.

In short, a presumption raises a duty in the party disadvantaged by the presumption to come forward with evidence or have the presumed fact used against him without contrary evidence.

B. Burden of Proof - The Effect of Mt. Laurel.

In Mt. Laurel litigation there are two presumptions at work. The first is the traditional presumption that legislative enactments are constitutionally valid. Home Builders League of South Jersey, Inc. v. Township of Berlin, 81, N.J. 127, 137 (1979). The second is that municipalities must presumptively act for the regional general welfare. Mt. Laurel, 67 N.J. at 179.

The first presumption, constitutional validity of municipal ordinances, is strengthened by the Constitutional provision mandating liberal construction of municipal powers:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government...shall be liberally construed in their favor.

N.J. Constit., Art. IV § VI, par. 11. This strong presumption casts upon a plaintiff challenging a municipal ordinance both the burden of persuasion and the burden of producing evidence. Justice Pashman restated that burden in Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 564-65 (1975), a case upholding a rent control ordinance:

> Municipal ordinances, like statutes, carry a presumption of validity. The presumption is not an irrebuttable one, but it places a heavy burden on the party seeking to overturn the ordinance. Legislative bodies are presumed to act on the basis of adequate factual support and, absent a sufficient showing to the contrary, it will be assumed that their enactments rest upon some rational basis within their knowledge and experience. This presumption can be overcome only by proofs that preclude the

> possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public interest.

The presumptive validity of municipal zoning ordinances was not changed by Mt. Laurel. Rather, Mt. Laurel articulated the presumptive municipal constitutional duty to zone for the regional general welfare,* 67 N.J. at 175, and made very clear that a cause of action may be made out when a municipal ordinance fails to do so. Then the burden of producing evidence shifts to the defendant municipality. The burden of persuasion, however, remains with plaintiff.

> We have spoken of this obligation of such municipalities as "presumptive". The term has two aspects, procedural and substantive. Procedurally, we think the basic importance of appropriate housing for all dictates that, when it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action.

Mt. Laurel, 67 N.J. 180-181.

*Mt. Laurel, of course, did not create the presumptive municipal duty to conform to constitutional requirements. As Justice Hall noted: [i]t is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws. 67 N.J. 174 (Emphasis supplied). The decision extended this duty to zone for the regional general welfare specifically as it applies to housing needs.

The Court in Mt. Laurel relied on Independent Electricians and Electrical Contractor's Assoc. v. New Jersey Board of Examiners, 48 N.J. 413 (1967) to support this familiar procedural rule. In Board of Examiners the Supreme Court held that when a presumptively valid statute was shown to be arbitrary, the challenger would "shift to the defender the obligation to come forward with an affirmative factual presentation in support of rationality." 48 N.J. at 424.

This rule is consistent with Wigmore's analysis which allowed for the burden of producing evidence to shift, but not the burden of persuasion:

> The first burden above described - the risk of non-persuasion of the jury - never shifts, since no fixed rule of law can be said to shift...the second kind of burden, however - the duty of producing evidence to satisfy the judge, - does have this characteristic referred to as a "shifting." It is the same kind of duty for both parties, but it may rest...at one time upon one party and at another time upon the other.

Wigmore, supra. § 2489 (emphasis in original).

The Court applied the "shifting" burden of proof rule in a post Mt. Laurel case, Home Builders, League of South Jersey, Inc. v. Township of Berlin, 81 N.J. 127 (1979). In this case, the Court held unconstitutional a zoning ordinance containing minimum floor areas unrelated to occupancy. The Court's analysis of the ordinance is instructive. First, it recited the familiar principle governing a challenge to a municipal ordinance:

> Guidelines which should be observed are that the provisions are presumptively valid,...the wisdom or advisability of the enactment is properly a legislative function,...and laws granting authority to municipalities should be construed broadly and liberally...Second, there are constitutional constraints which must be observed. Zoning, reflecting as it does the exercise of the police power...is subject to due process requirements...arbitrary or unreasonable zoning ordinances cannot stand.

81 N.J. 137-138, citations omitted.

The Court also cited Mt. Laurel for the holding that zoning regulations must promote the general welfare including housing needs. 81 N.J. 138. Then the Court stated the procedure for allocating the burden of producing evidence as set forth in Board of Examiners and Mt. Laurel:

> We hold that when it is shown that a municipality has adopted as part of its zoning ordinance a minimum size living area provision which is on its face unrelated to any other factor, it will be presumed to have acted for improper purposes. The burden is then on the municipality to establish that a valid basis does exist. [citations omitted] We hasten to add that the establishment of such a basis does not terminate the judical inquiry. At that point, it must be determined whether the provision furthers or is contrary to the general welfare. It is then that the court must weigh and balance, as previously discussed, the exclusionary and salutary effects of the provision.

Home Builders, 81 N.J. at 142.

It is apparent that Mt. Laurel did not alter plaintiff's traditional burdens of proof for challenging a municipal ordinance. Plaintiff's heavy burden of persuasion and of going forward with evidence sufficient to overcome the

ordinance's strong presumption of validity remains the law. Neither did Mt. Laurel change the law which shifts to defendant municipality the burden of producing evidence once plaintiffs have made a prima facie showing that the ordinance is arbitrary.

However, Mr. Laurel did change the defendants' burden of proof for effective rebuttal. In a traditional challenge to a legislative act, a defendant could rebut plaintiff's prima facie case by showing that the enactment "rested upon some rational basis within the knowledge and experience" of the defendant. Board of Examiners, supra, 48 N.J. 423-424. Mt. Laurel replaced this " rational basis" burden with a "heavy" burden of producing evidence, 67 N.J. at 181. This does not shift the burden of persuasion, which always rests with plaintiff, Wigmore, supra, § 2489, but merely requires a greater quantum of evidence necessary to rebut plaintiffs prima facie case.

C. Applying Plaintiff's Burden.

A review of the Court's analysis in Mt. Laurel and Madison confirms this conclusion. Mt. Laurel, of course, was the easy case. Limited review of the ordinance was required to find it arbitrary:

> [Mt. Laurel's] general zoning ordinance (including the cluster zone provision) permits, as we have said, only one type of housing-single-family detached dwellings. This means that all other types...are prohibited.
>
> ...Mt. Laurel has allowed some multi-family housing by agreement in planned unit developments, but only for the relatively affluent... and even here, the contractual agreements between municipality and developer sharply limit the number of apartments having more than one bedroom. ...the design of such limitations is obviously to restrict the number of families in the municipality having school age children and thereby keep down local education costs. Such restrictions are so clearly contrary to the general welfare as not to require further discussion.

Mt. Laurel, 67 N.J. 181-183, footnotes omitted.

When the burden of producing evidence shifted to the defendant municipality, it was unable to carry its burden.

In Madison the Court went well beyond the face of the ordinance to determine its validity. The Court reviewed the amount and type of land zoned for high density and the number of units which would actually be built on this land and found the number inadequate. 72 N.J. 504-506. The relationship between various parts of the ordinance was closely examined to determine whether development was "realistically" possible. For example, although the PUD overlay zone permitted a maximum density of 5 units per acre, this density was permitted only

on a 500-acre parcel. Plaintiffs proved that the accumulation of this number of acres was neither "possible nor probable". 72 N.J. 508.

Development regulations were also examined to determine whether they unnecessarily inflated the cost of units in a development. The PUD regulations, for example, required the developer to build a school to accommodate .5 children per dwelling. 72 N.J. 508. This burdened the purchasers of units with additional costs of $1,275 which the Court found unreasonable in light of accepted standards. 72 N.J. 520-21.

These and other proofs led the Court to conclude that the plaintiffs had carried their heavy burden to show that the Madison Township ordinance was prima facie arbitrary. The ordinance failed to provide the realistic opportunity for an adequate amount of lower cost housing. The burden of producing rebutting evidence then shifted to the Township.

Madison attempted to carry its burden by demonstrating a region and fair share methodology which required only a small lower income zoning obligation. The Court affirmed the trial court in rejecting these proofs, and found the "post litem motivation" of defendant's study "apparent" and the study itself "self serving." 72 N.J. 529-530. The Township had thus failed to carry its heavy burden of producing rebutting evidence.

Mt. Laurel and Madison show that the burden of producing evidence shifted to defendants only upon a showing of clearly arbitrary provisions: floor area ratios that encourage

very small apartments; zoning 676 acres for multi-family housing when only 120 acres are vacant and developable; Madison, 72 N.J. 506; contractual bedroom restrictions in all multi-family housing; Mt. Laurel 67 N.J. 183; etc. Accord, Home Builders, supra, 81 N.J. 141-142 (minimum floor areas). No opinion of the Supreme Court in favor of plaintiffs rested on a facially reasonable judgment by the municipality. Only a showing that the ordinance taken as a whole was arbitrary in light of the regional welfare command of Mt. Laurel and Madison was sufficient.

The rationale of Mt. Laurel and Madison was applied by the Appellate Division in Urban League of Greater New Brunswick v. Mayor and Council of the Borough of Carteret, Docket No. A-4681-75 decided September 11, 1979, on appeal, Supreme Court Docket No. 16,492 argued October 20, 1980. The Appellate Division dismissed the plaintiffs because of their failure to prove region, an essential element of their prima facie case.

> ...plaintiffs have failed to prove the appropriate region for which defendants have an obligation to provide their fair share of opportunity for construction of low and moderate income housing. Since the definition of such a region is essential to prove that the defendants exclude such housing through their choice of zoning policies (a choice, we add, which must be proved "arbitrary," Pascack Assoc., Ltd. v. Mayor & Council, Washington Township, supra, at 484) it follows that the proofs were insufficient to support the claim of exclusionary zoning.

Slip Opinion, 17-18.

Even if Carteret is reversed by the Supreme Court on the merits,* its analysis is fully consistent with the burden of proof requirements set forth in Mt. Laurel and Madison. Plaintiffs have a heavy burden of persuasion and of producing evidence. If they fail to meet that heavy burden, the complaint must be dismissed. No other course of action would vindicate the strong constitutional presumption of validity of the ordinance in the first instance.

To make a prima facie case of exclusionary zoning, plaintiffs must prove all the elements of their case: they must prove that the development regulations do not allow an amount (fair share, whatever that may mean, see infra) of least cost housing sufficient to meet the demands of an appropriately defined housing region.

A failure to prove any element requires dismissal of plaintiff's case since it is a failure to prove that the ordinance is arbitrary. Under these circumstances - a failure of plaintiff's prima facie case - the burden of producing evidence never shifts to defendant.

*The plaintiffs in Carteret failed to demonstrate an appropriate region. A reversal by the Supreme Court on the merits would mean only that plaintiffs had demonstrated an appropriate region. This, however, would not change or lessen plaintiff's burden, viz. to demonstrate municipal failure with respect to a region deemed appropriate under the Guidelines of Mt. Laurel and Oakwood at Madison.

Moreover, plaintiffs must make an affirmative showing in view of the environmental and planning considerations unique to the municipality and its region. A zoning ordinance or land use regulation cannot be shown to be arbitrary or unreasonable in a vacuum. Any provisions of a zoning ordinance challenged by plaintiffs must be shown to be arbitrary in the context of the comprehensive planning needs of the municipality. Plaintiffs' proofs must demonstrate a thorough review of municipal needs and show that defendant's ordinance does not satisfy those needs. It is not enough, for example, to isolate a few sections of the ordinance in a town with very rough terrain to show that units cost more money than in a town with flat land and good soil. Nor is it enough to show the units are not "affordable".* These will not make the showing necessary under Mt. Laurel.

Furthermore, plaintiffs' evidence must be presented by a person trained, qualified, and authorized to make such decisions in this state - a licensed professional planner. Evidence by an lesser "expert" witness** will not insure that comprehensive planning considerations were evaluated in the formation of plaintiffs' case. Such evidence should be excluded.

*See Point VI, infra.

**See Point VIII, infra, for argument to disqualify plaintiffs' expert witnesses.

III

THE DCA HOUSING ALLOCATION REPORT IS INADEQUATE AS A MATTER OF SOUND PLANNING PRINCIPLES

Plaintiffs rely heavily on the DCA Revised Housing Allocation Report to determine Region and "Fair Share." Plaintiffs' "fair share" expert, Mary Brooks, has adopted the methodology of the report and "adjusted" the input statistics to inflate the output fair share numbers by a factor of 200%.

Defendants reject any reliance on the Housing Allocation Report to resolve the land use questions in this case. This suit is about planning and zoning. The Allocation Report is not a planning document. Its assumptions and methodology are not consistent with planning theory. Its results are inconsistent with State planning policy as defined by the D.C.A. State Development Guide and the Tri-State Regional Planning Commission's Regional Development Guide. The Report and the so-called "Fair Share" philosophy it promotes serve no useful purpose in this litigation.

Moreover, the data base of the Report is both inaccurate and out of date. For example, one of the three factors used by the Report to determine present housing need is the number of "dilapidated" units taken from the 1970 census. This factor was determined by unskilled census takers and was found to be so unreliable that it was deleted from the 1980 census.

Moreover, the count of deteriorated units does not consider the extensive rehabilitation of units that has taken place during the past decade in the cities where the number of

deteriorated units is found so high by the Report, or the rehabilitation or that could take place there in the future. Nor does it consider the number of new units constructed for low and moderate income families during the decade. By inflating housing "need" in the cities, suburban "fair shares" are increased since the allocation process distributes "need" from the cities to outlying areas. (See Point III-D infra.)

