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Comments of the civic league of greater New Brunswick + the American civil liberties Union of N.J. on the issue papers prepared by the Dep. of comm. affairs for the COAH

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COMMENTS OF THE

CIVIC LEAGUE OF GREATER NEW BRUNSWICK

AND

THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

ON THE ISSUE PAPERS PREPARED BY

THE DEPARTMENT OF COMMUNITY AFFAIRS

FOR THE

COUNCIL ON AFFORDABLE HOUSING

February, 1986

CONTENTS

INTRODUCTION

In order to assist the Council in its formidable task, the Civic (previously Urban) League of Greater New Brunswick and the American Civil Liberties Union of New Jersey (hereafter collectively referred to as the Urban League) shall address on a point by point basis those matters raised in the Issue Papers that are most critical to the needs of low income households. First, however, we address several issues crucial to the housing needs of low income groups that unfortunately have not been mentioned in the Issue Papers. We submit that the issues identified in Section 1 below merit the same painstaking study devoted to the issues set forth in the Issue Papers of the Department of Community Affairs ("DCA").

1. Additional Issues Requiring Council Attention

a. Advocate for Low Income Groups. Low income groups will have no advocate before the Council unless the Council takes affirmative steps to provide for their representation. The Urban League analyzed this problem in detail in its brief to the Supreme Court; the relevant portion is attached as Exhibit A. In addition to the modified builder's remedy suggested by the Urban League, the Council should consider funding an ombudsman's unit. The Public Advocate, the ACLU and the Urban League do not have the resources to pursue more than a small number of these cases. Competing points of view must have

access to the Council.

b. Compliance Standards for Housing Elements and Mechanisms to Insure Implementation. Standards must be established for the housing elements to be filed by municipalities as a prerequisite to substantive certification. A mechanism to insure the implementation of such elements without undue delay must also be developed.

Although the Fair Housing Act ("the Act") does not expressly require the Council to promulgate such standards, the enactment of clear guidelines is essential to the statutory scheme. Without such guidelines, municipalities will not know what they must do to obtain substantive certification. These guidelines should include technical standards to govern each of the relatively straightforward elements set forth in Sections 10(a) through (f) of the Act.

Section 11(a), which addresses the means by which lower income housing is to be provided, presents a more difficult problem and demands a creative approach. Municipalities must be given every incentive to explore all practicable alternatives. The alternative selected, and embodied in the municipality's housing plan, must afford the "realistic opportunity" required by Mount Laurel II. Considerations should include site availability, to the extent needed to achieve the fair share goal, and, if presented as part of the housing plan, infrastructure feasibility, including financing. Utilization of state or federal subsidy funds must be realistic in light of the

limitations on those resources. In short, the housing plan must include a feasibility study demonstrating that these units will in fact be produced.

The Issue Papers fail to address the crucial question of compliance. Experience to date suggests that even after fair share and site specific issues are resolved, arduous negotiations are required to implement these decisions with appropriate compliance ordinances. The Council should promulgate model ordinances and give them presumptive effect. Subjects covered should include:

1. A Council-defined consistent and statistically reliable method of ascertaining regional median income.

2. Extent to which senior citizen housing is permitted.

3. Permissible priority and preference standards for selecting occupants of units; a plan giving substantial preferences to local residents is not consistent with the regional fair share obligation imposed by Mount Laurel.

4. Affirmative marketing requirements for lower-income units, including provisions to assure that urban residents and minority groups are informed about and have access to these units.

5. Appropriate rental/sales mix. This point is discussed further at page 5 below.

6. Acceptable administrative structures for implementing affordable housing controls, such as establishing a local affordable

housing agency or contracting with a county housing agency or the DCA; a plan permitting developer self-administration should not be acceptable.

7. Staging schedules, requiring that construction of Mount Laurel and market units proceed simultaneously so that a developer cannot complete the market units first and then default on its Mount Laurel obligation. A phasing plan should require that construction of the Mount Laurel housing begin as soon as a maximum of 20% of the market units in the same development are built, parallel development of the Mount Laurel and market units thereafter, and completion of all the Mount Laurel units before the last market units are completed.

8. Equal numbers of low and moderate income units or other appropriate balance as necessary to insure that units are affordable to households at all levels within each income category, not merely to households at the very top of the low and moderate income categories. This point is discussed further at page 5 below.

9. Distribution of efficiencies, one, two and three bedroom units to reflect actual needs of lower income households.

10. Suitable physical design standards, including minimum square footage standards.

11. Affordability and resale/rerent controls to be in effect at least 30 years, with incentives for restrictions remaining in effect for the life of the housing.

12. Dispersal of Mount Laurel units within each inclusionary development to prevent separation and isolation.

13. Mechanisms to facilitate resale by Mount Laurel households including statewide advertising of available units and maintenance and circulation of lists of prospective purchasers by an appropriate state-wide agency.

Sample ordinances from North Brunswick and Old Bridge are enclosed as Exhibit B. All but the marked changes in the North Brunswick ordinance were agreed to by the municipality, developers and the Urban League; the Old Bridge ordinance, already adopted and in effect, reflects complete agreement of all parties.

Special comments concerning points 5 and 8 above are appropriate because they address two significant problems not solved so far by ordinance or housing plans produced through litigation: the overwhelming production of sales rather than rental housing, and the failure to provide housing for households below 45% of the median regional income.

Sales housing is more difficult for qualified lower income families to secure because even a relatively small down payment may exceed the family's limited ability to assemble up-front cash and because they must, in addition, receive mortgage lender approval. Although local regulations that define the form of ownership have traditionally been prohibited in New Jersey, the Urban League believes

that the special position of Mount Laurel zoning justifies a requirement that some housing be in rental form. The Supreme Court has expressly endorsed this departure from traditional law in the Mount Laurel context since Mount Laurel zoning deals with type of household at least as much as physical use of land.

In addition, rental projects should be given a strong preference with regard to subsidies available under the Act; indeed, the Council could limit municipal use of subsidy programs in certified housing elements to those targeted for rental units. Finally, if carefully reviewed by the Council and its staff, a municipality might be encouraged to develop rental housing by permitting phasing of its fair share as a "bonus" for doing so.

Similarly, the Council should structure its regulations to encourage -- indeed require -- that municipalities provide units for the many low income households earning less than 45% of the regional median income. It is clearly within the economic capacity of inclusionary market developments to provide some of their units below the 45% range. Moreover, the Council should require that municipalities use the limited cash subsidies available under the Act solely or primarily to expand opportunities for the lowest income ranges, because experience has shown that moderate units can be supplied by market forces or by the mandatory set-aside device. A "bonus" for production of units affordable to those earning under 40%

of the regional median income, in the form of carefully controlled phasing of a municipality's fair share obligation, should also be considered.

c. Displacement. Affordable housing is an urban as well as a suburban issue. Substantial gentrification resulting in massive displacement and loss of affordable housing stock is underway in Hudson County, particularly in Hoboken and Jersey City. While this process has not yet been the subject of Mount Laurel litigation, it is clearly covered by the Mount Laurel II concept, since gentrification prices (and in many cases literally forces) poor families out of the market. As the Court observed in Mount Laurel II: "The zoning power is no more abused by keeping out the regional poor than by forcing out the resident poor." 92 N.J. at 214.

The Governor has stated his commitment to preserving affordable housing along the Hudson waterfront. The Council should examine affordability proposals previously developed for Hudson waterfront communities (an example from Hoboken is attached as Exhibit C) and incorporate appropriate standards into its regulations.

As evidenced by the number of oral presentations before the Council in recent weeks, the regulations should also incorporate standards relating to the shelter of the homeless.

d. Financial Need. Judicially-developed approaches to housing need such as AMG have focussed exclusively on substandard housing as

an indicator of need. However, both Mount Laurel II and the Fair Housing Act specifically refer to affordable housing; that is, housing that does not cost more than 30% of the household's income. Those low income households forced to allocate more than 30% of their meager resources for housing are entitled to the benefits of the Act. By encouraging voluntary planning at the local level, permitting inter-local transfers, and providing substantial new subsidy money, the Fair Housing Act opens up compliance techniques that were not readily available to the courts.

The Council, as a politically responsive administrative agency, was thought by the Legislature to be a stronger and more flexible intrument to achieve Mount Laurel compliance precisely because it had better tools. Since the Council can be expected to function effectively to this end, it should begin by recognizing the full scope of the problems it was created to solve. The courts, with more limited powers and cruder compliance tools, understandably chose not to confront financial need in the first round of decisions. There is no justification for continuing this policy now. The Urban League's concrete proposals for approaching the issue of financial need in the context of the Act are set forth under the heading "Present and Prospective Need."

2. Determination of Regions

The Act limits the Council's discretion in this regard and the AMG regions cannot stand. The Urban League urges that the Council use four-county regions wherever possible so as to maximize flexibility and best balance opportunity and need. Urban counties with large reservoirs of housing need should be matched with suburban counties that have a capacity to absorb that need. In the northern and central part of the state which most concerns the Urban League, we submit that the following regions best serve the purposes of the Act:

a. Essex/Morris/Warren/Sussex

b. Union/Somerset/Hunterdon/Middlesex

c. Hudson/Bergen/Passaic

d. Mercer/Camden/Burlington/Gloucester

e. Monmouth/Ocean

Each of the first four proposed regions contains at least one urban county and some suburban receiving area. Moreover, these regions satisfy Section 4(a) of the Act in that they deviate very little from the PMSAs. Hudson/Bergen/Passaic provides the least satisfactory receiving area, but this is an inescapable consequence of the four-county limitation. This problem can be offset by careful attention to the displacement problem discussed above.

The statutory language requiring that the regions have economic

and other "similarities" has been uniformly interpreted by the parties arguing before the Supreme Court, and by Judge Skillman, to permit linkage of urban and suburban counties. Any other reading would render the section patently unconstitutional, which should be taken into account in determining regions.

3. Estimate Present and Prospective Need

The Council should recognize the full scope of the regional housing need by including "financial need" in the base data. "Financial need" refers to those households residing in standard housing but paying more than 30% of their income for shelter. A 1983 estimate of financial need by the Urban League's expert, Alan Mallach, is attached as Exhibit D.

The Issue Papers, at pages 4-6, overstate the impact of filtering and neglect to calculate its real costs. While there has concededly been some improvement in household quality, such improvement reflects the growing numbers of lower income households forced to pay more than 30% of their incomes for housing. Unless financial need is taken into account by this Council, lower income households will rarely find standard housing at a price they can fairly be expected to pay.

The "filtering" approach produces a plainly erroneous undervaluation of actual housing need unless financial need is incorporated into the formula. This is demonstrated by the Annual

Housing Survey prepared by the Census Bureau and HUD, which found that between 1975 and 1983 the number of physically inadequate or overcrowded rental units declined only .1 million nationwide, from 5.4 million to 5.3 million. During the same period, the number of households paying more than 30% of their income for shelter increased from 6.2 million to 9.8 million.

The DCA further contends that the "1985 need" should be used instead of "1980 need." Because households formed since 1980 have had to make some sort of shelter decisions, this position at first seems plausible, at least as to prospective need. The 1985 need figures, however, do not even attempt to account for the significant portion of the 1980 prospective need that has been absorbed not in adequate and affordable housing, but by paying exorbitant amounts, doubling up, settling for substandard housing, or becoming homeless. The Council should not accept the reduced 1985 figures unless it has hard data to support such a reduction. The 1980 present need should not be cut at all. It is mere wishful thinking to conclude that this previously existing but unmet need has somehow disappeared on its own during the last five years.

It is similarly misleading to base calculations of lower income need on market factors such as approvals of development applications and real property transfers. Since lower income households are not participants in the housing market in any effective way, these market

factors are irrelevant to any determination of lower income need. In short, need determination must truly reflect need. There will be ample opportunity to make adjustments if need cannot realistically be met. At this stage, however, there is no justification for any adjustments which reduce "need" below actual housing needs.

4. Municipal Determination of Fair Share

a. It is important that the Council promulgate a specific fair share methodology rather than vaguely-worded general criteria for determination of municipal fair share

Mount Laurel II correctly determined that so-called "numberless fair share" approaches (as in Oakwood at Madison) are insufficient to encourage voluntary municipal compliance. Since voluntary municipal compliance is the central thesis of the Act, adoption of a specific methodology is crucial. The DCA Issue Papers assume that such a methodology will be determined and the Urban League endorses this approach.

The methodology approved by Judge Serpentelli in AMG Realty and Judge Skillman in Van Dalen should be the Council's starting point. While the Council can -- and should -- investigate additional data sources to improve the accuracy of the formula (e.g., reevaluation of the 82% figure rejected by Judge Skillman in Van Dalen; vacant land data to substitute for the growth area measure), the conceptual framework of the formula is sound. It avoids giving undue prominence

to any single factor, which could skew the fair share towards some municipalities and away from others, by averaging land, employment, employment growth, and community wealth. The logic behind each of these factors is fully analyzed in Judge Serpentelli's AMG opinion.

At pages 11-12 of the Issue Papers the DCA criticizes the Urban League formula[1] and argues that the resultant median income factor is an "arithmetically meaningless" number. It is apparent that the DCA, along with the Rutgers Report,[2] misunderstand the rationale for the income adjustment. The purpose of the Urban League adjustment is to increase the allocation for communities with higher median incomes, and reduce it for those with lower median incomes. It is not "arimethically meaningless," since it is an adjustment factor, applied on top of the allocation factors, to weigh them further in the appropriate direction.

What the Rutgers Report is recommending, by comparison, is a factor that actually weighs population significantly more than income. This is erroneous as demonstrated by the following hypothetical example. Municipalities vary by population far more than by median

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1 The "Urban League formula," as used in the Issue Papers and in these comments, refers to the methodology adopted by Carla Lerman, the court-appointed expert in the Urban League case, after meetings with all of the parties' planners.

2 The Rutgers Report is the product of the Rutgers Center for Urban Policy Research ("Rutgers CUPR"). The Civic League, formerly known as the Urban League, has been represented by the Rutgers Constitutional

income. The approach set forth in the Rutgers Report would yield the following, assuming three municipalities in a region of 100,000 people and a median income of $20,000:

	POP	INC	AGG INC (PxI)	SHARE
REGION	100,000	20,000	2,000,000,000	1.0000
MUN 1	10,000	15,000	150,000,000	0.0750
MUN 2	5,000	25,000	125,000,000	0.0625
MUN 3	2,000	40,000	80,000,000	0.0400

Here, the most affluent municipality has the lowest allocation factor, and the least affluent, the highest factor. This approach is completely contrary to the goals as well as the spirit of the Act.

The Urban League approach uses municipal income as a measure of relative wealth, all else equal; the approach of the Rutgers Report would measure each municipality's wealth as an absolute portion of the regional wealth, and would give small, but wealthy municipalities a smaller share than large municipalities at or even below the median. This adjustment factor recommended by the Urban League would merely shift fair share to those municipalities, large or small, which have a relatively stronger financial base upon which to support growth. In order to do this, the measure of wealth has to be expressed in

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Litigation Clinic, which has no affiliation with Rutgers CUPR.

relative rather than absolute terms.

The DCA further suggests that municipalities could supply accurate vacant land data to substitute for the arbitrary growth area measure used in the Urban League formula. While all contributors to the Urban League formula, as well as the Court, agreed that an accurate measure of vacant land would be preferable to the growth area data, vacant land data supplied by individual municipalities will be of dubious value. Since the formula weighs each individual municipality against the regional total, vacant land can only be used accurately if all municipalities measure their land development potential in the same way. This will not be the case if one municipality uses vacant developable land in the numerator of the fraction while others use total growth area. The Council should continue to use growth area uniformly until the completion of an adequate statewide vacant land survey. Hopefully, this should be available within a year or two pursuant to recently enacted state planning legislation, L.1985 c.395, which creates a State Planning Commission to prepare a State Development and Redevelopment Plan that will replace the SDGP.

Finally, the Urban League urges the Council to develop standards for municipal housing surveys. As suggested by Judge Skillman in the Van Dalen case, these should be based on actual field surveys conducted for this purpose, rather than on secondary data.

b. The distinctions between growth areas and limited non-growth areas should generally be maintained with adjustments being made sparingly and only on a case by case basis.

The Urban League views the proposal to allocate need to non-growth areas as ill-advised at this time. The principle that certain designated areas should not be forced to grow is an essential element of the Mount Laurel concept. It is certainly possible that some areas designated non-growth by the old SDGP should be redesignated for growth, and vice versa. This determination, however, should only be made on the basis of comprehensive planning and environmental analyses. It should not he based on the absurd premise that there is no room for meeting fair share goals in the growth areas.

A new statewide planning process is underway. An interim approach must be adopted, until the state has had the opportunity to re-evaluate the entire problem. There is no question that in some parts of the state, substantial growth has invaded the limited growth area, making the distinction emphemeral at best. The Mount Laurel judges have been properly reluctant to disregard the SDGP lines, but the Concil has far greater flexibility to make these kinds of decisions.

The Urban League recommends that reconsideration of the growth area boundary be permitted on a case by case basis. This case by case approach is consistent with our recommendation concerning the "drastic alteration" adjustment factor discussed below under the heading

"Municipal Adjustments." If the SDGP improperly has an entire community or a major part of it in the growth area, the correct approach is not to assign a fair share and then adjust it, but to adjust the community's classification at the outset. While such adjustments should be made sparingly, they should not be totally prohibited.

c. Credits. It is undisputed that the provision of the Act dealing with credits must be interpreted by regulation to avoid the patently unconstitutional result of wiping out most or all of the regional fair share, which would result from the literal reading of the statute. The Issue Papers, at page 13, correctly note that credit should be given only for units built since the most recent census, and then only to the extent that they are properly controlled for eligibility and affordability. In brief, the only units for which a municipality should receive credit are those constructed or rehabilitated since 1980 which are both affordable to and occupied by lower income households, and have controls to ensure that they stay that way.

For further discussion of credit issues, we attach the Master's Report in the Freehold case is included in the Appendix as Exhibit E.

5. Municipal Adjustments

a. Suggested Approach. As a threshold matter, it should be

noted that adjustments must be considered in conjunction with the parallel statutory provision for phasing. The adjustment provisions, like the phasing provisions, permit modification of the fair share formula under certain special circumstances, such as the presence of an historical district, for example. As a general rule, adjustments should be made first, and phasing thereafter should be permitted only to the extent required by circumstances not already factored into the adjustment decision. A municipality should never be granted both an adjustment to fair share and phasing of the adjusted fair share in connection with the same factor.

The adjustment decision itself must be carefully controlled and rigorously analyzed. The burden should be on the municipality to prove that satisfaction of its fair share obligation is wholly incompatible with the specific factor upon which the adjustment claim is predicated.

The Urban League urges the adoption of the following threshold tests, which can be framed as a sequence of steps:

1. Determine the unadjusted fair share goal;

2. Determine whether there is a potential conflict between the goal and the particular factor which is the basis for adjustment under the Act;

3. Determine whether there is any manner in which the fair share goal can be accommodated that does not conflict with that

factor. If the fair share goal may be met without infringing upon the protected factor, there is no basis for adjustment;

4. If the fair share goal cannot be met without infringing on the protected factor, the question becomes: what steps can be taken to minimize infringement? If the infringement can be acceptably mitigated, here, again, there would be no basis for an adjustment;

5. Only if the infringement cannot be successfully mitigated is there basis for any adjustment. At that point, determine the largest number of units that can be accommodated, assuming application of all mitigation measures.

Using the example of an historic district, under the proposed test it would be insufficient for the municipality to simply show that the historic district exists. The municipality must demonstrate that the full fair share cannot be accommodated anywhere in the community without having a significant impact on historical preservation values. Thus, in most communities, it will be sufficient to require that the Mount Laurel development take place in parts of the community removed from the historic district. Even if adjacent development is necessary, the municipality must show that the impact on the historical structure or district cannot be adequately mitigated by careful design and siting. The burden on the municipality should be a heavy one, and should apply to each of the adjustment factors set forth in the Act.

Adjustment should be allowed only in rare circumstances and only upon a detailed, fact-specific record, in which the municipality satisfies each and every element of its burden of proof. Moreover, adjustments should not be cumulative, but limited to the amount needed to accommodate the specific factors relied upon. For example, if a community is entitled to a reduction of 100 units for agriculture, 200 units for vacant land, and 150 units for infrastructure, the total adjustment should be 200 units, not 450, since the other adjustments can be accommodated within the vacant land adjustment.

b. Infrastructure. The Council should approach demands for adjustments on the basis of inadequate infrastructure with great caution because this will often present a circular argument. Growth inevitably requires provision of infrastructure. By refusing to provide infrastructure, a municipality may attempt to retard growth and thereby avoid its fair share responsibility.

Adjustments for infrastructure should be allowed only in the rare cases where physical limitations make it impossible to provide adequate infrastructure at reasonable cost in the foreseeable future. In general, if infrastructure cannot be built in sufficient quantity to accommodate all of the necessary building during the fair share period, phasing of the fair share should be considered. The lost portion of fair share that results from adjustment is lost permanently; the portion that is phased is deferred to a later time

period but is enforceable when that time arrives. The municipality should not receive a permanent adjustment of its fair share obligation when infrastructure is only temporarily unavailable.

Infrastructure provides a good example of a problem which must be guarded against whenever adjustments are demanded; i.e., the application of potentially arbitrary exclusion criteria to matters which have traditionally been dealt with very effectively in an informal manner. In many cases, the absence of infrastructure can be addressed. If a municipality wants a non-Mount Laurel development, for example, accommodations are made, infrastructure is expanded, and developers provide funds or facilities. It is essential that Mount Laurel projects be treated the same way and have the same options as other projects. Mount Laurel projects should not be defeated because of inability to meet certain objective standards. Nor should the fair share be adjusted downward because of a rigid application of such standards, especially where non-Mount Laurel development continues apace by means of informal arrangements.

c. Drastic Alteration of Established Pattern of Development

Similarly, any adjustment sought for "drastic alteration in the pattern of development" must be viewed with some skepticism. This is virtually incomprehensible as a rational adjustment factor and, frankly, the Urban League cannot imagine circumstances justifying its application. All growth, by definition, alters the pattern of

development. Mount Laurel and the Act both contemplate that needed growth will be channeled into the areas of the state most appropriate for growth.

The Issue Papers seriously misfire on the approach to this adjustment factor by focusing on the Hintz Report concerning site suitability (page 21). While the usefulness of any scoring system is extremely dubious in Mount Laurel cases, the Hintz Report is intended to aid decisionmakers in evaluation of alternate sites within the community. While these criteria may be helpful in deciding among several competing sites, by definition, comparative site suitability is irrelevant to the determination of community development as a whole.

The proposed establishment of ranges for acceptable densities is similarly inappropriate. First, it assumes that these matters are immutable, when development throughout the state demonstrates that these factors change as a community grows. Second, the DCA mistakenly assumes that public transportation, services, and related infrastructure precede population growth. In fact, the process invariably goes the other way.

d. Environmental Factors. The Council should not fall into the Natural Resources Inventory Trap implicitly suggested by the Issue Papers. Not all land subject to "environmental constraints" should be considered unsuitable or unavailable for development. Depth to

bedrock, high water table, and septic suitability are not absolute criteria. It has become increasingly clear that many of these standards are only applied when a community is seeking to prevent development, and easily disregarded when the particular development is considered desirable. A good faith effort to accommodate the fair share must always be made and environmental factors should be subject to the same rigorous analysis set forth above.

e. Conclusion. The crucial point is to insure that when growth does occur, there not be additional hurdles for Mount Laurel housing. The Act merely permits the Council to "consider" the listed factors. There is no requirement that adjustments be granted with regard to any of them. The municipality should not be allowed to apply more stringent standards to Mount Laurel housing that it applies to non-Mount Laurel development.

Finally, we note a useful suggestion offered by the Township of Cranbury before the Supreme Court. Cranbury proposed that all fair share numbers be initially adjusted upward to anticipate the downward adjustment in some municipalities. The Urban League formula similarly incorporates a 20% upward adjustment for undevelopable growth area land. This suggestion acknowledges a very important principle, that is, that after all fair share calculations are made and all adjustments completed, the total regional fair share must be accommodated somewhere. In the alternative, municipalities that

cannot demonstrate any need for downward adjustments, the "ideal" communities for growth, could have their fair share adjusted upward. Mount Laurel and the Act incontrovertably require, however, that any fair share lost to adjustment must be made up elsewhere.

6. Limits Upon Municipal Fair Share

At least for the present, the scope of potential fair share adjustments makes it both unnecessary and undesirable for the Council to set any absolute limits on fair share allocations for individual municipalities.

7. Resale Controls

The Mount Laurel mandate will be seriously undermined by anything less than the most rigorous vigilance in establishing and enforcing strict resale controls. While it is clear under the Act that in general resale restrictions should remain in place for at least 30 years, the Council should note that there is no prohibition against indefinite restrictions. In order to best effectuate the goal of the Act, the Urban League urges the Council to provide every possible incentive to the municipalities to enact resale/rerent controls for the life of the housing. Anything less erodes the Legislature's stated aim of providing affordable housing, by depleting the inventory. Moreover, any time limitations on such restrictions only

invite speculation by assuring a windfall to the last buyer. There is no valid purpose to be served by limiting the resale controls and the Council should resist pressure to do so from those seeking to exploit the Act for their own profit.

Similarly, appropriate provisions must ensure that rental housing remain available for rental for an absolute minimum of 15 years. If such housing is thereafter converted to sale and condominium ownership, it should be subject to resale controls for the balance of its life.

Whatever the index used to adjust affordability limits, the return to the seller should be less than the full index increase. In some ordinances, for example, 75% of the index is the maximum increase.[3] In the Bedminster program, although the price increases by the full index amount, 20% of the appreciation goes to a nonprofit corporation to facilitate the purchase of new homes. This helps deal with the interest rate fluctuation problem noted on page 43 of the Issue Papers, without introducing complete uncertainty into the process of determining resale price.

Provisions dealing with the sale of units for which a lower income buyer is not readily found must be carefully drafted to ensure

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3 The 75 percent is calculated on the total vlaue of the unit, rather than on the seller's equity which will usually be considerably less than 50 percent of the total value. At 75 percent, therefore, the seller is still receiving a reasonable return on his/her investment.

that the units are not lost from the stock. For example, if, after diligent efforts, a lower income buyer cannot be found, sale at the same maximum price might be allowed to households with income as much as 50 percent greater than the ceiling for the relevant category; such a limited exemption from income requirements would apply only to that one sale. The Council has an important role here in requiring municipalities, as well as encouraging DCA/HMFA, to develop administrative procedures to minimize the risks that units remain vacant or that they are lost to lower income households.

Because the main components of a Mount Laurel unit's sale price are principal and interest, it is possible that the maximum resale price of units will have to be lowered in periods when interest rates escalate. In no event however, should a lower income seller be required to lose his or her investment upon sale and, of course, lending institutions will not agree to do so if they cannot thereafter recoup the mortgage loan balance. As a last resort, then, total carrying charges may have to rise to accommodate these factors. To avoid doing so, however, the Council should explore the possibility of a contingency fund that would subsidize re-sales back to affordable levels.

The Council is in a uniquely strong position to develop uniform procedures with the banking industry to deal with foreclosures. It is hoped that the Council will explore all possible avenues in this

regard. We have been told that banks and other lenders will not lend funds for lower income mortgages unless they are assured that the units will be released from lower income price controls in case of default and foreclosure. We find this suggestion questionable, because the amount of the outstanding mortgage will always be less than the permissible resale price (as it would have been less than the original purchase price) and thus see no reason why sale at a higher price is necessary to fully protect the lenders' legitimate interests. We believe that the Council is in a good position to investigate this assumption and determine whether release from controls is really necessary to insure an adequate flow of mortgage funds for lower income purchases. If investigation reveals that release from controls is necessary upon foreclosure, and thus that lower income units will be lost from inventory in those circumstances, it is crucial that provision be made for the appropriate disposition of those funds derived from the sale that are in excess of the lender's loan plus costs and the seller's equity. All excess funds obtained at foreclosure should be used for the development, subsidization or acquisition of additional affordable housing units, to replace those lost in foreclosure. Foreclosure clearly should not operate as a windfall to either the seller or the municipality.

8. Regional Contribution Agreements

The DCA has placed far too much emphasis on the mechanics of sorting out competing proposals, while virtually ignoring the central issue of quality control; i.e., ensuring that the Agreements actually produce housing.

The Issue Papers completely fail to address the content and regulation of regional transfer agreements, although the Act plainly contemplates that such agreements are to be tightly controlled by the Council. Detailed regulations must assure that the fair share transferred from one community will in fact be met in another. The crux here is to assure that there is a real flow of funds from the sending community to the receiving one. The price of each unit transferred should be set realistically. It should include not only the actual construction or other subsidy necessary for the unit to be built or rehabilitated but also the planning and administrative costs engendered by the transfer.

If a municipality has indicated in its housing plan that it intends to enter into an agreement, there must be a mechanism to ensure that it actually does so within a reasonable time. Substantive certification could be made conditional on receipt by the Council by a date certain of a duly executed agreement, for example. There must be a firm deadline after which the municipality would be required to implement specific fallback arrangements set forth in its Housing Plan for meeting the need within the sending community. Under no

circumstances should a municipality be allowed to use the transfer agreement procedure to unduly delay implementation of its fair share obligation.

In addition, the Council guidelines must require adequate reporting and monitoring (by both the Council and the sending municipality) to insure that the funds are properly spent by, and the units actually developed in, the receiving community. Transfer agreements should be voided -- and the sending municipality required to provide the units within its own boundaries -- if the receiving municipality breaches the agreement. This will insure that sending municipalities taking advantage of the special benefit of the Regional Contribution Agreement act as monitoring agents for the Council and remain responsible for all of their fair share.

The Council should take an active role to facilitate and expedite the transfer process. The Council can encourage applications from "paired" municipalities, for example. In addition, it could usefully act as a broker by "packaging" programs from transferring municipalities, and soliciting expressions of interest from potential receiving municipalities. The Council could also publish guidelines regarding the sending municipality's contribution.

In the final analysis, of course, each agreement must be tailored to the specific needs of the municipalities involved. The contribution must be adequate to the specific tasks set forth in the

agreement. The cost of rehabilitation, for example, will vary from Camden to Newark, as will the cost of internal subsidization. The procedures adopted, accordingly, must be sufficiently flexible to allow for case by case assessment.

APPENDIX A

Excerpts from the Urban League's Brief to the Supreme Court on the Issue of Builder's Remedies

A. Voluntary Implementation of the Fair Share Obligation Through the Affordable Housing Council is Illusory and Unconstitutional Unless a Builder's Remedy can be Awarded Because Otherwise There is No Incentive to Seek Substantive Certification

The Fair Housing Act pays scant attention to the builder's remedy. Yet, because it is a central aspect of Mount Laurel II, assessment of the facial constitutionality of the Act requires an inquiry into whether the Act sufficiently incorporates or substitutes for the builder's remedy. We submit that the Act would be constitutionally deficient in this regard unless substantial clarification is added through a combination of judicial construction and administrative implementation.

The Act contains only two explicit references to the builder's remedy, both of which are essentially negative. Section 3(a) provides that "it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing." "Builder's remedy" is not included in the definition section of the Act, § 4, but it is defined in Section 28, which provides for a moratorium on awards of the builder's remedy until early 1987.[33] The Section 28 definition is:

> For the purpose of this section "builder's remedy" shall mean a court imposed remedy for a litigant who is an individual or a profit-making entity in which the court requires a municipality to utilize zoning techniques such as mandatory set asides or density bonuses which provide

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33 The constitutionality of the Section 28 moratorium will be considered separately infra, Point IV.

> for the economic viability of a residential development by including housing which is not for low and moderate income households.

A matter of terminology is important here. The term "builder's remedy" has come to acquire two distinct meanings in Mount Laurel litigation. As used by politicians, newspaper reporters and angry citizens in municipalities faced with a Mount Laurel obligation, "builder's remedy" is often meant to describe the mandatory set aside technique which this Court approved for use in Mount Laurel II. It is, of course, hostility to the overbuilding that results from the 4:1 ratio of a 20% setaside in a development with higher than normal density, which generated much of the pressure for passage of the Fair Housing Act and, specifically, the Section 28 moratorium provision.

