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McCARTER & ENGLISH
ATTORNEYS AT LAW
550 BROAD STREET
NEWARK, NEW JERSEY
07102

January 11, 1982

Re: Bedminster Township ads Allan-Deane
Docket No. A-636-80-T1

Elizabeth McLaughlin, Clerk
Appellate Division
Office of the Clerk
Room 316
State House Annex
CN 006
Trenton, New Jersey 08625

Dear Ms. McLaughlin:

I enclose for filing an original and four copies of Brief and Appendix on behalf of defendant-respondent, Bedminster Township.

We enclose also Certification of Service.

Sincerely,

Alfred L. Ferguson

ALF/nw
Enclosures
cc: Honorable B. Thomas Leahy ✓
Henry A. Hill, Jr., Esq.
Kenneth E. Meiser, Esq.
George M. Raymond, AICP, AIA

THE ALLAN-DEANE CORPORATION, et al.,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
	:	DOCKET NO. A-636-80-T1
Plaintiffs-Respondents,	:	
vs.	:	Civil Action
THE TOWNSHIP OF BEDMINSTER, et al.,	:	
Defendants-Respondents.	:	
	:	

BRIEF FOR DEFENDANT-RESPONDENT
TOWNSHIP OF BEDMINSTER

Alfred L. Ferguson
Kathleen M. Miko
On the Brief

McCarter & English
550 Broad Street
Newark, New Jersey 07102
(201)622-4444
Attorneys for Defendant-Respondent

Table of Contents

Table of Contents continued

Table of Authority

Table of Authority continued

Table of Authority continued

Table of Authority continued

Cases — Page

Table of Authority continued

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Township of Bedminster will rely on the procedural histories and statements of facts as stated by the Public Advocate and as amplified by Allan-Deane in their respective briefs, with the following additions:

1. Reasons For Bedminster Township's Decision Not To Include Resale Price Control On Sales Units In The Ordinance

The Township of Bedminster specifically declined to include any mandatory resale price control or any provision which would guarantee the actual construction of affordable sales units. The reasons for this decision are important and are not sufficiently set forth in the statement of facts of the other parties.

In the Order for Remedy, dated March 6, 1980, the Court directed the Township to draft and submit for comment a new land development ordinance (for purposes of this case the distinction between zoning and site plan approval is irrelevant). The new ordinance directed the Township to include a number of types of provisions (small lots, two family units, planned developments, density controls, performance standards for environmental protection, and the like) and specifically included:

> "provisions mandating specific percentages of least-cost or subsidized units."

The drafting process under the supervision of Mr.

Raymond, the court-appointed planning master, commenced in March and finished in October, 1981. The process was, in simplest terms, a mechanism designed to produce the most inclusionary set of development regulations possible in the Development Corridor (that area delineated by Judge Leahy in his Order for Remedy). The new ordinance was, in fact, negotiated by and between the Township, the corporate developer, the Public Advocate (who had both amicus status in his own right as Public Advocate, and who also had been substituted as the attorney of record for the individual plaintiffs) and, most important of all, Mr. Raymond. Many proposals were put forward, either by the parties or by Mr. Raymond. Many proposals and ideas were discarded as the result of the discussions and given-and-take which occurred in the twice weekly meetings of the representatives of the parties involved. These representatives included the lawyers for the parties, two planners for Bedminster Township, at least three planners and two architects for the corporate developer, Mr. Raymond (a planner himself) and others of his staff, including other planners and engineers, and from time to time various structural, traffic and environmental engineers. The rooms chosen for the meetings were at times too small for the assembled professional staffs. With all this professional help every type of development regulation was considered: those that had been used in New Jersey, those that had been used in California, those that the planners had

merely heard about but wanted to investigate; and some which were invented on the spot.

It was in this context that the initial draft ordinance contained a provision for resale price control and internally subsidized (or rent skewed) sales units. The idea was to get this proposal on the table and subject it to the critical discussion of all parties. Such critical discussion in fact occurred, and the only party totally in favor of such a provision was the Public Advocate.

The question of the legality of resale price controls on sales units was raised fully in the process, and counsel for Bedminster Township advised Judge Leahy that we had in fact rendered an opinion to Bedminster that serious questions of anti-trust liability were involved. See letter to Judge Leahy, May 22, 1980 (PAD 103a-110a).

Although potential anti-trust illegality was the initial reason for rejecting resale price controls, it was evident from the discussions of all the problems associated with any kind of set-aside ordinance (sales units and rental units) that Bedminster Township did not, as a matter of municipal policy, want to adopt any ordinance which would require for its successful operation the creation of, and the continued supervision by, a housing authority, rent control board, tenant eligibility board, tenant eligibility standards, etc. The Township believed that these

extra layers of governmental regulation would in fact be antithetical to the concept of least-cost housing which they understood to be mandated by the New Jersey Supreme Court in Madison and by Judge Leahy in his order for remedy.

In short, Bedminster rejected the Public Advocate's request for resale price controls, housing authorities, rent control, and the like, not only on the grounds that such regulations might be invalid under the anti-trust laws of the United States and New Jersey, but more importantly on the grounds of municipal policy: the regulations would be burdensome, expensive to administer, necessitate the creation of additional layers of governmental bureaucracy, would be cost generative, and would increase not only the cost of housing in the Allan-Deane development, but also the cost of housing in general.

Moreover, there was absolutely no evidence presented by anyone, either in the trial before Judge Leahy or by any party during the ordinance drafting process (which lasted over six months), which suggested that the rent skewing and the mandatory inclusionary building programs proposed by the Public Advocate would, in fact, work. Indeed, there was some indication that they had been unsuccessful in the very few instances when they had been tried, even on a limited basis.

2. Motion for Stay

On May 1, 1981, the individual plaintiffs, now represented by the Public Advocate, appealed. In June of 1981, the defendant Township of Bedminster moved before Judge Leahy for an order staying all further proceedings in this case, pending appeal. Such a stay would have halted the development applications of the corporate plaintiff Allan-Deane. The reason for the motion was to make sure that the development applications of the developer plaintiff did not proceed to the point where any rights would have "vested" under the Municipal Land Use Law, before the appeal had been decided. The Township wanted to make sure that the corporate developer would be bound by any determination of any appellate court as to what inclusionary remedies were mandatory. If any remedies were found mandatory by the appellate courts beyond those already contained in the ordinance, Allan-Deane, as the owner of the largest undeveloped piece of real property in the Development Corridor, would have to implement those remedies. Unless such a stay or other order was entered, the corporate developer might proceed so far with the development application process that its rights would become vested, and it would not have to comply with any further court order.

Anticipating that Judge Leahy would not stop the development application process completely, Bedminister requested

that an alternative order in lieu of stay be entered which would protect the ability of Bedminster Township to insist that the corporate developer comply with and implement any order of any appellate court, irrespective of which particular stage of the development application process had been completed. The motion was adjourned at the first hearing in June at the request of Mr. Raymond. After extensive oral arguments on November 4, 1981, Judge Leahy agreed with the position of Bedminster Township. The order set forth in the Appendix of Allan-Deane (PAD 157a) was in fact entered under date of November 16, 1981. (DM a) Under this order any units for which development applications are approved must be included in the calculations as to whether the requirements for affirmative remedial action which may be imposed by an appellate court have been met. Thus, although Allan-Deane may receive some initial approvals for housing units without having the burden of mandatory inclusionary remedies (if they are ordered as a result of this appeal), compliance with affirmative remedies must nevertheless be provided based on the total number count of the entire development.

The Order in Lieu of Stay of November 16, 1981, is important insofar as Allan-Deane argues that it should not necessarily be made to comply with whatever requirements result from this appeal or from the decision in the six consolidated cases now pending in the Supreme Court. See Allan-Deane brief,

PTIII, p. 27-30. On this one point Bedminster and Allan-Deane are in significant disagreement. This problem, however, has already been decided by Judge Leahy adversely to Allan-Deane and is not raised in this appeal by the Public Advocate.