These and other data destroy the validity of the Allocation Report and inflate its "fair share" numbers. Plaintiffs ignore these statistical deficiencies and "adjust" the data to inflate them further. For example, the DCA Allocation Report allocates Morris County a fair share of 44,341 low and moderate income units by the year 1990. Mary Brooks, plaintiffs' fair share witness, "adjusts" these data to derive a figure of 94,016, more than double the Allocation Report. Brooks, Addendum Report: Housing Allocation Adjustments for Morris County, August, 1979.

Plaintiffs arbitrary numbers game becomes tiresome and produces no reliable evidence. Defendants will look to comprehensive planning principles rather than artificial formulas to determine their reasonable planning needs.

A. The DCA Housing Allocation - A Brief Overview

The New Jersey Division of State and Regional Planning is responsible for research and general planning for the state. Pursuant to the govenor's directive the Division developed A Revised Statewide Housing Allocation Report for New Jersey which had two purposes: 1) to determine statewide low and moderate income housing needs, and 2) to suggest guidelines for dispersing that need within regions.

The Court should first be aware of what the Report is not. It is not a site plan document. It is not the result of Legislative mandate. Indeed, the Legislature has not endorsed the document in any way. The Report is merely a preliminary advisory effort to "guide" municipalities in assessing their Mt. Laurel "fair share" obligations. Moreover, the Report is not self-contained. It explicitly notes that it must be read together with the State Development Guide Plan which attempts to define broader development goals.

1. DEFINITIONS

Low and moderate income as used in the plan means four-member households with incomes up to 80% of the statewide median. The report estimates that in 1978, household income of $14,000 would qualify as "low-moderate."

"Region" for purposes of the Report, means one of 12 regions which the Division judged to delineate equitable and practicable housing allocation areas. Ten of the regions are comprised of single counties. Another region contains three counties in southern New Jersey. The region relevant to this

suit, Region 11, contains eight counties, including Morris County. This single region contains 63 percent of the State's population.

The arbitrary nature of the regions, evident from their sheer disparity in size, is confirmed by a review of the four criteria used to define them. None of the criteria has a basis in hard data. The first two, "Sharing Housing Need" and "Socio-economic Interdependence," are impressionistic standards rather than objective criteria. The other two criteria, "Data Availability" and "Executive Order 35," actually define policy and methodology limitations rather than selection criteria. Moreover, the Report does not articulate what weight was given to each of these criteria. Nor does it describe which alternate models were considered and why they were rejected. No reference is made to objective, quantitative studies such as commuting distance or income distribution analyses.

This limited methodology leads to some startling results. For example, the region in which Morris County is placed terminates abruptly at the western border of the county although it extends eastward to the Hudson River. This is an anomalous result since the employment and service facilities of the county clearly exert a development influence westward into Hunterdon and Warren Counties and even Eastern Pennsylvania.

2. HOUSING NEED

The first step of the allocation process defines housing needs. The Report analyzes both current needs (based on 1970 census) and prospective needs (projecting through 1990).

Current needs are measured by three factors: 1) dilapidated units--those needing extensive repair or demolition; 2) overcrowded units--those occupied by more than one person per room; 3) needed vacant units--those needed to raise the vacancy rate to 5% for rental units and 1.5% for owner occupied units.

The prospective housing need for low and moderate income households was calculated in a simplistic manner. Projected population increases through 1990 were adopted for each county and were divided by the projected average household size in 1990 (expected to be less than the current household size). This yielded a projected increase in the total number of households which was then multiplied by the 1970 percentage of low and moderate income residents for each county. The results were county projections for low and moderate income units needed in 1990.

3. ALLOCATION METHODOLOGY

The second step is the allocation process itself. The Report uses an intra-region dispersion of housing need based on the relative needs and capacities of municipalities within each region. That is, municipalities with proportionately greater needs relative to other municipalities in the region will receive a proportionately smaller "fair share" allocation. Municipalities with proportionately greater capacities to absorb needs relative to other municipalities in the region will receive a proportionately greater "fair share" allocation.

The allocations of housing are based on four criteria: 1) vacant developable land (excluding land with greater than 12 percent slope, wetlands, qualified farmlands, and public lands); 2) employment growth; 3) municipal fiscal capability,and 4)

personal income. Of the four only "Employment Growth" represents a demand factor. (See discussion at Point D, infra.) "Vacant Developable Land" is a supply factor, "Municipal Fiscal Capability" and "Personal Income" are related to the ability of a municipality to "absorb" low and moderate income housing.

While the index of "Employment Growth" does consider the most important factor in assessing the demand for housing, the location of employment centers, it does so inaccurately. The index allocates to a municipality a percentage of the prospective housing need of the region equal to the municipality's share of employment growth in the region between 1969 and 1976. By relying on a municipality's share of growth and not its total employment, the Report shifts a disproportionately high number of housing units to those municipalities with high employment growth rates but with a relatively small percentage of total employment. The huge employment centers which have grown at a more modest rate are ignored.

This allocation bias to outlying areas is exacerbated by the three other indexes utilized by the Department of Community Affairs to allocate housing - "Vacant Developable Land", "Municipal Fiscal Capability", and "Personal Income" which by definition emphasize relatively less developed areas. "Municipal Fiscal Capability" and "Personal Income" are equity factors related to some notion of a municipality's ability to absorb low and moderate housing, its ability to bear a "burden". The factor "Vacant Developable Land" is a supply factor relating to the availability of land for development. Use of vacant

developable land skews the allocation of housing to outlying exurban and rural jurisdictions, since those areas, by definition, contain most of the region's "vacant developable land." Vacant land cannot generate housing demand or Nevada's deserts would be booming.

B. The "Fair Share" Housing Concept of the DCA Housing Report Must be Distinguished from the "Fair Share" Zoning Concept of Mt. Laurel and Madison.

"Fair Share" is a nebulous term. It has been used to describe both the D.C.A. Allocation Plan and the Municipal zoning obligation created by Mt. Laurel and Madison. Use of the term to describe both is misleading. There are important distinctions between "fair share" housing allocation plans and the concept of a "fair share" zoning obligation embodied in Mt. Laurel and Madison. "Fair Share" housing allocation is generally concerned with the geographic dispersion of low and moderate income groups from the urban core to outlying jurisdictions. Mt. Laurel and Madison, however, are concerned with reducing barriers which prevent people from living where they would like to live.

C. The Fair Share Concept Embodied in Mt. Laurel and Madison is Based on Zoning and Free Market Economics.

The Mount Laurel and Madison decisions are very much statements of free market economics. The decisions seek to eliminate local zoning restrictions which prevent the public and private housing market from responding to housing demand. In Mt. Laurel, at 179, the Court established that:

> "The presumptive obligation arises for each municipality affirmatively to plan and provide by its land use regulations the reasonable opportunity for an appropriate variety and choice of housing . . .to meet the needs, desires, and resources of all categories of people who may desire to live within its boundaries." (emphasis added)

As part of this demand-oriented zoning obligation, municipalities must also provide through zoning the reasonable opportunity for housing to accommodate a "fair share of the regional housing need" for low and moderate income persons. Id. at 174.

It is clear from Madison that "regional need" for housing is a demand concept. The Court defined "region" in Madison, 72 N.J. at 537, as:

> ". . .the area from which, in view of available employment and transportation, the population of the township would be drawn, absent exclusionary zoning."

The Court also stated, 72 N.J. at 539, that the "region" should be large enough so that there is:

> ". . .no substantial demand for housing therein coming from any one locality outside the jurisdictional 'region,' even absent exclusionary zoning." (emphasis in original)

The Court further defined this concept of "demand" in planning terms emphasizing location and accessibility:

> "The factors which draw most candidates for residence to a municipality include not only, for employed persons and those

> seeking employment, reasonable proximity thereto of jobs and availability of transportation to jobs, as mentioned by Judge Furman and stressed by most of the experts, but proximity to and convenience of shopping, schools and other amenities."

Madison, 72 N.J. at 540-541.

Mt. Laurel and Madison establish that the foundation of a municipality's "fair share" zoning obligation must be a consideration of the present and prospective demand for housing in the municipality as created by the regional demand for housing. This "fair share" zoning doctrine, however, has been confused with the "fair share" housing allocation philosophy by the Public Advocate and others.* "Fair share" housing allocation plans are not based on concepts of housing demand. They are based on socio-political concepts of the geographic dispersal and "equitable distribution" of persons who "need" housing. The terms "housing need" and "housing demand" are often used interchangeably, but they refer to totally different concepts.

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*The Supreme Court's recognition of the distinction in Madison, 72 N.J. at 538, n. 43, has not eliminated the confusion.

D. The Fair Share Concept Embodied in the Department of Community Affairs Housing Allocation Report Represents a Geographic Dispersal Policy

"Fair share" housing allocation plans are policy tools for dispersing low and moderate income housing from the urban core to outlying jurisdictions.* The fair share plans from other states, upon which the D.C.A. Report is based, are unrelated to any judicial mandate with respect to zoning or even the issue of zoning.**

In "fair share" housing allocation plans housing "need" is defined as a social concept, separate and apart from the economic concept of demand.*** Housing "need" is determined by estimating the number of housing units required to eliminate substandard housing and overcrowding and to provide for a comfortable vacancy rate. Such "need" is simply a number count of substandard units. It has no necessary relation to the factors of jobs, services and transportation, which determine demand. Allocations of "fair shares" of the regional housing "need" to each municipality, in turn, are based on criteria related to suitability, distribution, and equity. (See Appendix A for a brief description of the major "fair share" housing allocation plans from other jurisdictions.)

As a result, the allocation of "need" from a central city to an exurban area may bear no relationship to whether there is a real demand for those units in the exurban area.

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*David Listokin, Fair Share Housing Allocation, (New Brunswick: The Center for Urban Policy Research, 1976) p. 57.

**See id.

***Dale F. Bertsch, Executive Director, Miami Valley Regional Planning Commission, "A Regional Housing Plan. The Miami Valley Regional Planning Commission", Planners Notebook, Vol.1, No.1, April, 1971.

The dispersal philosophy simply determines that it is "fair" that the exurban area share the "need".

The D.C.A. Housing Allocation Report, based as it is on the methodology of fair share plans from other states, determines housing "need" and housing allocations without considering the demand for housing. The Report is designed to disperse low and moderate income housing to outlying areas with vacant developable land and a "higher capacity to absorb housing."

A review of one example of the Report's methodology to accomplish its goal points up the distortions the Plan will cause.

The only allocation factor used by the Report which relates directly to housing demand is the percentage of employment growth in the target municipality. See Point III A-3, supra. Utilizing percentage of employment growth skews the fair share allocation to outlying areas that have experienced increases in employment relative to small employment bases. See Report, p.16. Newark, with a population of 382,417, lost 51,385 jobs from 1969 to 1976. Report, p. D-14. Accordingly, Newark's employment factor is zero in the allocation, p. C-14. By contrast, Chester Township, with a population of 4,265, had gained 402 jobs (id., p. D-17), and had an employment allocation of plus 294 (id., p. C-17). The thousands of jobs presently in Newark and the housing demand they create are ignored.

According to the Report Newark had an in-place 1970 housing need of 23,257 Yet its allocation of this need is 12,823; 10,434 needed units are, therefore, going some place else--to towns with large amounts of vacant acreage and not much employment. The huge existing employment base of Newark is ignored.

The Report represents little more than an administrative housing dispersal plan. It does not determine what the present and prospective demand for housing is in terms of allowing those persons who may desire to live within the municipality to do so; it allocates housing on the basis of a social policy of dispersing housing from urban to suburban and exurban areas.

Moreover, this social policy is never justified or even explained. The Report simply assumes that dispersal of lower income persons for its own sake is intrinsically beneficial. No evidence supports this assumption. It is merely one theory for addressing broad social problems. More importantly, however, the assumption of dispersal for its own sake was not contemplated by Mt. Laurel and Madison. Those cases were about providing opportunities for housing construction through zoning where there is a demand for such housing. Those cases did not advocate creating demand by allocating housing "need."

E. The Housing Dispersal Policy Underlying the D.C.A. Plan is Antiquated and Contradicts Current Public Policy

Fair Share planning assumes that it is in the public interest to disperse population away from the urban centers and into the exurban areas. This policy is obsolete and inconsistent with established federal, state and regional planning policies for growth.

The fair share planning movement developed during the late 60's and early 70's when suburban growth and low density development were accepted as metropolitan ways of life. The fair share movement sought to promote a suburban life style characterized by low density development through the geographic dispersal of population.

During the '70's federal, state and regional policy makers began to recognize the detrimental effects of suburban sprawl and low density development and began to refocus development energies inward to the urban core.* It was recognized that suburban sprawl through low density development had resulted in inefficient use of infrastructure and energy, environmental degradation, and the economic decay of inner cities.**

*See New Jersey Department of Community Affairs, State Development Guide Plan, May, 1980 at 2, 16, 48. Tri-State Regional Planning Commission, Regional Development Guide: 1977-2000, (1978) at 5; Governor Brendan Byrne, Speech to Regional Plan Association, October 4, 1978, and Sixth Annual Message, January 8, 1980, p.2, "[w]e will...shift growth to already developed areas and away from fragile remaining natural resources."

**Council on Environmental Quality, The Cost of Sprawl (1974); Richard Tabors, et al., Land Use and the Pipe: Planning for Sewerage (Lexington, Mass.: D.C. Health, 1976); and Clark Binkley, et al., Interceptor Sewers and Urban Sprawl (Lexington, Mass: D.C. Heath, 1975).

Recognizing the deleterious effects of low density development, the State of New Jersey, The Tri-State Regional Planning Commission, and the federal government have developed policy statements and programs which are intended to reverse the proliferation of urban sprawl, to provide incentives for urban revitalization, and to make more efficient use of present resources, infrastructure, and services.

