RULS-AD-1980-290

6/26/1980 (year is unclear)

- Re: Brief in Reply to 24 Questions on behalf of Urban League of G. New Brunswick.

pgs: 108 (including: Title pgs; TOC; + Appendix)

S-854/1

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RULS - AD - 1980 - 290

SOUTHERN BURLINGTON COUNTY N.A.A.C.P., et al., Plaintiffs-Appellants, Cross-Respondents, and DAVIS ENTERPRISES, Plaintiff-Intervenor, -v- TOWNSHIP OF MOUNT LAUREL, Defendant-Respondent, Cross-Appellant.	SUPREME COURT OF NEW JERSEY DOCKET NO. 17,041 A-192/193, September Term 1979 Civil Action BRIEF IN REPLY TO 24 QUESTIONS ON BEHALF OF URBAN LEAGUE OF GREATER NEW BRUNSWICK, URBAN LEAGUE OF ESSEX COUNTY, SOUTHERN BURLINGTON COUNTY N.A.A.C.P., and NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE
URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs-Appellants, -v- MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants-Respondents.	SUPREME COURT OF NEW JERSEY DOCKET NO. 16,492 A-146, September Term 1979 Civil Action BRIEF

JOSEPH CAPUTO, et al., Plaintiffs-Appellants, -v- TOWNSHIP OF CHESTER, et al., Defendants-Respondents.	SUPREME COURT OF NEW JERSEY DOCKET NO. 16,455 A-150, September Term 1979 Civil Action BRIEF
GLENVIEW DEVELOPMENT CO., Plaintiff-Appellant, -v- FRANKLIN TOWNSHIP, et al., Defendants-Respondents.	SUPREME COURT OF NEW JERSEY DOCKET NO. 16,813 A-151, September Term 1979 Civil Action BRIEF
URBAN LEAGUE OF ESSEX COUNTY, et al., Plaintiff-Appellants, -v- TOWNSHIP OF MAHWAH, Defendant-Respondent.	SUPREME COURT OF NEW JERSEY DOCKET NO. 16,967 A-173, September Term 1979 Civil Action BRIEF

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Appendix

QUESTION #1

Discuss the application of the duty not to exclude, as first announced in Mt. Laurel, to all types of housing (i.e. regardless of income level).

Mt. Laurel was a class action brought on behalf of low and moderate income persons. This Court declared that proper provision "for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation." Southern Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, 179 (1975) (Emphasis added). This court enunciated a duty that developing municipalities "make realistically possible a variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income." Mt. Laurel, supra, 67 N.J. at 187. The duty to provide a variety of housing was not imposed for the sake of variety itself; it was done to vindicate the constitutional rights of people who needed housing, particularly the low and moderate income class who were the plaintiffs in that case.

In Madison the Court introduced the concept of least cost housing. The court recognized this concept was a fall back position, the "only acceptable alternative recourse" if in fact private enterprise cannot construct the housing needed for lower income families. Oakwood-at-Madison, Inc. v. Madison Tp., 72 N.J. 481, 512 (1977). Least cost housing was to be a substitute "to the extent that builders of housing in a developing municipality like Madison cannot through public assisted means or appropriately legislated incentives provide the municipality's fair share of the regional need for lower income housing." Madison, supra, 72 N.J. at 512. (Emphasis added).

Municipalities have disregarded the fact that "least cost" housing was considered a fall-back position, an "alternative recourse." They have considered "least cost" housing to be their only obligation. The position of Mahwah's planner could not have been more explicit. His definition of least cost housing is housing that can be built at "a lesser cost than conventional housing at a given price generally on large lots requiring very expensive improvements". Mahwah, 8T 64, 7T 60. The trial court, in upholding the Mahwah ordinance, found that "least cost housing" would sell for "close to $100,000" per unit. Mahwah opinion at 45-46.

If this "least cost" housing is sufficient to comply with Mt. Laurel, then neither low, moderate, nor middle income persons can afford to live in the community. The duty to provide all types of housing becomes absolutely irrelevant to persons of low and moderate income and middle income in such a case because none of the housing types provided will benefit them.

This cannot be permitted to happen, especially since there are a number of ways by which municipalities can, and do, make housing for low and moderate income persons a reality. These methods would make reliance on the "only alternative recourse" unnecessary (least cost housing which can cost close to $100,000). These alternatives include (1) subsidized housing; (2) mandatory percentages of low and moderate income housing; (3) price-controlled units; (4) density bonuses; and (5) least cost mobile homes.

Municipalities can provide zones for subsidized housing and could establish such a use as a conditional use under the MLUL. Some municipalities require large developers such as developers of multi-family housing or planned unit developments to provide a percentage of that

housing for low and moderate income persons. This was contemplated in Mt. Laurel. Mt. Laurel, supra, 67 N.J. at 187. A number of ordinances including some in New Jersey have this focus. South Brunswick requires every planned unit development to provide at least 20% of their dwelling units for low and moderate income persons.[1] East Windsor requires that 5 to 10% of the units in a planned unit development shall be for low income and 10 to 15% of moderate income.[2] Cherry Hill requires that 5% of the units in a multi-family development be for low income persons.[3] Bedminster, after eight years of litigation is revising its ordinance pursuant to a court order and with the assistance of a master, mandates in its draft ordinance that a developer of a planned unit development or a planned residential development provide 20% of its housing for low and moderate income persons.[4] Similar requirements exist throughout the country.[5] The New Jersey ordinances are based on language from Mt. Laurel:

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1 See appendix, (A-1). The trial court approved of this provision but noted that it did not provide enough units to meet South Brunswick's fair share.

2 See Appendix, (A-2).

3 See Appendix, (A-3).

4 See Appendix, (A-4).

5 Similar provisions exist in other states, particularly California. The California Department of Housing and Community Development has drafted a model inclusionary zoning ordinance for use by California municipalities. See Appendix A-6. The ordinance mandates that a certain percentage of all units in subdivisions, rental projects and sale projects be affordable to low, moderate and middle income families.

Orange County, California, adopted as part of its Land Use Element of its General Plan a requirement that developers provide 25% of their units for low, moderate and middle I and II incomes. The Orange County Environmental Management Agency cannot approve the development unless the development is consistent with the Plan. The 25% requirement is broken down as follows:

10% for low and moderate (less than 80% of county median)
10% for Middle I (81-100% of county median)
5% for Middle II (100-120% of county median).

(footnote continued on next page)

> "If planned unit developments are authorized, one would assume that each must include a reasonable amount of low and moderate income housing in its residential 'mix' unless opportunity for such housing has already been realistically provided for elsewhere in the municipality." Mt. Laurel, supra, 67 N.J. at 187.

Most of these ordinances contemplate that the developer will apply to the government to have some of his units financed under a Federal subsidy program.[1] Housing for low income persons,[2] persons with less than 50 percent of median income, in the suburbs is possible today only through subsidized rental housing. If the developer is unable to get subsidies for his development, he simply cannot build housing which the low income person can afford. In that case municipalities may give the developer one of two alternatives: build price controlled moderate income units

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(footnote 5 continued from previous page)

5 Los Angeles requires a developer of any multi-family project to set aside 5-15% of his units for low and moderate income persons. Palo Alto, California, requires that at least 10% of all units in development of more than 10 units be available for moderate income families. Montgomery County, Maryland requires that at least 15% of units in developments with more than 50 units be built for low and moderate income persons. These and other examples are summarized in a HUD funded report, Housing Choice: A Handbook for Suburban Officials, Non-Profit Organizations, Community Groups and Consumers (1980). Excerpts are found in the Public Advocate's appendix to its Mahwah brief.

1 For example, Section 8 housing allows the tenant to pay 25% of his income for rent; the government pays the difference.

2 Madison, supra, 72 N.J. at 551, fn. 49 notes that low income in 1970 is defined as up to $5,568. HUD now defines low income (very low income is now their terminology) as a family of four with less than 50 percent of the median income for an SMSA. As of 1979, this is $11,500 in the Newark SMSA and $9,400 in the Philadelphia-Camden SMSA.

or donate land to the municipality[1] to be held or used by the municipality for the purpose of constructing this housing in the future if housing subsidies become available.[2]

As an alternative to subsidized housing, a developer may, under most mandatory ordinances, build a certain percentage of price-controlled units, affordable to lower income persons. Thus the draft Bedminster ordinance provides that if the developer cannot obtain subsidies, a PUD developer may sell or rent 20% of his units at prices affordable to moderate income persons.[3] First preference in purchasing these units must go to moderate income families.[4]

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1 Orange County will consider one of two options: provision of price controlled housing as a substitute or dedication of lands to Orange County with the land or the proceeds of the sale of the land to be used to implement an Inclusionary Housing Program. Montgomery County, Maryland also will accept transfer of land to the county as an alternative. See Housing Choice, pages A-14 and A-17, appendix of Public Advocate's Mahwah Brief.

2 Plaintiffs submit that land should be set aside for this development. It is a fact that land, like water/sewer capacity, is a limited resource. Unless an adequate supply is maintained for lower income persons, they are apt to forever lose the opportunity. Governments require developers to set aside lands for open space and recreation; the need for lower income housing is even a more compelling reason to reserve land.

3 The units must sell for no more than 2½ times median income or 2½ times 80% of median income depending upon bedroom size.
Newark SMSA 2½ x $21,300 (median income for the area) = $53,250
Camden SMSA 2½ x $18,800 (median income for the area) = $47,000
Newark SMSA 2½ x $17,050 (80% of median for the area) = $42,625
Camden SMSA 2½ x $15,050 (80% of median for the area) = $37,125
80% of median income is the most a moderate income person can afford.

4 Some of these jurisidction have also imposed price controls on resales of price controlled units. This has been done, for example, in Palo Alto, California and Fairfax County, Virginia, and has been recommended by the master in the Bedminster case. The master stated "I am very much aware that control over the initial sales price of a privately owned house provides no guarantee against the initial purchaser's reaping windfall profits on resale." p. 10 May 27, 1980 report. The resale provision is also strongly endorsed in a major law review article. Strauss and Stegman, "Moderate - Cost Housing After Lafayette: A Proposal", II Urban Lawyer 208 (1979).

The reason for such a requirement is spelled out in the master's report in the Bedminster case which recommended both price controls and resale controls. He pointed out that "controlling the size of a dwelling in no way controls its rental or sales price". Master's Report, page 8. If the community is desirable, the buyers will pay a premium to live there even if the unit is smaller than average. Likewise if there is a housing shortage, competition will bid up the price even of a modestly built unit beyond what moderate income persons can afford.

Mandatory requirements are only one side of the coin; the other is incentives to developers to provide the housing. California links mandatory requirements with incentives to the developer to provide this needed low and moderate income housing. State law provides that if developers of more than five units anywhere in the State provide 25% of the units for persons of low and moderate income, they are automatically entitled to either a 25% density bonus or an exemption from several municipal burdens.[1] 41B Cal. West. Government 6915; Cal. Stats. 1979, c. 1207. Furthermore, the statute does not preclude a government from "taking additional actions which will aid housing developers to construct housing developments with 25% or more of the units for low and moderate income persons. 41B Cal. West. 69515.

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[1] If a density bonus is not given, the municipality must do at least two of the following: (1) exempt the developer from any dedication of land or payment of fees for park or recreational purposes; (2) the municipality may construct all public improvement including streets, sewers and sidewalks; (3) utilize local revenue to reduce the land cost; and (4) exempt the development "from any provision of local ordiances which may cause an indirect increase in the cost of the housing units to be developed."

Finally a municipality can provide for a reasonable amount of mobile home parks and mobile home subdivisions and assure that all or a percentage are affordable to lower income persons. Mobile homes are the only non-subsidized, non-price-controlled units which are affordable by some moderate income persons.[1]

These are the only methods other than actual municipal construction of housing which will provide housing for low and moderate income persons. These methods should be utilized in conjunction with an ordinance which provides for a variety of high density types which can be built without unnecessary cost-exacting features. The developer who seeks to build subsidized housing can do so, even if subsidies are available, only if density limitations and cost-exacting features do not make it impossible to build for less that the maximum construction cost established by HUD. The mobile home developer can make a home available to moderate income and middle income persons if allowed a reasonably high density and not fettered with cost-generating restrictions. Price controlled units must be built under the same conditions. In short, for low and moderate income housing to occur, two things must happen: (1) there must be a sufficient amount of land zoned for high density development without unnecessary cost-generating features and (2) there must be use of mandatory percentages, price-controlled units and density bonuses.[2]

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1 Those moderate income persons making close to 80% of median can often afford a least cost mobile home.

2 The mandatory requirements are also workable especially if the municipality has a zoning ordinance which is truly not cost-generating. The municipality can also smooth and encourage the process by appropriate use of the California density bonuses. Housing Choice concluded that such mandatory ordinances have provided 2,000 units of low and moderate income housing in Orange County; 400 in Los Angeles and 350 in Montgomery County, Maryland.

Plaintiffs recognize that the Court in Madison withheld judgment on whether mandatory provisions, price controls or density houses "may be exercised without express legislative authorization." Madison, supra, 72 N.J. at 518. It is time to declare that they may be and must be exercised. In this context, the following should be considered:

1. The Mt. Laurel decision specifically "assumes" mandatory provisions of low and moderate income housing in P.U.Ds.[1]

2. This Court in Madison specifically conditioned corporate relief for the developer upon his agreement to provide 20 percent low and moderate income housing. It would be a strange result indeed if the Court has the power to impose such condition in remedying a constitutional violation but that a municipality has no power to impose this condition to implement the constitutional rights of low and moderate income persons.

3. These mandatory ordinances do not compel a developer to do anything. They merely state that if a developer wishes to build a high density P.U.D. or multi-family development, he must provide a certain percentage of low and moderate income housing. If he does not wish to comply with the condition, he is free to build a traditional subdivision at much lower densities.

4. Taxpayers Assn. of Weymouth Tp. is strong authority that municipalities have the power to utilize mandatory provisions, price controls and density bonuses. In Taxpayers Assn. of Weymouth v. Weymouth Tp., 71 N.J. 249 (1976), the Supreme Court held that municipalities were authorized to require developers in certain zones to rent only to senior citizens; there was a question whether

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[1] "If planned unit developments are authorized, one would assume that each must include a reasonable amount of low and moderate income housing in its residential 'mix' unless the opportunity for such housing has also been realistically provided for elsewhere in the municipality." Mt. Laurel, supra, 67 N.J. at 187.

this was authorized by the enabling act. The Supreme Court stated in Weymouth that compliance with Mt. Laurel "would be impossible if the municipality could not design its land use regulations to provide for the unsatisfied housing needs of specific, narrowly defined categories of people." Weymouth, supra, 71 N.J. at 293.

5. Plaintiffs submit that these mandatory provisions and density bonuses provisions are essential and unless they are utilized low and moderate income persons will be excluded from the community. If the zoning enabling statute does not authorize a municipality to do those things which will enable low and moderate income persons to live in the community, then the state enabling statute is unconstitutional as denying low and moderate income persons the equal protection of the law.

This issue, however, was resolved in Madison. Madison restates the holding in Mt. Laurel:

> "The state zoning statute is to be construed to conform with state due process and equal protection so as to compel zoning in developing municipalities to affirmatively combat exclusion of the lower income population needing housing." Madison, supra, 72 N.J. at 547 (emphasis added)

This sentence can only mean that the zoning enabling act must be construed to authorize mandatory provisions, price controls and density bonuses - the only effective affirmative methods of combatting exclusion.

6. This Court has just held that nursing homes may be required to set aside a certain amount of beds for indigents. The Court rejected arguments that the requirement was unconstitutional and beyond the scope of the enabling statute. New Jersey Assn. of Health Care Facilities v. Finley. There is no conceptual difference between the authority to enact that regulation and authority to do what plaintiffs propose.

7. Further, this power need not be found in the constitutional authority to zone. The Mt. Laurel mandate arises from another provision of the Constitution and its implementation goes beyond "zoning" per se but to the totality of action undertaken by local government which impacts on land use and housing opportunities. The Mt. Laurel trial court and this Court focused on non-zoning action which impacted on the resident poor (such as the case of municipal services) and new housing opportunities (such as a resolution of need). Mt. Laurel, supra, 67 N.J. at 169-170.

In short, local government is the instrumentality through which most land use decisions are made, from maintaining streets to producing subsidized housing. Absent governmental action, housing opportunities for lower income persons will not occur. When local government chooses to act, the opportunities do occur and existing lower income neighborhoods are maintained. The decision to act is not discretionary. When a municipality fails to provide a realistic housing opportunity and/or discriminates against the poor in use of local services, the courts must intervene to remedy the deprivation. At least this Court has the luxury of making the decision. The lower income citizens, on whose behalf it is made, have no other recourse than to give the Court that opportunity.

QUESTION #2

Discuss the appropriate procedural posture for the joinder of necessary/desirable parties in an exclusionary zoning suit.

Plaintiffs submit that the following reflects the present state of the law of joinder and need not be altered.

1. Municipalities in the region are not necessary parties required to be joined under R. 4:28-1.

2. Municipalities in the region should not be joined under the permissive joinder rule. R. 4:29-1, in a suit brought by a landowner who only owns property in one municipality.

3. Permissive joinder of some other municipalities in the county is allowable in actions by low income persons.

Other municipalities are not indispensable parties. The general rule is that:

> Whether a party is indispensable depends upon the circumstances of the particular case. For a general rule a party is not truly indispensable unless he has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest. Allen B. DuMont Labs v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959).

A neighboring municipality is not needed to fully grant complete relief in a suit between a plaintiff and a municipality. Nor will adjudication of the dispute impair or impede the neighboring municipality's right to defend itself if it is later sued. It is not therefore a necessary party. Thus this Court did not require other municipalities to be joined in the actions that were brought against Mt. Laurel and Madison.

Permissive joinder under R. 4:29-1 is not appropriate in a lawsuit brought by a developer who owns land only in one municipality. The developer may have a right to relief against the municipality in which his property is located because of the way his land and other land in

the municipality has been zoned. He has no right to relief against any other municipalities in which he does not own land. Furthermore, the developer would clearly lack any interest in remedial action as to other municipalities. In this situation, there is no basis for permissive joinder under R. 4:29-1.