PRELIMINARY STATEMENT

This case no longer involves exclusionary zoning. Bedminster has adopted and Judge Leahy has approved, a very comprehensive and innovative land use ordinance: all undue cost generating elements have been eliminated; there is overzoning for least-cost housing; the major portion of the area in Bedminster Township served by existing and planned infrastructure has been designated for multi-family housing and various devices have been utilized to encourage the building of least-cost housing. In short, the Bedminster ordinance complies with the requirements of the Mt. Laurel and Madison cases, as those cases were decided and written by the New Jersey Supreme Court and understood by all courts and most commentators, other than the Public Advocate.

The sole issue in this case is the cost of housing, which has become exceedingly high in relationship to housing costs over the last 30 years. The Public Advocate is attempting in this case (and in the cases now pending before the New Jersey Supreme Court) to fundamentally change the Mt. Laurel and Madison rulings. The Public Advocate reads those cases, and would have this court reinterpret those cases, to require that municipalities and developers must guarantee the actual construction of low and moderate income housing, at prices lower than prevailing market prices. The Public Advocate in this case proposes that the

developer be made to construct affordable housing as the price for specific corporate relief. In the six consolidated zoning cases pending in the Supreme Court, the Public Advocate has argued for the "presumptive entitlement mechanism" under which any developer proposing to build affordable housing would be presumptively entitled to a building permit, irrespective of where the land is located and irrespective of the other site limitations and planning considerations. These proposals have stirred much comment and controversy, both from lawyers and planners. Some aspects of these proposals are being legislatively or administratively implemented in New Jersey and other jurisdictions, on a very limited scale. But in no jurisdiction, anywhere in the United States, have such proposals been required as a matter of constitutional obligation as the Public Advocate proposes in this case.

There are many causes of the escalating cost of housing. High interest rates rank first; then come energy costs, costs of environmental controls imposed upon the building products industry and upon the residential construction industry; labor costs; the long and costly delays of the approval process; and inflation in general. Housing costs have been increasing at a faster rate than inflation generally.

Absent from this list of significant causes of high housing costs is the impact of exclusionary land use controls. No

one has contended, in this or any other exclusionary zoning litigation, that the elimination of exclusionary land use controls would in fact make any significant amount of housing affordable to any low and moderate income group. In fact, if all land use controls were eliminated -- if there were no zoning at all -- the cost of housing would still be prohibitively high, and the housing problems of New Jersey would remain acute.

The exclusion which the Public Advocate attacks in this case is exclusion by income and inequality caused by the inability of 90% of Americans to afford a new home. Carl Bisgaier, in charge of all exclusionary zoning cases in the Public Advocate's office, has publicly stated this view: "Our perspective is that poverty can't be legal."[1]

The sole issue in this case, therefore, is whether this Court should engraft upon the Mt. Laurel and Madison constituitonal doctrines a quasi-legislative/administrative attempt to solve the problems of high cost housing: whether developers and municipalities have the obligation to guarantee the production of housing affordable to low and moderate income groups. The Public Advocate, in this quest for affordable housing at any price, would have the courts of New Jersey adopt this

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[1] Carl Bisgaier, quoted in DePalma, "Morris County Verses the Public Advocate", 9 N.J. Reporter No. 10, p. 14, 21 (May, 1980).

legislative and result-oriented approach. The New Jersey Supreme Court specifically rejected this approach in Madison, and all other courts have agreed.

Judge Leahy in this case correctly characterized the law in New Jersey as follows:

> As I understand the decisions which control this Court's thinking, the obligation is on the municipality to get out of the way, but not to push -- [municipalities] are not to prevent the creation and providing of housing . . . but it is certainly not clear to this court yet that there is any obligation on the part of the municipality, in the [absence] of legislation, to affirmatively attempt to generate housing of any type. I therefore reject the argument of the Cheiswick plaintiffs and of the Public Advocate . . . .

June 27, 1981, Tr. at 5-6 (Leahy, J.) The consitutional duty of municipalities is to get out of the way. Bedminster has in fact done this, and more.

POINT I

THE BEDMINSTER ORDINANCE COMPLIES WITH, AND EXCEEDS, MT. LAUREL AND MADISON REQUIREMENTS

A. The Mt. Laurel and Madison Requirement

The decision in Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, cert. denied, 423 U.S. 808 (1975), is directed solely toward elimination of the improper use of zoning to exclude certain economic groups, which use was characterized as the "dark side of municipal land use regulation." 67 N.J. at 193 (Pashman, J., concurring).

Mt. Laurel specifically recognized that the elimination of these abuses of the zoning power would not directly result in the production of low and moderate income housing, since the economics of housing construction generally necessitate some form of governmental subsidy or assistance. Id. at 170 n.8; 188 n.21.

The Mt. Laurel decision also recognized that even non-exclusionary zoning would do little to alter housing market conditions:

> Courts do not build housing nor do municipalities. That function is performed by private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government. The municipal function is initially to provide opportunity through appropriate land use regulations. . . .

Id. at 192.

Any ambiguity as to the meaning of the Mt. Laurel duty was resolved in Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977), where the concept of "least cost" housing was introduced. Id. at 210-14. There the court squarely addressed the realities of housing construction economics, which had been previously acknowledged in Mt. Laurel. The Court explained that zoning regulations permitting the construction of housing at the least cost consistent with minimum health and safety standards would indirectly benefit the lower income housing supply through the "filtering down" process. Madison, 72 N.J, at 512-14.

Accordingly, the Mt. Laurel duty was confined to the proper exercise of zoning power; the court expressed the legal obligation as follows:

> As a developing municipality, Mt. Laurel must, by its own land use regulations, make realistically possible the opportunity for an appropriate 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.

67 N.J. at 187 (emphasis supplied).

In Madison, the court rejected the Public Advocate's argument for a

> judicial mandate that developing municipalities be required affirmatively to act for the creation of additional lower income housing in more ways than by eliminating zoning restrictions militating against that objective.

* * *

> While we have described the sponsorship of public housing projects as a moral obligation of the municipality in certain specified circumstances, Mt. Laurel, 67 N.J. at 192, we have no lawful basis for imposing such action as obligatory.

Id. at 546 (emphasis supplied). Accordingly, the court deemed it unnecessary to comment upon various additional proposals designed to enforce lower cost housing. Id. at 547. Those additional proposals were also made by the Public Advocate as amicus in Madison. The broad reading of the Mt. Laurel duty proposed by the Public Advocate was squarely rejected by the court in Madison, supra at 546.

A final indication of the scope of the Mt. Laurel duty, and the proper role of a trial court in reviewing Mt. Laurel claims, is provided by the Supreme Court's decision in Pascack Ass'n., Ltd. v. Mayor of Washington, 74 N.J. 470 (1977). In Pascack, the court reaffirmed the continued validity of the rule of judicial respect for local policy decisions in the zoning field. 74 N.J. at 481, 485. More specifically, the court stated that, "the judicial branch is not suited to the role of an ad hoc super zoning legislature," and emphasized that there are reasonable differences of opinion as to many specific zoning issues. 74 N.J. at 487-88. The court also observed that it had gone "as far in that general direction as comports with the limitations of the judicial function, in [its] determination in Mt. Laurel, supra,

and Oakwood at Madison, supra." 74 N.J. at 487-88. Thus, when a court is implementing the Mt. Laurel mandate, the court must respect local policy decisions as to the appropriate measures for compliance, provided that they are reasonably directed toward the Mt. Laurel goal. The trial court should not try to implement remedies which seek to guarantee affordable housing.

In summary, Mt. Laurel and Madison require only that municipalities must eliminate land use regulations which prevent the construction of an adequate quantity of least cost housing. In addition, under the particular circumstances of the Madison case, there is a duty to structure some zoning provisions so as to encourage the construction of units with multiple bedrooms.

