

ML-Tewksbury

9/24/85

Certification of William Guale, JR. in
opposition to motion for partial summary
judgment

• licensed professional planner of NJ

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ROBERT E. RIVELL :
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 Plaintiff :
 vs. :
 :
 TOWNSHIP OF TEWKSBURY :
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 Defendant :
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 :

SUPERIOR COURT OF NEW
JERSEY
LAW DIVISION
HUNTERDON COUNTY/MIDDLESEX
COUNTY
MOUNT LAUREL
DOCKET NO. L-040993-84PW

CIVIL ACTION

CERTIFICATION OF WILLIAM
QUEALE, JR. IN OPPOSITION
TO MOTION FOR PARTIAL
SUMMARY JUDGEMENT

WILLIAM QUEALE, JR. hereby certifies as follows:

1. I am a licensed professional planner of the State of New Jersey (Professional Planners License No. 47). I am associated with the firm of Queale & Lynch, Inc., a firm engaged in professional planning and housing consulting. I have been engaged in professional land use planning since 1959, and have prepared numerous master plans, land use plans and other studies dealing with land use, housing and land development in various portions of the State of New Jersey. I have been the professional planner for Tewksbury Township



since about 1968.

2. I am familiar with Tewksbury Township's Development Regulations Ordinance, and in particular with an amendment to it, No. 4-84, which among other things, established a zone providing for a substantial density bonus and mandatory set-aside for the construction of lower income housing. I participated in the framing of these ordinances. The land use ordinance of Tewksbury Township generally, and Ordinance No. 84-4 in particular, were, to my personal knowledge, based on extensive prior study and consideration by the Township Planning Board and by me. Ordinance No. 84-4, for example, was preceded by a series of meetings of the Planning Board and meetings of the Township Committee for a period of about a year. During this time the Township's response to Mt. Laurel and the ultimate ordinance was extensively discussed. A number of these meetings were attended by me.

3. In my professional opinion, the Tewksbury Township Development Regulations Ordinance complies with the requirements of the Mt. Laurel II decision and affords a realistic opportunity for low and moderate income housing at a level which satisfies the Township's obligation for such housing. In my opinion, ample developable acreage

located in the SDGP "growth area" yet outside environmentally sensitive areas has been zoned to provide a density bonus and mandatory set-aside affording an adequate incentive to develop lower income housing that will satisfy the Township's lower income housing obligation.

4. The Tewksbury Township Development Regulations Ordinance as adopted is substantially consistent with, or designed to effectuate, the adopted Master Plan and Long Range Land Use Element and Housing Plan. Over the past few years the Township has also been in the process of updating the Master Plan and re-examining its land use ordinances as required under the Municipal Land Use Law.

5. While there has been modest residential growth in the Township in recent years, the Township is still characterized by a low population density, farming, and lack of commercial and industrial enterprise. There have been no construction permits issued for the construction of any new commercial or industrial buildings in the Township since 1973, according to the Township Construction Office, and there are no formal applications to the Township pending for any commercial or industrial development.

6. Attached, and incorporated by reference in this Certification, are portions of a report prepared by me entitled "A Report Written in Defense of Tewksbury Township's Zoning and Planning, December 1984" which was previously

filed with the Court in this matter. The portions attached are those most relevant in responding to certain statements made in certifications supporting a partial summary judgment motion now before the Court.

I hereby certify that the foregoing statements, and those in the attached portions of a report prepared by me, are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: September 12, 1985


WILLIAM QUEALE, JR.

Part I

INTRODUCTION

It is the conclusion of this report that the township's ordinance, introduced before this suit was commenced, complies with the Mt. Laurel II decision (92 NJ 158). The ordinance combines efforts to develop lower income housing with sound planning principles. It ties the implementation of lower income housing to future development so as to phase in lower income housing with future development. The township proceeded with deliberate, measured steps to produce a result that recognized their historical patterns of development, the limitations imposed by various physical conditions, as well as the changes that were necessary in order to comply with the Mt. Laurel mandate. Their efforts were directed at timely compliance in order to avoid the hectic, quick-fix and disruptive solutions that have thus far emerged from litigation in other towns.

Flexibility is offered by providing opportunities to produce more than the township's fair share, thus allowing choices in housing types and possibly less than 20 percent of a project having to be set aside for lower income housing. This latter point not only permits lower densities to begin with, but is still at a level that would produce the township's fair share.

This report also concludes that a builder's remedy for this plaintiff, who commenced the suit after the ordinance addressing Mt. Laurel II was introduced, is inappropriate and that the fair share obligation produced by the "consensus" formula adopted in the Warren decision is unrealistically high.

Part II

HISTORY OF LOCAL ACTIONS

The township has been exploring its mandate ever since Mt. Laurel I. The problems in developing a solution have been related to an historically rural township, difficult terrain and soil conditions, no large water or sewer systems, and no realistic possibility for major utility systems.

The process of planning in the township has always recognized the three villages, the rugged mountain terrain throughout much of the interior of the township, the less rugged terrain along the southern portions of Rt. 517/523, and the impact of Interstate Route 78.

In the 1969 Master Plan, the mountainous terrain called for "scattered residential development proposed for minimum 5 acre lots" that recognized the "rural, scenic, topographic areas where special efforts should be made to preserve scenic beauty and aesthetics due to topography and woods". The less severe topographic areas were classified as "Farming/Residential" calling for "farming on at least 10 acre parcels with not less than 3 ac. lot density for residences; planned residential development encouraged; open space to be an integral part of any development". (Master Plan Program and Summary of Proposals, October, 1969, Plate 7).

In addition, the 1969 Master Plan identified Oldwick, Pottersville and Mountainville as the three "Historic Districts" anticipating "initial growth around Oldwick" (p.24). The map delineated the extended growth area around Oldwick generally to the north side in conjunction with the proposed by-pass, plus an area in the southeast (on the north side of Lamington Road [Rt.523]).