The permissive joinder of more than one municipality in a county is possible in an action brought by low and moderate income persons. This is illustrated by Urban League of New Brunswick v. Carteret where 23 municipalities in Middlesex County were sued in one action. This permissive joinder was proper under R. 4:29-1. The test is whether there is a "logical relationship between the claims which would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding." MacNeil v. Klein, 141 N.J.Super. 394, 409-410 (App. Div. 1976). The claims against the Middlesex municipalities were reasonably related because each municipality must consider regional needs in zoning. Mt. Laurel; N.J.S.A. 40:55D-2(a).

Furthermore, the exclusionary practices of municipalities interrelate and impact upon low income persons. If all municipalities in the county exclude, the plaintiffs will be excluded from the county. Additionally, there are common questions of law and fact. The legal standards of Mt. Laurel and Madison apply. The county planning data, the employment picture in the county and county housing needs are all common questions of fact. Permissive joinder then was appropriate in Urban League v. Carteret.

There are legal and practical limitations on the use of permissive joinder. It appears impossible under the Rules to join municipalities

from more than one county in one case. The Middlesex Superior Court has no jurisdiction over municipalities in Somerset or Monmouth Counties. There is a tremendous expenditure in time, money and resources in bringing a zoning action in which a number of municipalities are joined; few lower income groups will have the capacity to bring such an action and, therefore, the extent of joinder, unless patently arbitrary, should be left to their discretion.

QUESTION #3

Discuss the relevance of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq. (in particular, the general welfare requirement in N.J.S.A. 40:55D-2(a)) in exclusionary zoning cases.

The MLUL became effective on August 1, 1976. It was signed into law on January 14, 1976. However, the bill was under consideration well before the Mt. Laurel decision and, in fact, a public hearing on it was held on April 3, 1975, only ten days after the decision was rendered (March 24, 1975). During that hearing, the Honorable Martin L. Greenberg, Chairman of the Senate County and Municipal Government Committee, repeatedly stated that the bill "is not a response to that (Mt. Laurel) decision".[1]

However, both Chairman Greenberg and Senator Thomas G. Dunn (Committee member) indicated that consideration of the decision would have to be made prior to enactment.[2] Thus, shortly after the Mt. Laurel decision, those Senators actively working on what was to become the MLUL articulated two definitive positions: first, the bill had not been written to implement Mt. Laurel (which it could not have been since it had been drafted before the decision) and, second, the bill was not and would not be in conflict with Mt. Laurel.

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1 Public Hearing before Senate County and Municipal Government Committee on Senate Bill No. 3054 (April 3, 1975) at p. 2. ("Public Hearing" hereafter). See also his statement: "On the contrary, I have said four times today and I am now saying again that this bill does not deal with the Mount Laurel problem." Public Hearing, p. 70.

2 Senator Dunn: "It (Mount Laurel) is something that came after the fact and I am sure that before this bill or other bills will be enacted into law, a great deal of consideration is going to be given to the ramifications of the Supreme Court decision." Public Hearing, p. 67.

Senator Greenberg: "I have also . . . reread the bill as against the Mount Laurel decision to see whether or not there was language in the bill which would require modification in the face of the Mount Laurel decision, and I have not yet seen any. It may be that on a rereading, we will find some. We are looking for that kind of a problem. We haven't yet determined that it exists." Public Hearing, p. 68-69.

The conclusion to be drawn is that the bill and the decision were, essentially on two parallel, somewhat overlapping tracks. To the extent they overlapped, they were not seen as inconsistent; both, however, had aspects with which the other did not deal. The MLUL was largely a procedural recodification of existing law. Its major connection with Mt. Laurel may be found it its statement of purposes and Master Plan requirements.[1]

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[1] The Honorable Justice Frederick Hall, then retired and writing after the Mt. Laurel decision, identified this relationship, Frederick Hall, "Judicial Role in Land Use Regulation," 100 N.J.L.J. 505, 515 (1977):

> While the legislature has not yet responded to the Court's suggestion of provision for regional zoning, it did, after Mount Laurel, enact the new Municipal Land Use Law, various sections of which indicate an important shift in policy from the individual-municipality emphasis of old enabling acts, and give statutory support to the constitutional bases of that decision. I refer to the purpose sections, where the intent of the Act is stated:
>
> > to ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole; to promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment; and:
> >
> > to provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space . . . in order to meet the needs of all New Jersey citizens.
>
> In addition, the zoning ordinance of every municipality must conform to a master plan, which must contain a land-use plan element and a housing element. I submit that the latter, in order to ground a valid zoning ordinance, would have to make provision, appropriate to the particular municipality, for a variety and choice of housing.
>
> While any home rule tradition is always subject to constitutional requirements and guarantees on rights of all people, as Mount Laurel in effect held, the land use law provisions just referred to indicate to me a legislative recognition that the invisible walls of suburban communities must have many gates for entrance.

(1) -- Does the MLUL adopt the dictates of Mt. Laurel and require compliance by all municipalities?

The MLUL "adopts the dictates of Mt. Laurel" in so far as it is the legislative enabling act for local land use action under the State Constitution and is either consistent with Mt. Laurel or unconstitutional. Since it is easily read as consistent with the decision no question of unconstitutionality on that ground is raised. However, the MLUL does not "implement" Mt. Laurel, per se. That is, although it establishes the procedural framework for municipal land use decisions (which must be consistent with Mt. Laurel), it does not articulate substantively how to implement the decision.

All municipalities must comply, of course, with the MLUL. The question is whether the MLUL was intended to alter the Courts "developing" municipality distinction and, as a matter of statute (as opposed to Constitutional Law) mandate Mt. Laurel compliance for all municipalities. The legislative history would seem to indicate that such a major decision was not contemplated, let alone effectuated. Furthermore, this Court has so found. See Pascack Ass'n, Ltd. v. Washington Tp., 74 N.J. 470, 486, fn 4 (1977). Essentially, the MLUL appears to accept whatever the Mt. Laurel mandate is in that regard.

The law does statutorily mandate regional considerations in land use planning for all municipalities in the adoption of a master plan (and ensuing zoning ordinance). N.J.S.A. 40:55D-28(d). Plaintiffs do not believe, nor does the record suggest, that this imposed a statutory obligation in fully developed municipalities, which are neither undergoing redevelopment nor have resident poor in substandard housing,to affirmatively change existing developed land use patterns.

(2) -- If the MLUL "general welfare" duty is interpreted so that the regional need requirements of Mt. Laurel are limited to developing municipalities, is delegation of the zoning power to other municipalities without a concommitant regional perspective requirement unconstitutional? See Payne, 29 Rutgers L. Rev. 803 (summer 1976).

The MLUL "regional perspective requirement" is imposed on all municipalities. At issue is not whether all municipalities must undertake such a perspective but what they must do once having done so. Certainly if this Court is willing to maintain the viability of distinctions among municipalities from a constitutional perspective, the legislature is not acting unconstitutionally by creating enabling legislation which accepts the wisdom of those distinctions. The developing-developed-rural distinctions have been judicially fashioned out of the Constitution. It is for the Court to articulate it more comprehensively. The MLUL is of little or no help.

(3) -- If the MLUL represents a complete adoption of Mt. Laurel principles, should the Court adjust its focus in these cases so as to concentrate on violations of the statute?

As previously stated, the MLUL offers no substantive implementation of Mt. Laurel. Compliance with all of its procedural provisions, on its face, will not indicate compliance with Mt. Laurel. Nothing in the MLUL describes how a municipality must realistically provide a housing opportunity for lower income persons or how to determine how many of such opportunities should be provided. Legislation which might have helped on those points has not been forthcoming. The major legislative action in this regard since Mt. Laurel has been the attempts by the minority legislators in their amicus briefs in these cases to have the Court withdraw from implementation of Mt. Laurel.

(4) -- Discuss the significance of the reexamination (40:55D-89) and variance (40:55D-70) provisions of the law in developing guidelines for exclusionary zoning litigation.

N.J.S.A. 40:55D-89 requires a periodic reexamination of the municipal Master Plan and zoning ordinance every six years. It is not particularly directed at Mt. Laurel compliance but could be used as a periodic check to determine whether municipal action has been sufficient to create the realistic housing opportunity required by Mt. Laurel. See Answer to Question #11(d) and 15(c).

The variance provisions of N.J.S.A. 40:55D-70 are unchanged from the prior law. This was criticized by the Court in Mt. Laurel as an invalid method of providing privately built multi-family housing. Mt. Laurel, supra, 67 N.J. at 181-182, fn. 12. The special exception method (now the conditional use, N.J.S.A. 40:55D-67) was approved of and plaintiffs believe, under certain circumstances, it could encourage the provision of lower income housing. See answers to Question #21.

(5) -- Discuss those legislative enactments listed in the amicus curiae brief of legislators accepted by Court on April 16, 1980 that are responsive to the exclusionary zoning problem.

Plaintiffs are somewhat at a loss to understand the thrust of the amicus brief of the minority legislators as to its listing of various legislative enactments. Not a single one of these was intended to deal with the concerns raised by the plaintiffs in Mt. Luarel. Virtually all were enacted prior to the decision. None provide any opportunities for lower income housing which are not permitted within initial municipal action or cooperation.

Mt. Laurel deals with the problem of a breakdown in municipal responsibility under the Constitution. It addresses the failure of some local

governments to create realistic housing opportunities for lower income persons. State and federal programs do exist which make such housing production possible. The laws cited by the minority legislators are examples. Mt. Laurel deals with making this possibility a reality in discriminatory, recalcitrant municipalities. The Legislature as a whole, let alone the minority legislators,[1] have as yet failed to address that problem. In fact, it is the utter bankruptcy of legislative initiative that led to Mt. Laurel in the first place. Certainly nothing which the Legislature has done since the decision could possibly be read to indicate that this Court should step back. If anything, the subsequent legislative history mandates a much more vigorous judicial response to continued municipal recalcitrance.

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[1] It may be worth noting that several of the same legislators participating on the amicus briefs of the minority legislators sponsored Assembly Concurrent Resolution No. 3008 (introduced on January 31, 1977) seeking to amend the New Jersey Constitution to permit land use practices which effectively result in limiting or restricting the ability of lower income persons to acquire, use or enjoy land. Several also participated in Macklet v. Byrne, 154 N.J.Super. 410 (App. Div. 1977), an attempt to constrain implementation of Executive Order 35.

QUESTION #4

Discuss the significance of Executive Order 35. Discuss any other similar initiatives relating to the problems of exclusionary zoning that you may be aware of.

In sharp contrast to the legislative experience, the executive has clearly evinced a determination to implement Mt. Laurel. Executive Order 35 followed a history of Executive pleas to the legislature to do something. Several Executive messages addressed the housing crisis in the State and the role played by local land use policies in the ghettoization of the State's lower income citizens. A Blueprint for Housing in New Jersey, A Special Message by Governor Cahill, 1970; New Horizons in Housing, A Special Message by Governor Cahill, 1972; Executive Orders No. 35 and 46, 1976; The State of New Jersey, Annual Messages, 1975, 1976 and 1977.

Executive Order 35 indicates not only executive agreement with the Mt. Laurel decision but also an executive determination to use the administrative agencies of government as an aid in its implementation. In 1976, Governor Byrne set forth as a specific goal for New Jersey the end of exclusionary zoning.

> End exclusionary zoning: No review of housing programs would be complete in 1976 without a discussion of the State Supreme Court decision striking down zoning barriers to low and middle income housing in developing suburban areas. As I predicted a year ago, the courts have held such restrictions to be unconstitutional.
>
> It is now our obligation to provide the legislative framework to enable local communities to conform to the Court's mandate. To further assist such communities, I shall issue an executive order directing the promulgation of voluntary fair-share housing guidelines. The order will also direct the departments to give preference in discretionary state aid programs to those communities that adjust their zoning in accordance with the Court's ruling. 1976 Annual Report, Manual of the N.J. Legislature, p. 496.

Accordingly, Executive Order 35 was issued in recognition of the serious shortage of decent and healthful housing opportunities in New Jersey, especially for low and moderate income households. The Governor specifically articulated the state's policy and law to alleviate the housing shortage by municipal planning and provision for a variety and choice of housing for all persons irrespective of their incomes.[1] Perhaps, one of the most important directives included in the Order is found in paragraph 7 which states:

> 7. The housing goal allocated to each county shall specify a minimum number of housing units economically suitable for different segments of the population for which an adequate range of appropriate sites should be made available within the county. (Emphasis added).

This paragraph makes it clear that the goal of the Order was not to be the provision of $90,000 "least cost" housing units affordable by families with incomes of $40,000 and up. The goal is inclusionary zoning ordinances which result in housing which persons of low, moderate and, even, middle incomes can "reasonably afford." Executive Order 35, p. 1.

In November of 1976 the State DCA published a draft statewide housing allocation plan. In December, 1976, by Executive Order 46, Governor Byrne ordered the Division of State and Regional Planning in the Department of Community Affairs to review, and if necessary, modify its preliminary housing allocation plan to:

> assure that they take into account current programs designed to revitalize the cities of New Jersey, including such programs as neighborhood

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[1] The preamble states:

> WHEREAS, there exists a serious shortage of adequate, safe and sanitary housing accommodations for many households at rents and prices they can reasonably afford, especially for low and moderate income households, newly formed households, senior citizens, and households with children.

> preservation and urban economic development programs; redevelopment possibilities for the more developed municipalities of New Jersey; and statewide planning objectives as encompassed by the comprehensive planning activities of the Division of State and Regional Planning; as well as the housing goal allocation criteria prescribed by Executive Order No. 35 (1976). Executive Order No. 46; See also 1977 Annual Report, p. 5.

DCA redrafted the plan as a result of Executive Order No. 46 and prepared a plan which was consistent with the State Development Guide Plan and goals to revitalize New Jersey's cities. DCA 1978 Report, p. 4 and 21-23. In May, 1979 Governor Byrne released the DCA Housing Allocation Report, entitled A Revised Statewide Housing Allocation Report for New Jersey. The report was released for public review and comment and has not been modified to date. DCA 1978 Report, p. 1 and 3.

QUESTION #5

What practical effects have the decisions in Southern Burlington County NAACP v. Mt. Laurel, Oakwood at Madison v. Madison, Pascack v. Mayor and Council of Township of Washington and Fobe v. Demarest had on either zoning or housing in New Jersey.

The Mt. Laurel decision was rendered on March 24, 1975 at a time when exclusionary land use practices were solidly entrenched in law and social attitude. The Court, itself, had essentially condoned virtually every type of land use restriction imposed on the municipal level.[1]

Mt. Laurel deals with a problem of profound governmental intransigence arising from fundamental attitudes of economic discrimination and, at best, latent racism. The articulation of the constitutional mandate should have been unnecessary. The fact that it was not only necessary, but the last resort of lower income persons and racial minorities, underscores the incredible problem one could anticipate with implementation.

Mt. Laurel, to date, has not resulted in a substantial increase in housing for lower income families in areas which previously discriminated against such housing. The reason for this is clear: the discrimination continues and is rampant.[2]

There are several reasons for this continued discrimination:

First, municipalities have had little or no incentive to change voluntarily since nothing is lost by waiting to be sued; i.e., the courts have not provided a remedy which would encourage voluntary compliance;

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1 See, for example, Fanale v. Hasbrouck Hts., 26 N.J. 32 (1958); Vickers v. Gloucester Tp., 37 N.J. 232 (1962).

2 Mount Laurel Township is itself holding out - vigorously attempting to foreclose a lower income developer from building in the Township.

Second, municipalities will not be sued unless a strong developer's remedy is adopted. The public interest bar is incapable of litigating against most municipalities and developers will not sue unless a realistic remedy is afforded;

Third, and perhaps most importantly, any sign of judicial ambivalence or disinclination to implement Mt. Laurel and any loophole available is devastating to insuring the provision of housing opportunities for lower income people. As previously stated in answersto Questions 3 and 4, only the Executive has moved to assist in implementation. The Legislature has done essentially nothing. Any judicial equivocation will be and, in fact, has been seized upon by most municipalities to avoid compliance. In this regard, this Court's subsequent decisions to Mt. Laurel; Madison,[1] Washington Tp. and Demarest, were read as indicative of the Court's retreat from the precepts set forth in Mt. Laurel. Whether that reading was accurate or not, those decisions did have a negative impact on subsequent cases at both the trial and Appellate level.[2]

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1 The articulation of the "least cost" concept in Madison has been read to exempt municipalities from any responsibility toward affordable lower income housing. See Mahwah.

2 The Appellate Division reversed or modified trial court decisions in favor of plaintiffs and, where the issue was seriously contested, few, if any, municipalities were found to be developing. See Urban League of Greater New Brunswick v. Bor. of Carteret, 142 N.J.Super. 11 (Ch. Div. 1974) rev'd 170 N.J.Super. 461 (App. Div. 1979); Round Valley v. Tp. of Clinton, Docket No. L-29710-74 P.W., Law Div. (Jan. 13, 1978) rev'd Docket No. A-2963-77 (App. Div. March 5, 1980); Middle Union Associates v. Tp. of Holmdel, Docket No. L- , (Law Div.) rev'd in part Docket No. A-3257-74 (App. Div. 1977); Windmill Estates, Inc. v. Totowa, 147 N.J. Super. 65 (Law Div. 1976) rev'd 158 N.J.Super. 179 (App. Div. 1978); Nigito v. Closter, 142 N.J.Super. 1 (App. Div. 1976) certif. den. 74 N.J. 265 (1977); Segal Constr. Co. v. Wenonah, 134 N.J.Super. 421 (App. Div. 1975).

All of this is to say that whatever the "practical effects" have been to date, they clearly would have been, and still may be, much more significant if it was clear that the constitutional mandate was going to be judicially enforced and that the failure to comply would prompt a sharp judicial remedial response.

The following are some of the "practical effects":

1. Recognition in the new Municipal Land Use Law, N.J.S.A. 50:55D-1 et seq., of a municipality's regional responsibilities and the need to conform a zoning ordinance to a land use plan which is based, in part, on a housing plan element. N.J.S.A.. 40:55D-2(d),(g); 40:55D-28(b); 40:55D-62(a). Although drafted prior to Mt. Laurel, there is a substantial question if any deference to regional housing needs would have found its way into the law had it not been relatively clear that the Court was inclined this way.

2. Preparation and release by the statewide planning agency, the Department of Community Affairs, of a statewide housing allocation plan and a draft state development guide whose contents have been reviewed to insure consistence between the two plans. A Revised Statewide Housing Allocation Report for New Jersey, p. 21, May, 1978; Draft State Development Guide Plan, September 1977.