That, however, is the maximum Mt. Laurel duty which the New Jersey Supreme Court has imposed upon municipalities. There is no duty to assure that affordable housing is actually built.

C. The Bedminster Ordinance

The trial court held that the revised Bedminster Township Land Development Ordinance complied with all Mt. Laurel and Madison requirements. An analysis of the Ordinance shows that Judge Leahy was correct.

The Ordinance is the result of an innovative process involving the participation of a court-appointed planning master, George Raymond, who actively monitored the rezoning process,

communicated with all parties, and submitted a series of written reports advising the trial court. The record of this thorough and conscientious review process is itself very substantial support for the trial court's determination that the Ordinance complies with not only the requirements of Mt. Laurel and Madison, but with the best possible planning theory presently available. That holding should not be disturbed absent a clear misapplication of the law or abuse of discretion.

The Ordinance represents the elimination of cost-generating provisions and the implementation of provisions which permit and encourage the construction of different housing types. The Ordinance contains adequate zoning for multi-family units, without the excessive cost-generating requirements and disincentives for larger units condemned in Mt. Laurel and Madison. The Ordinance also permits a variety of other units on small lots, including single-family detached units on 6,000 square foot lots, semi-detached units on 3,750 square foot lots, and two-family units on 7,000 square foot lots. In Madison, the court described an obligation to enact zoning ordinances which encourage the construction of, for example, multi-bedroom units. Bedminster Township has done this, and more. Its experimental, inclusionary provisions directly address the need for least-cost housing.

These provisions, which appear at §606(C)(9) and §606(D)(10) of the Ordinance and which apply to both Planned

Residential Development ("PRD") and Planned Unit Development ("PUD") options, require that 20% of the housing units in PRD and PUD developments either be subsidized or "least cost" units. The detailed provisions for compliance with this 20% requirement can be summarized as follows:

1. Subsidized housing. In PRD projects, subsidized housing must be used to satisfy the 20% requirement to the extent that the development contains rental units. In PUD projects, at least 25% of the 20% requirement must be satisfied with subsidized senior citizen housing and at least 35% of the 20% requirement must be satisfied with other subsidized rental units. If subsidies are unavailable, then the least cost provisions apply, as discussed below.

2. Least Cost Mini/max provisions. Non-subsidized rental or sale units used to satisfy the 20% requirement may have a maximum net habitable floor area ("NHFA") of 115% of the minimum NHFA. The applicable minimum NHFAs for different types of units are the lesser of either the NHFAs specified in the ordinance or the NHFAs utilized by the New Jersey Home Finance Agency.

3. Rent controls. For non-subsidized rental units used to satisfy the 20% requirement, the initial rent levels cannot exceed the Fair Market Rents for the area as established by the U.S. Department of Housing and Urban Development. These figures are published periodically in the Federal Register. Subsequent rent increases cannot be greater than the change in the Consumer Price Index.

4. Multi-bedroom requirements - rental units. Of the rental units built under these sections of the Oridnance, at least 20% must contain 3 bedrooms and at least 5% must contain 4 bedrooms.

5. Multi-bedroom requirements - sales units. Sales units utilized to satisfy this requirement must comply with the following distribution: 1-bedroom units 30-40%; 2-bedroom units 30-40%; 3-bedroom units 10-20%; 4-bedroom units 10-20%.

6. Phased development. If a PRD or PUD is to be built in phases, then §805(c)(8) of the Ordinance establishes ratios of subsidized to non-subsidized units which must be constructed and/or committed prior to final approval of individual sections of the development.

Under the Ordinance, PRD and PUD developers are required to participate in housing subsidy programs conditioned only upon the availability of subsidy funds. This is a reasonable exception, since municipalities have no control over the appropriation of such funds by the state and federal governments. This requirement has been imposed by Bedminster Township, even though the Supreme Court has clearly held that municipalities have no legal obligation to sponsor or require public housing projects. Madison, 72 N.J. at 546. See Point I(A), supra.

If subsidies are unavailable, then the least cost mini/max mechanism requires the construction of smaller size units, with NHFAs not to exceed 115% of the minimum NHFA specified by the New Jersey Housing and Financing Authority. These smaller units will sell for less, and therefore will be more affordable, than the larger units in the same section of the development.

The Public Advocate objects to the use of HUD fair market rent guidelines as a basis for Bedminster rent ceilings

where subsidies cannot be obtained (PAb15) on the theory that the rents thus established would be too high to satisfy low and moderate income requirements. This argument fails to recognize that the rent ceilings were adopted and designed to provide "least cost", and not lowest cost or affordable housing. The concept involves numerous cost factors which may vary depending upon the particular location, site, project and builder. The HUD procedure relies solely upon comparable units of modest design (see 45 Fed. Reg. 58 040, Aug. 29, 1980), and it use of the 75th percentile is an appropriate method to allow for these cost variations. Consequently, it is proper for the HUD Market Rents to be utilized as a reasonable measure of least cost, particularly since this is readily available to the Township at no expense. While a municipality could conceivably opt for the more costly and complex procedure urged by the Public Advocate, the selection of a simpler method using HUD Fair Market Rents is not illogical or unreasonable.

The rent ceiling provisions discussed above have been voluntarily adopted by the Township as an affirmative measure to encourage least cost housing, even though this is absolutely not required under Mt. Laurel and Madison. Consequently, there is no justification for a court to impose what the Public Advocate believes is a better alternative; the Bedminster legislative judgment should be given due deference. See Pascack Association, supra, and discussion thereof, supra, at 14.

In addition, the Public Advocate's argument presumes that the achievement of lower rent ceilings can be accomplished by shifting the economic burden to private parties through the requirement of mandatory internal subsidies. This position is legally and logically without merit. See discussion, infra.

* * *

In summary, the zoning ordinance of Bedminster Township has been completely revised in order to comply with the New Jersey Supreme Court's decisions in Mt. Laurel and Madison. Exclusionary barriers to least cost housing have been eliminated, and innovative provisions have been adopted to encourage the actual construction of both least cost and subsidized housing. These affirmative actions by Bedminster Township exceed any reasonable interpretation of the scope of the Mt. Laurel mandate. The trial court had the benefit of a court-appointed planning expert, enabling the judge to make a fully informed decision in approving the revised Ordinance. Under these circumstances, the objections and proposals suggested by the Public Advocate must be rejected.

POINT II

A DEVELOPER SHOULD NOT BE COMPELLED TO GUARANTEE AFFORDABILITY AS THE PRICE OF CORPORATE RELIEF

The Public Advocate argues that an obligation to guarantee low/moderate housing must be imposed upon a corporate developer who wins a lawsuit and is granted specific corporate relief.

This is substantially the same argument that the Advocate made in Caputo v. Chester Township, Docket No. 16,455, now pending in the Supreme Court; there it was called "presumptive entitlement." A developer who "won" an exclusionary zoning case would be entitled to a building permit provided (1) the developer would provide "affordable" housing; and (2) the development was environmentally safe. See Public Advocate's amicus brief, and Chester Township's reply brief, submitted to the Supreme Court in No. 16,455.

In the Bedminster case the Advocate takes a further step: any developer that gets any help from a court should be made to provide 20% affordable housing. This proposal must fail.

First, this result is not mandated by Madison. See discussion, 72 N.J. at 548-551. In Madison, the developer offered to provide 20% affordable housing; the Supreme Court accepted that offer. 72 N.J. 551. The affordable housing requirement was a

matter of contract.[2] Allan-Deane made no such offer; in fact, Allan-Deane was at all times very careful not to offer such a broad committment.

