ML - Tewksbury Twp 9/4/85

Brief of Tp, Robert E. Rivell, in support of its motion for partial summary judgment

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ROBERT E. RIVELL,	:	SUPERIOR COURT OF NEW JERSE
	:	LAW DIVISION
Plaintiff	:	HUNTERDON COUNTY/
	:	MIDDELSEX COUNTY
vs.	:	MOUNT LAUREL
	:	
TOWNSHIP OF TEWKSBURY, a municipal corporation located in Hunterdon County, New Jersey,	:	DOCKET NO. L-040993-85PW
	:	CIVIL ACTION
Defendant.	:	

BRIEF OF PLAINTIFF, ROBERT E. RIVELL, IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

THOMAS J. BEETEL, Attorney for Plaintiff

ARGUMENT

TEWKSBURY'S TOWNSHIP ZONING ORDINANCE FAILS TO PROVIDE A REALISTIC OPPORTUNITY FOR THE CONSTRUCTION OF LOW AND MODERATE INCOME HOUSING OF ITS INDIGENOUS AND PROSPECTIVE HOUSING NEED.

"Mount Laurel II" substantially changed the test for determining whether or not the obligations set forth in "Mount Laurel" have been met by a particular municipality's zoning ordinances. It is the intent of the Supreme Court in "Mount Laurel" that obligation can be determined solely on an objective basis. That is "if the municipality has in fact provided a realistic opportunity for the construction of its fair share of low and moderate income housing, it has met the Mount Laurel obligation to satisfy the constitutional requirement; if it has not, then it has failed to satisfy it. See "Mount Laurel II" at page 221. The Court went on further to hold that a showing by the plaintiff that the defendant municipality's land use regulations fail to provide a realistic opportunity for low and moderate income housing or that such regulations contain requirements, restrictions, or exactions which preclude or substantially hinder it, create a prima facia case of the failure to satisfy the Mount Laurel obligation. See Mount Laurel II at page 222. Notwithstanding a most recent amendment to the Township zoning ordinance, namely 4-84 wherein the Township established a multi-family zone in a formerly rural residential

district which would allow townhouses at three units per acre or five apartments per acre, with a 20 percent set-aside for low and moderate income housing.

This amendment which well may be procedurally deficient as to its enactment, is economically unrealistic, see reports of Robert Tublitz, P.P. dated April 29, 1985, William Steinfield, dated, May 20, 1985, Harry Oldstein, dated, May 28, 1985, and the depositions of Bruce C. Clay, June 18, 1985 as well as other submitted reports relevant to the above. Mr. Dale Blazure, I.C.A. has valued the re-zoned land known partially as Lot 8, Block 29 at $2,812,500.00 less 20 percent for the required set aside, which translates into $2,250,000.00 or $30,000.00 per acre. Presently there is no sewer or water availability or the likelihood within the foreseeable future for this land to be developed even if it were for sale.

The defendant expert, William E. Fitzgerald, P.E., in his report dated April 3, 1985, values the same land at $885,750.00, and suggests that a profit would be realized in the amount of $3,942,033. Our analysis of said report indicates a loss of $1,907,360 after five years, which illustrates the opinion of Robert Tublitz, P.P., plaintiff's planner, as stated in his report dated, October 4, 1984, page 10, and his report dated, May 24, 1985 on page 3, wherein he maintains that Tewksbury has and still continues an exclusionary posture through "camouflage zoning".

The defendant, Township of Tewksbury, lies within a growth

area as designated by the S.D.G.P. and has a constitutional requirement to provide its fair share of low and moderate housing, being comprised of present, reallocated and prospective housing needs. That Tewksbury has failed to provide through its zoning ordinances and regulations for this need is obvious from even a cursory review its zoning ordinance, master plan, and zoning maps. See Robert Tublitz, P.P., plaintiff's planner, reports previously submitted to the Court, containing the 1979 Tewksbury Master Plan, Land Use Plan, Zoning Map and Zoning Ordinance and Regulations of the defendant Township.

As outlined in Robert Tublitz, P.P., plaintiff's planner, report, dated October 4, 1985 Evaluation of the Constitutionality of the Township of Tewksbury Development Regulations Ordinance Including its Official Zoning Map and the Excessive Restrictions and Exactions Therein the municipality's zoning ordinances and regulations utterly fail because of the lack of affirmative measures to effectively encourage construction of its fair share of low and moderate income housing. As recited in Southern Burlington County N.A.A.C.P. v. Mt. Laurel Township, 67 N.J. 155 (1975); Southern Burlington County N.A.A.C.P. v. Mt. Laurel Township, 92 N.J. 158 (1983); Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. (1977) and based thereon, the defendant Township zoning ordinances and regulations should be declared unconstitutional and be ordered to develop a new ordinance which provides a realistic opportunity for lower income housing.