Despite the obvious legislative hostility to the mandatory set aside (or "builder's remedy," as some would call it)[34], a fair reading of the Act is that it permits (although it does not require) use of the mandatory set aside technique to achieve compliance. Section 11(a), for instance, requires a municipality to "consider" in preparing its housing element for submission to the Council:

> [r]ezoning for densities necessary to assure the economic viability of any inclusionary developments, either through mandatory set asides or density bonuses, as may be necessary to meet all or part of the municipality's fair share.

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34 Throughout this brief, we use the term "mandatory set aside" when referring to required ratios of Mount Laurel to market rate housing in an inclusionary development. Correct use of the term "builder's remedy" will be explained in the next paragraph.

In this respect the Act is facially constitutional.[35]

There is a different, more correct use of the term "builder's remedy," one which this Court explicitly used in Mount Laurel II and which is crucial to the analysis of the constitutionality of the Act. Mount Laurel II recognized that the ability of public interest plaintiffs to vindicate the Constitution was severely limited. It therefore sought to provide sufficient incentive to private parties -- builders -- to insure that the necessary constitutional litigation would be brought. Without such an incentive, it was found, the teaching of Mount Laurel I would remain a hollow abstraction.

The incentive provided was not the mandatory set aside as

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35 It may be argued that the Act, unlike Mount Laurel II, seeks to de-emphasize the use of the mandatory set aside and thus reduces the likelihood that housing elements submitted to the Council will provide the constitutionally required "realistic opportunity." Although the significant appropriation of housing subsidies also contained in the Act somewhat mitigates this objection, the money appropriated to date is clearly insufficient to meet fully the housing need covered by the Mount Laurel doctrine.

Housing elements that do not contain a mandatory set aside nevertheless can be realistic if carefully crafted. The Urban League respondents achieved a model settlement with Plainsboro Township, which like many of the appellants here sought to avoid excessive growth. The settlement will provide 575 units of low and moderate income housing with only 60 units of related market-rate housing, by placing primary emphasis on tax sheltered financing and use of a housing trust fund. Because a "realistic opportunity" standard can be satisfied without a mandatory set aside, and the Fair Housing Act does not prohibit use of the set asides generally (deferring for the moment the moratorium question), it cannot be said that the Act is facially unconstitutional by attempting to discourage use of the mandatory set aside. Any constitutional problems in this area will arise on an as-applied basis.

such, because such a zoning technique applies with equal force to builders or landowners who have had nothing to do with Mount Laurel litigation. Rather the carrot was the promise that a successful builder-plaintiff who offered to provide a significant amount of lower income housing, on a site and in a manner that was not inconsistent with environmental and other general planning suitability criteria, would be entitled to build on that site, even if the town might prefer compliance on a different site and even if some alternative sites might in other circumstances be regarded as "more suitable." 92 N.J. at 279-80.

Properly understood, therefore, the builder's remedy is the builder-plaintiff's right to a personal and concrete remedy. Absent this specific entitlement, the defendant municipality could easily rely on the inherent interchangeability of many developable sites to come up with a compliance plan that excludes (spitefully, or on more legitimate grounds of planning preference) the winning builder-plaintiff. No economically motivated entity will undertake expensive and complex litigation, such as Mount Laurel cases, without assurance that "winning" will include tangible reward as well as the nobler satisfaction of having done the right thing. The builder's remedy acquires constitutional status as a result -- not because builders have a constitutional right to build, but because lower income households have a constitutional right to have a realistic opportunity to have the housing built and have no other way to

insure that this will occur. The situation is comparable to the well recognized conjunction of principle and profit that allows booksellers and movie theatre owners to pursue the first amendment rights of their patrons. See, e.g., Paris Adult Theatre v. Slaton, 413 U.S. 43 (1973). As a technique to encourage litigation that would vindicate the Constitution, there can be no doubt but that the builder's remedy technique has succeeded spectacularly well, judging by the number of private suits - well over 100 - filed since January 20, 1983.

Nowhere in the Act is there an explicit authorization for the award of a site specific remedy as an incentive to a builder to bring a municipality to constitutional compliance. There is, however, in Section 10(f), a requirement that the municipality's housing element include "a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing." This provision, we submit, is sufficiently broad that it can be construed to permit a form of builder's remedy incentive adequate to save the Act from facial invalidation.

The central concept of the Act is voluntary compliance. Municipalities initiate the process by filing a notice of participation and thereafter a housing element. § 9(a). In support of its housing element, the municipality makes its own fair share study, which is then reviewed by the Council against Council-promulgated criteria that may be quite non-specific. Finally, "at any time during a six year period following the filing of the housing element," § 13, the

municipality may, but need not, move for substantive certification which, if granted, will immunize it from litigation for six years unless a heavy presumption of validity can be overcome by "clear and convincing" evidence to the contrary. § 17(a).

On the face of the Act, the inducement to voluntary compliance is the effective immunity from Mount Laurel litigation achieved through substantive certification. This inducement is illusory, however, because of the way the key sequence of statutory events intersects with the Act's provision for exhaustion of administrative remedies. Once a housing element has been filed pursuant to section 9(a), no matter how inadequate it may be, a private litigant is required to exhaust review and mediation before the Council and an Administrative Law Judge before it can bring or pursue an exclusionary zoning suit in the Superior Court. § 16(b).

Although the municipality has six years to seek substantive certification, § 13, it will have an incentive to do so once suit is filed or threatened by a builder, because the mediation and review process obligation prevents the litigation from going forward, § 16 and certification effectively kills it. § 17. Section 14, moreover, even gives the municipality sixty days to refile for substantive certification should it initially be rejected by the Council. It will be a rare municipality indeed that cannot come up with a substantive certification for its housing element after the second try, and thus gain effective immunity from the

litigation which has been foreclosed while this administrative process has been unfurling.

The apparent result of this process -- housing elements that afford a "realistic opportunity" for the construction of lower income housing -- would hardly be unsatisfactory (assuming, as the Urban League respondents do at this stage, that the Council will develop constitutionally adequate standards for passing on substantive certification) but for one catch. Because the outcome of the process will almost certainly be substantive certification for all but the dullest of municipalities, effectively barring litigation, there is in fact very little incentive for a private, profit-motivated builder to trigger the process by bringing or threatening suit in the first place.[36] And if the builder suit is not brought, then there is neither statutory nor real-world incentive for the municipality to seek the protection that substantive certification will confer. The legislation, in other words, is circular, and the inducement that it offers to constitutional compliance is illusory.[37]

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36 There is a continuing incentive for public interest groups to trigger the process. As this Court correctly recognized in Mount Laurel II, however, neither lower income individuals nor groups speaking for them have the resources to pursue this kind of litigation on a broad scale. That the Mount Laurel doctrine is not self-executing was the lesson of Mount Laurel I, and there must, therefore, be some additional mechanism for vindicating the constitutional rights involved.

37 There is one technical loophole in this analysis. Section 18 provides that the obligation to exhaust ceases "if the council rejects the municipality's request for substantive certification or conditions its certification upon changes which are not made

The circle can only be broken by assuring the builder that his involvement in the process will be effective. For the last 2 1/2 years, defendant municipalities have for the most part subverted Mount Laurel II by refusing to acknowledge its clear warning that municipalities not in compliance would be subject to the onerous requirement of the builder suits and the builder's remedy. Notwithstanding these consequences, few municipalities did undertake voluntary compliance, and few that were sued took any effective steps to reduce their reliance on the mandatory set aside as Plainsboro did.[38] They apparently gambled that the pressure would build to the point that the Legislature would take them off the hook. The pressure is real, and the Legislature has attempted to respond to it by authorizing "various alternatives" to the builder's remedy. § 3. But the legislative response must stay within

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within the period established in this act . . ." Read in comparison to Section 14, which flatly permits refiling even if there is outright rejection by the council rather than a conditional rejection, Section 18 seems to mean that exhaustion would cease immediately upon flat rejection, and that litigation in the Superior Court could thereafter proceed, even if the municipality decided to refile under Section 14(b). If this construction is correct, then there is some slight incentive to the builder to trigger the process by bringing the initial action -- the possibility that the Council will issue an outright rejection. It stretches belief, however, to think that the Council will do so very often. The overriding statutory purpose is to encourage voluntary compliance, and the Council will almost certainly respond to this by conditioning approvals and allowing the municipality an opportunity to rewrite non-compliant plans unless the initial submission has been so defective as to imply bad faith.

38 See note 35 supra.

constitutional bounds,[39] and the question thus becomes whether any of these alternatives can satisfactorily replace the builder's remedy.

We submit that they cannot. As noted above, the phrase "builder's remedy" connotes two different aspects of the Mount Laurel doctrine. The Legislature has responded to the overbuilding aspect by encouraging use of alternate mechanisms such as public subsidies, rehabilitation, rent control, regional contribution agreements, and the like, see §§ 14, 20-21, to produce the needed lower income housing. These alternatives are generally satisfactory to the Urban League respondents, which have never contended that a municipality's Mount Laurel obligation must be met through a mandatory set a-side on a 4:1 ratio.

Nowhere in the Fair Housing Act, however, does the Legislature respond to the more important aspect of the builder's remedy -- its function as a stimulus to a compliance process, either judicial or administrative, which will lead a

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39 As previously noted, see pp. 58 - 59 supra, the builder's remedy has constitutional status as a necessary means of implementing the Mount Laurel doctrine. This Court has not had an occasion to state explicitly that the constitutional obligation runs to the state as well as to local governments; in In Re Egg Harbor Associates, 94 N.J. 358 (1983), the Court went to some lengths to rest its decision on grounds of statutory interpretation rather than constitutional command. However, whether based specifically on the zoning clause, N.J. CONST. art. 4, § 6, par. 2 or on "inherent" concepts of the general welfare, see 92 N.J. at 208-09, it is inconceivable that the Legislature could authorize municipalities to violate their constitutional mandate simply by creating a state administrative forum within which to do so.

municipality to the point where it will actually choose from the available methods of compliance. The essence of the Act is voluntarism, and the sorry eight year history from Mount Laurel I to II taught this Court that voluntarism alone will not satisfy the constitutional mandate.

This is not to say that only the builder's remedy can satisfy the constitutional mandate that there be an effective method for policing the constitutional obligation. A properly financed and administered state enforcement agency, for instance, would be at least facially adequate. The enforcement contemplated by Executive Order 35, a priority of state aid for municipalities in compliance with fair share goals, see Markert v. Byrne, 154 N.J. Super. 410 (App. Div. 1977), offers similar possibilities. We do not specifically endorse either of these possibilities, but mention them only to demonstrate that other enforcement mechanisms are feasible.

Such mechanisms, however, are subject to executive or legislative discretion and not within the power of this Court to compel. For this reason, the builder's remedy remains the only viable enforcement mechanism available to the Court until the political branches choose to act equally effectively. Either the Fair Housing Act must be construed so as to find authority to award a form of builder's remedy under appropriate circumstances, or it must be found to be facially unconstitutional. We believe that the Act can be construed to preserve its constitutionality in this regard.

The Act does not prohibit award of a builder's remedy.[40]

Moreover, in Section 10(f), it specifically recognizes the relevance of ready, willing and able builders as an important component in evaluating the "realistic opportunity" afforded by a housing element submitted to the Council for substantive certification. Finally, the Act states that its purpose is to "satisf[y] the constitutional obligation enunciated by the Supreme Court," § 3, accord § 2(c), of which one major component is the builder's remedy incentive. Given what might be called a grudging acceptance by the Legislature of the builder's remedy as a necessary evil on occasion, and given the general precept that constructions sustaining constitutionality are favored, we believe that an adequate form of builder's remedy can be read into the Act to provide the necessary stimulus to compliance.

Our construction is consistent with the structure and purpose of the statute. The Act envisions the continued threat of builder-remedy suits in court. It seeks to induce compliance by offering presumptive immunity from such remedies through administrative certification of compliance. Where certification is denied or its conditions rejected, the builder is free to preceed in court, towards a site-specific personal remedy. Offering such a remedy to a builder who establishes noncompliance in the administrative process defers

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40 We emphasize again the dual nature of the builder's remedy. As explained above, the Act focuses on alternatives to the builder's remedy as a compliance mechanism, and totally ignores the problem of providing enforcement incentives.

to the legislatively preferred mechanism while assuring enforcement of the constitutional mandate for which the mechanism was created.

In essence then, we suggest that this Court construe Section 10(f) to mean two things. First, it means, as it states, that a municipality in developing its housing element and fair share ordinances must consider the land of developers interested in providing lower income housing. If, however, no objector appears and the plan is reviewed by the Council and its staff alone, the municipality need not incorporate such land in its fair share plan, provided that the plan is otherwise "consistent with the rules and criteria adopted by the council" and "make[s] the achievement of the municipality's fair share of low and moderate income housing realistically possible," §§ 14(a) and (b). Second, Section 10(f) must mean that if an objector establishes through the review process that the plan, which does not incorporate its site, is substantially inadequate, then the Council must condition substantive certification on an appropriate rezoning of that objector's site. Thus, the Section 10(f) "consideration," which is permissive if the voluntary plan is adequate, becomes mandatory if the plan proves substantially inadequate.

We say "substantially inadequate" because we see no reason for mandating inclusion of a site inconsistent with the town's master plan simply because of technical noncompliance with some administrative regulation or lack of realism in some

minor portion of the housing element.[41] Failure to cross every bureaucratic "t" in the drafting of the zoning or affordable housing ordinance for example, should not condemn a municipality to Mount Laurel purgatory. Likewise, if a housing element fairly assures development of 95% of the properly determined fair share, but unrealistically estimates rehabilitation, subsidization, or exercise of a density option to achieve the last 5%, the conditional certification should mandate correction but not necessarily import a mandatory builder remedy. Where, however, the plan is fundamentally flawed -- falling far short in rezoning or realism -- the Council should condition certification upon rezoning the land of the objector who has exposed the flaws.

A real problem will develop, as in the past, where the plan is fundamentally flawed but includes the potential builder-participant's site. Presumably a builder who gets the desired higher density rezoning with a set-aside will not object to such a plan, even if its development will produce only half of the town's fair share and the town proposes

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41 Until now, noncompliance has been almost a foregone conclusion because few towns had taken Mount Laurel I seriously and thus the number of zoning ordinances likely to produce more than a nominal amount of lower income housing was infinitesimal. The rigorous enforcement of Mount Laurel II, the growing stock of compliant ordinances, the establishment of a state-wide administrative mechanism expressly designed to satisfy the constitutional mandate, the promulgation and then interpretation of criteria and guidelines, and the statutory offer of virtual immunity from suit for voluntary compliance make it likely that many housing elements from here on will be serious efforts.

nothing else.[42] The situation should be different now because the Council is obligated to scrutinize the adequacy of a plan even when there is no objector, § 14, a situation called which could not occur in court since there is no jurisdiction without a complaint. We must assume that the Council will conscientiously exercise its functions, even if the Public Advocate, some public interest group or conscientious residents do not intervene. In any event, as in Old Bridge, such drastic flaws will almost certainly attract another landowner/developer who then would be entitled to mandatory inclusion. If not, perhaps the Council would consider, or be required by this Court to undertake, appointment of a master or designated objector.

There is a further problem, however. Sections 18 and 19

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42 A far more notorious example of municipal-developer coziness arose in the Urban League case itself where the celebrated builder-plaintiff in Oakwood at Madison pursued its builder's remedy to this Court in 1977 and prevailed. 72 N.J. 481 (1977). Six years later, the Urban League respondents found it necessary to revive compliance proceedings against the defendant township, Old Bridge, because nothing of substance had been done, either as to Oakwood's site or any other developments in the municipality. Indeed, Oakwood was about to begin construction in early 1985 under a site plan approval permitting construction of 1200 market units without requiring construction of any lower income units. This after the express guaranteed to this Court in 1977 of 20% lower income units. 72 N.J. at 549-50. The trial court stayed issuance of more than 120 building permits until an appropriate plan for phasing in lower income units is produced. Intervention by more recent builder's remedy plaintiffs has assured attention to provision of additional affordable housing, but it has continued to be the experience of the Urban League respondents that independent review, by a public interest party or by a master, is necessary to assure that the full scope of the Mount Laurel guarantee is being met. Indeed, as of this date, the Oakwood plaintiffs, now defendants in the Old Bridge portion of the Urban League case, have not submitted a plan for phasing its lower income units and thus the trial court's injunction against the development remains in effect.

provide for a number of circumstances under which the obligation to exhaust administrative remedies terminates, including failure to file a timely housing element, denial of substantive certification, and refusal to make the changes required by a conditional certification. Nowhere does the statute specify, however, what happens when a municipality fails to move for substantive certification after a timely filing of its housing element.[43] It is plausible to read Section 18 to require that the obligation to exhaust continues unless and until there has been a denial of a petition for substantive certification.

If this is so, however, a clever municipality could virtually guarantee itself a way to avoid any Mount Laurel obligation by filing a very adequate housing element and never moving for substantive certification. No builder will seek mediation and review under Section 15(a), which apparently will trigger a petition for substantive certification,[44]

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43 A municipality's housing element can be the basis of a petition for substantive certification for up to six years, but the statute nowhere requires petitioning during this period. § 13.

44 There is a further statutory lacuna here. Section 15(a) provides for mediation and review in two circumstances -- upon objection to a petition for substantive certification, § 15(a)(1), and when sought by a litigant required to exhaust, § 15(a)(2). The remainder of the section then describes what happens upon objection to a petition for substantive certification, without ever again mentioning a Section 15(a)(2) request. There must be something to mediate and review, however, and it does not make much sense to ignore a housing element already filed with the Council. In addition, the review and mediation process must produce and certification or its denial is all that the Council is empowered to order. Thus, Section 15(a)(2) should be

because there is no likelihood of a builder's remedy resulting if the plan is, so hypothesized, very adequate. And the town need not actually adopt ordinances implementing its very adequate proposed housing element until it receives substantive certification. § 14(b).

To avoid this apparently inadvertent result, this Court should contrue the statute to terminate the obligation to exhaust between the time that the housing element is filed and the time that the municipality petitions for substantive certification. During this period, a builder could proceed directly to suit in the Superior Court, challenge the underlying ordinance (not the unenacted housing element), and be awarded a builder's remeldy under appropriate circumstances.

Presumably to avoid this consequence, any municipality serious about complying with Mount Laurel and the Act will move immediately for substantive certification, when filing its housing element, as it should. The interested builder would then decide whether to object or not, depending on an assessment of whether the housing element is adequate. But even if there is no objection forthcoming, and hence only the Council's nonadversarial review, the purposes of Mount Laurel and of the Act will have been furthered by moving the housing element along towards substantive certification, enactment,

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construed to trigger a request for substantive certification automatically.

and eventual implementation.[45]

However arrived at, the remedy before the Council need not be identical to the builder's remedy implemented by Mount Laurel II. Indeed, this Court should take note of the experience that has accrued since January 1983, particularly as explored in Field v. Franklin, ___ N.J. Super. ___ (Law Div. 1984) (116 N.J.L.J. 1) (Nov. 21, 1985) and Allan-Deane Corp. v. Bedminister, ____ N.J. Super. ___ (Law Div. 1984).

Three major revisions seem plausible. First, some system of limiting or ordering multiple remedies is appropriate. The trial court has already attempted that in its priority decision in Field v. Franklin, where it grappled with 11 builder-remedy plaintiffs whose proposals would have clearly exceeded the municipality's fair share. In general, we believe that limitation to only one builder remedy before the Council would be reasonable. Of course, more than one objector may appear because a later filing objector might choose to gamble that the first objector's site will be found inadequate and thus that s/he will be the one receiving the 10(f) consideration/remedy. The objecting builder will, of course, be primarily concerned with establishing the suitability of its site -- but under this scheme, must also be

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45 This proposed construction squares with Section 13, which allows six years for substantive certification, because a municipality which has no significant development pressure may still choose to take a chance that no suits will be brought, a situation that existed before the Act with many municipalities which ignored Mount Laurel II with impunity.

concerned with establishing the inadequacy of the town's entire plan, just as builder-plaintiffs now must show that a town's overall land use regulation is not in compliance with the Constitution in order to be awarded a remedy.

Second, the winning builder-objector's remedy might be limited, despite the actual size of the land held, to a certain proportion of the town's total fair share. We propose a limit of one-half, for two reasons. First, the Act encourages the use of alternatives to high-density at the 4:1 ration of market to lower income housing. A builder's remedy, however, is almost always at this ratio. If the builder-remedy were to consume most of the fair share, the municipality would have been deprived of the legislative preference for alternatives.[46] In addition, the Act as revised by the Governor permits a town to transfer, through carefully controlled regional contribution agreements, up to half its fair share to another municipality, if it is willing to pay the price. § 12. This provision suggests one-half as a reasonable benchmark for the alternatives to mandatory set-asides.[47]

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46 That of course, would not be entirely unfair since the premise of a remedy is that the plan submitted by the municipality was substantially inadequate. Nevertheless, both interests can be accommodated through a formula that limits the objector's remedy to something like half of the total.

47 The one-half limitation may have to be relaxed in the case of some municipalities with very small fair shares, so that the single builder-remedy is large enough to permit an economically-feasible scale of construction.

This last point brings us to the third, and most drastic, possible revision of the remedy available to an objector before the Council. Increasingly, in settlements, Mount Laurel builder-plaintiffs are offering to build the traditional low-density single-family developments permitted under normal zoning while making a cash contribution towards lower income housing. This has the benefit of minimizing the number of market units built while increasing flexibility in meeting the fair share. One of the great disappointments for the Urban League respondents has been that almost all Mount Laurel compliance has been in the form of rezoning for construction of new units that will be offered for sale rather than rental. New units require time to build, often years, and sales units require mortgage company clearance and a substantial down-payment quite clearly not available to most truly low-income families. Cash contributions offer the possibility of immediate rent subsidization in existing units, and of reaching further down in the plaintiff class than is possible when family income alone must carry the entire housing cost.[48]

Although a cash contribution approach has been used sparingly to date in Mount Laurel compliance plaus, we propose

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48 In most orders and settlements, builders have been required to ensure only that the Mount Laurel units are affordable to households earning 90 percent of the applicable ceiling -- or 45 percent of median income for low income units and 72 percent of median for moderate income units.

that it could be made mandatory in the builder's remedy awarded by the Council as opposed to the courts. This approach would satisfy a municipality's goal of lower densities, the Urban League's goal of immediate housing, and the builder's goal of profitable development. The municipality would retain the initial discretion to propose, in its revised submission under Section 14, how best to use that money towards the fair share. Indeed, if the Township were interested, and a receiving municipality were available, the revised housing element could suggest using the successful objector's contribution to fund transfer of some units. The Council clearly would have to issue criteria to determine how much of a contribution is appropriate for each kind of low-density development and what limits would be placed on the municipal discretion to use those funds.

In offering this analysis of the builder's remedy problem in the Fair Housing Act, the Urban League respondents have stressed, as we believe it is incumbent upon a public interest plaintiff to do, the long-term perspective on the public interest. We believe that the Act can and should be construed in a manner to save its constitutionality, because the ultimate value of the Mount Laurel cases will prove to be that they stimulated an effective legislative solution to an otherwise ignorable problem. At the same time, however, we cannot lose sight of the particular circumstances of the Urban League case now before the Court.

In this case, a number of builder-plaintiffs have relied

heavily on the promise given them by Mount Laurel II that their builder's remedy claims would be cognizable in the court, and these parties have contributed substantially to the development of the Mount Laurel remedial process (including such cases as AMG, Field, and Allan-Deane). It would be a manifest injustice to them to allow their legitimate claims to be washed out in a transfer to the Council under rules that did not fully preserve their builder-plaintiff status. We therefore submit than any attention which this Court gives to the question of the builder's remedy before the Council should explicitly except existing claims.[49]

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49 This is not a major problem insofar as the four Urban League cases now before the Court are involved. Two -- Piscataway and South Plainfield -- do not involve any builder's remedy claims and a third -- Monroe Township -- involves only a single builder's remedy on a site that the municipality has already conceded to be suitable for Mount Laurel housing. Only Cranbury Township presents a potential problem and even there it may be mooted out by subsequent trial proceedings (adjourned since July 23, 1985, because of the pendency of these transfer motions). In Cranbury, the township challenges the suitability of two of the three builder-plaintiffs' sites, and the trial judge has indicated that he will allow plenary trial on the suitability issue set out in Mount Laurel II, see 92 N.J. at 279-80, before awarding a builder's remedy to any of the plaintiffs. A fourth builder's remedy claimant has taken a voluntary dismissal with prejudice after its site was found unsuitable by both the township, the Master and the Urban League respondents' planning consultant.

APPENDIX B

Suggested Compliance Ordinances:

1. North Brunswick
2. Old Bridge

DRAFT

AFFORDABLE HOUSING ORDINANCE

Prepared for the

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DELETIONS ARE INDICATED BY BRACKETS AND
ADDITIONS ARE INDICATED BY UNDERLINING.

NOVEMBER 21, 1984
Revised June 18, 1985
Revised December 9, 1985
Revised January 3, 1986
Revised January 20, 1986

Section I. Short Title.

This Ordinance shall be known and may be cited as the "Affordable Housing Ordinance of the Township of North Brunswick."

Section II. Purpose.

The purpose of this Ordinance is to comply with the Court Order of the Superior Court of New Jersey in Urban League of Greater New Brunswick, et al. v. Mayor and Council of the Borough of Carteret, et al., by establishing a mechanism for assuring that housing units designated for occupancy by low and moderate income households remain affordable to, and occupied by, low and moderate income households.

Section III. Definitions.

The following terms wherever used or referred to in this Chapter shall have the following meanings unless a different meaning clearly appears from the context:

Affordable Housing Plan. An instrument to be recorded with the Office of the Recorder, Middlesex County, New Jersey, constituting restrictive covenants running with the land with respect to the Lower Income Units described and identified in such instrument. The instrument shall set forth the terms, restrictions and provisions applicable to the Lower Income Units and shall be consistent with the Affordable Housing Ordinance including but not limited to those provisions of the Ordinance concerning use; occupancy; sale; resale; rental; re-rental; sales price and rental determination; duration of restrictions; exempt transactions; hardship exemptions; foreclosure; violation; legal description of the specific Lower Income Units governed by the instrument; determination of eligible purchasers and owners; responsibilities of owners; improvements; and creating the liens and rights of the Agency upon such Lower Income Units, all as such provisions of the Ordinance exist at the time that the instrument is executed by the Agency. The instrument shall refer to this Affordable Housing Ordinance and the rules and regulations of the Affordable Housing Agency. The terms, restrictions and provisions of the instrument shall bind all purchasers and Owners of any Lower Income Unit, their heirs, assigns and all persons claiming by, through or under their heirs, assigns and administrators. If a single instrument is used to govern more than one Lower Income Unit, then the instrument must contain the legal description of each Lower Income Unit governed by the instrument and the deed of each and every individual Lower Income Unit so governed must contain the recording information of the instrument applicable to such Lower Income Unit. It is intended that the terms of the Affordable Housing Plan be wholly consistent with the Affordable Housing Ordinance and the rules and regulations of the Agency, as such ordinance and rules and regulations of the Agency existed on the date the Affordable Housing

Plan is executed by the Agency, however, in the event of conflict or inconsistency, the Affordable Housing Ordinance and rules and regulations as they existed on the date of the Plan shall control. Changes, amendments or revisions to the Affordable Housing Ordinance and rules and regulations subsequent to the date of an Affordable Housing Plan shall not affect, amend or alter the Affordable Housing Plan and such Affordable Housing Plan shall continue to be interpreted and applied in accordance with the Affordable Housing Ordinance and rules and regulations as same existed on the date of the particular Affordable Housing Plan. Such instrument shall be executed by the Agency prior to recording of the Affordable Housing Plan and the Agency shall certify that the Affordable Housing Plan is consistent with the then current Affordable Housing Ordinance and rules and regulations. The Instrument shall also be executed by the developer and/or the then current title holder of record of the property upon which the Lower Income Units are to be constructed.

Agency. The Affordable Housing Agency of the Township of North Brunswick created pursuant to this Ordinance or any successor duly authorized by the Township Council to carry out the powers and responsibilities of the Agency.

Assessments. Shall mean and refer to taxes, levies, charges or assessments both public and private, including those imposed by the Association, as the applicable case may be upon the Lower Income Units which are part of the Association.

First Purchase Money Mortgage. Shall mean and refer to the most senior mortgage lien to secure repayment of funds for the purchase of a Lower Income Unit.

First Purchase Money Mortgagee. Shall mean and refer to the holder and/or assigns of the First Purchase Money Mortgage and which must also be an institutional lender or investor, licensed or regulated by a State or Federal government or an agency thereof. Other lenders, investors or persons may be holders of a First Purchase Money Mortgage, however, for purposes of this ordinance, such other lenders, investors or persons shall not be First Purchase Money Mortgagees for purposes of this Ordinance.

Foreclosure. Shall mean and refer to a termination of all rights of the mortgagor or the mortgagor's assigns or grantees in an Lower Income Unit covered by a recorded mortgage through legal processees, or through a Deed in Lieu of Foreclosure which has been executed and delivered prior to a judicially-regulated sale. Foreclosure shall not take place before the exhaustion of remedies as set forth in this Ordinance and the Affordable Housing Plan.

Gross Aggregate Household Income. The total annual income from all sources of all members of the household, with the exception of income exclusions provided for in the rules and regulations promulgated by the Agency. Gross Aggregate Household Income shall include imputed interest from all assets, including any home or real property owned within six months of the date of

application for a lower income unit, except that interest shall not be imputed for the first $5,000 of assets. Gross Aggregate Household Income shall also include Social Security benefits and interest from government bonds, whether or not subject to federal income taxation.

Household. One or more persons living as a single non-profit housekeeping unit whether or not they are related by blood, marriage or otherwise.

Improvement. Shall mean and refer to additions within a Lower Income Unit, including materials, supplies, appliances or fixtures which become a permanent part of, or affixed to, such Lower Income Unit.

Income Ceiling. 80% of the regional median income for moderate income households and 50% of the regional median income for low income households, with adjustments for household size.

Low Income Household. A household with a gross aggregate household income which does not exceed 50% of the regional median income, with adjustments for household size.

Low Income Purchaser. A Low Income Household purchasing either a Low Income Unit or a Moderate Income Unit as the case may be.

Low Income Unit. A unit which is Affordable to a Low Income Household.

Lower Income Household. A Household which is either a Low Income Household or a Moderate Income Household, as the case may be.

Lower Income Purchaser. A purchaser of a Lower Income Unit which is either a Low Income Purchaser or a Moderate Income Purchaser as the case may be.

Lower Income Unit. A residential unit within a development which has been designated as either a Low Income Unit or a Moderate Income Unit, as the applicable case may be, pursuant to this Affordable Housing Ordinance.

Market Unit. Any residential unit within a development which is not designated a Lower Income Unit.

Moderate Income Household. A household with a gross aggregate household income which is greater than 50% of the regional median income, but which does not exceed 80% of said regional median income, with adjustments for household size.

Moderate Income Purchaser. A Moderate Income Household purchasing a Moderate Income Unit.

Moderate Income Unit. A unit which is affordable to a Low or Moderate Income Household.

Owner. The then current title holder of record of a Lower Income Unit. Owner shall refer to and mean the title holder of record as same is reflected in the most recently dated

and recorded deed for the particular Lower Income Unit. For purposes of the initial sales or rentals of any Lower Income Unit, Owner shall include the developer/owner of such Lower Income Units. Ownership of a Lower Income Unit shall be deemed to be acceptance and ratification of the provisions of this Affordable Housing Ordinance and the Affordable Housing Plan. Where appropriate, the term Owner shall also mean and refer to a person who owns a Lower Income Unit as a landlord or who occupies a Lower Income Unit as a tenant. Owner shall not include any co-signor or co-borrower on any First Purchase Money Mortgage unless such co-signor or co-borrower is also a named title holder of record of such Lower Income Unit.

