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Brief of Plaintiff/Appellants

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5014-77

SOUTHERN BURLINGTON COUNTY N.A.A.C.P.; CAMDEN COUNTY C.O.R.E.; CAMDEN COUNTY N.A.A.C.P.; ETHEL LAWRENCE; THOMASINE LAWRENCE; CATHERINE STILL; MARY E. SMITH; SHIRLEY MORRIS; JACQUELINE CURTIS; GLADYS CLARK; BETTY WEAL and ANGEL PEREZ; on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, Cross-Respondents, and DAVIS ENTERPRISES, Plaintiff-Intervenor, -v- TOWNSHIP OF MOUNT LAUREL, et al., Defendants-Respondents, Cross-Appellants.	Civil Action ON APPEAL FROM THE DECISION OF THE SUPERIOR COURT, LAW DIVISION, BURLINGTON COUNTY Sat Below: WOOD, J.S.C.

BRIEF OF PLAINTIFFS-APPELLANTS

On the Brief:

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PROCEDURAL HISTORY

On May 3, 1971, plaintiffs filed a complaint against the defendant Mt. Laurel Township and others. On May 1, 1972, after a trial on the merits, the Honorable Edward V. Martino, A.J.S.C., rendered an opinion. Southern Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 119 N.J.Super. 164 (Law Div. 1972) (hereinafter Mt. Laurel I). The defendant appealed and plaintiffs cross-appealed that decision. On March 24, 1975, the New Jersey Supreme Court rendered its decision modifying, in part, the trial court's decision. Southern Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975). The Court reiterated the trial court findings that:

> The patterns and practices clearly indicate that defendant municipality through its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing and the opportunity to secure the construction of subsidized housing; and has used Federal, State, County and local finances and resources solely for the betterment of middle and upper-income persons. Mt. Laurel, supra, 119 N.J.Super. at 178; Mt. Laurel, supra, 67 N.J. at 170.

It held that the defendant must:

> (B)y its land use regulations, presumptively make possible an appropriate variety and choice of housing . . . (I)t cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. Mt. Laurel, supra, 67 N.J. at 174.

Accordingly, the Court declared Mt. Laurel's zoning ordinance invalid and ordered the defendant to correct the deficiencies specified:

> . . . both by appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of its fair share of the regional need for low and moderate income housing may be indicated as necessary and advisable. Mt. Laurel, supra, 67 N.J. at 192.

The defendant's motion for reconsideration was denied, and it appealed and petitioned for a writ of certiorari to the United States Supreme Court. The writ was denied and the appeal dismissed on October 6, 1975.

The defendant sought and was granted five extensions of time to comply with the New Jersey Supreme Court decision. On April 20, 1976, thirteen months after the decision, Mt. Laurel adopted Ordinance 1976-5 and averred that it had fully complied. On May 6, 1976, plaintiffs filed their amended complaint (JA-1a) by order to show cause alleging that in the five years since the initial trial court decision, the defendant had continued its unlawful practices and had failed to meet the judicial mandate by:

1. Continuing to neglect its own poor while acting affirmatively to benefit middle and upper income persons;

2. Inadequately assessing its regional housing responsibility;

3. Failing to provide, through its land use regulations, a realistic opportunity for a fair share of the regional housing need; and

4. Failing to take such other necessary and advisable action to provide that opportunity. See Pre-trial Order at JA-19a.

On August 24, 1976, the case was certified as a class action and on October 25, 1976, the motion by Davis Enterprises to file a complaint in intervention was granted by the new Assignment Judge of Burlington County,

the Honorable Samuel D. Lenox, Jr. Ultimately the case was assigned for trial to the Honorable Alexander C. Wood, III, J.S.C.

A trial was held on plaintiffs' amended complaint and plaintiff-intervenor's complaint in intervention between May 9, 1977 and July 8, 1977. One year later, on July 7, 1978, Judge Wood rendered his opinion which was followed by a signed order on August 2, 1978. Southern Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 161 N.J.Super. 317. (Law Div. 1978) (hereinafter Mt. Laurel II). JA-22a. On August 10, 1978, plaintiffs appealed from the whole of this decision and order with the exception of that part relating specifically to the proposed mobile home park of the plaintiff-intervenor. JA-25a. On August 18, 1978, the defendant cross-appealed on the mobile home issue. JA-27a.

On October 19, 1978, the defendant moved for a stay of that part of the August 2, 1978 order requiring the defendant to review, within 90 days of their submission, the plans of the plaintiff-intervenor for a mobile home park in Mt. Laurel. The stay was denied by the trial court on December 1, 1978. JA-29a. This denial was appealed by the defendant on December 26, 1978 and a stay was granted on February 13, 1979. JA-30a. The Appellate Division's order granting the stay was then appealed by the plaintiffs and plaintiff-intervenor to the Supreme Court on March 12, 1979. The Supreme Court vacated the stay on May 30, 1979. JA-31a.

STATEMENT OF FACTS

INTRODUCTION

The plaintiffs[1] in this action filed their first complaint against the defendant, Mt. Laurel Township on May 3, 1971. Despite an initial trial court victory in 1972 and a unanimous, nationally acclaimed Supreme Court decision in 1975, the plaintiffs have gotten nothing:

> 1) the resident poor are now living in neighborhoods and dwellings which have further deteriorated;
>
> 2) more of the resident poor have left Mt. Laurel; and
>
> 3) no realistic housing opportunity has been provided for persons of low or moderate incomes.

The plaintiffs' fundamental right to fair and equal treatment by municipal government continues to be thwarted and unprotected.

Much more, however, is now at stake than the vindication of these rights. The prior findings and decisions of the initial trial court and Supreme Court engendered a promise and hope that the judiciary of this state would not stand idly by and tolerate this abuse of municipal authority. It appeared that the courts, as reflected in those decisions, would move quickly and decisively to secure the rights of these citizens who had nowhere else to turn. The government in this state was profoundly effected

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[1] The plaintiffs represented (and still represent) three distinct groups: lower income residents, lower income non-residents, and a class of lower income persons who had been forced to leave the township because of the deterioration of their neighborhoods and the lack of alternative housing opportunities in Mt. Laurel. All of the plaintiffs sought the provision of needed housing opportunities. This included, for the residents, municipal action to upgrade the conditions of their neighborhoods - action comparable to that undertaken by the defendant in middle and upper income neighborhoods.