The text further indicated the intent of these three districts was to preserve the small town characteristics of these communities, pedestrian travel, a lack of domination of the automobile, and a stabilization of the current ratio of commercial and residential uses (p.25).

The area around the Rt. 78 Interchange was proposed for either industrial or regional shopping center purposes. The only activity in the last 15 years has been the construction of the A.M. Best office.

In 1971 the township completed several studies. One was the Oldwick Study, identifying the history of the village along with present land use and traffic conditions.

During 1971 there were discussions and meetings on the potential impact of Rt. 78 such as industrial and shopping center development around the interchange as well as possible Planned Unit Development at 5 units/acre with a mixture of apartments, townhouses and single family homes. The general concept was that if any higher intensity development were to occur, water and sewer systems would have to be part of it. No such systems existed, but the logical place was at the southern end of the township in conjunction with Readington's facilities and the natural drainage patterns which flowed in that direction.

Since then, additional work has been completed as part of the township's continuing efforts to keep its planning and zoning current. A lot-by-lot land use survey was done in 1977. An updating of the natural resources was completed in 1978. There were population and housing analyses done in 1978 and again in 1983. Traffic reports were completed in 1978 and 1984 including surveys of road conditions, traffic volumes, and traffic accident patterns. Evaluations of community facilities were completed in 1978 and 1984.

The culmination of those studies completed during the 1970s corresponded with the Mt. Laurel I decision. The township adopted its Summary of Planning Reports and Master Plan February 7, 1979.

In the 1979 Plan, many of the low density concepts in the mountainous terrain as well as the farmland areas in the southeast were retained from the 1969 Plan. The three major villages were still identified, but two other small areas of concentrated settlement were also added. The major differences between the 1979 and 1969 Plans were the township's response to Mt. Laurel I. Essentially, higher densities were located at the southern tip of the township where the 1984 zoning ordinance has located the lower income housing obligation. Moving north, the density is reduced. It was anticipated that sewage treatment would be needed for any of this higher density development, but that the best location was at the lower elevations at the southern tip of the township. In this location the system could be extended northward (up stream) as development might take place and still enable the additional development to tie into the system by gravity flow.

The most significant change from the 1969 Plan to the 1979 Plan was the reduction in the scale of the industrial proposals around the Rt. 78 interchange. Instead, an office area north of the interchange incorporated the A. M. Best facility and the area between the interchange and the lumber store. South of the interchange, a much smaller area was proposed for "commercial" than had been in the 1969 Plan. The remaining area that had been for industrial development in the 1969 Plan was changed to residential in response to Mt. Laurel I. The proposals included townhouses at 1.9/acre and 3/acre, apartments at 5/acre and single family homes at 1.5/acre. "The higher densities assume future water and sewer service" (MP, p.60).

The Village of Oldwick continued to be identified in the 1979 Plan as a village area, but the anticipated expansion area was reduced in size with the expected expansion still limited in the direction of the north and southeast, but not as far as the plaintiff's property.

The Housing Element of the 1979 Master Plan also contains some relevant statements regarding the conditions under which higher density housing can be anticipated. First, it is noted that new construction is not anticipated until water and sewer service is available in the Rt. 523/78 area. "At that time, additional clustering techniques and multi-family housing can be considered". The Plan indicates it has the capacity to provide the necessary housing anticipated due to population projections "including low and moderate income units" which, it was concluded, should be incorporated in the zoning regulations "but that such regulations at this time would be premature". (all quotes from MP, p.63)

Throughout the Housing Element, the limitations to development because of water supply questions and sewage disposal methods are repeated.

The apartment/townhouse area south of Route 78 provides sufficient area to produce the number of low/moderate units identified..." (p.64)

Until water and sewer systems are provided, the ability to concentrate units at higher densities is not likely and the low/moderate income housing cannot be met." (p.64)

..."the Housing Element should be implemented in the context of water and sewer limitations..." (p.64)

"With individual wells and septic systems, the zoning would provide for minimum lot sizes consistent with the geology in the area, e.g. minimum 3-5 acre lots. (Larger lots may in fact result due to water limitations in the rock formations and potential contamination from septic systems in the shale areas.)" (p.65)

"...water resources and sewage treatment are the limiting factors in the proposed higher density areas....Once adequate water is available, the intensity of development would be limited by the method of sewage treatment...If the effluent is improperly or incompletely treated, water contamination can result." (p.65)

The conclusion is that the township was neither negligent under Mt. Laurel I or II, nor do the implementation of its 1979 efforts fall short of reasonably providing opportunities for lower income housing even as it has emerged in 1984.

The ordinance has capacity to produce in excess of the township's fair share giving greater assurance the units will be realized. In relation to Memo 84-7, the township's fair share would be between 34 and 99 by the year 2000, with the appropriate number being 45 based on the criticisms of the Warren Formula. (If the Warren Formula is used, but the township's own survey data is used for determining the level of deterioration, the number would be 67.)

The area area zoned by the township contains 145 acres, about 90 of which are outside 100-year flood plain. This leaves 54.9 acres (37.9%) of the site within the flood plain to have density calculations based on §720B of the ordinance.

Acreage Calculations

90.1 ac: full credit;

21.75 ac: full credit for the first 15% of the tract in the flood plain;

14.5 ac: half credit based on the next 15-25% of the tract = 10% of the tract = 14.5 ac.

18.65 ac: zero credit.

145.00 ac.

Capacity of Dwelling Units in Zoned Area

111.85 ac. full credit @ 5/ac = 559 units

14.5 ac. half credit @ 2.5/ac	=	36 units
18.65 ac. zero credit		0 units
145.00 ac.		595 units x 20% = 119 low/mod. units

Because the number of low/moderate units is modest, and the township has potential for marketing higher cost units, a lower density can be used. Based on the various methods of computing fair share, the production of the lower income units would be less than 20 percent of the total of all units. This adds to the feasibility of the ordinance. The number can go as high as 119 low/moderate units before either more acreage, a higher density, or more than a 20% setback needs to be included in the present ordinance. On the other hand, the ordinance permits farms to add low/moderate income units for farm employees. This provision can be expected to produce more units that not only increase the capacity of the ordinance, but add to marketing flexibility as well.