Secondly, and more significantly, the imposition of an affordable housing burden on the fruits of what a developer wins will adversely effect that which specific corporate relief is designed to achieve: encouragement of developers to litigate against municipalities in the public interest. Indeed, there can be no question but that mandatory affordable housing quotas, imposed on developers, will have one or all of the following short term results:

(1) Lower the return to the developer;

(2) Necessitate mechanisms (housing authorities, tenant lists, eligibility standards review, etc.) which will prolong the approval process and give exclusionary communities more opportunity to hinder developers;

(3) Mandate internal subsidies; see discussion of resulting practical problems, infra;

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[2] One can only speculate whether the Madison developer knew what it was getting in for. Certainly the affordable housing has not been built. We are advised that there has been a settlement of the dispute, approved by the court, providing that 350 out of 1750 units must be "designed for occupancy" by persons of low or moderate income. The terms and conditions are as yet undefined. No units of any kind have been built.

(4) Foster the opportunity for more governmental regulation of the development enterprise.

The long term result is obvious: developers will go elsewhere; the reward will not be worth the time, effort and money it will cost to supply mandatory affordable housing under government supervision.

Alternatively, the "non-affordable" 80% of non-internally subsidized units will cost more as a result of cost-shifting and costs of increased governmental and judicial regulation.

On the facts of this case, Allan-Deane did not get very much corporate relief at all - only the benefit of the Master and 10 days notice of any proposed changes to the ordinance. The remedy process of drafting the new ordinance with the Master benefitted all plaintiffs and involved the whole town, not just Allan-Deane, and Allan-Deane had to pay one-half of the Master's costs. There is simply no factual basis for saying that Allan-Deane received any special benefit as a result of the Order granting specific corporate relief for which it should be made to pay the very considerable price of having to provide 20% affordable housing.

* * *

It makes no conceptual sense to impose the affordable housing burden on the winning developer, who paid for the costs of

litigation, and not to impose the burden on the neighboring developer who sat back and waited.[3] Imposing the burden of affordable housing on a developer who wins his lawsuit adds insult to injury; having been forced to sue the town in the first instance, he now has to bear the extra cost of affordable housing as a reward for having won! And his neighbor, who did not even have to hire a lawyer, receives the same benefit, pays none of the cost, and laughs all the way to the bank. This destroys a developer's incentive and discourages litigation which has an otherwise socially useful result: the production of more housing.

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[3] Little attention has been given to the litigation costs of specific corporate relief. Allan-Deane and Bedminster have spent many hundreds of thousands of dollars to fund the nine month remedy process supervised by the Master. This must result in higher housing costs and higher taxes.

POINT III

THE IMPOSITION OF MANDATORY INTERNAL SUBSIDIES IS NOT A PROPER JUDICIAL REMEDY

A. Internal Subsidies By Developers Cannot Be Judicially Imposed

The Advocate contends that Bedminster Township should be compelled to require developers to internally subsidize a portion of the housing units constructed in a given development. This could generally be accomplished by requirements which limit rents and/or sales prices to levels below those which permit the developers to receive a reasonable return on the land and construction costs for those units. Under such controls, developers cannot obtain a reasonable return on their entire investment unless they charge a disproportionate amount for the sale or rental of the non-controlled units. Thus, cost-shifting occurs, with some individuals obtaining below market cost housing at the expense of others who pay more than they otherwise would be required to pay.

In Madison, the New Jersey Supreme Court used the term "rent skewing" to generally refer to the various forms of private internal subsidy. See Madison, 72 N.J. at 517-19. The Madison Court refused to compel the adoption of such provisions and expressed its reservations about "rent skewing" as follows:

> We are constrained to take a more reserved position as to the validity of zoning provisions for "rent skewing," or the allowance of greater density in either sale or rental accommodations in exchange for special con-

cessions by the developer of rental or sale price of a limited number of units. Although this is also a widely recommended zoning technique for handling the problem of encouraging private construction of lower income housing, we discern serious problems with the exercise of local zoning power in such a manner without express legislative authorization. See Board of Supervisors v. De Groff Enterprises, Inc., 214 Va. 235, 198 S.E. 2d 600 (Sup. Ct. 1973); Annot. 62 A.L.R. 3d 880 (1975). We will not here resolve the issue in the absence of adequate argument on the matter. However, we are not to be understood as discouraging local initiative in this area; the question, moreover, deserves legislative study and attention.

Id. at 518-19. Footnote 28 is significant:

[28] "Rent Skewing" is a generic term referring to the imposition of a greater proportion of land, construction or other costs on one group of units in a development in order to lower the eventual rental or sale price of another group of units therein. Rent skewing can be encouraged by a municipality in two ways: requiring that a mandatory percentage of moderately priced dwellings be constructed (this is often referred to as an MPMPD ordinance) or allowing a developer a density bonus enabling him to build, for example, one conventional unit for every two low or moderate income units constructed. See Kleven, "Inclusionary Ordinances--Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing", 21 U.C.L.A. Rev. 1432 (1974).

Various alternatives have been suggested for satisfying the low and moderate income requirements: constructing federally subsidized housing, renting to low income families under a rent subsidy program, constructing units selling or renting at or below maximums fixed in the ordinance, conveying land to the county or its designee, selling or leasing units to a redevelopment or housing authority or giving the authority first refusal to rent

or buy. See Kleven, supra, at 139-147.

On density bonuses or MPMPD's generally, see Rose, "The Mandatory Percentage of Moderately Priced Dwelling Ordinance (MPMPD) Is the Latest Technique of Inclusionary Zoning", 3 Real Estate L.J. 176 (1974); Rose, "The Mount Laurel Decision: Is It Based on Wishful Thinking?", 4 Real Estate L.J. 61, 68-9 (1975); Brooks, Lower Income Housing: The Planner's Response, ASPO Report No. 282 (Am. Soc'y. of Planning Officials, July-August 1972).

Consequently, there is no legal authority to justify court-imposed "rent skewing" involving either rent or sales price controls which do not permit a reasonable return on the controlled units.

Although the Public Advocate objects to the revised Ordinance, in reality Bedminster Township has moved far in the direction of an "inclusionary" ordinance with its FMR rent ceiling provisions, discussed supra. These provisions stop short of requiring an internal subsidy, however, since the FMR levels are reflective of least cost housing rent levels. Consequently, developers should be able to obtain a reasonable return under these controls without any cost-shifting to the non-controlled units. Thus, the Township and the courts will not be forced into the quagmire of deciding whether a developer can receive "a just and fair return" under the ordinance. See discussion of rent control cases, infra. Even these less burdensome provisions, however, could not be imposed by a court. Rather, they should be

viewed as experimentation upon local initiative, which the Court did not wish to discourage by its holding in Madison, 72 N.J. at 519.

B. Mandatory Internal Subsidy Provisions Are Inappropriate.

Although the New Jersey Supreme Court's decision in Madison forecloses the issue of court-ordered imposition of internal subsidies through "rent skewing," the Public Advocate's continued requests for such measures make further rebuttal appropriate. While the Madison Court's reservations with "rent skewing" focus upon the obvious need for specific enabling legislation, there are other serious questions as to both the validity and utility of such provisions.

The proponents of "rent skewing" have generally defended such provisions on the grounds that the use of a density bonus will eliminate, or at least minimize, inherent cost-shifting. See e.g., Klevin, supra, 21 U.C.L.A. Rev. 1432; Fox & Davis, "Density Bonus Zoning to Provide Low and Moderate Cost Housing," 3 Hast. Const. L.Q. 1015 (1976). It is theorized that the density bonus compensates a developer for the loss of profits on the controlled units, since presumably the land costs remain fixed and the additional infrastructure and site preparation costs are minimal. Thus, the controlled units are considered to have zero, or very low, land costs and minimal infrastructure costs. While Klevin,

supra, presented theoretical figures supporting this argument, no empirical studies have been presented to show whether the theory is realistic, and there is no reliable record of the mechanism working.

The problem was discussed by the Planning Master, George Raymond, in his report to the trial court, dated July 11, 1980. Mr. Raymond argued against the inclusion of a density bonus on the grounds that the zoning ordinance already provided appropriate density levels. He argued that, from a planning perspective, once maximum appropriate densities have been established, higher densities could not be justified, even by affordable housing. Therefore, he believed that density bonuses of this type either may not be fully utilized or may produce results which are contrary to accepted planning and design critera.