Qualified Purchaser. Shall mean and refer to a person whom pursuant to this Ordinance and the Affordable Housing Plan, (1) submits an Application for Certification as a Qualified Purchaser to the Agency; (2) whose Gross Aggregate Household Income at the time of proposed purchase of a Lower Income Unit is within Low or Moderate Income Levels, as these Income Levels are designated herein; and (3) who obtains Certification as a Qualified Purchaser of an Lower Income Unit from the Agency pursuant to the rules and regulations of the Agency. Once a Qualified Purchaser becomes an Owner of a Lower Income Unit in accordance with the provisions of this Ordinance, any increase or decrease in the Gross Aggregate Household Income of such Owner shall not affect ownership rights, privileges or obligations of such Owner. The term "Qualified Purchaser" shall also include a person or family who occupies the Lower Income Unit on a rental basis, subject to the qualifications and conditions stated above and elsewhere herein. Any person who submits false information in support of an application for certification and who subsequently received such certification and either title to a Lower Income Unit as Owner or possession of a Lower Income Unit as tenant shall be deemed to have committed a substantial breach of the provisions of this Ordinance and the Affordable Housing Plan and any right of ownership of such unit shall be subject to forfeiture pursuant to the provisions of Section XII(C) of this Ordinance. A qualified purchaser shall not be permitted to own more than one lower income unit at the same time.

Regional Median Income. The median household income for the eleven county present need region determined by the Court to include the following counties: Bergen, Essex, Hudson, Hunterdon, Middlesex, Morris, Passaic, Somerset, Union, Sussex, Warren. For ease of calculation, regional median income shall mean 94% of the median income for the Primary Metropolitan Statistical Area (PMSA) in which Middlesex County is located.

Utilities. Those utilities that are essential for safe and sanitary occupancy of a rental unit, including water, sanitary sewage, gas, electricity and heat. For the purposes of this ordinance, cable television and telephone are specifically excluded.

Section IV. Establishment of Affordable Housing Agency.

A. Creation.

There is hereby created an Affordable Housing Agency ("Agency") of the Township of North Brunswick.

B. Composition.

1. The Agency shall consist of five members, and 2 alternate members, all of whom shall be appointed by the Council. The membership of the Agency may consist of one or more Township officials, no more than 2 of whom may be Council members. All remaining members must be Township residents. However, one appointment shall be reserved for a tenant or owner occupant of a low or moderate income unit who is not a Township official.

2. Alternate members shall have all of the powers of regular members when sitting in place of a regular member. Until such time as a low or moderate income owner or renter appointment can be made, an alternate member shall function as a regular member.

The Council shall designate annually one regular member to serve as chairperson.

3. Attendance by 3 regular members or alternates shall constitute a quorum. Passage of any motion requires an affirmative vote by a majority of members present.

4. The initial term of office of the Agency members shall be one (1), two (2) or three (3) years to be designated by the Council in making the appointment. The terms of office shall thereafter be three (3) years. The appointments shall be made in such a manner so that the terms of approximately one-third (1/3) of the members shall expire each year.

C. Vacancies; Removal for Cause.

The Council may remove any member of the Agency for Cause. Written charges served upon the member shall be followed by a hearing thereon, at which time the member shall be entitled to be heard either in person or by Counsel. A vacancy in the Agency occurring otherwise than by expiration of the term, shall be filled for the unexpired term in the same manner as an original appointment.

D. Powers and Duties. Within 30 days of the effective date of this Ordinance the Agency shall hold its first organizational meeting.

1. Within 90 days of its organizational meeting, to prepare and forward to the Township Council, such rules and

regulations as may be necessary to implement the policies and goals of this Section, specifically, to ensure that housing units designated as low or moderate income units, once constructed, shall remain affordable to, and be occupied by, low or moderate income households. Such rules shall be subject to review and approval of the Township Council. The Council shall review and approve or disapprove or recommend changes within sixty (60) days of the Agency's proposal to the Council. The Agency must revise and resubmit proposed rules and regulations to the Council within twenty (20) days of the Council's disapproval or recommended changes. The Council shall then review and approve the revisions within twenty (20) days of resubmittal by the Agency. The final approved rules and regulations shall be approved by the Council within a maximum total of 190 days from the organizational meeting of the Agency.

Guidelines for regulations of capital improvements shall be established within 150 days of its organizational meeting.

The Agency shall at a minimum review its rules and regulations and implementing guidelines annually and report to the Township Council on its findings.

2. To determine the maximum sale, resale and rental charges for low or moderate income units, and to provide certification of same to the developer, Planning Board, Mayor and Council and the construction official in charge of issuing building permits as required by this Ordinance. Said sales and rental prices shall be adjusted annually to reflect recalculations of the regional median income.

3. To pre-qualify prospective owners and renters based upon income and household size, and to issue a certificate as to income eligibility status.

4. To establish selection procedures and criteria for determining Qualified Purchasers and Households. [Preference shall be given to qualified Township residents.]

5. To verify that an Affordable Housing Plan has been recorded and the deeds of individual Lower Income Units reference such Affordable Housing Plan.

6. To develop a formula for use in calculating the maximum resale price of low and moderate income units which is consistent with the provisions of Section VII.B. of this Ordinance.

7. To determine whether the cost or value of the installation of improvements or amenities within or as part of a low or moderate income unit should be included in calculation of the resale price or rental charge for the unit and to establish procedures whereby a homeowner can obtain a determination from

the Agency in this regard prior to the time the improvements are made. The Agency shall publish within 30 days of adoption the guidelines and regulations setting forth the allowable capital improvements that will be considered for inclusion in the resale price of any Lower Income Unit. These regulations will indicate those improvements whose value will be included; the maximum cost allowed to be included within the resale price for each improvement, as well as guidelines for the total maximum percentage by which the base price of a Lower Income Unit may be increased by the cost of all capital improvements and the rate at which such maximum percentage increase may be attained, all for the purposes of determining the Maximum Resale Price of the Lower Income Units. No portion of the cost or value of any improvement not specifically set forth in the guidelines and regulations and which is not approved by the Agency prior to installation shall be included within the base price for purposes of resale price calculation. If the Owner receiving approval from the Agency for an Improvement, a portion of the cost or value of which is to be included within the base price of the Lower Income Unit, is in need of a second mortgage in order to pay for such Improvement, then the Agency shall execute and deliver to the Owner for recording by the Owner a document by which the Agency's rights, claims and liens under this Affordable Housing Ordinance and the Affordable Housing Plan are also subordinated to such second mortgage. The Agency's rights, claims and liens shall not be subordinated to any second mortgages unless the Agency shall execute and deliver such instrument to an Owner in connection with an Improvement approved by the Agency.

8. To review and to approve or disapprove the Affordable Housing Plan required of all developers of low and moderate income housing.

9. To review and approve or disapprove the developer's proposed Affirmative Marketing Plan and to require developers to submit proofs of publication in accordance with approved affirmative marketing Plans, and to monitor the marketing practices of developers of low and moderate income units to ensure that they comply with the affirmative marketing requirements of this Chapter.

10. To report quarterly to the Township Council on the status of low and moderate income units including but not limited to such things as the Agency's actions in connection with any Statements of Exemption and foreclosures upon any Lower Income Units.

11. The Agency shall at all times maintain a waiting list of qualified purchasers and shall provide said list to any owner in the event of default proceedings. The Agency may, at

its sole option and discretion, advance and pay sums necessary to protect, preserve and retain a Lower Income Unit as a Lower Income Unit subject to the terms of this plan. All sums so advanced and paid by the Agency shall become a lien against such unit and shall have a higher priority than any lien except the First Purchase Money Mortgage lien and liens by duly authorized government agencies. Such sums may include, but are not limited to, insurance premiums, taxes, assessments (public or private) and liens which may be or become prior and senior to any First Purchase Money Mortgage as a lien on the Lower Income Unit, or any part thereof. In the event any First Mortgagee or other creditor of an Owner of a Lower Income Unit exercises its contractual or legal remedies available in the event of default or nonpayment by the Owner of the Lower Income Unit, the Owner shall notify the Agency in writing within 10 days of such exercise by the First mortgagee or creditor and no later than 10 days after service of any summons and complaint and the Agency shall have the option to purchase, redeem, or cure any default upon such terms and conditions as may be agreeable to all parties in interest and/or to acquire the First Purchase Money Mortgage to the Unit, thereby, replacing the First Mortgagee as the First Mortgagee of the Unit. The Agency shall have the same priority of lien as was held by the First mortgagee at the time the Agency acquires such First Purchase Money Mortgage, and shall have the right of subrogation with respect to any other claim or lien it satisfies or acquires.

E. Appropriation and Accountability.

[Developers of lower income units shall, at the time of submission of an application to the Township Planning Board, reimburse the Township on a pro-rata basis for the cost of all initial start-up costs. Start up costs are those costs necessary to enable the Agency to establish rules, regulations and guidelines, and shall include, but not be limited to, attorney's fees, accountant's fees and fees for other required professional services. The total obligation for start-up costs to all developers shall not exceed a maximum of $25,000. The pro-rata calculation shall be performed by the Agency utilizing the Township's total lower income obligation established by pursuant court order.]

The Agency may employ or contract for professional sevices required to carry out its duties and responsibilities [and all developers of lower income units shall be required to pay application fees adequate to cover the cost of professional services required to carry out the following administrative duties:] including, but not limited to the following:

1) Review of information provided by the developer demonstrating the mortgage financing generally available to lower income homebuyers

2) Review of developer's calculations as to estimated sales prices for applicable sized units in each income category

3) Review of developers final calculations as to actual maximum initial sales prices

[The Agency shall develop an application fee schedule subject to review and approval of the Township Council.] The Township shall appropriate, as required, adequate monies to fund all [other] Agency operations.

[The developer or subsequent owner, as appropciate, shall be required to pay fees adequate to cover the costs associated with issuance of statements of exemption for both hardship exemptions and exempt transactions. The Agency shall develop such fee schedule subject to review and approval of the Township Council.

The Agency shall report to the Township Council through the Township Administrator.]

Section V. General Provisions.

A. Wherever reference is made to low or moderate income housing in the Township's Zoning Ordinance, the standards, definitions and procedures set forth in this section shall apply.

B. Except as otherwise expressly provided herein, no low income unit shall be offered for sale or rental except at prices

that are affordable by low income households and no moderate income unit shall be offered for sale or rental except at prices that are affordable by moderate income households and, except as otherwise expressly provided herein, no low income unit shall be sold, resold, rented or re-rented except to a household that has been qualified as a low income household by the Agency and no moderate income unit shall be sold, resold, rented or re-rented except to a household that has been qualified as a moderate income household by the Agency. The provisions of this paragraph shall apply equally to qualified lower income owners or renters, in terms of controls on sale, resale, rental or re-rental of any Lower Income Unit.

C. However, nothing contained in this Chapter, or in the rules and regulations promulgated by the Agency, shall restrict or preclude any household which was classified as low or moderate income based upon its gross aggregate household income at the time it purchased or leased a low or moderate income unit, from continuing to own or lease said unit, after its income exceeds the income ceilings established in this Chapter.

D. Prospective purchasers of Lower Income Units shall receive prior to or simultaneously with the execution of the contract to purchase a Lower Income Unit a copy of the Affordable Housing Plan and shall execute a Disclosure Statement which briefly summarizes the salient features of the use, occupancy and resale restrictions applicable to the Lower Income Unit. It shall be the Developer's responsibility to provide such for the initial sales and subsequent Owner's responsibility to provide same for resales. The Developer shall record the Affordable Housing Plan prior to conveying any title to any individual Lower Income Unit or executing a lease for any individual Lower Income Unit and the deeds or leases of individual Lower Income Units must reference such recorded Affordable Housing Plan.

E. The Township of North Brunswick shall forever receive full credit towards its "then current total fair share obligation" as may be determined from time to time so long as the "then current total fair share obligation" includes previous fair share obligations for all Lower Income Units developed pursuant to this Affordable Housing Ordinance, so long as such Lower Income Units are actually sold, resold, used, occupied, rented, re-rented and maintained in full and complete compliance with the provisions of this Ordinance including but not limited to those provisions covering Hardship, Foreclosure and Exempt Transactions and the Affordable Housing Plan.

F. The initial proportional relationship between condominium fees assessed against market units and lower income units shall not be increased in future years and said restrictions shall be reflected in the Articles of Incorporation and in the required Disclosure Statement. Association fees assessed against said lower income units shall be no less than 1/3 of those assessed against market units.

Section VI. Determination As to Income Eligibility.

A. A prospective purchaser or renter of a low or moderate income unit must be qualified as a low or moderate income household by the Agency prior to the purchase or rental of such unit. The Agency shall periodically recalculate the regional median income and determine adjustments for household size as updated data or estimates of regional median income become available.

B. The income ceilings for low and moderate income households of 4 members shall be 50% and 80% respectively of the regional median income, with adjustments for household size in accordance with guidelines of the U.S. Department of Housing and Urban Development.

Section VII. Determination of Maximum Sales Prices and Rental Charges.

Prior to the sale, resale, rental, or re-rental of a low or moderate income unit, the Agency shall determine the maximum sales price or rental charge that may be charged for that size unit in each income category in accordance with the following:

A. Estimated Maximum Initial Sales Prices for Units

1. As part of the preliminary site plan application submittal to the Planning Board by a Developer for a development containing Lower Income Units, the developer shall also submit to the Agency information demonstrating the mortgage financing generally available to lower income homebuyers and the developer's calculations as to the estimated maximum sales prices in accordance with subsection B below.

2. The Agency shall review the developer's calculations and shall determine the estimated maximum sales prices for applicable sized units in each income category in accordance with the financial terms determined to be generally available, and shall notify the Planning Board and the developer of said estimated maximum sales prices prior to final approval by the Planning Board. The delay of the Agency shall not postpone or delay the Planning Board's decision as to the proposed development.

B. Actual Maximum Initial Sales Prices for Units.

1. A base sales price shall be calculated such that the sum of the monthly payments for principal, interest, taxes, fire, theft and liability insurance, and homeowner association fees, if any, shall not exceed twenty-eight percent (28%) of the low or moderate income ceilings determined in accordance with Section VI.

2. In order to assure that low and moderate income units are affordable by households whose income is less than the low or moderate income ceilings, the maximum sales price that may

be offered for each such unit shall not exceed ninety percent (90%) of the base price for that size unit in each income category.

3. At least a minimum of thirty (30) days prior to the developer's anticipated need of building permits, with the exception of permits for model units, the developer shall provide the Agency with information demonstrating the financing that is generally, available locally to lower income homebuyers and the developers calculations as to Maximum Initial Sales Prices. The interest rate used by the developer in calculating the maximum sales price shall be the rate that the Agency determines to be generally available locally for a 90%, 30-year, fixed-rate mortgage.

4. If the developer proposes to provide financing through an adjustable rate mortgate (ARM) or establishes that ARMS are generally available locally to lower income purchasers, then the interest rate to be used for calculating the maximum sales price shall be the greater of either (1) the current index of one-year Treasury bills plus two points or (2) two points less than the best available fixed rate mortgage.

5. The Agency shall use this information to determine the Maximum Initial Sales Prices for the different sized units in each income category as described above. The Agency shall certify the actual Maximum Initial Sales Prices to the planning board, the developer and the construction official in charge of issuing building permits within 30 days of submission of complete information by the developer. No building permits, except for complete models (including models of non-lower income units) foundation permits for units other than models, permits for underground utilities, and site development work, shall be issued until the maximum initial sales prices have been certified by the Agency. These sales prices shall remain in effect for a period of one year. However, the developer may request a modification of the maximum sales prices at any time by applying to the Affordable Housing Agency for recalculation of these prices based on changes in any of the factors used to calculate the prices.

C. Maximum Resale Prices.

Prior to the resale of any low or moderate income unit, the Agency shall determine the maximum sales price for the unit in accordance with a formula developed by the Agency, which formula takes into account the following: 1) increases in the regional median income, 2) the cost or value of improvements to the property made by the owner, as determined in accordance with the rules and regulations established pursuant to Section IV (D)(7), 3) prevailing financing terms generally available in the market, and 4) reasonable out-of-pocket costs of the sale as determined by the Agency. To the extent feasible, the formula shall ensure that the sales price will be consistent with the affordability standards set forth in this chapter.

D. Maximum Rental Charges for Units.

1. A base rent shall be calculated such that the sum of the monthly rental payment, including utilities, does not exceed thirty percent (30%) of the low or moderate income ceilings determined in accordance with Section VI.

2. If the cost of all utilities is not included in the monthly rental charge, the Agency shall calculate for each unit size an estimated monthly charge for those utilities not included in the rent. These charges shall be estimated utilizing estimating techniques acceptable in the industry. This estimated charge shall be subtracted from the maximum gross rent to determine the maximum rental charge that may be charged for each low and moderate income unit.

3. In order to assure that low and moderate income units are affordable by households whose income is less than the low or moderate income ceilings, the maximum gross rent that may be charged for any such unit shall not exceed ninety percent (90%) of the base rent for that size unit in each income category. Notwithstanding these requirements, landlords shall have the option, to set rents equal to thirty percent of the tenant's gross household income, with the requirement that the average of all rents charged for the same size unit shall not exceed ninety percent of the base rent charge for such size unit. The cost of any additional administrative charges incurred by the Agency in the monitoring of such rental distribution shall be the sole responsibility of such Landlord.

4. The developer shall calculate the maximum rental charge for applicable sized units in each income category and shall submit said calculations to the Agency for review. The Agency shall determine, based upon its review, maximum rental charges. These rental charges shall remain in effect for a period of at least one year, except that the developer may request a modification of these charges by applying to the Agency for recalculation of the prices based on changes in any of the factors used to calculate the rental charges.

To the extent feasible, these criteria and procedures should ensure that the new rental charges are consistent with the affordability standards set forth in this Chapter.

5. The Agency shall establish appropriate criteria and procedures for allowing periodic rental charges increases.

E. Relationship Between Household Size and Unit Size.

For the purpose of determining maximum sales prices and rental charges pursuant to this Chapter, the ceiling incomes of the following household sizes shall be used to determine the maximum prices for each of the following unit sizes:

efficiency	1 person
1 bedroom	2 persons
2 bedrooms	3 persons
3 bedrooms	5 persons
4 bedrooms	6 persons

Any room other than a bathroom, kitchen, dining area or living room and which was initially designed for regular sleeping by regular members of the Household shall be considered a bedroom for purposes of calculating the Maximum Initial Sales Prices. No alterations or improvements by Owners after initial occupancy shall increase the number of bedrooms unless the total area of habitable living space is increased by an amount at least equal to the new area being claimed as a new bedroom.

Section VIII. Expiration of Restrictions.

Restrictions governing the Lower Income Units offered initially for sale shall expire as to a particular Lower Income Unit 30 years from the date of the initial deed of the particular Lower Income Unit to a Qualified Purchaser. The Restrictions governing the rental of Lower Income Units shall expire as to a particular Lower Income Unit 30 years from the date of the initial certificate of occupancy of such Lower Income Unit and a document shall be recorded stating such date immediately after such initial certificate of occupancy is issued by the Township.

If rental units are converted within 30 years of initial occupancy, the same number of low and moderate income units, respectively, must be maintained after conversion, subject to resale controls ensuring their continued affordability and occupancy for the balance of the 30 year period.

Section IX. Foreclosure, Exempt Transactions and Hardship Exemptions

A. Exempt Transactions. The following transactions shall be deemed "non-sales" for purposes of this Ordinance and the Affordable Housing Plan and the Agency shall issue a Statement of Exemption to the Owner receiving title by virtue of any of the following transactions:

(1) Transfer of Ownership of a Lower Income Unit between husband and wife;

(2) Transfer of Ownership of a Lower Income Unit between former spouses ordered as a result of a judicial decree of divorce or judicial decree of separation (but not including sales to third parties);

(3) Transfer of Ownership of a Lower Income Unit between family members as a result of inheritance;

(4) Transfer of Ownership of a Lower Income Unit through an Executor's Deed to any Person;

(5) Transfer of Ownership of a Lower Income Unit through an Order of the Superior Court or other court.

Such Transfer of Ownership neither extinguishes the Restrictions and applicability of this Ordinance or the Affordable Housing Plan to such Lower Income Unit nor terminates any liens set forth under this Plan. Liens must be satisfied in full prior to the subsequent resale of the Lower Income Unit and all such subsequent resales are fully subject to the terms and provisions of this Ordinance and the Affordable Housing Plan.

B. Hardship Exemptions. The Developer and subsequent Owners may apply to the Agency for a Hardship Exemption.

1. Provisions Applicable to Initial Sales or Rentals

a. The Developer may only apply to the Agency for a Hardship Exemption after the later of (i) six (6) months after the Developer has commenced marketing the Lower Income Unit in accordance with the requirements of the Affirmative Marketing Requirements as set forth in Section X, and (ii) ninety (90) days after the Developer has received the Certificate of Occupancy for such Lower Income Unit.

b. In order for the Developer to be entitled to a Hardship Exemption from the Agency, the Developer must show the Agency that (i) the time periods set forth in subsection (a) above have lapsed, and (ii) that the Developer has been marketing such Lower Income Unit in accordance with the Affirmative Marketing Requirement for such time period and (iii) no Qualified Purchaser is obligated under a contract to purchase or a lease to rent, as the case may be, for such Lower Income Unit.

2. Provisions Applicable to Other than Initial Sales or Rentals

a. Owners or the Developer may only apply to the Agency for a Hardship Exemption after one hundred twenty (120) days after such Owner or Developer has notified the Agency that s"ch Lower Income Unit is available for resale or re-rental to Qualified Lower Income Households.

b. In order for such Owner or Developer to be entitled to a Hardship Exemption from the Agency, such Owner or Developer must show the Agency that (i) the 120 day time period has lapsed and (ii) the Owner or Developer has been affirmatively marketing such unit in accordance with the Affirmative Marketing Requirement for such time period and (iii) no Qualified Purchaser is obligated under a contract to purchase or a lease to rent, as the case may be, for such Lower Income Unit.

C. Procedural Requirements for Issuance of a Statement of Exemption for both Exempt Transactions and Hardship Exemptions

1. The Agency must act upon an application for a Statement of Exemption within thirty (30) working days of receipt of such application.

2. The Agency shall approve the application for a Statement of Exemption if the Agency finds that the applicant has met its burden of proof as described above in subsections (B)(1)(b) and (B)(2)(b) or subsection (A) above.

3. If the Agency fails to approve, deny or conditionally approve an application within such thirty (30) day period, such failure to act shall be deemed to be an approval by the Agency of the application for a Statement of Exemption.

4. The Agency shall issue a written decision to the applicant immediately after making its decision. If the application is approved, the Agency shall immediately issue to the applicant a Statement of Exemption in recordable form describing the specific Lower Income Unit covered by the Statement of Exemption.

5. The original of the Statement of Exemption shall be given to the purchaser at the time of closing of title and shall be recorded simultaneously with the deed, or to the tenant prior to taking possession and occupancy, of the applicable Lower Income Unit.

D. Effect of Statement of Exemption for both Hardship Exemptions and Exempt Transactions

1. A Statement of Exemption issued pursuant to Subsection B (Hardship) above shall authorize the Owner or Applicant to sell or rent the particular Lower Income Unit to a household whose Gross Aggregate Household Income is up to fifty percent (50%) higher than the original relevant income ceilings applicable to such Lower Income Unit as determined in accordance with Section VI of this Ordinance.

2. A Statement of Exemption issued in accordance with subsection A (Exempt Transactions) above shall permit the named grantee or lessee to receive title or possession of the particular Lower Income Unit in the same manner as a Qualified Purchaser.

3. The Statement of Exemption under Section (A) or (B) above shall exempt only the specific sale or rental transaction for which it was issued.

4. The Statement of Exemption under (A) or (B) above shall deem the grantee or lessee to be a Qualified Purchaser of such Lower Income Unit for purposes of this Ordinance and the Affordable Housing Plan.

5. The Statement of Exemption under (A) or (B) above shall only relieve the specific transaction of the restriction of selling, reselling or renting such Lower Income Unit to only Qualified Purchasers. All other restrictions, requirements and provisions of the Ordinance and the Affordable Housing Plan shall remain in full force and effect, including but not limited to the Maximum Sales Prices and Rental Charges which are established pursuant to Section VII of this Ordinance.

6. The restrictions of resale or rental to only Qualified Purchasers shall apply to subsequent resales or rentals of the particular Lower Income Unit unless a new Statement of Exemption is issued by the Agency in accordance with the provisions of this Ordinance.

7. Nothing shall preclude the Agency from purchasing the specific Lower Income Unit and holding, renting or conveying it to a Qualified Purchaser provided such right is exercised prior to the Owner signing a valid contract to sell such Lower Income Unit and such right is further exercised before the expiration of the applicable fifteen (15) day period.

E. Foreclosure and First Purchase Money Mortgages

1. Provisions for First Purchase Money Mortgagees.

a. The terms and restrictions of this Ordinance and the Affordable Housing Plan shall be subordinate only to the First Purchase Money Mortgage lien on any Lower Income Unit and in no way shall impair the First Purchase Money Mortgagee's ability to exercise the contract remedies available to it in the event of default as such remedies are set forth in the First Purchase Money Mortgage documents for the unit.

b. So long as the First Purchase Money Mortgage is not sold to the Federal National Mortgage Association or in the secondary mortgage market, the First Purchase Money Mortgagee and/or mortgage servicer shall serve written notice upon the Agency within ten (10) days after the First Purchase Money Mortgage is three (3) months in arrears, and within ten (10) calendar days of the filing of the complaint seeking foreclosure of the First Purchase Money Mortgage held on a Lower Income Unit.

c. The obligation of First Purchase Money Mortgagee and/or servicer to notify the Agency shall cease automatically and immediately upon the sale of the First Purchase Money Mortgage to the Federal National Mortgage Association or in the secondary mortgage market unless the rules and regulations or guidelines of the Federal National Mortgage Association are amended so as to not prohibit or exclude placing such obligation upon the holder of the mortgagee or its service representative, in which case, an instrument duly evidencing same must be recorded with the Office of the Recorder, Middlesex County, New Jersey, and the Clerk of the Township of North Brunswick before any such obligation shall exist.

d. Provided that the First Purchase Money Mortgagee is obligated to give the Agency the above mentioned notices, the First Purchase Money Mortgagee shall also serve written notice of any proposed Foreclosure sale upon the Agency at least thirty (30) days prior to the first scheduled date of such sale.

e. The First Purchase Money Mortgagee shall serve notice upon the Agency within thirty (30) days of the sale of the First Purchase Money Mortgage to the Federal National Mortgage Association or in the secondary mortgage market.

f. The Township of North Brunswick and/or the Agency or any instrumentality designated by the Township shall have the right to purchase any mortgage which is in default at any time prior to the entry of a foreclosure judgment, or within the redemption period thereafter. Notification of a default and of the institution of a Foreclosure action and of a sheriff's sale shall be served in writing upon the Chairman of Agency as aforesaid. The Township of North Brunswick shall at all times be considered a party in interest and shall have the right to be joined as a party defendant and/or shall have the right to intervene in any foreclosure action seeking foreclosure of a first mortgage and/or shall have the right to redeem and acquire the owner's equity of redemption or to acquire the unit from the Owner upon such terms and conditions as may be determined by the Agency.

2. Effect of Foreclosure. Any Lower Income Unit which is acquired by a First Purchase Money Mortgagee by Deed in lieu of foreclosure, or by any purchaser at a mortgage foreclosure sale conducted by the holder of the First Purchase Money Mortgagee (including the First Purchase Money Mortgagee but excepting the defaulting mortgagor) shall be permanently released from the restrictions and covenants of this Plan and all resale restrictions shall cease to be effective as to the First Purchase Money Mortgagee and all subsequent purchasers and mortgagees of that particular unit (except for the defaulting mortgagor, who shall be forever subject to the resale restrictions of this plan with respect to the unit owned by him at the time of his default). The Agency shall execute a document in recordable form evidencing that such Lower Income Unit has been forever released from the restrictions of the Ordinance and the Affordable Housing Plan. Execution or Foreclosure sales by any other class of creditor or mortgagees shall not result in a release of the unit from the provisions and restrictions of this Ordinance or the Affordable Housing Plan.

3. Surplus Funds. In the event of a Foreclosure sale by the holder of the First Purchase Money Mortgage, the Owner shall be personally obligated to pay to the Agency any Surplus Funds. For purposes of this paragraph, Surplus Funds shall be the total amount paid to the sheriff in excess of the greater of (i) the Maximum Resale Price of the Unit pursuant to Section VII

(C), and (ii) the amount required to pay and satisfy the First Purchase Money mortgage, including the costs of foreclosure and (iii) any second mortgages approved by the Agency in accordance with Section IV(D)(7) of this Ordinance. Surplus Funds shall also include all payments to any junior creditors out of such Surplus Funds even if such were to the exclusion of the Owner. The Agency shall be given a first priority lien, second only to the First Purchase Money Mortgagee of a Unit and any taxes or public assessments by a duly authorized governmental body, equal to the full amount of such Surplus Funds. This obligation of the Owner to pay this full amount of Surplus Funds to the Agency shall be deemed to be a personal obligation of the Owner of record at time of the Foreclosure Sale and the Agency shall be empowered to enforce the obligation of the owner in any appropriate court of law or equity as though same were a personal contractual obligation of the Owner. Neither the First Purchase Money Mortgagee nor the purchaser at the Foreclosure Sale shall be responsible or liable to the Agency for any portion of this excess. [The Agency shall first utilize surplus funds for the purpose of funding operating expenses of the Agency. Other] Surplus funds shall be used ~~for~~ increasing the opportunities for affordable housing within the Township in accordance with the provisions of this Ordinance.

4. Owner's Equity.

a. If there are sums to which the Owner is properly entitled, such sums shall be placed in escrow by the Agency for the Owner. Any interest accrued or earned on such balance while being held in escrow shall belong to and shall be paid to the Agency.

b. Sums to which the Owner would be entitled are equal to the Maximum Resale Price of the Unit as calculated in accordance with Section VII(C) minus the total of the First Purchase Money Mortgage, prior liens, costs of foreclosure, assessments, property taxes, and other liens which may have attached against the unit prior to foreclosure, provided such total is less than the Maximum Resale Price.

c. This provision is subject, however, to applicable laws of the State of New Jersey governing the distribution and payment of proceeds of foreclosure sales.

Section X. Affirmative Marketing Requirements

A. All developers of low and moderate income units shall affirmatively market said units to persons of low and moderate income, irrespective of race, color, sex, religion or national origin.

Towards that end, the developer shall formulate and submit an affirmative marketing plan acceptable to the Agency, which plan shall be incorporated as a condition of approval of the

development application. At a minimum, the plan shall provide for advertisement in newspapers with general circulation in the following urban areas: Jersey City, Newark, Elizabeth, Paterson, New Brunswick and Perth Amboy. The plan shall also require that developer to notify the following agencies on a regular basis of the availability of any low or moderate income units: the Civic League of Greater New Brunswick, the Housing Coalition of Middlesex County, the Middlesex County Office of Community Development, and other fair housing centers, housing referral organizations, and government Housing and community development departments located in the following eleven counties: Bergen, Essex, Hudson, Hunterdon, Middlesex, Morris, Passaic, Somerset, Union, Sussex and Warren, as such are identified by the Agency prior to approval of the Developer's proposed Affirmative Marketing Plan.

B. All advertisements shall conform with applicable Affirmative Action, Equal Opportunity, and non-discrimination laws of the State and Federal government.

Section XI. Reporting Requirements.

The Township of North Brunswick shall report quarterly in writing to the Civic League of Greater New Brunswick or its designee, commencing with December 31, 1985, providing the following information with regard to any sites requiring set asides of low and moderate income housing:

A. Itemization of all proposed developments which are subject to the provisions of this Chapter and for which applications have been filed with or approved by the Planning Board. Information shall be provided on the location of the proposed site, number of low or moderate income units, number of Market Units, calculation of maximum sales prices per Section VII, the distribution of Lower Income Units by bedroom number, the phasing schedule for completion of Lower Income Units in relation to completion of Market Units, the name of developer, and dates that Planning Board actions were taken or are anticipated to be taken.