In addition, the Zoning and Development Regulation Ordinance of the Township are presumptively and facially invalid, arbitrary and capricious, as the case may be and ultra vires and contraary to substantive due process and equal protection guarantees inherent in Article 1, Section 1 of the New Jersey Constitution and are contrary to N.J.S.A. 40:55D-62, due to the failure of the Township through its regulations to provide for a balanced community and to promote the general welfare.

ARGUMENT

TEWKSBURY TOWNSHIP CONTAINS A SDGP GROWTH AREA. A LARGER AREA, DUE TO PLANNED AND ACTUAL IS APPROPRIATE AS A RECEIVING AREA FOR LOWER INCOME HOUSING FOR FAIR SHARE PURPOSES.

The issue is the appropriateness of the growth designation for Tewksbury Township as contained in the State Development Guide Plan (SDGP) published by the New Jersey Department of Community Affairs (DCA) as revised in May 1980. The SDGP was designed to provide a comprehensive growth management strategy to ameliorate the negative consequences which resulted from decades of expansive suburbanization. It enumerated four generalized land use categories: growth, limited growth, agriculture and conservation areas. Growth areas were described as:

> ...those regions of New Jersey where development has already occurred to an extensive, as well as partially suburbanized areas with accessibility to employment. Several existing rural in more peripheral have also been designated where continuing development would be appropriate.
>
> The growth areas were delineated by applying the following criteria:
>
> 1. Location within or adjacent to major population and employment centers.
> 2. Location within or in proximity to existing major water supply and sewer service areas.
> 3. Location within or in proximity to areas served by highway and rail commuter rail facilities.
> 4. Absence of large concentration of agriculation land.

5. Absence of large blocks of public open space or environmentally-sensitive land.

The initial question is how appropriately was the growth area assigned to Tewksbury and was the criteria adhered to? A secondary question, of equal importance is raised by Mt. Laurel II, supra 92 N.J. at 248, F21 (emphasis supplied).

> In addition to urban areas and the built-up suburbs, 'developing' municipalities will be subject to Mount Laurel to the extent that prior decisions imply that the so-called 'six criteria' must be satisfied to characterized a municipality as 'developing' see supra at 223-224, we disavow that implication. Any combination of factors demonstrating that the municipality is in the process of significant commercial, industrial or residential growth, or is encouraging such growth, or is it in the path of inevitable future growth, commercial, industrial of residential growth will suffice.

The Court's rejection of the formulaic "six-criteria" approach brings us back to first principles and is the key to understanding the use of the SDGP and the exceptions enumerated. The Court is admonishing us not to apply a rigid formula but to look at what is in fact happening in a particular municipality:

1. is it in the process of significant commercial, industrial or residential growth; or
2. is it encouraging such growth; or
3. is it in the path of inevitable future commercial, industrial or residential growth.

It should be noted that the Court, itself, emphasizes, in Mt. Laurel II, the disjunctive as to these three demographic factors. And they are the same factors which appear in its discussion of the SDGP exceptions.

Furthermore, these factors are a reiteration of the Court's basic concern. Where appropriate, as a result of actual growth or planning for growth, lower income housing must be provided to avoid further exacerbation of class segregation. Given the dynamic nature of the growth process and the need for adequate vacant land, it is obviously essential that lower income housing needs be addressed at the earliest possible time. This is particularly true when the major remedial and inclusionary device is to create incentives or mandate percentages of lower income housing in conventional developments. The Court refused to be beguiled by the notion that it could wait. It insisted that the provision of lower income housing and the planning for it, must be addressed at the outset of and then simultaneously with actual or planned growth.

In Mount Laurel I, the Court discussed these indicators of growth. Thus, while the Court acknowledged that a municipality may zone for industrial ratables, as has Tewksbury Township, it required that this be "done reasonably as part of a comprehensive plan". Mt. Laurel I, supra, 67 N.J. at 185. This meant two things: first, the lands so zoned must be "reasonably related to the potential" for such uses and, second:

> Certainly, when a municipality zones for industry and commerce for local tax benefit purposes, it without question must zone to permit adequate housing within the means of the employees involved in such cases. Mt. Laurel I, supra, 67 N.J. at 187. (emphasis supplied)

The use of terms such as "certainly" and "without question" in the same sentence by the Supreme Court was clearly done to

leave no doubt as to the seriousness with which the Justices viewed this issue. In fact, the Court would reiterate its position again in Mt. Laurel II:

> (I)f sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor. And, if the area will accommodate factories, it must also find space for workers. Mt. Laurel II, supra, 92 N.J. at 211.