For purposes of calculation, the 14.5 acres at half credit is equal to 7.25 acres at full credit. When this 7.25 acres are added to the other 111.85 acres of full credit, the total is the equivalent of 119.1 acres.

Because the ordinance allows apartments at 5/acre as well as townhouses at 3 units/acre, 78 lower income units could be produced from a total production of 390 units with a 20% setback. This could be a mixture of 150-200 apartments on 30-40 acres plus 200-250 higher priced townhouses on 67-83 acres, or various other combinations. If all the lower income units were to be apartments, for example, they would require about 16 acres, leaving over 103 acres for the production of 310 higher priced townhouses.

The township undertook to evaluate the possible impact of the bonus density approach and to provide a reasonable solution under Mt. Laurel I. The process took place deliberately and also voluntarily. The proposed location for the higher density housing is consistent with logical local and regional planning recognizing proximity to jobs and the ease of access to regional highways for the larger job market. The densities selected are appropriate for the character of the area, the number of units of lower income housing needed to meet the township's fair share, and the marketability of higher income units to more easily off-set the subsidies necessary for the lower income units. Also significant is the selection of an area "downstream". This places the development convenient to either the Readington sewage treatment plant just across Rockaway River, or in a location where other "upstream" sites either in or immediately adjacent to the growth area could flow to it by gravity.

By comparison, adding a new treatment plant in the Oldwick area to accommodate the plaintiff's site would be contrary to the limited scope of the existing village treatment facilities. Expanding the infrastructure in order to increase the size and scale of Oldwick would also be contrary to the historic preservation goals for the village as set forth in the township's Plan, contrary to the County's Plan which projected only modest expansion to the north and southeast that did not include the plaintiff's property, and outside the growth area of the SDGP. At present, the Oldwick sewage treatment system has capacity for treating 30,000 gallons/day (gpd). It is now treating about 18,000 gpd leaving 12,000 gpd capacity. This remaining capacity converts to about 40

single family homes, or equivalent dwelling units (edu), of which an estimated 5,000 gpd has been suggested as a reserve for future in-filling of lots within the village service area (about 17 edu's). The other 7,000 gpd is therefore available either within the village for unanticipated needs, or for assignment outside the village system for such things as septic management. This additional capacity equates to only about 23 single family homes or edu's.

Part IV

FAIR SHARE

As indicated earlier, the fair share number based on the Warren formula is considered unrealistically high. Because of this, the following suggestions are made to revise the Warren Formula in order to result in realistic obligations that will be achievable, have less impact on further syphoning population from the urban areas, and allow compliance at lower densities and therefore in more varied ways and smaller doses. The numbers are taken from Memo 84-7. Voluntary solutions involving more communities in a greater number of smaller projects is the objective. For example, one very large project caught in a market squeeze is more vulnerable to delay and financial risk than ten smaller ones scattered across a larger market area and in staggered stages of development.

While the following suggestions reduce fair share numbers, they are in no way an effort to stifle the regional market, or to obstruct an otherwise free choice of housing, or to lower a town's truly "fair share". The proposals are intended to provide realistic numbers to which towns and the market can respond on a steady basis over a period of time. As perceived at this time, the Warren Formula has produced such high numbers as to cause an ultimate forcing of the market conditions and caused municipalities to balk at otherwise accepted responsibilities under the Mt. Laurel mandate.

Tewksbury's Total Present & Prospective Need		
	1990	2000
Warren Formula	92	99
Twsp Data w/Warren Formula	52	67
Recommended Modifications	33	45

The results of the large numbers being produced under the Warren Formula will distort the market. The result will be unfair housing burdens on the first few towns getting the big numbers rather than a more equitable distribution across a broader region. Those towns voluntarily complying with the Mt. Laurel doctrine and using the Warren Formula, or those towns having been sued and subjected to the Formula, will absorb the bulk of the state's housing market, rather than their fair share.

In order to illustrate the impact of the following observations, the fair share number under the Warren Formula was about 92 low/moderate units in Tewksbury to 1990, or 99 units to the year 2000. Applying the following corrections, the result is 25 units as a present need plus 16 low/moderate units of prospective need for a total of 41 units to the year 1990, or 26 + 26 for a total of 51 units to the year 2000. The single greatest impact resulting from the adjustment in the formula was applying the same percentage of lower income households in the formula as in the ordinance.

The Projected Housing Need in Conjunction with the Required 20% Set-Asides are Forcing Zoning Solutions that will Require a 5-Year Housing Production 2.4 Times the Highest Production Year in the State's History and More Than 5 Times the Rate of Housing Development over the Past 10 Years.

First, the Rutgers' data states the lower income housing need to the year 2000 is for 342,800 units. If the lower income units represent 20% of the total, this would require over 1.6 million units in 15 years, or in excess of 100,000 units a year. The year with the most housing production in recent State history was 65,539 units (1975), but more significant is the broad downward trend in state-wide housing construction:

Annual average during the 1960s:	50,095/yr.
Last 23-year period, 1960-1982:	42,259/yr.
Last 10-year period, 1973-1982:	30,753/yr.

Source: Residential Building Permits, N.J. Dept of Labor

Second, the use of the population projections by N.J. Department of Labor (averaging OEDA Models 1 & 2) as set forth in the "consensus" formula produces a need for over 158,500 lower income units by the year 1990, or over 30,000 lower income units per year over the next 5 years. If the lower income units continue to make up 20% of the total housing production, the State would be expected to produce 158,500 units a year for the next five years, or a total of 792,500 units instead of the estimated 402,500 needed to meet population growth as shown below.