B. A copy of the affirmative marketing plans provided for each development together with copies of advertisements and a list of newspapers and community or governmental organizations or agencies which received the advertisements.

Section XII. Responsibilities and Violations

A. Developer's Responsibilities

The responsibilities of the developer shall include, but not be limited to the following:

1. Submission of information as to financing terms readily available to low and moderate income households for use by the Agency in computing maximum sales prices.

2. Submission of an Affordable Housing Plan and an Affirmative Marketing Plan to the Agency for approval, and submission of proofs of publication to ensure compliance with said plan.

3. The marketing of all low and moderate income units in accordance with the requirements of this Chapter.

4. Submission of quarterly reports to the Agency detailing the number of low and moderate income households who have signed leases or purchase agreements, as well as the number who have taken occupancy of lower income units including household size, number of bedrooms in the unit, sales price, and monthly carrying costs, or in the case of rental units, the monthly rental charges and utilities included.

5. The developer's responsibilities hereunder shall expire automatically with respect to "for sale" Lower Income Units upon the date upon which the last Lower Income Unit within the particular development is sold by the developer. With respect to "rental" Lower Income Units, the developer's responsibilities shall be assumed by the landlord and shall be performed by the landlord so long as such unit is a "rental" Lower Income Unit and subject to the restrictions of this Ordinance.

B. Responsibilities of Owners

1. In the event any First Mortgagee or other creditor of an Owner of a Lower Income Unit exercises its contractual or legal remedies available in the event of default or nonpayment by the Owner of a Lower Income unit, the Owner shall notify the Agency in writing within 10 days of such exercise by the First mortgagee or creditor and no later than 10 days after service of any summons and complaint.

2. Any Owner of a Lower Income Unit shall notify the Agency within ten (10) days in writing of any default in the performance by the Owner of any obligation under either the Master Deed of the Condominium Association including the failure to pay any lawful and proper Assessment by the Condominium Association, or any mortgage, or other lien, against the Lower Income Unit which default is not cured within sixty (60) days of the date upon which the default first occurs.

3. The Owner shall not permit any lien, other than the First Purchase Money Mortgage, Agency approved second mortgages and liens of the Agency to attach and remain on the property for more than sixty (60) days.

4. The Owner of a Lower Income Unit shall keep the unit in good repair and shall not commit waste thereon.

5. The Owner shall pay all taxes and public Assessments and Assessments by the Condominium Association levied upon or

assessed against the unit, or any part thereof, as and when the same become due and before penalties accrue.

6. If a Lower Income Unit is part of a condominium association the Owner, in addition to paying any assessments required to be paid by the Master Deed of the Condominium, shall further fully comply with all of the terms, covenants or conditions of said Master Deed, as well as fully comply with all terms, conditions and restrictions of this Ordinance and the Affordable Housing Plan.

C. Violation of Ordinance or Affordable Housing Plan. The interest of any Owner may, at the option of the Agency, be subject to forfeiture in the event of substantial breach of any of the terms, restrictions and Provisions of this Ordinance or the Affordable Housing Plan which remains uncured for a period of sixty (60) days after service of a written Notice of Violation upon the Owner by the Agency.

1. The Notice of Violation shall specify the particular infraction and shall advise the Owner that his or her right to continued ownership may be subject to forfeiture if such infraction is not cured within sixty (60) days of receipt of the Notice.

2. The provisions of this paragraph may be enforced by the Agency by court action seeking a judgment which would result in the termination of the Owner's equity or other interest in the unit, in the nature of a mortgage foreclosure. Any judgment shall be enforceable as if same were a judgment of default of the First Purchase Money Mortgage and shall constitute a lien against the Lower Income Unit.

3. Such judgment shall be enforceable at the option of the Agency, by means of an execution sale by the Sheriff at which the Lower Income Unit of the violating Owner shall be sold at a sales price which is not less than the amount necessary to fully satisfy and pay off any First Purchase Money Mortgage and prior liens and the costs of the enforcement proceedings incurred by the Agency including attorney's fees. The violating Owner shall have his right to possession terminated as well as his title conveyed pursuant to the Sheriff's Sale.

4. The proceeds of the Sheriff's Sale shall first be applied to satisfy the First Purchase Money Mortgage lien and any prior liens upon the Lower Income Unit. The excess, if any, shall be applied to reimburse the Agency for any and all costs and expenses incurred in connection with either the court action resulting in the judgment of violation or the Sheriff's Sale. In the event that the proceeds from the Sheriff's Sale are insufficient to reimburse the Agency in full as aforesaid, the violating Owner shall be personally responsible for and to the extent of such deficiency, in addition to any and all costs incurred by the Agency in connection with collecting such deficiency. In the

event a surplus remains after satisfying all of the above, such surplus if any, shall be placed in escrow by the Agency for the Owner and shall be held in such escrow for a maximum period of two years or until such earlier time as the Owner shall make a claim with the Agency for such. Failure of the Owner to claim such balance within the two year period shall automatically result in a forfeiture of such balance to the Agency. Any interest accrued or earned on such balance while being held in escrow shall belong to and shall be paid to the Agency whether such balance shall be paid to the Owner or forfeited to the Agency.

5. Foreclosure by the Agency due to violation of the Ordinance and Affordable Housing Plan shall not extinguish the restrictions of the Ordinance and Affordable Housing Plan as same apply to the Lower Income Unit. Title shall be conveyed to the purchaser at the Sheriff's Sale subject to the restrictions and provisions of the Ordinance and the Affordable Housing Plan. The Owner determined to be in violation of the provisions of this Plan and from whom title and possession were taken by means of the Sheriff's Sale shall not be entitled to any right of redemption.

6. If there are no bidders at the Sheriff's Sale, or if insufficient amounts are bid to satisfy the First Purchase Money Mortgage and any prior liens, the Agency may acquire title to the Lower Income Unit by satisfying the First Purchase Money Mortgage and any prior liens and crediting the violating Owner with an amount equal to the difference between the First Purchase Money Mortgage and any prior liens and costs of the enforcement proceedings including legal fees and the Maximum Resales Price for which the Lower Income Unit could have been sold under the terms of this Ordinance and the Affordable Housing Plan. This excess shall be treated in the same manner as the excess which would have been realized from an actual sale as previously described.

7. Failure of the Lower Income Unit to be either sold at the Sheriff's Sale or acquired by the Agency shall obligate the Owner to accept an offer to purchase from any Qualified Purchaser, which may be referred to the Owner by the Agency, with such offer to purchase being equal to the Maximum Sales Price of the Lower Income Unit as permitted by the terms and provisions of this Ordinance and the Affordable Housing Plan.

8. The Owner shall remain fully obligated, responsible and liable for complying with the terms and restrictions of this Ordinance and the Affordable Housing Plan until such time as title is conveyed from the Owner.

Section XIII. Severability.

If any section, paragraph, subdivision, clause or provision of this ordinance shall be adjudged invalid, such adjudication shall apply only to the section, paragraph, subdivision, clause

OLD BRIDGE

4-8 GENERAL REGULATIONS CONCERNING AFFORDABLE HOUSING
(Added by Ordinance #55-85, effective 2-16-86)
(Amended 2-26-86 by Ord. #4-86).

Mt. Laurel II

4-8:1 General Regulations for all Residential Development

4-8:1.1 The purpose of these special regulations is to satisfy a Judgement of the Superior Court of New Jersey in Urban League of Greater New Brunswick, et. al, v. Mayor and Council of the Borough of Carteret, et. al.

a. Each application for development shall comply with all provisions of the "Affordable Housing Ordinance of the Township of Old Bridge, Ordinance No. 54-85. (Amended by Ord. #4-86)

b. Each application for development subject to these provisions shall clearly state the number of low and moderate income units, as defined in the Affordable Housing Ordinance and each resolution of approval shall clearly state the number of low and moderate income units that are approved as part of the development.

c. Each approved development subject to these provisions shall contain moderate income units, in a minimum of five percent (5%) of the total number of units that may be developed, assuming full development at the maximum gross density allowed by right in the zone, and low income units minimum proportion of five percent (5%) of the total number of units that may be developed, assuming full development at the maximum gross density allowed by right in the zone.

d. Any approval of a development application subject to these provisions shall require that construction of the low and moderate income units be phased in with the balance of the development in accordance with the following standard:

Number of market units completed as a % of total number of market units approved	Number of low or moderate income units completed as a % of total number of low and moderate income units approved
Not more than 25%	At least 25%
50%	60%
75%	85%
90%	100%

(Amended by Ord. #4-86)

To implement this requirement, certificates of occupany shall not be issued for more than 25% of the total number of market units until certificates of occupancy have been issued for at least 25% of the total number of low or moderate income units; certificates of occupancy shall not be issued for more than 50% of the total number of market units until certificates of occupancy have been issued for at least 60% of the total number of low or moderate income units; certificates of occupancy shall not be issued for more than 75% of the total number of market units until certificates of occupancy have been issued for at least 85% of the total number of low or moderate income units; and certificates of occupancy shall not be issued for more than 90% of the total number of market units until certificates of occupancy have been issued for 100% of the low or moderate income units. Where construction of low or moderate income units is being phased in with the balance of a development, each phase shall include a mixture of low and moderate income units reasonably consistent with the percentage distribution of each category within the development as a whole.

e. No more than fifty percent (50%) of the low or moderate income units in any development subject to these provisions shall be one (1) bedroom units or efficiency units. At least twenty percent (20%) of these units shall be three (3) bedroom units or larger, except for units in senior citizen complexes. Construction of the various-sized units shall be phased proportionately according to the standard set forth above in subparagraph (d). (Amended by Ord. #4-86)

Such units shall not be smaller than the following:

Unit Type	Minimum size
efficiency units	480 sq. feet
1 bedroom units	550 sq. feet
2 bedroom units	750 sq. feet
3 bedroom units	950 sq. feet

(Added by Ord. #4-86)

f. No more than twenty percent (20%) of the total number of low or moderate income units that may be developed in any development subject to these provisions may have occupancy restrictions based on the age of household members, except for the senior citizen project provided in the settlement. Where such age restrictions are permissible, occupancy shall be restricted to persons aged sixty-two (62) or over. The Township may not require a developer of low or moderate income housing to impose any age-based occupancy restrictions with respect to such units as a condition of approval. (Amended by Ord. #4-86)

g. Developers of ninety-nine (99) or fewer units may make a contribution of three thousand dollars ($3,000) per market unit to the Township Affordable Housing Agency in lieu of constructing the housing in accordance with the procedures established by said Agency. The agency may, following hearings, adopt modifications to the contribution required so as to reflect increases or decreases in the cost of construction of such lower income housing units. (Added 2-13-86 by Ord. #1-86)

h. Developments containing lower income units pursuant to this ordinance shall physically disperse the lower income units as follows: (Added by Ord. #4-86)

1. No more than 24 lower income units may be located in any single building. No building, cluster or section shall be required to contain any lower income units. In any section containing lower income housing units, no more than one-third of the total number of units may be lower income units. Clusters may contain only lower income units provided that such a cluster is as much a part of a section as the clusters of market units, and that the boundaries between lower income clusters and market clusters, such as grassy areas, internal roads or sidewalks shall be no different than the boundaries between market clusters. Moreover, the landscaping buffers provided for lower income housing areas shall not be substantially different for those generally used in other portions of the development nor different from those buffers generally used to separate sections of the developmetn with different types of housing.

2. The restrictions contained in subsection (h)(1) above shall not apply to any building, cluster or section when necessary to finance the development of the building, cluster or section through public or tax exempt funding, but in no event shall any one building, cluster or section developed pursuant to this subsection contain more than 150 lower income units.

3. Lower income housing units must be located so as to afford similar access to transportation, community shopping, recreation, and other amenities as is provided to other units in the same development.

i. Final development approvals of applications containing residential housing shall be conditioned upon a requirement that the applicant pay, prior to the issuance of the first certificate of occupancy for any unit within the development,

$30 for each low and moderate income unit approved for construction in that development, or for which an in-lieu contribution is being made pursuant to subsection 4-8:1.1(g) hereof, to the Urban (Civic) League of Greater New Brunswick for purposes of monitoring the implementation of Old Bridge's lower income housing program. (Added by Ord. #4-86)

4-8:2 Manufactured or Modular Housing

4-8:2.1 Manufactured housing, including modular, is permitted in all residential zones.

APPENDIX C

A Housing Plan

For Hoboken

AFFORDABLE HOUSING IN HOBOKEN:

A COMPREHENSIVE PLAN OF ACTION

September 26, 1985

prepared by the
Office of the Mayor
Hoboken, New Jersey

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I. INTRODUCTION

A. PRESERVING HOBOKEN AS AN ECONOMICALLY AND CULTURALLY DIVERSE COMMUNITY

Throughout its history Hoboken has been a melting pot home for generation after generation of tightly knit extended families. Solid brick and stone residential buildings ranging from the elegance of Castle Point Terrace to the simplicity of Willow Avenue provided decades of affordable housing to a wide spectrum of income groups. Hoboken's size, family structure, low building height, and economic opportunities produced a rich tradition of neighborliness, community pride, and long-term residency.

After 15 years of unprecedented residential development, Hoboken stands on the verge of losing its identity as a culturally diverse, family community. Fueled by the affluent metropolitan housing market, the housing industry has taken full advantage of Hoboken's attractions to stimulate a 'gold rush' in land use which increased property values as much as ten fold during this 15-year period. Community location, size, transportation and building quality have provided the basic incentives for successful speculation on and re-development of Hoboken land and buildings.

The consequence of so much activity in the housing market has been to increasingly price out of Hoboken growing numbers of long-term low, moderate, and middle income families. Rents in the private market continue to escalate beyond the means of many Hoboken families. Condominium conversions produce intensified pressure on remaining rental property and purchase prices

which are prohibitive for Hoboken's traditional population. Homeownership is virtually an impossibility for newlyweds and first-time buyers. Current taxes and the threat of revaluation-induced tax increases encourage existing homeowners to sell and leave Hoboken.

Hoboken's low income population has been the most severely hurt by these developments. The absence of new federal subsidies precisely at the moment when local housing costs have dramatically increased has left both city government and low income residents in a "no-win" situation. Long waiting lists for both public housing and Applied Housing, the spectre of 200 families waiting 48 hours on line for 20 Caparra Homes' apartments last year, and a 30% enrollment decline in the public schools during the past six years all provide ample testimony to the burden faced by Hoboken's low income community. Lacking sufficient knowledge of their existing rights and in the absence of more explicit legal safeguards, low income families have been prey to a host of tactics aimed at displacement. It is no accident that increasingly low income families bargain for an acceptable 'buy-out' agreement with the landlord. There simply is no recent experience which encourages low income families to believe that displacement can be avoided.

Through all of this Hoboken is quite literally losing its children. Displaced families have been largely replaced by childless couples and singles. The normal re-generation of Hoboken families has been abated, since young people who grow up here cannot afford to remain while raising a family. And the reduction in families with children is exacerbated by fundamental shortcomings in educational and recreational services, the two

most critical public amenities for families with school age children.

15 years ago Hoboken faced a very different crisis. Then close to 20 years of industrial, commercial and retail erosion had placed Hoboken at the point of bankruptcy. An enlightened public policy was articulated and programs established to lure private capital into Hoboken for housing and redevelopment. The current crisis quite clearly requires a bold new policy direction and a new generation of programs to ensure continued development of Hoboken within a framework of protecting and enhancing the quality of life for all its citizens.

B. AN INTEGRATED POLICY PERSPECTIVE

Maintaining Hoboken as a viable community for low, moderate, and middle income families requires an integrated public response to all factors which directly or indirectly contribute to the current crisis. While protecting and enhancing affordable housing is key to easing the displacement of long-term residents, this administration fully recognizes that serious attention must be given to all related problems which influence the quality of family living in Hoboken.

Waterfront and related development will undoubtedly play a major role in shaping Hoboken's future and accordingly the prospects for continued economic and social diversity. It is critical that such development provide housing, recreation, employment and other public amenities for existing Hoboken families. Moderating proposed high rise development is essential if the 'feel' of Hoboken is to be preserved and dangerous new pressures on the infrastructure avoided. Current parking,

traffic, and sewage problems must be resolved if appropriate future development can be achieved without intensifying existing deficiencies. Poor public education has persuaded many young couples to leave Hoboken in the past and discourages other families with school age children from moving here. If family sized housing units are to be constructed by the private market and entry level jobs provided through diverse economic development, the quality of public education in Hoboken must be demonstrably improved.

In recognition of the foregoing, this administration advances the following policy objectives to be pursued during the next four years:

1) To protect existing and develop new affordable housing.
2) To ensure waterfront and other development responsive to existing community needs.
3) To facilitate orderly and community sensitive land use planning and development by upgrading government participation, coordination and oversight.
4) To stabilize local property taxes.
5) To increase local employment opportunities through diversified economic development.
6) To improve the quality and quantity of public education services.
7) To improve the quality and quantity of recreation services.
8) To satisfy federal and state requirements to upgrade sewage flow and treatment in a timely and effective manner.
9) To create a partnership between the private sector, the citizenry and the government to address these objectives.

C. OBJECTIVES OF THE AFFORDABLE HOUSING PLAN

1. To develop new affordable housing from both new construction and rehabilitation of existing stock.

2. To encourage continued private investment in new development and rehabilitation.

3. To strengthen existing home ownership and create new opportunities for affordable ownership.

4. To maintain and improve the quality of existing private rental housing stock.

5. To ensure long term stability of existing subsidized housing stock.

6. To re-organize city government to provide effective means of accomplishing these objectives.

D. THE ECONOMIC BASIS FOR THE HOBOKEN INCLUSIONARY HOUSING ORDINANCE

While the legal basis for an inclusionary housing program lies clearly within the doctrine set forth by the New Jersey Supreme Court in the Mount Laurel decision, such a program must also have an economic basis; simply stated, if the program cannot be implemented in a way that maintains the economic feasibility of development in the community, the program will inevitably fail.

There are many urban areas in which the viability of private market development is so limited as to make an inclusionary program, in which internal subsidies are to be used to create lower income housing units (or contributions in lieu of units), impossible. This is not, however, the case in Hoboken. All of the evidence that we have seen makes clear not only that new development, rehabilitation and condominium conversion in Hoboken are profitable, but that they have been significantly

more profitable, on the average, than representative suburban multi-family housing development during the same period/*.

This remarkable profitability cannot be attributed to value created by the investors and developers alone. These developers are taking advantage of a community with remarkable attributes, which attributes have created the profit opportunities being garnered by developers. These include the location of the community, and its direct access to mid-Manhattan; the physical character of the community generally and it buildings in particular; and the social and demographic character of the community. Thus, it is the community that is in actuality creating a substantial part of the profit that is reaped by the developer.

At the same time, the actions of those developers in furtherance of these profits, while unquestionably benefiting the community in certain respects, harm the community in other regards. These harms, or negative externalities as they are termed by economists, include pressure on the city infrastructure, such as the well-known parking problem; and most severely, pressure on the affordable housing stock, which has been the mainstay of the community's character and a major resource for the less affluent population of the community.

Hoboken is no longer a "pioneering" community where an investor is faced with such risks that he must be able to obtain

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*Although we have not analyzed specific projects in detail, our information indicates that representative total development costs on condominium conversion projects are typically in the area of $100-$110/square foot (SF), with sales prices in the area of $150/SF, thus resulting in profit levels (before taxes), between 27% and 50%. We believe the average to be in the area of 30%-35%. This compares to typical before-tax profit margins of 12%-15% in suburban townhouse developments in New Jersey. This information is derived from a number of sources, which have reported highly consistent figures.

a greater-than-average profit in order to justify taking those risks. Hoboken is an established housing market, as an extension of the Manhattan housing market; under these circumstances normal risks and, therefore, normal profits, can reasonably be expected.

It is our conclusion that all of these factors support an argument that substantial resources exist within luxury development to generate internal subsidies for a range of affordable units. Furthermore, there are compelling policy reasons for so doing. Unlike the typical suburban development which is burdened with a set-aside by a municipality seeking to meet its Mount Laurel obligations and which has had no visible negative impact on lower income housing conditions, development in Hoboken is clearly having such negative effects. There is, therefore, an even more compelling justification for imposition of inclusionary requirements in such an environment than in the more typical suburban setting.

E. AFFORDABLE HOUSING DEFINED

For the purposes of meeting Hoboken's policy objectives, the following income standards shall be used to define eligibility:

		1986 (Assuming $26,000 median family income)
Low income	0 - 50% median income or	0 - 13,0000/yr.
Moderate income	51% - 80% median income or	13,000 - 21,000/yr.
Middle income	81% - 150% median income or	21,000 - 39,000/yr.

This standard is adjusted from conventional HUD guidelines to extend the middle income level in order to better reflect the economic realities of Hoboken to provide affordable housing to a wider range of families and to reduce the average per unit subsidy cost factor.

II. A DEVELOPMENT STRATEGY FOR PRODUCING AFFORDABLE HOUSING

INTRODUCTION

The proposed housing development action plan addresses one of the most difficult tasks facing the city of Hoboken. That task is that of fostering the development of additional sound housing affordable to the low, moderate, and middle income population of the city, housing that will maintain the diversity of community and ensure that the revitalization of the city's economy and physical plant benefit not only wealthy immigrants, but all its residents.

In order to address this goal actions are proposed in two areas: mandating participation by private developers in the city's goal, through inclusionary development conditions and housing trust fund contributions; and affirmative steps by the city of Hoboken to develop additional affordable housing. Affordable housing, it should be stressed, includes but is not limited to low income housing; it is not only the poor who are victimized by displacement and who are unable to benefit from the new development that has taken place in the city. The needs of the city's moderate and middle income population must also be addressed by the housing program.

The following discussion focuses on a series of elements in the proposed affordable housing development strategy: first, a series of legislative and program initiatives, focusing around the enactment of an inclusionary ordinance and the creation of housing and infrastructure trust funds; second, a series of specif

proposed program actions; and third, the organizational structure, including the proposed reorganization of the Hoboken Community Development Agency (CDA), through which the strategy will be implemented.

A. LEGISLATIVE AND LEGAL INITIATIVES

1. ENACTMENT OF AN INCLUSIONARY ORDINANCE, PROVIDING FOR CONSTRUCTION OF LOWER INCOME HOUSING, OR MAKING A CONTRIBUTION IN LIEU OF CONSTRUCTION, AS A CONDITION OF ALL NEW DEVELOPMENT IN THE CITY OF HOBOKEN.

All private market development that takes place in Hoboken, however beneficial it may be in many respects, inevitably affects the housing conditions of Hoboken's low, moderate and middle income population. Much development, including new construction, substantial rehabilitation, and condominium conversion, affects rentpayers directly through rent increases or displacement. Other development, both residential and non-residential, affects the same population indirectly by further increasing the pressure on and the potential value of the remaining affordable housing stock. While the administration recognizes that it is not in its interest to prevent development, it seeks to ensure that development takes place with the least negative impact on the existing population, and in a way that make it possible to replace the affordable housing that is inevitably lost through development and redevelopment.

In addition to pressure on existing affordable housing, the development that is taking place in the city of Hoboken is placing great stress on the city's infrastructure, in particular in two areas - sewage treatment and parking. The city has begun the effort to develop action plans to deal with those two major

problem areas; at such time that those plans are developed and approved, the city will amend the ordinance to provide for a mix of contributions to the housing program, and to the proposed infrastructure trust fund.

The city of Hoboken therefore, proposes to enact the following ordinance:

PROPOSED INCLUSIONARY ORDINANCE PROVISIONS

1. ALL residential and non-residential development other than lower income housing development in the City of Hoboken, which shall include both new construction and substantial rehabilitation, shall be required to provide affordable housing as a condition of approval.

a. In the case of residential development, 20% of the units constructed, rehabilitated, or converted, shall be evenly divided between low, moderate, and middle income units.

b. In the case of non-residential development, the number of units constructed shall be determined on the basis of a formular keyed to the number of square feet of non-residential floor area, the projected number of jobs created, and the additional affordable housing needs projected to arise as a result of those added jobs. The formula shall specify the ratio between low, moderate and middle income units to be provided.

2. Units may be provided in the same building as the development incurring the inclusionary obligation, or may be provided in a different building within the city of Hoboken. Where provided in a different building, the units will only be accepted where a finding is made by the Community Development Agency (CDA) that the units are of comparable or better size, physical quality, and general environmental and neighborhood quality than they would be if provided in the same building or development incurring the obligation.

3. Residential developments containing fewer than 100 units and all commercial developments shall be permitted to make a contribution to the Hoboken Housing Trust Fund in lieu of constructing the units required under (1) above. The contribution can be in the form of (a) a cash contribution; (b) vacant land; or (c) buildings. Land or buildings shall be conveyed to the Hoboken Housing Development Corporation (HDC) and will be subject to the following conditions:

a. No vacant land will be accepted in lieu of all or part of a cash contribution unless the CDA finds that it is suitable for residential development;

b. No building will be accepted in lieu of all or part of a cash contribution unless the CDA finds that it is structurally sound, suitable for rehabilitation, and is an appropriate long-term part of the housing stock of the city of Hoboken; and

c. No building will be accepted in lieu of more than half of the cash contribution otherwise required, unless the CDA finds that existing cash resources available to the city for the purpose are adequate for anticipated rehabilitation and maintenance requirements.

4. Residential developments containing over 100 units shall be permitted to substitute a contribution in lieu of constructing up to 50% of the units required under (1) above, but only where the CDA makes a finding that such substitution will more effectively advance the housing policies of the city of Hoboken.

5. Affordable housing units, where provided, shall be divided equally between units affordable to households in each of the following three categories:

LOW INCOME	0	-	50% median family income
MODERATE INCOME	51%	-	80% median family income
MIDDLE INCOME	81%	-	150% median family income

6. Where a developer elects to make a contribution, the amount of the contribution shall be determined by multiplying the number of units required under (1) above, by the amount determined by the city of Hoboken to be the average cost of the city providing an affordable unit through its various housing activities.

The ordinance will specify that its provisions will not apply to development that may take place in the waterfront area. The waterfront area, however, will be subject to special developer agreements dealing with the provision of affordable units or contributions in lieu of providing such units. These agreements may require more substantial provision of affordable housing or contributions than the ordinance, but in no event may provide for a less substantial contribution.

2. ESTABLISHMENT OF THE HOBOKEN HOUSING TRUST FUND AS A VEHICLE FOR DIRECTING DEVELOPER CONTRIBUTIONS AND OTHER FUNDS TO THE AFFORDABLE HOUSING PROGRAM.

As the principal financial vehicle to be used to raise and spend funds on the affordable housing program, the Hoboken Housing Trust Fund will be created. The trust fund will receive all developer contributions made under the inclusionary ordinance, as well as special developer contributions that may be made under other agreements such as in the event of potential waterfront development. With these funds the trust fund will seek to pool any other housing funds that may be available and not restricted in a way preventing their inclusion in the trust fund. As outstanding commitments under the Community Development Block Grant program are completed, a substantial part of the funds made available should be allocated to the trust fund, as shall any funds that will become available through repayment of UDAG grants by developers. Funds may be available from other sources as well, including recently enacted state housing subsidy programs.

Funds collected in the trust fund will be used exclusively to maintain and expand the stock of affordable housing in the city of Hoboken. Priority activities for the trust fund will include:

a. Maintenance and rehabilitation of existing affordable housing. This could include rehabilitation of city-owned buildings; rehab loans to private building owners, who would agree to continue the building as affordable housing for a minimum length of time;

b. Acquisition and rehabilitation of privately owned rental properties. This activity, which would take place under the auspices of the Housing Development Corporation (described in Sec. II (C) (2) would be geared to maintaining buildings threatened with conversion and removal from the affordable housing stock, as affordable housing on a long-term basis.

c. Expansion of the affordable housing stock in the city of Hoboken: This would include any costs attendant on the construction of new affordable housing, including land acquisition, site improvements, capital

construction subsidies, as well as grants or loans to homeowners to create accessory apartments, etc.

Funds could also be used, but only to a limited extent, for activities ancillary to a housing development or rehabilitation project, such as non-residential facilities within a residential building, or the provision of tenant education or home-buyer counseling services.

The objective of the program, to the extent feasible, would be to enable the funds to revolve; i.e., funds would be made available as loans, although generally on a "soft loan" basis, so that they might be recouped in the future. Thus, if funds were made available to upgrade a building, a lien would be taken out on the property for the amount provided.

The trust fund would be a dedicated fund, administered separately from the municipal general fund by professional financial management. Its use would be directed by the Hoboken Housing Development Corporation. HDC is a crucial element in the plan: it is expected to become the vehicle through which the city can become an energetic actor in the development process, rather than merely reacting to the proposals of others.

3. ESTABLISHMENT OF THE HOBOKEN INFRASTRUCTURE TRUST FUND AS A VEHICLE FOR DIRECTING DEVELOPER CONTRIBUTIONS AND OTHER FUNDS TO THE RESTORATION AND IMPROVEMENT OF THE CITY'S PHYSICAL INFRASTRUCTURE.

We have already noted that the city has major needs with regard to improvement of physical conditions, in addition to its pressing housing needs. A particularly important need is rehabilitation and upgrading of the sewage system, both treatment and distribution, in the city. Another major need is for off-street parking. Both needs are exacerbated by the extent of new development taking place.

We propose the creation of an Infrastructure Trust Fund, to be a second dedicated fund to be used principally for sewage system and parking improvements in the city. At this time, however, specific plans for the implementation of improvements in these areas are not yet in place. Since we consider it inappropriate to levy contribution requirements in the absence of a clear plan for using the contributions obtained, it is proposed that creation of the infrastructure trust fund be deferred until those plans have been prepared, and adopted by the City Council. At such time, the infrastructure trust fund should be established, and the inclusionary ordinance amended to provide that developers subject to the ordinance must (a) provide a percentage of affordable housing of a cash contribution to the housing trust fund; AND (b) make a cash contribution to the infrastructure trust fund. The latter contribution requirement can be adjusted where developers themselves are providing infrastructure improvements directly.

4. LOCATE HOBOKEN'S REDEVELOPMENT AUTHORITY WITHIN THE CITY ADMINISTRATION

At the present time the redevelopment authority vested in Hoboken's municipal government lies with the Hoboken Housing Authority. Assigning this responsibility to the Housing Authority goes back many years when federal urban renewal programs were launched and local housing authorities were designated by many urban communities to redevelop under-utilized land. Conditions have changed dramatically over the years. Urban renewal funds are no longer available and the critical mandate of the Housing Authority today is to continue the process of upgrading the physical

plant, management and services of public housing.

We propose to locate Hoboken's statutory authority to develop and re-develop property within CDA or its successor organization. The ultimate success of Hoboken's commitment to provide new affordable housing will rest largely on the ability of city government to reform itself in order to efficiently acquire, package, and/or develop property in conformance with stated policy objectives and new legal mandates.

5. REVISION OF THE HOBOKEN ZONING ORDINANCE AND MASTER PLAN

In addition to the enactment of the inclusionary ordinance, if future growth of the city of Hoboken is to be effectively directed, the master plan and zoning ordinance of the city must be thoroughly reviewed, and amended where necessary, to become a key element in that process. The planning functions of the city and the development and housing responsibilities must be closely integrated; revision of the land use ordinance, in conjunction with the organizational and administrative steps described below, is an essential element in this process. We propose that a revised zoning ordinance be submitted to City Council within the next six months.

B. PROGRAM ACTIVITIES

1. INITIATING REDEVELOPMENT PROJECTS IN LARGELY VACANT AND UNDERUTILIZED SECTIONS OF THE CITY AS A MEANS OF CREATING ADDITIONAL HOUSING OPPORTUNITIES

In years past, the city of Hoboken, acting through its housing authority, undertook a number of redevelopment projects utilizing then-available federal urban renewal funds. Although those funds are no longer available, the combination of potential funds from the housing trust fund and the potential market

value of redeveloped sites and buildings creates the opportunity to undertake redevelopment projects once again, and to use such projects as a means of creating affordable housing opportunities.