The residents were motivated, in part, by their frustrated attempt in 1968 to construct subsidized housing in Mt. Laurel and a history of municipal inaction and neglect for the living conditions in the neighborhoods despite over a decade of official municipal studies and findings relating to their neighborhood needs. The former residents were also motivated by a desire to return to Mt. Laurel and the non-residents by a need for decent housing and a desire to share in the opportunities being afforded middle and upper class citizens in that municipality.

by those rulings and in the short time since their pronouncement, at least some movement has occurred at every level to implement them. The rulings have had, moreover, a national impact on the right of lower income people to redress discriminatory municipal land use practices.

Full enforcement of the Supreme Court mandate is the next essential step. The attention of many will be directed toward whether and how that mandate will be enforced. More importantly, the well-being of this state's most needy citizens depends upon it. Any indication that the judiciary will not stand behind this decision will be magnified by increased municipal recalcitrance and governmental inaction.

The opinion below has dashed any hope created by the Supreme Court's declaration of basic constitutional principles. It is perhaps to the shame of Mt. Laurel that the declaration was even necessary. However, it will be to the greater shame of this state if the declaration, once having been enunciated, was not enforced. The lower court has emasculated, if not reversed, the mandate and, if upheld, its opinion will result in a bitter end to the plaintiffs trust that the judiciary of this state would insure that the rights of the poor and otherwise disenfranchised citizens would be secured. To fail to protect and enforce these rights once having proclaimed them, would be in the nature of a cruel hoax. It would have been better for the plaintiffs to have lost in 1972 and 1975. At least there would then have been no pretension, no expectation, of relief.

This Court must appreciate the impact that this appeal and the Court's review of the decision below will have in a case of this magnitude. The decision will provide the "bottom line" for all developing municipalities

in New Jersey. It will establish the guidelines for trial courts in future litigation. The assumption is and will be that whatever Mt. Laurel ultimately is compelled to do to fulfill the constitutional mandate, certainly no other municipality need do more.

Careful scrutiny will not be required to comprehend fully that the lower court opinion must be reversed. The undisputed record is so overwhelming as to compel reversal under any standard of judicial review. However, the efforts of the plaintiffs and the needs of poor people throughout this state demand more than mere reversal. This Court can and must set forth explicit standards and an effective remedy which will result in an expeditious enforcement of the constitutional mandate. The defendant cannot be given another opportunity to delay the performance of its constitutional responsibilities. A terrible wrong has occurred here. That action has now been sanctioned, and thereby profoundly exacerbated, by the court below. This Court must see that it is quickly, thoroughly and decisively remedied.

The Supreme Court ordered Mt. Laurel to amend its land use ordinances and to take such other action as would be necessary and appropriate to end its pattern and practice of discrimination.[1]

> 1) the provision of a realistic opportunity for Mt. Laurel's fair share of the regional need[2] for housing for persons of low and moderate incomes; and
>
> 2) an end to the pattern and practice of discrimination in the allocation[3] of municipal resources and provision of municipal services.

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1 Mt. Laurel, supra, 67 N.J. at 192.
2 Mt. Laurel, supra, 67 N.J. at 179.
3 Mt. Laurel, supra, 67 N.J. at 170.

These results should have been realized through amended land use ordinances providing for least cost and assisted housing opportunities, affirmative municipal action necessary to realistically provide such housing opportunities and the implementation of a plan for the equalization of municipal services to the neighborhoods inhabited by the resident poor.

Mt. Laurel's only response, thirteen months after the Supreme Court's order, was to adopt an amendment to its zoning ordinance. This Ordinance, 1976-5, did nothing to correct the deficiencies in Mt. Laurel's land use scheme as enumerated by the Supreme Court. Instead, Ordinance 1976-5 created three new zones, of insignificant size, which themselves contain cost-generating restrictions or involve peculiar site conditions inimicable to the principles set forth in the Supreme Court decision. Needed affirmative action was not taken which could have made possible housing opportunities affordable to lower-income persons. No movement toward the improvement of existing low and moderate income neighborhoods occurred. In fact, the conditions of the two lower-income neighborhoods in Mt. Laurel worsened and more lower income residents left. The only developer who actively sought to provide least cost housing opportunities in Mt. Laurel (Roger Davis, now plaintiff-intervenor herein) was discouraged and required to litigate against the township.

This Court must now determine whether Mt. Laurel's adoption of its zoning amendment (Ordinance 1976-5) was full and sufficient compliance with the Supreme Court decision of 1975. In order to so hold, the Court would have to find that:

1. Ordinance 1976-5 does provide a realistic housing opportunity for 131 least cost units;

2. the provision of an opportunity for 131 units satisfies Mt. Laurel's fair share of regional housing needs for persons of low and moderate incomes; and

3. Mt. Laurel had no other obligation to correct the deficiencies of its unconstitutional land use scheme under the Supreme Court opinion; that is, lower income neighborhoods may continue to be neglected and abandoned and no affirmative action need be taken although necessary to the provision of housing opportunities for persons of low and moderate income.

Such findings are inconceivable, unsupportable by the overwhelming and virtually uncontroverted record below. Plaintiffs will show that even assuming that Ordinance 1976-5 does provide a realistic housing opportunity for 131 units, it is a totally inadequate response to the Supreme Court's directives for the following reasons:

a) the opportunity provided, if any, barely meets the present needs of Mt. Laurel's own residents who reside in substandard housing. It certainly does not meet Mt. Laurel's share of the regional present or prospective housing need;

b) the ordinance does nothing to address the pattern and practice of discrimination in the allocation of municipal resources and the provision of municipal services; and

c) the ordinance does not provide any other necessary and advisable action for the creation of a realistic housing opportunity for persons of low and moderate income.

Plaintiffs will further show that Ordinance 1976-5 is, in fact, a sham in that it does not provide a realistic housing opportunity for any least cost units since:

a) the sites chosen cannot be developed at least cost controls;

b) the controls set forth are not at least cost, minimally necessary standards; and

c) the three owners of the tracts have exhibited no interest to develop these sites at least cost controls. No incentives have been provided for such development and no guarantee exists to insure such development.

There can be absolutely no question of reversal. The opinion below is entirely unsupportable factually and legally except in so far as it relates to the provision of mobile homes. The record consists of 29 volumes of testimony and over two-hundred exhibits (now abbreviated in a four-volume joint appendix). The following factual statement provides a thorough analysis of that record and easy access to it.

Plaintiffs do not address the mobile home issue in this brief. Defendant has cross-appealed on that issue alone. Plaintiffs will fully respond on all issues relating to mobile homes in reply to defendant's brief on its cross-appeal.

I.