The State Development Guide Plan, developed by the New Jersey Department of Community Affairs, outlines, at p. 23-25, the change in planning philosophy quite lucidly:

> "During the 1950's and 1960's government focused much of its investment and development activities to create and support growth in suburban and rural areas. The construction of major highways created new opportunities for industrial, residential and commercial development in areas outside the State's central cities, and housing programs and tax policies encouraged single-family housing in the suburbs. The thrust of government policy was heavily weighted in favor of building new settlements rather than improving those which already existed.
>
> As a result of this suburbanization emphasis, some of the older municipalities in the State became overwhelmed by obsolescence and abandonment, and the consequences have been felt throughout the State. The deterioration of these central cities and older suburbs is a consequence of inadequate levels of public and private investment, and there is a need to revitalize these declining communities through compensatory levels of investment.
>
> This suburbanization process has proved to be expensive and wasteful. Facilities and services were duplicated elsewhere while urban facilities and services declined. Travel shifted to the less efficient mode of automobile travel and increased greatly due to the expanded travel distances and the disassociation of residences and jobs. There is a need now in New Jersey to alter this unplanned pattern of spread development. A compact development pattern for the future can serve to promote the utilization of the existing infrastructure and service systems in an economical way. This

> is especially important in an era of scarce and expensive fuels, and at a time when limited public funds are needed to restore and maintain rather than duplicate what already exists.
>
> It is now suggested that a major portion of the State's development efforts should be directed to areas within and contiguous to existing development."

Other indications of the new governmental emphasis on maximizing the efficiency of infrastructure and energy, revitalizating cities, and protecting the environment from the maladies of sprawl are manifold. On the state level, the Municipal Land Use Law states that one of the designated purposes for planning and zoning in the State of New Jersey is to avoid "urban sprawl".*

On the regional level, the Tri-State Regional Planning Commission has recommended that the outdated public policy planning goal of decentralized urban expansion be abandoned, and has adopted development policies which emphasize urban revitalization and environmental protection. The Tri-State Regional Development Guide: 1977-2000 has three goals:

> 1) to enhance our older cities as desirable places to live and do business;
>
> 2) to protect our farms, wetlands, mountains, stream valleys, watersheds, and forests;
>
> 3) to coordinate the location of homes and workplaces with public utilties, facilities, services and public transportation in order to conserve energy and promote social equity. This plan is a break from the Commission's earlier land-use plans, which were based on expectations of continued rapid growth. Now we must husband our resources and get the most out of what is already in place. (emphasis added) Id., p. i.

The D.C.A. Report takes no account of these policies. It is striking to see that the D.C.A. Report allocates, as pre-

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

dicted future need, 816 units to Chester Township. (pop. 4,265) and 1,312 units to Newark (pop. 382,417). Report, p. A-22 and A-27. No clearer statement of the Plan's misdirected result could be made.

The D.C.A. Report also assumes a development limit density of four units per acre. Id., p. 17. This is truly absurd; residential densities in built up areas are generally significantly higher. The artificial development limit also ignores the possibilities of urban redevelopment and rehabilitation.

The effect of this development limit is significant. In the Report, Newark is assigned zero acres of vacant land, p. D-14; Chester Township is assigned 6,367 p. D-17. The first result is to assign away from Newark to the suburbs any allocation for the 1,312 units needed by Newark in the future. Report, p. A-22. The second, and more significant, result is to totally ignore the large number of acres in Newark now lying unused.* The Report also assumes that the status quo in Newark will not change--that no new development will occur there.** This is directly contrary to and inconsistent with the universally accepted goal of revitalizing our urban areas.

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*Newark has over 400 acres of blighted urban renewal land available through public agencies for development. Newark Housing and Redevelopment Authority, Urban Renewal Program Map, January 2, 1979. Moreover, as a drive through the Central Ward of Newark vividly demonstrates, there are hundreds of acres of land available in the private sector that could be developed through an aggressive urban revitalization program.

**The development limit of many communities close to the urban centers is also zero. See Report, p. A-22 (Essex County) and p. A-24 (Hudson County, where the entire county is assigned a zero development limit).

With the policy of urban revitalization coming to charactize the 1980's, population dispersion philosophies, such as that which underlies the D.C.A.'s Housing Allocation Report, are now obsolete. They might have made sense for the 1960's but not for the 1980's. The concept of planning for 44,000 units*** of new low and moderate income housing in Morris County in the next decade, without keying such residential development to employment, represents a complete anachronism in public policy. It runs counter to trends in urban and regional planning for this area, policies made explicit by Governor Byrne, the Tri-State Regional Planning Commission, the New Jersey Department of Community Affairs, the New Jersey Department of Environmental Protection, and the Morris County Planning Board. Urban revitalization is now the objective, not suburban sprawl; efficient clustered development is now essential, not energy intensive and environmentally damaging population dispersal. Implementation of effective public policies for the 1980's should reinforce these new trends, and should not attempt to recreate the patterns of flawed growth of an era now over.

The D.C.A. approach may also encourage middle income families to leave the central cities since the "fair share"

***Report, p. A-29

housing, if built, will most likely be middle income housing. Increased loss of middle income families would have a severe economic, social, and fiscal impact on inner cities.*

The D.C.A. Report tends to promote development in outlying suburban and rural jurisdictions, communities with vacant developable land. The inevitable result of such an emphasis is the consumption of agricultural and environmentally sensitive land.**

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*See Rose, "Introduction and Overview". Conference on New Jersey Issues: Fair Share Housing, (New Brunswick: Bureau of Government Research, Rutgers College, April 1979) pp. 12-15.

> "[W]hen middle and moderate income families (and I would like to emphasize that this includes both black and white moderate and middle income families) when they leave the central city, the most stable, the most law-abiding, the most productive components of the cities' social structure are lost. The cities schools are left to the less educationally advantaged. This tends to diminish the quality of the city school system and it tends to encourage the further flight of the remaining middle class families from the city. When they leave, they leave the neighborhood stores without their customers. When they leave, they leave the cities' fiscal problems on the shoulders of people who are the least able to bear that burden." Id. p. 13.

**There is a strong argument that the best way to encourage redevelopment of the cities is to discourage relocation of employment, with the accompanying residential development, to the suburbs. It is quite apparent at this point that unwanted sprawl development is caused by the availability of cheap land in exurban areas. It is also true that centralized development will be encouraged, and sprawl will be discouraged, if cheap land is available in the city centers. Accordingly, the best strategy to help the cities may be to make development in the city centers cheaper, and therefore more profitable, than sprawl development in the suburbs. We should not adopt any mechanism, such as the D.C.A. Housing Allocation Plan, which brings large amounts of cheap land at the edge of the region into competition with land closer to the city centers.

F. A "Fair Share" Allocation Plan Should be Based on an In-Fill Housing Strategy, not a Housing Dispersal Strategy: the State Development Guide Plan Should be Followed.

Even if this Court reads Mt. Laurel as adopting "fair share" as a social concept, the D.C.A. Report must be rejected. The geographic housing dispersal strategy of the D.C.A. Report, as discussed supra, is obsolete and contradicts current public policy. Consistent with urban imperatives a proper "fair share" housing allocation plan should be based on an in-fill housing strategy of placing housing near existing infrastructure, services, and employment. Such an in-fill housing strategy emphasizes urban revitalization, environmental protection, and efficiency in the use of infrastructure, services, and energy; and is recommended by the D.C.A. State Development Guide Plan.

The fair share plan for allocating subsidized housing of the Metropolitan Council of the Twin Cities,* Minnesota, uses an in-fill housing strategy. It serves as a useful illustration of a fair share plan based on these public policies. In its plan, the Metropolitan Council of the Twin Cities emphasized that requiring that every suburban community be assigned some subsidized housing was less important than insuring that housing for lower-income families was constructed in appropriate locations. The housing plan emphasized "opening up more housing opportunities in well-serviced locations" and was designed to complement the council's general objective of minimizing urban sprawl.**

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* Metropolitan Council of the Twin Cities Area, 1977 Metropolitan Guide: Chapter on Housing, (Saint Paul, Minn.: Metropolitan Council, July 1, 1977).

** Id., p. 5.

The Metropolitan Council's plan utilized five factors for determining priority areas for subsidized housing;

1. Level of urbanization;
2. proximity to center city downtowns;
3. availability of transit service;
4. availability of jobs;
5. availability of shopping facilities.

Points were awarded to municipalities based on these factors; the greater the point total, the greater the priority assigned to that municipality. Applying these criteria, highest priority for low-cost housing went to the inner ring suburbs, while the lowest priority was assigned to communities along the periphery of the metropolitan area. Communities within the "Rural Service Area" did not have any responsibility to provide lower income housing to meet area wide needs.

The D.C.A. Report rejects this methodology. Instead, it treats an acre of vacant developable land in Jersey City or Newark in exactly the same manner as an acre in the most rural community in the region. There is no correlation to employment, transportation, or availability of water and sewer. The consequences of this treatment are destructive of rational planning: the marginal cost to construct a new unit in the rural setting will be far greater than the marginal cost of constructing a unit in a built up area, where infrastructure already exists. Housing will be encouraged where there are few jobs. Infrastructure planning (roads, sewers, etc.) will be fragmented.

Any fair share approach for Northern New Jersey must differentiate between vacant land in a center city area and vacant land at the fringe. The factors of employment, transportation, access, and available infrastructure must be factored in.

Inflation is rampant. High energy cost is the major factor in the national economy. Federal and state budgets are extraordinarily tight. These realities demand an in-fill strategy to maximize housing opportunity and minimize costs. Continued sprawl development with its concomitant need for new infrastructure construction is encouraged by the D.C.A. Report. This is precisely what we do not need.

It follows that comprehensive planning documents, such as the D.C.A. State Development Guide Plan (May 1980) should be used to plan for needed housing and infrastructure.* In particular, the Guide Plan calls for no growth in agricultural areas (Plan, p. 69) and very little growth in "limited growth" areas.** The Plan, at pp. 71-72, specifically recommends a low-growth strategy for "limited growth" areas:

> "It is neither desirable nor feasible to prohibit development in these areas. However, to support significant levels of new growth in such areas would require major public investments in services and facilities and an energy-inefficient pattern of scattered development would be continued. In addition, there would be significant indirect costs due to the diversion of necessary investments and other assistance from urban areas.
>
> Accordingly, Limited Growth Areas should be left to grow at their own moderate pace. Public resources should be targeted toward other areas where growth can be accommodated more readily. In this way, the needs of future generations -- for additional land to develop or to set aside

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* See also the very similar Land Use Plan of the Tri-State Regional Development Guide: 1977-2000, pp. 25-38 (March 1978).

** The Plan also advocates public ownership or severe regulation of development in "Conservation" (open space) areas. Plan, p. 86-89.

> for purposes which cannot now be anticipated are recognized. Areas which do not now appear to be necessary to accommodate projected population increases may become critically important resources for the New Jerseyans of the 21st century."

The Plan's basic concept is an in-fill strategy for the already developed and soon to be developed areas; a no-growth strategy for agricultural lands; only moderate growth in limited growth areas; and an overall planning strategy of maximizing utilization of present investment in infrastructure. This is incompatible with the D.C.A. Housing Allocation Report, which lumps growth and limited growth areas in one category. See Report, p. 23, ¶2.

In summary, the D.C.A. Allocation Report defines housing need in terms of a social concept. On the other hand, Mt. Laurel and Madison Township have established the principle that exclusionary zoning acts as a barrier to the satisfaction of housing demand. Until the D.C.A. Report and its methodology are revised to reflect housing demand, and not just a social concept of housing need, the D.C.A. Report should be ruled irrelevant as a matter of law.

The geographic definition of region depends on what is done with the region. The D.C.A. eight county region treats an acre of vacant land in Hudson County in the same manner as it treats an acre of vacant land in remote Jefferson Township, Morris County. This is patently inadequate. Such a region and such a methodology will lead to: planning for further urban sprawl; wasteful allocation of scarce funds to construct infra-

structure in the suburbs, instead of rehabilitating infrastructure in the urban centers and close-in suburbs; and an exacerbation of the painful effects of inflation and tight municipal budgets.

IV

"NUMBERLESS FAIR SHARE" IS THE RATIONAL PLANNING APPROACH TO MT. LAUREL AND MADISON

The Concept of "Numberless Fair Share" offers this Court an objective, simple and reliable yardstick for determing municipal compliance with Mt. Laurel. "Numberless Fair Share" means that a municipal ordinance should be tested against existing official comprehensive plans, not against an artificial "fair share" model based on assumptions unrelated to comprehensive planning and land use. If this Court finds that a municipal zoning ordinance does not provide for a variety of densities and development patterns consistent with county, state and regional plans, then a facial showing of invalidity may have been made. However, if the municipal zoning is consistent with county, state and regional plans, the Court then only need review development regulations. This review will determine whether least cost development is realistically allowed. It is absolutely unnecessary to have a quantified fair share allocation number. Zoning an adequate number of acres for least cost housing can be accomplished by using County Master Plans, the D.C.A. State Development Guide Plan, the Tri-State Regional Development Guide: 1977-2000, and studies from the Regional Plan Association. Most County Master Plans have a recommended target population for their municipalities. To check for consistency with other planning parameters, these

*The foreseeable future for planning is measured in six year increments, N.J.S.A. 40:55D-59.

population targets or estimates can be compared with regional and statewide plans. Other official population projections based on broad planning principles may also be used as appropriate.

If more quantification is need, a job oriented methodology such as journey-to-work, Point V, infra., should be used.