In contrast to an infill housing program, which is appropriate for those areas which are largely built-up but which contain scattered vacant parcels, redevelopment is appropriate in those parts of the city which are largely vacant and underutilized, and contain only scattered existing structures. A number of city blocks, for example, in the southwestern part of the city are between 50% and 80% vacant; some of these blocks are also potentially attractive for private market development as well.

By undertaking redevelopment of those blocks, the city is able to achieve a number of important goals: (1) to increase the number of affordable housing units on those blocks, and in the city as a whole; (2) to utilize more of the value available in that land for public benefit, rather than for private speculation; and (3) to see entire city blocks developed as a whole, creating visual qualities and neighborhood amenities that cannot be created where development is taking place piecemeal.

In order to accomplish these goals, the city must, working through its Redevelopment Agency powers, be ready to use the power of eminent domain to acquire land which the owners may not be willing to sell. Given the speculative fever in Hoboken, and the wild value expectations of many landowners, eminent domain will be necessary in order to assemble the large parcels which make the redevelopment process effective. The objective of the

redevelopment program will be:

a. To assemble suitable areas, acquiring the land through eminent domain where necessary;

b. To prepare redevelopment plans which provide a balance of housing types and affordability levels, including percentages of housing affordable to low, moderate and middle income households;

c. To secure the redevelopment of the areas according to plan, through appropriate combinations of private market development and public initiative, working through the Hoboken Housing Development Corporation.

The redevelopment program will be undertaken jointly by city government and the Hoboken Housing Development Corporation. Although substantial lead time will be required before any housing units will be produced under this program, over the coming years this may be the most productive vehicle for creating additional affordable housing available to the city.

2. CREATION OF IMMEDIATE PRIVATE MARKET DEVELOPMENT OPPORTUNITIES ON PARCELS OWNED BY THE CITY AND HOUSING AUTHORITY IN ORDER TO MAXIMIZE PRODUCTION OF LOWER INCOME UNITS AND GENERATION OF TRUST FUND CONTRIBUTIONS FROM THOSE PARCELS

There are two pairs of vacant land parcels, one pair owned by the Hoboken Housing Authority and one by the city of Hoboken, which are suitable for medium to high density residential development, are located in areas of high private market demand, and which can be made available immediately for private market development. These parcels are (a) the two housing authority parcels on the block bounded by Hudson Street, Third Street, River Street, and Second Street, each roughly one-half acre; and (b) two city-owned parcels along or near Observer Highway, one between Bloomfield and Garden Streets, and the other between Garden and Park Streets, with a combined acreage of roughly 1.25 acres.

These sites should be made available immediately for development, in a way that will maximize the ability of the city to achieve two objectives:

a. Obtain attractively designed structures, consistent with the character of the surrounding area; and

b. Create inclusionary developments, in which a substantial percentage of the units in each development are set aside for low, moderate, and middle income households.

In order to prepare these sites for development, three steps must be taken:

a. Determine the configuration of the parcels to be offered: Both the River Road and Observer Highway sites include two separate parcels of land. A determination must be made as to whether 2, 3, or 4 distinct RFP's are to be offered.

b. Include design guidelines for each parcel: If the quality of development and the compatibility of the development with surrounding areas are to be ensured, the design of these projects cannot simply be left to developers submitting proposals within the framework of the zoning ordinance. All of these sites are in highly visible locations and will have a significant effect on the visual character of the city. Issues such as building height, mass, transitions (particularly on the Observer Highway parcels), use of street level space, etc. are all complex and important.

c. Prepare a request for proposals for each site and disseminate to prospective developers: The objective of the request for proposals is to elicit a detailed picture from each prospective developer of the manner in which he/she would develop each site, and with specific reference to the affordable housing program, the combination of lower income units and trust fund contribution that each developer is willing to make. The RFP must make explicit that proposals not only include responsiveness to the design guidelines, but a percentage increase of affordable units above and beyond the 20% provided for in the inclusionary ordinance. Alternative projections should be encouraged based upon financing options and alternative land purchase or lease arrangements.

It should be stressed that this will be a negotiated process, rather than a simple "highest bidder" competition. The award of these sites must be based on a balance of factors requiring the exercise of judgment, including, of course, the percentage of affordable housing, but also design and planning factors in order to determine which proposal is most beneficial to the entire community.

3. IDENTIFY SUFFICIENT NUMBER OF SITES TO MAKE FEASIBLE THE CREATION OF LOWER INCOME HOUSING OPPORTUNITIES THROUGH AN INFILL HOUSING DEVELOPMENT PROGRAM UNDER THE AUSPICES OF THE HOBOKEN HOUSING DEVELOPMENT CORPORATION

The city of Hoboken owns a small number of vacant parcels which are suitable for housing development. These parcels, and many other similar vacant tracts all over the city, represent a substantial opportunity for the provision of affordable housing through an infill housing program. An infill program is appropriate where small vacant parcels exist on blocks which are largely built-up, and largely residential in character. In such a program, small clusters of housing units, either small apartment buildings or townhouses, at a scale and of a character consistent with the immediate surroundings of the site, are built on such vacant parcels, typically ranging in size from 2,000 to 5,000 square feet. Such development enhances the community in which it is located, by providing new housing consistent in style and character with the rest of the area, and by eliminating vacant lots which are often hazardous and unpleasant.

The infill program will begin through use of city-owned land, since that land is already available, and has no cost attached to it. We have identified five city-owned sites which are at least worth consideration for this program.

Further investigation will determine whether it will be possible to recapture any of the sites that have been sold, subject to various conditions, by the city in recent years, and where the conditions of sale have not been adhered to; it may be possible, in this manner, to add more sites to the program. Finally, a potential use of trust fund money, both from developer contributions and from other sources, will be the acquisition of privately-owned parcels for this program.

This project will be implemented by the Hoboken Housing Development Corporation, to which the city will convey these sites. Depending on the size, location, surroundings, and other site considerations, the types of housing that would be built could include rental housing, condominiums, and owner occupied townhouses, with or without income rental units. The latter approach can be an effective way of combining low and middle income housing, by constructing townhouses which can be made affordable to moderate or middle income households by virtue of the inclusion of the rental unit in the townhouse. The rental unit can then be rented at levels which make it affordable to a low income tenant.

An alternative approach, which takes up the same space as a three-story townhouse unit with an income apartment,

is two duplex units, each one utilizing one and a half floors. This approach can be used in a condominium development, and may make it possible to offer condominium ownership of units suitable for family occupancy at prices affordable to low and moderate income buyers. The same unit can be further adapted to make three separate small apartments, or flats, which would be suitable for single people, young couples, or senior citizens. These approaches recognize that, by virtue of limited land availability and high land cost, much of the future affordable homeownership opportunity that can be created in Hoboken will be in condominiums, rather than in the more expensive, and traditional, row houses.

4. CREATE ADDITIONAL OPPORTUNITIES FOR SENIOR CITIZEN HOUSING IN THE CITY OF HOBOKEN

It is important to be able to continue to provide additional housing opportunities for senior citizens in the city. In this area, as is noted in section II (D) below, there are still some limited funding opportunities available. In terms of immediate action, the city plans to identify an immediately available site on which 60 to 100 senior citizen housing units can be constructed and prepare plans for an application for funds under the Federal Section 202 senior citizen housing subsidy program, in time to qualify for the next funding cycle of this program, expected early in 1986. It is suggested that city-owned property at 5th and Madison may well be most suitable for this development.

5. INITIATE A PROGRAM TO ESTABLISH CLEAR GUIDELINES FOR DEVELOPMENT AND EXPEDITE DEVELOPMENT AND CONSTRUCTION APPROVALS

The city affordable housing program places substantial, although not unreasonable, burdens on private developers working in the city of Hoboken. In order to be able legitimately to impose those burdens, the city has a parallel obligation to facilitate and expedite the activities of those developers where it can do so in keeping with city policy and the concerns of its citizens. One area in which the city can, and should, develop new policies, is in the closely related areas of, first, establishing the conditions for approval of development; and second, ensuring that, where developers meet those conditions, their approval will be expedited and without unreasonable delays.

It is anticipated that, through revision of the zoning ordinance and implementation of the inclusionary ordinance, the conditions of development approval will be substantially clarified; the nature of development that the city seeks to have take place will be set forth clearly in the zoning ordinance. For all developments other than the largest and most complex, the Planning Board will adopt, and adhere to, strict timetables for approval of site plan and other applications, consistent with the Municipal Land Use Law.

Firm timetables will also be established for the following permits and inspections following Planning Board approval:

- Issuance of building permits
- Conduct of code and subcode inspections during construction
- Final inspection, and issuance of certificates of occupancy

The specific standards and timetables will be developed and adopted by the appropriate city agency within the next six months.

C. OPERATION OF THE PROGRAM

1. REORGANIZE THE CITY HOUSING, PLANNING, CONSTRUCTION, AND COMMUNITY DEVELOPMENT RESPONSIBILITIES INTO A NEW DEPARTMENT OR AGENCY

Historically, the various functions of city government which are related to housing, planning and development in Hoboken have been highly fragmented; many housing activities have been carried out through a largely autonomous agency, The Community Development Agency, while planning has been conducted through the Planning Board and its consultant without oversight from any other arm of city government. Coordination between closely related governmental functions has been limited, and sometimes nonexistent, and many important activities have not taken place. This city, to a large extent, has found itself in a reactive position with regard to events; private developers have established the ground rules for the future of the city, and government has become little more than a passive observer.

The position of the city administration is that housing, planning and development are parts of a single whole, which in turn will determine the future of the city of Hoboken. If city government is, therefore, to take an active role in shaping that future, it must reorganize to establish an effective and coordinated approach to all of the functions and responsibilities which make up those areas. The means by which this can take place, in conjunction with the new initiatives described in this plan, is the reorganization of city government

and the creation of a new department or agency based on a rational division of responsibilities in this area.

While the precise formula for re-structuring CDA awaits the completion of a study conducted by the CDA transition team, the responsibilities of city government described in this Affordable Housing Plan requires such re-structuring to include the following functional arrangements:

1. Planning and Community Development: This area will be responsible for concerns relating to the future development of the city. It will integrate both the regulation of private development (planning, zoning, construction code) and the direct intervention of city government into development (redevelopment, nonprofit development corporation, and the municipal capital program in conjunction with the Public Works Department). It will also be responsible for management of the waterfront development program, which combines both private and public involvement.

2. Economic Development: This area will be responsible for undertaking efforts to preserve the industrial and retail economic base of the city of Hoboken, to create future opportunities for economic development, and to maximize creation of job and training opportunities for Hoboken residents resulting from new development activities.

3. Housing Stabilization: This area will have the responsibility for managing the city's efforts to stabilize and maintain the existing affordable housing stock, including both rental housing and owner-occuppied housing. In addition to the new offices of Tenant Assistance and Homeowner Assistance, it will include technical services to the rent control board, housing inspection, and a number of new responsibilities, described in Section III below.

2. ESTABLISHMENT OF THE HOBOKEN HOUSING DEVELOPMENT CORPORATION AS THE VEHICLE FOR DIRECT INVOLVEMENT BY THE CITY OF HOBOKEN IN HOUSING DEVELOPMENT AND REDEVELOPMENT ACTIVITIES

While the housing plan envisages active participation by private developers in achieving the city's housing objectives that participation will not, in itself, make achieving those

objectives possible. If all available resources are to be mobilized to maintain existing affordable housing, and produce additional affordable housing in the future, the city must become directly involved in the development process.

City government, as such, is not best suited to become directly involved in development. Statutory restrictions on the operations of local government limit its ability to act with the flexibility that development activities dictate; similarly, the direct regulatory and management responsibilities of city government, while not directly in conflict with the entrepreneurial role of a development-oriented entity, are in many respects inconsistent with such a role.

The logical conclusion, which has been reached by many other communities faced with similar objectives, is the creation of a nonprofit development corporation which will be an arm of city government; while it will have considerable flexibility in operational matters, its mandate will be to carry out the policies and programs of city government. Those policies and programs that are to be implemented by the corporation will be defined in an annual work program of the corporation which will be submitted to, and approved by, the mayor and city council. The board of the corporation will be appointed by the city, and the key staff of the corporation will be provided by the Planning & Development Staff of CDA's successor organization. Within the scope provided by the Corporation's approved work program, it is anticipated that its principal responsibilities will include:

a. Program management (not financial management) of the housing trust fund;

b. Conduct of the infill housing development program;

c. Operation of city-owned residential buildings;

d. Implementation of redevelopment projects initiated by the city;

e. Acquisition and operation of affordable units provided by developers under the inclusionary ordinance;

f. Acquisition and rehabilitation of buildings acquired by the city to maintain the affordable housing stock.

The specific features of the proposed infill program, and the city redevelopment strategy, are described in the preceding sections of the housing plan. In each case, it will be city government that will establish the policies to be followed, and the corporation, using its flexibility as a private entity, but working within the structure of city government and with the resources of the housing trust fund, that will carry out the policies.

3. ESTABLISH THE MAYOR'S ADVISORY COMMITTEE ON AFFORDABLE HOUSING

In order to provide ongoing public input into and oversight of the affordable housing programs proposed in this plan, a Mayoral Advisory Committee should be established to include a balance of local affordable housing advocates, housing experts, representatives from the Planning and Zoning Boards, and participating developers. The committee's responsibilities would include but not be limited to:

a) Reviewing and making recommendations on specific ordinances proposed in this plan;

b) Reviewing and making recommendations on proposed administration re-structuring, re-staffing, and procedural changes;

c) Monitoring and making recommendations on implementation of the overall plan.

d) Identifying and proposing solutions to existing or new problem areas not covered by the Plan.

4. THE HOBOKEN CITY COUNCIL SHOULD ESTABLISH A COMMITTEE ON AFFORDABLE HOUSING

As the governing body of the city, the council will have responsibility for major decisions crucial to the successful implementation of this Plan. Adoption of proposed ordinances, administration re-organization and re-staffing, and land use decisions lie at the heart of the plan and require agreement between the executive and legislative branches of local government. Accordingly, we respectfully propose that a working committee of the council be established to provide a formal mechanism for city council participation in the development of proposed ordinances, adminstrative reforms, and specific re-development actions.

5. CREATE MORE EFFECTIVE COORDINATION OF MUNICIPAL PLANNING, ZONING AND DEVELOPMENT AUTHORITY

The planning activities and development activities of a city are closely interwoven, as the planning decisions directly affect the scope of private and public development activity, and inevitably affects future planning as well. Hoboken is unusual among urban communities in the lack of integration between these activities in city government; while the planning board has had professional consulting assistance of high quality, its effectiveness has been limited by its lack of connection to other functions of city government. At the same time, the zoning board of adjustment, acting without professional planning support, through the granting of variances permitting substantial increases in density or floor area ratio ((d) variances), has often had a disproportionately significant

effect on the course of growth and development in the city.

We propose to integrate planning and development functions into a single division of planning and development. This division will provide technical services to both the planning board and the zoning board of adjustment; division staff or consultants will provide detailed recommendations to both bodies on matters coming before them.

The entire practice of awarding (d) variances must be carefully reviewed. Under the New Jersey Municipal Land Use Law, which governs the actions of zoning and planning boards, and the related case law on the subject, applications for such variances are to be given strict scrutiny, and are not to be granted unless they can be granted "without substantial detriment to the public good, and (they) will not substantially impair the intent and the purpose of the zone plan and zoning ordinance" (N.J.S.A. 40:55D-70(d)).

D. FINANCING AND SUBSIDY OPTIONS

1. LAND AND BUILDINGS: Owing to the escalating cost of acquisitions, judicious use of city-owned land and/or buildings at no purchase cost to the eventual tenant or owner of an affordable housing unit provides an important subsidy option.

2. COMMUNITY DEVELOPMENT BLOCK GRANTS: CDBG funds have been and continue to be used in a large variety of ways, such as, grants, loans, private loan subsidies or guarantees. Individuals and cities use these funds to repair and rehabilitate housing, economic development activities, code enforcement related activities and to assist tenant referral and informational functions. Additionally, CDBG funds may be used by municipalities

as matching shares toward other programs, to provide seed money for eligible non-profit activities, to provide capital improvements, etc.

The CDBG program has been and continues to be the prime source of funding for local housing and development activity. In operation for approximately a decade, the city of Hoboken has used the program to facilitate many housing and related activities. The program continues to provide the opportunity to use local initiatives to address local problems. Although funding may be reduced slightly, Hoboken should continue to receive funds in fiscal '86. In addition, preliminary research has revealed the existence of unused CDBG funds from prior funding years which also should be made available to the Housing Trust Fund.

3. HOUSING FOR THE ELDERLY AND THE HANDICAPPED (Section 202):

Provides direct financing below interest loans to qualified non-profit sponsors for new construction or moderate or substantial rehabilitation of housing for the elderly and handicapped. A Section 8 allocation is also allotted to provide rent subsidies for 100% of the units in a 202 project. This program has been successfully used to develop Columbian Towers. The program, although extremely competitive due to limitation of available units, provides an opportunity for Hoboken to provide additional senior citizen housing.

4. URBAN DEVELOPMENT ACTION GRANTS (UDAG):

UDAG was established by the Housing and Community Development Act of 1977, to provide specific project related assistance to eligible communities in order to stimulate housing and economic development activities. Grants, which are very competitive,

are designed to encourage private investment that would not be made without some federal assistance. UDAG projects must meet the "But For" criterion acnowledging that without UDAG assistance the project would not be implemented. Eligible activities are tied to those identified in the CDBG program. UDAG money can be used by the cities in a variety of ways and purposes, such as; infrastructure improvements; low interest loans; site acquisitions, preparation and improvement; rehabilitation, etc.

Grants are competititive and project specific. Applications are reviewed quarterly and submitted by the city on behalf of the specific project.

Hoboken has had success in its use of UDAG funds in the past and should continue the use of the program in fiscal '86.

5. TAX EXEMPT FINANCING

Section 103 of the Internal Revenue Code provides for the issuance of Tax-Exempt bonds to finance multi-family rental housing. The regulations call for the inclusion of 20% of the units in a project to be affordable for lower income residents as defined by the regulations.

Tax exempt bonds must be issued by a qualified issuer, such as, the State Housing Finance Agency, Redevelopment Agency, County Improvement Authority, etc. Bonds are issued to finance the acquisition, construction and long-term debt of such housing.

Tax exempt financing can produce rates up to 6 points lower than conventional loans, therefore, making housing more affordable by lowering the debt service payment. This is a

valuable tool and can provide opportunity to develop vacant sites within the city of Hoboken

6. RENTAL REHABILITATION PROGRAM

The Rental Rehabilitation Program (RRP) provides grant funds through a formula allocation to states and local governments. Funds are to be used to rehabilitate residential rental units. The program further provides a special allocation of Section 8 existing certificates and vouchers. These additional rent subsidies are to be used by eligible low income tenants currently occupying or moving into rehabilitated units.

RRP Funds are generally used to provide subsidies for rehabilitation through up-front grants, deferred payment loans or below market rate loans as an inducement to owners to participate.

Units are to be rented at Market Rate rents. Projects must be located in low income areas where rents are currently affordable, and likely to remain so, to low income tenants.

The program has not received wide use in this area. Hudson County returned their funding allocation of both Fiscal Year '84 and '85. However, Hoboken should look closely at the program for adoption to local needs.

7. HOUSING DEVELOPMENT GRANT PROGRAMS (HODAG)

Provides grants to eligible cities, counties and states to support the construction or substantial rehabilitation of residential rental housing. Funds may be used to provide capital grants, loans, interest reduction payments, rental subsidies, etc., to project owners. Project owners are required to make at least 20% of the project's units available to lower

income tenants for rentals @ 30% of income. Owners cannot convert units to condominiums for twenty years. Fiscal '86 appropriations bill includes continued funding for this program. Although competitive, this may present an opportunity for Hoboken.

8. STATE RESOURCES

The State of New Jersey has been active in addressing state and local needs for many years. The N. J. Department of Community Affairs (DCA) and the New Jersey Housing and Mortgage Finance Agency (HMFA) has operated both loan and grant programs aimed at assisting local governments efforts to alleviate problems.

DCA has provided and continues to provide funds to local cities to operate locally designed efforts to preserve neighborhoods. The Neighborhood Preservation Program, one of their mainstays, continues to provide necessary assistance to the Urban Aid Cities to conduct these efforts. Funds are used locally to operate programs encompassing, grants, loans, administrative expenses, etc.

Recently, in addition to the above, DCA announced their Balanced Housing Program. This first year effort to create affordable housing has been funded at $10 million dollars under the Fair Housing Act of 1985. Hoboken is eligible and should immediately apply for these competitive funds. Additionally, the HMFA has made available $15 million in grants and loans and $111 million in lower interest rate mortgages for home purchases, and unlimited funding for financing rental housing.

E. IMMEDIATE DEVELOPMENT ACTIONS/NEXT STEPS

The following immediate actions will be taken to implement the affordable housing development strategy. All of these actions can and should be completed within six months or less from the date this plan is announced.

While in some respects it might seem desirable to postpone many actions until after the housing, planning, and development functions of the city have been reorganized and re-staffed as proposed, in many other respects this would be unwise. Many activities can begin immediately, utilizing qualified consulting services, and then absorbed into the new re-organized administrative structure. Other activities must begin immediately if we are to be able to compete effectively for limited state and federal funds. Finally, we are in a crisis. The housing and development situation in Hoboken is highly volatile, units are being lost daily, and speculation is widespread. Where we are uncertain about our course, we must plan further; where we are certain, we must move ahead.

1. Convene the Mayor's Advisory Committee on Affordable Housing.
2. Draft, and enact the proposed inclusionary ordinance.
3. Establish the Housing Trust Fund.
4. Reorganize the city housing, planning, and development functions as discussed above.
5. Transfer to city government authority to undertake redevelopment projects.
6. Prepare for development -- those larger sites currently owned by municipal government.
7. Retain a consultant and design assistance as needed to prepare Requests for Proposals for the Marineview and Observer Highway sites, and initiate (in conjunction with the appropriate committees) the developer selection process for these sites.

8. Retain consultants to initiate preparation of grant applications:

a. To the New Jersey Department of Community Affairs for financing of an acquisition and rehabilitation project under the Neighborhood Preservation Program; and

b. To the Department of Housing & Urban Development for funding under the next cycle of the Section 202 senior citizen housing program.

III. A STRATEGY FOR PROTECTING THE EXISTING AFFORDABLE HOUSING STOCK

INTRODUCTION

Erosion of the existing affordable housing stock, both rental and owner-occupied, is one of the most serious housing problems facing the City of Hoboken. As demand for luxury housing in the city increases, the economic rewards to owners and developers from vacating rental buildings in order to rehabilitate them as luxury rentals or condominiums have skyrocketed. The result has been the steady loss of affordable rental housing units, and the displacement of thousands of low, moderate, and middle income tenants. Existing tenants are being subjected to worse and worse conditions as landlords warehouse vacant apartments and defer essential maintenance in the expectation of future conversion. At the same time skyrocketing costs and prices are threatening existing homeowners, and making homeownership less and less readily available to the children of long-time Hoboken families.

The cental policy goal of the city of Hoboken in this area is to stabilize, to the extent possible, the existing affordable rental and owner occupied housing stock. With regard to rental housing in particular, the city's program is grounded in the following principles:

1) Every tenant in the city of Hoboken should be able to live in healthy and sanitary conditions;

2) Every existing rental housing unit in the city should be utilized to house a family or individual; and

3) In those situations where these two objectives are not being achieved, the city should be able to intervene quickly and effectively.

Although it may not be possible to achieve these objectives with regard to every unit and every household in the city, we believe that they are largely achievable. The policy proposals below have been framed in order to enable the city to move toward achievement of these objectives. At the same time, the city will initiate a series of efforts to assist existing homeowners through financial and technical assistance, and to create new opportunities for young moderate and middle income families to become homeowners in the future.

We do not seek to prevent legitimate re-use and re-development of property within the city of Hoboken. Private re-use and re-development, however, must be regulated to ensure that they take place in a manner consistent with the public health and safety; and do not result in the abuses that have characterized the recent past. The proposals in this plan are designed as well to permit reasonable redevelopment activities without the abuses that so severely affect the lives of the less affluent residents of the city.

It must be noted that an ominous threat to existing affordable housing looms on the immediate horizon. The most decent and stable housing for low and moderate income families provided in Hoboken during the past two decades has been privately owned and publicly subsidized development. The owners and investors in Applied Housing, the 8th and Willow Project Uplift, Clock Towers and Church Towers are all potentially vulnerable to housing market pressures, particularly because of the quality of the original rehabilitation. Additionally, the tax recapture provisions of the depreciation option chosen by the developer will end within 18 months in some of the originally subsidized buildings. The elimination of this tax advantage will create further economic incentives for owners and investors in these buildings to consider altering rent structures or converting to condominiums.

Finally, proposed new federal regulations would restrict occupancy of Section 8 subsidized units only to very low income families. Such a restriction would not only increase the existing demand for moderate and middle-income housing, but would lead to destabilizing conditions and more costly building maintenance and residential services.

For all of these reasons the administration is committed to begin immediately a process of exploring with the owners of these projects the options available to protect this critical source of affordable housing.

A. LEGISLATIVE AND LEGAL INITIATIVES

1. STRENGTHEN EXISTING RENT CONTROL LEGISLATION

For the past several years, the language and enforcement of rent control has come under heavy public criticism from both sides of this issue. The heated political climate within which the matter was debated, produced a series of compromises which attempted to cool public controversy but which did not necessarily produce a complete ordinance faithful to the continuing problems which create the need for controls on rent increases in the first instance. The appointment of a new Rent Levelling Board, provides the opportunity for that Board to take the leadership in carefully reviewing the ordinance and proposing those changes which it believes to be in the broad public interest. In undertaking such a review, we propose that the Board be guided by the following concerns:

a) Keeping allowable rent increases and surcharges within affordable limits;

b) Ensuring that speculation and imprudent investment not be rewarded;

c) Ensuring that all incentives for tenant displacement are removed;

d) Providing explicit landlord notification requirements to tenants and the Rent Levelling office in all matters covered by the ordinance.

e) Providing explicit standards where applicable to guide the actions of the Rent Levelling Administrator and Board;

f) Ensuring that legitimate landlord hardship is fully documented and expeditiously resolved;

g) Providing relief for small homeowners who have supressed rents in units previously occupied by direct family members.

2. UPGRADE THE HOUSING CODE ENFORCEMENT PROGRAM TO PROVIDE IMMEDIATE AND EFFECTIVE ENFORCEMENT OF CODE VIOLATIONS IN RENTAL BUILDINGS.

This program, which must be seen in conjunction with other programs described below, is central to the stabilization of the rental housing stock. In recent years, code enforcement has been sporadic and inconsistent; while substanial inspection activity has taken place, follow-up and monitoring have both been inadequate. Indeed, the code itself which is being enforced by city officials is clearly antiquated, and fails to recognize either technical or organizational changes of recent decades. Code enforcement, however, takes on particular importance in an environment such as that of Hoboken. Because of the economic rewards associated with vacating buildings, not only is there evidence of deferred maintenance, but also of landlords perpetrating or creating serious code violations as a form of tenant harassment. According to what we have learned, this is particularly common on weekends and holiday periods, during which tenants have little recourse.

The following elements must be included in the upgraded code enforcement program:

1. The codes administered by the housing inspection staff must be reviewed, and where necessary, revised to reflect current technical and organizational realities.

2. The housing inspection function must be integrated with related city responsibilities, and held accountable to the Housing Stabilization unit of CDA's successor organization.

3. The code enforcement program must be expanded in order to conduct inspections in response to complaints, issue citations, and enforce housing codes on a 7 days per week, 24 hours per day, basis. This will, in all probability, require the expansion of the staff of the office.

4. An organized and consistent system, using computer resources for follow-up of violation notices, and monitoring of landlord compliance, must be established.

5. A systematic program of prosecution of landlords failing to comply with housing codes must be established and fines increased to provide disincentives.

6. A program which requires security deposits of landlords, as described below, must be established by ordinance and agressively utilized.

7. The statutory provisions for rent receivership, which are described below, must be utilized on a pilot basis by the city.

The establishment of an effective 24 hour code enforcement office is central to the entire program. Within that office, changes must be made from current conditions: (1) Overall administration of the office must fall within the agency generally responsible for housing and planning matters in the city; (2) All personnel must be thoroughly trained to perform their work effectively; and (3) the city legal staff must be closely coordinated with the code enforcement program.

Finally, all personnel in the office must be committed to the city's objectives and to the interests of the tenants of rental housing. This is not unfair to the city's landlords. Any landlord who maintains his or her building or buildings in sound condition is an asset to the city; landlords who do not, however, are jeopardizing the health and safety of the city's residents. Such actions must be treated with the utmost severity.

3. ENACT AN ORDINANCE REQUIRING THAT CERTAIN LANDLORDS POST A "SECURITY DEPOSIT" TO BE USED BY THE CITY TO CORRECT VIOLATIONS NOT EXPEDITIOUSLY CORRECTED BY THE LANDLORD.

Even the most effective code enforcement program, in

itself, cannot always ensure that violations are expeditiously corrected, particularly those affecting the health and safety of the tenants. If a landlord under most circumstances fails to correct a violation prosecution, while important, does not get the violation corrected. Similarly, a city cannot afford to use municipal funds every time a need arises.

The approach proposed is to enact an ordinance under which all landlords meeting certain criteria, discussed below, will have to make a "security deposit" payment, based on the number of units owned by the landlord, to the city. These funds are held in escrow by the city, and are available for one purpose only: If the city issues a violation notice to a landlord, and the violation is not corrected expeditiously, the city may draw funds from the landlord's escrow account in order to have the necessary work done under the auspices of the city. Once this takes place, the landlord is required to replenish the fund for the amount drawn out within a fixed period.

The program has two attractions: first, it provides a source of funds with which the city can ensure that emergency or other necessary repairs are made. Second, and perhaps more importantly, since most landlords can get repair work done at less cost than can the city, the threat that these funds will be used can be a strong incentive for the landlord to make the repairs without delay.

With regard to which landlords would be covered by this program, we propose, at least initially, that (1) owner-occupants of 2 to 4 family buildings be exempt; and (2) of

those not thereby exempt, only those who have demonstrated a pattern and practice of code violations during the past three years be required to make a deposit.

4. ESTABLISH PILOT PROGRAM TO UTILIZE THE STATUTORY RENT RECEIVERSHIP PROVISIONS TO TAKE OVER BUILDINGS IN ORDER TO CORRECT VIOLATIONS AND PROVIDE SOUND LIVING CONDITIONS FOR TENANTS.

New Jersey law provides that where conditions in a rental building are such that they represent a threat to the tenants, and where the landlord has been recalcitrant and unwilling to make necessary repairs and improvements, the city may go to court and have the court appoint a receiver for the property. The receiver then has complete control over the finances of the building, may apply the entire rent roll to improving the property/*, may borrow money, impose liens on the building in order to make necessary capital improvements, and may rent vacant apartments. The receivership continues until the landlord can convince the court that it should be terminated. The above is a considerable over-simplification, but provides a general idea of the program. With that person or firm in place, and working closely with city legal staff, the city can then test this program for wider applicability.

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*/This is potentially significant, since, if the entire rent roll is devoted to the building itself, the landlord must therefore make tax payments, as well as payments on any mortgages that there may be on the property, from other resources, or risk foreclosure. Since Hoboken buildings have substantial value, the landlord is unlikely to want to risk foreclosure, thereby increasing the pressure to maintain the building and avoid the receivership situation.

5. ENACT A CITY ORDINANCE, FOR A FIXED PERIOD NOT TO EXCEED FIVE YEARS, PROHIBITING "WAREHOUSING" OF APARTMENTS: I.E., THE PRACTICE OF ALLOWING APARTMENTS TO REMAIN VACANT IN ANTICIPATION OF FUTURE REHABILITATION OR CONVERSION OF THE BUILDING, AND PROVIDING EXPLICIT STANDARDS UNDER WHICH OWNERS CAN OBTAIN WAIVER OF THE PROHIBITION.