ORDINANCE 1976-5 DOES NOT PROVIDE A REALISTIC HOUSING OPPORTUNITY FOR ANY LEAST COST OR SUBSIDIZED UNITS

The adoption of Ordinance 1976-5 was Mt. Laurel's sole response to the Supreme Court mandate.[1] It provides a housing opportunity on three sites (23 acres) for, at most, 131 non-least cost, non-subsidized units.[2] It does not provide a realistic housig opportunity for any least cost or subsidized units.[3] The court below found that this re-zoning was full and sufficient compliance with the Supreme Court order.[4] The finding, under any interpretation of the undisputed facts, is unsupported and must be reversed.[5]

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1 This was admitted by the defendant and its planner. Glass, 20T 136-3. Defendant's Answer to Interrogatory 11, 15T 77-23 to 25, 15T 78-1 to 6.

2 This was the estimate of plaintiffs' expert. Abeles, 10T 125-6 to 11. Mt. Laurel's expert estimated that only 115 to 120 units could be built on these 23 acres. Glass, 21T 148-17 to 20, 21T 16-24 to 25. The difference is due to the application of Mt. Laurel's excessive undue cost-generative subdivision controls. Glass, 23T 210-21 to 24, 23T 212-4 to 6; Abeles, 11T 20-12 and 17. Plaintiffs will use the "higher" estimate of their own expert in this brief.

3 A realistic opportunity for least cost units would be provided if: (1) the sites chosen were developable for least cost housing; (2) the zoning controls set forth were at least cost standards; and (3) the owners of the sites realistically expected to develop them for least cost units. A realistic opportunity for subsidized units would be provided if: (1) the sites chosen and the controls governing development were consistent with state and federal specifications; (2) all municipal barriers were removed; that is, municipal action necessitated by the state and federal programs was taken; and (3) the owners of the sites realistically expected to develop them for subsidized units.

4 Mt. Laurel II, supra, 161 N.J.Super. at 354.

5 Even if Ordinance 1976-5 provided a realistic opportunity for 131 least cost and/or subsidized units (which it does not), defendant would have failed to comply with the Supreme Court mandate for: (1) failure to provide an opportunity for its fair share of the regional need (see II infra) and (2) failre to upgrade conditions in its lower income neighborhoods (see III, infra).

The uncontroverted evidence is that:

1) the three (3) sites selected by the defendant as designated in Ordinance 1976-5 are inadequate and are some of the worst locations for residential development in Mt. Laurel;

2) the "new" zoning controls regulating development in these zones exceed minimally necessary least cost standards, duplicate controls already condemned by the Supreme Court as exclusionary, and in fact, include additional unduly cost-generative requirements not found in any other Mt. Laurel land use code;

3) necessary incentives and assurances were not included in Ordinance 1976-5 to insure the production of least cost unist;

4) non-least cost and unduly cost-generative requirements of the original zoning and subdivision ordinances have been retained which preclude least cost and/or subsidized development throughout the township; and

5) barriers to subsidized housing have been retained by the defendant.

A. The Three (3) Sites Selected in Ordinance 1976-5 are Inadequate and are Some of the Worst for Residential Development in Mt. Laurel:

The selection of only three small sites out of the over 7,000 admittedly vacant acres[1] in Mt. Laurel exposes the defendant's bad faith. A realistic opportunity for low and moderate income housing has not been provided.[2] Each new zone is located on a small site, almost lost in the massive 22 square mile township and barely visible on its zoning map.[3] Two

1 Glass, 20T 36-10, 23T 69-2.

2 The owners of the sites were never contacted. - CITE - Mt. Laurel prepared no studies prior to selecting these sites. Glass, 23T 109-1. The suitability of these sites was not evaluated by site planning, soil testing or boring tests. Glass, 23T 109-18. No evaluation was made as to what the resulting costs of development on these specific sites would be nor was it known. Glass, 23T 109-22 to 23. The township engineer was not asked by the township or its planner to evaluate these sites for development and did not have any input into their selection. Talbot, 28T 16-11, 28T 16-6.

3 Exhibit P-35 on following page and at JA-307a and see Exhibit P-36 following page 68 and at JA-308a.

severe developmental problems detailed below, and the third site (located in one section of one PUD) is not even scheduled for development until 1984 or 1985.[1]

Despite these facts the trial court ruled that the re-zoning of these particular sites was "sufficient and proper action to comply with the Court's directive."[2] This Court must understand that there is no basis in the record for that conclusion. As detailed below with specific transcript references, even those portions of Mt. Laurel's planner's testimony which the trial judge recites[3] as rebuttal to plaintiffs' criticisms of these sites were ultimately negated, withdrawn or qualified by the defendant's own witnesses. The record was inadequately and inaccurately characterized by the trial judge to support his ultimate finding.

1. The R-5 Site: Exhibits P-30, P-31 and P-32[4] graphically portray the problems with the R-5 site and should be carefully studied. Exhibit P-32 which is a map of the R-5 site is attached on the following page. The

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1 Mt. Laurel always admitted that Ordinance 1976-5 was insufficient to satisfy the Supreme Court mandate, at best, only sufficient to deal with Mt. Laurel's own 1976 local housing need. It admitted that the sites chosen were to respond to this local present need and admitted that others would be selected in the future but only after these sites were developed. Glass, 23T 76-4 to 15; 23T 70-4 to 9. This was blatantly in bad faith. If the 131 units were to meet a present need why were sites chosen that were clearly unavailable for development for several years? As will be detailed below, the R-5 site is in a proposed industrial prak landlocked with no on-site water or sewer. Its development is dependent upon the construction of the industrial park which has not yet been approved. The R-6 site is dependent on the Larchmont PUD for water and sewer. That area of the PUD is not scheduled for years. R-7 is in the Larchmont PUD in an area scheduled for development in 1984 at the earliest.

2 Mt. Laurel II, supra, 161 N.J.Super. at 343, 347, 354.

3 Mt. Laurel II, supra, 161 N.J.Super. at 337-340.

4 JA-259a, 260a, 261a.

admitted development problems with the R-5 site are numerous and extensive; they include:

a. Opposition by the tract's owner;
b. Incompatible surrounding uses;
c. Isolation from existing residential areas, schools and recreation;
d. A flood plain encumbering half of the site;
e. No existing access;
f. A water retention basin proposed for the site by the industrial owner-developer;
g. A Hi-Speed Line proposed right of way transecting the site;
h. Noise pollution;
i. Traffic congestion;
j. Water/sewer inaccessibility; and
k. An alternative industrial accessory use, compatible with the new residential zoning, already proposed for the site.