3. Express adoption of Mt. Laurel concerns to provide needed housing opportunities for persons of low and moderate incomes in planning for the Pinelands Area, Coastal Areas and the development of the Hackensack Meadowlands. See New Jersey Pinelands Draft Comprehensive Management Plan, Vol. I, p. 5.16-5.17, 7.2 and Vol. II, p. 212; DEP Coastal Management Program, Final Bay

and Ocean Shore Segment, 1978, pp. 116-117; DEP Proposed Coastal Management Program, 1980, p. 186-187; Hackensack Meadowlands Development Commission Decision on Berry's Creek Center Specially Planned Area in East Rutherford and Rutherford, New Jersey, pp. 120-122.

4. Specific consideration of Mt. Laurel concerns in innumerable municipal and county master plans drafted pursuant to the mandates of N.J.S.A. 40:55D-1 et seq.; some including fair share analyses, housing needs studies and specific proposals for meeting housing goals. Although basically paying lip-service to Mt. Laurel and divining minimal fair share numbers, at least the concern is explicitly addressed.

5. Substantial increase in zoning for higher density single-family and multi-family uses in new zoning ordinances prepared pursuant to N.J.S.A. 40:55D-1 et seq.;[1]

6. Specific provisions in zoning ordinances to attempt to address the housing need by mandating or encouraging housing for lower income persons and subsidized housing itself;[2]

7. Increase in the actual construction of subsidized housing, particularly for senior citizens, in municipalities which had

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[1] This, of course, has resulted largely in expensive, if not luxury housing. The zoning controls, although at higher densities, are certainly not even "least cost" and certainly not directed at insuring opportunities for lower income persons.

[2] This has been rare but has, in fact, occurred. Some municipalities are zoning for subsidized housing districts and conditional uses. Others mandate percentages in larger developments. See answer to Question #1.

never before considered such housing;[1]

8. Increased developer interest in Mt. Laurel- type litigation and willingness to provide a proportion of least cost and/or subsidized housing in proposed developments;[2] and

9. Importantly, a high degree of visibility to an issue which never before was taken seriously: provision of adequate housing opportunities for lower income persons in all areas of the State.

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1 Little or no subsidized housing for families is occurring.

2 This, of course, will evaporate if a strong developer's remedy is not adopted.

QUESTION #6

Is the underlying goal of Mt. Laurel -- providing housing opportunities outside urban areas for low and moderate income New Jersey citizens -- economically feasible? Will attainment of the goal affect another important goal of this state - to rehabilitate its cities?

Housing lower income persons in suburban areas is not more economically feasible than in urban areas. In fact, costs may be higher in urban areas where new housing opportunities are often provided by redevelopment. This often necessitates dislocation, demolition and site preparation costs not experienced on vacant or sparsely developed land. The fact is that many lower income persons now live in suburban areas and lower income jobs are being created there. Furthermore, new housing opportunities are being provided in suburban areas for them throughout the nation. The crucial issue is not whether such opportunities are economically feasible but whether a municipality wants such housing or, if not, will be required to provide the opportunity.

Where municipalities actively desire to have lower income housing opportunities provided, they are provided. Examples exist in New Jersey and elsewhere and some are set forth in Answer to Question #1.[1] Also, where recalcitrant municipalities or other bodies are forced to provide such housing, it is provided.[2] The issue in such matters is the fortitude

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1 Perhaps one of the better examples in this State is Princeton Township which has encouraged and facilitated the provision of several hundred subsidized units. New Jersey Directory of Subsidized Rental Housing, 1978, p. 14 If no such directive is forthcoming, no housing will be built.

2 See, e.g., Sasso v. City of Union City, Cal., 424 F.2d 291 (9th Cir. 1970), and Daily v. City of Lawton, Oklahoma, 1425 F.2d 1037 (10th Cir. 1970), where the subsidized projects were constructed following plaintiffs' successful challenges of the municipalities' refusal to rezone to permit construction of subsidized housing. By the same token, following the United State Supreme Court's decision in Hills v.Gautreaux, 425 U.S. 284 (1976), upholding metropolitan-wide relief after a finding of unlawful discrimination in the provision of subsidized housing, the subsidized housing has been provided in the suburban areas of the Chicago metropolitan region.

and resolve of the Court, not economic feasibility.[1]

Housing opportunities for lower income persons in suburban areas can be provided through subsidized housing, mandatory percentages of large developments (with price and resale controls) and least cost mobile homes. Least cost housing, per se, will not reach lower income persons (except through mobile homes and price controlled units); however, such housing does make shelter economically feasible for middle income groups who otherwise could not afford conventionally built (non-subsidized) housing

Mt. Laurel principles and the policy of urban revitalization are not in conflict and, in fact, are interdependent. Mt. Laurel does not, per se, indicate any policy as to the proper location of new housing opportunities.[2] It only calls for each municipality to do its fair share. Fair share is appropriately geared to employment opportunities as well as available land, among other factors.

Urban revitalization is a salutary goal. Since many of New Jersey's lower income citizens are now located in the urban cities, revitalization will help them. However, they will not be helped by (nor does a policy of urban revitalization countenance) the continued polarization and ghettoization of economic classes. Our cities will not be revitalized if we continue to isolate the poor in them and, in fact, add to their numbers.

The plight of the cities has been a function of the flight of jobs and upper income residents from their borders and the increasing concentration of lower income residents in the cities who could not find housing in the new suburban locations. See A Blueprint for Housing, 1970, p. 10,

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1 Mt. Laurel Township is a grave example. A judicial directive regarding the plaintiff-intervenor will result in actual housing opportunities. If no such directive is forthcoming, no housing will be built.

2 If anything contravenes the policy of urban revitalization, it is the Court's "developed municipality" distinction. See Answer to Question #7.

11, 20, 28-29; "1975 Annual Report"; Manual of the N.J. Legislature, p. 431; Executive Order 46; "1977 Annual Report", p. 5; Draft State Development Guide Plan, p. 107, 9; Tri-State Regional Planning Commission's RegionalDevelopment Guide, p. 7; Regional Plan Association's Second Regional Plan, p. 8, 11, 55-57, 59. This has been explicitly recognized by Congress.[1]

Continuing a process of isolating the poor in the cities, and additionally housing the projected increase in population of poor persons in the cities will exacerbate the problems of urban decay. It is not a feasible alternative, even if it were deemed appropriate, to assume that the housing needs of additional lower income persons

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[1] The Housing and Community Development Act, 42 U.S.C. 5301 et seq. expressly finds:

> (a) The Congress finds and declares that the Nation's cities, towns, and smaller urban communities face critical social, economic, and environmental problems arising in significant measures from --.
>
> (1) the growth of population in metropolitan and other urban areas, and the concentration of persons of lower income in central cities . . .
>
> (c) The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives . . .
>
> (6) the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income . . .
>
> 42 U.S.C. 5301 (a)(1) and (c)(6).

should be met in the older central cities of a region. Revitalization can only occur if housing opportunities for lower income persons are made available in all areas of the state, including the cities, and jobs and upper income persons, are, in turn, attracted to the cities.

It is the utmost in hypocrisy to argue that the decay of the cities, having been created by the flight of jobs and upper income residents, their revitalization can occur by continuing to house all lower income persons in them. The DCA plan calls for housing lower income persons in a similar manner to housing others - near jobs and in areas with available land resources. The plan also calls for continuing to house a substantial number of lower income persons in the cities.[1] A true suburban proponent of urban revitalization would order an end to the location of jobs and upper income housing in the suburbs, not the continued exclusion of lower income persons.

The Court should realize that the issue of urban revitalization in the Mt. Laurel context is a subtrefuge to attempt to justify continued discrimination. The demographic data highlight this. In Region 11 of the DCA plan the following job pattern has occurred since 1970:

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[1] For example, in Region 11 of the DCA plan (including Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Somerset and Union Counties), almost 50,000 new units are allocated to the cities of Newark, East Orange, Orange, Hoboken, Bayonne, Jersey City, Union City, New Brunswick, Perth Amboy, Passaic, Paterson, Elizabeth and Plainfield. This is approximately 18% of the total need ascertained for that region in the DCA plan.

Covered Employment[1] (rounded to nearest 1,000)

County	1970	1978	Change	Percentage
Bergen	268,000	339,000	+71,000	+27
Essex	324,000	309,000	-15,000	- 5
Hudson	207,000	177,000	-30,000	-14
Middlesex	170,000	230,000	+60,000	+35
Morris	87,000	140,000	+53,000	+61
Passaic	155,000	160,000	+ 5,000	+ 3
Somerset	47,000	78,000	+31,000	+66
Union	215,000	231,000	+16,000	+ 7

The obvious point to be derived from this data is the trend throughout the 1970's (essentially uninterrupted and reflected in each year) toward job location in the suburban ring.

Population data is equally significant. Department of Environmental Protection population projections in water quality management plans certified by the Governor show:[2]

County	1975	2000	Change	Percentage
Bergen	879,100	980,000	100,900	11.5
Hudson	577,600	610,000	32,400	5.6
Essex	881,600	881,600	---	---
Middlesex	594,000	820,000	226,000	38.0
Morris	395,000	520,000	125,000	31.6
Passaic	468,800	520,000	51,200	10.9
Somerset	203,700	280,000	76,300	37.5
Union	520,500	520,500	---	---

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1 Data reflects private sector "covered employment" for September of each year. A "covered job"is one covered by unemployment compensation and does not include all jobs. Also there have been some definitional changes since 1970; however, the trends indicated are unaffected. The data is from published annual reports of the N.J. Department of Labor and Industry entitled Covered Employment Trends in New Jersey by Geographical Areas of the State.

2 These projections are in six (6) New Jersey Department of Environmental Protection Water Quality Plans. Two of them, the Upper Raritan Water Quality Management Plan and the Northeast New Jersey Water Quality Plans, were certified by the Governor in March, 1980, and have been approved by the United States Environmental Protection Agency.

As indicated above, virtually all of the expected growth in that region is anticipated in the suburban counties. More importantly, this is the growth for which water/sewer infrastructure is being planned and represents state policy.

The issue is not whether jobs[1] and increased population are going into suburban areas but whether lower income persons will participate in those opportunities.

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[1] No case can be made that these are all higher income jobs. If anything, the data reveals that more lower income jobs are appearing in suburban locations than in urban areas. This can be gleaned from covered employment data by county which gives job classification breakdowns.

QUESTION #7

Discuss the wisdom of limiting the reach of Mt. Laurel to developing municipalities.

(1) -- What rational exists to support such distinction?

(2) -- Would the distinction reward those municipalities who have used exclusionary zoning most successfully, either in remaining rural, or becoming developed without providing a variety of types of housing opportunities?

No rationale exists to support a distinction between "developing" and "developed" municipalities. Any such distinction clearly will operate to "reward" exclusionary municipalities in the sense that they will avoid compliance with a constitutional mandate.[1] More importantly, the effect of the distinction is to eliminate the possibility of lower income housing opportunities in the relatively developed inner suburban ring where it may be most appropriate.

The DCA plan, for example, allocates over 50% of the regional need in Region 11[2] to municipalities with less that 500 vacant developable acres. The breakdown is:[3]

	Units	Percentage
Central Cities[4]	49,627	17.8
Suburbs (less than 500 vacant acres)	92,443	33.0
Suburbs (500 + vacant acres)	137,433	49.2
	279,503	100.0

Thus, the statewide planning agency does not accept the notion that future development of lower income housing opportunities should be exclu-

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1 Plaintiffs do not believe this result is beneficial either to upper or lower income persons, and the notion of "reward", which denotes something "good", is misplaced. Just as whites or blacks do not benefit from prevailing racism, neither do economic classes benefit from ghettoization.

2 Region 11 comprises Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Somerset and Union Counties.

3 Source: 1978 Housing Allocation Plan, DCA.

4 Newark, East Orange, Orange, Hoboken, Bayonne, Jersey City, Union City, New Brunswick, Perth Amboy, Passaic, Paterson, Elizabeth, Plainfield.

sively provided in municipalities "like Mt. Laurel." Ironically, this Court itself, expressed an awareness that most new housing opportunities would occur within existing developed areas. Mt. Laurel, supra, 67 N.J. at 188, fn. 21.[1] Eliminating so-called developed areas from the responsibility to provide for lower income housing is incongruous; especially since this policy will result in "in-fill" or redevelopment by exclusively upper-income housing and non-residential uses - only lower income uses will be kept out.[2]

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[1] The draft State Development Guide Plan essentially supports this notion by delineating corridors for major future development (growth areas) largely within areas which have already experienced significant growth.

[2] Such "in-fill" and redevelopment is occurring. A look at building permit and covered employment data for municipalities which courts have adjudged to be "developed" in either reported or unreported cases shows the following:

Covered Employment[1]	1970	1978	Change	%
Closter	1,884	2,262	378	20
Paramus	21,596	29,203	7,607	35
Demarest	243	293	50	21
Washington	414	477	63	15
Totowa	6,477	10,436	3,959	61
Morris	925	5,472	4,547	492
Cinnaminson	1,916	4,372	2,456	128
Wenonah	161	340	179	111

Building Permits[2]	Total 1970-1978			
	1-Family	2-4 Family	Multi-Family	Change
Closter	174	2	--	176
Paramus	344	132	--	476
Demarest	114	--	--	114
Washington	204	--	19	223
Totowa	262	34	--	296
Morris	612	--	202	814
Cinnaminson	341	--	--	341
Wenonah	57	--	--	57

[1] Source: New Jersey Department of Labor and Industry Annual Reports - "Covered Employment Trends in New Jersey". See answer to Question #6 for further data.

[2] Source: New Jersey Department of Labor and Industry Annual Reports - "The State of New Jersey Residential Construction Authorized By Building Permits."

This Court should either limit Washington and Demarest to their facts or narrow the holdings. Washington Township was found to have only 46 vacant acres (2.3 of its total land size of 1,984 acres) with little commercial use and no industrial use. Pascack Associates, 74 N.J. at 477-8. Demarest had only 32 acres of vacant land (2.5% of its total land size of 1,345 acres), a 7-acre commercial development and no land zoned for industry. Demarest, supra, 74 N.J. at 523-4. This Court could hold that only a municipality with so little land (both in terms of actual acreage and in terms of percentage of land) and no industry is exempt from a Mt. Laurel obligation.

A better approach should be that the burden of proof could be placed on the municipality which is alleging that it is developed to prove that development of any of its vacant land for lower income housing would cause a real and substantial detriment to the municipality.[1] Such a municipality would also have the burden of showing that a specific proposal for infill or redevelopment for lower income housing would cause this detriment.[2]

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1 In Washington Township the court-appointed masters found that the proposed multi-family housing would not detrimentally affect Washington Township. Washington Tp., supra, 74 N.J. at 507. Plaintiffs believe this finding is not unusual and would be the likely outcome.

2 This is especially true where the municipality is permitting redevelopment of new residential or expanded non-residential uses. Developed municipalities with no vacant land still "grow" through redevelopment. A municipality should not be permitted to undergo such change without insuring that lower income housing opportunities are provided.

A municipality should also have a special obligation to its own lower income persons who are in need of housing.[1] The need of these residents[2] should be given substantially more weight than an infringement upon the character of the neighborhood a municipality. Preservation of the municipal character should not be a basis for forcing lower income persons out of the town and into an urban ghetto.

The Court should also consider the rural municipality distinction. Plaintiffs support the position of the DCA Housing Allocation Report. It establishes four basic principles:

(1) Municipalities which are categorized as growth or limited growth areas must provide their fair share of housing for low and moderate income persons. DCA Report, p. 2.

(2) Municipalities which "may be exclusively categorized as open space or prime agricultural areas" may defer their obligation to provide for a regional fair share until a later date. DCA Report, p. 23.

(3) These deferred municipalities must still respond to their share of existing housing needs. "Each municipality's indigenous share of 1970 housing need exists and is an immediate need. Attending to such needs would be remedial rather than growth-oriented and should be addressed immediately by every municipality regardless of any future growth policy." DCA Report, p. 21.

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1 This means lower income persons living in substandard or overcrowded conditions or paying more than they are financially able to afford.

2 As shown in Mt. Laurel, itself, a pattern of discriminating against lower income neighborhoods in the provision of municipal services (streets, lights, recreation, etc.) cannot be a land use practice excused because a municipality is "developed".

(4) "A municipality will lose its deferred status if it actually 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 Report, A-23.

Limitation of these agricultural deferments is important because rural counties are gaining in employment[1] and are projected to gain substantially in population.[2] These statistics should be compared to the loss of industry and projected lack of growth in our urban counties discussed in Question #6.

1

RURAL	1970	1978	% Change
Hunterdon	12,991	19,432	+55%
Sussex	11,158	16,856	+51%
Warren	20,297	25,230	+25%

Source: Department of Labor and Industry 1970 N.J. Covered Employment Trends; 1978 Covered Employment Trends in N.J.

2 The Department of Environmental Protection in its Water Quality Management Plans which have been certified by the Governor contain the following population projections:

Northwestern New Jersey	1975	2000	% Growth (1975-2000)
Sussex	99,000	164,300	66.0
Warren	80,000	100,100	25.1
Hunterdon	78,500	107,700	37.2
Total:	257,500	372,100	44.5

(3) -- What impact would the distinction have on the Executive's apparent priority to help rebuild urban areas? (See 1980 State of the State message.) Would it add to or subtract from an effort to concentrate on urban problems?

This has been previously answered. See answer to Question #6. The distinction makes no sense in that context. As already indicated, strategies for in-fill development must include opportunities for lower income persons. State policy, as reflected in the DCA Allocation Plan and Executive Orders, is that lower income housing opportunities are appropriate in every municipality. If the inner ring of suburbs are excluded from a Mt. Laurel obligation, lower income housing will be limited to increasing the lower income population in the cities and in the outer suburbs. This simply does not make planning or legal sense. There is no basis to distinguish between economic classes as to housing location between developed/developing areas.

(4) -- Discuss the function of the six Mt. Laurel criteria relating to the "developing" status of a municipality.

(5) -- Are the criteria (a) conjunctive?
(b) merely illustrative?