In the Bedminster ordinance, therefore, density bonuses would not eliminate the internal subsidy impact of "rent skewing." Even the theoretical expositions of proponents of such measures are not compelling; further, there is no empirical data upon which to rely. In addition, the general utility and appropriateness of this type of density bonus has been seriously questioned by the Master in this litigation.

The proponents of "rent skewing" appear to recognize the inadequacy of the density bonus as a compensatory device, for they also argue that even if cost-shifting does occur, these provisions

are valid since they are analogous to reasonable subdivision exactions. See, e.g., Fox and Davis, supra, at 1031-32; Klevin, supra; Pazar, "Constitutional Barriers to the Enactment of Moderately Priced Dwelling Unit Ordinances in New Jersey," 10 Rutgers -Camden L. Rev. 253, 269-72 (1979). Initially, it must be emphasized that exactions of this type are not authorized by the Municipal Land Use Law, since it limits subdivision exactions to off-tract water, sewer, drainage, and street improvements. N.J.S.A. 40:55D-42. This provision has a narrower scope than the prior enabling provision which additionally allowed requirements for "such other subdivision improvements as the municipal governing body may find necessary in the public interest." N.J.S.A. 40:55-1.21 (repealed by L. 1975, c. 291).

Even assuming, arguendo, that such exactions could be imposed pursuant to some other delegation of authority, they would not be valid under New Jersey case law governing subdivision exactions. The basic rule is that a subdivider can be "compelled only to bear that portion of the cost which bears a rational nexus to the needs created, and the benefits conferred upon, the subdivision." Longridge Builders, Inc. v. Princeton Planning Bd., 52 N.J. 348, 350 (1968). Any additional impositions, "although purportedly authorized by the Planning Act or by local ordinance, amount to impermissible exactions." Brazer v. Borough of Mountainside, 55 N.J. 456, 466 (1970); Divan Builders v. Planning Bd. of Wayne, 66 N.J. 582 (1975).

In applying these requirements to the imposition of "rent skewing" upon a developer, it is difficult to perceive either a benefit to the development or any causal link to the need for affordable housing. The benefits resulting from the production of affordable housing extend beyond the municipality, and actually flow to residents of the entire region. There is certainly no direct economic benefit to the properties in the subdivision analogous to that resulting from traditional subdivision exactions, such as drainage facilities, streets and parks.

With respect to causation or the nexus requirement, it has been argued that the process of residential development generally stimulates the need for low and moderate income employment, thus creating a need for affordable housing for such persons. See Klevin, supra. It has also been contended that housing developers are responsible for affordable housing shortages, since they have failed to construct such housing. See, Pazar, supra, at 1031. These rationales present far too tenuous a causal relationship to justify the imposition of an economic burden upon private developers and/or the occupants of conventional units in new housing developments. These arguments ignore the fact that the fundamental cause of the affordable housing problem is the economics of housing construction and finance. Private developers are not responsible for that problem; rather, they operate within the constraints imposed by our economic system.

In summary, the subdivision exactions analogy is totally inapplicable to "rent skewing" provisions. Once the adverse impact of exclusionary zoning has been eliminated, the remaining problems are due to the economics of the private housing sector. Programs to address this problem benefit all of New Jersey's citizens, and in recognition of that fact, the Legislature has adopted various statutes addressing the housing problem. See, e.g., statutes cited in Mt. Laurel, 67 N.J. at 179. It is unreasonable to disproportionately impose the responsibility for this problem upon the builders and/or residents of new housing developments.

Efforts to legitimize "rent skewing" provisions have also employed analogies to rent control regulations. While this argument may be facially appealing, it is simplistic and does not resolve the problem basic to mandatory private internal subsidies.

The Supreme Court of New Jersey has construed the police power as broad enough to permit municipalities to engage in rent control. In Inganamort v. Fort Lee, 62 N.J. 521 (1978), rev'd. on other grounds, 72 N.J. 412 (1977), the Court sustained ordinances fixing rental prices in the face of broad constitutional challenges. See also, Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543 (1975); Brunetti v. New Milford, 68 N.J. 576 (1975); Troy Hills Village v. Parsippany-Troy Hills Twp. Council, 60 N.J. 604 (1975) (rent control ordinances held not to violate

substantive due process and equal protection and held not to be confiscatory).

The court has also held that the municipal zoning power gives municipalities the authority to restrict certain uses to specific classes of people. Taxpayers Ass'n. v. Weymouth Twp., 80 N.J. 6 (1976) (upholding a zoning ordinance limiting the use of mobile home units in trailer parks to families with heads of households 52 years of age or older); Shepard v. Woodland Twp., 71 N.J. 230 (1976) (upholding ordinance permitting senior citizen communities as a special use exception in a residential agricultural district).

However, the Court has also recognized constitutional limitations on municipal power to enact ordinances regulating rent control. In Property Owners Ass'n. v. Township of North Bergen, 74 N.J. 327 (1977), the court specifically rejected as unconstitutional a rent control ordinance which would require the landlord to subsidize senior tenants (persons over 65 years of age with annual incomes of less than $5,000) or alternatively, would require other residents of the apartment complex buildings to subsidize the senior tenants.

Under the challenged ordinance, rents for senior tenants were frozen. Upon a showing of need, landlords could increase the rent of non-senior tenants by a maximum of 15%. If a landlord could not meet expenses with the 15% increase, the township would

provide a subsidy of up to 10% of rents being paid by senior tenants. There was no provision in the ordinance for landlord relief if the combination of the 15% and 10% increases did not permit the landlord to meet expenses.

The Supreme Court first recognized the power of municipalities to enact rent control ordinances which provided landlords with a reasonable return and noted the laudable purpose of the legislation. Nevertheless, the court rejected the ordinance for two reasons. First, the ordinance could prevent the landlord from obtaining a fair and reasonable return:

> Under the terms of the ordinance, the landlord may not recoup any additional funds to which he is rightfully entitled. Imposition of that burden would deprive an owner of property without due compensation. Such rent control is confiscatory and unconstitutional.

74 N.J. at 336.

Secondly, the court objected to the burden of the initial 15% rent increases being born exclusively by the non-senior tenants:

> The Public Advocate, conceding that landlords are entitled to a fair return upon their investment, contends that the subsidization should be born by the remaining tenants who are not Senior Tenants. The Advocate relies upon public utility rate structure decisions wherein certain types of users have been charged less than their cost of service and others in excess thereof. At oral argument, he asserted that the trial court should exercise its discretion in determining whether the financial burden should be placed on the remaining tenants, the Senior Tenants, or all

> tenants in the building. None of those contentions are pursuasive (citations omitted).

74 N.J. at 337. The court summarized its objections by holding that:

> A legislative category of economically needy senior citizens is sound, proper and sustainable as a rational classification. But compelled subsidization by landlords or by tenants who happen to live in an apartment building with senior citizens is an improper and unconstitutional method of solving the problem.

74 N.J. at 339.

Therefore, Property Owners Ass'n. makes clear that even under the broad construction of police powers granted by the New Jersey constitution and state legislative enactments, and even with a public purpose of unquestioned worth, municipalities are without power to control prices of residential dwellings when such control will require a limited number of other private citizens (or the developer) to bear the cost of the control.