The selection of this particular tract despite these problems and the availability of other appropriate sites (even in the vicinity of the selected R-5 site)[1] exemplifies the defendant's bad faith in complying with the Court's order.

a. The Industrial Owner-Developer is Clearly Opposed: This site is located in the middle of an industrially zoned area in the township and is actually part of a proposed industrial subdivision which the township has known about for several years.[2] The industrial owner-developer of the tract has said that he will not build "least cost" units and does not intend to develop it in accordance with the R-5 provisions. He had, in fact, submitted his objections in writing to the township prior to the adoption of Ordinance 1976-5.[3] Despite this history, the township never

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1 Mr. Alvarez, a former mayor and M.U.A. chairman, admitted that a similar, seven acre, vacant tract existed in his neighborhood which was within walking distance from the R-5 site. Alvarez, 24T 117-18 to 21, 24T 115-17 to 25, 24T 120-3 to 4. This area was not chosen although (perhaps, because) it would have actually placed the "least cost" units adjacent to existing residential areas, recreation, schools and within walking distance to the Moorestown Mall.

2 Glass, 23T 112-6 and 13; Exhibit P-29 at JA-258a; Exhibit P-21 at JA-174a.

3 Wisniewski, 9T 34-18 to 20, 9T 43-1 to 4; Exhibit P-24 at JA-177a.

bothered to contact him prior to the ordinance's adoption.[1] Furthermore, due to the industrial park's proximity to the Pennsauken Creek, a water retention basin to serve the industrial park has already been designated for this site area.[2] The plans for this site, submitted to the township in June, 1975, also demarcate the right of way for the proposed hi-speed line corridor through the R-5 site.[3] The trial judge does not refer to any of this undisputed testimony in any portion of his opinion.

b. Incompatible Surrounding Uses: From the time the Supreme Court rendered its decision, the township's planner knew that one of the sites that would be zoned for low and moderate income housing would be in "that corner of the township"; that is, in the part of Mt. Laurel which is and has always been designated for industrial uses.[4] The R-5 site is totally surrounded by either existing or proposed non-residential uses including a major shopping mall, business offices and indstrial warehouses.[5] No

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1 Glass, 23T 104-25, 23T 105-1 to 4.

2 Wisniewski, 9T 24-2 to 5.

3 Wisniewski, 9T 24-8 to 17; Exhibit P-21 at JA-174a.

4 Glass, 23T 108-8 to 22, 23T 112-1 to 2. This area has been mapped industrial since 1956 and is so designated in the 1959 Master Plan (p. 61) because "it is an area of little or no residential or business development." Glass, 23T 117-21 to 22. Its continued use as an industrial park was planned for in the 1969 Master Plan (p. 64) with development proceeding accordingly since then.

5 Glass, 23T 112-1 to 2, 21T 26-10 to 18, 21T 26-24; Abeles, 13T 8-5; Exhibit P-30 at JA-259a; Exhibit P-31 at JA-260a.

adjacent residential uses exist, are planned or zoned.[1]

The trial judge's description of all of this testimony was that such proximity to the industrial zone would provide easy access to employment opportunities in that zone.[2] Plaintiffs never denied that R-5 is in close proximity to employment sources.[3] In fact, it is surrounded by them. The question raised by the plaintiffs is why has Mt. Laurel chosen to place a small (60 unit) development for persons of lower income in the only are in the township which is surrounded by warehouses and industrial uses when: 1) all planning precepts dictate against such zoning; 2) no other residential uses are so planned; 3) 7,000 acres of land are admittedly vacant; and 4) other appropriate sites are available for residential development in close proximity to employment opportunities?

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1 Abeles, 13T 9-20 to 24. The defendant's placement of R-5 in the middle of an industrial area is clearly aberrant. No where in the township are there residential units totally surrounded by industrial uses. Glass, 23T 127-23. In fact, every business, commercial and industrial zone in the township expressly prohibits residential uses (except farms) within them. See Mt. Laurel's Zoning Ordinance, Exhibit P-25, Sections 402.15 (Major Commercial District) at JA-140a, 600.2.1 (Business) at JA-193a, 700.4.1 (Specially Restricted Industrial Zone); at JA-195a, 800.1.4.2 (Industrial Zone) at JA-196a. Glass, 23T 123-18 to 19, 23T 123-7 to 8, 23T 125-4 to 9, 23T 125-1 to 3, 23T 124-10 to 20; Abeles, 10T 24-16 to 17. The PUD ordinance also specifically provides that residential areas are to be protected from industrial activities through the separation of these incompatible uses and the prohibition of any residential development in the industrial area. Exhibit P-27, Sec. 310D,1(b),(c),(e) and 2(b) and (d) at JA-251a. Furthermore, the township's planner in every master plan on which he has worked has warned against and recommended the prohibition of residential uses in commercial and industrial zones. Glass, 23T 140-20, 23T 141-19, 23T 143-8 to 10, 23T 143-19 to 20. Another planner, appearing for the defendant, admitted that he would not isolate even 100 residential units, much less 60, in the middle of an industrial park. Lynch, 18T 124-25, 18T 125-6 to 14; Accord, Abeles, 10T 64-1 to 12.

2 Mt. Laurel II, supra, 161 N.J.Super. at 338.

3 Abeles, 13T 9 to 11.

c. Isolation from Existing Residential Areas, Schools and Recreation: This tract as a site for residential development (small, isolated community within an industrial park) establishes an archtypical "ghetto" or "other side of the tracks" situation.[1] As previously discussed, there are no existing residential areas adjacent to the site and vehicular transportation will be required to schools and recreational areas.[2] Virtually the only potential access to the site is through an adjoining township (Moorestown). All of these factors, including those to follow, make it improbable, if not impossible, that a development at the R-5 site would be conventionally mortgagable.[3] The trial judge made no reference to the undisputed facts regarding this site's isolation and its potential for the "ghettoization" of housing opportunities in Mt. Laurel for persons of lower incomes.

d. Flood Plain: The defendant's planner in his affidavit dated October 28, 1975, to Judge Martino stated that the R-5 site contained "minor streams".[4] In fact, the North Branch of the Pennsauken Creek

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1 Planner Glass in selecting this site didn't even consider whether the placement of a subsidized housing development consisting of 60 isolated units surrounded by an industrial park, with no continguous residential areas, might not have the affect of creating a stigmitized, ghetto area. 23T 133-14 to 15.

2 Glass, 23T 144-6 to 7 and 22.

3 It was undisputed that these features and the resulting potential for conflicts between the designated land uses would certainly render it ineligible for state or federal mortgage guarantees and subsidies. Abeles, 10T 60-12 to 16, 10T 65-1 to 7.