Since these comprehensive planning documents consider all factors contributing to growth and development, including the need for low and moderate income housing,* they provide valid, objective criteria for determining whether a municipal zoning ordinance is consistent with Mt. Laurel. A municipality which has provided for development densities far below those of official plans, either by providing inadequate area or by development regulations which preclude realistic opportunity for least cost development, must bear the burden of justifying its restrictions.

This process insures that planning principles will control in land use litigation.

In deciding Allan-Deane Corp. v. Township of Bedminster, Docket No. L-36896-70 P.W. and L-2-28061-71 P.W. (Law Division, Somerset County, December 13, 1979), Judge Leahy used this approach effectively. After an extensive trial to decide whether the defendant's zoning ordinance complied with its Mt. Laurel obligation the Court said:

> "A great deal of testimony and many exhibits were offered to establish the "fair share" of

*See e.g. "State Development Guide Plan, Revised Drafts" (May, 1980), p. 6-7;

**"Regional Development Guide 1977-2000", (March, 1978), p. 21.

existing and prospective housing needs appropriately attributable to Bedminster and to establish the "region" to be served by such housing opportunity in the township. In this court's opinion it is neither necessary nor appropriate for the court to engage in such mathematical and geopolitical determinations.

Delineation of housing need region's and computation of a municipality's fair share of responsibility to meet such needs are socio-economic political judgments best left to the legislative and executive branches of government." Slip Opinion at 3-4.

Judge Leahy then reviewed in detail the role and legislative authorization of the Tri-State Regional Planning Commission, County Master Plan, the Department of Community Affairs' State Development Guide and the Municipal Land Use Law and noted the importance of "this integrated federal, state and local planning scheme." Slip Opinion at 5.

The Court then concluded:

"If municipal zoning provisions must comply with municipal master plans and the master plans must be consistent with county plans, it follows with indisputable syllogistic logic that municipal zoning must be consistent with county, and thus state and regional, planning.

By enacting this requirement the legislature has provided the courts with an objective standard against which to measure the provisions of a municipal zoning ordinance. The courts need no longer attempt to resolve the complex political issues inherent in zoning and planning. So long as the general legislative program is effectuated through county, state and regional planning which adheres to the general constitutional principles recognized and elucidated in judicial decisions such as Mt. Laurel and Oakwood, the courts can confidently judge the constitutional legitimacy of municipal zoning and planning by measuring it against applicable county, state and regional planning.

> The efforts and work product of the legislative and executive branches are thus respected and decisions made by municipal officials which comply with legislative intent will be sustained. Slip Opinion at 11.

This sound and lucid judicial methodology commends itself as compelling precedent. It strikes a note for basic legal and planning principles and, indeed, common sense, in an area of litigation that has become tangled and confused by artificial data manipulation and departures from fundamental concepts of comprehensive land use practices.*

The Supreme Court in Madison clearly supported the idea that "fair share" should be numberless and consistent with general planning principles:

> [W]e deem it well to establish at the outset that we do not regard it as mandatory for developing municipalities whose ordinances are challenged as exclusionary to devise specific formula for estimating their precise fair share of the lower income[4] housing needs of a specifically demarcated region. Nor do we conceive it as necessary for a trial court to make findings of that nature in a contested case.
>
> [4]"Lower income" is intended as a generic reference to low and moderate income, collectively. Madison, 72 N.J. at 498-499.

The "numberless fair share" approach of Judge Leahy and the guidelines of the Supreme Court in Madison stand in sharp

*The decision overstates the need for municipal consistency with other comprehensive plans. The municipal Land Use Law, N.J.S.A. 40:55D-28(d), directs a municipality to consider the master plans of contigious municipalities and of the county where the municipality is located, and the State Development Guide Plan. But Judge Leahy's analysis remains sound. Courts should look to legislatively sanctioned comprehensive planning efforts for evidence relevant to determine the reasonableness of a zoning ordinance.

contrast to plaintiffs' approach in this case. Rather than looking to existing comprehensive plans as a measure of municipal compliance with Mt. Laurel, plaintiffs advocate artificial "regions" and contrived "fair share" that have nothing to do with planning, land use, or even the direction of Mt. Laurel.

V

HOUSING ALLOCATION REGIONS AND "FAIR SHARE" DETERMINATIONS ARE A FUNCTION OF EMPLOYMENT LOCATION AND AVAILABILITY

A. Housing Regions Should Be Based on Comprehensive Planning Principles, Not "Fair Share" Principles.

Municipal compliance with Mt. Laurel and Madison can be determined objectively through the "numberless fair share" approach defined in Point IV. However, if the Court chooses to define a numerical "fair share", it should adopt a methodology consistent with comprehensive land use principles. Such methodology would measure the demand* for low and moderate income units in the municipality. The journey-to-work methodology or its functional equivalent is one example of a methodology that meets these requirements.**

In Madison, the Supreme Court noted that the criteria for defining "region" in "fair share" formulations had not received extensive attention. It found, however, that journey to work criteria were the most popular amoung experts and were those used by the Federal Housing Authority (FHA) to define a housing market region. 72 N.J. 540, fn. 44. The Court found these criteria consistent with its own definition of region: "the area from which, in view of available employment and transportation, the population of the township would be drawn

*See Point III-D supra, for discussion of "need" vs. "demand."

**A journey-to-work region has found fairly wide acceptance. See, e.g., Lindbloom, "Defining 'Fair Share' of 'Regional Need': A Planner's Application of Mt. Laurel," 98 N.J.L.J. 633 (1975). Most of the "fair share" plans use a region which is functionally equivalent to a journey-to-work region.

absent exclusionary zoning. Id. 72 N.J. at 537.

Fair Share "regions", such as those in the D.C.A. Allocation Report, are result-oriented and promote the dispersion of lower income persons. Such regions do not meet the Court's standards. They beg the question of what is the "best" region by assuming a priori that it must include both densely populated and sparsely populated counties so that a "burden" may be shared.

Mr. Richard Ginman, Director of the Division of State and Regional Planning which produced the Allocation Report testified to this fact in Round Valley v. Clinton Township, Docket No. L-29710-74 P.W., (Superior Court, Law Division 1978). He indicated that the 8-county Region 11, which includes Morris County, was determined by "drawing a region from contiguous counties until land was calculated as sufficiently available" to meet the "needs" of Essex, Hudson and Union Counties. Slip Opinion at 39-40. It was necessary to expand region 11 westward because the Report assumed that the urban areas had no vacant developable land with which to meet their housing needs. See Allocation Report which found the following amounts of vacant developable land in these cities*:

Newark	0
Paterson	0
New Brunswick	0
Jersey City	0
All of Hudson County	0

These startling assumptions about vacant developable land are contradicted by the most casual observation of the respective

*Allocation Report at A-22, A-24, A-25, and A-30.

areas. In addition, the Hudson County Master Plan (1974) at 50 found 6,925 vacant acres in the County, although all may not be "developable." Moreover, the Allocation Report includes "dilapidated" units in its need formulation. It is not clear why a dilapidated unit "need" should be relocated to the suburbs rather than rehabilitated or rebuilt in place.

Housing allocation regions must be based on sound planning principles to be consistent with Mt. Laurel and Madison. One reasonable planning approach is the journey-to-work region described below.

B. A Municipality's "Fair Share" Obligation Must Be Based on a Journey-To-Work Region or its Functional Equivalent.

While no formula for estimating demand should be prescribed, a reasonable estimate of the present and prospective demand for housing should consider: (a) existing and future levels of employment in the municipality; and (b) the proximity and access of the municipality to that employment.

According to Madison, 72 N.J. at 537, the regional base for a "fair share" calculation must be defined as "the area from which, in view of available employment and transporation the population of the township would be drawn absent exclusionary zoning." This is a clear statement of a demand methodology, not a dispersion methodology. It looks at a given municipality and asks: if there were no exclusionary zoning in this town, who would choose to live here, and where do they presently live?

In terms of the issues in this lawsuit, the question is more specific: Would lower income persons presently living and working in Union City, Newark, Jersey City and other eastern employment centers choose to move to Morris County and commute to work in the east? That is, would these persons create a demand for housing in Morris County, absent exclusionary zoning? If the answer is no, as we believe it is, then the dispersion "fair share" region should be rejected on its face.

The critical factor in housing choice is proximity

to job.* Proximity is measured by journey to work statistics. These statistics are based on access to transporation facilities and to a labor market providing a range of employment opportunities.** The Housing demand in any given municipality is then delineated by the employment available in the journey-to-work region centered in that municipality.

The greater a municipality's proximity to employment, the greater the demand for housing in the municipality, and the greater a municipality's fair share zoning obligation should be. However, population density around a place of employment tends statistically to fall off for every mile that one moves away from the employment center.*** Therefore, the demand for housing within the journey-to-work region is greatest within the employment center itself and weakest at the fringe of the journey-to-work region. The type of housing demanded, moreover, depends in large part on the incomes of those employed within the journey-to-work region. Employment centers with lower

*See, Madison, 72 N.J. at 540-541. See also, Franklin J. James, Ed., Models for Employment and Residence Location, (New Brunswick: Center for Urban Policy Research, 1974): Mahlon R. Straszheim, An Econometric Analysis of the Urban Housing Market, (New York: National Bureau of Economic Research, 1975); Blank and Winnick, The Structure of the Housing Market, 1953 Q.J. Econ. 107; HUD, FHA Economic and Market Analyses Division, FHA Techniques of Housing Market Analysis, at 12; C. Abrams, The Language of Cities (1960) at 143.

**Id.

***Mills, Urban Economics (New York: Scott, Foresman, 1972). Increased energy costs are most likely having a significant effect on these dispersion curves.

wages will have had more low and moderate income families than employment centers of higher incomes.

* * * * * * * * * *

In short, the journey-to-work methodology for determining housing needs is based on real housing demand which in turn must consider both the type and location of jobs which create the housing demand.

To estimate demand for low and moderate income housing in a municipality, therefore, one should know (a) the present and prospective low and moderate income employment in the municipality: and (b) the proximity of the municipality to present and prospective low and moderate income employment within a journey-to-work region centered on the municipality. These demand-generated housing estimates subtracted from the existing supply of housing would represent the municipality's presumptive Mt. Laurel obligation.

The journey to work methodology or some other method which reasonably estimates a municipal housing region based on demand is clearly preferred over the arbitrary and artificial "fair share" regions suggested by the D.C.A. Allocation Report and adopted by the Public Advocate.

A demand methodology for estimating a muncipality's regional obligation effectuates the mandate of Mt. Laurel. By quantifying their zoning obligations by a demand methodology, municipalities can zone for the appropriate variety and choice of housing opportunities for those individuals who may desire to live within a particular municipality.

The journey to work region, of course, is not perfect. Like any planning model it rests on certain assumptions. For example, most journey to work regions assume that the desireability (demand) of a place to live with respect to the employment center is constant for each point in the region. In fact, however, residential preference decreases as distance from the work place increases; the demand at the outer edge of the region is less than at points closer to the center. Nevertheless, overlapping regions around different employment centers correct for most of this distortion. On the whole, then, it represents a reasonable municipal response to its Mt. Laurel and Madison obligation.

In the final analysis, the reasonableness of the municipal housing region is one essential element of plaintiffs' case. Plaintiffs have the burden to prove that defendant's region is unreasonable and arbitrary. A journey-to-work region or some other method using comprehensive planning principles easily meets the test of reasonableness. Plaintiffs' "fair share region" is arbitrary.

VI

THE DOCTRINE OF LEAST COST HOUSING: EVIDENCE OF "AFFORDABLE" HOUSING IS IRRELEVANT AS A MATTER OF LAW

A. The Doctrine of Least Cost Housing.

It is conceded that private industry cannot, without subsidies, construct new rental or ownership housing that is affordable to lower income persons. The economics of land development and housing construction simply prohibit it. The Supreme Court first observed this fact in Mt. Laurel and reaffirmed its recognition in Madison:

> "A key consideration in this particular case as well as a factor integral to the entire problem, generally, is the well-known fact, amply corroborated by this record, that private enterprise will not in the current and prospective economy without subsidization or external incentive of some kind construct new housing affordable by the low income population and by a large proportion of those of moderate income. We recognized this fact in Mt. Laurel. 67, N.J. at 170, n. 8; 188, n. 21.
>
> Madison, 72 N.J. at 510-511.

The Court then ruled that municipalities would satisfy their Mt. Laurel obligation if their ordinances provided opportunities for least cost housing.

> "To the extent that the builders of housing in a developing municipality like Madison cannot through publicly assisted means or appropriately legislated incentives...provide the municipality's fair share of the regional need for lower income housing, it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the "least cost" housing, consistent with minimum standards of health and safety, which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share.
>
> Madison, 72 N.J. at 512.

The Court then added,

> "Nothing less than zoning for least cost housing will, in the indicated circumstances, satisfy the mandate of Mt. Laurel. While compliance with that direction may not provide newly constructed housing for all in the lower income categories mentioned, it will nevertheless through the "filtering down" process referred to by defendant tend to augment the total supply of available housing in such manner as will indirectly provide additional and better housing for the insufficiently and inadequately housed of the region's lower income population.

Madison, 72 N.J. at 513-514 (footnote omitted).

This is the Least Cost Doctrine. It is essentially a very conservative doctrine: the government should erect no cost barriers which are not reasonably necessary to promote the principles of sound planning; the least police power regulation, the least intensive governmental regulation, is the most appropriate. In this way the private construction market mechanism will produce housing units of the least possible cost in response to market demand. Of course, ordinances should also provide enough land on which the least cost housing can be built.