C. The Ordinance as a Density Bonus

The Development Corridor (approximately 1700 acres) was zoned for over 5700 dwelling units, for a gross density of approximately 4 dwelling units per acre, and with net densities of over 15 dwelling units per acre possible in the PUD or PRD configurations. Mr. Raymond considered whether any density bonus mechanism should be employed, as was suggested in Madison at 546-

547. For a number of reasons he recommended against any higher densities. Because of the radical increase in the number of units, he characterized the entire ordinance as "a huge density bonus". He recommended that no further density bonus be considered. (Letter by George Raymond to Judge Leahy dated July 11, 1980, p.2 (PAD 150a-47))

POINT IV

RESALE PRICE CONTROL OF SALES UNITS VIOLATES FEDERAL AND STATE ANTI-TRUST STATUTES AND IS UNDULY CUMBERSOME

A. Anti-Trust Violations

Mandatory internal subsidies of sales units would require resale price control in order to prevent a windfall profit for the first buyer, who could buy at the subsidized price and immediately sell at the market price, many thousands of dollars higher. Under the present statutory scheme, such price control would violate federal and state anti-trust laws.

Section 1 of the Sherman Act, 15 U.S.C. §1 et seq., prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce. . .."

The Supreme Court, in interpreting the broad language of the Act, has recognized that because certain practices are so inherently anti-competitive, they constitute a per se violation of the anti-trust laws. The Court has long held that price-fixing agreements in general are unlawful per se under the Sherman Act. United States v. Socony - Vacuum Oil Co., 310 U.S. 150, 218 (1940). Specifically, the Court has held that resale price maintenance agreements and maximum price controls severely intrude upon the ability of buyers to compete and survive in the market and are illegal per se. Albrecht v. Herald Co., 390 U.S. 145, 153 (1969).

The New Jersey Anti-trust Act, N,J.S.A. 56:9-1, et seq., parallels the federal statute, and federal decisions are thus significant precedent for applying the state statute. See e.g., Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 237-38 (Ch. Div. 1972).

Parker v. Brown, 317 U.S. 341 (1945), City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), and their respective progeny establish a state action exemption to the Anti-trust Act and specify the strict limitations within which that exemption may be claimed.

In Parker, the Court upheld a California statute specifically authorizing the establishment of agricultural marketing programs which expressly restricted competition among raisin growers and fixed the prices at which growers could sell their product. The Court created the "state action" exemption to the Sherman Act excluding states, acting as sovereign in a legitimate sphere of regulation, from anti-trust liability.

The Court has since narrowly defined the state action exemption. In Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), a private electric utility used its monopoly power in the distribution of electricity to restrain competition by distributing light bulbs to its customers at no additional charge. When a competing retail drugstore brought suit, defendant utility claimed an anti-trust exemption by virtue of an approval of its practice

by the state's regulatory authority. The court found that Parker did not immunize such private anti-competitive action even though approved by a state agency in a "pervasively regulated" industry. Indeed, the Court stressed that the Parker holding was limited to "official action taken by state officials." Id. at 591-91 n. 24.

Furthermore, even if official state action is found to exist, it must have been exercised by the appropriate state agency wielding the power in question.

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court struck down a minimum fee schedule for attorneys which had been published by a county bar association and enforced by the Virginia State Bar when it found that the anti-competitive effects of the minimum fee schedules were not directed by the state acting as sovereign.

In contrast, the court ruled exempt from anti-trust liability the Arizona Supreme Court's ban on attorney advertising because the challenged restraint was the "affirmative command" of the Arizona Supreme Court, which was, in this instance, "the ultimate body wielding the state's power over the practice of law," and thus the restraint was "compelled by direction of the State acting as a sovereign." Bates v. State Bar of Arizona, 433 U.S. 350, 360 (1977), citing Goldfarb, supra, at 791.

A particularly relevant limitation upon the availability of Parker exemptions is the court's continued refusal to equate

anti-competitive regulation by the state's subdivisions, including its municipal governments, to "state action" unless that subdivision's activity was undertaken pursuant to a comprehensive, state-mandated scheme of regulation. See, City of Lafayette, supra.

In Lafayette, cities which had been granted the power to own and operate electric power systems under state law, sued Louisiana Power & Light, a private utility, alleging various anti-trust violations. Louisiana Power & Light counterclaimed, also asserting anti-trust offenses, and the cities moved to dismiss the counterclaim under the "state action" immunity doctrine of Parker. The court held that municipal governments are exempt from federal anti-trust sanctions only when the anti-competitive action they take is "pursuant to state policy to displace competition with regulation . . . ." Id. at 413. This was distinguished by the court from the more typical situations,

> [w]hen the State itself has not directed or authorized an anti-competitive practice, the State's subdivisions, in exercising their delegated power, must obey the anti-trust laws.

Id. at 416.

In the context of municipal zoning, the strict Lafayette standard has been even more narrowly interpreted.

In Mason City Center Ass'n. v. City of Mason, 468 F. Supp. 737 (N.D. Iowa 1979), plaintiff developers, whose zoning application for construction of a regional shopping center had

been denied, sued the city, its council members and another developer, charging that the city and the developer had entered into an anti-competitive agreement to prevent the development of a competing shopping center. The city contended that its refusal to rezone was protected as a matter of law by the "state action" exemption of Parker.

The court denied the municipality's motion to dismiss because the court concluded that it was not enough that

> anti-competitive conduct is "prompted" by state action; rather, anti-competitive activities must be compelled by direction of the State acting as sovereign.
>
> * * *
>
> Other considerations of special significance are whether or not the state policy requiring the anti-competitive restraint is specifically part of a comprehensive regulatory system; and is clearly articulated, affirmatively expressed and actively supervised by the state as policymaker.

Mason City, supra, at 742. Applying the "displaced competition" test and the Goldfarb test, which requires that "anti-competitive activities . . . be compelled by direction of the State acting as sovereign," the court found that:

> Although zoning statutes assuredly sometimes have anti-competitive effects, it is somewhat fatuous to contend that they inevitably reflect a state's clear and affirmative intent to displace competition with regulation or monopoly public service.

Mason City, supra, at 742 citing Lafayette, supra and Goldfarb, supra.

Assuming that a state's policy compels a municipality's anti-competitive activities,

> [a] court would further have to find that the grant of a Parker state action exemption is necessary in order to make the state's zoning statute work, and even then only to the minimum extent necessary."

Id. at 743 (emphasis in original).

In the wake of Lafayette, lower courts have universally adopted the narrow "displace competition with regulation" test. In Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth., 451 F.Supp. 157 (S.D.N.Y. 1978), the court paraphrased the crucial test as,

> whether the state, acting as a sovereign, had required the instrumentality in question to engage in a particular form of anticompetitive behavior.

Id. at 166 (emphasis supplied). The court explained that the test does not mean that the specific act must be directly authorized by the legislature, but that:

> The legislature must direct its instrumentality to engage in a particular type of anti-competitive activity and then each subsequent action of that type will have satisfied the threshold requirement for Parker immunity.

Id.

In Star Lines, a publicly created shipping authority terminated its booking agent and granted that exclusive right to another private party. The court reviewed the statutory language

purporting to exempt the authority from application of the anti-trust laws and found that the language did not confer "blanket immunity" such as would give the authority power to engage in agreements to create monopolies. The court found that the scope of the authority's activity could not have been intended to include such anti-competitive conduct. Id. at 167. See also, Woolen v. Surtan Taxi Cabs, Inc., 461 F.Supp. 1025, 1031 (N.D. Tex. 1978), in which the court noted that statutes which "merely authorize" but do not "require" anti-competitive activity do not suffice to confer anti-trust immunity upon municipal action. Accord, Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F.Supp. 543 (D.N.C. 1979); Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), vacated and remanded, 435 U.S. 992, op. reinstated and remanded, 576 F.2d 696 (5th Cir. 1978), cert. denied sub nom, Impact v. Witworth, 440 U.S. 911 (1979); Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), vacated and remanded, 435 U.S. 992, op. reinstated and remanded, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979).