4 Glass 23T 147-15; Exhibit D-34 at JA-638a.

borders the length of the site with its flood plain encompassing virtually half of the site.[1] Mt. Laurel has passed a special ordinance, Ordinance 1973-4, to protect this particular flood plain and has incorporated in the Ordinance (See Section 2) a special study of the area done by the Army Corps of Engineers regarding potentially hazardous conditions.[2] Furthermore, the township's concern about this flood plain was a major factor in its review of the industrial park subdivision, in which the R-5 zone was subsequently located. In September, 1975, a letter written by the township's engineer indicated that ten acres of the industrial park were

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1 Exhibit P-32 at JA-261a. Builder Roger Davis described this site as mostly "unbuildable":

> The site . . . starts in the center line of the Pennsauken Creek, or a branch of the Pennsauken Creek. . . . It proceeds along the flood plain or marsh area of the branch of the Pennsauken Creek, and finally about two fifths of the way through the property reaches what may be buildable ground. Davis, 2T 69-16 to 23.

2 The Army Corps of Engineers' report indicates that this area is in a 100-year flood plain with a potential for very severe floods. These floods would have a ruinous impact on a development built in the flood plain. Abeles, 10T 61-19 to 25, 10T 52-1 to 13. The study states:

> Flood Damages that would result from the recurrence of major known floods would be substantial. (p. 3).
>
> Hazardous Conditions would occur during large floods as a result of the rapidly rising streams, high velocities and deep flows. (p. 4).
>
> Structures in the flood plain have been damaged by past floods; however, others were only slightly above these past flood levels. Continued urbanization will drastically decrease the area of water-absorbing soil and increase the amount of runoff by reason of the greatly expanded areas covered by paved streets and highways, parking lots and buildings. Many buildings, including residences and commercial establishments, would be damaged by floods equal to those of the past or by the Standard Project, the Flood Hazard Area Design or Flooding Design Floods. (p. 20).

located in the flood plain and had to be removed from any possible construction plans.[1] Even the industrial park developer chose not to propose warehouses for this site and, instead, designated it for a water retention basin.[2] Despite the existence of a specific ordinance protecting this flood plain; a report documenting hazardous conditions and a report by its own engineer regarding the developability of this area, Mt. Laurel chose to locate the R-5 site here.

The trial judge disregarded these admitted facts by noting the township planner's testimony that the location of R-5 in a flood plain does not totally preclude development on those portions of the site which are not in the flood plain itself.[3] Plaintiffs have never contended that the flood plain rendered the land totally unusable. Plaintiffs' point is that the defendant knowingly selected a site in which a flood plain consumes a portion of the tract making it more difficult to develop, reducing the development potential which can occur on the site and compounding site planning problems and potential financing.[4] No explanation was provided by the township as to why this site was selected given the township's history of concern about the flood plain, the township's policy in other areas of the township to keep development away from flood plains,[5] and the fact that

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1 Glass, 23T 156-4 to 15.

2 Exhibit P-21 at JA-174a.

3 Mt. Laurel II, supra, 161 N.J.Super. at 339.

4 Abeles, 13T 11-15 to 18.

5 The township planner testified that it is a general policy of the township to keep structures out of flood plains. 23T 156-22 to 24. In fact, in its final review of one of the PUD proposals, the township required that all building lots be at least 15 feet back from the flood hazard line and prohibited even active recreation areas in a flood plain. Glass, 23T 157-2 to 3 and 10 to 12, 23T 159-2; Exhibit P-55, #11 at JA370a.

95% of the land in Mt. Laurel is not encumbered by flood plains and would concededly be more appropriate for multi-family development.[1]

e. Water Retention Area: Because of the flood plain and the associated soil conditions, the industrial sub-divider of a larger area which encompasses the site will build a water retention basin for the subdivision. This basin is and always has been located by the owner-developer on the R-5 tract[2]. The need for and the location of this water retention basin on this site was known to the defendant prior to the rezoning of this parcel for low and moderate income housing. For over three years, the township planner has been reviewing with the township's planning board the developer's plans which designate a retention basin on this site.[3] In fact, the township engineer in a letter dated June 10, 1976, noted that the presently designed water retention basin may not be large enough.[4] A letter from the Burlington County Conservation District, dated February 21, 1975 emphasized the need to construct the retention basin prior to any development in this area because of the attendant disruption to natural drainage conditions which will occur.[5]

More important to its potential for residential uses, the present location of the needed water retention basin in that part of the developer's industrial tract zoned R-5 is not precluded or changed by the residential re-zoning of the tract.[6] Despite the trial judge's statement that the

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1 Glass, 23T 156-22 to 24; Abeles, 10T 67-8 to 9, 13T 12-19 to 23.
2 Exhibit P-21 at JA-174a.
3 Glass, 23T 115-20 to 25.
4 Glass, 23T 206-4 to 10; Exhibit P-65 at JA-436a.
5 Exhibit P-66 at JA-440a.
6 Talbot, 28T 21-19 to 23, 28T 24-19; Abeles, 10T 41-10 to 13.

location of this basin is "not a fait accompli",[1] the lawyer for the industrial owner-developer of this tract testified that the owner will keep the needed basin's location on this site rather than lose other parcels in the tract which are zoned industrial.[2] The designation of a water retention basin on the R-5 site removes all potential, limited as it is, for development of the tract.[3]

f. Access: The trial judge stated that this "site is, moreover, convenient to and in close proximity to a network of state, county and local roads, giving ease and convenience of access."[4] In so stating, the court incorrectly assumed that the site's proximity to major roads meant that the site was accessible. The trial judge was wrong. In fact, the R-5 zone is completely landlocked with no existing road into the site.[5] Access will ultimately depend on the development of the industrial subdivision.[6]

The developer's plans indicate an extension of Nixon Drive to curve through the R-5 site which further reduces the available land in the

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1 Mt. Laurel II, supra, 161 N.J.Super. at 339.

2 Wisniewski, 9T 34-15 to 20. Abeles, 10T 66-2 to 11. The township's initial contention, ultimately withdrawn, that the needed water retention basin must be located within the industrially zoned land is without legal foundation and admittedly contrary to past township practices. Talbot, 27T 48-17 to 25, 28T 24-19. In a recent Burger King approval, the defendant permitted the required buffer strip for the commercial building to be located on adjacent, residentially zoned land. Talbot, 28T 107-6 and 10.