"Warehousing" of apartments is a practice, widespread among Hoboken landlords, which has a particularly severe effect on housing conditions in the city. First, it removes scarce units from the housing stock available to Hoboken residents. Second, the presence of long-term vacant units in a building increases the risk of infestation, other code violations, break-ins, arson, and vandalism. Third, it enables the landlord to make long-term changes in the housing stock without providing appropriate relocation benefits and other mitigation measures. For all of these reasons, the practice of warehousing apartments is clearly violative of public health and safety. The city should enact an ordinance prohibiting the warehousing of apartments in rental buildings covered by the rent control ordinance.

At the same time, the city recognizes that in order to undertake reasonable and desirable private rehabilitation efforts, it will be necessary in many cases to vacate buildings and relocate sitting tenants. This is similarly the case where an owner seeks to rehabilitate a building for conversion to condominiums, a practice which is not, in any event, within the purview of the city of Hoboken to ban outright. The city has an obligation, however, to regulate the process by which buildings containing affordable units are vacated in two essential respects: first, to ensure that the needs and concerns of the sitting tenants are respected during the process;

and, second, to ensure that the loss of affordable housing units from the city's stock is, in some reasonable manner, mitigated.

The proposed ordinance is designed to balance these two concerns; it provides one set of standards which apply as long as the landlord has not formally declared his intention to vacate the building. If the landlord formally declares his intention to vacate the building by applying for a waiver of those standards, a second set of standards come into effect, which must be complied with before the waiver is granted.

The city of Hoboken is in a crisis. Units are being lost, and tenants are being displaced daily, and no replacement affordable housing is being provided. It is anticipated, however, that over the coming years, the city's development strategy will begin to take effect, and produce substantial numbers of affordable units. For that reason, we propose this as a time-limited ordinance, that will "sunset" in the future when the affordable housing development program has begin to have a significant effect on the city's housing stock.

a. Provisions governing landlords: the anti-warehousing standards:

All landlords, except for owner-occupants of 2-4 family structures, will be subject to the anti-warehousing standards of the ordinance. The mechanics of these standards are straight-forwar

(1) All landlords must make a good faith effort to rent all of the units under their control/* If two of the units in the building, or 5% of the total number, are vacant, whichever is greater, that will be considered a prima facie case that a good faith effort is not being made.

*/The dimensions of the "good faith effort" would be defined in the ordinance. They would include not only offering the unit for rent, but offering it at a reasonable/legal price, under reasonable and realistic lease terms, and in habitable condition.

(2) A complaint of warehousing may be brought by any party, including tenants or the city housing inspection staff to municipal court. If the court finds that the landlord has not made a good faith effort to rent, it will enter a finding that the landlord is warehousing units in violation of the ordinance and will have the power to impose a fine. The fine could be abated if the unit is rented within a reasonable period of time in accordance with all applicable ordinances.

These provisions, as noted, would govern landlords as long as they have not applied for a waiver for the purpose of vacating the building. Any owner of rental property subject to the ordinance is presumed to have the intent of renting his units, unless he or she has formally applied for a waiver of the ordinance.

b. Provisions for waiver of anti-warehousing standards:

The intent of the waiver requirement is to ensure that, when units are vacated, the impact on the tenants specifically, and on the affordable housing stock of the city generally, is mitigated to the extent feasible. For this reason, in order for the anti-warehousing standards to be waived, the applicant must submit to the Rent Levelling Board and receive approval of the following elements:

(1) A temporary mitigation program, showing how the building will be maintained free of vandalism and health and safety deficiencies, and essential services will be provided to remaining tenants during the period while units are in violation of policy outlined in a.1.above.

(2) A relocation program. In the event the application for a waiver is based on the intention of the landlord to complete a major rehabilitation program involving displacement of tenants, the landlord must demonstrate that all tenants will be relocated to sound and affordable housing.

(3) A permanent mitigation program, showing how the long-term effect of vacating the units and thereby removing affordable units from the housing stock will be mitigated. In the case of rental property the appropriate provisions of the Rent Control ordinance will be invoked. In the case of a proposed conversion:

a. The owner can agree to sell a minimum of 25% of the units in the converted building to present tenants qualifying for the affordable housing program at "insider" prices; i.e., at prices affordable to them based on income.

b. The owner can provide a minimum of 25% of the units in the rehabilitated building as affordable units meeting the standards of the inclusionary ordinance.

c. The owner can provide the same number of affordable units in another building, or

d. The owner may make a housing trust fund contribution.

B. PROGRAM ACTIONS

1. ACQUIRE AND REHABILITATE EXISTING PRIVATELY OWNED SUBSTANDARD RENTAL BUILDINGS

In the final analysis, the city's goal of maintaining on a long-term basis a stock of affordable rental buildings may require the creation of alternatives to ownership by private landlords. While this has been done in the past through federal programs, such as Public Housing or Section 8, it can be done in the future through the direct initiative of the city working through the Housing Development Corporation (HDC) which will be established, and using resources from the Hoboken Housing Trust Fund, as well as outside resources, most notably from the newly-expanded Neighborhood Preservation Program in the New Jersey Department of Community Affairs.

Preliminary analyses suggest that in many cases this may be a more cost-effective approach to creating lower income housing than new construction since it does not create new units. However, it can only be part, although a significant part, of the city's overall program. The relative costs of rehabilitation versus new construction may also be affected

by the implementation of the rental housing stabilization program generally, which may potentially act to moderate some of the speculative excess that today characterizes the Hoboken real estate market.

We propose to initiate such a program and select a group of buildings to act as a pilot program in this area. Depending on the amount of funds available, from the Trust Fund and elsewhere, the number of units to be acquired will be determined. The buildings will be in sound structural condition, and where it can be determined that the buildings can be acquired, rehabilitated to the extent necessary, and maintained at rents affordable to lower income tenants within the resources of the program. While buildings can be maintained as rental buildings under the management of the HDC or that of the Hoboken Housing Authority, other arrangements are also possible.

In view of the extent of land speculation in the city, and the expectations of building owners, it is possible that here too the city will have to use its eminent domain powers in order to acquire the buildings it seeks. In view of the effect of half-vacant, substandard, buildings on the health and safety of the entire community, we consider this not only a reasonable use of those powers, but even a mandate for their use.

This program could make possible many opportunities to provide meaningful roles for tenants in the management and ownership of their buildings. This could include establishment of tenant-owned companies or organizations for

building management, either their own or other buildings; it could also include the creation of limited-equity cooperatives made up of the present tenants themselves, in which use of sweat equity, both as a means of reducing housing costs and as a means of providing skill training to lower income households, could be included.

2. TENANT EDUCATION AND ORGANIZATION

Because displacement has been a recurring fact of life for Hoboken's tenant population, many remaining low, moderate and middle income tenants have come to believe that eventually they will be forced out of Hoboken as well. The rapid turnover of property, the resources available to landlords, and insufficient municipal assistance has contributed to a general feeling of hopelessness. Tenants have been and continue to be subjected to subtle harassment and/or "buy-outs". To encourage rent payers to take advantage of existing and new protections proposed in this Plan, a systematic program of tenant education, advocacy, and organization should be launched by the city. Such a program would print and widely distribute a brochure of rights and procedures, would seek the cooperation of tenant, civic and religious organizations and would use every public relations mechanism available to increase public awareness of tenant protections.

In addition, a program of training volunteer tenant advocates should be established through the proposed office of tenant assistance to identify and prepare tenant leaders for on-going tenant advocacy, education and assistance in the organization of new tenants groups.

Finally, a city-wide tenants conference should be held in conjunction with established organizations to discuss this Plan and its implications for affordable housing.

3. EVALUATION OF PREVAILING RENTS

A pilot program of rent history review should be undertaken for (5) buildings suspected of rent gauging and (5) randomly selected buildings. Depending upon the results of this review, a more comprehensive review may be indicated.

4. ESTABLISH A COMPUTERIZED PROPERTY INFORMATION BANK

A major constraint affecting the ability of the city at present to enforce existing ordinances, as well as those proposed here, is the state of records and information within city government. Not only is much information simply not available, but information that does exist is maintained in a manner which makes efficient retrieval difficult, if not impossible, often by different agencies working without coordination.

We propose to establish a central computerized property information bank within the reorganized CDA, which will include information now maintained by the Rent Control Board, housing inspection and code violation information, property tax assessment information, etc. As the new programs proposed in this Plan are implemented, they too will be added to the information bank. The information bank will make it possible for city officials to have accurate and up to date information about rental properties in the city; it will make possible establisment of an efficient system for monitoring and

follow-up of code violation notices, as well as for efficient administration of the landlord "security deposit" and anti-warehousing ordinances.

C. HOMEOWNER ASSISTANCE

1. AN OVERVIEW

Owner-occupied (1 to 4 family) housing has always been one of Hoboken's chief assets and, more recently, one of its prime attractions. When disinvestment in housing was at its peak in the 1960's, homeowners were the one group of property owners who maintained a steadfast, even chauvinistic, loyalty to the city. Owner-occupied housing constitutes 2,314 or 69% of all housing structures and 5,766 or 34% of all dwelling units in the city.

In 1971, the Hoboken Model Cities created a Municipal Home Improvement Program to assist owner-occupants by offering effective low interest loan financing to maintain and upgrade their homes. By 1980, 1,500 homeowners had obtained home improvement financing totalling $13,500.00. Of this amount, $10,000,00 was private or bank financed. In 1980, CDA restructured HIP into a direct loan program offering 3% loans. As of July, 1985, a total of 1,600 homeowners obtained financing from these combined programs.

In the past ten years, Hoboken has witnessed a large influx of new homeowners and a rapid rise in the value of owner-occupied housing. While no accurate figures exist, pre-1975 homeowners still seem to be a much higher percentage over those who bought homes after 1975.

Today, Hoboken's homeowners are feeling a potential threat to their future homeownership status. Critical questions facing homeowners include:

* Can aging homeowners afford to reside in their homes and familiar surroundings during their golden years?

* How high will property taxes rise upon revaluation, and how will homeowners be able to carry these costs?

* Will large numbers of homeowners be forced to sell? And, if so, will property values decline as a result?

* Has it become impossible now for young couples to own a home in the city of their origin?

* For homeowners who have to sell for some reason, what happens to their tenants, especially those who have resided for many years and still at affordable rents?

* Will municipal services improve sufficiently to justify high taxes and restore government credibility?

* Will public school education improve sufficiently to avoid the 'double taxation' created by private school tuitions?

* What are the causes of increasing water and sewage bills and will necessary infrastructure rehabilitation drive quarterly payments through the roof?

There are no easy answers to these questions. We do believe, however, that the contemporary status of homeownership in Hoboken requires a major commitment by this administration to seeking answers and providing direct assistance to homeowners. Accordingly, we propose the following:

2. ESTABLISH THE MAYOR'S ADVISORY COMMITTEE ON HOME-OWNERSHIP comprised of homeowners and professionals familiar with the problems peculiar to homeownership. The committee's mandate should include, but not be limited to:

a) Identification of special problems facing homeowners.

b) Developing proposed solutions to identified problems.

c) Developing a proposed 'pro-homeowners' strategy for easing the threat posed by revaluation.

d) Reviewing and recommending improvements in existing services.

e) Monitoring and recommending changes as needed in the implementation of the Comprehensive Plan as it affects homeownership.

3. ESTABLISH THE OFFICE OF HOMEOWNERS ASSISTANCE to concentrate on direct technical assistance to homeowners. This would include, but not be limited to:

a) Applying for improvement loans

b) Preparing tax appeals

c) Identifying building problems

d) Establishing a recommended list of contractors

e) Renting for the first time

f) Applying for mortgages

g) Advocacy before other government offices

h) Eliminating red tape in problem solving

i) Assisting in the establishment of block associations, block watch programs, conducting block parties, etc.

4. CONTINUE AND UPGRADE THE HOME IMPROVEMENT PROGRAM

a) Restructure the Home Improvement Program, developing new policies, procedures and financing methods to cope with the present situation in Hoboken.

b) Develop innovative and demonstration-type projects to test the feasibility of meeting the needs of homeowners and their tenants.

c) Organize a new management team around the present HIP staff as the basis for setting out in these new directions.

d) Create a "business-like" method for operating a new HIP, including staff retraining, marketing, and management information systems.

e) Negotiate new and flexible financing commitments from local banking institutions as a method for leveraging private capital in excess of public funds.

f) Seek federal and state grant funds aggressively and with tenancity so as to increase the basic core of public funds necessary to carry out these objectives.

g) Establish a new "face" for HIP, with greater visibility and accessibility with a wide range of information and services to all homeowners and their tenants.

5. TAX RELIEF

The simple most explosive issue for homeowners everywhere is the local property tax. Confronted by an alarming growth in successful tax appeals and state and county mandates for property revaluation, within the next year or two, Hoboken officials will be forced to implement an acceptable revaluation. To offset the potential crippling impact revaluation could have on long-term homeowners, city officials must embark upon a simultaneous program of budget reductions and prudent expansion of the tax base. The City Council should establish a short-term target of coming in under $3 per $100 of assessed value when the

revaluation is implemented. To ready this objective, the council must establish budgetary limits on school appropriations and municipal appropriations. Spending within these prescribed limits could be facilitated by a serious program of zero-base budgeting, productivity increases, elimination of unnecessary jobs, and improved public planning and management. In the long run, public participation in finalizing financial arrangements for waterfront and other development should ensure dramatic increases in revenue available to city government within the next 10 years. With an anticipated doubling of the ratable base by the mid-1990's, long-term prospects for coupling the provision of essential services and captial improvement funding with deeper tax reductions, are bright.

D. PROGRAM OPERATION

1. ESTABLISH A STRUCTURE FOR COORDINATION AND ACCOUNTABILITY OF ALL EXISTING AND PROPOSED OFFICES & SERVICES DESIGNED TO MAINTAIN THE STOCK OF EXISTING AFFORDABLE HOUSING

A central part of reorganization of CDA will be the creation of a unit which will have the responsibility to administer the programs and ordinances described in this section - the anti-warehousing program, the landlord "security deposit" program, and the rent receivership program. It will be responsible for directing activities already part of city government, such as, the rent control office and the housing inspection function.

Finally, it will contain two new [illegible] offices - one for tenant assistance, and one for homeowner assistance. These offices will not be limited in their scope to the administration of specific programs or ordinances: they will be expected to work aggressively and creatively to apply

city resources to the needs of tenants and homeowners respectively, to develop new programs, seek out new sources of funding, and become visible to the particular populations they are designated to serve.

The essence of the unit is that it will have a broad mandate. In the past, there have been various city agencies with responsibility for specific aspects associated with maintaining the affordable housing stock; there has never, however, been an agency with that overall mandate. The unit will be expected to be a creative agency; if the specific ordinances that it enforces are not adequate to accomplish its task, it will be expected to recommend others.

2. ESTABLISH AN OFFICE OF TENANT ASSISTANCE TO PROVIDE TECHNICAL ASSISTANCE, ADVOCACY AND REFERRALS.

Specifically, the office would:

a) Monitor the anti-warehousing ordinance

b) Participate in rent levelling board hearings, court proceedings, etc., to ensure full and effective representation of tenant interests and concerns.

c) Provide aggressive relocation assistance.

d) Refer tenant complaints and inquiries to appropriate offices and monitor response and follow-up.

e) Conduct training for volunteer tenant advocates as discussed above.

f) Conduct tenant education as discussed above.

g) Advocate tenant interests before other government offices and bodies

3. ESTABLISH THE OFFICE OF HOMEOWNERS ASSISTANCE (see above)

4. ESTABLISH THE MAYOR'S COMMITTEE ON AFFORDABLE HOUSING (s a

5. ESTABLISH THE MAYOR'S COMMITTEE ON HOME OWNERSHIP (see above

6. ESTABLISH A CITY COUNCIL COMMITTEE ON AFFORDABLE HOUSING (se

E. IMMEDIATE ACTIONS/NEXT STEPS

1. IDENTIFY AND INITIATE PILOT PROGRAM IN ACQUISITION AND REHABILITATION OF THREATENED BUILDINGS

There are many rental buildings, and, in some cases, clusters of contiguous rental buildings, which have provided affordable housing, and are now in the process of warehousing, clearly under threat of removal from the affordable housing stock. The city will seek to implement initially its program of acquisition and rehabilitation of rental housing with such a property or properties.

In order to develop such a project, during the next few months the city will evaluate alternative properties for potential acquisition, and identify the resources, both state and local, that may be available for this purpose. It is anticipated that a program designed to acquire and rehabilitate 40 to 100 units can be initiated within the next six months.

2. CONVENE THE MAYOR'S ADVISORY COMMITTEE ON HOME OWNERSHIP

3. INTRODUCE AND ENACT THE ANTI-WAREHOUSING ORDINANCE

4. INSTRUCT THE RENT LEVELLING BOARD TO PREPARE PROPOSALS FOR A NEW OR AMENDED RENT CONTROL ORDINANCE

IV. PROPOSALS FOR STATE LEGISLATIVE ACTION

A. FURTHERING THE MOUNT LAUREL OBJECTIVES

A central element in the proposed inclusionary program of the city of Hoboken is the objective of offering developers, both residential and non-residential, the option of providing

affordable housing units directly or making a contribution in lieu of units, to go to a dedicated fund for use in providing affordable housing under city auspices. While the Mount Laurel decision makes clear that one can, within reasonable bounds, obligate a residential developer to include affordable housing in a development, the other aspects are less clear. While there is a serious body of legal opinion that contributions can be required of developers, both residential and non-residential, particularly where it is framed as an alternative to providing the units directly, the issue is not fully resolved. It is clear, however, to the extent that there are difficulties with the approach, those difficulties are statutory and not constitutional.

We propose that State enabling legislation be enacted clearly establishing the authority of local government to enact ordinances, in furtherance of their Mount Laurel obligations requiring affordable housing fees of developers in any of the following combinations:

1. For residential development, as an alternative to direct production of affordable units;

2. For residential development, without the alternative of direct production of affordable units;

3. For non-residential development.

The statute should require that any ordinance must be based on reasonable standards; this would mean (a) with regard to residential development, that the fee be equal or less than the cost of meeting a reasonable Mount Laurel setaside obligation; and, (b) with regard to nonresidential development, that the fee have a direct relationship to the employment generated by the facility, and the lower income households projected to be supported by those jobs.

B. CONDOMINIUM CONVERSION

The strongest protection against the continuing removal of affordable rental units for the purpose of conversion to condominiums is to enact explicit State legislation. This Administration will propose to the Governor and the legislature the following two options:

1. Requiring that conversions of rental property not be granted unless 51% of the tenants residing in the structure have registered their agreement with the conversion Plan.

Such legislation would have the effect of discouraging conversion, or in the alternative, encouraging reasonable 'insider prices' for present tenants. A companion piece of legislation would expand the protective tenancy status already provided in existing statutes. Specifically, it would

1a. Establish the right of non-purchasing tenants to remain in their apartments.

-and-

2. Amending the State condominium statute to state that municipalities were not pre-empted from enacting local legislation designed to reasonably control the removal of affordable rental units for conversion purposes.

C. PROPERTY TAX DEFERRAL

The administration will propose to the Governor and the legislature a tax deferral program designed to mitigate the effects of property revaluation on low and moderate income 1 to 4 family homeowners. Specifically, such enabling legislation would provide:

1. An income standard to determine eligibility

2. The option for eligible homeowners to elect a deferral of tax increases caused by revaluation until such time as the increased value of the property has been realized through a sale.

3. Permission for municipal government to attach a lien on the property for each year the owner elects to exercise the deferred option.

4. A threshold requirement that such a deferral program can only be locally implemented if an expansion of the tax base can be documented equivalent or greater than the total deferrals in order to prohibit a proportionate tax increase on ineligible property owners.

D. FAMILY RECAPTURE IN OWNER-OCCUPIED 4-FAMILY HOMES

Current State statutes permit owner occupants of 2 and 3-family homes to recapture an apartment for use by a direct family member. Hoboken's residential pattern includes a large percentage of owner occupied 4-family homes. Because housing costs have skyrocketed, many 4-family owners are seeking to provide affordable housing for parents, siblings, or grown children. Under current law, there is no provision for an owner of such a home to make a unit available unless an existing tenant voluntarily vacates. We propose to the Governor and the State legislature amendments to the Just Cause for Eviction Statute providing:

1) Owner occupants may petition the appropriate government agency to recapture a unit for the purpose of providing affordable housing to direct family members.

2) Strict standards for certification of the family relationship.

3) 6-months notification of the existing tenant.

4) Maintaining the protected status of the remaining tenants.

5) Owner-supplied proof that all provisions of the rent control law have been and will be honored.

E. INCREASED STATE FUNDING

For the first time this year, the State of New Jersey appropriated funds in the general fund for housing subsidy purposes - $10 million for neighborhood preservation administered by the Department of Community Affairs, and $15 million for new construction administered by the Housing & Mortgage Finance Agency. While these funds are welcome, they represent a pittance. New Jersey is a wealthy state with a booming economy, and with massive housing needs. It is capable of supporting housing programs at a substantially greater level.

At this point it would be premature for us to make a major effort to seek legislation increasing available funding. Our own programs are not yet in place, and the state has yet to see the level of demand for their new program, which will not begin to solicit applications until October. Over the coming months, however, we will be in a better position to determine our own funding needs, as well as (by monitoring the state programs closely) the level of funding that can readily be utilized elsewhere.

Based on this analysis, we propose that in 1986, a strong effort be made for increased statewide funding of housing and neighborhood preservation efforts, including appearances of city officials at budget hearings, and efforts to mobilize support from other communities in New Jersey with similar needs.

Second, for every lower income household living in inadequate housing as defined above, roughly two are living in housing that is adequate, but for which they are spending more than 25% of their gross income. This is a need as real as the needs of households living in units with inadequate plumbing or heating. A table illustrating the extent of financial housing need is given below. It was determined, however, that this need could arguably be considered less appropriately met through construction of new units than was the case with physical housing needs; i.e., the units

TABLE I

LOW AND MODERATE INCOME REGION RENTER HOUSEHOLDS SPENDING MORE THAN 25% OF GROSS INCOME FOR RENT 1980

	LOW	MODERATE
Bergen	23,770	11,498
Essex	63,476	14,501
Hudson	49,038	8,448
Middlesex	16,173	7,641
Morris	6,200	4,628
Passaic	25,320	6,456
Somerset	3,473	2,089
Union	19,309	7,325
REGION	206,759	62,586
	269,345	

SOURCE: U.S. Census of Housing (STF-3, Table IX, No. 30). Since the income information in this table was presented in ranges ($0 to $4,999, $5,000 to $9,999, etc., etc.) the range of $0 to $9,999 was used as a equivalent of low income, and the range of $10,000 to $14,999 as the equivalent of moderate income. These closely approximate 0 to 50%, and 50% to 80% of median income in the region, as of 1980. Note also that these numbers include some overlap with housing deficiency categories discussed previously.

associated with financial need do not need replacement, but the families living in them need either increased income or less expensive housing accommodations. Since our intent is to provide for a conservative fair share allocation, and since there is at least some possibility that programs such as housing allowances will be available to meet some of the financial housing need in place, we did not include this need in calculations for allocation within the region. It does represent, however, a significant component of indigenous need.

As an indigenous need category, the number of households living in financial need, although in otherwise sound housing, should be addressed by each of the seven Middlesex County defendant municipalities. If adequate

TABLE II

LOW AND MODERATE INCOME COUNTY RENTER HOUSEHOLDS SPENDING MORE THAN 25% OF GROSS INCOME FOR RENT 1980

	LOW	MODERATE	TOTAL	TOTAL LESS POTENTIAL OVERLAP *
Cranbury	33	18	51	31
East Brunswick	255	245	500	290
Monroe	40	19	59	-0-
Piscataway	877	513	1,400	1,048
Plainsboro	246	389	635	587
South Brunswick	172	126	298	133
South Plainfield	95	82	177	33

* Potential overlap assumes all substandard units are included within total of units in which lower income households spend in excess of 25% of income for shelter.

SOURCE: See preceding table.

subsidies, from Section 8 existing housing programs, welfare programs, future housing allowance programs, etc., are available, this need may be potentially met without new construction. If, however, such subsidies are not available, this need may have to be met by development of lower income housing. However it may be met, it is a part of each municipality's responsibility to its citizens to address this problem as directly as it must address those problems for which new housing units are clearly dictated. Table II presents the relevant data for each of the seven communities.

APPENDIX E

The Freehold Master's Report

Re: Credits

AN ANALYSIS OF THE FREEHOLD TOWNSHIP MOUNT LAUREL SETTLEMENT PROPOSAL: THE PROBLEM OF FAIR SHARE CREDITS

Prepared pursuant to order of Hon. Eugene D. Serpentelli, J.S.C., in matter of American Planned Communities v. Township of Freehold (Docket No. L-028912-84 P.W.)

Alan Mallach
Roosevelt, New Jersey

January 1985

AN ANALYSIS OF THE FREEHOLD TOWNSHIP MOUNT LAUREL SETTLEMENT PROPOSAL: THE PROBLEM OF FAIR SHARE "CREDITS"

Prepared by Alan Mallach pursuant to order of Hon. Eugene D. Serpentelli in matter of American Planned Communities v. Township of Freehold et al (Docket No. L-028912-84 PW)

INTRODUCTION

The Township of Freehold, in a proposal to settle the above litigation, has submitted a plan to the court which proposes that it be given substantial credit, in the form of a reduction of its fair share obligation, for a number of existing housing and related facilities within the community, including garden apartments, a mobile home park, and a nursing care facility for indigent senior citizens. Specifically, from a total fair share obligation of 1465 units, determined under the AMG methodology, the Township proposes to subtract 744 units in the form of credit for various existing housing resources within the Township, so that the residual fair share obligation of the municipality, which provides the basis for settlement, becomes (1465 - 744) 721 units.

The immediate purpose of this report is to make a recommendation to the court with regard to the extent to which it is appropriate, within the standards set by the Mount Laurel II decision, for Freehold Township to receive credit as it proposes against its fair share obligation. That is, however, a more difficult question than it may appear. To begin, there is no established frame of reference in which to establish which credits can and which cannot be reasonably awarded. While, as we will discuss below, the Mount Laurel decision provides some guidance in developing such a framework, it provides no explicit direction; in order to arrive at an intellectually consistent approach to this problem, as well as one that will be consistent with the objective of producing genuine lower income housing opportunities, it is necessary to undertake a detailed analysis of the nature of the housing need, and the range of potential responses to that need. It is only through such an approach that it will be possible to answer the question posed by Freehold Township's submission in a manner that is both consistent with the Mount Laurel decision, and, as important, is capable of being replicated in other communities with a substantial degree of consistency.

There is a further issue, even more fundamental, which is the nature of different proposed adjustments to the municipal fair share housing allocation. //A "credit", in the literal sense, refers to a unit, provided in some fashion, and predating the present litigation, which can directly substitute for a unit to be built as a part of a Mount Laurel compliance program// Clearly, a court may adjust the number of units to be included in the compliance program on the basis of other considerations as well. As has been widely publicized, the courts have been ready to adjust the fair share number in recognition of the benefits of a voluntary settlement. As will be discussed below, there may be room for other adjustments as well; indeed, there may be cases where common sense dictates that

such adjustments be made, and yet to use the "credits" approach may unreasonably strain the logic of the Mount Laurel holdings.

In view of these issues, the initial sections of this report do not deal, except perhaps by inference, with the Freehold Township settlement proposal, but rather with the general issues raised above. By discussing, and, it is hoped, resolving those general issues, it is anticipated that it will be possible to frame a sound and logical recommendation with regard to the Freehold Township proposal.

I. HOUSING NEEDS, HOUSING PRODUCTION, AND FAIR SHARE CREDITS

A unit which can count as a credit toward a community's fair share obligation is one which can legitimately substitute for a unit that would otherwise be provided through that community's Mount Laurel compliance program. In order to determine what units may potentially qualify for such substitution, it is necessary first to determine what the housing needs are toward which the compliance program is directed; and second, what forms of housing production can meet those needs.

A. Housing Need and Housing Production

It must be stressed that the need assessment that serves as the basis of the fair share housing allocation process is limited to certain categories of housing need, and is not inclusive of everything that can reasonably be categorized as a housing need of some sort. One area that has been deleted is the category of financial housing need; i.e., households spending excessive amounts of their income for shelter. For a variety of reasons, households spending excessive amounts for shelter, but living in otherwise acceptable housing conditions, were not included in the need base for fair share housing allocation/1; as a result, measures that deal with this problem, such as housing certificates under the Section 8 Existing Housing program, are not considered elements of a compliance program, or by extension, "credits" against a fair share obligation/2.

1/This category, generally referred to as "financial housing need" is a problematic one. Although the need is unquestionable, it can not unreasonably be argued that it is more fundamentally an income problem rather than a housing problem, and can therefore be more effectively addressed through income supplements, such as the Section 8 certificate program, or the proposed housing voucher program. It should also be noted that the number of lower income households in financial housing need is vast; in 1980, it is estimated that 83% of low income households, and 31% of moderate income households, for a total of over half a million households, were spending over 30% of their gross income for shelter.

2/This point was recognized by Judge Smith in his recent decision in the Mahwah case, in which he rejected a proposal by the Township that they be granted fair share credits for units in this program.

The housing needs addressed in the fair share obligation are twofold: (1) lower income households living (as of 1980) in substandard housing conditions; and (2) the net increment projected in lower income households between 1980 and 1990. A schematic representation of the components of housing need is shown in the table on the following page. It is not difficult, simply as a matter of logic, to define what must take place in order for the needs of each category of household to be met.

The needs of households living in substandard housing conditions are met by enabling them to live in sound housing fully meeting their housing needs. This can take place either by virtue of their moving into new housing affordable to them, moving into a sound existing unit, or through the rehabilitation of the unit that they presently occupy/3.