B. Plaintiffs' Proofs going to the question of affordability should be excluded.

Affordable housing is not an issue in this case. Evidence of "affordability" does not prove that a municipality is engaging in improper zoning. It merely demonstrates an economic state of affairs which all parties concede.* More importantly, such evidence can never establish a prima facie case of exclusionary zoning. To make that case, Mt. Laurel requires an examination of the zoning ordinance itself. 67 N.J. at 180-181.

Plaintiffs will offer extensive evidence to show that some existing housing and new construction in Morris County is not "affordable" to low and moderate income families. For example, plaintiffs' expert Mary Brooks has prepared an extensive report of sales prices and apartment rentals in Morris County to show the percentage of persons in the Newark SMSA who could afford** such units.

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*A Municipality may draft its ordinance to provide maximum appropriate densities with no unnecessary cost-generating provisions. Will such a municipality be found exclusionary under Mt. Laurel if no "affordable" housing is in fact built? Nothing in the Mt. Laurel analysis suggests such a result.

**In Brooks's study persons are deemed able to afford to buy a house if it is priced at two or two and one-half times the person's annual income. Rental units are "affordable" if annual rent does not exceed 25% of annual income. But these old rules of thumb are no longer adequate. See, Homeownership: Coping with Inflation, United States League of Savings Associations (1980), showing that almost 46% of all home buyers spent more than one-quarter of their income on housing expenses in 1979, compared to 38% in 1977. Id. at 8. These figures indicate that many persons are finding a higher housing expense to income ratio "affordable."

Moreover, the quintile analysis methodology itself is faulty. By focusing exclusively on current income and ignoring savings or equity,in an existing house, the methodology inflates the number of persons who cannot "afford " a home.

Since much of the new housing in defendants' municipalities is concededly expensive, due to reasons unrelated to zoning provisions, the housing cost data prove nothing about defendants' land use practices.

Rule 4 of the New Jersey Rules of Evidence provides that:

> "The judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will either (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury.

Evidence of affordability, especially as it will be presented by plaintiffs, is not probative of any issue in this case and will certainly "necessitate undue consumption of time." Defendants ask that this evidence be excluded.

VII

THE DOCTRINE OF LEAST COST HOUSING REQUIRES LEAST COST SITING TO MINIMIZE THE COST OF NEW DEVELOPMENT

A. Planning Policy and Least Cost Siting

We have previously argued, Point III-E, F, supra, that current planning theory and social policy demands efficiency in new development. A policy of in-fill development rather than continued sprawl constitutes the modern planning imperative. That is, siting new development where use of existing infrastructure can be maximized and damage to the environment can be minimized is the most cost effective. Only such siting of development will yield least cost housing which is required by Madison. In addition, least cost housing requires that lower income housing be located where the social costs to the lower income residents and to the community at large will be minimized.

Courts have recognized the importance of proper siting decisions for least cost housing by municipalities. For instance, in N.A.A.C.P. v. Tp. of Mt. Laurel II, 161 N.J. Super. 317 (Law Div. 1978), Judge Wood commented favorably upon the siting decision of the Township for its least cost zones: its proximity to the industrial zone contributed to employment opportunities; the proximity of shopping facilities and recreation areas would benefit residents; the site was close to a network of state, county and local roads, with convenient access; and most importantly, existing water and sewer facilities were close by and available. 161 N.J. Super. 338-339.

Likewise, in Caputo v. Chester Twp. Superior Court, Law. Div., Morris County, Docket No. L-42857-74, Judge Muir found that the municipality's land use siting decision was supported by sound land use principles. Transcript of Opinion, October 4, 1978, at 100-102.

B. Environmental Costs

The least cost housing mandate of the Supreme Court in Madison necessarily includes the proposition that, where environmental constraints are a factor (as they are in all of Morris County), the most environmentally appropriate land must be chosen for high intensity uses such as least cost housing.* Construction on inappropriate land will require excessive engineering costs to mitigate the detrimental effects of development. These costs will drive up the cost of the unit and be passed on to the consumer. The improper siting decision then becomes a prohibited cost-generating factor.**

Improper siting of development also inflates the costs to society. Development on inappropriate land may be relatively cheap in the short run, but the costs of restoring the damage over the long run will be exhorbitant. Development of housing units that merely defers massive costs to the future is not least cost.

The plaintiffs will contend that good engineering can solve any environmental problem. Even assuming that this is true, the real question is: what is the price? If the price

*This case does not present the more difficult issue of whether it is ever appropriate to use the zoning power to exclude all uses because of overwhelming environmental factors. See, e.g., Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N.J. 539 (1963); AMG Association v. Springfield, 65 N.J. 101 (1974), at footnote 4, page 112, Just v. Marinette County, 56 Wisc. 2d 7, 201 N.W. 2d 701 (Sup. Ct. 1972).

**See the direct holding on this point in Madison, 72 N.J. at 507, 510.

is excessively high housing cost, polluted water supplies, septic systems that do not work, soils that erode, beautiful woodlands needlessly destroyed, the price is too high.

Plaintiffs' "fair share" approach to land use planning ignores these factors. Plaintiffs ignore the fact that 92% of the land in Morris County is in watersheds. Tri-State Regional Planning Commission, Interim Technical Report, 3321, (September 1977) at 3. They also ignore the fact that the Tri-State Regional Planning Commission has characterized 60 % of Morris County in the Open Land Areas (development at less than .5 dwelling units per acre with 3 to 10 acre development recommended. Regional Development Guide 2000, at 19 (visual inspection of map). Plaintiffs also disregard the fact that 40% of the undeveloped land in Morris County has soil characteristics termed "critical": soils which flood frequently; soils which retain water; potential aguifer recharge soils, and slopes of more than 25%. Northeast N.J. §208 Water Quality Management Plan.

The most dramatic evidence of plaintiffs' disregard for environmental constraints in land use planning is found in their population forecasts for Morris County. The §208 Water Quality Plan for Northeast New Jersey, prepared by the New Jersey Department of Environmental Protection, developed growth projections for each New Jersey county based on water quality protection standards. The §208 Plan projected the addition of 75,000 residences in Morris County between 1975 and 1990. This increase includes housing for all income levels. Yet the DCA

Housing Allocation Report projects an increase of 44,341 low and moderate income units alone; and plaintiffs' "fair share" witness, Mary Brooks, projects an increase of 94,016 low and moderate units. The DCA and Brooks numbers are projections to the year 1990, not 2000!

These vast discrepancies need little analysis to prove that plaintiffs concern for the environment is illusory. If we conservatively assume that the Morris County population will be 33% low and moderate in 1990, Ms. Brooks' "fair share" methodology projects nearly 4 items as many residences in Morris County as water quality constraints will safely permit. The costs of such overdevelopment will be paid somehow and sometime; the development will not prove to be least cost.

If a watershed is over-developed so as to degrade water quality downstream, then the water will have to be upgraded by increased treatment. Increased treatment costs more, and this cost will ultimately be borne by all water users. For instance, chemicals from runoff may be chlorinated during the treatment process, and may become carcinogenic, requiring expensive filtering treatment for removal. This is just as much a part of the ultimate cost of the development as is construction cost or road improvement cost and should be avoided by sound environmental least cost siting whenever possible.

C. Social Costs

The economics inherent in the control of suburban sprawl and the pursuit of in-fill development are fully consistent withthe doctrine of least cost housing. When the Supreme Court formulated the least cost doctrine in Madison, it explicitly recognized that the long range costs to the community, not merely the "step in" costs of the project, must be considered in developing such housing:

> The concept of least cost housing is not to be understood as contemplating construction which could readily deteriorate into slums. Madison, 72 N.J. at 513, fn. 21

Slums are not merely a function of inadequate housing units.* They are a function of numerous social and economic factors which destroy the fabric of a community. Therefore, the prevention of slums requires more than the creation of soundly-built housing units.** It requires planning and providing for the personal and social service needs of the residents who will occupy the units.

Lower income persons are heavily dependent on external community resources for these services. Community resources in this context are not limited to welfare and social service agencies.

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*See H. Gans, The Urban Villagers (1962).

**The most dramatic example is the history of the Pruitt-Igoe housing project in St. Louis. The project consisted of 33 eleven-story buildings incorporating modern construction standards. In 1972 the project was razed by public officials because it was plagued by crime and vandalism and became unworkable. See L. Rainwater, Fear and the House as Haven in the Lower Class in URBANMAN: THE PSYCHOLOGY OF URBAN SURVIVAL (N. Eddington, ed. 1973) at 97.

They include the broad range of resources which form the necessary elements of community: employment opportunities; stores which cater to a full range of tastes and budgets; shopping which is accessible without automobile travel;* social, religious, recreational, ethnic and cultural community facilities; etc.

These resources, which may be termed the social-cultural infrastructure, do not just "spring up" spontaneously in a new community. They must be either planned for or created by new residents. Middle and upper income persons have the personal resources to create or purchase these services: music lessons for children; memberships in private clubs for recreation and social activities; travel to regional malls for shopping; etc. Lower income persons will be limited to public facilities which are either unavailable or inaccessible in automobile - oriented suburbs. Creating the required "social-cultural infrastructure" at public expense for relatively small populations is not "least cost" development. The infrastructure already exists in the central cities and close-in suburbs. Using existing infrastructures is "least cost."

These are not insignificant matters. While the policy of dispersing the poor from the declining urban core to "clean"

*If Mt. Laurel means that each outlying community must affirmatively include a "fair share" of lower income families, does it also mean that each such family will be issued a "fair share car" to function in these automobile - oriented communities.

suburban and exurban areas has an intuitive appeal, extensive sociological literature has documented the critical importance of planning for the community needs of relocated residents. See, e.g. Gans, Effects of the Move from City to Suburb in the THE URBAN CONDITION (L. Duhl, ed. 1973). One theoretical basis for this conclusion is that relocated persons become "de-networked". That is, familiar social and cultrual ties to the old neighborhoods and institutions are severed. These networks are esstential to an individual's emotional and sometimes physical survival. If they are not replaced, a variety of pathologies develop. This phenomenon is true of all social and economic classes* but the lower income groups do not have the financial means to reconstruct new networks or to maintain old ones (e.g., extensive travel or long distance telephone calls to family and friends). Id. See also Gans, THE LEVITTOWNERS, supra; B. Adams, KINSHIP IN AN URBAN SETTING, (1968).

It is not sound planning to relocate low income persons to areas where the most common services and facilities are either unavailable or inaccessible. The costs of dealing with the resulting social problems caused by the isolations will be shifted to the community at large. Thus, the housing units built to minimum physical construction standards in an inappropriate community will become must more expensive in both dollars and human misery. It is no longer "least cost."

*See, C. Alexander, The City as a Machanism for Sustaining Human Contact, in J. Helmer and N. Eddington, eds., URBANMAN, THE PSYCHOLOGY OF URBAN SURVIVAL (1973).

Moreover, it is wishful thinking to expect that the necessary social-cultural infrastructure can be provided in outlying areas at public expense. Even if it were politically and economically possible, it would not be least cost development.

We argued previously that least cost development is impossible on environmentally sensitive lands where the true cost of development is hidden in pollution and future reclamation efforts. This is the concept of "least cost siting" of development. Least cost siting also requires that planning for low and moderate income housing consider the marginal and long range social costs to the community and the personal costs to the relocated persons. Only a comprehensive perspective on least cost housing including least cost siting, will guarantee the reasonable implementation of Mt. Laurel and Madison.

VIII

LAYPERSONS ARE NOT QUALIFIED TO GIVE EXPERT PLANNING TESTIMONY

A. Theory of the Expert witness.

Expert opinion testimony is admitted under two conditions: (1) where the witness has peculiar knowledge not common to the world and (2) where that knowledge is an aid to the Court or jury in resolving the issue in question. Nesta v. Meyer, 100 N.J. Super. 434, 442 (App. Div. 1968). A witness may speak as an expert only upon an initial determination that he qualifies as an expert. His testimony may be admitted only if (1) his opinions are based "primarily on facts, data, or other expert opinion established by evidence at the trial, and (2) his opinions are within the scope of the special knowledge he possesses. Evid. R. 56; See also Castwell v. Township of Franklin, 161 N.J. Super. 190 (App. Div. 1978).

The Court must decide whether these initial tests have been met in this case. In so doing, however, two principles should govern. The first is that any expert in this case must be qualified in the field of comprehensive planning. The second is that no potential expert may be an advocate. If either of these principles is not satisfied, the witness should be disqualified.

It is well established that the "fact that one may be an expert in one field does not qualify him to testify as an expert in a field in which it is not shown he is qualified" Keuper v. Wilson, 111 N.J. Super. 489 (Chan. Div. 1970). The admissibility of any potential expert's testimony depends on whether there is a perfect match between the specific expertise

of the witness and the specific issue requiring specialized knowledge. An English teacher is not an expert on issues relevant to an obscenity trial. Id. A state trooper is not an expert on the origin of gas explosions. Erschen v. Pennsylvania Industrial Oil Co., 393 A 2d 924 (Penn. Sup. Ct. 1978). "The mere fact that a witness is an expert in a wide general field... does not make everything he says admissible." Newman v. Great American Insurance Co., 86 N.J. Super. 391, 399 (App. Div. 1965).

In the instant case, the field of expertise is comprehensive planning. As noted above, Mt. Laurel required comprehensive planning on the part of municipalities. Those who challenge or defend municipal zoning ordinances must do so with respect to the dictates of comprehensive planning. As such, relevant testimony which requires the imprimatur of expertise must come from those qualified as experts in the field. Qualification in other fields is necessarily irrelevant.