The "criteria" presented in the Mt. Laurel case have been extrapolated out of context and have been given a meaning never anticipated by the original litigants or the Court. They simply were illustrative of how that particular municipality had developed over a period of years. It certainly cannot be dispositive of a constitutional obligation. Madison, for example, had developed quite differently and yet was found to be subject to Mt. Laurel. The criteria are neither appropriately used conjunctively or illustratively in determining the appropriates of local land use controls for all municipalities. The key issue is whether the municipality has responded to its fair share obligation:

1. Does it have a fair share of lower income housing opportunities?;

2. Are there local residents or employees in need of housing opportunities?; and

3. Is there available land for growth or appropriate land for redevelopment?

(6) -- Can a municipality fit into more than one Mt. Laurel category (undeveloped, developing, developed) simultaneously? For example, what is the "duty" of an 80% developed municipality under Mt. Laurel?

All municipalities are partially developed and partially undeveloped as to the existence of available vacant developable land. Some also contain agricultural lands. The question underscores the meaningless of the distinction. The duty of an 80% developed municipality is to provide housing for low and moderate income persons in an amount which approximates its DCA fair share number. See also answer to Question #11.

QUESTION #8

Discuss the relevance of "fiscal zoning" to Mt. Laurel cases. Should the Mt. Laurel doctrine be dependent on a showing of fiscally exclusionary motive or purpose or is the effect of exclusion the only factor to be considered in exclusionary zoning litigation?

Plaintiffs have never had the burden of providing a "fiscally exclusionary motive or purpose" in a Mt. Laurel case. The plaintiffs in Mt. Laurel proferred little evidence in that regard and certainly did not perceive such proof as an element of their case. Neither did the initial trial court or this Court. In fact, the issue of fiscal zoning arose in Mt. Laurel as a defense which this Court considered and resoundingly rejected. Mt. Laurel, supra, 67 N.J. at 185-186.

Perhaps one of the clearest holdings in Mt. Laurel was that the focus of such litigation was on the existence of an exclusionary land use plan, per se. Even intent, although proved in Mt. Laurel, is not necessary. Mt. Laurel, supra, 67 N.J. at 174, fn. 10. Plaintiffs need only prove that the effect is exclusionary and discriminatory. The constitutional right pronounced by this Court is the right to an opportunity to live in a community and, negatively, not to be precluded from that opportunity by needlessly restrictive land use policies and regulations. Mt. Laurel, supra, 67 N.J. at 180. That right is as effectively extinguished or thwarted by an exclusionary zoning ordinance irrespective of whether the ordinance was motivated by a fiscal reason, a dislike of or prejudice against lower income persons or a desire to maintain an existing homogeneous lifestyle in a municipality. Accordingly, in Madison this Court invalidated Madison Township's 1973 zoning ordinance without any determination or analysis of whether the ordinance was adopted for a fiscally exclusionary

motive or intentionally to discriminate against lower income persons. From the perspective of the one who has been excluded or discriminated against, it hardly matters what the purpose or motivation was, if any. The effect is equally devastating.

QUESTION #9

A. Discuss the wisdom of a per se rule against large lot (e.g., 5 acre) zoning.

As recognized by this Court in Mt. Laurel and Madison, the provision of housing opportunities for persons of low, moderate and, even, middle incomes requires that a sufficient amount of land be zoned for high density development and at minimally necessary controls. Mt. Laurel, supra, 67 N.J. at 166-68; Madison, supra, 72 N.J. at 508, 512. It is irrelevant to the provision of housing for these lower and middle income families how the remaining land in a municipality is zoned. Land zoned at one home to the acre or to five acres will not provide a housing opportunity affordable to low, moderate or, even, middle income families. See A Blueprint for Housing in New Jersey, p. 7, 11; The Housing Crisis in New Jersey, p. 68, 88; New Horizons in Housing, p. 1; Land Use Regulations, The Residential Land Supply, p. 9-10; State Housing Programs and Policies: New Jersey's 1977 Housing Element, p. 19. In short, the interests of these families are not necessarily furthered by a per se rule against large lot zoning.

Once a municipality has provided its fair share of low and moderate income housing, the validity of a municipality's large lot zoning should be evaluated under the traditional tests of reasonableness, that is: is the large lot zoning reasonable under all the circumstances and is the large lot zoning confiscatory. Home Builders' League of So. Jersey v. Berlin Tp., 81 N.J. 127, 137-38 (1979); Pascack Ass'n, Ltd. v. Washington Tp., 74 N.J. 470, 483 (1977). Accordingly, the large lot zoning challenged in Caputo was invalidated not on Mt. Laurel principles but on grounds of arbitrariness and capriciousness.

B. Discuss the validity of a per se exclusion of mobile housing (see Vickers v. Gloucester Tp.)

A municipality which seeks to provide a housing opportunity for moderate and middle-income persons must zone a substantial amount of land for mobile home parks and mobile home subdivisions. Mobile homes, having undergone dramatic changes pursuant to state and federal regulations, are safe, decent and the least expensive form of conventional housing available today. In Mt. Laurel II, 161 N.J. Super. 317 (Law Div. 1978), where an extensive record was presented to the trial court regarding mobile homes[1], the court found that mobile homes were "prototypical examples of least cost housing." Mt. Laurel II, supra, 161 N.J. Super. at 357. In fact, these homes are the only new type of housing, other than subsidized or price-controlled units, which can be affordable to a moderate-income family today. The mobile home subdivision is the only opportunity in the 1980's which is comparable to the housing opportunity provided by the Levitt developments in the 1950's.

The mobile home is now as thoroughly regulated for construction quality as the conventional home by the Mobile Home Construction and Safety Act of 1974, 42 U.S.C. 5401 et seq., and its implementing regulations, 25 C.F.R. 280.[2] See

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[1] The Mt. Laurel II record as to the minimum costs of various types of housing is summarized below:

Type of Housing Unit	Summary Experts' Cost Projections	Davis JA-492a	Haeckel JA-499a, 500a	Reading JA-601a, 602a & 604a
Mobile Home in Park	$268-291 per mo.	$275	$268	$291
Mobile Home on Private Site	$333	--	$333	--
Modular	$342-354	$354	$348	$342
Apartment	$350-375	$350	--	$375
Condominium	$426	--	--	$426

[2] The quality of the construction of conventional homes is also regulated but by the New Jersey Uniform Construction Code, N.J.S.A. 52:27D-119 et seq. A municipality is pre-empted from imposing more restrictive standards for a mobile home or conventional home as provided by these statutes. See N.J.S.A. 52:27D-139 and 42 U.S.C. 5422.

also Plaintiffs Mt. Laurel II Reply Brief at p. 15.

Additionally, as recognized by this Court in two recent cases,[1] the trial court in Mt. Laurel II,[2] and as thoroughly briefed by Plaintiffs in the appeal of Mt. Laurel II,[3] mobile homes in their construction, size and appearance have undergone dramatic improvements. In fact, Mt. Laurel Township itself, in summarizing the factual record now before this Court, admitted that: "it would be difficult to argue based on the record (below) that mobile homes, if properly developed, would not be a reasonable method of providing housing for, if not low income, perhaps moderate income families." Mt. Laurel Tp.'s Brief at p. 97:42 to 50.

Nor is there any legal basis to exclude mobile homes. New Jersey is one of the few states where the courts permit the exclusion of mobile homes. Only

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1 Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., 71 N.J. 249 (1976); Koester v. Hunterdon County Bd. of Taxation, 79 N.J. 381 (1979).

2 The trial found that:

> The testimony and evidence offered by the intervenor make it abundantly clear that the modern mobile home is a far cry from the primitive highway-borne shelters of the past. It is not necessary to recite the details of that evolution. The conclusion is inescapable that mobile homes are today an acceptable form of housing and are available at costs considerably below that of the most modestly priced conventional single-family dwelling. Mt. Laurel II, supra, 161 N.J. Super. at 357.

3 Since 1962, the typical mobile home has substantially increased its square footage making it comparable in size to conventional housing. Fourteen foot single-wide mobile homes (twice the size of the Vickers' trailers) and double-wides (almost four times larger) are now the predominant types of homes on the market. Haeckel, 3T 17-2. Similarly, the design of mobile home parks has also improved dramatically during the past eighteen years. In Vickers, the mobile home park proposed a lot size of 2400 square feet (40 x 60) with ten to twenty units per acre. Vickers, supra, 37 N.J. at 246. Today, density levels have been sharply decreased. Parks are typically built at a density of approximately six homes to the acre, a density comparable to single-family subdivisions. Lynch, 18T 48-22 to 49-6. In addition to larger lots, landscaping, cul-de-sacs and swimming pools have become common elements of modern parks. Haeckel, 3T 31-5 to 14. See Plaintiffs Mt. Laurel II Reply Brief, p. 11-23.

two other states, in dated cases, still uphold the total exclusion of mobile homes: Ohio by direct holding[1] and New Hampshire in dictum.[2] These states and New Jersey are the only ones in which Vickers remains good law. In all of the other states where the issue has been raised, the courts have declared the exclusion arbitrary, unreasonable and void.[3]

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1 Davis v. McPherson, 132 N.E. 2d 626 (Ohio Ct. of App. 1955); Carlton v. Riddel, 132 N.E. 2d 772 (Ohio Ct. of App. 1955).

2 Plainfield v. Hood, 240 A.2d 60 (N.H. Sup. Ct. 1968).

3 See cases cited in Plaintiffs' Mt. Laurel II Reply Brief at p. 18-23.

QUESTION #10

When, under Mt. Laurel, does the presumption of invalidity of an ordinance (based on particular exclusionary characteristics) attach and to what extent? What evidence will rebut such presumption?

(1) -- What is the effect of such rebuttal (i.e., does the burden shift back to plaintiffs)?

A municipal land use ordinance is prima facie invalid under Mt. Laurel upon plaintiff's proof that:

1. The challenged land use ordinance does not:

   a) provide a realistic opportunity for a variety and choice of housing for persons of low and moderate incomes; or

   b) provide a realistic opportunity for an adequate number of low or moderate income housing units; or

2. The land use ordinance explicitly contains "requirements" or "restrictions which preclude or substantially hinder" the provision of housing opportunities for persons of low and moderate incomes. See Mt. Laurel, supra, 67 N.J. at 181.

The major criteria for evaluating whether a land use plan realistically provides a housing opportunity for lower income persons are:

1. inclusionary controls relating to subsidized housing opportunities[1] and, where necessary, affirmative action to facilitate such housing;

2. adequate provision for mobile homes with regulations to insure least cost development for lower income persons;

3. mandatory requirements for major developments guaranteeing a minimum percentage of lower income units through subsidization, price controls, density bonuses, etc.;

4. absence of discrimination in use of municipal resources and services as applied to lower income housing and neighborhoods.[2]

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[1] This might include creation of a local public agency, cooperative agreement with local or regional housing authority, land banking, resolution of need, payment-in-lieu of taxes agreement, use of Community Development monies to undertake housing construction. See Plaintiffs-Appellants Brief, Mt. Laurel II, p. 59-62 and 122-128.

[2] See Mt. Laurel II proofs regarding discrimination as to streets, street lighting, water, sewer, recreation, etc. Plaintiffs-Appellants Mt. Laurel II Brief, pp. 84-104, 129-135.

Certainly a prima facie showing can easily be established if the land use plan does not even provide controls explicitly critiqued in Mt. Laurel and Madison. These include:

1. The variety and choice of housing types;[1]

2. Single-family detached units and their lot size, unit size and frontage requirements;[2]

3. Multi-family units and their density level and unit size requirements and bedroom restrictions;[3] and

4. The extent of mapping for low and moderate income housing

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[1] In Mt. Laurel, the court reiterated that a variety and choice of housing types must be provided to meet a "full panoply of needs" including small single-family homes on small lots, mobile homes and multi-family housing. Mt. Laurel, supra, 67 N.J. at 174, 181, 187. See Question #1 above.

[2] In Mt. Laurel, the Court specifically condemned quarter acre (9,375 square foot) lot minimums as "realistically allowing only homes within the financial reach of persons of at least middle incomes." Mt. Laurel, supra, 67 N.J. at 164, 183, 197. Subsequently, in Madison, the Court condemned lot sizes of 7,500 square feet. Madison, supra, 72 N.J. at 505, 516. Floor space requirements were also evaluated in Mt. Laurel. The Court specifically addressed and invalidated the Township's non-occupancy based 1,100 square foot standard as exclusionary. Mt. Laurel, supra, 67 N.J. at 183; see also, Home Builders' League of So. Jersey v. Berlin Tp., 81 N.J. 127 (1979). Mt. Laurel also addressed lot frontage requirements and condemned the township's standards of 75 feet and 100 feet as precluding single-family housing for even moderate income families. Mt. Laurel, supra, 67 N.J. at 183.

[3] Mt. Laurel and Madison specifically underscore the exclusionary effect of zoning only for low density multi-family development. In Mt. Laurel, the Court described the density limit of 6 and 7 units per acre as "low density." Mt. Laurel, supra, 67 N.J. at 168. The fact that Mt. Laurel had approved several thousand apartments was deemed per se irrelevant given the density limit. Mt. Laurel, supra, 67 N.J. at 166-68. Similarly, Madison's limit of 5 units per gross acre was condemned as exclusionary. Madison, supra, 72 N.J. at 508. The evaluation of floor area requirements of multi-family units is identical to that of single-family units. Additionally, in Mt. Laurel in reviewing the housing opportunity being provided by a municipality's zoning for multi-family units, the Court specifically condemned bedroom restrictions as per se invalid. Mt. Laurel, supra, 67 N.J. at 183, 187.

development and commercial/industrial and other employment-generating uses.[1]

The presumption of invalidity of a municipality's land use regulations attaches if the initial review of the ordinance under consideration fails to meet these major criteria. (Plaintiffs reiterate that the provision of "least cost" housing is clearly not enough. Although least cost housing will provide a housing opportunity for a needy class and should be mandated, it does not meet the needs of lower income persons.) If a municipality has not fulfilled these mandates, the opportunity for housing available for persons of low and moderate incomes has been presumptively precluded and the burden shifts to the municipality to justify its exclusionary practices.

This Court has stated that once the burden shifts to the municipality the presumption that the ordinance is invalid is a "heavy one" to rebut. Mt. Laurel, supra, 67 N.J. at 181. There appears little which the Court will accept as rebuttal other than proving that the plaintiff's case is factually wrong. In Mt. Laurel, the Court rejected fiscal reasons (67 N.J. at 185-186) and also stated that ecological bases for exclusionary land use restrictions were invalid unless "the danger and impact (was) substantial and very real . . . and the regulation adopted (was) only

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[1] In Madison, the Court specifically mandated that sufficient areas (overzoning) must be made available for least cost housing. Madison, supra, 72 N.J. at 519. Additionally, in Mt. Laurel and Madison the Court reviewed the extent of industrial and commercial zoning by these municipalities and the reasonableness of the housing opportunity being provided in relation to the employment opportunities being or sought to be generated within the townships. Mt. Laurel, supra 67 N.J. at 162-63, 187; Madison, supra, 72 N.J. at 503-504. This relationship is an indication of the adequacy of the provision for low and moderate income housing opportunities set forth in the challenged land use plan. Mt. Laurel, supra, 67 N.J. at 187; see Question #13, infra.

that reasonably necessary for public protection of a vital interest." Mt. Laurel, supra, 67 N.J. at 197.

The burden never shifts back to the plaintiffs. Once the presumption is established, effective rebuttal means that the defendant would win. The idea of a reshifting of the burden is essentially meaningless and seems more semantic than real. The Court held in Mt. Laurel that, once the burden shifts, the defendant essentially must prove, by the preponderance of the evidence, that its land use plan is constitutionally valid. The clear intent of that ruling was to insure that there would be no question about the validity of a land use plan which was shown to be prima facie discriminatory against lower income persons.

(2) -- Where plaintiffs seek a builder's remedy, how should the burden of proof be allocated as to that remedy?

This is an equitable remedy for a victorious litigant. The basis for awarding it is discussed in answer to Question #21 below. In sum, plaintiffs believe that developer-instigated litigation should be bifurcated. Once liability is established,[1] the builder's remedy should be presumptively granted. If the defendant opposes the relief, it should be required to prove, by a preponderance of the evidence, that the development plan will result in substantial adverse health or safety consequences which cannot be rectified by appropriate planning or regulatory techniques.

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[1] Clearly a finding of only a technical violation would not trigger the builder's remedy. The violation must be more than inconsequential. However, good faith or intent are irrelevant. A substantial violation should trigger the builder's remedy regardless of municipal attitude.

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The Allan-Deane Corporation

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-SOMERSET COUNTY
DOCKET NOS. L-36896-70 P.W.
L-28061-71 P.W.

THE ALLAN-DEANE CORPORATION, et al.,	:	
Plaintiffs,	:	Civil Action
vs.	:	ORDER APPOINTING MASTER
THE TOWNSHIP OF BEDMINSTER, et al.,	:	
Defendants.	:	

THIS MATTER having come before the Court by way of Application for Relief to Litigants, pursuant to R.1:10-5, and this Court having issued an Order to Show Cause on April 19, 1978 providing for a hearing for the purpose of considering whether Defendants had complied with the previous Orders of this Court and, in the event of a finding of noncompliance, for a determination as to the appropriate remedy, and this Court having determined in an Opinion handed down on December 13, 1979 and by Order

entered on January 4, 1980 (mistakenly dated January 4, 1979) that Defendants have, in fact, not complied with the previous Orders of this Court and the Court having determined in an oral decision handed down on January 29, 1980 to order Defendants to rezone a defined area of the Township within a given time period, under the supervision of a Court Appointed Master, qualified as a planning expert, to act on the Court's behalf as more particularly set forth in this Court's Order for Remedy to be entered hereafter;
and this Court having further ordered the parties to attempt to come to an agreement as to the identity of the Master, and the parties having reached such an agreement,

IT IS on this 22d day of February 1980,

O R D E R E D as follows:

1. George M. Raymond, President of the planning firm of Raymond, Parish, Pine & Weiner, Inc. is hereby appointed the Master, to act on the Court's behalf to monitor the Defendants' efforts with respect to:

a. This Court's Order to rezone the 202-206 Corridor in Bedminster Township.

b. This Court's Order to review and revise all pertinent land use ordinances affecting development within such corridor.

c. This Court's ruling that the corporate plaintiff is entitled to receive prompt and specific relief.