If either the first or third option takes place (new unit or rehabilitation) there is no question that a lower income housing unit has been provided, and that it counts toward a community's fair share obligation/4. The second option, however, raises some questions. Among the existing body of lower income households some live in substandard housing, and some live in sound units. If a household living in one of the substandard units moves into an existing sound unit, but no additional units are created affordable to lower income households, as long as the number of lower income households remains the same, there has been no net improvement in

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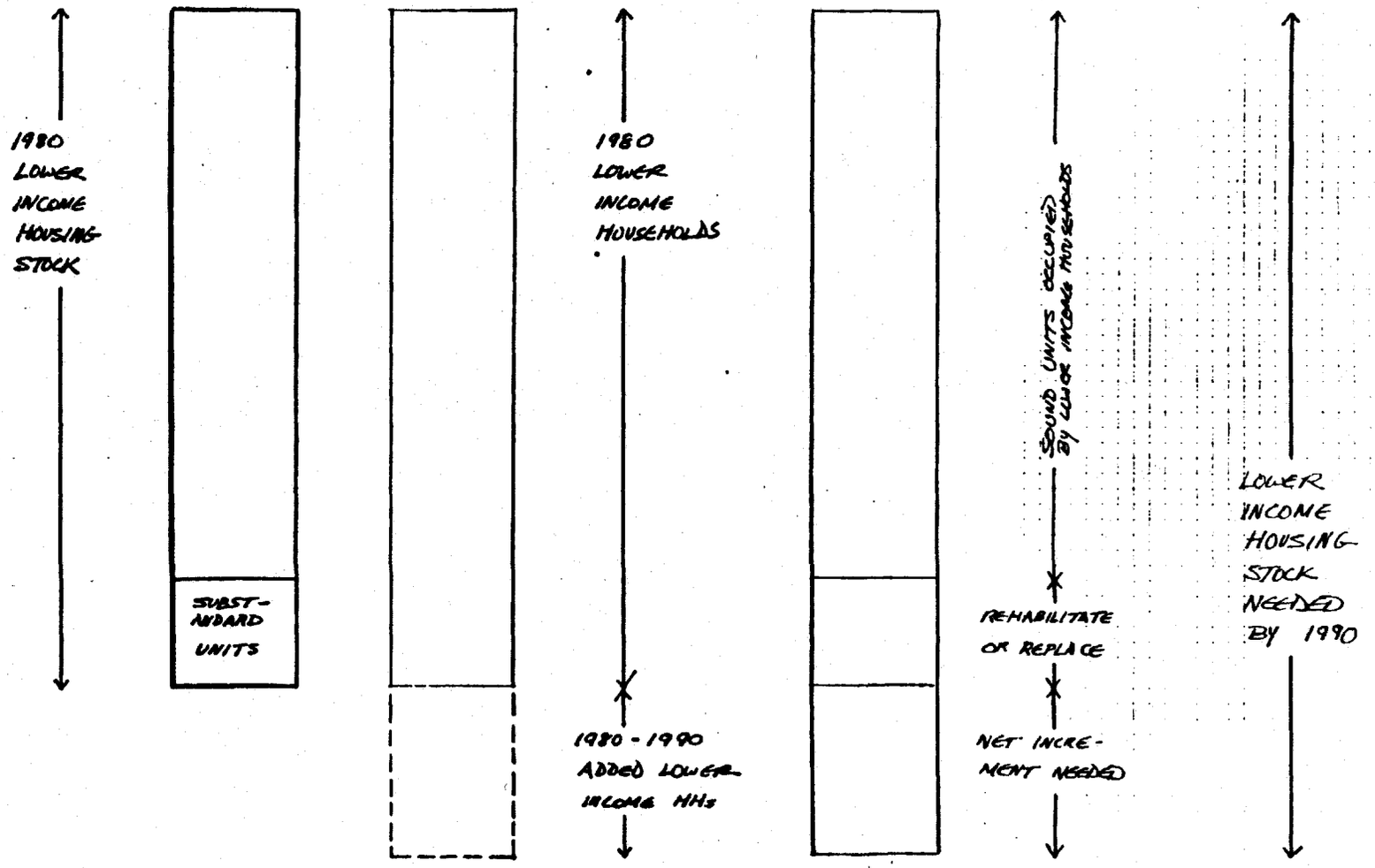
3/One question that remains is whether the household can be considered to have solved its housing problems if, by moving from substandard to sound housing, its housing costs increase to the extent that it is now paying an excessive share of income for its shelter costs (this is what happened to a large number of lower income households between 1970 and 1980). From a fair share standpoint, however, its problems have arguably been solved, since it is no longer in a defined fair share need category. This begs the question, of course, of whether the household still suffers from a genuine housing need. We would argue that, notwithstanding their exclusion from the fair share calculation, they do, and that any fair share compliance "solution" which assumes the contrary is on its face invalid. While this may appear to be inconsistent with the original decision to exclude financial need from the fair share totals, it should be stressed that that decision was made on policy grounds, and did not imply that no such need existed.

4/a residual question remains as to whether it is appropriate to consider rehabilitation as meeting fair share goals when there is no provision to ensure continued lower income occupancy, and local market conditions suggest that the buyers of the rehabilitated unit on subsequent resale are unlikely to be lower income households. In view of the fact that the rehabilitation is clearly meeting a defined present housing need, one must argue that it should be counted notwithstanding the resale problem, but sound public policy would strongly suggest that some form of continued occupancy (or at least antispeculation) controls be embodied in any such rehabilitation program.



SIMPLIFIED REPRESENTATION OF RELATIONSHIP BETWEEN LOWER INCOME HOUSING NEED (FAIR SHARE) AND NEED FOR PRODUCTION AND REHABILITATION OF LOWER INCOME HOUSING

the housing conditions of the lower income population. The sound unit into which the household moves has been made available by the displacement of another lower income household. That household may move into a substandard unit, may move into housing which it can only occupy by spending an excessive income share for shelter, or may leave the region. If it leaves the region, then the household taking its place (moving into the region) will only be able to find either (a) substandard housing, or (b) overly expensive housing. In either case, the overall picture remains the same.

There is one exception to this last statement; specifically, when the family moving into the sound unit moves into a unit that was not previously available to lower income households, but became available through the working of the filtering process. In this situation filtering has created a net increment in the lower income housing stock, therefore enabling the sequence of moves described above to be considered a net benefit to the lower income population. Although there is little doubt that such a process exists, as is discussed below, it is impossible to quantify with any reliability.

Thus, the only circumstances in which the fair share is clearly being met is where there is a net increment in the pool of sound housing available to the lower income population, either by new construction, by rehabilitation of a substandard unit currently occupied by a lower income household, or, at least in theory, through the filtering process. The same is even more clearly true with regard to meeting prospective housing needs; since the prospective housing need is by definition the net increment in lower income households, it can only be addressed by a net increment in housing units available to such households.

The point of net increment should be stressed. It is clear that many households who were lower income in 1980 will not be in 1990, and that at least some of them will vacate units which will then be occupied by new lower income households; i.e., prospective need households. That is, however, immaterial. Prospective need does not represent the number of newly formed lower income households; it is the total number of lower income households projected to exist in New Jersey in 1990 less those known to exist in 1980. If it were simply the number of "new" lower income households; i.e., all of those households existing in 1990 who did not exist in 1980, it would be a much larger number of households.

It is clear from observation of reality, however, that the principle of net increment does not simply translate into new construction on vacant land, and the rehabilitation of clearly substandard structures. Indeed, it is important to try to translate this general principle into some more specific illustrations, to show how it is reflected in how the housing market actually does or does not work for lower income households (remembering that the eventual objective of all of this is to provide a basis for defining fair share "credits"). The consensus methodology projects

prospective need, or the increase in lower income households from 1980 to 1990, at approximately 150,000 households. Since 1985 has arrived, it can be assumed that a substantial number of those households have formed already. Even if we assume that a substantial number of household formations have been prevented owing to lack of affordable housing, it is still likely that as many as 50,000 of the total number of households have already formed, and been independently housed, whether poorly or well.

This number, of course, is simply a rough estimate, presented here for purposes of illustration alone. Furthermore, since a substantial part of the lower income household increment grows out of the aging process/5, the formation of lower income households does not always trigger a like need for housing units.

That notwithstanding, however, it is clear that nothing even remotely like 50,000 units affordable to lower income households were newly built between 1980 and 1985, just as we know that new construction of units affordable to lower income households between 1970 and 1980 does not account for more than a fraction of lower income household increase during that period. Clearly, other factors are at work in the housing market. There are at least four separate elements affecting the housing of lower income households, over and above the construction of Mount Laurel units:

(1) Frustrated household formations clearly reduce the overall demand for affordable housing; e.g., young single individuals and couples continuing to live with their parents despite their desire, or need, for a unit of their own;

(2) Additional units affordable to lower income households, and occupied by them, are created within the existing housing inventory through informal means, most notably through conversion of single family houses; i.e., the creation of accessory apartments/6.

5/Specifically, much of the lower income household increment arises from a transformation process; a household which was not lower income as long as it contained an employed wage earner may become lower income when that earner retires; similarly, a retired couple may not be lower income, but the widowed survivor may become a lower income household by virtue of loss of pension rights, etc.

6/There is evidence that this mechanism represented a significant share of the national increment in housing units between 1974 and 1980; see Duane T. McGough, U.S. Department of Housing & Urban Development, "Additions to the Housing Supply by Means Other than New Construction" (1982). Programs to encourage creation of accessory apartments have been accepted, although reluctantly, by the courts in two Mount Laurel compliance packages, in Mahwah and in Morris Townships. While there is no question that such conversions can provide housing affordable to lower income households, in areas of strong demand they are likely to rent above lower income levels, and be occupied, as often as not, by non-lower income households. In addition, conversions (as a Mount Laurel remedy) raise difficult questions of tenant selection, screening and verification, and fair housing compliance.

(3) Substantial numbers of households, in order to be able to occupy a unit, spend substantially more than is generally considered reasonable for that unit, either in purchase price or rent. As noted earlier, this problem is not considered a component of housing need for fair share purposes.

(4) Filtering creates a net increment of units available to lower income households, thereby creating at least some net increment over and above the production of newly constructed units.

The existence of at least two of the above mechanisms; namely, filtering of existing units, and the creation of new housing within the existing stock, suggest that there is considerably more flexibility within a reasonable lower income housing market model than was initially suggested. Indeed, a preliminary analysis conducted by the author suggests that, between 1970 and 1980, between 140,000 and 200,000 additional housing units were created within the State of New Jersey as a result of informal means, most of which (if not all) were the result of manipulation of the existing housing stock.

Still, one should not exaggerate the extent to which these mechanisms work. While there is no question that there is some filtering taking place, it is likely that it is disproportionately concentrated in the inner cities of New Jersey, and in those inner suburbs which are in the process of becoming core cities. Filtering, almost by definition, is largely ineffective in suburban areas where market demand is strong, and the cost of the existing housing stock is being bid upward/7. The analysis referred to immediately above suggests that the same is true of informal additions to the housing stock; namely, that such additions take place disproportionately in the urban areas of the State/8. Thus, it is likely that one significant side effect of the filtering process is the increasing concentration of the poor in central cities, and the increasing disparity between rich and poor communities, two patterns typical of New Jersey which the courts had hoped to combat in the Mount Laurel decision.

7/One exception to the absence of filtering in suburban settings is the experience of garden apartment developments under stringent rent controls; in some such cases the rent levels have increased at a substantially lower rate than the increase in household incomes in the area, thus rendering the units progressively more and more affordable to lower income households.

8/Specifically, it is estimated that roughly 45% of the informal additions to the housng stock statewide took place in Essex and Hudson Counties, where such additions represented roughly 2/3 of the total increment in the housing stock.

B. The Legitimate Scope of Fair Share Credits

The extent to which certain types of housing opportunity can be considered "credits" for Mount Laurel compliance hinges significantly on the extent to which one can accept filtering as an element in meeting the housing needs of the lower income population. While it should be clear that, barring extraordinary evidence of the effectiveness of filtering in a particular community, filtering itself would not be given credit in a suburban setting, it nonetheless has a significant effect on other, more visible, manifestations of the housing market. The issue, therefore, is to distinguish between those types of credit which do not depend on filtering, and those which do. All of this is grounded, of course, in how one defines the concept of a "net increment" in housing available to the lower income population.

The most obvious legitimate credit is for clearly defined lower income housing constructed or rehabilitated within a community since 1980. Many suburban communities have seen in recent years the construction of low income senior citizen housing under either the Section 8 or the Section 202 subsidy program. Those units not only count as Mount Laurel credits generally, but as credits toward meeting the low income component of the overall lower income housing need/9. Rehabilitation under the Community Development Block Grant program is also widely carried out in New Jersey suburbs. While this program is rigorous in limiting its beneficiaries to the lower income population, much of the rehabilitation work that takes place under the program is relatively minor in nature, and does not truly represent the conversion of a substandard unit into a sound one. It is possible, however, and generally not difficult, to review program records and arrive at a well-grounded judgment as to how many of the "rehabilitated" units should should be given credit toward a municipality's fair share obligation.

This principle could possibly be extended to housing affordable to lower income households constructed after 1980, although not under a governmental subsidy program. If, for example, a rental project was constructed in which the rents of some of the units were affordable to moderate income households spending under 30% of their income for shelter, it might be possible to develop an analysis which would estimate what percentage of those units would indeed be occupied by lower income households. An argument could be made that a community would be entitled to fair share credit for that number of units. The legitimacy of such credits, however, would be enhanced by a showing that, by virtue of rent controls, market conditions, or other factors, there was a substantial like-

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9/Under current HUD guidelines, the overwhelming majority of occupants of new Section 202 projects for the elderly must fit into the "very low income" category as defined by that agency, a standard which is the same as the low income category under Mount Laurel.

lihood that those units (or that percentage of them determined to be occupied by lower income households) would continue to represent a lower income resource over an extended period.

One major reservation regarding credit for such a development would be the absence of controls ensuring continued lower income occupancy, over the "extended period" called for in the Mount Laurel decision. This problem could perhaps be remedied through the imposition of rent controls by the municipality, or by a finding that the (moderate income) rent levels were indeed consistent with market rents. Such a finding would be unlikely, but not completely inconceivable/10.

A variation on the above, still limiting the discussion to units created after 1980, which may be slightly more plausible, would be the establishment of a new mobile home park of a modest nature after 1980. Depending on the price at which the owner sold the units, and given that market conditions tend in most parts of New Jersey to limit pad rentals to the vicinity of $200 to $300 per month, it is not inconceivable that some percentage of the buyers moving into the park would be moderate income households. A question would arise, however, as to how to treat the typical buyer in a modest mobile home park for fair share purposes; i.e., a lower income senior citizen household with enough assets to purchase their unit entirely or largely on a cash basis/11..

The award of credits to the various types of housing described above, although raising a variety of technical question, can be justified whether or not one accepts that filtering, and other informal means of producing affordable housing, make a significant contribution to meeting lower income housing needs. In contrast, any award of credits for units constructed prior to 1980 must be grounded in the premise that filtering does contribute

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10/From a practical standpoint, the issue of credit for this type of development is unlikely to arise often, if at all, since what little rental housing that has been built since 1980 in suburban New Jersey generally rents at levels well above what is affordable to a household even at the ceiling of the moderate income range.

11/There is no question that households of this sort are included within the prospective need totals, since there is nothing in the methodology by which prospective need is determined which would screen out households with substantial assets. This would suggest, therefore, either (1) developments such as the above can legitimately be given credit for Mount Laurel purposes; or (2) some adjustment should be made (if technically feasible) to the prospective need figures to reflect households who, notwithstanding their technically lower income status, have assets which enable them to complete effectively for housing in the marketplace. Although it is both feasible and appropriate, in selecting tenants or buyers for units in Mount Laurel developments, to screen out households with substantial assets, it is realistically not possible to do so with regard to the overall housing need totals.

significantly to meeting those housing needs. Only if filtering exists, and is a significant factor, can one assume that a unit becoming available in a pre-1980 housing project is part of a process resulting in a net increment to the lower income housing stock. Furthermore, to the extent that one makes that assumption, it can only be made with regard to units that are not only affordable to the lower income household, but occupied by such a household, and occupied by that household without requiring that that household spend an excessive percentage of its income in order to live there.

The simple existence of a potentially affordable unit, therefore, is not of great significance. It must be demonstrated that the unit, at a minimum:

(1) Becomes available during the fair share period;

(2) Is occupied, when it becomes available by a lower income household, who is spending no more than an appropriate share of its income to live in that unit; and

(3) Exists within a market in which additional units affordable to lower income households are being simultaneously made available through informal increments to the housing stock after 1980.

It is possible, as will be discussed below, to estimate the first two factors with relative accuracy in many cases. The third, however, will inevitably require the exercise of considerable judgement. In that regard, it appears logical (operating within this premise) to look more favorably on credit for turnover in subsidized housing than affordable market housing, particularly housing with direct subsidies, such as Section 8 or Public Housing. Among the reasons in support of this position are (1) it is known, rather than just assumed, on the basis of some at least partially speculative analysis, that the households moving into available units will be lower income units, spending no more than a reasonable share of income for shelter; and (2) it is also known that the units will continue to be both affordable to and occupied by a lower income household over an extended period, a consideration, as noted earlier, given explicit attention in the Mount Laurel decision.

This latter problem raises a serious question about the subject of credit for pre-1980 private market affordable housing in general. Assuming that it satisfies the criteria set forth above, but contains no means to ensure continued lower income affordability or occupancy, it is an inherently unstable solution to lower income housing needs. It would indeed logically follow that, if a community is given credit for such units at one point, and the units are subsequently shown to have become no longer affordable to lower income households, the community should then be given a

debit; i.e., their fair share obligation would be increased by the number of previously credited units lost. This is not being proposed here as a practical approach; it is mentioned, rather, to point out the problem inherent in this type of "credit". Thus, it becomes clear that the more one moves away from, on the one hand, subsidized, or at least price-controlled housing; and on the other, the period beginning with 1980, the more tenuous the basis for fair share credits becomes.)

There is one further area that is proposed for consideration in a number of cases which is even more tenuous; namely, credit for accomodating populations in group quarters. The need assessment at the core of the fair share process is, of course, limited to households; i.e., units of one or more people living independently as a noncommercial, noninstitutional, entity. While the great majority of the population lives in households, a substantial although much smaller part live in group quarters, also referred to as the institutional population. This includes the population of college dormitories, military barracks, nursing homes, mental institutions, and the like.

Although they are a part of the population, there are good reasons for excluding the institutional population from the fair share calculation, as was done in the Warren methodology. They are, for the most part, dependent for a substantial part of their survival, not only their shelter, on others, in most cases some form of public entity. Furthermore, their accomodations are not provided (as a general rule) through a marketplace process, but through the intervention of public or private nonprofit entities. Particularly to the extent that they are public facilities, It is likely that the provision of such institutional facilities as indicated above has not been significantly affected by municipal exclusionary zoning or other land use practices, which is the issue at the core of the Mount Laurel decision, which in turn is the starting point of this entire discussion/12. The fundamental inconsistency between the notion of credits in this area and the essence of the fair share obligation becomes apparent if one bears in mind the underlying principle behind the granting of credits; namely, whether the unit in question can readily be substituted for a unit in the community's Mount Laurel compliance package.

The foregoing discussion, limited to "credits" in the strict sense the term is used here, has suggested the legitimate scope of that concept, as well as some of the problems or inconsistencies which arise when the issue is evaluated in a systematic manner. As

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12/This is not to suggest that there have not been at times zoning barriers created against certain institutional facilities, such as group homes for developmentally disabled or other individuals. It should be noted, however, that (1) these tend to be the exception, rather than the rule, among institutional facilities; and (2) when these barriers arise, the Legislature has been far more forthright in addressing them than has been the case with regard to the more fundamental patterns of exclusionary zoning.

was indicated at the beginning of this report, however, it is our position that the scope of potentially reasonable adjustments to a community's fair share allocation may well be substantially greater than that of credits against the same fair share. It is appropriate now to discuss this broader issue, before turning to the specific facts presented by Freehold Township.

II. ADJUSTMENTS TO FAIR SHARE OTHER THAN CREDITS

Two areas of potential adjustment exist that should be adressed in this section; first, the concept of adjustment for past non-exclusionary performance by a community, as distinguished from "credits" for specific units which are affordable to lower income households today; and second, the issue of adjustments to fair share allocations as a part of a voluntary settlement. As the discussion below will demonstrate, it is not difficult to establish a logical basis for such adjustments, as well as for some variation between communities with regard to each. It is more difficult, however, to quantify these adjustments for purposes of establishing a municipality's final fair share obligation.

A. Adjustments for Prior Performance

It is apparent that many municipalities which argue that they should receive "credits" for specific units against their fair share obligation are inadvertently confounding two separate issues: first, whether there are specific existing units in the community which can legitimately be substituted for units in their compliance program; and second, whether they are entitled to recognition for relatively open land use practices in the past, whether or not those practices resulted in units that are directly substitutable for forthcoming Mount Laurel units.

A sense of fairness suggests that there is merit to the idea that a community which has permitted a wide variety and type of housing in the past, prior to the Mount Laurel decision and its strict standards, receive some recognition for that history. Although such a community may not have provided directly for the poor to any great extent, by providing housing for middle class and working class populations, it has clearly better responded to regional housing needs than those who have been consistently exclusionary, and have little or no housing other than expensive single family homes. Furthermore, given the relative lack of specificity about remedy in Mount Laurel I, and, indeed, the endorsement of the (admittedly nebulous) principle of "least cost housing" in Madison, a community can reasonably argue that by

providing relatively open zoning, they met the mandates of those earlier decision, whether or not their zoning resulted in any truly lower income housing units, then or now.

While the AMG methodology makes a gesture at recognizing past performance, it does so indirectly, in ways that appear to have little effect on the fair share determination. The methodology includes two elements which can be construed as recognizing past performance:

> (1) By incorporating an adjustment for wealth, in the form of the ratio between the municipal median household income and that of the region, it increases the fair share of those communities with a wealthier population than the region as a whole, and decreases it for the less affluent communities. It can be argued that a community's affluence is at least in part a function of the extent to which it has been exclusionary in its land use practices.
>
> (2) Since indigenous need is a component of the fair share, communities which have acted to meet local housing needs will have a lower indigenous need total, and therefore a lower overall fair share, than if they had done nothing.

While both of these considerations are legitimate, they are far more strongly determined by the historical character of the community, largely set in place decades before the term "exclusionary zoning" was coined than by explicit zoning practices, particularly during the past decade/13. The number of substandard housing units in a community (the measure of indigenous need) is largely determined by the type of housing that was built in the community prior to World War II, in some cases prior to the twentieth century. Although, typically, the communities with the greatest amount of such housing will have made the greatest (although in all cases woefully inadequate) efforts to deal with the problem, they are still likely to have substantially more substandard housing than communities which were fortunate enough to be born wealthy. Although they would have had a still larger indigenous need, as noted earlier, if they had done nothing, they still have a bigger number than their neighbors. Historical settlement patterns largely

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13/Indeed, a notable irony present in this entire subject is that many of the communities seeking credit, or at least some recognition, for previously provided affordable housing are communities in which that housing was largely built during the 1960's or earlier. Many of these communities, after a substantial number of multifamily units had been built, then revised their land use ordinances to prohibit any more such development, and in some cases, to become blatantly exclusionary. Many of these communities, notwithstanding their earlier history (or perhaps because of it) were consistently hostile to any form of inexpensive or multifamily housing development during the years following the first Mount Laurel decision.

determine a community's household income level as well. As is well known in the real estate world, communities develop from their earliest years a "character" which substantially dictates the type of housing built in the community, and the type of people who move there. While exclusionary zoning may be able to influence that character, its effect is likely to be modest. If a community of a working class character zones large tracts for large single family houses on two acre lots, it is less likely to see expensive housing built than to see the land sit vacant. Indeed, some of the most blatant efforts at exclusionary zoning have come in communities of generally modest socioeconomic character, who have seen it as a way of getting a higher class of development. It rarely if ever works.

In short, both the method of calculating indigenous need, and the use of the median income adjustment, provide at most a modest recognition of a community's past performance. If past performance is to be given serious consideration, that must be done in some way over and above the adjustments now found in the AMG methodology.

We would argue that past performance, appropriately defined, is worth such serious consideration. To begin, it should be clear that the fair share numbers themselves, as generated by the AMG or any similar methodology, represent what can best be characterized as an idealized goal for the housing of the lower income population. By adopting the premise that the fair share allocation process should deal with the entirety of both present and prospective lower income housing needs, the methodology generates numbers that are substantially larger than the realistic prospects for either construction of new units or substantial rehabilitation of substandard housing. It provides, therefore, substantial scope for adjustments (over and above "credits") to individual municipalities' fair share numbers without materially affecting the number of new or substantially rehabilitated units likely to be provided, either in the municipality or in the region/14.

It should be noted, perhaps parenthetically, that if the fair share allocation methodology were modified, to reduce from the total amount to be allocated a number which reflected projected gains through filtering or other informal means, the opportunity to provide adjustments, and to "reward" communities, either for past performance or for voluntary settlements (discussed below), would be lost. Under such a modified methodology, any such adjustments would materially reduce the number of units that would become available to the lower income population, not only in the munici-

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14/It is possible, by providing a substantial adjustment to the fair share allocation of a particular community in which market demand was exceptionally high, the adjustment could result in a reduction in the number of lower income units that might actually be built in that community. Since, in all likelihood, the total called for in the cumulative total of fair share allocations within the region will still be well in excess of realistic production capabilities (looking at the region as a whole), any shortfall in one community will in all probability be made up elsewhere in the region.

pality, but in the region as a whole. Such an outcome would clearly fly in the face of meaningful compliance with the mandate set forth by the Supreme Court in the Mount Laurel II decision.

With regard to adjustments to fair share for past performance, accepting the above premise with regard to the fair share allocation process, at least three different factors should be evaluated in an effort to establish both whether an adjustment should be considered at all, and if so, to what extent:

(1) The extent to which the past performance has created units within the community which can be shown to be available at present to lower income households, or will become available during the fair share period under consideration.

(2) The extent to which the past performance was a conscious or deliberate response by the community to the constitutional mandate set forth in Mount Laurel in 1975 and in Madison in 1977/15.

(3) The extent to which the past performance for which an adjustment was sought was indeed extraordinary; as will be shown below, many, even most, suburban municipalities, have approved at least some multifamily housing.

Furthermore, since by its nature the adjustment for past performance is meant to require a lower threshold of compliance than a fair share "credit", the magnitude of the adjustment (for a given number of units) should be less than if the same number of units were able to meet the standard required for them to be treated as fair share credits.

A final consideration is that of the consistency between the past performance claimed and the character of the community, both with regard to its demographic features and the overall nature of its housing stock. A community which has, overall, a substantial percentage of rental housing, for example, and a median income near or below the state or regional median, arguably should be able to seek and obtain adjustments on the basis of a more modest standard of proof than one whose character is overwhelmingly affluent and single family oriented. This argument is based on the premise that, if the community's "openness" has indeed been consistent and substantial, it should be reflected in the overall character of the community. If it is not, it is likely that the "openness" being argued as a basis for an adjustment to the fair share is more of an exception to the community's historic land use practices, rather than a example of a consistent approach.

15/It could be argued that the opposite should be true as well; i.e., that a community which became significantly more exclusionary during the 1970's should be less entitled to credits or adjustments for otherwise acceptable units. We do not see matters in that light; Mount Laurel is not meant to be punitive, and should not be implemented to that end.

B. Adjustments for Voluntary Settlement

The second area of adjustment under consideration is that provided in the context of a voluntary settlement of Mount Laurel litigation initiated against a community. There are strong public policy arguments in support of offering incentives for settlement; a settlement substantially reduces the amount of time between the initiation of litigation and the construction of lower income housing units; it substantially reduces the amount that both plaintiff and defendant must spend in litigation costs, expenditures which would be far better spent in facilitiating the development of lower income housing. Finally, a settlement makes the municipality a partner in the provision of lower income housing, rather than an antagonist. This may well be the single most important reason for encouraging settlements of Mount Laurel disputes.

In view of the strong public interest arguments in favor of settlement, it logically follows that incentives can reasonably be offered, most particularly in the form of a reduction in the number of lower income units encompassed in the community's fair share. Since it can reasonably be argued that a settlement increases the probability of the municipality's obligation actually being built, that increase more than justifies a trade-off in the form of a lower number, particularly in view of the practical limitations on achivement of fair share goals discussed earlier. The appropriateness of adjusting a municipality's fair share obligation in the interest of obtaining voluntary compliance with Mount Laurel has recently been stated by this court in its decision in Field et al. v. Franklin Township et al. decided January 3, 1985 (at 9).

The figure of 20 percent; i.e., a reduction of the fair share by 20 percent from the number generated by the AMG methodology, has been widely discussed, and applied in a number of cases. Although there is no scientific basis for that particular percentage, it appears reasonable/16. Specifically, it is large enough so that it does represent a meaningful incentive, while being small enough so that it is unlikely to result, at least at the regional level, in any actual loss of lower income housing production. This last point is predicated on the assumption that the sum of municipal fair share allocations represents a number substantially larger than the total amount of new production (and substantial rehabilitation) of lower income housing that one can realistically anticipate being constructed.

Two issues have been raised with regard to this approach. First, whether there should be a cut-off point for the adjustment;

16/It has been suggested that the 20 percent adjustment appropriately represents the deletion of the 20 percent upward adjustment in the fair share allocation made in the AMG methodology. Since there were reasons for that upward adjustment to be made, which are not significantly affected by whether a community does or does not settle a Mount Laurel case, there is no rational basis to see its deletion as a sound "trade-off" for settlement.

i.e., whether a community forfeits its opportunity to get this adjustment if it fails to settle by some predetermined point in the litigation process, such as the beginning of trial, or some other point; and second, whether there should be different levels of adjustment permitted, depending on the point at which voluntary compliance began. The first area can be dealt with quickly. If the logic of offering incentives for settlement is as suggested above, the incentives should be available for a settlement reached at any point up to the issuance of an order finding non-compliance, setting the fair share, and establishing a timetable for the municipal ordinances to be brought into compliance with Mount Laurel. After all, it is clear that a difference of a few weeks or months does not significantly affect the benefits that are anticipated from a settlement.

The second issue is more complicated. There are, at a minimum, three different points at which voluntary compliance can begin:

> (1) A settlement which is negotiated only after an extended period of pre-trial preparation, or even after the beginning of trial (the distinction is not considered of great substantive weight);
>
> (2) A settlement where negotiations begin expeditiously after a suit has been filed, before any substantial pre-trial activity has taken place, and where a settlement is also reached expeditiously; and
>
> (3) A community has enacted a program of voluntary compliance with Mount Laurel, without any lawsuit having been filed, and seeks court approval in order to have a formal determination of its fair share obligation, and to obtain the six year period of repose offered in Mount Laurel II.

There are significant differences, in terms of the reasons offered for providing incentives for settlement, between these three alternatives. There are potentially significant differences in time between the alternatives, and (particularly with regard to the third) significant differences in the level of affirmative effort embodied in municipal policies. Thus, if we somewhat arbitrarily set the incentive for a settlement under alternative (1) at 20 percent, it could be increased as one moves toward alternative (3), perhaps reaching as much as 40 percent for a wholly voluntary compliance program/17. Having said that, however, it must be recog-

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17/We would argue that both substantively, and in terms of its reflection of true municipal cooperation, the difference between alternative (3) and either (1) or (2) is substantially greater than the difference between alternatives (1) and (2). Given that nearly two years have passed since the Mount Laurel II decision, during which time the great majority of growth area townships have either complied, settled, or are in litigation, any community not yet in litigation which has not yet undertaken a program of voluntary (footnote continued at bottom of following page)

nized that such a gradient is by its nature highly arbitrary; despite extensive analysis and discussion, we have been unable to arrive at any clearly or even implicitly objective basis on which to construct such a gradient/18.

One final question remains; namely, the extent to which it is appropriate to make cumulative adjustments to fair share goals, for example, through the pyramiding of adjustments for voluntary compliance onto further adjustments for past performance, and so forth. The short answer is that adjustments should only be considered to the extent that they do not significantly impair the extent to which realistic lower income housing production, on the regional level, can take place.

It must be remembered that, under the AMG methodology, a substantial part of the total fair share goal is allocated to communities which will not be able to provide for construction of more than a minute fraction of their total obligation. These include both the small, relatively built-up, boroughs such as Princeton Borough, Highland Park, Metuchen, and the like. The list also includes many townships which still contain some vacant developable land, but nonetheless receive fair share allocations vastly beyond their capacity. This includes Piscataway, Edison, Woodbridge and many others. Even with the 20 percent upward adjustment that is incorporated into the methodology it is very likely that a large part of the fair share goal will simply be lost, by allocation to communities incapable of accomodating it. The units lost through adjustments to fair share goals in communities capable of accomodating larger numbers of units will represent a further deficit over and above that number.

The extent to which cumulative adjustments should be entertained, in the absence of a precise statistical basis for making such adjustments, should reflect the extent to which the adjustment will truly impair the production of real housing units, as contrasted with the elimination of what have been characterized as "phantom units"; i.e., units which exist solely as an element in fair share calculations, but are not realistically expected to be constructed, for any of a variety of reason. Thus, rather than suggest a mathematical cut-off here, this question will be left with the suggestion that its resolution vary on a case-by-case basis, in light of the facts of each individual case.

(footnote 17 continued) compliance is likely to be either strongly antagonistic to any program to meet lower income housing needs, or else extremely foolish.

18/The formulation of standards such as these must, somehow, balance the desire of the parties for clearly-stated ground rules with an effort to avoid reducing complex issues to the level of mathematical formulae; sometimes, however, there may be no sound alternative available.