The Court looked as indicators of growth which were rather easily ascertainable: actual development of commercial, industial or residential uses; planning for such development or the inevitability of such development occurring. A municipality which shows positively as to any one of these indicators is required to address lower income housing needs. In Tewksbury Township's case, all indicators point in this direction.

1. it is experiencing growth;
2. it has planned for growth; albeit, a select type of growth; and
3. it is in the path of inevitable future growth.

Application of the SDGP: The Court's use of the SDGP can now be addressed in the context of this background. The explicit purpose was to avoid the "developing" municipality issue by finding an objective standard to trigger the Mount Laurel fair share obligation. the SDGP seemed an obvious tool since its depiction of "growth" most readily matched what the Court had previously discussed as "developing". The Court, however, recognized three problems with using the SDGP and devised exceptions to a mechanistic application of its land use

designations:

1. The SDGP, in particular situations, may have been erroneous in the growth designation for a particular area;
2. The SDGP is a statewide, not a local, planning document - changed in the circumstances or local planning activities may warrant a change in the designation for a particular area;
3. The SDGP, as a planning document, would become dated. If not updated periodically, its usefulness as a planning tool would diminish, if not be totally lost.

There is an appealing neatness to the Court's recognition of these three problems since they cover the logical geography with perfection. Having accepted the SDGP, these were the only concerns left as to triggering the Mount Laurel fair share obligation.

The first exception is distinct from the other two. The second and third are essentially identical except as to the burden of proof involved; that is, the "relative ease of variance from the SDGP". Mt. Laurel II, supra, 92 N.J. at 243. In fact, the second and third exceptions do not necessarily involve an analysis of the DCA criteria for establishing the growth designations but revert back to the Court's earlier focus on demographic or planning factors which trigger the fair share responsibility. These have been discussed above.

The Court is telling its trial judges to look to see if these growth factors are operating and, if so, to insure that

lower income housing needs are properly addressed even before or until the SDGP is updated. This will be discussed in detail below; however, its importance is fundamental. The Supreme Court is simply stating that a municipality which experiences or encourages growth in an area is estopped from arguing that the areas is inappropriate for fair share purposes. If it can experience or be planned for growth, then it is a reasonable area for lower income housing units.

The Exceptions: The first exception involves the simple recognition that a state-wide planning agency, undertaking a task as ambitious as a state development guide, might make an error in any given situation. Mt. Laurel II, supra, 92 N.J. at 241. One who challenges the SDGP on this ground must show:

1. the line drawn is arbitrary and capricious (acknowledging that a line must be drawn somewhere); and
2. not having drawn the line somewhere else was arbitrary and capricious.

Plaintiffs have reviewed the data used by DCA in drafting the SDGP. Based on that data, alone, DCA's lines appear generally reasonable in regard to most portions of Hunterdon County, however, exception is taken as to the growth area as it extends from Clinton into Somerset County (see Robert Tublitz, P.P., plaintiff planner, report dated, October 1, 1984, entitled Evaluating the State Development Guide Plan Designation of the Township of Tewksbury, pages 9, 13-22).

By 1980, the growth experience, pressures and planning were clear enough that, if known or utilized would have warranted the adoption of an extended growth area to include the area previously described.

The second and third exceptions are, essentially identical, but for the measure of proof involved. Both call upon the court to recognize a greater area for receiving fair share units under certain circumstances. The differences is the relative ease with which the court may "vary the locus of the Mount Laurel obligation". Mt. Laurel II, supra, 92 N.J. at 242.

In both, the Court would entertain two types of proofs relating to actual, planned or potential change within the Township:

1. actual or approved development of residential, commercial or industrial uses; and
2. actions by the municipality to encourage or allow such development.

Here, one must pause and look back to the foundation of the Mt. Laurel doctrine as previously discussed. The goal is to insure that government not act, through its land use practices, to exacerbate patterns of class segregation and polarization. The Court, in adopting the SDGP as a means to advance the mandate, wanted to be sure that it could never be used to retard

it.* This had been its experience with the "developing" municipality test. Thus, whatever the Court indicated regarding problems with the "developing" municipality test a fortiori apply here.

The plaintiff urges the Court to review Mr. Robert Tublitz P.P., report dated October 1, 1984, entitled Evaluating the State Development Guide Plan, Designation of the Township of Tewksbury as to the plaintiff's response to the two questions posed in the beginning portion of this brief. In addition, this area of the Township, as evaluated by plaintiff's experts, can be aptly described by the Supreme Court's own language:

> (I)f sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor. And, if the area will accommodate factories, it must also find space for workers. Mt. Laurel II, supra, 92 N.J. at 211.

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*DCA had first articulated this concern in its 1978 Housing Allocation Report.