2. The Allan-Deane Corporation and Bedminster Township are ordered to equally share the cost of the time and services of the Master and his firm. Raymond, Parish, Pine and Weiner's fee schedule attached hereto as Exhibit "A" is hereby approved as the rates for the services of the said George M. Raymond and his firm, which shall be billed to the parties.

The Master shall submit monthly invoices and duly executed vouchers on the appropriate forms for services rendered at the rates set forth in Exhibit "A" to the plaintiff Allan-Deane and the defendant Township of Bedminster, which shall each pay one-half thereof.

3. Duties of Master

The Master appointed herein shall have the duty to:

A. Attend, either personally or through a representative, and, if he chooses, participate in all public meetings, informal meetings, and work sessions of the Township Committee, Planning Board or other special committee at which Bedminster Township's duties under this Court's Orders are discussed or acted upon.

B. Analyze the proposed revised ordinances to

be presented to the Court by the Township and submit a written report to the Court, on or before May 9, 1980, on the issues of whether such ordinances:

a. Comply with the opinions and orders of this Court;

b. Are in substantial conformity with the regional planning for the area by all appropriate regional planning agencies including, but not limited to the Somerset County Planning Board, Tri-State Regional Planning Commission; and the Department of Community Affairs Division of State and Regional Planning.

C. To observe and monitor the application process by the plaintiff, Allan-Deane, following the adoption of suitable land use ordinances for a planned development through at least the preliminary approval stage, and shall remain available to report to the Court if any dispute arises involving that application. Thereafter, Allan-Deane may make application to this Court to continue the services of the Master through construction and the issuance of certificates of occupancy.

D. To undertake such other responsibilities as the Court may deem necessary or desirable to speedily implement the relief ordered in this proceeding.

B. THOMAS LEAHY, J.S.C.

QUESTION #11

Discuss the proper function of the Housing Allocation Plan of the New Jersey Department of Community Affairs Division of State and Regional Planning in exclusionary litigation. Should a demonstration of satisfaction of a particular Division on Planning allocation constitute prima facie evidence of compliance with Mt. Laurel?

The Department of Community Affairs, Revised Statewide Housing Allocation Report for New Jersey (May 1978), is a guideline for municipalities in planning and providing for their shares of needed housing for persons of low and moderate income. This report is based upon a uniform review and analysis of employment growth, tax ratables, vacant lands and development constraints within municipalities throughout the state. The DCA plan should be deemed to be prima facie proof of the municipal obligation to provide housing for low and moderate income housing. It however was not designed to be and cannot be used to measure the need for least cost housing.

The DCA plan considers only the housing needs of low and moderate income persons (those earning up to approximately $8,567 in 1970 dollars). DCA Report, p. 5. No attempt was made to determine or allocate the housing needs of persons earning more than this amount. Despite the specificity of the plan in regard to income levels, municipalities have misused the allocations set forth in the report by equating them with the number of "least cost" units needed within their jurisdictions. For example, Mahwah, with a DCA allocation of 1,120 low and moderate income units, argues that this number comprises its complete obligation to provide least cost units. Mahwah brief, p. 21. Least cost, in turn, was defined by the Mahwah expert as housing that can be built at "a lesser cost than conventional housing at a given price

generally on large lots requiring very expensive improvements." Mahwah brief, pp. 89, 64, 79, 60. This "lesser cost housing" results in units selling at close to $100,000 in Mahwah. (Mahwah opinion at 45-46). Other municipalities, including Clinton, have also adopted this position, that is, utilizing the DCA numbers as their fair share of least cost or lesser cost housing.

If the only focus of exclusionary zoning cases is the Mahwah "lesser cost" or least cost unit selling at close to $100,000 then the DCA Allocation Report is irrelevant, meaningless and inadmissible. The low and moderate income persons whose needs were considered in the DCA Report can never hope to benefit from these units. Furthermore, the people who can benefit in Mahwah were not considered or counted in the DCA report. Persons would require an income of $35,000 to $45,000 a year to be able to live in the Mahwah "lesser cost" units. To use the DCA numbers for low and moderate income persons to determine Mahwah's fair share of lower cost housing for persons with an income of $35,000 to $45,000 makes no sense.

The DCA report makes sense and should be deemed "prima facie" valid for the purpose for which it was intended, as a measure of the municipality's obligation to provide low and moderate income housing. In Madison, this Court noted "we conceivably might regard a fair share plan constructed (under Executive Order No. 35) as meriting prima facie judicial acceptance." Madison, supra, 72 N.J. at 538. However, because the DCA draft was only a preliminary report at the time of the Madison decision, the DCA report was not discussed further by the Court. Yet all members of the Court in Madison recognized that determination of fair share is much more a legislative or an administrative function than a judicial one. (See Justice Conford, 72 N.J. at 531 to 533; Pashman, 72 N.J. at 576-6; Schreiber,

72 N.J. 621-2; Mountain, 72 N.J. at 627 and Clifford, 72 N.J. at 632). The advantage of the agency approach is that the agency has the "equipment and resources to study the problem in depth, taking objective account of competing interests." 72 N.J. at 627. It can "render the making of allocations with relative fairness" to all municipalities on a uniform, consistent basis. Madison, supra 72 N.J. at 532. This approach is by far a preferable one for a court listening to and trying to resolve the "statistical warfare" of competing fair share plans brought on an ad hoc basis in isolated cases.

The primary advantage of the D.C.A. plan is that it establishes a uniform methodology which can be followed by municipalities throughout the state. The D.C.A. report determines housing need in the state on the basis of existing present need as of 1970[1.] and projected household need for low and moderate income persons until 1990.[2.]

The units are then allocated among the municipalities on the basis of four equally weighed criteria: vacant land, employment growth, fiscal capacity and personal income.[3.] This produces a fair share number for the municipality. D.C.A. then ascertains that there is sufficient vacant developable land to permit this development.[4.]

1. Existing present need was determined on the basis of dilapidated units, overcrowded units and units necessary to establish a minimum vacancy rate. Allocation Report, p. 6.

2. Prospective need was determined by projecting population growth and average household size for 1990 in each region. This gives a projection for the number of additional households in 1990. This number is multiplied by the percentage of the households that were low and moderate income in 1970. This determines the projected need for low and moderate income households until 1990. Allocation Report, p.9.

3. These are recognized acceptable criteria. See Madison, supra, 72 N.J. at 542 n.45.

4. If there is not sufficient developable land, the municipality's share is reduced and the additional units reallocated. Allocation Plan, p. 19.

The D.C.A. methodology should be deemed prima facie valid. This means that a court should utilize the D.C.A. methodology unless the court is convinced that the methodology is arbitrary and capricious. Acceptance of the D.C.A. methodology will tremendously simplify litigation. As it is now, each planner for any party is free to start from ground zero and develop his or her own allocation plan. The planner determines housing needs in his own way; uses his own formula and time frame for projected housing needs; determines his own factors by which he will allocate fair share and the weight to be given to each factor. The result is both a statistical war between the parties and a war between the planners' methodologies. Prima facie acceptance of the D.C.A. methodology will substantially reduce the disputes.

Prima facie acceptance should also be given to the D.C.A. numbers set forth in the Allocation Report. There is, however, a difference between the methodology and the numbers. The methodology is an approach which D.C.A. believes can be used over a long period of time. The numbers which D.C.A. plugged into that formula were the best statistics which existed at the time but which might be updated at a later date. For example, population projections which D.C.A. relied upon have now been updated. Should any other number initially used in the formula be proven to be obsolete as a result of updated statistics, the presumption of validity given the initial figure would be rebutted. The new or revised data could then be plugged into the D.C.A. formula.

Additionally, plaintiffs submit that the regions demarcated in the D.C.A. report should be deemed presumptively valid. The Report adopts twelve (12)

regions: ten (10) individual counties are regions; the eight (8) counties of the northeastern New Jersey are combined into a single region and Camden-Burlington-Gloucester counties are combined as one region. The larger regions were established to make sure that the region was large enough to encompass housing needs within the area. The report notes that Hudson County for example lacks the land to provide its needed amount of housing. Allocation Report, p. 12.

The Court in Madison formulated a "position as to the concept of region in the context of an ad hoc application of Mount Laurel principles to a single litigated ordinance." Madison, supra, 72 N.J. at 539. The Court recognized that experts might reasonably differ in defining region. Madison, supra, 72 N.J. at 539. A concern was expressed that "undue restriction of the pertinent region" might impair the objective of securing an adequate opportunity for lower income housing. Madison, supra, 72 N.J. at 541. Accordingly, the Court suggested that in the context of ad hoc litigation, a county was not a realistic boundary for a region and that a region is more appropriately demarcated as that area from which the population of the Township would be drawn, absent exclusionary zoning. Madison, supra, 72 N.J. at 537.

This analysis in Madison does not preclude prima facie judicial acceptance of the D.C.A. regions. Even though D.C.A. delineates some individual counties as regions, this is not invalid. It was done in the context of a statewide allocation of units with the purpose of securing an adequate opportunity for lower income housing. This was not a parochial attempt to minimize local fair shares in the determination of these regions. Furthermore, where a single county is delineated as a region, the fair share allocation is

based upon the state's best projection of the county's population in 1990; this projection takes into account the persons now living outside the county who will move into it. For these reasons, the D.C.A. determination of region should be declared prima facie valid. Should a court find this determination to be unreasonable in the case of a particular county or municipality, the D.C.A. formula can still be used. Any planner can do the mechanical calculation of applying the D.C.A.methodology and data to the revised region.

Finally, the D.C.A. development limit as applied to a particular municipality should be presumptively valid. D.C.A. does not require a fair share allocation to exceed the development limits of a municipality. Development limits in a town might be less or more than D.C.A. projected and the amount may change over time.[1.] Thus a municipality is free to rebut the allocation number by showing that it does not have sufficient developable land to accomodate it. Where D.C.A. has found that a municipality's allocation cannot be met because of a lack of developable land, a plaintiff can likewise rebut this.

The D.C.A. numbers are meant to be an approximation and guidelines to a municipal obligation. Acceptance by the Court of the allocation report as prima facie valid will permit all parties to use it as a reasonable working tool; such approval would tremendously simplify litigation.

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1. Developable land may become developed and agricultural land may come into use for residential purposes.

B. Should fair share orders imposed on non-complying municipalities adopt the Division on Planning's allocation unless the municipality demonstrates that such allocation is inappropriate.

A master or the municipal defendant in amending an invalidated land use plan could be directed to take into consideration the D.C.A. report, as modified at trial, as a guideline for determining its fair share of low and moderate income housing. The D.C.A. number should be considered, even with modification, as a guideline and not a rigid number.

C. What effect should changed allocation have on a finding of previous compliance.

N.J.S.A. 40:55D-89 provides for re-examination of a master plan every six years. Except in extraordinary circumstances, a changed allocation should not require a municipality to reassess its land use plan. "Extraordinary circumstances" means a change in condition within the municipality which drastically alters the pattern of growth in a community(approval of a 743 acre tract in Clinton Tp. which has just been sold to Exxon to construct research and office facilities would constitute such an extraordinary circumstance. Clinton Tp. brief p. 18).

QUESTION #12

Discuss the proper function of the State Development Guide Plan in such litigation.

The State Development Guide Plan is entitled a "Preliminary Draft." The preface expressly states that this preliminary draft is intended to be a "first step" towards preparation of a Housing and Land Use Plan. The preface also notes that a "future draft" after consultation, public hearings, meetings and conferences is planned. This revision has not yet been done and released.

In addition to being a preliminary draft, the plan is only a guide. It is not binding on any municipality. A municipality designated as a limited growth area or an agricultural area in the guide plan is legally free to zone for full growth.

Plaintiffs have argued in Question 11 that prima facie validity should be given to the D.C.A. Revised Statewide Housing Allocation Report for New Jersey. That plan did consider and incorporate the policy and objectives of the State Development Guide Plan in determining fair share allocations. D.C.A. Housing Allocation Report, p. 4 and 21-23.

Accordingly, the Housing Allocation Report provides that municipalities which are designated as growth or limited growth areas in the Development Guide Plan should immediately act to implement their regional fair shares of low and moderate income housing while municipalities which are classified in the Development Guide Plan as entirely agricultural or open space may defer their regional fair share allocations, but must respond to local needs. Housing Allocation Report, p. 21-23. The D.C.A. Housing Allocation Report also recognizes

that the policies of the Development Guide Plan are not binding on a municipality. Thus the Report contains an important caveat:

> However, it is important to understand that a municipality will lose its deferred status if it actually 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. Housing Allocation Report, p.23.

An expert should be permitted to testify about and draw conclusions on the basis of the State Development Guide Plan. However, caution should be used in evaluating the plan because it is both a preliminary draft and a guide. It also should be considered in conjunction with the D.C.A. Housing Allocation Report and the policies and caveats expressed therein.

QUESTION #13

(a)(b) What is the function and relative importance of defining the appropriate region in a court's determination and disposition of cases challenging municipal land use regulations as unconstitutionally exclusionary? Discuss the wisdom of a formulaic analysis for determining fair share/regional need?

In both Mt. Laurel and Madison this Court invalidated each defendant's zoning ordinance without regard to the specific delineation of region or fair share. The Court, in declaring each land use plan unconstitutional, specifically reviewed and evaluated the actual land use provisions and the housing opportunities permitted thereby. In each case, the defendant township had "expressly prescribed requirements or restrictions which precluded or substantially hindered" a realistic housing opportunity for persons of low and moderate incomes. Mt. Laurel, supra, 67 N.J. at 181; Madison, supra, 72 N.J. at 499. The delineation of either township's region or regional need was irrelevant to these findings. As observed by Justice Pashman, "(I)n some cases, such as in the instant case, the exclusionary impact of the challenged ordinance is so patent that there is not need to quantify the municipal obligation under Mt. Laurel prior to invalidating the ordinance." Madison, supra, 72 N.J. at 590. See also answers to Questions 10 and 22.

A fair share/regional analysis, however, is necessary in order to validate a land use plan. Thus, whereas a court could forego such an analysis and still be able to rule as to the unconstitutionally of a land use plan, the converse is not true: validating a land use plan does require a standard against which it is to be measured. A fair share/regional analysis provides such a standard.

The D.C.A. fair share/regional analysis provides such a standard devised by a statewide planning agency in a non-litigative atmosphere. Plaintiffs argue it should be granted presumptive acceptance. See Answer to Question 11. An alternative or supplementary approach, which plaintiffs do not consider as acceptable as use of the D.C.A. fair share plan, would be a trial court's use of the regional proportion test as set forth in Madison, supra, 72 N.J. at 543. This test could be used as a measure of the reasonableness of the opportunity being provided. See Answer to Question 22. In other words, the Court could evaluate and determine whether the prospective municipal proportion of low and moderate income households will roughly correspond to that proportion in the appropriate region, as a whole. Plaintiffs reiterate their position that this is far less satisfactory than a fair share analysis and that although the demarcation of an "appropriate region" and "fair share" are not critical to a finding that the challenged land use plan is unconstitutional, they are necessary to uphold such a plan. Madison, supra, 72 N.J. at 525 and 543. See Amicus Brief in Support of Petition for Certification, Middlesex appeal, p. 9-11 and Amicus Brief, Middlesex appeal, p. 2-5.[1]

(c) Can and should a fair share/regional need allocation be used to: meet today's housing needs throughout the State; remedy prior exclusions by particular municipalities; and meet future demands for housing in New Jersey from within the State and throughout the Northeast corridor?

The Revised Statewide Housing Allocation Report for New Jersey addresses the existing (1970) housing needs for low and moderate income persons

1. In any event, proof of "region" is not an element of plaintiffs case in the sense that failure to convince a court of the accuracy of a specific region warrants dismissal. As already stated, findings of invalidity can be, and have been, made without such precision. See Amicus Brief in Support of Petition for Certification, Middlesex appeal, p. 3-8; Amicus Brief, Middlesex appeal, p. 6; Plaintiffs' Brief in Support of Certification, Middlesex appeal, p. 12-16.

residing in New Jersey and their projected housing needs until 1990. The plan does not address directly the prior exclusionary practices of municipalities. However, it may indirectly redress these practices since it does factor in the fiscal capacity and personal wealth of the municipalities in allocating regional needs. In those municipalities where opportunities were provided only for favorable ratables and persons of upper incomes, the fiscal capacity and personal wealth of the municipalities will be higher and may result (all other factors being equal) in a higher allocation or share to that municipality.

Meeting future demand is accomplished in a fair share analysis by accounting for growth projections. Such projections are based on growth which may be generated in the region from all areas of the state and nation as well as from the region itself. Thus, it is the region's future housing need which is accomodated within the region.[1.]

1. Substantial shifts in population location within a region could result in a demand for new housing in one area as opposed to another even though the population of the region, as a whole, remains stable or might be declining.

QUESTION #14

Discuss the relevance of an existing county-wide percentage of low and moderate income housing in an analysis of a particular municipality's compliance or non-compliance with Mt. Laurel.

In Madison, this Court suggested that it could be prima facie fair to require that future zoning provide a housing opportunity for a "fair share" of low and moderate income persons which will result in at least a rough approximation of the percentage of low and moderate income persons residing in the region. Madison, supra, 72 N.J. at 543. This test for determining the reasonableness of the opportunity being provided is a less sophisticated method for evaluating a municipality's obligation than is set forth in the DCA fair share plan. The DCA fair share plan assumes that some municipalities should have a greater or lesser fair share than other municipalities because of differences in employment opportunities, tax ratables, etc. The regional percentage test is not as precise because it assumes an identical percentage for all municipalities in the region. Nevertheless, it can be a valuable measuring tool. If the zoning does not provide for a percentage of low and moderate income persons roughly comparable to the region's proportion, this is a strong indication that the ordinance is exclusionary.[1]

The use of region-wide ratios can also be used for a second purpose. Plaintiffs believe that municipalities must make some provision for middle income persons, families with incomes from 80 percent of the median up to, perhaps, $26,000 (the DCA cut-off for eligibility for HFA housing). Utilization of the regional ratio of middle income persons would give a court a benchmark for determining

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1 Presumably, the municipal and regional percentages of low and moderate income households would be comparable absent discriminatory practices that precludes such housing opportunities. See Plaintiffs-Appellants Brief, Mt. Laurel II, p. 76, 4a-5a.

whether a municipality was providing a reasonable opportunity for high density units without unnecessary cost-generating features affordable to these middle income families.