Any limitation on adjustments, however, would not apply to fair share credits, which would, as discussed earlier, be awarded only for those units which can clearly be shown to be substitutable for units that would be provided through the compliance process. Since any unit for which credit is awarded can, therefore, be considered itself a Mount Laurel unit, there need not be any limit to the number of credits, as distinct from adjustments, that can be awarded on the basis of adequate substantiation.

III. APPLICATION OF FAIR SHARE ADJUSTMENT PRINCIPLES TO FREEHOLD TOWNSHIP

In the preceding sections, we have discussed, perhaps in excessive detail, the principles that should be applied in order to determine the extent to which a community may qualify for credits, or for adjustments, to its fair share housing obligation. This section, then, will seek to apply these principles to Freehold Township. Specifically, Freehold Township argues that their fair share allocation should be reduced on the basis of lower income housing units created, through a variety of means, in the past within the Township/19. Four types of accomodation are cited as being worthy of such credit, as follows:

(1) A county facility for the indigent aged;

(2) Private market rental apartment units;

(3) Condominium units created through conversion of existing rental units; and

(4) A mobile home park.

Each one of these facilities will be discussed in turn. Before discussing the specific facilities, however, two more general issues must be touched upon; first, the determination of Freehold Township's gross fair share, leaving aside for the moment questions of credit or adjustment; and second, some overview of the past performance issues discussed above, as they apply to the Township.

A. The Determination of Freehold Township's Fair Share Obligation

Any examination of adjustments or credits to a community's fair share obligation must begin with an examination of the way in which the obligation is initially determined. In the case of Free-

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19/Throughout this report, wherever the terms "Freehold" or "the Township" are used, they will refer to Freehold Township.

hold Township, the municipality has proposed that their lower income housing obligation be determined according to the AMG methodology, with one proposed modification. Specifically, the Township proposes that the amount of the Township's Growth Area, for purposes of fair share calculation, be reduced by 1,602 acres from the amount encompassed within the State Development Guide Plan (SDGP) growth area.

In essence, the Township's argument is that an area in the southeastern part of the Township, which was included within the Growth Area boundaries by the SDGP, is significantly less suitable for development, by virtue of both soil characteristics as well as the absence of public sewer systems, than the balance of the Growth Area within Freehold. There are legitimate points made in the argument; we recommend, however, that it not be accepted, for a number of reasons:

(1) In essence, the Township is arguing for a shift in the SDGP Growth Area boundary, or, as given in the Mount Laurel II decision (at 240) "a ruling that varies the locus of the Mount Laurel obligation". As such, it would appear that such a ruling, just as would be the case where arguments have been made that a community's Growth Area should be expanded, must meet a higher test than simply being reasonable.

Without wanting to presume to argue legal issues, it appears that the courts have, up to now, been extremely reluctant to modify the lines drawn by the SDGP/20. To our knowledge, no challenge by a developer to the SDGP Growth Area delineations has been successful, notwithstanding some eminently reasonable arguments put forward in such challenges. There is nothing so compelling about the arguments brought forward by the Township to suggest that this would be an exception.

(2) While the submission by the Township documents the unsuitability of the area for development with septic systems, it is generally acknowledged that higher density development, such as that which would incorporate lower income housing, must be developed with public sewer systems. A review of the soil types characteristic of the area proposed for exclusion from the Growth Area (Freehold Township submission, p.28) indicates that many of those soils are considered suitable for development, although they may not be considered suitable for development without public sewer. There is no reason to assume that public sewer cannot

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20/It is conceivable that that could change in 1985, in view of the more permissive language used by the Supreme Court regarding cases arising after January 1, 1985 (at 240). Not only is the 1985 exception not particularly germane to the issue at hand, but it would be highly presumptious to speculate in advance on its possible application to a proposed settlement.

be made available to that area, if it is determined that it is appropriate for development. Thus, without suggesting that this area necessarily should be developed, there does not appear to be a basis to conclude that it is so inappropriate for development as to be excluded entirely from consideration.

(3) Even if one assumes that the technical basis for the adjustment is compelling (which it is not), a major methodological problem remains. There may be thousands of acres in other municipalities, also included within the SDGP Growth Area, meeting the same or even more stringent standards for exclusion from the Growth Area. To delete one such area, in Freehold Township, without simultaneously adjusting the regional total of land within the Growth Area, is clearly unreasonable/21. It is impossible to determine what Freehold's Growth Area percentage would be if the adjustment they are proposing were to be made in every similarly situated community within the region.

In conclusion, then, it is our recommendation that the (unadjusted) fair share allocation for Freehold Township be recomputed and established on the basis of the AMG methodology without the modification proposed by the Township. We have recalculated the fair share allocation by restoring the 1602 acres to Freehold's growth area total. Freehold's Growth Area increases from 3.7042% to 4.0138% of the total of its Present Need Region, and from 1.6899% to 1.8315% of its Prospective Need region. The revised fair share allocation is shown in the table on the following page.

A further fair share adjustment is discussed in the Appendix to the Freehold Township Submission; namely, the modification to the method of determining present and indigenous need advocated by personnel at the Rutgers Center for Urban Policy Research, and adopted by Judge Skillman in the Ringwood decision. This modification, in large part, arises from a reduction in the percentage of all substandard housing which is held to be occupied by lower income households. Specifically, there appears to be some basis to challenge the assumption that 82% of the substandard and overcrowded units identified are indeed occupied by lower income households; as noted in the Freehold submission, the number may well be in the area of 60%.

21/It has been argued in the past that there is at least one set of circumstances where a Growth Area adjustment can be made even though it is not possible similarly to adjust Growth Areas throughout the region; specifically, where the proposed Growth Area adjustment arises as a result of development approved by the municipality outside the Growth Area. Since the adjustment flows from the policies and practices of the municipality, such an adjustment may be justifiable even without an overall regional adjustment. In the case of Freehold Township, the proposed adjustment arises from the existence of natural features independent of any municipal action.

FREEHOLD (22)

TABLE 1: REVISED FAIR SHARE HOUSING ALLOCATION FOR FREEHOLD TOWNSHIP

INDIGENOUS NEED	94
REALLOCATED PRESENT NEED	50
PROSPECTIVE NEED	1364
TOTAL FAIR SHARE HOUSING ALLOCATION	1508

SOURCE: Analysis by Alan Mallach, modifying information contained in Freehold Township Submission, pp. 18-23

A review of some of the relevant materials strongly suggests that it may well be appropriate to consider adjusting the AMG fair share methodology to reduce the formula percentage of lower income occupancy that is used to convert the total number of substandard units to the present need figure. This would be, however, an adjustment that would affect all municipalities, not only Freehold Township, since it would change the methodology generally, not only in its application to this one municipality. As such, any such adjustment in one case could be seen as setting a precedent which could then be applied in other circumstances. In view of its potential significance, it would be inappropriate to recommend here that such an adjustment be made.

B. An Overview of Freehold Township Characteristics

Although not directly affecting the specific number of units claimed as credits for fair share purposes, we have argued earlier that the general character of the community, with regard both to housing and demographic features, is a relevant factor in evaluating that claim. In other words, to the extent that a community has accommodated a larger share of lower income housing, or multifamily housing, than the regional average, or has a less affluent population than the regional average, such factors establish the context in which specific credits or adjustments can be considered.

Freehold Township, it must be acknowledged, does not demonstrate that it is different from what might be characterized as a typical affluent suburb in this regard. As determined for purposes of fair share calculation, the 1980 median household income in Freehold Township was 135% of the regional median, $27,878 compared to $20,637. Furthermore, in 1980, a substantially smaller percentage of Freehold's housing stock was either renter or multifamily than in the region as a whole; 82% of Freehold Township's housing was in single family owner-occupied stock/22. By contrast, 31% of

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22/It should be noted that the 82% figure represents only conventional single family units. Freehold's mobile homes are included in the remaining 18%.

the units in Monmouth County, and 38% of the units statewide, were renter occupied.

With regard to approval of multifamily housing units, again, there is no basis to distinguish Freehold from suburban communities generally. Contrary to some impressions, a substantial amount of multifamily housing has been approved in suburban New Jersey during the past decades. Table 2 on the following page lists municipalities of generally suburban character by the number of multifamily building permits issued between 1970 and 1979. The picture that emerges is at some variance with the image of suburbia as an area exclusively of single family homes, with only a handful of communities in which any multifamily housing at all has been permitted/23.

The picture in the table is complemented by a closer look at which years during this period saw the multifamily permits issued in Freehold. All of the roughly 500 permits were issued between 1970 and 1973; between 1974 and 1980, during which time the Supreme Court was establishing new rules for the conduct of local government in this area, no multifamily permits were issued in Freehold Township.

It should be made clear that we are not suggesting that Freehold Township acted in an irresponsible or improper manner. Indeed, it appears that during much of the period under question the Township was affected by a sewer moratorium. This information does indicate, however, that there is no apparent basis to suggest that Freehold Township was acting in a manner different from the typical suburban municipality throughout this period.

C. Freehold Township's Proposals for Fair Share Credit

As noted earlier, Freehold Township has cited four different areas of its housing stock as being appropriate for the granting of fair share credit. Each of these areas will be discussed in turn.

(1) The John L. Montgomery Home

The Montgomery Home is a "dormitory style" facility operated by Monmouth County for indigent and chronically ill individuals. As such it is clearly an institutional facility, such as a hospital, mental institution, or college dormitory. There is little question that its occupants are characterized for Census purposes as residents of group quarters, and not as members of

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23/This is not to suggest that all, or even much, of this housing was lower income housing, or even "least cost" housing. It will be noted that many of the most well known exclusionary communities, including Mount Laurel Township itself, will be found on the table.

FREEHOLD (24)

TABLE 2: RANKING OF MUNICIPALITIES OF SUBURBAN CHARACTER BY NUMBER OF MULTIFAMILY BUILDING PERMITS ISSUED 1970-1979

MANCHESTER (O)	6236	EDGEWATER PARK (BER)	936
MT OLIVE (MOR)	3694	LAWRENCE (MER)	926
EDISON (MID)	3516	EWING (MER)	920
FORT LEE (BER)	3442	MEDFORD (BUR)	870
BRICK (O)	3260	EATONTOWN (MON)	857
MAPLE SHADE (BUR)	3194	CLEMENTON (CAM)	821
WOODBRIDGE (MID)	3098	MT. LAUREL (BUR)	806
GLOUCESTER (CAM)	2962	WINSLOW (CAM)	777
PLAINSBORO (MID)	2880	SOMERS POINT (A)	765
HAMILTON (MER)	2822	WEST ORANGE (ES)	733
CLIFFSIDE PARK (BER)	2469	PALMYRA (BUR)	709
VOORHEES (CAM)	2297	E. WINDSOR (MER)	704
LINDENWOLD (CAM)	2248	UNION (U)	687
W. DEPTFORD (GL)	2024	EDGEWATER (BER)	672
NO. BRUNSWICK (MID)	1844	PALISADES PARK (BER)	662
PINE HILL (CAM)	1746	WASHINGTON (GL)	644
OCEAN (MON)	1637	LOWER (CM)	614
HILLSBOROUGH (SOM)	1264	MONROE (GL)	568
MANALAPAN (MON)	1189	ABERDEEN (MON)	563
HAMILTON (A)	1132	BARNEGAT (O)	551
MANSFIELD (WAR)	1106	BURLINGTON TWP (BUR)	520
FRANKLIN (SOM)	1073	MONROE (MID)	517
DEPTFORD (GLO)	1051	SCOTCH PLAINS (U)	507
DOVER (O)	1042	FREEHOLD TWP (MON)	504
LODI (BER)	997		

SOURCE: New Jersey Department of Labor, New Jersey Residential Building Permits: Historical Summary 1970-1979

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households. They do not, therefore, represent an element of lower income housing need for fair share purposes (for reasons discussed earlier), and are not an appropriate fair share credit/24.

This is not to suggest either that the Montgomery Home does not meet a legitimate, even important, social need, or that

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24/The comment in the Submission (at 35) "If these persons did not live in the Home, they would have to be accomodated in housing units somewhere", is incorrect. It is unlikely in the extreme that any of the inhabitants of the Home would occupy housing units, as that term is generally used. They would, however, occupy institutional facilities elsewhere; indeed, under the Finley rule, private and proprietary nursing homes are required to accept certain percentages of indigent patients, people essentially similar to those accomodated by the Montgomery Home.

FREEHOLD (25)

Freehold Township has not acted responsibly and decently in providing services to the Home, and approving expansion of the home, notwithstanding the fact that it receives no tax revenues from the facility. Both considerations, of course, would apply equally to a wide variety of socially desirable facilities; schools, hospitals, and the like. Freehold Township may well be entitled to some consideration for its socially responsible behavior, a question which is well beyond the scope of this analysis. The fair share context, by its nature, must narrow the scope of discussion to a defined pool of housing need, which does not encompass facilities such as this one.

(2) Rental Garden Apartment Units

This area poses far more serious issues than the preceding one. Leaving aside, for the moment, the "filtering" issues discussed earlier, it is still necessary to determine a number of elements:

a. The extent to which the garden apartment units are indeed occupied by lower income households;

b. The extent to which those lower income households are spending no more than 30 percent of gross income for shelter;

c. The rent levels, at the present time, on the basis of which a unit can be considered "affordable" to the lower income population.

The first two questions, in general terms, can be answered through the analysis of data provided in the 1980 Census of Housing. This data provides a breakdown for each community, for rental housing units, of the income distribution of the occupants and the percentage of income spent for shelter. While the income and expenditure ranges are not precisely on target with the Mount Laurel definitions, they can easily be adapted to that purpose. The income range from 0 to $9,999 closely parallels the "low income" range, and that from $10,000 to $14,999 the "moderate income" range, based on 1980 median income levels. While the breakpoint of 30% is not, regrettably, provided in the Census tabulation, it is possible to interpolate within the "25% to 35%" range in order to arrive at a reasonable estimate. The table on the following page presents an analysis of Census data with regard to Freehold Township.

The data in the table clearly that (1) most rental units in Freehold are occupied by non-lower income households; and (2) most lower income households living in Freehold rental units spend over 30% of their income for shelter. Only 126 out of 891 units, or 14.1%, are occupied by lower income households who do not spend more than 30% of their income for shelter. The significance of that statistic is that it provides a starting point to estimate the extent to which, of a given pool of "affordable" units in the community, they will actually meet lower income housing needs.

TABLE 3: DISTRIBUTION OF RENTER HOUSEHOLDS IN FREEHOLD TOWNSHIP BY INCOME AND PERCENTAGE OF INCOME SPENT FOR SHELTER

	LOW INCOME	MODERATE INCOME	OTHER	TOTAL
30% OR LESS	12	114	548	674
OVER 30%	148	61	8	217
TOTAL	160	175	556	891

SOURCE: 1980 Census of Housing, STF-3, Table XI, no. 30. Analysis by Alan Mallach (see discussion in narrative)

The next step is to estimate rents at which units can reasonably be considered affordable to lower income households. In this regard we recommend that a number of procedures be followed that differ in certain regards from those adopted in the Freehold Township submission (pages 37-38):

a. "Midyear" adjustments in the lower income ceilings as published by the U.S. Department of Housing and Urban Development are inappropriate/25;

b. It is important, as was done in the Lerman report which served as the basis for the AMG methodology, to correlate specific household sizes with dwelling unit sizes.

c. The affordability standard must be targetted at an income level some degree below the ceiling, in order to provide at least a minimal range of affordability within the lower income population.

d. Since heat/hot water are included, but electricity is not, within the rents charged, a minor deduction from gross rent must be made so that gross rent + electricity do not exceed 30 percent of gross income.

Following the Lerman report we have assumed the following relation-

25/The practice of making interim adjustments keyed to the precise month at which time the analysis was done, and, presumably subject to monthly updating during the course of litigation, is likely to generate innumerable potential inconsistencies and technical conflicts, between parties in litigation, among different cases progressing at different timetables, etc. This is particularly the case in view of the fact that such short-term updating is methodologically highly uncertain and subject to considerable disagreement between analysts (the methodology used in the Submission is, to say the least, highly dubious). It raises the further question whether adjustments should be made to potential credits whenever rent levels in a development change.

ships between household and unit size:

0 bedroom	1 person
1 bedroom	2 person
2 bedroom	3 person
3 bedroom	5 person

The maximum rent levels considered realistically affordable to the lower income population, and their derivation, are set forth in the table immediately below. When these rents are compared with the rent levels cited for the two housing developments in Freehold (Chesterfield and Stonehurst), we find that only the Chesterfield units clearly fall within the affordability range. For purposes of this analysis, however, we have also decided to include the 1 bedroom units in Section I of Stonehurst, since these units rent for $450, while the ceiling "affordable" rent for the category in which they fall has been determined to be $446, a non-significant difference. The other units are either clearly not affordable to a lower income household, or so close to the absolute affordability ceiling (the rent level affordable only to a household at the ceiling of the income range) as to make the likelihood of their

TABLE 4: DETERMINATION OF MAXIMUM AFFORDABLE RENT LEVELS FOR LOW MODERATE INCOME HOUSEHOLDS IN FREEHOLD TOWNSHIP

	STUDIO	1 BR	2 BR	3 BR
LOW INCOME				
MAXIMUM INCOME	$11050	$12650	$14200	$17050
X .30	3315	3795	4260	5115
X .90 (MAXIMUM ANNUAL SHELTER AMOUNT)	2894	3416	3834	4604
/12 (MAXIMUM MONTHLY SHELTER AMOUNT)	249	285	320	384
LESS ELECTRICITY	[10]	[10]	[15]	[20]
MAXIMUM AFFORDABLE RENT	239	275	305	364
MODERATE INCOME				
MAXIMUM INCOME	$17700	$20250	$22750	$26900
X .30	5310	6075	6825	8070
X .90 (MAXIMUM ANNUAL SHELTER AMOUNT)	4779	5468	6143	7263
/12 (MAXIMUM MONTHLY SHELTER AMOUNT)	398	456	512	605
LESS ELECTRICITY	[10]	[10]	[15]	[20]
MAXIMUM AFFORDABLE RENT	388	446	497	585

SOURCE: Maximum income figures from U.S. Department of Housing and Urban Development; analysis by Alan Mallach

adequately accomodating lower income households (without their paying an excessive amount for shelter) minimal.

Of the total of 690 rental units submitted by Freehold, therefore, 247 (171 in Chesterfield and 76 in Stonehurst) can be considered affordable to moderate income households. We have previously noted that, of all rental units in Freehold, only 14% house lower income households spending 30% or less for shelter. Since these 247 units rent for less than the average unit in the Township, it is at least arguable that a larger percentage would be likely to be satisfactorily housing lower income households. If we assume that that percentage is 20% rather than 14%, we find that this pool of units provides a realistic housing opportunity to (247 x .2) or 49 lower income households/26. Whether these should be considered credits, or adjustments, or neither, will be discussed below/27.

(3) Condominium Conversions

All but one section of the Stonehurst development has been converted to condominiums and all or most of the units sold. The majority of the units have been sold to investors, who rent the units back; as has been noted earlier, none of these rental units are considered lower income housing for purposes of this analysis.

It is possible to determine, in a manner similar to that used for rental housing, the maximum sales price of a condominium unit that would be affordable to a lower income household, still using the standard that such a unit must be affordable to a household earning 90% of the ceiling income for the appropriate income and household size category. The analysis was based on the following assumptions:

a. Units would be financed at 13% for 30 years, with a 10% down payment;

b. Property taxes were 2.40% of market value (this figure is from the Freehold Township Submission);

26/This is optimistic, since it appears on the basis of a comparison of Census data with that in the Submission that rents, on the whole, have risen substantially faster than incomes in Freehold Township since 1980; thus, the average level of lower income benefit obtained from the rental stock as a whole is likely to be less than 14% today.

27/It is unlikely, in a development of this nature, that this figure would have to be further modified for turnover. Since turnover in garden apartment developments is consistently in excess of 10% per year, the effect of turnover, therefore, is likely to result in at least as many units as there are in the pool becoming available over a ten year period.

c. Condominium fees, after deduction of utilities included in the fee, will average $61/month for 1 and 2 bedroom units, and $71/month for 3 bedroom units/28.

Based on these assumptions, the following maximum affordable prices were established (all figures have been rounded to the nearest $500):

1 bedroom units	$30,500
2 bedroom units	35,000
3 bedroom units	41,000

Using these figures, and information on the actual prices of condominium sales in the development during the past 12 months provided by the Township, it was possible to determine that 50% of all sales (81 of 162) were within the affordability range established/29. A further analysis, based on information contained within the Freehold Township Submission, established that 178 of the condominium units have been sold to owner-occupants, with the balance to investors/30. Assuming that price distribution of the units sold to owner-occupants was the same as that for the total pool of units sold (in other words, that half of those were affordable to lower income households), it would then reasonably follow that (178 x .5) 89 condominium units were sold at prices which could have been afforded by a moderate income household.

It is clearly unlikely in the extreme that all of these units were purchased by lower income households spending no more than 28% for mortgage, taxes, and condominium fees. Notwithstanding the existence of condominiums on the market at moderately higher prices which might be attractive to middle income households, the number of lower income households potentially capable of buying these units, as a percentage of the total market, is very small. Furthermore, during most of the selling period (in 1981 and 1982) interest rates were such that affordability was much less than it is today,

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28/Heat and hot water are included in the condominium fees. Information on condominium fees was provided by Mr. Davison (communication of 12/18/84).

29/A substantial number of the 1 bedroom units were sold for $30,625; in view of the proximity of this number to the maximum established above, all such sales have been considered affordable.

30/Based on information in the submission, the breakdown of owner-occupants and investors in Stonehurst has been estimated as follows:

SECTION	UNITS	INVESTOR %	INVESTORS	OWNER-OCCUPANTS
2	85	67%	57	28
3	233	57	133	100
4	100	50	50	50
TOTAL	418		240	178

based on a 13% mortgage interest rate. If we assume, optimistically, that one third of these units were indeed bought by lower income households spending no more than 28% of income for appropriate housing costs, we find that the extent to which lower income housing needs were met through this part of the development was (89 x .33) 30 units.

While recognizing the above, one must still raise a question about the extent to which condominium conversions affect lower income affordability on a long term basis, and therefore, the extent to which even such affordable condominium sales as these can realistically be considered to contribute to lower income housing opportunity. While the initial sales price of the condominium unit may be affordable, these units, in the absence of price controls, are likely to appreciate out of the affordable range substantially faster than rental units. It is widely held, not without reason, that the process of condominium conversion, on balance, generally exacerbates the housing needs of lower income households. Notwithstanding some benefit to approximately 30 moderate income households, that benefit may be outweighed by the longer term negative effects of the con-version process on the lower income housing stock.

(4) Silvermead Mobile Home Park

The Silvermead mobile home park is an age restricted (one member must be 52+ years old) mobile home park, containing 203 pads for singlewide units and 142 pads for doublewide units, renting at various levels. Sales prices for singlewide units range from $11000 to $19000, and the doublewide units from $28000 to $42000.

In order to analyze the affordability of these units, it is necessary to reconstruct the carrying costs of these units, based on financing available to purchasers of mobile homes to be set on a rented pad, as distinct from those located within a subdivision (in which the unit owners also own the land under the unit). An estimate of currently available terms indicates that a rate of 15% for 15 years is reasonable, up to no more than 80% of the purchase price/31. Assuming an additional $40 per $10,000 value for insurance, we obtain the following annual carrying costs, based on unit price:

$11,000	$1522/year
15,500	2145/year
19,000	2630/year
28,000	3875/year
36,000	4982/year

31/Or 125% of the invoice price (the price at which the mobile home park owner buys the unit from the factory) whichever is less. Under many circumstances, where the owner markup is high, this factor will result in the maximum mortgage being substantially less than 80% of the actual purchase price.

Total annual costs which should not exceed 28% of income are obtained by combining the above costs with the annual pad rents, which are presented in the Submission. Rather than replicate that report for all pad rents, we have limited the analysis to those which apply to the majority of the units. This information is presented in the table on the following page. This table shows, for example, that if a unit selling for $15,500 (the average for a singlewide unit) is placed on a pad renting for $242/month, the annual carrying costs to the owner/tenant will be $5049.

The maximum annual costs sustainable by moderate income households for these units are as follows:

3 person household: $22750 x .9 = 20475 x .28 = $5733
2 person household: $20250 x .9 = 18225 x .28 = $5103

Thus, the example given above would be affordable either to a two or three person moderate income household. We have used two and three persons here (and in fact suggest that two be used exclusively), since the age restricted nature of the development strongly suggests that families with children will be rare, and the typical occupant will be a couple, or perhaps even a single person.

The analysis indicates (a) that a two person moderate income household could afford a singlewide unit, priced at or below the average price of $15,500, on pads renting for $245 per month or less; and (b) no moderate income household can afford any of the doublewide units offered in this mobile home park. It may be argued that this is perhaps misleading, inasmuch as many of the units will be bought by households on a cash basis. Still, it reasonably reflects the extent to which this mobile home park provides housing for lower income households.

Assuming that half of the singlewide units sold below the average price, and that units are evenly distributed by price among pads of varying rentals, it is possible to estimate the number of affordable units. There are 173 pads renting at $242 per month or less, so that the number of affordable units is (173 x .5) 87. If we assume, in turn, that half of these are occupied by lower income households, that number would be (87 x .5) 43. The actual number of lower income households occupying these units could be higher, since, as noted earlier, households with low incomes but with substantial assets from the sale of a home could afford to buy many of the more expensive mobile homes in the park, using their funds to reduce or eliminate the need for mortgage financing. Notwithstanding the ambiguous nature of their lower income status, such households are included in the calculation of prospective need, so that some consideration of them is not completely unreasonable/32.

32/A further consideration is that many purchasers of mobile home units are vacating relatively modest homes or apartments that they previously occupied, and in most cases, owned. To the extent that filtering is taking place at all, this is logically one setting in which it is likely to be present.

TABLE 5: CARRYING COSTS FOR MOBILE HOME PARK UNITS

MONTH/ANNUAL PAD RENTAL	UNIT CARRYING COST $11000	$15500	$19000	TOTAL CARRYING COST $11000	$15500	$19000
SINGLE WIDE UNITS						
$219/2628	1522	2145	2630	4150	4773	5258
$235/2820	1522	2145	2630	4342	4965	5450
$242/2904	1522	2145	2630	4426	5049	5534
$258/3096	1522	2145	2630	4618	5241	5726
DOUBLE WIDE UNITS						
		$28000	$36000		$28000	$36000
$242/2904		3875	4982		6779	7886
$258/3096		3875	4982		6971	8078
$269/3228		3875	4982		7103	8210
$294/3528		3875	4982		7403	8510.

SOURCE: Analysis by Alan Mallach, based on sales prices and pad rentals as reported in the Freehold Township Submission

It should be noted that there are no formal resale or other controls governing this mobile home park which would ensure that the units which are affordable to lower income households today will remain so over time. Although, in the abstract, such controls would be desireable, in practice it is debatable whether they are really necessary. This mobile home park would appear to be an example of the type of development in which the price of the units in the marketplace is such that they are affordable to lower income households. Given the nature of the development and its apparent clientele, there is no reason to expect this to change substantially in the future. For that reason, they can be considered for purposes of fair share credit even in the absence of formal controls on resale.

The above discussion has evaluated each of the elements of the housing stock proposed by Freehold Township to be considered as credits toward meeting their fair share obligation. With regard to one facility, the Montgomery Home, we have concluded that it does not provide housing, in the sense that that term is used for fair share purposes. With regard to the others, in each case we have determined, acknowledging a substantial margin of error in our estimates, the approximate extent to which lower income households benefit from these housing developments. The term "benefit" refers to the extent the developments house lower income households without creating a need for them to spend more than a reasonable share of their income for shelter. This benefit has been estimated

as being made up of 49 rental units, 30 condominium units, and 43 mobile home units, for a total of 122 units.

It is doubtful, however, that most of even these units can be considered fair share "credits". Many of the units, including the rental units at Stonehurst and many of the condominiums, are already at the edge of affordability. In the absence of either rent controls or other limitations, there is at least a substantial possibility that they will not remain affordable to lower income households after their next turnover, and certainly not over the extended period called for by the Supreme Court.

Although beyond the scope of this analysis, it is worth pointing out that the municipality may want to consider efforts to stabilize lower income occupancy in some or all of these units. A number of municipalities around New Jersey are seriously contemplating programs under which garden apartment rental units would be "retrofitted" as lower income housing, through a combination of rent and occupancy controls. It may be possible to apply such a program in Freehold, and perhaps to extend it to some of the condominium units, which we have established are selling within a range affordable to lower income households. Such programs are a legitimate element within a Mount Laurel compliance scheme, and make it possible for a community to meet its fair share goals without the need to construct new units.

One final point should be made. The critical character of the foregoing discussion has not been meant, and must not be taken as, a criticism of Freehold Township, or of its housing and land use policies. Indeed, we feel that many aspects of the Township's position are worthy of praise. It is, rather, that we feel that effective compliance with Mount Laurel, and effective programs which will truly meet lower income housing needs, will only come about through a clear understanding of how those needs are met, and a rigorous distinction between lower income housing opportunities and other housing or non-housing ventures, however reasonable they may be in themselves. The entire thrust of the Mount Laurel II decision dictates that such distinctions be clearly made.

IV. RECOMMENDATIONS

Notwithstanding that, in our judgement, it would be inappropriate to award fair share "credits" on the basis of the Freehold Township submission, with one modest exception noted below, we consider it completely appropriate to adjust the Township's fair share obligation. Freehold Township has shown itself, not once but twice, to be willing to act responsively to meet its Mount Laurel obligations. The Township rezoned a substantial parcel of land, without litigation, for multifamily housing at reasonable densities, incorporating a lower income setaside, as a result of negotiations with the Affordable Living Corporation in 1983. When the litigation which is now proposed for

settlement was filed, by American Planned Communities, it is our understanding that Freehold moved expeditiously toward bringing about that settlement, and toward obtaining a judgement of compliance from the court.

It is clear, therefore, that Freehold has acted in a substantially more forthcoming manner than the great majority of New Jersey municipalities. While many (in all probability most) Mount Laurel cases have been settled or are in the process of being settled, most of the settlements have not come except after protracted legal proceedings; in some cases, the settlements have not occurred until after the trial itself had begun. If it is the case that a 20 percent adjustment to a community's fair share has come to be considered the "standard" adjustment for settlement, we believe that Freehold Township can legitimately argue for a more substantial adjustment.

Since there is no precise mathematical basis on which to ground such a larger adjustment, it must be, in the final analysis, based on a subjective standard of fairness. That standard must be applied as well to the "bottom line" number; in other words, is the ensuing fair share number, after adjustments, large enough so that (1) there is little risk that real, as distinct from phantom, units are being lost; and (2) the magnitude of the community's obligation appears reasonable by comparison with other at least roughly comparable communities. It is our belief that the number that results from the adjustments proposed in this report meets those criteria.

In light of the above consideration, our recommendations with regard to the fair share obligations of Freehold Township are as follows:

(1) Freehold Township's fair share allocation, prior to adjustments, is 1,508 low and moderate income housing units.

(2) Freehold Township should receive a 30 percent adjustment in its fair share allocation in reflection of its expeditious efforts, both with regard to Affordable Living Corporation and the current litigation, to move toward settlement and toward Mount Laurel compliance.

(3) Freehold Township should receive a further credit of 43 units for lower income units located in the Silvermead mobile home park, which units are (a) affordable to moderate income households; and (b) likely to remain affordable as a result of market constraints at least for the immediate future.

The resulting fair share obligation of Freehold Township can be

summarized as follows:

FAIR SHARE ALLOCATION (AMG)	1508
less settlement adjustment	[452]
less mobile home units credit	[43]
ADJUSTED FAIR SHARE OBLIGATION	1013

This recommendation, it should be noted in closing, is not meant to discourage the Township from pursuing its argument that the method of determining present need under the AMG methodology should be modified. Again, as noted earlier, it is our opinion that to recommend a reduction in Freehold Township's fair share for that reason, in the absence of an explicit instruction from the court to consider basic changes in the underlying fair share methodology, goes beyond the scope of the assignment, so that such a recommendation would clearly be inappropriate here.