> On the other hand, those municipalities which may be exclusively categorized as open space or prime agricultural area may defer action in complying with their adjusted housing allocations until some future date or perhaps indefinitely. However, it is important to understand that a municipality will lose its deferred status if it acutally experiences growth or elects to pursue policies which encourage growth. For example, a municipality would be encouraging growth if it actively seeks ratables or jobs or manifests other characteristics which could be considered as having a growth orientation, such as zoning for commercial and industrial ratables. Where a municipality is experiencing or encouraging growth, a share of that growth (as quantified in this report) should be for low- and moderate-income housing. DCA Housing Allocation Report (1978), p. 23. (Emphasis added.)

Plaintiffs do not contend that all of the Township should now be considered in this context. Plaintiff's contention is that in areas where a municipality permits growth and growth has occurred, and where a municipality continues to encourage and allow development, it is essentially estopped from denying the suitability of the area for fair share purposes. The Supreme Court acknowledged that a municipality need not follow the SDGP. Mt. Laurel II, supra, 92 N.J. at 247. By the second and third exception, it attempted to insure that if it did not, the poor would not be forgotten.

The difference between exception two and three is the degree of growth or encouragement of growth which must be found before a court will vary the locus of the fair share receiving area. In the third exception, the degree is very low. As stated by the Court, allowing the construction of a "significant commercial and research uses" or a "residential subdivision" or attempting to attract such uses would probably be enough. Mt. Laurel II, supra, 92 N.J. at 242-243.

The second exception demands somewhat more since it predates the revision date of the SDGP. Thus, it "might or might not constitute a substantial change" if a township added an "industrial use" and a "fairly large, residential subdivision". In that case, the Court was open to the possibility of change "depending upon all of the circumstances". Mt. Laurel II supra, 92 N.J. at 241-242. However, proof would be definitely conclusive if there was added infrastructure and several new

substantial places of work and residential subdivisions. This would be even more true if the municipality continued to encourage or allow development. Mt. Laurel II, supra, 92 N.J. at 242.

History of the SDGP

The initial SDGP (September 1977) showed the Clinton corridor located to the north of Interstate 78 from Clinton to Somerset County and beyond to the east. The SDGP of 1980 located the growth area from Clinton bisecting Interstate 78 and U.S. Highway 22 in and about the Tewksbury/Readington Township area. This change is in conflict with the criteria set forth in the 1980 SDGP for growth areas, namely:

1. It totally disregarded the "location within or proximity to areas served by major highway and commuter rail facilities"
2. It disregarded the "location within or adjacent to major population and/or employment centers"
3. It disregarded :location within or in proximity to existing water supply and sewer service areas."

Furthermore, the SDGP (1980) disregarded its relationship to other plans and programs, namely the Hunterdon County Land Use Plan (1975), the Farmers Home Administration plans for a sewer system in Oldwick (1978), the master plan of the Township of Tewksbury (1979) as to office and research zone at the interchange of Interstate 78 and County Road 523, as well as the

existence of A.M. Best office building (1977) at said interchange, as well as the goals of said master plan.

In fact, the entire area including all the Townships in Hunterdon County abutting Interstate 78 are growing at a much higher rate, population wise than the County. Furthermore the Hunterdon County Planning Board has created a report indicating the need for County Road 517 to be improved in and about Oldwick due to the influence of Interstate 78 and Route 22, and its interchange with County Road 523, which reflects the proposals in the Tewksbury master plan.

In addition, the SDGP indicates its adherence to the concept of cross-acceptance, wherein the State desires to develop its plan (SDGP) in concert with all the Counties as to its growth, limited growth, agricultural, etc. areas. With regard to Hunterdon County, their discussion were extremely limited. As per conversations with John Kellogg, Planning Director of the County, with four months experience. The SDGP (1980) on page 155 states, "Basic agreement was reached with the County prior to publication. Since then no comments have been received. However, additional discussions should be held to review current thinking." Discussions with John Kellogg indicated he does not subscribe to the SDGP statement, in that there was no general accord reached.

May the Court take notice of a report of John H. Rodrigues of the New Jersey Public Advocates Office, presented to the New Jersey State Senate Oversight Committee on Mount Laurel II and

the State Development Guide Plan, dated October 4, 1983, whereon pages 27, 28 and 29, the comments are that "Since, however the Supreme Court did make the SDGP the governing standard, it is critical that the plan be regularly updated.... "First, the plan is already becoming out-of-date and is a diminishing value as a planning document...." "The legislature has already mandated the SDGP be kept up to date N.J.S.A. 13:13-15.52 not only requires a guide plan be 'prepared' it also requires that it be 'maintained'.... "The Supreme Court declared in the second Mt. Laurel decision that the SDGP will continue to be the basis for determining Mt. Laurel obligations only if it is updated by January 1, 1985...." "If the Guide Plan is not updated, the Courts will be permitted to freely deviate from the Guide Plan."