3 Abeles, 10T 41-3 to 5.

4 Mt. Laurel II, supra, 161 N.J.Super. at 339.

5 Glass, 21T 22-10, 23T 159-7 to 8; Abeles, 10T 29-21 to 22; Rabin, 14T 67-12 to 15; Exhibit P-30 at JA-259a.

6 Glass, 23T 159-14 to 17; Abeles, 10T 30-9 to 11.

tract.[1] The township's engineer agreed that this extension of Nixon Drive would be the easiest way of providing access to the site.[2] Even so, such an extension would require at the outset a dedication of 50 feet of land in Moorestown presently owned by the Moorestown Mall.[3] Virtually all of the ultimate access would then be into the adjacent municipality of Moorestown and approvals from that township would be required before access was accomplished.[4] An alternative access route could be built over the North Branch of the Pennsauken Creek and up to a connection with Fellowship Road.[5] This would involve an unknown cost and would be highly unlikely.[6] The defendant gave no explanation as to why a non-landlocked site was not chosen although it was undisputed that site inaccessibility negatively impacts on the desireability and financial feasibility of a proposed project.[7]

g. Hi-Speed Line Corridor: One of the major reasons given for choosing this site is its proximity to a future hi-speed line station.[8] In his affidavit to Judge Martino dated July 8, 1975 the township planner committed himself to review the extension plans for the speed line.[9] Yet, at the time of trial it was first revealed that the speed line right-of-way, far from being in an adjacent township or merely "clipping" the corner of the R-5 tract (as answered in the deposition of the township planner),

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1 Abeles, 10T 30-6 to 13, 10T 38-9 to 15. Exhibit P-21 at JA-174a; Exhibit P-32 at JA-261a.

2 Talbot, 26T 134-11.

3 Glass, 23T 162-16 to 17, 21T 21-7 to 13; Abeles, 10T 31-12 to 21.

4 Exhibit P-30 at JA-259a.

5 Glass, 21T 21-16 to 25.

6 Glass, 23T 164-19; Abeles, 10T 30-16 to 23.

7 Rabin, 14T 34-3 to 7.

8 Glass, 23T 169-19; Mt. Laurel II, supra, 161 N.J.Super. at 338.

9 Exhibit P-62 at JA-434a.

actually transected the site, eliminating from development its entire corner or 5.27 acres.[1] Additionally, an electrical sub-station has been planned by the Port Authority directly on the site.[2] All of these plans were known or should have been known to the township. Although the township had possession of the right-of-way maps prior to selecting the R-5 site, its planner stated that he didn't even look at them.[3]

Furthermore, the township apparently never cared to find out the location of the proposed station and that it would not be open during the morning rush hour despite the clear note to that effect in the P.A.T.C.O. report.[4] Residents could not, therefore, contrary to the trial judge's mistaken description,[5] use it to get to work.[6] Other stations, open at all times, are also proposed for Mt. Laurel including one at Church Street near ample, vacant residentially zoned land.[7]

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1 Glass, 21T 112-25, 23T 170-15 to 17; Abeles, 10T 36-2 to 5; Exhibit P-31 at JA-260a and Exhibit P-32 at JA-261a.

2 Exhibit P-13 at JA-147a and Exhibit P-31 at JA-260a; Abeles, 10T 33-13.

3 Glass, 23T 113-25, 23T 114-1, 23T 114-21 to 22; Exhibit P-13, Profile MM-16 at JA-147a. Exhibit P-13 at JA-144a is the Technical Studies report for the PATCO hi-speed line which was approved by the Delaware River Port Authority Board (Exhibit P-14 at JA-163a). This report maps the speed line corridors for the expansion of the Port Authority's rail program in South Jersey.

4 Van Eerden, 7T 94-10 to 16; Glass, 23T 113-9 to 10, 23T 114-10. Lambert Van Eerden is the director of the engineering and planning division of the Delaware River Port Authority. 8T 91-18.

5 Mt. Laurel II, supra, 161 N.J.Super. at 338.

6 See Exhibit P-13 at 146a. The mall station is specifically designed and referred to as a "walk-in" station. This indicates that its hours will be limited in order to make it available only through the mall and not for commutation purposes. Van Eerden, 7T 94-2 to 6.

7 Van Eerden, 7T 98-3 to 7; Exhibit P-13, Profiles MM-17 through MM-19 at JA-148a through 153a.

The location of the hi-speed line right-of-way through this site places in question the usefulness of this tract for residential purposes.[1] The township's ignorance regarding the location of the line's right-of-way through the site and the station's inaccessibility to the tract's residents further confirm its bad faith in making the R-5 site selection.[2]

h. Noise Levels: It is undisputed that Interstate 295, industrial-generated traffic and the hi-speed line will cumulatively generate unacceptable noise levels at the site which will make residential development undesireable and financially unfeasible.[3] The speed line alone will generate noise levels greater than those acceptable at a distance of 550 feet and render

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1 Abeles, 10T 65-8 to 11.

2 The township's belated assertions, posited by the planner, that he would request a change in the timetable and a walkway from R-5 to the station are preposterous. In any event, they simply do not negate the problems which exist now and which exist at the time of the site's selection. Glass, 21T 113-1 to 25, 21T 114-1 to 4. The planner testified that he would request a walkway connection from the Moorestown Mall to the R-5 site for the residents of the 60 units similar to the walkway tunnels in Philadelphia which connect the Sheraton Hotel, Penn Center, INA Building and Suburban Station. Glass, 23T 176-19; 23T 177-2 to 4. He admitted that he had no knowledge of the cost of such a corridor and whether the developer would have to incur the expense. 23T 177-10. The trial judge's characterization of his testimony in this regard is incorrect. The planner did not assert, nor did he have a factual basis from which to contend, that ". . . the location of the high speed line . . . route could easily be changed." Mt. Laurel II, supra, 161 N.J.Super. at 339. As previously stated, he contended only that he would request a change. However, no such requests were made either prior to designating the site for R-5 use or prior to trial. Furthermore, no proof whatsoever was or could be offered that these requests, if made, would be treated favorably. Glass, 23T 173-2 to 4. In fact, the present plans have been approved by D.R.P.A. Exhibit P-14 at JA-163a.

3 Abeles, 10T 65-12 to 15.

the site unacceptable.[1]

Even at 550 feet (which encompasses more than the whole R-5 site) dBA levels are significantly higher than that established by accepted standards. This is exacerbated by the frequency of speed-line trains (one every 3½ minutes in either direction over the existing line during the day) and their use throughout the night.[2] Additionally, the noise resulting from I-295 and industrial traffic around the site will increase this problem.