Although two courts have recently attempted to invest actions of local government with Parker anti-trust immunity, it appears that both decisions apply the Parker doctrine in too broad a fashion. In Huron Valley Hosp. v. City of Pontiac, 466 F.Supp. 1301 (E.D. Mich. 1979), rev'd. ____ F.2d ____ (slip op. 6th Cir. 1981), the trial court upheld Michigan's comprehensive certificate

of need system for regulating hospital construction. In reversing the summary judgment decision entered in favor of the City of Pontiac, the Court of Appeals for the 6th Circuit held that the state's health care statutes did not provide blanket immunity so as to preempt and preclude Huron Valley's anti-trust allegations.

Community Comm. Co., Inc. v. City of Boulder, 630 F.2d 714 (10th Cir. 1980), cert. granted, 450 U.S. 1039 (1981), found state action immunity in Boulder's imposition of a moratorium on customer expansion by a cable television franchise while the city accepted bids for additional cable franchisees. The plaintiff franchisee's petition for certiorari, however, has recently been granted. In both Huron Valley and Boulder, and unlike Bedminster, comprehensive statutory schemes regulating the relevant activity (hospitals and cable television) existed and were being followed, yet even in the face of pervasive regulation, it appears that the Parker doctrine has and will continue to have limited application.

Most recently, the United States Supreme Court heard oral argument on the issue whether maximum fee schedules, set by nonprofit medical care foundations for their physician members, constitute per se illegal price fixing. Arizona v. Maricopa County Med. Soc'y, No 80-419, 50 U.S.L.W. 1082 (U.S., argued November 4, 1981). Significantly, counsel for the federal government argued that, "maximum price fixing evidences many of the evils of a cartel...Those who fix reasonable prices today will

fix unreasonable prices tomorrow." 50 U.S.L.W. at 1082.

* * *

In New Jersey, there has been no "affirmative command" by the legislative body ultimately wielding the state's authority concerning the specific anti-competitive activity of controlling the resale prices of homes. The zoning power is a limited delegation of authority given to municipalities by the State Constitution, N.J. Const., Art. IV, § 6, ¶2. See, e.g., Taxpayers Ass'n. v. Weymouth, 80 N.J. 6, 20 (1976). The Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., does not suggest that such anti-competitive behavior, which would be otherwise illegal, is either allowed or encouraged.

Therefore, unless and until the New Jersey Legislature acts comprehensively, anti-trust liability would be incurred by those attempting to fix or otherwise regulate the resale price of housing units.

B. Resale Price Controls are Unduly Cumbersome

Practical considerations also militate against the mandatory imposition of resale price controls.

The basic elements of resale price control include the establishment of a housing board, the setting of initial sale prices, the on-going establishment and control of resale prices, the maintaining of a list of eligible purchasers, the creation of

procedures to prevent unreasonable sales delays, and the general management of the resale process. While this conceptual framework might arguably be termed theoretically "feasible", in practice, considerable complexity will result. Some of the unresolved problems inherent in this concept can be briefly stated.

The maintenance of an eligible purchaser list would be complicated. Income limits would need periodic updating, as would the list of present owners no longer qualifying due to income changes. If an owner's income goes up, does he have to retroactively pay more of the purchase price? If so, whom does he pay? A related problem would be the need to ensure that income ceilings were sufficiently high in order for potential residents to qualify for financing, if indeed, financing is available at all.

The establishment of resale prices is difficult, time consuming and expensive.

Although an "inflation-escalator" mechanism appears simple in concept, the procedure necessary to adjust prices for property improvements would be inherently problematic and controversial. There must be a method for valuation of improvements; how to include labor costs for owner-installed improvements must be determined; improvements must be distinguished from repairs, and accurate records of individual improvements (in order to apply the inflation escalator) would be needed. Some owners would inevitably be unsatisfied with the

designated resale price, and there would be a due process right to a hearing and adjudication.

Management of the resale process would be similarly complex: eligible persons would have to be notified of an available property, after which each would require a prescribed amount of time during which to inspect the property, make a decision, and attempt to arrange financing. If a person subsequently decided against purchasing, or was unable to obtain financing, then it would become necessary to repeat the entire process.

* * *

Resale price controls entail a significant governmental intrusion into the private housing market and would require a complex, time-consuming and costly regulatory scheme. The thrust of Mt. Laurel and Madison is to eliminate unnecessary regulation which makes housing more expensive. The Public Advocate seeks to create a whole new set of costly regulations - judicially imposed - which would have the very same cost-generating effect as was condemned in Madison. The Advocate's proposal should be rejected.

POINT V

INTERNAL SUBSIDIES OR "RENT SKEWING" VIOLATE NEW JERSEY'S CONSTITUTIONAL AND STATUTORY PROVISIONS GOVERNING THE POWER TO TAX.

In essence, the cost-shifting devices discussed supra constitute an improper system of private taxation.

The power to tax, the direct source of which is Art. IV, § I, para. 1 and Art. VIII, § I, para. 1, of the New Jersey Constitution reposes only in the State and can be exercised by no other authority absent express delegation. Robinson v. Cahill, 62 N.J. 473, reargued 63 N.J. 196, cert. denied sub nom. Dickey v. Robinson, 414 U.S. 976 (1973).

Municipalities, while agencies of the state, are without inherent power to tax without legislative authorization. E.g., Switz v. Kingsley, 37 N.J. 566, 590, modified 37 N.J. 566 (1962). See also, Inganamort v. Borough of Fort Lee, 62 N.J. 521, 534 (1973).

While the legislature may "confer upon political subdivisions powers to legislate and provide revenue for defraying the expenses of local government", Switz, supra at 34, it has not done so with respect to the municipalities in the case of cost-shifting for affordable housing. Compare, City of Camden v. Byrne, 82 N.J. 133, 156 (1980).

Not only has the local power to raise housing subsidy revenue by cost-shifting not been authorized, but the Madison court has expressly recognized that a misuse of the State's taxation system is an unacceptable method of dealing with the problem of affordable housing:

> Plaintiffs and supporting amici press for a judicial mandate that developing municipalities be required affirmatively to act for creation of additional lower income housing in more ways than by eliminating zoning restrictions militating against that objective. Of the devices that have been suggested to this end, tax concessions ... must be summarily rejected. Tax concessions would unquestionably require enabling legislation and perhaps constitutional amendment.

Madison, supra at 546.

The relationship common to those who may come to reside in planned developments does not justify imposing upon those residents with average incomes the duty of assisting in the payment of lower income tenants' rent. This is quite distinct from the public, through its legislature, recognizing and assuming an obligation to assist in the achievement of affordable housing by spreading the cost over the citizenry so that its effect is minimal. See, Property Owners Ass'n., supra at 337.

It is clear that the Legislature has not yet even attempted to authorize a municipal power to subsidize "affordable" housing at the expense of development residents who will be

"taxed" for the benefit of their lower income neighbors. It is highly questionable whether such an attempted delegation of power would survive constitutional scrutiny.

In any event, this court is not entrusted with the power to engage in a function which is purely legislative: determining whether localities shall be authorized to tax some (but not all) of their residents in order to achieve affordable housing. Therefore, Bedminster urges this court to reject the Public Advocate's internal subsidy proposals as violative of the New Jersey Constitution and taxing statutes.

POINT VI

THE MOBILE HOMES ISSUE

This case is not the appropriate case, and this court is not the appropriate forum, in which to decide any issues concerning mobile homes.

The Public Advocate contends that Bedminster should be required to provide significant amounts of mandatory mobile home zoning as an inclusionary remedy. However, no plaintiff, including those represented by the Public Advocate, presented any extensive testimony concerning the mobile home issue. Only the most passing references to mobile home zoning were made at the remedy hearing in June of 1980. The issue was not litigated in this action in any significant way.

The issue however, has been litigated in other actions now on appeal. Specifically, Mt. Laurel II, 67 N.J. Super. 151 (Law Div. 1980), certified directly by the New Jersey Supreme Court, Docket No. 17,041, did directly involve this issue. During the four days of argument in September and December of 1980 before the New Jersey Supreme Court in the six consolidated cases, including Mt. Laurel II, the mobile home issue was hotly debated. The briefs of the parties and amici in the six cases extensively addressed the issue. See brief filed by New Jersey legislators, amici curiae, in Mt. Laurel II, Docket No. 17,041, at pp. 43-69.