It is now September 1985, the State has not updated or revised the SDGP, and will or cannot update the SDGP for at least another year, if then. It is now the responsibility of the Court to act upon our request. It should be prepared to modify the SDGP as to the Township of Tewksbury based upon this report and the evidence that can be provided.

As the Court has adopted the "Lerman Report" and subsequently modified it from time to time, decision to decision, so be it with the SDGP, and its mandate from the Supreme Court, based upon Mt. Laurel II.

ARGUMENT

TEWKSBURY TOWNSHIP RESPONSIBILITY TO MEET ITS FAIR SHARE OBLIGATION FOR LOW AND MODERATE INCOME HOUSING.

FAIR SHARE HOUSING ALLOCATION

According to the Mount Laurel II decision of the New Jersey Supreme Court, handed down in January of 1983, every municipality has an obligation to provide a realistic opportunity for the construction of decent housing affordable to those of lower income. How much of an obligation an individual municipality has depends on how it is designated within the State Development Guide Plan, New Jersey Department of Community Affairs, May, 1980.

The Guide Plan divides the State into Growth Areas, Limited Growth Areas, Agricultural Areas, and Conservation Areas. A municipality which is located wholly outside a Growth Area is obligated to meet only the needs of its existing lower income residents inhabiting overcrowded or dilapidated units, the present indigenous housing need. However, a municipality that is located wholly or partly within a Growth Area must provide for its present indigenous housing need and, in addition, must provide for a fair share of the surplus present housing need in its region. The surplus present housing need is that portion of the present indigenous housing need in certain other municipalities in the region which cannot or should not be met in

place because the need is disproportionately high compared with the region as a whole. Moreover, a Growth Area municipality must also provide its fair share of the projected future regional need for lower income housing.

A small part of Tewksbury Township lies within the Guide Plan's Growth Area. Specifically, 228 acres, out of a total of 20,352 acres contained within the Township's boundaries, are located within the Growth Area. The remainder of the Township is located within a Limited Growth Area. Because part of the Township lies within a Growth Area, Tewksbury has a housing obligation, according to the Mount Laurel II decision, which extends beyond its own boundaries to its region and beyond the present need to the future need.

A number of methods have evolved since the Mount Laurel II decision for determining the extent of a municipality's lower income housing responsibilities. The method which, until recently, appeared to have achieved the greatest legitimacy and has been most widely relied upon is that developed by the consensus of the planners involved in the Urban League of Greater New Brunswick v. Carteret, et als. case and applied by Judge Serpentelli in the AMG Realty Company et als. v. Township of Warren et als. decision, rendered July 16, 1984. The method is described in a report presented by Carla L. Lerman, P.P., to Judge Serpentelli on April 2, 1984, and further detailed and defended in the Warren decision. In brief, the "consensus methodology" provides a means of calculating the three components

of a Growth Area municipalities' lower income housing responsibility: its present indigenous need, its fair share of the surplus present need within the present need region; and its fair share of the prospective need in the municipality's employment of commutershed region.

On July 25, 1984, Judge Skillman decided the Countryside Properties, Inc. et als. v. Mayor and Council of the Borough of Ringwood et als. case. In that decision, Judge Skillman challenged the consensus approach to establishing the number of dilapidated housing units in a municipality. Based on the testimony of Dr. Robert Burchell, a co-author of the report entitled Mount Laurel II: Challenge and Delivery of Low Cost Housing, published by the Rutgers University Center of Urban Policy Research in 1983, Judge Skillman concluded that the indicators relied upon the consensus methodology to determine the existence of a dilapidated housing unit were not as reliable as those used by the Rutgers Center for Urban Policy Research. Moreover, the data available from Rutgers presents a direct count of those substandard units actually occupied by lower income households. The consensus methodology, on the other hand, relies upon a percentage (82%) published in a 1978 Tri-State Regional Planning Commission report, People, Dwellings and Neighborhoods. Judge Skillman found the use of the Tri-State percentage to be problematic and unreliable.

Using the Ringwood approach, we have computed Tewksbury's lower income housing responsibilities by modifying the consensus

methodology in accordance with the data available through the Rutgers Center for Urban Policy Research. Based on this "hybrid methodology", the Tewksbury Township has a total Mount Laurel II housing obligation through the year 1990 of about 120 units: 40+ for the present indigenous need, 16 for the share of the reallocated surplus present need, and 72+ for the prospective need. The following paragraphs describe in more detail the procedures utilized to determine each component of the Township's Mount Laurel II housing obligations.