It should be noted that in fashioning a remedy, the DCA fair share plan with modifications is more useful than the regional percentage test. For example, if a municipality is exclusionary, the growth projection under the unconstitutional ordinance may be unreasonably low. Reliance on the DCA fair share plan as a tool in fashioning a remedy is easier than trying to assess a reasonable population projection for the municipality in the absence of exclusionary zoning and then a reasonable low and moderate income percentage of that projected population.

B. Is the concept of "tipping" relevant in this area?

Tipping is the description of a process whereby so many low income persons or minorities (often a majority) move into a neighborhood that the upper-income persons move out resulting in a neighborhood which is virtually all poor or all minority. It is inconceivable that this process could ever occur in a suburb because of the implementation of the constitutional mandate pronounced in Mt. Laurel. The whole purpose of fair share planning is to insure that all municipalities provide a reasonable proportion of the housing need and that none experience an imbalance.

QUESTION #15

Discuss the fair share formula introduced in Mt. Laurel and cited by Justice Pashman in Pascack.

The fair share discussion in Mt. Laurel addresses the municipal obligation to provide an opportunity for a fair share of the housing needs of persons of low and moderate incomes.[1] Accordingly, plaintiffs have been presenting assessments of the regional need for housing which is affordable to persons of low and moderate incomes. Municipal defendants, on the other hand, have been assessing their shares of "least cost" or "lesser cost housing" that may sell for $100,000 per unit or more. Therefore, the issue of what housing needs are to be assessed has now become more important than what particular methodology or approach to adopt in allocating fairly those needs.

Housing affordable to low and moderate income persons is provided only by subsidized housing, least cost mobile homes and price controlled rental or sale units. See answer to Question 1. As Mt. Laurel recognized, every municipality must provide its fair share of these units. Mt. Laurel, supra, 67 N.J. at 190.

A. Should municipalities have an absolute duty to provide an opportunity for housing for all present and potential employees in the region?

Employees need to live somewhere. As this Court recognized in Mt. Laurel, "When a municipality zones for industry and commerce . . . , without question it must zone to permit adequate housing within the means of the employees

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[1] The Court in Mt. Laurel, supra, 67 N.J. at 188, held that:

> "A developing municipality's obligation to afford the opportunity for decent and adequate low and moderate income housing extends at least to the municipality's fair share of the present and prospective regional need therefore."

involved in such uses." Mt. Laurel, supra, 67 N.J. at 187. The D.C.A. allocation plan takes into consideration employment within the municipality in determining a municipality's fair share of the regional housing need. In determining a fair share of housing units for middle income persons, the needs of employees within the town must also be considered.

B. Should a change in employment figures affect such litigation?

The municipal land use law specifically provides that municipal master plans be re-examined every six years. N.J.S.A. 40:55D-89. Except in circumstances where employment figures have changed substantially, a municipality should not be required to reassess its zoning during those interim years. A substantial change, warranting rezoning, may result when a municipality drastically alters its zone plan and the pattern of growth established thereby. Clinton Township's approval of Exxon's 743 acre tract for the construction of research and office facilities may result in a substantial change in the Township's employment figures and warrant a reassessment of the housing opportunities presently zoned.

C. Should municipalities have a duty to house for their resident poor?

Municipalities must plan and provide for the housing needs of its resident poor. No municipality should be permitted by its discriminatory land use practices to force its poor to move out and relocate into the nearest urban ghetto. Mt. Laurel Township has continued to neglect and discriminate against its lower income neighborhoods, blatently refusing to meet its constitutional obligation. This municipal discrimination in utilization of local resources is a land use practice which also cannot be tolerated. See Plaintiffs'-Appellants Brief, Mt. Laurel II, pp. 84-103, 129-135.

D. Should these duties be incumbent upon all municipalities regardless of the developing status?

See answer to Question 7. Even if a rural municipality has no

obligation to provide a fair share of the region's housing, it must provide for the needs of its own employees and resident poor. See Amicus Brief, Franklin Tp., p. 5-7 The D.C.A. Allocation Report does exempt some prime agricultural and open space communities from zoning for its regional fair share obligation; it does not, however, exempt these municipalities from providing for the housing needs of its resident poor. The D.C.A. report states:

> (E)ach municipality's indigenous share of 1970 housing need exists and is an immediate need. Attending to such needs would be remedial rather than growth-oriented and should be addressed immediately by every municipality regardless of any future growth policy. D.C.A. Revised Statewide Housing Allocation Report for New Jersey at p. 29.

QUESTION #16

Discuss the function of the "time of decision" rule

Exclusionary zoning battles have been terribly prolonged: Mt. Laurel for nine years; Bedminster for nine years; Mahwah for eight years; Middlesex County for six years. Even a dispute over a 61 unit project, Kruvant v. Cedar Grove, took eight years to litigate. The New Jersey Law Journal in a recent editorial commented on the tremendous waste of time and money resulting from this lengthy litigation.[1] The time of decision rule should not be used to justify such prolonged litigation.

Plaintiffs suggest that an order invalidating an ordinance as unconstitutional should not be a final, appealable order. Rather, the trial court should retain jurisdiction while the defendant municipality rezones its ordinance under the supervision of a master (see Question 23) and in accordance with the directives of the court. If requested, a second hearing would be held to determine whether the amended ordinance brought the municipality into compliance. Only at this point would a final judgment be entered authorizing an appeal to the appellate division. An appellate court could end the litigation by determining (1) whether the trial court properly invalidated the first ordinance and (2) whether the revised ordinance established compliance.

Application of the time of decision rule should also not limit developers' remedies. Both legal commentators and other courts have recognized that a developer should be entitled to a building permit if the defendant

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[1] "Zoning in the Eighties", 105 N.J.L.J. 36 (1980) states:

> "The present judicial response, lengthy trials and invalidation of local ordinances on a piecemeal basis do not adequately respond to the problem. For each affected municipality is free to develop a second plan, or a third or fourth plan, and have each passed upon by the courts in turn to see when and if the town planners can create something which passes the test of regional planning. If this were the only judicial answer, it is no answer at all in terms of a solution to land use problems in New Jersey."

municipality has not made a bona fide effort before trial to comply with its constitutional mandate. Amendments to a zoning ordinance during or after trial should not be permitted to be used by the municipal defendant to preclude this relief. Allowing a municipality to do so, as noted by a commentator in the Harvard Law Review, encourages it to engage in a "litigative war of attrition" by assuring the municipality that even if it loses, it can defeat the plaintiff-developer by simply rezoning and proposing other sites.[1] The Pennsylvania Supreme Court has already acknowledged this problem and has refused to withhold a developer's remedy for an interim period after invalidating the challenged ordinance. The Court stated:

> Such a delay would effectively grant the municipality a power to prevent any challenger from obtaining meaningful relief after a successful attack on a zoning ordinance. The municipality could penalize the successful challenger by enacting an amendatory ordinance designed to cure the constitutional infirmity, but also designed to zone around the challenger. Casey v. Warwick Tp., 328 A.2d 464 (Pa.Sup. Ct. 1974)

How can the problems stemming from outdated statistics be avoided?

Plaintiffs' suggestions seek to minimize the problems arising from outdated statistics. The trial court must base its evidence on the most up-to-date statistics that are available. If the municipality's ordinance is invalidated, a master should be appointed (See Question 23); he or she is free to take into consideration and make recommendations based upon any substantial changes that occur after trial. The Appellate Division must make its review based on the record below barring any truely extraordinary major changes

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1 "Developments in the Law-Zoning", 91 Harv. L. Rev. 1427, 1698-99.

which would warrant a remand; this situation should be exceedingly rare and would be limited to a specific narrow issue. The procedures which plaintiffs have suggested should avoid time-consuming remands and terribly prolonged appeals thus reducing problems with outdated statistics.

How does the rule affect the shifting burden of proof.

Plaintiffs during trial should have the burden of showing that the ordinance or any amendments are exclusionary. After a declaration of invalidity, the municipality should have the burden of proving that its new ordinance complies with the court's directive. Substantial deference should be given to a master's report at the compliance hearing, if any.

QUESTION #17

Should a trial court retain jurisdiction to rule on orders of compliance after the main case has been appealed?

Under current court rules, jurisdiction over all matters stayed is in the appellate court once an appeal is taken. Jurisdiction over initial motions for a stay and matters relating to orders not stayed is in the trial court. R. 1:10-5, 2:9-1, 5(b).

Plaintiffs believe that adoption of their recommended procedure in answer to Question #16 will simplify matters greatly. Compliance will essentially have occurred voluntarily or by court order prior to appeal. Any further need for judicial action would appropriately be in the Appellate Court.

If the Court does not accept plaintiffs' recommended procedure, plaintiffs believe that orders relating to the builder's remedy should not be stayed in so far as they relate to review and processing of the development plan up to but not including issuance of the building permit. This was done in Mt. Laurel as to the plaintiff-intervenor's development.

QUESTION #18

What function should a showing of good faith or bona fide efforts at compliance with existing principles of law play in these cases?

"Good faith" cannot be distinguished from "lack of intent to discriminate." The Court has already ruled that intent is irrelevant in exclusionary land use cases. Mt. Laurel, supra, 67 N.J. at 174, fn. 10. Thus, a showing by the municipality that it lacked the intent to discriminate or exclude is irrelevant to a finding of lack of compliance with Mt. Laurel principles. "Good faith", therefore, is irrelevant. If a municipality is in violation of Mt. Laurel principles, its "good faith" will not make an otherwise unconstitutional land use plan constitutional. The legal violation is not in the attitudes of municipal officials but in the land use plan itself. The "bona fides" of a land use plan goes to its compliance or lack of compliance with the Constitution and not the drafter's intent.

Plaintiffs have already articulated a position that a showing of all but technical compliance should result in foregoing the builder's remedy; that is, mere technical violations should not trigger that equitable relief. However, intent and good faith are irrelevant even to that analysis. The focus should be on the effect of the plan itself.

QUESTION #19

Discuss the validity of a "trickling down" theory in the current housing market.

As was discussed in Question 1, the concept of least cost housing was developed as the "only acceptable alternative recourse" if there was no other possibility of constructing housing that low and moderate persons could afford." Madison, supra, 72 N.J. at 512. In a brief discussion, the Court noted that such least cost housing might indirectly benefit low income persons through the filtering down process. Madison, supra, 72 N.J. at 514 n. 22. In that discussion, the Court articulated the notion that the construction of new homes may result in a "chain of families 'moving up'" to a better housing opportunity. The shorter the chain, the sooner the needs of the lowest income families for decent and healthful housing may be met. In turn, "the shortness of the chain obviously depends on the inexpensiveness of the most recently constructed housing." Madison, supra, 72 N.J. at 515 n. 22. Accordingly, the provision of needed housing opportunities for lower income families through the filtering down of middle and upper-income families "may take a lifetime to occur." "Do Lawsuits Build Housing," 6 Rut. Camden L.J. 653, 666 (1975); Madison, supra, 72 N.J. at 514 n. 22.

In Mahwah, the trial court declared that "least cost" housing now costs close to $100,000. This least cost housing is so expensive that middle income persons (up to 120% of median income) cannot afford it. If "the shortness of the chain obviously depends on the inexpensiveness of the most recently constructed housing," Madison, supra, 72 N.J. at 514, then the $100,000 least cost housing makes the filter-down chain so long as to be meaningless for low and moderate income persons.

The filter-down theory would work best, if at all, in a region which had no restrictions on construction and an oversupply of housing. Builders in that market would build housing for the lowest possible price. The glut of housing would keep the price of housing depressed. The depressed prices and oversupply of housing would produce the shortest possible filter-down chain. The situation in New Jersey, however, is in sharp contrast to this.

In a housing market, as exists in New Jersey, where there is a scarcity of units, there is an imbalance between supply and demand. This imbalance means that developers will respond to the pent up need for upper-income housing before they respond to the need for middle, moderate and low income housing; and secondly, developers can exact a higher price for any units produced. In New Jersey's market, the filter-down theory produces the longest, slowest chain which is of the least benefit to low and moderate income persons.

Additionally, the Court must recognize that there are constraints on the growth and development in areas throughout the State which impact on the market place in providing housing. These include:

1. State or local limitations on water or sewer capacity which sets a ceiling on the number of units which could be built;

2. Stringent environmental protection laws which prohibit or constrain development;

3. Legislation such as CAFRA and the Pinelands Protection Act which results in the removal of land from further development and/or a specific limit on the total number of units which can be built;

4. Promotion of prime agricultural land preservations.

Plaintiffs do not challenge these policies but rather ask the Court to appreciate the impact of these policies on the provision of needed housing and the filter-down concept. These constraints preclude unlimited growth and development in the State, their purpose being to insure a limited amount of growth. These policies also impede the operation of the filter-down theory[1]. Therefore, it is essential that a proportion of that permitted growth be committed to housing for persons of low and moderate income as opposed to "least cost" housing. Absent such policies, the housing needs of low and moderate income persons will not be met.

The constitutional mandate pronounced in Mt. Laurel is the provision of a realistic housing opportunity for low and moderate income-persons. In today's market that obligation cannot be interpreted to mean, by use of the filter-down theory, the provision of housing which is not affordable to low and moderate income persons. The only answer for them is to mandate housing they can afford: subsidized housing, mobile homes, price controlled units with such incentives as California density bonuses. The alternative is to admit that the mandate of Mt. Laurel does not address the housing needs of poor people but protects only middle income persons and to sanction the municipal exclusion of persons of low and moderate income.

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[1] As there is only a limited amount of land zoned for multi-family housing, upper and middle income persons as well as lower income persons who seek to occupy multi-family housing are competing for this land. The shortage of land so zoned will substantially increase the price of the land. As long as the total amount of land zoned for this purpose is less than the need, this land will be used for upper-income housing absent affirmative controls.

QUESTION #20

Discuss the function of "phasing" in a fair share plan.

A municipality may not constitutionally limit or phase the development of low and moderate income housing while permitting developers of upper income housing and non-residential uses to build without such restrictions. If anything the reverse should be true. Given the difficulty in providing lower income units, a heavy burden should be placed on a municipality to justify phasing such growth even in the context of a comprehensive phased growth plan. This Court in Mt. Laurel recognized that a phased-growth ordinance could not be utilized as a discriminatory tool. The Court stated that:

> (A)ssuming some type of timed growth is permissible, it cannot be utilized as an exclusionary device or to stop all further development and must include early provision for low and moderate income housing. Mt. Laurel, supra, 67 N.J. at 188, n. 20.

Plaintiffs fully adopt the Court's position as stated in footnote 20. While comprehensive phased zoning with adequate provision for all types of housing may be reasonable, phased zoning only for low and moderate income housing is clearly exclusionary and unconstitutional. See Golden v. Planning Bd. of Ramapo, 285 N.E. 2d 291 (1972), app. dism. 409 U.S. 1003 (1972).

Mt. Laurel's amended ordinance, Ordinance No. 1976-5, sets forth a classic example of how a municipality may use phased zoning for exclusionary purposes. Mt. Laurel determined that its "fair share" of low and moderate income housing housing was 515 units. Ordinance 1976-5, §1703, JA-32a. It then sought to limit the provision of these needed units by setting forth a housing time-table which permits the immediate construction of those units assessed by the township as presently (1976) needed and limits all further construction in

subsequent years to 17 units per year. See Appendix to Plaintiffs-Appellants Mt. Laurel II Brief at 29a-30a. The ordinance also provides that Mt. Laurel will suspend its "fair share" obligation if the "fair share" units built in the Township exceed the number being built elsewhere in Burlington County. Ord. 1976-5, §1708.1, JA-32a. These phasing requirements are not imposed upon any other developer in Mt. Laurel except those seeking to provide low and moderate income housing.

There is no justification for arbitrarily and exclusively limiting when development of low and moderate income housing should take place. To the contrary, a fair share plan should act, not to limit but, to insure that these needed housing opportunities are being provided in a municipality. Appendix to Plaintiffs'-Appellants Mt. Laurel II Brief at 29a-30a. In reviewing Mt. Laurel's ordinance, the Court must adopt the precepts set forth in footnote 20 of the Mt. Laurel decision as its holding and declare such phasing provisions unconstitutional. Phased zoning which is applicable only to "fair share" housing is exclusionary and unconstitutional.[1]

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[1] It should be noted that no municipality has yet adopted a comprehensive, non-exclusionary Ramapo-type phased-growth ordinance. The Court need not, therefore, address and evaluate here the validity of such ordinances.

QUESTION #21

Discuss the legal and practical implications of the following remedial devices a court might employ in exclusionary zoning cases.

Plaintiffs submit that upon a finding of exclusion, the following remedy should apply:

1. A master should be appointed to aid in the rezoning and the implementation of a developer's remedy. The role of the master is discussed in Question #23.

2. In developer's cases, a developer should be presumptively entitled to a building permit. As in Madison, he must agree to provide a certain percentage of low and moderate income housing, either through subsidies or through units which sell or rent for a price affordable to low and moderate income persons. Such a developer should be presumptively entitled to a building permit unless it is proven that the land cannot be developed in an environmentally safe way. See Public Advocate's Chester brief, pp. 3-6 and 10-13.

3. With the assistance of a master, the municipality should rezone to meet its fair share of low and moderate income housing. The role of the master is discussed in Question #23. The fair share should be met through:

(1) inclusionary land use practices:
   a) affirmative provisions for subsidized housing;
   b) least cost mobile homes;
   c) mandatory percentages of lower income housing in major developments; and
   d) use of density bonuses to reward provision of low and moderate income housing; and
(2) equalization of municipal services, where appropriate, to equalize conditions in lower income neighborhoods.[1]

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[1] See Plaintiffs' Mt. Laurel II brief, pp. 84-104, 129-135.

After the proposed ordinance is drafted the court would conduct a hearing to determine that the amended ordinance brought the municipality into compliance.

(1) -- Total invalidation of an ordinance, accompanied by an order to draft a new ordinance within a certain time period (i.e., 90 days) or be unzoned, see Orgo Farms.