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1 Abeles, 10T 45-2 to 8, 10T 65-12 to 25. It must be noted that the speed line will be at ground or slightly above ground level directly through the site. Talbot, 28T 19-18. Any alleviation of the noise level as described by Talbot, which could be achieved by having the line elevated or below ground is not available on the R-5 site. The D.R.P.A. noise study (Exhibit P-33 at JA-272a, 273a) quantifies the amount of noise produced from the speed line right-of-way, explains the problem created by excessive noise levels and recites standards for residential noise in dBA's:

	Day	Night
Quiet Residential	40-50	35-40
Average Residential	50-65	40-45

This study also indicates the noise levels generated by a two and a six car speed line train at different distances from the right-of-way JA-277a, 278a, 279a):

Distance from R.O.W.	2 car train	6 car train
50 feet	85	90
150 feet	81	88
250 feet	75	82
350 feet	71	80
550 feet	67	78

Peter Abeles testified as to the current federal standards regarding maximum noise levels in residential projects:

Single-Family	-	45 dBA's
Multi-Family	-	55 dBA's

Noise attenuation design is required prior to federal approvals where noise levels exceed 55-65 dBA's. Abeles, 10T 45-17 to 20, 10T 46-6 to 8.

2 Glass, 23T 192-5 to 7.

Nothing can be done to alleviate this noise aside from building very expensive massive structures to absorb the noise.[1] The trial court made no reference to any rebutting fact of this undisputed testimony.

i. Traffic: The traffic problems in and around R-5 are extensive with all proposed access to roads to the site involving major industrial arteries.[2] The township engineer's own letter of June 10, 1976, states that the industrial subdivision, of which R-5 is a part, can only be built at 32% of its capacity before major traffic problems will occur.[3] The trial judge made no finding regarding the fact that the R-5 site was significantly impacted by the traffic generated by the surrounding industrial

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1 All of this is in sharp contrast to the defendant's concerns regarding noise levels elsewhere in the township. The township's PUD ordinance requires 500 foot setbacks and protective measures in the form of screening from major transportation facilities such as interstate highways. Exhibit P-27, Sec. 310, H, 10(k), 1(l) at JA-253a. The P.A.R.C. Ordinance (Sec. 1600.3.5 at JA-212a) requires 100 foot setbacks from arterial roads. Complaints about the speed-line were received by Canterbury Green residents who are over 400 feet from the proposed right-of-way. In response to these complaints, the township requested assurance from P.A.T.C.O., Exhibit P-33 at JA-262a. Yet, no similar request was made regarding the noise levels which will be generated by the line passing through the R-5 site and directly adjacent to residential uses. In fact, the planner did not even review this report in selecting this site. Glass, 23T 194-14 to 17. Only upon cross-examination regarding these noise levels did he think about setbacks for those properties abutting the speed-line and recommended that they be setback at least 100 feet. Glass, 23T 190-4.

2 Abeles, 10T 60-1 to 9.

3 Glass, 23T 199-5 to 18, Exhibit P-65 at JA-437a. Although the planner proferred that the residential traffic would not exacerbate the problem since it would be going in the opposite direction from the industrial traffic, traffic reports specifically analyzing this tract are to the contrary. These reports which were ordered by the township and furnished at the developer's expense state that:

> . . . even at only one-half of the allowable development, it appears that site-generated traffic would result in significant delay and congestion at nearby intersections affecting flow to and from the site and other surrounding areas. Exhibit P-34 at JA-289a; Glass, 23T 202-1 to 20.

uses.[1]

j. Water/Sewer: The trial judge inaccurately recited the township planner's testimony regarding the availability of water and sewer at the R-5 site. The court stated that "existing water and sewer facilities are already in place within a hundred feet and can readily be extended to the district."[2] The admitted or undisputed facts on this record are to the contrary:

1. The site is not now served by water and sewer. Abeles, 10T 31-25.

2. The closest existing main is at least 400 feet away. Glass, 20T 73-19 to 22.

3. In order to connect into that main a pump would be needed to raise the sewage to the level of Fellowship Road and over the North Branch of the Pennsauken Creek.

4. Such an extension of a lateral just for this site with a maximum of 60 residential units would be at an unknown cost. Glass, 23T 209-23 to 24. Practical considerations would therefore require that service await construction of the industrial subdivision.

5. The practical unavailability of water and sewer at the site impacts upon the realistic potential that a developer could obtain state or federal assistance for a proposed development on the site. A developer must have water and sewer facilities in-place or, at least, a binding assurance from local officials that such facilities will be provided prior to obtaining state or federal assistance for a proposed development. Abeles, 10T 64-19 to 25.

k. Timing and Alternative Use: R-5 is the major new site provided by the defendant for low and moderate income housing. It is supposed to serve an "immediate" need in the township for such units. Yet, it is clear

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1 Abeles, 10T 67-17 to 21.

2 Mt. Laurel II, supra, 161 N.J.Super. at 339.

from the above admissions by the defendant that no reasonable estimate can be given as to when this site will be developed, whether it will be developed for "least cost" housing, or in fact, whether it will ever be used for housing. All of the testimony indicates that plans for the R-5 site will realistically develop pursuant to the industrial owner-developer's present plans for its use as: a water retention basin, a hi-speed line right-of-way, an access road to the industrial subdivision and an undeveloped flood plain. All of these uses are permissible in a residential zone. The defendant knew of these facts and that R-5 would not result in any "least cost" units when it selected this site.[1]

2. The R-6 Site: The R-6 zone is a single, seven-acre tract, owned by one person, which was "created for the single purpose of meeting the Supreme Court requirement that there be made available the opportunity

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[1] Question: I thought we were designing units here for present need?

Answer by Glass: Trying to make sites available, yes, sir.

Qeustion: Well, the present need that we are referring to is an immediate need for Mt. Laurel Township for housing for Mt. Laurel residents where they are found to be living in substandard or dilapidated conditions, and paying too much of their income for rent. And you designed three sites to immediately accommodate those people, did you not?

Answer: I designed them so that the owners had the opportunity. If they don't choose to submit a plan, I think it points out one of the weaknesses of relying on zoning to accomplish this type of housing.

Question: One the other hand, it might point out one of the weaknesses on relying on an industrial subdivision, might it not?

Answer: I think the statement is equally applicable to these situations. Glass, 23T 161-5 to 25, 23T 162-1.

to develop 'small dwellings on very small lots' . . ." Mt. Laurel II, supra, 161 N.J.Super. at 339. The total opportunity provided for, as testified to by the township planner, is 30 units.[1] Everyone agreed that this tract, depressed from the road level, has a serious drainage problem which makes it soggy, damp and very difficult, if not impossible to build on.[2] It is undisputed that this site (below the road and damp) must be elevated prior to its development. If the site is raised the necessary three feet, increased costs of developing the site would approximate $10,000 per acre.[3]

Additionally, no water and sewer exists at the site.[4] Glass testified that in his own estimation water and sewer would not be available for five or six years since the availability of these facilities is dependent upon completion of the Larchmont PUD lines and the unlikely possibility that the Larchmont developer would be ordered by the township (no evidence that

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1 Glass, 23T 210-22. Plaintiffs' expert estimated that the maximum potential "on paper" for this site was 40 units. Abeles, 10T 74-9 to 22. If land is set aside for recreational use pursuant to the requirements of the Mt. Laurel Subdivision Ordinance, the potential number of units which could be developed on this site would be significantly less. Abeles, 11T 20-12, 11T 20-17.