Indigenous Housing Need

The Mount Laurel II decision defines present indigenous housing need as those dilapidated and overcrowded units occupied by lower income households.

Overcrowded housing units are not truly substandard; there is merely a mismatch between the size of the occupying household and the size of the housing unit. The 1980 U.S. Census provides an indicator of overcrowding: those units having 1.01 more persons per room.

Dilapidated housing units are difficult to identify without a house-to-house survey. Even if such an inventory were to be undertaken, there are not uniform standards for evaluating dilapidated units in a manner which could be applied to all municipalities on an equitable basis. Because of the difficulty in developing reliable empirical data, Census indicators which suggest the existence of dilapidated housing are used instead.

(See Robert Tublitz, P.P., report, dated May 24, 1985 Addendum to the Determination of Tewksbury Township Low and Moderate Housing Obligation.

The consensus methodology relies upon the existence of one of the following indicators of dilapidation: units lacking complete plumbing facilities for the exclusive use of the occupants or units which are inadequately heated, defined as lacking either central heating or room heaters with flues. The Census tables used in the consensus methodology provide sufficient data to eliminate most of the overlap between these two factors. The consensus methodology adds to the dilapidated unit count the number of overcrowded units, again eliminating four double-counting.

The Rutgers study, cited in the Ringwood decision, does not separate out overcrowded versus dilapidated units. Instead, it establishes deficient housing based on the presence of at least two out of seven indicators from the Census: whether the unit was built prior to 1940; whether the unit is occupied by more than 1.01 persons per room; whether the unit has access only through another dwelling unit; whether the unit lacks plumbing facilities for the exclusive use of the occupants; whether the unit lacks complete kitchen facilities; whether the unit lacks centralized heating facilities; and whether the unit lacks an elevator if it is located in a structure of more than four stories.

According to the Ringwood decision,

> ...none of this census data directly measure housing dilapidation. A house may lack centralized heating or complete kitchen facilities and yet be structurally sound and possess the other qualities of satisfactory housing. Conversely, a housing unit may not exhibit any negative characteristic revealed by the census data and yet have broken windows and doors, a failed roof and a collapsing exterior structure, and hence be dilapidated. Nonetheless, the experts agree that there is some degree of correlation between the negative characteristics of housing recorded by the census and actual physical dilapidation.

As indicated above, the original Rutgers study did not count as substandard those overcrowded units constructed since 1939 and occupied by lower income households, although overcrowded units constructed prior to 1939 were included. Based on the mandate of the Mount Laurel II decision, Judge Skillman, in Ringwood, required that the post-1939 overcrowded units be added to the Rutgers present need numbers.

Another problem that Judge Skillman encountered in using the Rutgers data is that they are available only on a subregional level and not on a municipal level. To overcome this problem, Judge Skillman used the consensus calculations of each municipality's unadjusted present indigenous need and the consensus estimate of the total unadjusted present need in an equivalent subregion to develop a percentage which could then be used to allocate the Rutgers subregional count to each municipality in the subregion.

Under the consensus methodology, Tewksbury has a total of 86 dilapidated and overcrowded units (after eliminating double-counting), of which 82% or 71 are estimated to be occupied by

lower income households and therefore constitute the Borough's present indigenous housing need.

The Rutgers study computes the present need for lower income housing in Tewksbury's subregion (Hunterdon/Warren) to be 2360 units, significantly lower than the 4054 deficient units that the consensus counts in Hunterdon and Warren Counties. Utilizing the methodology described in the Ringwood decision for allocating the more reliable Rutgers present need figures to each municipality in the Hunterdon/Warren subregion, which is to formulate a percentage from the consensus numbers, Tewksbury's present indigenous housing need is $\frac{68}{4054}$, or .0168 of 2360, a total of 40 units.

Reallocated Present Need

Virtually every municipality in the State of New Jersey has an indigenous housing need. Some communities, particularly the central cities, have disproportionately large numbers of substandard and overcrowded dwellings occupied by lower income households. The Mount Laurel II decision clearly intended that this condition not be perpetuated. The opinion states that

> Each municipality must provide a realistic opportunity for decent housing for its indigenous poor except where they represent a disproportionately large segment of the population as compared with the rest of the region. (emphasis added)

The consensus methodology translates this mandate into a technique in which a portion of the indigenous need in those communities which have a higher percentage of dilapidated and

overcrowded units as compared to total housing units then the average percentage for the region as a whole are allocated out to communities which have a relatively low indigenous housing need. The ratio of indigenous housing need units to total dwelling units is calculated for each municipality and for the region; the number of indigenous need units in any municipality which causes its percentage to exceed the regional average is determined to be surplus and is placed in a pool which is then reallocated among the remaining municipalities in the region in which the ration of indigenous need units to total units is lower than the regional percentage.