Accordingly, because the issue was not litigated here; because there is no record on which this court could act even if it so desired to act and because the issue is expected to be addressed by the New Jersey Supreme Court in the six consolidated cases, we believe it inappropriate for this court to attempt to decide any mobile home issues.

For the information of the Court, however, we have included in the appendix to this brief a summary of the arguments against mandatory mobile home provisions. This is excerpted from a "Trial Brief on Certain Issues Common to all Defendants," submitted to the Honorable Reginald Stanton in Morris County Fair Housing Council v. Boonton Township, Docket No. L6001-78 P.W.,[4] by this firm as counsel to Chester Township. The Public Advocate advances the same position in this case that he did in the Morris 27 case.

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[4] This is the "Morris 27" case, in which the Public Advocate is suing 27 alleged "developing" municipalities in Morris County; the trial has been stayed pending disposition of the consolidated cases by the Supreme Court.

CONCLUSION

For the foregoing reasons, defendant, Bedminster Township requests that the appeal of the Public Advocate be denied and that the order of the trial court dated March 20, 1981 be in all respects affirmed.

Respectfully submitted,

McCarter & English
Attorneys for Defendant,
Bedminster Township

By: _____
Alfred L. Ferguson
A Member of the Firm

Dated: January 11, 1981

APPENDIX

A copy of the within Notice of Motion has been filed with the County Clerk of the County in which the venue is laid,
McCarter & English
McCARTER & ENGLISH

WE CERTIFY THAT ON 6-12-81
A COPY OF THE WITHIN motion
WAS SERVED ON THE PARTIES AND IN THE MANNER REQUIRED BY R.1:5, by
✓ U.S. Mail
__ U.S. Mail R.R.R.
__ Hand Delivery
McCARTER & ENGLISH

FILED
JUN 15 1981
D.
Clerk

McCARTER & ENGLISH
550 Broad Street
Newark, New Jersey 07102
(201) 622-4444
Attorneys for Defendant
Township of Bedminster

10

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

THE ALLAN-DEANE CORPORATION, et al	:	
Plaintiff,	:	Civil Action
-vs-	:	NOTICE OF MOTION FOR STAY OR ALTERNATE RELIEF
TOWNSHIP OF BEDMINSTER, et al	:	
Defendant.	:	

20

TO: Henry Hill, Esq.
Brenner, Wallack, Rosner & Hill
15 Chambers Street
Princeton, New Jersey 08540

Kenneth Meiser, Esq.
Department of Public Advocate
Division of Public Interest Advocacy
P.O. Box 141
Trenton, New Jersey 08625

SIRS:

PLEASE TAKE NOTICE that on Wednesday, July 1, 1981 at 1:30 in the afternoon, defendant Township of Bedminster shall 30 apply before B. Thomas Leahy, J.S.C. for an Order granting the following alternative forms of relief:

NOTICE OF MOTION

1. An Order pursuant to R. 2:9-5 for a stay of the processing of Hills Development Company applications in Bedminster Township and a stay of all specific corporate relief which has been afforded to Hills Development Company by Order of the Court dated March 20, 1981; until the appeals by the individual plaintiffs, represented by the Public Advocate, are finally decided;

Or in the alternative:

2. An Order pursuant to R. 4:50-1:

(a) requiring Hills Development Company to incorporate into its development plans such flexibility as is necessary to accommodate any requirements which may be imposed on Bedminster by an appellate court in this case; or

(b) permitting Bedminster to stop the Hills application process just before the vesting of any Hills' development rights which would be inconsistent with a successful appeal by the individual plaintiffs; or

3. An Order pursuant to R. 4:50-1 requiring plaintiffs, including the individual plaintiffs, and the Hills Development Company, jointly and severally, to post a bond of $200,000 to cover the costs of rezoning the Township and of

making the Hills development plans comply with the requirements of an appellate court ruling.

PLEASE TAKE FURTHER NOTICE that in support of this motion we shall rely upon the attached Brief in Support of Motion for Stay or Alternate Relief.

McCARTER & ENGLISH, ESQS.
Attorneys for Defendant,
Township of Bedminster

By _____
Alfred L. Ferguson, Esq.
A Member of the Firm

DATED: June 12, 1981

Original hereof filed with the Clerk of the Superior Court on

11/16/81

B. THOMAS LEAHY, J.S.C.

McCarter & English
550 Broad Street
Newark, New Jersey 07102
(201) 622-4444
Attorneys for Plaintiff

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,

vs.

TOWNSHIP OF BEDMINSTER, et al.

Defendants.

Civil Action

ORDER IN LIEU OF STAY

This matter being opened to the Court by McCarter & English, Esqs., Alfred L. Ferguson, Esq. appearing on behalf of the defendants; and on notice to and in the presence of Henry A. Hill, Jr., Esq., of Brenner, Wallack & Hill, Esqs., attorneys for plaintiff, Allan-Deane Corporation; and Kenneth E. Meiser, Esq., Deputy Public Advocate, attorney for the individual plaintiffs;

The Court, after considering the pleadings, briefs and argument of all parties and the advice of the Planning Master George M. Raymond, set forth in his letters to the Court dated June 25, 1981 and October 29, 1981, and in his oral remarks at the hearing on November 4, 1981;

For the reasons noted by this Court at the hearing on November 4, 1981;

ORDER IN LIEU OF STAY

IT IS on this 16th day of November, 1981,

ORDERED:

A. The motion filed by defendant Township of Bedminster for a stay of all further development applications of the corporate plaintiff is denied;

B. The motion of defendant Township of Bedminster for other relief in order to protect the subject matter of this appeal and in order to properly administer specific corporate relief to the corporate plaintiff, is granted, as follows:

(1) Any and all preliminary and final approvals of development applications granted by defendant Township to the corporate plaintiff be, and they hereby are, conditioned to the extent that development under such applications is not to be excluded from calculations of any and all requirements for affirmative action which may be imposed as the result of the appeal now being prosecuted by the Public Advocate in this action;

(2) All parties to this action are given leave to apply to this Court for relief from this Order for such further or other relief as may be appropriate to (1) allow the corporate plaintiff's applications to be processed expeditiously; and (2) allow the implementation of any affirmative remedy which may be ordered as the result of the appeal now being prosecuted by the Public Advocate in this case.

B. THOMAS LEAHY J.S.C.

J.S.C.

EXCERPT FROM BRIEF: MOBILE HOME ISSUE

IX

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

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

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

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

42 U.S.C. §5401.

While some progress in improving mobile home

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

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

1. UREA-FORMALDEHYDE EMISSIONS.

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

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

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

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

The problem, which is rapidly becoming the subject

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

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

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

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

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

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

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

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

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

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

EXCERPT FROM BRIEF: MOBILE HOME ISSUE

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

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

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

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

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

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

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

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

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

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

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

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

HUD Request for Proposals, supra, at 5.

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

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

detection?

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

(c) What is an adequate standard?

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

Id. at 4.

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

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

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

2. FIRE HAZARDS

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

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

(March, 1979).

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

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

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

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

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

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

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

3. WIND STABILITY

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

HUD (Nov. 1977).

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

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

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

EXCERPT FROM BRIEF: MOBILE HOME ISSUE

4. WARRANTY PROBLEMS

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

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

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

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

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

up," Id. at 93;

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

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

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

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

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

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

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

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

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

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

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

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

EXCERPT FROM BRIEF: MOBILE HOME ISSUE

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

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

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

EXCERPT FROM BRIEF: MOBILE HOME ISSUE

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

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

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

EXCERPT FROM BRIEF: MOBILE HOME ISSUE

5. HIGH REAL COST OF OWNERSHIP.

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

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

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

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

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

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

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

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

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

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

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

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

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