This remedy was desinged to deal with traditional zoning cases where ordinances were attacked as arbitrary and capricious. It is singularly inappropriate in the Mt. Laurel context where the issue is unconstitutional deprivation of lower income housing opportunities. The effect has been an intolerable delay in affording a realistic remedy. The Court in Mt. Laurel itself utilized that remedy. Mt. Laurel, supra, 67 N.J. at 191. That case has been in litigation for over nine years and is before this Court for a second time. Now that all municipalities are on notice as to the constitutional mandate, any finding of exclusion must be dealt with more dramatically than by mere invalidation.[1]

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[1] Should the Court continue to utilize this remedy, it should do so only in tandem with other specific relief:

a. builders remedy - presumptive building permit;

b. presumptive variances for non-litigants willing to do lower income housing (or a reasonable percentage of such housing) until an approved ordinance has been accepted by the Court; and

c. where relevant, specific relief for resident plaintiffs to equalize municipal services.

(2) -- Presumptive variances as suggested by Justice Pashman in Pascack and Fobe.

Presumptive variances are not possible unless this Court holds that the rationale of Fobe v. Demarest does not apply after a court has declared a zoning ordinance unconstitutional. In Fobe the Zoning Board denied a variance on the basis of very general findings that the negative criteria have not been met.[1] The Supreme Court held that: "We cannot find these determinations to be arbitrary or without substantial support by evidence in the record." Fobe, 74 N.J. at 538.

Justice Pashman in dissent argued that the findings were conclusionary. His dissent argues that "where a variance is sought for a use which has been found to substantially further the general welfare of the region, a municipality must demonstrate unique or special circumstances which would justify denying the variance request." Fobe, 74 N.J. at 556.

This Court could adopt the dissent's position but limit it to these circumstances where a zoning ordinance has been invalidated. Once an ordinance had been invalidated, then presumptive variances could be granted to any developer in the municipality willing to do lower income housing (or a reasonable percentage of such housing) until an approved

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1 The findings were that:

(a) "Demarest is a community of established character that is almost totally developed with one family residential structure and the granting of a variance would have a major impact upon the entire Borough generally and even a greater impact upon the surrounding neighborhood."

(b) "Granting of the variance would substantially impair the intent and purpose of the zone plan and zoning ordinance of the Borough of Demarest and would operate as a substantial detriment to the public good." Fobe, supra, 74 N.J. at 531.

ordinance has been accepted by the Court. Such an approach would place the burden on the zoning board to justify the denial of the variance. The burden would remain on the municipality at all appellate stages. There would be no presumption of validity to a zoning board finding that the negative criteria had not been met. If the Court were willing to adopt this approach, the presumptive variance could be an effective remedy.

(3) -- An order for specific rezoning of plaintiffs' lands for multi-family development (Builder's remedy).

This is the most important remedy that a court can grant. However, it must be conditioned upon a developer's agreement to provide a certain percentage of low and moderate income housing as was done in Madison.

(4) -- Order to seek subsidies provide density bonuses, institute rent-skewing.

Least cost housing, per se, will not provide a realistic housing opportunity for lower income persons.[1] In answer to Question #1, plaintiffs submitted that a municipality which sought to comply with Mt. Laurel should require a PUD or large multi-family developer to provide a certain percentage of low and moderate income housing through subsidy programs or price controlled units. The municipality should reward a developer who does this with density bonuses. These approaches are also crucial in fashioning a remedy when a municipality has been found to be exclusionary.[2]

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[1] Least cost mobile homes will provide some opportunity for the upper-end of the moderate income scale.

[2] Thus, the master in Bedminster has proposed that all PUD and PRD developments contain at least 20% low and moderate income housing, either subsidized or units which sell or rent at a price affordable to low and moderate income persons.

(5) -- Specific rezoning for high density development accompanied by automatic reverter if the development planned is not for low and moderate income persons.

This is essentially a technique using the conditional use option. N.J.S.A. 40:55D-67. In Question #1, plaintiffs noted that municipalities throughout the country are conditioning high density zoning - PUD, PRD and multi-family - on the provision of a certain percentage of low and moderate income housing. Such a conditional use may also be provided for subsidized housing. If the developer chooses not to do this, he has the right to build at a very low density, e.g., one to the acre.[1]

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[1] There must be a substantial disparity between the density under the conditional use and that which would be used under the reverter. The less disparate, the less incentive exists to provide for lower income units.

QUESTION #22

Should all remedies developed in these cases be tracked to the level of need in the region and/or municipality, or does Oakwood suggest the possibility of "numberless" (as opposed to fair share/regional need) remedies?

A specific numerical standard is not always necessary to measure the municipal obligation. The Court may not need a numerical standard to find a land use plan invalid. The need may be such and the plan so unresponsive, that its invalidity may be clear regardless of the relevant fair share. Mt. Laurel and Madison were such cases.

The Court must understand, however, that in the absence of a numerical standard there is no way to know if a particular land use plan is valid. For example, if a land use plan provides a realistic opportunity for 1,000 lower income units, a standard is necessary to determine if that is sufficient.

It should be clear to the Court that the "numbers" game is a function of governmental intrusion into land use decisions. Since we are dealing with a finite amount of land, limited water/sewer capacity and imposed ceilings on residential growth, numbers become crucial. We are governmentally cutting up a limited pie. The question raised is what portion of it must be reserved for lower income persons.

Madison indicates that the Court does not believe that a specific fair share plan must be considered or adopted by a court in a Mount Laurel-type case. Madison, supra, 72 N.J. at 543. The Court, however, took great pains to review those plans which were presented (72 N.J. at 531-541)

and, in fact, articulated a test to establish prima facie evidence of the propriety of a land use plan. (72 N.J. at 543).

> If the existing municipal proportions correspond at least roughly with the proportions of the appropriate region the formula would appear prima facie fair.

Plaintiffs believe that a fair share plan is the best method to ascertain the required municipal obligation to provide realistic housing opportunities. The DCA plan should be used as presumptively valid and a reasonable guide subject to additional proofs. Alternatives may exist, however, to indicate invalidity. For example, a land use plan would be presumptively invalid if:

a. a reasonable relationship did not exist between jobs and housing;

b. the proportion of lower income housing opportunities, as compared to reasonably anticipated future growth and/or residential capacity, should be similar to the regional proportion of lower income persons;

c. local lower income residents reside in substandard housing and/or suffer from discrimination in the provision of municipal services and the land use plan does not provide a realistic means of alleviating these conditions.

QUESTION #23

Discuss the function of expert planners in exclusionary zoning litigation.

Plaintiffs recommend the use of a master at the remedy stage in all cases where the trial court finds that the municipality has not complied with Mt. Laurel (except where only minor, technical violations are found). The role of the master is to act as a mediator and advisor to the court in carrying out both the rezoning and implementation of a developer's remedy. A model could be the use of a master in the Allen-Deane v. Bedminster litigation.

The use of masters has been recommended by legal commentators[1] and widely used in a number of areas[2] including zoning litigation.[3] This court has recognized its feasibility in Madison, and trial courts have chosen it in Pascack Ass'n.,Ltd. v. Tp. of Washington, 131 N.J. Super. 195, 207 (Law Div. 1974);

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1 See Special Project, The Remedial Process in Institutional Litigation, 78 Col. L.R. 787, 805-8 (1978); Berger, The Odyssey of A Special Master: From the Courthouse to the Field, 78 Col. L. Rev. 910 (1978).

2 Swann v. Charlotte Mechlenberg, 402 U.S. 1 (1971)(school desegregation plan adopted by a master and approved by the district court upheld); Swann v. Charlotte Mechlenberg, 306 F.Supp. 1261, 1313 (W.D.N.C. 1969)(court appointment of "expert consultant" in educational administration to prepare school desegregation plan with which defendant directed to comply), U.S. v. Bd. of Comm'rs of Indianapolis, 503 F. 2d 18 (7th Cir. 1974), cert. den. 421 U.S. 929 (1975) (court rejected challenge to district court's appointment of a two-person commission to prepare desegregation plan); Armstrong v. O'Connell, 416 F. Supp. 1325 (E.D. Wisc. 1971), aff'd 359 F. 2d 625 (7th Cir. 1976), rev'd on other grounds, 433 U.S. 672 (1977)(court held designation of a master to assist court by preparing school desegregation within judicial power) Hart v. Community School Bd. of Brooklyn, 383 F. Supp. 699 (E.D.N.Y. 1974)(appointment of skilled master crucial to preparation of workable remedy); other school desegregation cases in which a master was appointed include: Keys v. Denver School Dist., 380 F. Supp. 673 (D. Colo. 1784); Bradley v. Milliken, 402 F. Supp. 1096 (E.D. Mich. 1975) rev'd on other grounds, 418 U.S. 717 (1974); Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), aff'd 530 F. 2d 406 (1st Cir. 1975); U.S. v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd 466 F. 2d 518 (5th Cir. 1972); Prison cases in which a master was appointed include Newman v. Alabama, 559 F. 2d 283 (5th Cir. 1977); Taylor v. Perini, 413 F. Supp. 189 (N.D. Ohio 1976) and Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972). Masters have been appointed in other school cases including those regarding the education of retarded children. N.Y. State Ass'n. for Retarded Children v. Carey, 409 F. Supp. 606 (E.D.N.Y. 1976); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); Gautreaux v. Chicago Housing Authority, 384 F. Supp. 37 (N.D. Ill. 1974). Construction Industry Assn of Sonoma City v. Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), rev'd on other grounds 525 F.2d 897 (9th Cir. 1975); Pascack Ass'n, Ltd. v. Tp. of Washington, 131 N.J. Super. 195 (Law Div. 1974), rev'd on other grounds, 74 N.J. 470 (1971).

3 See Plaintiffs-Appellants Mt. Laurel II brief, pp. 138-141

Round Valley, Inc. v. Tp. of Clinton[1] and Allen-Deane v. Tp. of Bedminster.[2] Pennsylvania by statute specifically authorizes the court to appoint a master to help determine whether to grant a developer relief.[3] This Court should direct trial courts to take full advantage of masters in cases successfully brought by private developer litigants.

In the Bedminster case, on December 13, 1979, the trial court climaxed eight years of litigation by invalidating Bedminster's ordinance for the second time. The court then ordered two remedial orders. (See Appendix hereto) One directed the Township to rezone to allow for certain excluded types of housing at densities which were established at trial to be reasonable and also established a timetable for compliance. The court in its other order (see Appendix hereto) appointed as a master a planning expert who would supervise the rezoning on the court's behalf. The role of the master was to:

> (1) Attend all public meetings, informal meetings, and work meetings of the Township concerning implementation of the Order;
>
> (2) Analyze the proposed revised ordinance of the Township and submit a written report on whether the proposed ordinance complies with 1) the court's order and 2) regional planning for the area;

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1 Docket No. L24710-74 P.W. (Law Div., Hunterdon County, Jan.13, 1978) rev'd Docket No. A-2963-77 (App. Div., March 5, 1980).

2 Allen-Deane Corp. v. Tp. of Bedminster, Docket No. L-36896-70 P.W. (Law Div., Somerset Cty., Order Filed Feb. 22, 1980).

3 The Court may:

> Employ experts to aid the court to frame an appropriate order. If the court employs an expert, the report or evidence of such expert shall be available to any party and he shall be subject to examination or cross-examination by any party. He shall be assessed against any or all of the parties as determined by the court. The court shall retain jurisdiction of the appeal during the pendency of any such further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order. 53 Pa. Stat. Ann. 11011 (Pardon)

(3) Observe and monitor the application process of the plantiff for corporate relief and report to the court on any disputes that may arise.

On May 27, 1980, the master submitted his report. The master had met weekly with the Township's planners and the plantiff's planners. All of these meetings were open to the public. Master's Report, p. 18. There were constant discussions concerning implementation of the Court's order. Master's Report, p. 18. After the Township drafted a new ordinance, it was reviewed paragraph by paragraph at a public meeting of the master and all parties. (Master's Report, p. 19). On the basis of this, substantial modifications were made by the municipality (Master's Report, p. 19). The master's report summarizing the ordinance's compliance with the order has now been submitted to the Court and the party's few remaining problems will be argued before the court on June 27, 1980. This procedure has allowed the municipality to redraft its ordinance but has also provided a forum for maximum input by all parties under the guidance and supervision of an impartial expert master.

The parties should have the first opportunity to agree on a master as was accomplished in Bedminster. Failing this, the court should appoint the master giving deference to the opinions of the parties. If corporate relief is to be considered, the developer and the municipality should split the cost of the master. If a low income person or civil rights organization is plaintiff, the municipality should pay for the master.

QUESTION #24

Should the trial judge assume a supervisory role over the implementation of his or her order? If so, how long should such role continue?

Plaintiffs have indicated, in Answer to Question #16, what they believe the appropriate procedure should be in such cases. Judicial involvement on the trial level should be maintained until compliance has been found. Jurisdiction on appeal is discussed in Answer to Question #17.

The remedy suggested in Mt. Laurel, filing of an amended complaint, is unnecessary and too time-consuming. Mt. Laurel, supra, 67 N.J. at 191. When appropriate, judicial intervention may be further secured through an R. 1:10-5 proceeding.

CONCLUSION

The foregoing answers to the twenty-four questions submitted by the Court are endorsed by the following parties and amicus curiae:

URBAN LEAGUE OF GREATER NEW BRUSNWICK

BY: Martin Sloane
MARTIN SLOANE

SOUTHERN BURLINGTON COUNTY N.A.A.C.P. and AMICUS CURIAE, NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE
STANLEY C. VAN NESS, PUBLIC ADVOCATE

URBAN LEAGUE OF ESSEX COUNTY

BY: Joel Kobert
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BY: Kenneth E. Meiser
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BY: Linda Pancotto
LINDA PANCOTTO
Attorneys, Amicus Curiae

Date: 6/26/80

APPENDIX

The South Brunswick zoning ordinance provides:

16-57.3 *Low and Middle Income Units.* Every planned unit residential development shall provide dwellings for families of low and moderate income, including the elderly. A PRD developer shall provide, or cause others to provide, low and moderate income dwelling units which shall not be less than 20 percent of the total number of dwelling units specified in the development plan. In the PRD-7 areas, a total of one low/moderate income mid-rise development up to four stories in height, designed for senior citizens, may be built within the town center, as designated on the master plan, provided that it does not exceed 200 dwelling units, and the density does not exceed 30 units per acre. The maximum building height may be increased up to six stories provided that the height of the building is not greater than the existing height of the trees which will remain in the area following construction, so as to provide for natural screening of the project. All low and moderate income housing shall be built under subsidy programs of the state of federal government or other similar programs acceptable to the planning board.

The East Windsor ordinance, Sec. 20:16b provides:

b. At least five percent and not more than ten percent of the dwelling units within a planned development shall be constructed, kept available for families, whose incomes do not exceed the "Public Housing Admission Limits", as they are defined for East Windsor by the Department of Housing and Urban Development of the United States. At least ten percent but not more than 15 percent of the dwelling units within a planned residential development shall be constructed, made available and maintained for families whose incomes do not exceed the "Family Income Limits for FHA, Sections 235 and 236 Housing Based on 135 percent of Approved or Permissible Public Housing Admissions Limits", as they are defined for East Windsor by the Department of Housing and Urban Development of the United States.

In the event an applicant satisfies the planning board that such units cannot feasibly be built without Federal or State programs of assistance, the applicant shall, with the cooperation, consent and assistance of the Township apply for and diligently prosecute applications for any and all such available programs or otherwise make provisions to satisfy such low and moderate income housing requirements.

The Cherry Hill ordinance, Section 3002(5) provides:

5. LOW INCOME HOUSING

Within each R-5 Multi-Family development, five (5) percent of the total allowed number of units shall be low or middle income housing units, publicly or privately subsidized through Federal, State, local or private housing programs.

A low or middle income housing program is one under which (1) the rental or purchase costs of housing are reduced by direct grant, by below market interest rates, or by continuing direct subsidy payments for rent or interest, and (2) there are regulations which reasonably assure that the dwelling units will be occupied by families or individuals whose incomes would otherwise be insufficient to permit them to occupy housing of equivalent quality and size. The Township Council shall be responsible for determining whether such subsidized programs qualify under the requirements of this Ordinance.

Planned Residential Developments

§606(C)(9): Subsidized and/or Least Cost Housing Requirements

At least twenty percent (20%) of the total number of residential dwelling units within a Planned Residential Development shall be subsidized and/or least cost housing in accordance with the following provisions:

"a. If rental units are provided within a Planned Residential Development, the residential units shall be used to fulfill the required twenty percent (20%) and the rents of said rental units shall be subsidized in accordance with available subsidy programs authorized and regulated by the Federal Department of Housing and Urban Development or the New Jersey Housing Finance Agency. If no subsidy programs are available, this fact shall be certified to the Planning Board, and the rental units shall be restricted in size to be no larger than fifteen percent (15%) greater in area than the minimum net habitable floor area specified for the dwelling units in this Ordinance. Moreover, if no subsidy programs are available, said rental units shall be rented at a cost not exceeding the Fair Market Rents established for Bedminster Township by the Department of Housing and Urban Development, provided that rents may be subsequently increased in conformity with revised and updated Fair Market Rents as published by the Department of Housing and Urban Development.* In any case, not less than five percent (5%) of the units shall have four (4) bedrooms and not less than an additional twenty percent (20%) of the units shall have three (3) bedrooms."

"b. If enough rental units are not provided to fulfill the required twenty percent (20%), dwelling units for sale in the Planned Residential Development used to fulfill the required twenty percent (20%) shall be sold at a cost not exceeding 2 1/2 times the median income (as published by the Somerset County Planning Board) if the dwelling units contain two (2) bedrooms or more, or at a cost not exceeding 2 1/2 times 80% the median income if the dwelling units contain less than two (2) bedrooms. Not less than five percent (5%) of these units shall have four (4) bedrooms and not less than an additional twenty percent (20%) shall have three (3) bedrooms."

---

* This provision is in the process of being changed to substitute an element of the Consumer Price Index instead of HUD fair market rents.

Planned Unit Developments

§606(D)(10): Subsidized and/or Least Cost Housing Requirements

At least twenty percent (20%) of the total number of residential dwellings within a Planned Unit Development shall be subsidized and/or least cost housing in accordance with the following provisions:

"a. At least twenty-five percent (25%) of the required twenty percent (20%) shall be subsidized Senior Citizen Housing units in accordance with Section 601 B. of this Ordinance. If no subsidy programs are available for Senior Citizen Housing, this fact shall be certified to the Planning Board and the required percentage of subsidized and least cost housing in the Planned Unit Development shall be provided in accordance with Sections 606 10.b. and 606 10.c. hereinbelow. The height, parking and other provisions specified for subsidized Senior Citizen Housing units in Section 601 B. of this Ordinance shall not be applied to any other housing within the Planned Unit Development."