The consensus methodology divides the State into four fixed line regions for the purposes of reallocating surplus present need. Tewksbury Township lies with Region I, which includes the eleven northern New Jersey counties of Bergen, Essex, Hudson, Hunterdon, Middlesex, Morris, Passaic, Somerset, Sussex, Union and Warren. The prospective need region differs from this fixed line present need region in that it varies with each municipality and is related to commuting distance. The prospective need region will be discussed in a later paragraph of this brief.

A significant difference between the Rutgers data used for determining present indigenous need and the numbers produced using the consensus methodology is that the Rutgers numbers reflect both lower income households and lower income subfamilies sharing a dilapidated or overcrowded housing unit, while the consensus methodology counts only the deficient housing

units. Since a single housing unit may contain a family and one or more subfamilies, each representing a potential separate household, the Rutgers data identifies an additional component of the present housing need not addressed in the consensus methodology. On a subregional level, in a rural or suburban area, this additional component does not make a noticeable difference in the numbers. At the level of the eleven-county region, it produces a present need number that exceeds by almost 9000 the consensus methodology's adjusted present need figure.

Assuming the Rutgers numbers are to be used consistently for the computation of a municipality's housing obligations, it is necessary to recompute the reallocatable surplus in the present need region using the Rutgers, rather than the consensus, data. This necessitates a computer run for each subregion within the eleven-county present need region, an expensive undertaking. Alternately, an adjustment can be made to the consensus allocation system by modifying both the municipal "fair share cap" and the percentage used to reduce the total present need count in a municipality to reflect lower income occupancy to be more consistent with the Rutgers data.

The methodology for determining the reallocated present need obligation is based on a series of calculations involving 1984 municipal employment compared to 1984 regional employment, municipal Growth Area compared to regional Growth Area, and municipal median household income for 1979 compared to that for the region. The resulting percentage is then multiplied times

the total surplus present need (as modified by the Rutgers numbers) in the eleven-county region (38,293) to arrive at the Township's fair share. The consensus methodology then multiplies the fair share by 1.2 to compensate for any units that cannot be constructed in other municipalities in the region due to insufficient vacant land. Additionally, a 3% allowance is added to ensure an adequate vacancy rate.

Tewksbury's fair share of the total reallocated surplus present need through 1990 is about 17 units.

Prospective Need

The region used for the determination of a municipality's fair share of prospective lower income housing need differs from the region used for the reallocation of the surplus present need. It is a region that varies with each municipality, since it is determined based upon a modified commutershed for each municipality. The modified commutershed includes all counties which are touched by a 30-minute commute as measured from the functional center of the municipality in question. The functional center of a municipality is described in the Warren decision. It is: a.) the generally recognized commercial/ residential core of a community, or downtown area; or b.) in the absence of a commercial/residential core, it is the municipal building; or c.) in the absence of both, it is the major crossroads within the municipality. The 30-minute drive time must be measured at speeds of 30 miles per hour on local and

County roads, 40 miles per hour on State and Federal highways, and 50 miles per hour on interstates.

Since there is no generally recognized commercial/ residential core of this community or downtown area, the functional center is therefore the municipal building, which incorporates the police headquarters located in Mountainville. Based upon the 30 minute drive computed at the requisite speeds for each type of roadway, the commutershed region for Tewksbury Township was determined to include the counties of Hunterdon, Warren, Morris and Somerset.

The method for calculating the Township's responsibility for the prospective lower income housing need in its region is similar to that for calculating the reallocated present need obligation. However, one additional factor is added to the prospective need computations, and that is employment growth between 1974 and 1984 for both the municipality and the region.

Based upon the use of the consensus methodology formula for the determination of prospective need, the Township of Tewksbury has an obligation to its commutershed region to supply 81 lower income dwelling units by 1990. This includes, again, a basic computation of about 72 units with a 20% allocation for units which cannot be constructed due to inadequate vacant land in the rest of the region as well as a 3% allowance for vacancies.

The formula used for the determination of Tewksbury's lower income housing obligation is the consensus methodology, as modified by the Rutgers data in accordance with the Ringwood

decision. This formula yields an allocation which is more reasonable than that which would result from the use of the consensus methodology with the consensus methodology numbers. However, there are ways in which even the hybrid methodology may assign too high a housing obligation to a municipality.