The title of expert carriers with it another condition: The expert cannot speak as an advocate. As the New Jersey Supreme Court noted, the expert's role

> "...is to contribute the insight of his specialty. He is not an advocate; that is the role of counsel. Nor is he the ultimate trier of the facts; that is the role of the jury or the judge, as the case may be. The trier of fact may be misled if the expert goes beyond what he can contribute as an expert.
>
> In re Hyett, 61 N.J. 518, 531 (1972).

The Court, therefore, should disqualify so-called experts who on the one hand lack expertise in the area of

comprehensive planning or on the other hand view their own expertise as lying in the area of advocacy or advocacy planning. We believe plaintiffs' experts fail on both counts. We therefore ask that they be disqualified.

B. Single Issue Planning is Not Comprehensive Planning.

A single issue planner is one who plans solely in an effort to realize one goal. He either plans to achieve environmental quality, or he plans to achieve dispersion of low and moderate income families, or he plans to fashion a community that is racially and economically exclusive. Whatever the technique, the goal of a single issue planner is narrow.

Single issue planning is at odds with comprehensive planning. It is therefore contrary to the dictates of Mt. Laurel and Oakwood at Madison. It places one goal or outcome above all else and fashions zoning ordinances to meet that goal. It may pay lip service to demand for a regional perspective or for environmental quality, but to the extent those demands are not accounted for in a reasonable fashion, the planner is merely trying to disguise his single issue perspective in the terminology of comprehensive planning.

C. Single Issue Planning is Advocacy Planning.

In addition to failing to be comprehensive, single issue planning is also advocacy planning.

The role of the planner as advocate has been outlined by Paul Davidoff of the Suburban Action Institute. Mr. Davidoff has written:

> "...the planner should do more than explicate the values underlying his prescriptions for courses of action; he should affirm them; he should be an advocate for what he deems proper...[P]lanners should be able to engage in the political process as advocates of the interests both of government and of such other groups, organizations or individuals who are concerned with proposing policies for the future development of the community...The advocate represents an individual, group, or organization. He affirms their position in language understandable to his client and to the decision makers he seeks to convince.

Davidoff, "Advocacy and Pluralism in Planning, " 31 Am. Institute of Planners, J., 331-332 (1965).

The planning perspective that emerges from Mr. Davidoff's description can never qualify as a sound basis for expertise in a Court. Expertise is grounded on a finding of specialized knowledge that will aid the Court in resolving issues. A witness who advocates has sacrificed that degree of objectivity which allows the Court to trust his opinions. To repeat what was noted earlier, an "[expert's] role is to contribute the insight of his specialty. He is not an advocate; that is the role of counsel" In re Hyett, 61 N.J. at 531.

Single issue planning is invariably advocacy planning. The interests of a particular group, organization or individual define the goal sought by the planner. Cf. Davidoff, supra at 334. Alternative and even complementary goals are in good conscience cast aside. This is because the advocate-planner understands planning as part of a pluralistic political process in which competing interests ultimately arrive at results which balances all goals. As such, the advocate planner's role is simply to represent the single issue he has embraced.

Such a perspective is fine in a legislative or bureaucratic setting. There, political actors play out their roles in a kind of Hobbesian universe where each person fights against the other. In that universe Mr. Davidoff's advocate is a required player. But in a Court setting as an expert, there is no place for the advocate-planner.

D. Brooks Is a Single-Issue Planner and Mallach Is Not Even a Planner

Plaintiff's two major experts, Mary Brooks and Alan Mallach, must be disqualified as experts in this case. Mary Brooks is a single issue planner. She does not engage in comprehensive planning. She is an advocate planner. As such she fails to satisfy the criteria for expertise. And Alan Mallach is not even a planner. As such, he too fails to satisfy the criteria for expertise in this case.

Both her past work and the testimony provided in pre-trial depositions demonstrate the narrowness of Ms. Brooks's perspective. She is not licensed as a planner (Deposition of Mary Brooks, May 9, 1979, at 66). She has never completed any elements of a master plan (Id.). And despite her contention that zoning is critical in this case, she has never even reviewed defendants' zoning ordinances.

> Q. [I]t is fair to say that, with respect to the defendant municipalities, you believe zoning to be the largest single impediment to the construction of low and moderate income housing?
> [Ms. Brooks] In a sense, yes.
> Q. Are there any zoning ordinances in Morris County which you believe do not provide an impediment to the construction of low and moderate income housing?
> [Ms. Brooks] I don't know.
> Q. Have you reviewed any of the zoning ordinances in Morris County?
> [Ms. Brooks] No.
>
> (Deposition of Mary Brooks, February 4, 1980, at 66.)

Her admitted goal is the dispersion of low and moderate income families (Deposition of Mary Brooks, May 17, 1979, at 24). And from the methodology she employed in arriving at an allocation figure for Morris County, it is apparent that

the simple goal of dispersion is her exclusive goal. She concedes ignorance as to the existence of necessary infrastructure such as sewers, transporation centers, and the presence and location of public services. (Deposition of Mary Brooks, May 21, 1979 at 39.) She testified that she did not factor in the costs of constructing or the technical feasibility of providing sewer treatment for projected waste. She admitted having no expertise in the area of environmental impact. (Deposition of Mary Brooks, May 9, 1979 at 61.) She did not consider soil suitability or any other environmental factors in arriving at her allocation figure. (Id. at 75) She admitted knowing nothing about the cost of land in the County, (Id. at 71), she has not read or reviewed relevant studies of the County's transportation network, and she did not consider the relevance of existing employment centers. (Deposition of Mary Brooks, Feb. 25, 1980. She did not consider any potential effects of urban revitalization. She did not consider that urban revitalization might be contrary to a policy of dispersion. (Deposition of May 17, 1979 at 92) Her concept of planning therefore is at best narrow and at worst absolutely misleading.

The number of factors omitted by Ms. Brooks in her assessment of need destroys her claim to expertise. Her frame of reference does not admit of goals other than dispersion. Her work does not reflect an effort to balance competing goals in evaluating alternative strategies. This is the work of a comprehensive planner. It is the work that Ms. Brooks simply does not do.

Given the narrow confines of Ms. Brooks "planning" perspective, it is no surprise that she describes herself as

an advocate (Deposition of Mary Brooks, Jan. 28, 1980, at 82). As an advocate, the narrowness of the single issue is a necessity. But, as an aid to the Court in resolving the issue of this case (Nesta v. Meyer, 100 N.J. Super. at 441), advocacy is inappropriate. In re Hyatt, supra 61 N.J. at 531.

In the case of Alan Mallach, the lack of qualification is even more evident. His claims to broad-based expertise are simply unsupported by either professional training in the planning discipline or demonstrated experience in the field of comprehensive planning. His penchant for testifying in Mt. Laurel-like cases is matched only by the penchant with which the Courts have disregarded his testimony.*

Mr. Mallach is not a planner. He holds a degree in sociology. Insisting, as he does, (Deposition of Alan Mallach, April 9, 1979, at 122-123), that he is an expert in planning

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*In Mt. Laurel II, for example, Mallach's inflated fair share figure was rejected. See So. Burlington Co. N.A.A.C.P. v. Township of Mt. Laurel 161 N.J. Super. 317, 344 (Law Div. 1978). In Urban League of Essex County v. Mahwah, Docket No. L-17112-71 P.W., Slip. op. at 11, 39-40 (Law Division, Bergen County, March 8, 1979), the Court again rejected Mallach's analysis. Judge Leahy rejected Mr. Mallach's 10 days of fair share testimony in Allan Deane Corp. v. Bedminster, Docket No. L-36896-70 P.W., L-28061-71 P.W. The judge wrote:

> In this Court's opinion it is neither necessary nor appropriate for the Court to engage in such mathematical and geopolitical determinations.

Letter Opinion of December 13, 1979 at 3.

requires more than his own assessment of his qualifications. He must demonstrate expertise in the field of comprehensive planning if he is to testify on the Mt. Laurel obligations of 27 municipalities in Morris County.

Like Ms. Brooks, Mr. Mallach has fallen prey to the narrowness of the single issue and the error of advocacy. His reports are laced with references to Mr. Laurel and Madison. He is being offered as an expert on whether defendants' zoning ordinances are exclusionary. Yet, he admits having done no work on region relevant to the issue in this case. (Deposition of Alan Mallach, April 9, 197 , at 111). To fail to offer regional analysis and then to offer oneself as an expert strains credulity. Region outlines the parameters of housing need and ultimately determines whether a municipal ordinance is potentially exclusive.

The explanation for Mr. Mallach's failure lies in the narrow advocate's role he has structured for himself. With one exception, he has never reviewed an ordinance and found it non-exclusionary. In the case of the exception, moreover, he was still prepared to testify against the municipality. This was because the ordinance, though not exclusionary as a whole, contained, in Mr. Mallach's words, "minor provisions" that were exclusionary. (Deposition of Alan Mallach, April 19, 1979, at 61).

In all, Mr. Mallach says he has reviewed between sixty and one hundred municipal zoning ordinances throughout this

state (Id. at 60). In all those cases, however, he never once testified on behalf of a municipality. This record itself denies Mr. Mallach's self-announced claims to expertise. It betrays a single devotion to the goal of dispersion. It indicates a total inability to formulate comprehensive plans. As such Mr. Mallach has responded admirably to the demands placed on an advocate. Again, however, expertise in a court does not allow advocacy from an expert. Mr. Mallach is not qualified.

IX

MUNICIPAL RESTRICTION ON MOBILE HOMES ARE REASONABLE IN VIEW OF HEALTH, SAFETY, AND ECONOMIC PROBLEMS ASSOCIATED WITH MOBILE HOMES*

While both New Jersey and the federal government have enacted certain statutory provisions intended to help alleviate mobile home-related problems, 42 U.S.C. §5401, et seq., N.J.S.A. 52:27D-1 et seq., it is clear that very significant problems still remain.

In enacting the National Mobile Home Construction and Safety Standards Act of 1974, 42 U.S.C. §5401, et seq., which preempts local and state regulations, id. §5403(d), Congress delegated mobile home regulation to the Department of Housing and Urban Development (HUD) in order to improve upon the poor safety and quality record of mobile homes:

> The Congress declares that the purposes of this chapter are to reduce the number of personal injuries and deaths and the amount of insurance costs and property damage resulting from mobile home accidents and to improve the quality and durability of mobile homes. Therefore, the Congress determines that it is necessary to establish Federal construction and safety standards for mobile homes and to authorize mobile home safety research and development.

42 U.S.C. §5401.

While some progress in improving mobile home

*This point was adopted from the Brief of the Amici Legislators before the Supreme Court in Southern Burlington County NAACP v. Township of Mount Laurel, Docket No. 17,041.

safety may have been made since 1974, the industry's problems, which were significant enought to trigger this legislation, have not miraculously been cured in the five years following the law's passage.

1. UREA-FORMALDEHYDE EMISSIONS.

The federal government and mobile home industry is just now taking notice of potentially major health problems caused by the gaseous emissions from the urea-formaldehyde products and resins used in mobile home construction. In a recent notice of nation-wide public hearings to be held on this subject, the Consumer Product Safety Commission noted that consumers exposed to released formaldehyde gas may experience eye, nose and throat irritation and other upper respiratory tract problems; lower respiratory problems, headaches and dizziness; swelling of face and neck; nausea and vomiting; severe nose bleeds; and severe skin irritation and eczema-like rashes. Consumer Product Safety Commission, "Public Hearings Concerning Safety and Health Problems that may be Associated with Release of Formaldehyde Gas From Urea-Formaldehyde Insulation," 44 Fed. Reg. 69,578 (1979).

The Wisconsin Department of Health and Social Services, in response to complaints from mobile home owners, has proposed certain regulations which may very well

effectively preclude or restrict new mobile home development in Wisconsin. See, Mary Ann Woodbury, Dr. Carl Zenz, "Formaldehyde Vapor Problem in Homes From Chipboard and Foam Insulation," Wisconsin Department of Health (1978).

Wisconsin Department of Health officials have recently recommended a maximum indoor air formaldehyde concentration of .1 or .2 ppm (parts per million). Progress Report of Wisconsin Advisory Committee on Mobile Homes (Nov. 12, 1979); Mary Ann Woodbury and Dr. Carl Zenz, "Formaldehyde Vapor Problem in Homes from Chipboard and Foam Insulation," at 9, Wisconsin Department of Health paper (1978). The American Industrial Hygiene Association has recommended an in-home limit of .1 ppm. Woodbury and Zenz, supra, at 5, citing "Community Air Quality Guides-Aldehydes," American Industrial Hygiene Ass'n (Sept. - Oct. 1968). However, actual tests on 68 mobile homes (including five randomly sampled on a sales lot), in which 92 persons have actually experienced adverse reactions purportedly resulting from formaldehyde exposure, show formaldehyde concentrations averaging over .5 ppm in the bedrooms and kitchens, more than five times greater than these suggested safety levels, 26 Environmental Health & Safety News, University of Washington, Nos. 1-6, at 8-12 (June, 1977).

The problem, which is rapidly becoming the subject

of extensive study, has been known as the "mobile home syndrome":

> Clinicians at the University of Washington, Seattle, have described a "mobile home" syndrome. Irritation of the eyes, nose, and throat; labored breathing; and nausea have been the chief complaints of Seattle-area mobile home dwellers seen over the past six years. Airborne formaldehyde is the culprit, and particle board, plywood, plywood finishes, and urea formaldehyde insulation have been identified as the source. In some of the mobile homes tested, the formaldehyde level of the air has exceeded 1 ppm, the NIOSH permissible exposure;* for sensitive individuals, however, there may be no safe level. Because the formaldehyde dissipates over the years, only newer homes precipitate the syndrome.