"b. At least thirty-five percent (35%) of the required twenty percent (20%) shall be rental units subsidized in accordance with available subsidy programs authorized and regulated by the Federal Department of Housing and Urban Development or the New Jersey Housing Finance Agency. If no subsidy programs are available, this fact shall be certified to the Planning Board, and the rental units shall be restricted in size to be no larger than fifteen percent (15%) greater in area than the minimum net habitable floor area as specified in this Ordinance.

Moreover, if no subsidy programs are available, said rental units shall be rented at a cost not exceeding the Fair Market Rents established for Bedminster Township by the Department of Housing and Urban Development, provided that rents may be subsequently increased in conformity with revised and updated Fair Market Rents as published by the Department of Housing and Urban Development.* In any case, not less than five percent (5%) of the units shall have four (4) bedrooms and not less than an additional twenty percent (20%) of the units shall have three (3) bedrooms."

---

* This provision is in the process of being changed to substitute an element of the Consumer Price Index instead of HUD fair market rents.

State of California

Business and Transportation Agency

Memorandum

To : All Interested Parties

Date: October 25, 1978

From : **Department of Housing and Community Development**
Legal Office

Subject: Inclusionary Zoning

Enclosed for your information you will find a model inclusionary zoning ordinance and a legal opinion on inclusionary zoning prepared by this Department.

We hope this information will assist you in developing a housing program of the housing element that responds to the needs of all economic segments of the community.

If you have any comments or questions concerning the model ordinance, please contact John Atha at 916/445-4725.

Enclosures

MODEL INCLUSIONARY ORDINANCE

A. Findings

The City of _____ declares that the provision of a decent home and a suitable living environment for all is a priority of the highest order; this priority is consistent with state, regional and national policies. Whereas the goal of the city is to achieve a balanced community with housing available for persons of all income levels, there exists within the city a shortage of housing that is affordable to persons of low and moderate income. Federal and state housing finance and subsidy programs are not sufficient by themselves to satisfy low and moderate income housing needs. The city finds that the high cost of housing in new developments has exacerbated and will continue to exacerbate the low and moderate income housing shortage by reducing the supply of developable land that is needed to satisfy the total community need for housing for all income levels. The city finds that the housing shortage for persons of low and moderate income is detrimental to the public health, safety and welfare, and further that it is a public purpose of the city to seek assistance and cooperation from the private sector in making available an adequate supply of housing for persons of all economic segments of the community.

B. Purpose

The purpose of this ordinance is to enhance the public welfare and assure compatability between future housing development and the housing element of the general plan of the city through increasing the production of housing units affordable to persons of low and moderate income. In order to assure that the city's remaining developable land is utilized in a manner consistent with local housing policies and needs, the city declares that all new housing developments shall contain a proportion of housing units affordable to persons of low and moderate income.

C. Definitions

As used in this ordinance, each of the following terms are defined as follows:

1. "Inclusionary unit" means a housing unit which (a) has a monthly contract rent that is equal to or less than the fair market rents (RMR) established by the U.S. Department of Housing and Urban Development (HUD) for the Section 8 rental assistance program for existing units or, (b) is intended for sale with a purchase price that is equal to or less than 3.0 times the median county income (Standard Metropolitan Statistical Area (SMSA) median if available).

2. "Median income" means the median family income as established annually by HUD for the Standard Metropolitan Statistical Area (or, in non-SMSA areas, the county) and updated on annual basis.

3. "Density bonus" means an increase in the number of units authorized for a particular parcel beyond that which would have been authorized by ordinance.

4. "In lieu fee" means a fee paid as an alternative to the provision of inclusionary units or in the absence of these inclusionary provisions.

5. "Resale control" means a mechanism by which affordable units will be maintained in the low and moderate income housing stock over time.

6. "Affordable" means (a) housing selling at a price that is not more than 2.5 times annual household income and (b) renting at a monthly rent that does not exceed 25% of monthly household income.

COMMENTS

A. The findings should describe as specifically as possible the local housing conditions in the community. For example, actual information on the housing need could be presented and employment generating factors in the locality might be cited as creating a need for housing for low and moderate income employees.

B. The statement of purpose should include a more explicit reference to general plan and housing element goals, policies and objectives. In addition, the inclusionary ordinance will become part of the local housing program effort to make adequate provision for housing need as required by the state's housing element law and the California Coastal Act.

C. 1. The provision of rental units at rents equal to or less than HUD's fair market rents will assure that a portion of all new rental units will be available to lower income households eligible for rental assistance under federal housing programs. (See comments on C-6 below.)

C. 6. This defines "affordable" in terms of a selling price of 2.5 times annual household income or a monthly rental of less than 25% of monthly household income. In several places the model ordinance employs formulas which apply factors of 3.0 and 2.0 times median income. These figures are used to simplify the method of determining the range of housing prices at which inclusionary units must sell (Note: 3.0 times the median income is equal to 120% of the median income times 2.5. 2.0 times the median income is equal to 80% of the median income times 2.5.)

7. "Very low income households" means households with annual incomes less than 50% of the median income.

8. "Lower income households" means households with annual incomes less than 80% of the median income.

9. "Moderate income households" means households with annual incomes between 80% and 120% of the median.

D. Applicability

1. All multiple family projects (renter or owner) of 5 or more units.

2. All single family subdivisions of 10 or more units or subdivisons of less than 10 units if contiguous to or part of a phased project for which 10 or more units are approved in a 12-month period.

3. All land subdivisions of 10 or more improved lots approved in a 12-month period.

E. Inclusionary Requirements

1. Rental Projects (a) In rental projects of at least 5 and no more than 50 units, at least ___% and not less than one of the units shall be inclusionary.
(b) In rental projects of at least 51 units and no more than 100 units, no less than ___% of the units shall be inclusionary.
(c) In rental projects of more than 100 units no less than ___% of the units shall be inclusionary. The percentage of inclusionary units shall be increased where the scale of development allows greater savings to the developer and an additional density bonus provided pursuant to Section 63.

2. For Sale Projects (a) In developments with houses intended for sale of at least 5 units and no more than 50 units, no less than ___% of the units shall be inclusionary. The mean price of all inclusionary units shall not exceed 2.5 times the median income, and the price of no less than 25% of inclusionary units and at least one of the inclusionary units shall not exceed 20 times the median income.
(b) In developments intended for sale of at least 51 units and no more than 100 units, no less than ___% of the units shall be inclusionary. The mean price of all inclusionary units shall not exceed 2.5 times the median income, and the price of not less than 25% of the inclusionary units shall not exceed 2.0 times the median income.
(c) In developments intended for sale or more than 100 units, no less than ___% of the units shall be inclusionary. The mean price of all inclusionary units shall not exceed 2.5 times the median income and shall be provided in a range that is affordable to households with an income of 50% to 120% of median income. The price of no less than 25% of the inclusionary units shall not exceed 2.0 times the median! The percentage of inclusionary units shall be increased where the scale of development allows greater savings to the developer.

For example, in C-1 above, an inclusionary sales unit is defined as a unit intended for sale with a purchase price equal to or less than 3.0 times the median income. The same result could be attained by defining inclusionary units in terms of 2.5 times 120% of median income; but such an approach adds a step to the computations required to derive the maximum purchase price for an inclusionary unit.

Example: Median Income = $15,000

Recommended Approach	Alternative
$15,000	$15,000
x3.0	x120%
$45,000	$18,000
	x2.5
(Maximum purchase price for inclusionary units.)	$45,000

E. The percentages used in (a), (b) and (c) of Sections 1, 2, and 3 can differ substantially between jurisdictions based on market area need, median income, market demand (effective) and development costs. As an example, a home affordable to a median income family of four in County A ($18,000, median income) would cost $46,500 (2.5 x $18,000); while in County B, a median income family of four ($13,400) would require a $33,500 home. Assuming development costs are not substantially different, developers in County B will be able to accommodate a higher percentage of homes affordable to median income families where the homes can be sold for $46,500 than will County A developers who will have to accommodate a significantly lower sales price of $33,500. In addition, economic conditions in areas of high median income usually make these housing markets more profitable. Therefore, in housing markets where median income and market demand are high, inclusionary percentages can generally be set at higher levels than in areas where conditions are less supportive.

Another factor that affects developer profits is the savings of scale that usually results in lower per unit costs in larger projects. For this reason the developer of smaller projects should not be expected to provide as many inclusionary units as required in larger developments.

3. Land Subdivisions (a) In land subdivisions of at least 10 lots and no more than 50 lots, at least ___% of the improved lots of an average size of all lots in the subdivision shall be dedicated to the city or its designee for the provision of housing affordable to low and moderate income households. The dedicated lots shall be of a developable nature.
(b) In land subdivisions of at least 51 and no more than 100 lots, at least ___% of the improved lots of an average size of all lots in the subdivision shall be dedicated to the city or its designee for the provision of housing affordable to low and moderate income households. The dedicated lots shall be of a developable nature.
(c) In land subdivisions of more than 100 lots at least ___% of the improved lots of an average size of all lots in the subdivision shall be dedicated to the city or its designee for the provision of housing affordable to low and moderate income households.

In the jurisdictions included in the California coastal zone and South Coast Air Basin several developers, in order to comply with state law, have agreed to construct inclusionary units. In these cases as many as 35%-40% of the units have been inclusionary.

Using the above parameters a reasonable percentage range can be established. It is recommended that jurisdictions with a high median income and other factors conducive to developing inclusionary units include minimum percentages as follows: (a) 15%, (b) 20%, and (c) 25%. In cases where the median income and developer profit are low, the percentage range may reasonably be reduced.

F. General Requirements

1. All inclusionary units and dedicated lots shall be reasonably dispersed throughout the development and shall contain on an average the same number of bedrooms as the noninclusionary units in development.

2. All inclusionary units identified in Section C-1-b shall be sold to low and moderate income households. The household income of a purchaser of an inclusionary unit shall be within 10% of the affordability standards identified in Section C-6.

3. All inclusionary units shall be subject to resale controls in order to maintain low and moderate income units at the affordable level over the life of the unit. For a sales unit, the resale control may take the form of a co-tenancy agreement, limited equity cooperative, a deed restriction, or any other mechansim agreeable to the city which will limit the appreciation of equity and provide that the unit will only be resold to an eligible low or moderate income household. For rental units, developers must agree and bind any successors to maintain units at HUD-established fair market rentals for existing units.

F. 3: This is a key provision that assures that units constructed for low and moderate income households will be maintained in the affordable housing supply. The city may wish to spell out in more specific detail the resale control program (Attachments A, B and C provide models for different resale programs). For example, the following language might be appropriate for the requirement of deed restrictions:

Inclusionary units must be sold with covenants attached to the deed which require the following:

(a) the purchaser is prohibited from renting, leasing, or assigning rights to the units.

(b) the city or its designee has a 60-day option to purchase the unit if the buyer decides to sell; if the buyer intends to sell, he or she must notify the city.

(c) the unit will be sold to the city at a price which is determined as follows: (i) the lesser of (a) the original sales price plus [the original sales price times the mean rate of inflation during tenure (established by the overall consumer price index for the city) times the tenure in terms of complete years], or (b) the appraised market sales price at the time of sale; (ii) the sales price shall be increased by the amount equal to the value of any improvements; (iii) the sales price may be reduced by a reasonable fee established to pay for the administrative costs incurred by the city or its designee through the resale; (iv) the sales price shall be reduced by an amount necessary to put the unit in marketable condition.

4. All inclusionary units identified in Section C-1-a shall be offered to Public Housing Agency (PHA) certified households that are eligible for rental assistance programs. If rental assistance programs are available, the owner of the rental units shall enter into such programs, offering rental units to assisted low income households. If rental assistance progams are unavailable, all inclusionary units shall be rented to low and moderate households with monthly incomes that do not exceed four times the contract rent.

5. All inclusionary units in a project or phase of a project must be developed simultaneously with or prior to the development of noninclusionary units.

G. In-Lieu Fees

1. In developments of 20 units or less where, due to the extreme cost of development, the planning commission deems that the provision of inclusionary units will constitute extreme hardship, the developer may pay an in-lieu fee instead of providing inclusionary units. The amount of the fee shall be determined by the following formula: estimated average sales price of a newly constructed 1200 square foot unit in the jurisdiction (such estimate to be made by the appraisal section of the county assessor's office and be updated on a quarterly basis) minus the median income times 2.0, times the number of inclusionary units required in Section E-1-a and E-2-a.

G. 1. The in-lieu provisions provide an equitable solution to developers who cannot comply with the inclusionary requirements. The fee amounts to the difference between what a moderate income household (at 80% of median income) can afford and the market price of a modest sales unit.

2. In land subdivision of 25 units or less where, due to the extreme cost of development, the planning commission deems that the dedication of improved lots will constitute extreme hardship, the developer may pay an in-lieu fee instead of making a land dedication. The amount of the fee shall be determined by the following formula: estimated sales price of an improved lot of the average size of all lots in the subdivision (such estimate to be made by the appraisal section of the county assessor's office and be updated on a quarterly basis) times the number of lots required in Section E-3-a.

H. Density Bonus

1. In projects meeting the minimal requirements of Section E-1 and E-2 or G-1, one additional conventional unit shall be allowed for every two inclusionary units constructed or in-lieu payments made to the city.

2. In land subdivisions meeting the minimal requirements of Section E-3 or G-2, one additional lot will be allowed for every two lots dedicated or in-lieu payments made to the city.

3. In projects where the number of inclusionary units exceeds the number required in Sections E-1 and E-2, one additional noninclusionary unit shall be allowed for every additional inclusionary unit.

I. Reduced Zoning Requirements

1. All inclusionary units shall be allowed the following reductions in zoning and subdivision requirements: (list items)

I. 1. The city's zoning and subdivision requirements must be analyzed to determine what reductions are appropriate. It is strongly recommended that lot size and floor area minimums be provided which will reduce the cost of units. Consideration could likewise be given to reducing frontage requirements, parking and garage requirements, amenity requirements, permit fees and time required for permit processing and waiving amenity requirements for inclusionary units (e.g. open space).

J. Compliance

All final subdivision tract approvals or building permits in the case of apartment projects shall have conditions attached which will assure compliance with the above provisions. Such conditions may specify the number of inclusionary units at appropriate price levels, the certification of incomes of purchasers and renters of inclusionary units to assure that the affordability standard is adhered to, a resale control mechanism, a requirement for dispersal of inclusionary units, density bonuses and reduced zoning requirements.

J. Alternatively the city may prefer compliance through performance agreements with developers wherein they agree by contract to satisfy the requirements of the ordinance.

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Attorneys for Plaintiff,
The Allan-Deane Corporation

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-SOMERSET COUNTY
DOCKET NOS. L-36896-70 P.W.
L-28061-71 P.W.

THE ALLAN-DEANE CORPORATION, et al.,	:	
Plaintiffs,	:	Civil Action
vs.	:	ORDER APPOINTING MASTER
THE TOWNSHIP OF BEDMINSTER, et al.,	:	
Defendants.	:	

THIS MATTER having come before the Court by way of Application for Relief to Litigants, pursuant to R.1:10-5, and this Court having issued an Order to Show Cause on April 19, 1978 providing for a hearing for the purpose of considering whether Defendants had complied with the previous Orders of this Court and, in the event of a finding of noncompliance, for a determination as to the appropriate remedy, and this Court having determined in an Opinion handed down on December 13, 1979 and by Order

entered on January 4, 1980 (mistakenly dated January 4, 1979) that Defendants have, in fact, not complied with the previous Orders of this Court and the Court having determined in an oral decision handed down on January 29, 1980 to order Defendants to rezone a defined area of the Township within a given time period, under the supervision of a Court Appointed Master, qualified as a planning expert, to act on the Court's behalf as more particularly set forth in this Court's Order for Remedy to be entered hereafter;
and this Court having further ordered the parties to attempt to come to an agreement as to the identity of the Master, and the parties having reached such an agreement,

IT IS on this 22d day of February 1980,

O R D E R E D as follows:

1. George M. Raymond, President of the planning firm of Raymond, Parish, Pine & Weiner, Inc. is hereby appointed the Master, to act on the Court's behalf to monitor the Defendants' efforts with respect to:

a. This Court's Order to rezone the 202-206 Corridor in Bedminster Township.

b. This Court's Order to review and revise all pertinent land use ordinances affecting development within such corridor.

c. This Court's ruling that the corporate plaintiff is entitled to receive prompt and specific relief.

2. The Allan-Deane Corporation and Bedminster Township are ordered to equally share the cost of the time and services of the Master and his firm. Raymond, Parish, Pine and Weiner's fee schedule attached hereto as Exhibit "A" is hereby approved as the rates for the services of the said George M. Raymond and his firm, which shall be billed to the parties.

The Master shall submit monthly invoices and duly executed vouchers on the appropriate forms for services rendered at the rates set forth in Exhibit "A" to the plaintiff Allan-Deane and the defendant Township of Bedminster, which shall each pay one-half thereof.

3. Duties of Master

The Master appointed herein shall have the duty to:

A. Attend, either personally or through a representative, and, if he chooses, participate in all public meetings, informal meetings, and work sessions of the Township Committee, Planning Board or other special committee at which Bedminster Township's duties under this Court's Orders are discussed or acted upon.

B. Analyze the proposed revised ordinances to

be presented to the Court by the Township and submit a written report to the Court, on or before May 9, 1980, on the issues of whether such ordinances:

a. Comply with the opinions and orders of this Court;

b. Are in substantial conformity with the regional planning for the area by all appropriate regional planning agencies including, but not limited to the Somerset County Planning Board, Tri-State Regional Planning Commission; and the Department of Community Affairs Division of State and Regional Planning.

C. To observe and monitor the application process by the plaintiff, Allan-Deane, following the adoption of suitable land use ordinances for a planned development through at least the preliminary approval stage, and shall remain available to report to the Court if any dispute arises involving that application. Thereafter, Allan-Deane may make application to this Court to continue the services of the Master through construction and the issuance of certificates of occupancy.

D. To undertake such other responsibilities as the Court may deem necessary or desirable to speedily implement the relief ordered in this proceeding.

B. THOMAS LEAHY, J.S.C.