<u>Age</u>	<u>State-Wide Population</u>	<u>Headship Rate</u>	<u># Households</u>
Under 25	2,570,500	x .0453	= 116,444
25-29	596,350	x .4253	= 253,628
30-34	658,150	x .4972	= 327,232
35-44	1,263,900	x .5408	= 683,517
45-54	862,650	x .5623	= 485,068
55-64	743,550	x .5844	= 434,531
65-74	617,100	x .6305	= 389,082
75+	<u>422,300</u>	x .6194	= <u>261,573</u>
TOTALS	7,734,500		2,951,075
Less Existing Households 1980:			<u>-2,548,594</u>
Equals Needed Housing 1980-1990			402,481
Times 39.4% for Low/Moderate units			<u>.394</u>
Equals Needed Lower Income Units			<u>158,578</u>

If one assumes housing production will attain its highest historical level and sustain it annually for five years, the 65,000 units a year will produce only 40 percent of the low/moderate income units calculated under the "consensus" formula at a 20% setaside (65,000/158,500). Under these assumptions, the result is the need for state-wide housing production 2.4 times the state's highest production year, or more than 5 times the state's average production over the past 10 years.

To require towns to over zone by such high factors is to assure an uneven distribution of what was intended to be each town's "fair share". In addition,

the formula adds 20% for undeveloped land and 3% for vacancies. The result is that towns who attempt to comply, or who were sued and forced to accept an allocation developed and applied under the formula, will be assuming more than their fair share.

The Warren Formula Inflates Present Need Figures by Assigning Excess Deteriorated Units from Towns Having a Higher Portion than the Region's Average to Towns Having a Lower Portion.

The calculation of occupied, but deteriorated and dilapidated housing units is an indication of the condition of a town's housing stock. These units should be upgraded or replaced, not re-allocated to another town. One positive way to do it would be to give those towns with excess deteriorated units full credit for upgrading that portion of their deteriorated housing stock that is in excess of the regional average. This would ease the present pattern that is forcing excessive zoning and future housing production into the outlying areas that have more land which, in the process, will create stronger competition for the urban areas that have suffered declining populations for years. The state needs to have the Mt. Laurel mandate turned into a positive force that results in realistic fair shares in all areas, including the urban areas. A program of credits would be an inducement to upgrade the units as part of their present and prospective need while removing a factor that artificially inflates housing needs numbers in outlying areas.

The present re-allocation method in the Warren Formula creates artificial housing production in the regional market with little or no guarantee that the people living in the existing units either want to move, can afford to move, or would be able to move to such locations given where their jobs may be or the fact that they may be retired and out of the labor market. This gets even more exaggerated when the re-allocation takes place within such a large, 11-county region.

The re-allocation tends to punish those who either maintained their housing stock or, as a result of being newer communities, have not yet met a court acknowledged quota of deterioration. The Mt. Laurel doctrine should be encouraging ways to deal with these problems in a realistic and positive manner, not reallocating the failures of the past in a punitive sense. To include equal shares of deterioration seems contrary to the court's conclusion that every municipality need not be "...a microcosm of the entire state in its housing pattern, and there are sound planning reasons not to do so" (92 NJ 238).

In removing the re-allocation portion of the present need formula, the result need not run contrary to the court's conclusions that all municipalities must provide a realistic opportunity for "their fair share of the region's present lower income housing need generated by present dilapidated or overcrowded units, including their own" and that some towns may have to go far beyond that generated in the municipality itself (92 NJ 243).

Because the data base is the 1980 Census, those towns having to go beyond levels of their present deteriorated units should have an immediate requirement to zone for a portion of their "prospective" need since 5 years of the prospective need have already passed and could now be considered "present".

The re-allocation of "surplus indigenous" units to other towns also generates new units that will compete with the old ones. The result can almost certainly contribute to the further deterioration of any units vacated in the process. In the next Census, these same units will reappear as either an excess vacancy rate or an increase in deteriorated units. Either way, the result tends to set up a perpetual cycle of building additional units to solve the problem of deteriorated units that never leave the data base.

It would make more sense to require each town with surplus indigenous units to improve its housing stock, receiving credit toward its prospective need for the excess indigenous units it does improve. A program of rehabilitation and/or replacement, and receiving credit for its efforts, will involve cities and older suburbs in meeting their obligation (at 215, 236, 238/39, 240 and footnote 15 at 240) and be a positive contribution to the state's problems of urban deterioration. The present program forces new construction elsewhere in competition with the cities and older suburbs.

The Warren Formula Removes Urban Aid Towns from Land Area and Job Calculations Giving Other Towns a Higher Portion of the Present Need Region

In my opinion, urban aid towns have an obligation as much as any other town (92 NJ at 215, 236, 238/39, 240, and footnote 15 at 240). Their number should be determined under a formula in the same manner as all other towns. Once the number is known, various credits or zoning solutions can be dealt with. In fact, recognizing that poor people are less able to "pick up and move", or that many are retired and not tied to the job market, efforts to maintain a base of habitable housing in relation to jobs and growth area is more fair than removing urban aid towns from the formula and causing inflated numbers in nearby towns. As indicated above, to the extent an urban aid town, or any other town, has an excess of the region's deteriorated units, its obligation should be to either remove them and build others in the town, or rehabilitate them, while receiving credit toward their prospective need in the process.

The Warren Prospective Need Formula Identifies the Number of Needed Housing Units to Meet Population Projections and Assumes 39.4% should be Lower Income Units. But the Resulting Solutions Have Allocated Only 20% of the Units as Lower Income

The result of this process requires twice as many units as are needed. If the total housing need is 100 units, of which 39 are identified for lower income, the total housing production would have to be 195 units in order to have 20% of the total equal the needed number of lower income units. This total housing production is almost twice what the total market is expected to be able to absorb.

If, on the other hand, the population projections are high to begin with, as I and many others believe, the margin of error in estimating housing production goes way beyond the need for each town to over zone in order to assure compliance, and way beyond the market to absorb the housing. It further assures that the bulk of the state's housing production will be contained in a few large projects in a few towns rather than spread across a broader base of projects and towns.