45 Modern Medicine 23 (Sept. 30, 1977).

While formaldehyde problems can possibly arise in conventional homes with urea-formaldehyde insulation (now banned in Massachusetts), the problem is much more serious in mobile homes because they "utilize much more plywood and particle board [of which urea-formaldehyde resins are a key

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* This NIOSH standard of 1 ppm is the maximum recommended for an employee for any 30-minute sampling period. Such industrial standards are based on a 40-hour work week for adult employees in good health. The standards must, however, be stricter for the 24-hour a day exposure in mobile homes which may be occupied by infants, pregnant women, the elderly with respiratory problems and heart trouble, and young children. Environmental Health and Safety News, supra at 19.

ingredient] then [sic] is found in conventional homes. In addition, the mobile home is constructed much tighter than is [sic] the conventional homes so that dilution with outside air is minimized." Environmental Health & Safety News, supra, at 15. Accord, HUD Proposal Request for "An Evaluation of Formaldehyde Problems in Residential Mobile Homes," at 3, (July 25, 1979) (hereafter, HUD Proposal Request) (noting that "as mobile homes have been getting physically tighter" as a result of energy conservation efforts, air quality and formaldehyde emission problems have worsened).

In addition to their limited volume and ventilation, mobile homes are particularly vulnerable to formaldehyde problems because of the urea formaldehyde products used "extensively" in the synthetic materials utilized in the manufacture of furniture, rugs, and drapes which are often found in mobile homes. HUD Proposal Request, supra, at 3.

The seriousness of the problem is aggravated by the fact that current federal regulations and warranty requirements do not deal with this aspect of mobile home-related health hazards. Thus, the Wisconsin Dept. of Health and Social Services recently wrote to the Federal Trade Commission (FTC) urging that warranty requirements under

consideration by the FTC include coverage of formaldehyde induced health problems:

> The Wisconsin Department of Health strongly recommends that if warranty requirements are established that they include warnings for consumers about the potential for exposure to formaldehyde vapor. And, it should explain that the chemical can cause eye and upper respiratory irritation and possibly more serious health problems. The department also recommends that any warranty requirements include making the manufacturer or dealer responsible for correcting the cause of the health problem or replacing the mobile home.
>
> The Department is making these recommendations based on experiences in Wisconsin involving formaldehyde vapor-related health problems among residents of mobile homes. The Department's Division of Health has sufficient data and cause to believe that formaldehyde vapor, even in relatively low concentrations, poses a serious threat to the health and well-being of residents in some mobile homes. This data was obtained through complaints and requests for assistance received by the Division from mobile home residents, physicians and other state agencies. The development of this data led to the selection of the Wisconsin Department of Health and Social Services, by the U.S. Environmental Protection Agency (EPA), to do an epidemiologic study of formaldehyde vapor and the health status of mobile home residents. The EPA study was prompted by reports of similar problems with formaldehyde vapor from several states including New Mexico, Washington, Oregon, North Carolina, Florida, Illinois and Wisconsin.

In Wisconsin there have been instances in which persons purchased new mobile homes and then found that because the formaldehyde vapor in the home adversely affected their health that they could not live in the home. They were forced to find alternative housing because even though they owned a home they couldn't live in it.

While formal studies are yet to be completed on the question of whether formaldehyde vapor causes birth defects or cancer or has other long term effects on health, it is evident from the information at hand that the release of formaldehyde vapor renders certain homes unfit for human habitation and has, in fact, had serious effects on the health of certain families. Case studies in Wisconsin disclose formaldehyde-related health problems such as eye irritation, respiratory difficulty (shortness of breath), headache, fatigue, vomiting and diarrhea. Six of the seventeen infants involved in these case studies experienced health problems that required hospitalization.

Wisconsin is in the process of establishing air standards for formaldehyde vapor in mobile homes that will hopefully include language making the manufacturers responsible for correcting any problem with formaldehyde vapor.

The Wisconsin Department of Health and Social Services encourages your agency to establish warranty requirements for mobile homes that would include protection for the consumer who has problems in a mobile home with formaldehyde vapor.

Such warranty requirements are necessary to protect consumers from the possibility that substances contained in

> materials used in mobile homes home construction may have adverse affects on the health of persons living in the home and may even cause the home to be unfit for human habitation.

Letter from Donald E. Perry, Secretary, Wisconsin Dept. of Health and Social Services, to Arthur Levin, Federal Trade Commission (November 6, 1979). (emphasis supplied).

The formaldehyde emission problem has also been heightened by the fact that young families and retired couples are representative of many mobile home dwellers, and are particularly vulnerable to the harmful effects of formaldehyde which has its greatest detrimental effect upon infants, and the elderly with respiratory problems and heart disease. Physicians have had little success in treating formaldehyde caused health problems which may prove to be permanent. Environmental Health and Safety News, supra, at 18.

Moreover, this Court should be apprised of the fact that little can be done currently to alleviate the formaldehyde problem in a mobile home. Absorbing chemicals, sealing of particle board and fireboard and boiling out of the formaldehyde by vacating the home and turning up the heat for a weekend, have all failed. Id.

In light of the relatively recent recognition of the problem, and of the receipt of "substantial consumer complaints during the past three years [i.e., 1976-79]," HUD

has now undertaken a study to determine the need for a ppm standard for formaldehyde concentration in mobile homes. HUD Request for Proposals, supra, at 3. In its study proposal, estimating a $75,000-$90,000 cost for the first phase of this study, HUD noted current need to cope with this complex problem:

> The problem of urea formaldehyde outgassing in residential mobile homes has been of concern to the Department in terms of occupant health and safety. There have been numerous complaints. The problem is, however, deceptively complex since formaldehyde emissions may develop from any sources. We have met with other interested federal agencies, interested individuals and the mobile home industry -- and its suppliers -- in an attempt to gather sufficient information on which to base a judgment.
>
> There is now a need, from the Department's point of view, to assess all the factors concerning the formaldehyde problem and to place them into a perspective suitable for determining whether a regulation is needed to meet the intent of the National Mobile Home Construction and Safety Standards Act of 1974. That is the purpose of this research project. In addition, the project will attempt to offer alternatives and to systematically evaluate their advantages and disadvantages.

HUD Request for Proposals, supra, at 5.

Phase I of this study, now underway, will likely include consideration of questions such as:

(a) What is the state-of-the-art in formaldehyde

detection?

(b) Is there a realistic test method for use on the factory floor in mobile home plants?

(c) What is an adequate standard?

(d) What are the first and ultimate costs and benefits?

Id. at 4.

It is therefore apparent that the mobile home formaldehyde emission problem, which has recently been recognized as a significant health and safety hazard, is now the subject of extensive study that may ultimately lead to regulations which will radically affect the industry. This fact shows that it is certainly not arbitrary and capricious for a town to proscribe mobile home development through its zoning laws designed to promote the health, safety, and welfare of New Jersey's citizenry. This major unresolved health problem is grounds enough to compel the Legislature (or the Judiciary) not to impose state-wide, mandatory mobile home zoning.

Moreover, there remain to be resolved critical questions concerning several other aspects of mobile home safety, including fire safety, wind stability, unsafe installation and set-up procedures, limited effectiveness of warranties, and high real costs of mobile home ownership. While these problems will not all be discussed in the same

detail as the mobile home formaldehyde problem, they are nevertheless very significant.

2. FIRE HAZARDS

Mobile homes have, for a long time been known to be much more vulnerable to fires than are conventional homes. Data from different areas of the country indicate that the fatality rate for mobile home fires is two to eight times greater than that for conventional homes. Mobile Homes: The Low-Cost Housing Hoax, at 128, Center for Auto Safety, Wash., D.C. (1975). The greater relative severity of mobile home fires is also demonstrated by the fact that Oregon figures show that average fire loss as a percentage of dwelling value is 4.6 times greater for mobile home fires than for conventional home fires. Id. at 129.

Moreover, an independent evaluation of the National Bureau of Standards studies performed to evaluate HUD fire safety regulations indicates that there is insufficient evidence from which one could conclude that the current HUD standards are adequate. Rexford Wilson, Jonathan Barnett, "The Mobile Home Fire Safety Question," Firepro Inc., Mass. (May, 1979). Design modifications recommended by the National Bureau of Standards (NBS) to improve the fire safety afforded by the HUD regulations have not been implemented. E. Budnick and D. Klein, Mobile Home Fire Studies: Summary and Recommendations (NBSIR 79-1720)

(March, 1979).

HUD fire safety regulations, which do not even cover furnishings, draperies, and other highly flammable accessories, 24 C.F.R. 3280.202-203, allow interior wall and ceiling finishes, kitchen cabinets, and surfaces of plastic baths and shower units to have a flame spread rating of 200, using the surface flammability of materials using a radiant heat energy source, (Am. Society for Testing and Materials). 24 C.F.R. 3280.203. The meaning of this 200 rating, a Class "C" requirement under 1973 National Fire Protection Association regulations, has been succinctly explained in laymen's terms by a University of Maryland fire-research professor, Harry Hickey:

> A flame spread rating of between 150 and 200 burns about as quickly as the average adult can run. Anything over 200 will reach the end of a hallway before a running person does.

Mobile Homes: The low Cost Housing Hoax, supra, at 138.

Over 6 years ago, the National Commission on Fire Prevention and Control recommended that this flame spread standard for mobile homes be made stricter. Id., at 139, citing National Comm'n on Fire Prevention and Control, American Burning (May, 1973). Indeed, the 1964 National Fire Protection Ass'n (NFPA) code relating to mobile homes and travel trailers provided a stricter standard (i.e. flame

spread rating of 150) than is now applicable to mobile homes under the HUD code. Id. at 140, citing NFPA, Mobile Homes and Travel Trailers 23, at 8 (501B) (1964).

Moreover, extensive use of polyvinyl chloride plastics in mobile homes leads to the emission of clouds of toxic carbon monoxide and hydrogen chloride in a fire, which can be as fatal as the flames themselves. See id. at 141-144.

In short, this 200 flame spread material rating "'opens the door to just about everything.... [and] raises a serious question as to whether... people [have] enough time to escape.'" Id. at 139. HUD "fire safety" regulations, 24 C.F.R. 3280. 201 et seq., are therefore of at least very dubious value. It should thus be within a municipality's legislative discretion to proscribe mobile development in order to reasonably protect the health, safety, and welfare of New Jersey's citizens.

3. WIND STABILITY

Wind stability is also a major, unresolved problem for mobile home producers and, of course, for occupants. A National Bureau of Standards study has highlighted the fact that the HUD Code's uplife load requirements are inadequate and should be significantly strengthened. Richard Marshall, "Measurement of Wind Loads on a Full-Scale Mobile Home," National Bureau of Standards Report for

HUD (Nov. 1977).

Since these wind resistance requirements have been analyzed to be 50% inadequate at a 70 mile per hour wind speed, mobile homes built to these specifications could be a real hazard in New Jersey where wind speeds periodically exceed this level. G. Lenaz, "Physical and Economic Concerns of Mobile Homes as a Low Cost Housing Alternative," at II - 18, 19 (February, 1980) (expert report for Harding Tp. in Morris County Fair Housing Council v. Boonton Tp., No. L-6001-78 P.W.).

The improper set-up and installation of mobile homes adversely affect wind stability and structural performance arising from the improper leveling of the home (e.g. door alignment and plumbing problems). FTC Report of the Presiding Officer on Proposed Trade Regulation Rule: Mobile Home Sales and Service, at 200-16 (Aug. 31, 1979). HUD has also recognized that improper set-up and tie-downs of a mobile home will aggravate performance problems. HUD, "Report on Used Mobile Homes," 84-85 (1975).

HUD regulations do not, however, currently cover mobile home installation procedures and methods. 24 C.F.R. 3280, et seq. Furthermore, improper installation by the owner can also result in the manufacturer's release from liability under any warranty. FTC Report, supra, at 216-18.

4. WARRANTY PROBLEMS

Mobile home connected consumer problems have led to extensive investigation by the Federal Trade Commission (FTC) into the industry's warranty practices. Last summer, the FTC published the Report of the Presiding Officer on Proposed Trade Regulation Rule: Mobile Home Sales and Service (August 31, 1979). This 332 page report, and accompanying proposed regulations, are the product of rule making proceedings which actually commenced on May 29, 1975 with the publication of the Initial Notice of the Proceedings in the Federal Register. 40 Fed. Reg. 23,334 (1975). The report of the Presiding Officer evaluates many consumer problems caused by mobile home defects and manufacturer warranty problems, for example:

1. The failure of mobile home manufacturers to disclose their ultimate warranty responsibility, FTC Report of the Presiding Officer, supra at 58;

2. The inclusion in manufacturer warranties of unenforceable disclaimers or exclusions of implied warranties, Id. at 60;

3. The delegation by manufacturers of substantial warranty service and other responsibilities to dealers without sufficient safeguards to assure that the manufacturer, the dealer, and any third party contractors fulfill their respective obligations, Id. at 91;

4. Problems caused by manufacturers who "have not taken steps to assure that their authorized dealers ... perform a pre-tender inspection to determine whether certain defects are present and whether the mobile home is properly set

up," Id. at 93;

5. The questionable performance of manufacturers in handling repairs and stocking adequate replacement parts, Id. at 142;

6. The failure of manufacturers "to establish and maintain effective and regular programs to ensure prompt action on, and fair disposition of, consumer complaints and requests for warranty service," Id. at 144;

7. The practice of mobile home manufacturers of including the 3 or 4 foot tow-hitch in the total stated length of the mobile home, without disclosing this fact, thereby misleading consumers into believing that they have an additional 3 or 4 feet of living space in their home, Id. at 197-99;

8. The lack of adequate formal training programs to equip dealers to properly set up mobile homes, coupled with the consistent exclusion of defects arising from improper set-up from "a substantial number of manufacturers' warranties," Id. at 213-17;

9. The failure of the HUD inspection program to discover production defects, Id. at 241;

10. The need, acknowledged by HUD, for mobile home warranties to supplement the HUD program, Id. at 242.

The second report prepared in connection with the FTC review of warranty-related problems is the Final Staff Report to the Federal Trade Commission and Proposed Trade Regulation Rule; August, 1980).