Both the Rutgers figures and the consensus numbers rely on data given in the Census regarding heating facilities. When the census was taken, householders were asked what type of heating equipment the most often used. In Hunterdon County ,there are many households occupying units equipped with central heating facilities but depending upon a wood or coal stove for most of their heat in a conscious effort to maintain independence from the furnace. Because of the way the question on heating was asked, the number of physically deficient housing units derived by relying on this statistic will be artificially inflated. On the other hand, because the Rutgers data requires that each unit have at least one other deficiency for it to be counted as substandard, the degree of error is reduced.

One of the strongest criticism that has been made of the consensus methodology, particularly with respect to the reallocation surplus present need and the prospective need calculations, is that these formulae employ no factor for vacant developable land. This deficiency is recognized in the Warren decision and also in the Lerman report, which states that:

> All of the planners and housing experts involved have felt that the lack of reasonably accurate data on land availability presents a serious problem. There was general agreement that as soon a this information is available, a reevaluations of all formulas would be in order.

In other words, the consensus methodology presently calculates a community's housing obligation without reference to its development potential or to the developability of its vacant lands. Although Tewksbury Township has a considerable amount of vacant land, some of that land is not well suited for a Mount Laurel II housing project because of steep slopes, flood plains or other considerations which preclude its intensive development. It is anticipated that any future statewide inventory of vacant developable land will result in a refinement of the methodology and a concomitant adjustment of each municipality's housing obligations with respect to its present and prospective housing regions.

The consensus formula does recognize the problem of not considering the vacant developable land factor and attempts to compensate for the probability that some communities will not be able to accommodate their full fair share by adding 20% to the allocations of both the surplus present need and the prospective need. While this is logical in view of the desire of the Supreme Court to make certain that regional housing needs are met, it compounds any inequities inherent in a methodology that includes no vacant developable land factor.

Regardless of whatever fair share number is assigned to Tewksbury Township, there is clearly a lower income housing need

within the Township and within the regions, both present and prospective, of which Tewksbury is a part. The Township has the responsibility under Mount Laurel II to make the fulfillment of those needs realistically possible.

The plaintiff takes exception to Mr. Queale's fair share report, based upon Mr. Michael Morris' tax re-evaluation, using a physical examination of housing as the basis of indigenous need (1985), blending it with U.S. Census Information (1980) as to overcrowding, deleting any mention as to exclusive use of plumbing facilities, etc. arbitrarily using certain classifications for structural soundness, for the basis of fair share, utilizing a study designed to develop data in one sphere, and converting it into mode for such purposes is subject to suspect and investigation.

Please, take note of the book, Mount Laurel II, Challenge and Delivery of Low-Cost Housing by Robert W. Burchell et al. published by The Center of Urban Policy Research, Rutgers University 1983, wherein on pages 108 to 114, they discuss conditions signalling a deficient structure, namely seven criteria. Going further the report entitled Response to the Warren Report: Reshaping Mount Laurel Implementation prepared for: the New Jersey League of Municipalities by Robert W. Burchell, Ph.D.; David Listokin, Ph.D. with assistance of Fred Stickell III, Esq., December 1984, brings into focus the overal problems associated in attempting to develop specific fair share Mount Laurel numbers. Therefore a re-evaluation in 1984,

combined with data of 1980, blended with arbitrary assumptions casts doubts as to Mr. Queale;s report being the "state of the art" as to the basis of indigenous need of Tewksbury Township in 1985.

Furthermore, the Court has two reports as to fair share by William Queale Jr., P.P. defendant's planner; one dated December 31, 1984 indicating a fair share of 92, based on census data; 52 based upon Township data; and 33 based upon modified Warren decision with Township data. The other report dated May 22, 1985 shows two fair share numbers, one called previous estimates indicating 59, and a current estimate of 37.

The second report was based upon Mr. Michael Morris', Township survey based upon the Assessor's inspection. There are two reports by Mr. Michael Morris, which indicated deficient units as 22 and a subsequent report, showing 24. Both are doubtful in our opinion because of Mr. Morris' deposition taken on April 12, 1985, and our analysis of his overall approach and subsequent findings.

Mr. William Queale Jr., P.P., defendant's planner, has employed every technique, to skew the fair share obligation of Tewksbury Township to 29 as opposed to over 120 per the six surrogate identified deficient units plus any overcrowding (Skillman alteration of the Rutgers method). May the Court take note of estimate number of households based upon some adjustment to 1990 population estimates, the modification of the number of low and moderate income numbers from 2360 to 1880 per subregion

51, U.S. Census 1980, N.J. Public Use sample, the arbitrary use of a subjective inspection of houses in Tewksbury for valuation, as a basis for indicating deteriorated units, etc. The plaintiff contends the fair share number is about 120 based upon Judge Skillman's alteration of the Rutgers method in the Ringwood case.

Respectfully Submitted:

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for Plaintiff

Dated: September 4th, 1985