The larger fair share, high densities and a few large projects might also forecast problems because a few large projects have less flexibility with which to respond to changing market conditions than multiple smaller projects in scattered markets. If problems in marketing occur, a drop in sales (=revenues) make it difficult or impossible to cover the costs of large initial expenses for infrastructure as well as on-going carrying costs. Should such problems develop when the lower income housing production is contained within a few large projects, it can spell trouble for measureable shares of the state's market all at one time. If the fair share numbers were smaller, and projects developed at lower densities, the marketing problems may still develop, but the impact will be less concentrated and the opportunities for some successes during a downturn are enhanced.

The Warren Prospective Need Formula Excludes Urban Aid Towns from the Land Area, Jobs, Job Growth and Household Income Calculations, Again Resulting in all Other Towns Assuming a Higher Portion of the Regional Need

As indicated above, the exclusion of urban aid towns is inappropriate in calculating fair share numbers. They too have a fair share. If their resulting numbers cannot be accommodated, relief can be handled on an individual basis. But to exclude them at the outset by manipulating the formula gives inappropriate relief to areas with utilities, mass transit, existing high densities, jobs, shopping, and other services consistent with the SDGP goals, as well as the court's policy shift from the previous obligations of "developing municipalities" in Mt. Laurel I to the obligations in all towns located in a growth area under Mt. Laurel II.

In many urban towns there are vacant lots, units able to be rehabilitated, lots or blocks available for clearance and renewal, as well as other private and public solutions that would be able to produce housing under the same pressures and demands currently being placed on more suburban towns in the growth area. The same bonus zoning provisions now being applied in suburban areas (and bonus

zoning actually originated in urban centers) can be applied in the cities as well to help redevelop certain areas while meeting their fair share at the same time.

The response to Mt. Laurel II should not foster excess housing beyond a reasonable fair share in the more suburban and rural fringes of the growth area, for to do so will tend to further sap the cities of their remaining population base. As indicated by the court, the developing/nondeveloping distinction is no longer valid and the earlier conclusion that "developed" towns have no obligation is no longer valid (at 240, footnote 15).

The Inclusion of Jobs + Job Growth in the Warren Formula Gives Unnecessary Weight to Employment Considerations for Prospective Need

In my opinion, the jobs should be counted once in both present and prospective need calculations. Because the number of jobs reflects present conditions, the number of jobs would reasonably relate to "present" need. Because past trends can be used to help estimate a direction of either job growth or decline consistent with attempts to project future population, using job trends would be more consistent with the efforts to predict "prospective" need.

The Inclusion of a Household Income Factor in the Warren Formula is Not An Appropriate Factor for Estimating Housing Need.

While I understand the arguments that wealth is an indication of past discrimination in housing (if lower income families resided there the median household income would be lower), and that wealthier families can presumably afford the cost of subsidizing the development of lower income housing, I find both arguments inappropriate as a basis for identifying where housing of any type should go.

Where towns are ratably wealthy, the jobs created by those ratables should influence their fair share, not the household income. Jobs have a relationship to where housing should go, but household income does not. And jobs are already factored into the formula.

Where a town has a portion of the growth area, that factor too has validity in the general placement of future housing needs, but wealth does not.

Carried to its logical extreme, a town with vast blue collar employment where the employees reside in the town should have a median income below that of the region. Its "household income factor" would then be less than 1.0 under that

portion of the formula. This would deflate that town's fair share number. Another wealthier town in the same region will pick up the difference. The problem is, the housing is being directed to locations where the jobs do not exist.

Other than what may be forced to take place as a result of the wealth factor in the formula, who really expects a major regional shift in residency to take place merely based on a town's wealth? If the wealthy town also has jobs and other services within a growth area, the shift may take place, but the shift will occur because of these other factors, not because the town is wealthy. And on what rational basis should a wealthy town with little or no jobs, or no other services, be required to set in motion the cycle of more development, requiring more services that can then support more development, etc.?

The 82% Factor Used to Estimate the Number of Deficient Housing Units Occupied by Poor People in the Warren Formula is Too High.

The 82% factor is found in the 1978 Tri-State Regional Planning Commission's publication People, Dwellings & Neighborhoods, page 15, where, under the discussion of Low and Moderate Incomes, it says "This includes one-third of all households, and it also includes almost all 82 percent of the households experiencing inadequate housing conditions."

In the 1983 Rutgers CUPR report entitled Mount Laurel II, Challenge & Delivery of Low-Cost Housing, Exhibit 2A-1 is based on 1980 Census data. It indicates the portion of deteriorated units occupied by lower income households to be 67% in the 11-County Northeast Region.

In their Response to the Warren Report: Reshaping Mount Laurel Implementation, December 10, 1984, prepared for the N.J. State League of Municipalities, Drs. Burchell and Listokin show that the use of the Warren procedure, but qualifying households by HUD income criteria, results in a percentage of 64.9%. (Exh. 6, p.24).

In view of the greater explanation given by Rutgers and their use of the more current 1980 data, the new Rutgers' percentage of 64.9% appears more reliable because they not only refute the older 82% figure, but their new publication applies the Warren formula to the HUD Income criteria. The earlier Rutgers' percentage related income to the Rutgers' seven surrogate methodology for measuring deteriorated units.

The Use of 1990 Population Projections in the Warren Formula is Too Short a Time Period to Implement the Numbers Being Generated. The Use of Year 2000 Projections Show a Decline in the Rate of Growth and Afford Better Phasing Opportunities.

The 1990 population projections have produced estimated housing needs far above what can reasonably be expected based in many respects to projections I feel are too high. The year 2000 projections show a reduction in the rate of growth which I expect will be moved up in future projections. Accordingly, the use of year 2000 projections will provide the opportunity to phase-in the housing need over almost three 6-year reexamination periods.