The Final Staff Report recommends that the requirements of the final rule apply to manufacturers that either voluntarily offer a written warranty or are required to offer a written warranty under Federal or State Law. A company that does not offer a

written warranty or that is only obligated under state implied warranties would not be covered by the rule. In the 15 states which mandate a written warranty in the sale of new mobile homes, the manufacturer would have to meet the performance requirements of the rule. In the rest of the states, it would be left to the discretion of the individual manufacturer as to whether to offer a written warranty and, thus, fall under the scope of the rule.

Most manufacturers issue written warranties, but the consumer who purchases a home whose manufacturer does not offer a written warranty or who does not reside in one of the 15 states which mandate a written warranty would have no warranty protection whatsoever.

The Staff Report contains a suggested remedy for various warranty problems. Each remedy recommends that manufacturers and dealers be required to provide the warranty service or to include within their warranties the correction of each of the problems. It should be pointed out that neither the Report of the Presiding Officer nor the Final Staff Report has been adopted by the Federal Trade Commission and the time when a Final Rule may be adopted is problematical. Political pressures from manufacturers and trade organizations will probably seek to prevent the Rule from being adopted.*

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*At least one lawsuit has been filed by mobile home manufacturing interests challenging the hearing process leading to the FTC reports. See Indiana Manufactured Housing Assoc. v. FTC No. IP80-328-C (S.D. Ind., Filed April 4, 1980).

The Final Staff Report indicates that neither the HUD standards nor state regulation are effective in addressing warranty problems:

> "The HUD Program went into effect in June of 1976. It establishes construction standards for the major components of mobile homes, requires that each home be inspected one time at the factory and requires post-sale repair of only safety-related defects. Many parts of the mobile home which are typically covered by a manufacturer's warranty and for which consumers seek service are outside the HUD program. Repairs for defects that commonly occur in mobile homes (leaks and other problems with doors, ceilings, windows and walls) can be sought under the warranty but are not required by the HUD program. The thrust of the HUD inspection and correction requirements is to determine whether the same defect recurs in a class of mobile homes, rather than to focus on repairs for an individual home. In addition, the HUD program does not generally address defects arising from transportation or set up of a mobile home.
>
> Throughout the proceeding, HUD representatives testified and commented in support of many of the provisions in the Recommended Rule. Further, survey evidence generated in the fall of 1977 and manufacturer service records obtained in 1978 showed no significant difference in the quality of warranty service or frequency of defects in homes built before or after implementation of the HUD program. Several officials reported that the HUD program had weakened existing standards in their states.
>
> State laws concerning mobile homes include the licensing and bonding of manufacturers and dealers and mandated warranties on new mobile homes. These initatives, however, do not directly address the problem of warranty nonperformance. The rule provisions are consistent with repair deadlines in the few states that have enacted such standards and staff does not recommend that the rule preempt state inspections. To the contrary, the Recommended Rule should augment state efforts to monitor the industry and was widely supported by state Attorneys General and state mobile home officials.*

*Final Staff Report to the Federal Trade Commission and Proposed Trade Regulation Rule, 16 CFR Part 441, pp. xv and xvi.

It is important to note that mobile homes are expressly excluded from coverage under New Jersey's New Home Warranty and Builders' Registration Act N.J.S.A. 46:3B-1 et seq.; N.J.A.C. 5:25-1.3.

Moreover, not only have HUD's regulations failed to cure mobile home problems, but HUD is also now considering changing some of its regulations to accomodate mobile home manufacturers who have been building smaller mobile homes which HUD has found not to comply with its Code. This action is being taken following a HUD investigation in which it inspected some 65 smaller mobile homes, apparently many of which failed to comply with HUD regulations. 45 Fed. Reg. 26,908 (April 21, 1980).

In view of the foregoing findings relative to the broad question of mobile homes and their safety-from-occupancy problems, there is obviously little similarity between the mobile home owner's hazards and those of the buyer of a conventional single-family home.

5. HIGH REAL COST OF OWNERSHIP.

Additionally, costly mobile home financing, insurance, depreciation and market value, and taxation problems may so greatly add to the real cost of mobile home ownership, so that the mobile home is not even close to being least cost housing. Like automobiles, mobile homes are subject to certain built-in depreciation which often results in a 50% reduction in the wholesale value of a mobile home after only 6 1/2 years following its manufacture. Mobile Home Bluebook - Official Market Report, Judy Berner Publishing Co. (January, 1980). Thus, instead of building up equity in a sound investment like conventional home-owners can do, mobile home occupants may very well find themselves sinking money into a rapidly depreciating asset.

High financing and insurance costs also contribute significantly to the real cost of mobile home ownership, over and above its purchase price. Mobile homes are usually financed through chattel mortgages with relatively short-terms (e.g. 7-10 years), and relatively high interest rates. Insurance costs for mobile homes may be as much as 2 to 6 times greater than those for conventional homes which have longer useful lives, and are not subject to the same high fire and wind loss risks. Mobile Homes: The Low Cost Housing Hoax, supra, at 47-48. And, by financing add-ons such as the sales tax, insurance premiums, awnings and steps, in the mobile home mortgage, the real cost of ownership further increases. Id. at 45. See, generally "Financing and Insurance: Doubling the Price of a Mobile Home

Without Even Trying," in Mobile Homes: The Low Cost Housing Hoax, supra, at 37-51.

The Mount Laurel opinion certainly did not change the basic proposition that, "[z]oning is an exercise of the police power to serve the common good and general welfare." V.F. Zahodiakin Engineering Corp. v. Summit, 8 N.J. 386, 394 (1952). A zoning ordinance must "guide the appropriate use or development of... [land] in a manner which will promote the public health, safety, morals and general welfare... ." N.J.S.A. 40:55D-2(a). Accord, Pascack Association v. Washington Tp., 74 N.J. 470, 481-83 (1977).

In light of the aforementioned problems associated with mobile home use, e.g.:

1. formaldehyde emissions;
2. fire hazards;
3. lack of wind stability;
4. set-up and installation problems;
5. warranty effectiveness problems; and
6. the high real cost of mobile home ownership,

there can be no doubt that it is a very sound and defensible policy for a municipality to proscribe mobile home development, and thereby promote "safety from fire," and the public health, safety, and general welfare. N.J.S.A. 55D-2(a), (b).

The legislature has just begun to study mobile homes through the Commission to Study the Problems of Restrictive Zoning Regulations, Financing and Taxation of Mobile Homes

within the State of New Jersey. The Commission has issued its initial report, but until the Legislature and Governor act affirmatively with definitive legislation, the evidence amassing against the safety and economy of mobile homes must govern the decision of this Court.

Moreover, the State Commission has not addressed the health and safety problems:

> The Commission made no effort to ascertain the effectiveness of current code standards or of code enforcement, primarily because the adequacy of the federal code was never seriously called into question in the course of Commission deliberations.

Report and Recommendations of the Mobile Home Study Commission, October, 1980, at p. 50.

A reconsideration of this position will obviously have to be undertaken in light of recent HUD activity and the findings of the Wisconsin Advisory Committee on Mobile Homes, supra.

CONCLUSION

Land use planning which assumes the geographic dispersion of low and moderate income groups westward to the exurban areas of Morris County is inconsistent with the Mt. Laurel mandate to plan comprehensively. Such experiments in social engineering are contrary to the planning mandates of all regional and state planning bodies and would, if implemented, perpetuate the land use planning mistakes of the last three decades: costly sprawl development and environmental degradation.

The economic realities of the housing market today are such that few, if any, new housing units can be afforded by persons of low and moderate income, even in the absence of all zoning restrictions. Land use regulations will therefore not solve the affordability crisis; affordability is irrelevant.

In an age of increasing inflation in housing and energy costs, the constitutional duty of municipalities must be to remove unnecessary barriers to housing which artificially inflate all costs; to plan for efficient utilization of infrastructure and available transportation facilities; and to avoid sprawl development and environmental degradation.

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APPENDIX A

Fair Share Plans from Other Jurisdictions

The forerunner, and prototype, of many fair share plans, the Dayton Plan, was a *Housing Dispersal Plan* which had as its central planning strategy the geographic dispersal of lower income persons from inner city areas to outlying metropolitan jurisdictions. The *Dayton Housing Dispersal Plan,* which was adopted by the Miami Valley Regional Planning Commission in 1970, "called for the balanced distribution of about 14,000 additional units of low and moderate income housing, including a considerable amount of public housing, over the next four years throughout the five-county Dayton, Ohio region."*

In the *Dayton Housing Dispersal Plan*

> "housing need was quantified using a straightforward need vs. supply technique. *Need was defined as a social concept, separate and apart from the economic concept of demand* . . . The need figure dealt with units required to eliminate dilapidation and overcrowding and provide a comfortable vacancy rate . . . The results of this analysis showed that in 1970, the five county region was suffering a deficit of 16,000 additional housing units. Of these, more than 14,000 were estimated to be needed for the low-moderate income market."**

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* Dale F. Bertsch, Executive Director, Miami Valley Regional Planning Commission, "A Regional Housing Plan: The Miami Valley Regional Planning Commission Experience," *Planners Notebook* Volume 1, Number 1 April, 1971.

** Id.

The calculated "need" figures were then allocated to each of the 53 planning units within the Miami Valley Regional Planning Commission. The "needed" low and moderate income dwelling units were assigned to planning subareas based on factors emphasizing equal share, capacity to absorb, and distribution.

The Dayton Plan not only defined need separate and apart from the economic concept of demand, but also determined where housing should go based on factors other than the concept of demand. The Dayton *Housing Dispersal Plan,* moreover, assigned housing to the 53 planning units, but did *not* address the issue of how local zoning ordinances impacted on housing; the Miami Valley Regional Planning Commission did not have the power to override local zoning ordinances.*

The next major fair share housing allocation plan to appear after the Dayton Plan was the *Fair Share Housing Formula* developed by the Metropolitan Washington (D.C.) Council of Governments. The Washington Plan, adopted in 1972, sought to distribute the 6,274 federally subsidized housing units that had been allocated to the Washington area by the United States Department of Housing and Urban Development among the jurisdictions comprising the Washington Area Council of Governments: Washington, D.C., Prince George County, Maryland; Montgomery County, Maryland; and Fairfax County, Virginia. The Washington *Fair Share Formula* considered only relative need for low and moderate income housing, in the sense of what part of the total units assigned to the Washington area by HUD should be allocated to each jurisdiction.** The Washington *Fair Share*

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* *Id.*

** Metropolitan Washington Council of Governments, Fair Share Housing Formula, (Washington, D.C.: Metropolitan Washington Council of Governments, January, 1972).

Formula did not attempt to define the concept of a "fair share" of the regional housing need; instead it defined a brokering process which determined how the much sought after subsidized housing projects were to be divided among the several jurisdictions.

The "fair share" housing allocation plans which have been developed since the introduction of the Dayton and Washington plans follow closely the design, methodology and goals of both the Dayton and Washington plans. The post-Dayton plans can be categorized into two groups: those that follow the methodology of the Dayton plan, allocating housing "need"; and, those that follow the methodology of Washington plan, allocating publicly assisted, or subsidized, housing. Neither group considers demand as a determinative factor in the allocation.

The "fair share", or housing allocation, plans which fall into the Dayton category determine housing need as a social concept separate and apart from the economic concept of demand, allocating "need" to planning subareas based on criteria relating to equity, dispersal, and suitability. The plans which can be grouped into this category include the following plans*:

1) New Jersey Department of Community Affairs, *Revised Housing Allocation Plan* (1977)
2) Delaware Valley (PA) Regional Planning Commission, *Regional Housing Allocation Plan,* (1977-2000)
3) West Piedmont (VA) District Planning Commission, *Housing Distribution Formula* (1973)
4) Genesee/Finger Lakes Regional Planning Commission, *Housing: Regional Analysis and Program* (1971)

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* *See* Listokin, *Fair Share Housing Allocation,* (New Brunswick's Center for Urban Policy Research, 1976).

5) Monroe County, (NY) Planning Department, *Housing: A Challenge for Monroe County* (November 1972)

6) Metropolitan Dade County (FL) Planning Department, *Housing on the Metropolitan Plan—Dade County Florida*

7) Jacksonville Department of Housing and Urban Development, *A Housing Distribution Model* (1973)

The second group of plans consists generally of schemes for allocating publicly assisted, or subsidized, housing units within a jurisdiction based on criteria of need, equity, distribution and suitability, as in the Washington, D.C. *Fair Share Housing Formula.* Plans allocating publicly assisted or subsidized housing projects include the following plans:*

1) Cleveland City Planning Commission, *A Fair Share Plan for Cuyahoga County in Low-Rent Housing* (1971)

2) San Francisco City Planning Commission, *Community Development and Housing* (1975)

3) Metropolitan Council of the Twin Cities Minnesota, *Metropolitan Development Guide Housing Policy Program* (1972)

4) San Bernardino County Planning Commission, *Government Subsidized Housing Distribution Model* (1972)

5) Sacramento Regional Planning Commission, *An Approach* to the Distribution of Low and Moderate Income *Housing* (July 1973)

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* *See* Listokin, *Fair Share Housing Allocation,* (New Brunswick's Center for Urban Policy Research, 1976).