By spreading the larger, longer-term needs over the additional years, the average annual production is less, even though still high. The result provides an opportunity to reduce the impact of annual production toward more attainable numbers. With lower numbers, a larger number of smaller projects at lower densities can be envisioned producing a broader base of compliance. In short, phasing a larger 20-year need over 16 years is more feasible than having to provide the first 10-year need over 5 years.

It is proposed that the housing need to the year 2000 be calculated. From that total, the 1980 Census' occupied units should be deleted. The remaining need would represent total units needed, of which a percentage should be for lower income households. This percentage should be the same as what is expected to be produced in actual projects and local ordinances as outlined earlier.

The resulting "fair share" should then be divided equally into the remaining years with the first six years being a "present need" zoning obligation. Additional housing allocations would then be required every 6 years as part of subsequent Master Plan and Development Regulation Ordinance reexamination periods as required under the Municipal Land Use Law (40:55D-89).

Part V

TOWNSHIP ORDINANCE

The township's ordinance meets the requirements of the Mt. Laurel doctrine, and does it in accordance with sound planning principles.

First, the ordinance removed exactions and other provisions that added to the cost of housing. Many were done prior to Mt. Laurel II. For example:

§409 allows the board to grant exceptions from design and performance standards if the literal enforcement of the ordinance is "impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question".

§606A,7 allows swales rather than requiring piped storm water systems.

§606B allows waivers from storm water detention facilities.

§606D provides options for on-site storm water detention/impoundment.

§611 permits, but does not require lighting.

§613A on townhouse designs requires a developer to specify what "consideration" has been incorporated in the overall plan for various design items, "singly or in combination", but does not require how or what ones are to be included.

§613C allows additional building height on side hill locations in response to topographic conditions in the township.

§614 requires the preservation of natural features "whenever possible".

§617, Off-Street Parking, requires 2 spaces per unit, does not require garages, requires screening of large parking lots by plantings, walls, fences or grading, lighting is not required, and curbing is not required.

§627 allows curbs and gutters to be waived.

§628, Streets, provides for 20 foot paving widths (Ord.11-77)

There are no requirements for sidewalks.

In addition, the adoption of Ordinance 4-84, July 10, 1984, included the following:

§301 added a definition of low and moderate income related to the HUD Family Income Limits.

§416, Permits, added a §F that requires a certificate of occupancy for occupants of lower income units in order to verify the sales/rental prices and the qualifying income of the new occupants.

§613B was added as a new section on designing lower income units with flexible setbacks based on building heights, allowing waivers on street widths, curbs and gutters, and piped storm drainage, and requiring the lower income units to be phased in as the development progresses.

§709B was added to allow additional opportunities for lower income housing as related to farm employees on farms of at least 25 acres provided the additional units are occupied by lower income employees and do not exceed four units per farm.

§710B was amended by the addition of a new ¶4 allowing multi-family housing in that portion of the RA District south of Rt. 78 designated as a "growth area" on the SDGP. At least 20% of the units must be lower income units. The density is 3/acre for townhouses and 5/acre for apartments.

Finally, as noted earlier, the ordinance has a capacity to produce 119 low and moderate income units in the multi-family district located in the growth area plus additional farm units. The Year 2000 obligation is estimated to be 78 units.

Part VI

CONCLUSIONS

A. Ordinance Complies with Mt. Laurel II

The township's ordinance is a very meaningful amendment to its original ordinance (92 NJ 260).

It mandates developers to participate in the production of lower income housing (92 NJ 267);

While it allows all upper income housing in some non-Mt. Laurel zones, it retains the obligation to participate in lower income housing production to overcome the deficiency identified by the court (92 NJ 267).

It provides for lower income units on farms in order to relate local agricultural jobs to housing needs.

The ordinance has considered, and responded to the following (92 NJ 267, Footnote 29):

assuring adequate profit for developers;

allowing the proportion of units to go above the minimum 20% accepted by the court;

and accepts the fact that staging will occur out of sheer market absorption rates.

The ordinance has zoned all that portion of the growth area that is accessible by major highways. By zoning all the accessible acreage, the ordinance attempted to respond to the court's requirement for zoning substantial acreage (the inaccessible portion of the growth area has not been zoned, but its acreage has been used in calculating fair share). The ordinance has also specified a portion of the units for lower income, resorted to over-zoning to better assure compliance, and removed restrictions and exactions (92 NJ 270).

It has also expanded the base of its participation by including non-Mt. Laurel projects through the allowance of up to four lower income units on a farm for farm employees as a means of "creating other devices and methods for meeting its fair share obligation" (92 NJ 266) besides the list of considerations listed by the court.

The components of the ordinance are interrelated with local conditions as well as regional and local planning. The result has been an affirmative response to Mt. Laurel. The ordinance provides a realistic opportunity to produce low/moderate income housing by coordinating local planning, economics, fair share obligation, and participation of farmers as well as new housing developers. The combination of the density bonuses and the requirement to produce low and moderate income housing can result in profits producing opportunities sensible for someone to use. (92 NJ 261)

The ordinance addresses the control over rentals and resales (92 NJ 269), phasing in the lower income units (92 NJ 270), and encouraging the higher density developments to areas within the growth area as intended by the court (92 NJ 244).

The ordinance removes municipal barriers to the construction of the township's fair share (92 NJ 258,259) and has removed zoning and subdivision restrictions and exactions that are not necessary to protect the public health and safety (92 NJ 259,270).

These changes comply with the Mt. Laurel doctrine, while following sound planning principles related to established land use, traffic and facilities planning in the township and as well as proposals by the County Plan as well as the SDGP. The results avoid an indiscriminate broom designed to sweep away all distinctions in the use of land (92 NJ 260).

B. Builder's Remedy Should Be Denied

The results in Ordinance 4-84 were part of a deliberative process. As part of its study and review process over the years, the township evaluated several methods of compliance and settled on the concentrated development in the growth area, with additional, low density options on farms to be related to agricultural employment in an agricultural area.

In Mt. Laurel II, the court addressed the builder's remedy issue because three plaintiffs argued they were needed 1) to maintain a significant level of litigation to enforce compliance; 2) to compensate developers who have invested substantial time and resources in litigation; and 3) to ensure lower income housing is actually built (92 NJ 279-281).

None of these conditions apply to the plaintiff in this case. The ordinance ensures a reasonable opportunity to provide lower income housing in accordance with the decision and within the growth area. The plaintiff has not invested substantial time or resources. And the maintenance of significant levels of litigation is just what Mt. Laurel II sought to eliminate. And because Tewksbury selected an area different than the plaintiff's site should not be a basis for granting a remedy outside the growth area, in an area where new infrastructure would be required where it was not planned, and where the selected site is inconsistent with existing sewer capabilities, the SDGP, regional highways, and regional job and retail services.

The plans submitted by plaintiffs are incomplete. Their use and intensity have not been supported by water and sewer service availability. The higher density

proposal is not related either to the SDGP, the County Plan or the Township Plan. It is removed from the regional proposals for transportation, jobs, utilities and higher density housing along the Rt. 22 corridor.

The denial of a builder's remedy is appropriate when considering that what is proposed is an effort to get the court to approve a plan that could not logically be approved under local, county or SDGP goals. Further, plaintiff's site is no different, and in many physical ways better to develop, than other sites in the area that continue to be developed at low densities in compliance with the ordinance.

Development in compliance with the ordinance would not involve the extension of infrastructure into non-growth areas that would put in motion the historical pattern of further sprawl development plus the development already permitted by the ordinance in the growth area.

Mt. Laurel II also allows the trial court to adjust the remedy to cushion the impact where the development would cause a sudden and radical transformation of the municipality (92 NJ 280). It also required that the planning board be closely involved in the formulation of the remedy so the project would be suitable for the municipality (92 NJ 280). The court finally stated that a builder's remedy was not to be viewed as a license for unnecessary litigation when builders are unable, for good reason, to secure variances, and that the trial courts should guard the public interest carefully to be sure that plaintiff-developer's do not abuse the Mount Laurel doctrine (92 NJ 281).

In particular, a proposal such as plaintiff's is beyond water and sewer capacities and, at 11 units/acre, is not only a sudden and radical transformation, it is a threat, a project for which a variance should not be granted, and contrary to sound land use planning at township, county or SDGP levels. The plaintiff first disclosed this development in his complaint in this law suit, a suit which was commenced after the township had introduced zoning provisions specifically dealing with Mt. Laurel II, but on property other than the plaintiff's. The submission of such a dense development without realistic water and sewer proposals, located outside a growth area, and adding 418 units enlarging the village about six times its present size is not a logical expansion of the village, it is a radical transformation without proper health and safety concerns.

In my opinion the plaintiff's proposal is so deviant from the character of the area and the goals of local and regional plans, that it does not constitute an opportunity for the "required discussion", that the efforts have been used as an "unintended bargaining chip", and that the courts are being used as "the enforcer for the builder's threat" to bring litigation (92 NJ 280).

In my opinion, the plaintiff in this case has abused the Mt. Laurel doctrine. He has sought to get court approval for something that is beyond the bounds of reasonableness in a town that acted on its own to adopt an ordinance complying with the decision. It is a suit commenced after the township had made zoning proposals regarding Mt. Laurel II, but on property other than the plaintiff's.

The court should use this opportunity to require these and future developers to participate in a meaningful effort toward local solutions rather than allowing

perfunctory efforts commenced after an ordinance was introduced to be the open door to builder's remedies. In this instance, the township was not intransigent nor was it developing stalling tactics. It had acted.

The profits from the plaintiff's proposal for 11 units/acre would warrant higher proportions of lower income housing than the 20% "minimum" adopted by the court (92 NJ 270, footnote 37). Yet, if 30% or more of the units are low/moderate units, the marketability of the entire job might be in question (92 NJ 267, footnote 29). Yet, if high densities are approved but the full amount of low/moderate units are not included, the project invades the total housing market without maximizing the production of low/moderate income units.

If all municipal fair share numbers are based on 39.4% of the future housing need, yet all projects are constructed so as to produce only 20% of their units as lower income units, a few high density developers will absorb all the market-level housing, but only half the state's lower income housing need will be produced. In the meantime, the extra profit from the extra market-level units has been diverted from the production of lower income housing and lost forever.

The result of high density projects will be a smaller number of large developments around the state rather than a larger number of small developments. The fair share will be shifted to a few towns rather than spread out in a more equitable manner. The court should require developers to submit responsible plans and reasonable densities, not plans with densities designed to frighten towns into settling at any cost, the beneficiary of which can only be the voracious developer noted in Mt. Laurel I.

C. The Township's Ordinance Complies with the Municipal Land Use Law

In addition to complying with the Mt. Laurel doctrine, it is my opinion the ordinance also complies with reasonable planning and the objectives of the Municipal Land Use Law.

The importance of adhering to sound planning concepts were repeatedly stated in Mt. Laurel II:

While directing compliance, the court indicated that specific locations will continue to depend on sound local planning (92 NJ 211).

That the obligation does not extend to areas where the SDGP discourages growth (92 NJ 215).

The obligation depends on rational long-range land use planning rather than sheer economic forces (92 NJ 215).

Even when considering a builder's remedy, the awards are to be located and designed in accordance with sound zoning and planning concepts (92 NJ 218).

The court recognized the potential impact and indicated the obligation may be phased in over those years included in the projection and used to calculate the need (92 NJ 218).

The court's acceptance of the SDGP and sound planning was related to its shift from the "developing" municipality concept of Mt. Laurel I when it concluded in Mt. Laurel II that certain towns should not yield to inevitable growth and the unacceptable demands to extend infrastructure, including agricultural land, open spaces and areas of scenic beauty (92 NJ 224).

The court mandated local zoning consider regional considerations (92 NJ 238) and that the prospective lower income housing need be channeled into the SDGP "growth areas" (92 NJ 244).

It is my opinion the township's ordinance successfully merges the Mt. Laurel doctrine with sound local planning and regional considerations, as well as the purposes of the Municipal Land Use Law.

The location of the higher density solutions are in the growth area consistent with township development patterns as well as county and SDGP objectives. It is an area adjacent to a sewage treatment plant and/or a river where a new plant might be appropriately located within a growth area serving land between a Rt. 22 corridor and the Interstate 78 interchange. As such, the ordinance encourages municipal action for appropriate uses or development of all lands in the State in a manner promoting the public health, safety, morals and general welfare (40:55D-2a).

The areas designated are sufficient to accommodate the township's fair share at appropriate densities and related design standards as well as being placed according to the county's and SDGP's long-range planning, both of which suggest low density development throughout 99% of the township. The results secure safety from fire, flood, panic and other disasters while providing adequate light, air and open space and promoting appropriate population densities and concentrations contributing to the well-being of persons, neighborhoods, communities and regions and preservation of the environment. (40:55D-2b, c, and e)

In absorbing its fair share of the region's housing need, and placing it in the growth area near major highways, jobs, utilities, and retail services, the township has considered the development and welfare of neighboring municipalities, the county and State as a whole. (40:55D-2d)

The ordinance provides a variety of uses according to 40:55D-2g and orients the higher density development toward the Route 22/78 corridor and away from more congested and limited capacity of local streets in order to promote the free flow of traffic while discouraging routes that will result in congestion and blight (40:55D-2h).

It uses a variety of residential methods to produce the higher density lower income housing units in order to conserve open space and valuable natural resources while preventing urban sprawl outside the growth area and degradation of the environment through improper use of land by using the existence of a small village of less than 100 units as the excuse to erect 418 more units in an area without water and sewer service. (40:55D-2j).

The ordinance's concentration of higher density area closest to sewer service and regional highways, jobs and a corridor of proposed development has

encouraged the coordination of various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land. (40:55D-2m).

In particular, the ordinance has given reasonable consideration to the character of each district and its peculiar suitability for particular uses and has encouraged the most appropriate use of land. (40:55D-62a):

The higher density housing is included in the SDGP's Clinton growth corridor and the County's Clinton-Whitehouse "center" giving consideration to existing and proposed development of housing, jobs, services and transportation.

The low density areas throughout the rest of the township have been retained consistent with lack of water and sewer service, serious soil limitations for supporting development, difficult access roads in mountainous terrain, steep slopes and rock conditions in some areas, and other areas with shale that might provide water, but the proximity of the water to the surface requires lower densities to prevent septic systems from contaminating the water supply.

The result has produced a plan to absorb the township's fair share on the least amount of land located in the south end of the township where it is most likely to provide utility service, major highway access, proximity to retail services, proximity to local and regional jobs, and compatibility with the long-range character of development anticipated through county and state plans.

road conditions and passes through a mining operation as well. The area is at higher elevations than surrounding areas with future water and sewer systems considered impractical. The terrain is difficult to build on and the character of the area is agricultural or wooded remoteness.

Finally, the following major policies concentrate development away from Tewksbury in general, and portions north of Rt. 78 in particular. They steer concentrations of development away from Oldwick to avoid leap-frogging into "limited growth areas". Instead, the SDGP and County give priority for development in those portions of the growth areas having support services (highways, rail service, utilities, jobs, etc.) suggesting the logic of infilling in the closer-in areas before considering growth beyond the fringes of the "Growth Area".

It is the intent of the SDGP to accommodate development in Hunterdon County's portion of the region "...recognizing growth pressure around Clinton and the importance of Flemington as a commercial and service center." (SDGP, p.158)

"Growth should be concentrated within and around Flemington and Clinton where major public investments have been made to support further development. The sewage treatment facility serving the Clinton area has reserve capacity and another facility has been approved for construction in the Growth Area east of Clinton." (SDGP, p.158)

Notwithstanding knowledge of Rt. 78's penetration into the region (SDGP, Map VIII, p.37) and the existence of older villages and developed areas, Tewksbury is largely designated a "limited growth area".

The discussion of the Clinton Corridor (SDGP, p.55-56) acknowledges Rts. 78, 22, 202 and 287 as part of the larger region, as well as various train and bus service. "The area includes older centers such as Somerville, Raritan and Clinton, but much of the land is either open or developed at very low densities". The SDGP acknowledges the sensitive conditions in the mountainous areas. "Development should be restricted on excessive slopes. Growth should be controlled around Six Mile Run, Spruce Run and Round Valley Reservoirs to avoid damage to these water storage areas." (SDGP, p.55-56)

b. There have been No Changes in Conditions

1. The County's Land Use Alternatives and Future Land Use Plan, 1975 has not been updated. Oldwick is not looked upon as a major center for future expansion, while the Clinton and Whitehouse corridor is identified as a "planned center" (Map 1, p.30) Plaintiff's property is identified as "Prime Agricultural Soils". In discussing these soils, the text of the Future Land Use Plan indicates that those prime soils

not conflicting with industrial or residential land uses have been identified. It also states "...the County Planning Board does not know of a desirable alternative land use for lands not required within the proposed residential/industrial patterns. One of the County's major concerns should be to solidify this position by seeking to develop the means to keep these lands productive."

2. The township has maintained a dominant portion of its acreage in Farmland Assessment and there is nothing one can do to change the rugged terrain that influences much of the township or the roadways to get there.

Those items which would otherwise suggest changes tilting the issue toward an enlargement of the "growth area" into the Township have not taken place.

1. No major water system expansion;
2. No new sewer service;
3. No major loss of farmland or decline in the industry of agriculture;
4. No new job growth;
5. No new mass transit facilities;
6. No new highway proposals;
7. All important highways to the Township existed when the SDGP was prepared, i.e. Rts. 22 and 78.