2 Talbot, 27T 54-23 to 24; Glass, 23T 213-24, 23T 224-18 to 25; Abeles 10T 73-16 to 21; Davis, 2T 71-7. Builder Davis described the site as:

> . . . a very poor piece of ground. When I investigated and walked the site, . . . it was during the end of the very dry period we had in the beginning of April. I sunk. It was sopping wet, and it's just very difficult, if not impossible, to build on a site like that. 2T 71-3 to 8.

3 Abeles, 10T 76-16 to 24, 13T 30-10 to 17, 13T 32-1 to 23.

4 Abeles, 10T 73-25. Farmers Home Administration regulations normally require water and sewer before subsidizing a project. FmHA Instructions 424.5, Sect. VI; Glass, 23T 223-4 to 14.

he has been or that any developer has ever been) to build mains greater than those required to meet his own capacity needs.[1] Even if this is done, the defendant had no estimate as to what it might cost to bring the lines 1¼ miles from the Larchmont PUD boundary to the R-6 site or whether that is even feasible for a 30-unit project.[2] Despite these facts, testified to by the township's planner and engineer, the trial judge described this testimony as follows:

> Moreover, the site was chosen, . . . partly because of its advantageous location within only a short distance of the proposed southerly extension of water and sewer lines for the Larchmont PUD, thus potentially making these services available to the new district without excessive costs. Mt. Laurel II, supra, 161 N.J.Super. at 340.

This finding is patently wrong.[3] As documented above, the admitted facts do not support it at all.

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1 Glass, 23T 214-7 to 11, 20T 73-1 to 7, 23T 216-17 to 21, 23T 222-11, 23T 217-22 to 25, 23T 219-19 to 25.

2 Glass, 23T 217-15 and 18, 20T 60-8 to 10, 23T 214-25, 23T 215-1; Talbot, 23T 13-1.

3 Furthermore, this site is located in Springville, an admittedly low and moderate, minority concentrated area. Glass, 25T 79-20 to 21; Blackwell, 19T 106-19 to 20; Rabin, 14T 55-19 to 22; Mt. Laurel II, supra, 161 N.J.Super. at 339. Due to this location, it is uncontroverted that the site might have difficulty obtaining federal approvals and assistance. 24 C.F.R. § 880.112; Abeles, 10T 73-11 to 13, 10T 75-19 to 25, 13T 29-12 to 17. Despite Mt. Laurel's planner's affidavit to Judge Martino regarding his plans to review the HUD site-selection criteria, he was unfamiliar with them and did not evaluate the location of the R-6 zone in accordance with those regulations. Glass, 23T 223-17, 23T 224-9; Exhibit P-62 at JA-433a.

The trial judge did not recite this testimony and the uncontroverted difficulty asserted by plaintiffs regarding this site's selection. The trial judge chose instead to assert and rebut the potential impact the development of R-6 might have on the low income, Springville area. Mt. Laurel II, supra, 161 N.J.Super. at 339. Plaintiffs are really not disputing whether or not the development of R-6 for low and moderate income housing will exacerbate the existing concentration of low income persons in this area of the township. Their point is that given ample land in other areas of the township adjacent to on-going residential development and the admitted development problems with this piece of land, it must be asked why this site was chosen.

3. The R-7 Site: The sum total of the trial judge's "critique" of the R-7 site itself (as opposed to the R-7 controls) was a single statement implying that this site was concededly satisfactory.

> As for the R-7 district, its location is really not a matter of controversy because it already constitutes a geographical part of the Larchmont PUD and has been approved as such. Mt. Laurel II, supra, 161 N.J.Super. at 340.

Although plaintiffs offered no testimony regarding the site-conditions of the R-7 zone, the uncontroverted testimony regarding the timing of this development is damning. The township located the R-7 zone in Section VII of the Larchmont Center Section of the Larchmont PUD (Exhibit A of Ordinance 1976-5 at JA-35a). This section is scheduled for development in 1984.[1] Although the PUD timetable can be changed if the township's approval is obtained, this section has always been scheduled for development in the mid-1980's and no attempt has been made to change it by the township.[2]

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1 2 Glass, 23T 232-7 to 10
Glass, 23T 234-6:

EXHIBIT P-57, JA-379a

Page	Date of Schedule	Date of R-7 Development
23T 233-1	March 1970	1983
23T 232-21	March 1974	1985
23T 232-16	June 1976	1984
23T 232-9	May 1977	1984

As with the R-5 and R-6 zones, a site allegedly selected for the purpose of meeting a present need in Mt. Laurel is not ready for immediate development. Section VII of the Larchmont PUD was chosen although over 800 apartment units were scheduled for development prior to this particular section's construction. Glass, 24T 4-21, 24T 3-22, 24T 4-1, 5 and 8.

MAY, 1977
TERRACE APTS.-LARCHMONT PUD
APPROVED DEVELOPMENT TIMETABLE

1976	Vill. I, § 5 and § 6	160 apts.
1978	Vill. II, § 13	215 apts.
1978	Vill. II, § 20-22	268 apts.
1979	Vill. III, § 7	180 apts.

No other section in the Larchmont PUD was given the "opportunity" to build the alleged "least cost" units.[1] Nor were any of the other PUDs in the township given the "opportunity". Only 31 of the 310 units (10%) to be developed in 1984 in Section VII of the Larchmont Center have been made developable, even on paper; only 31 of 2,830 units (1%) projected in all of the Larchmont Center; only 31 of 6,092 (.5%) in all of the Larchmont PUD.[2] These figures speak for themselves as an indictment of the township's bad faith to provide an opportunity for housing for persons of low and moderate incomes.

4. Conclusion: The selection of these three sites evinces manifest bad faith by the defendant to provide a realistic housing opportunity in Mt. Laurel for persons of low and moderate income. The sites allegedly were selected only to provide an opportunity to meet an assessed, immediate need for Mt. Laurel residents only.[3] Yet, none of the sites are realistically developable in the foreseeable future. The R-5 site, the major site selected by the defendant, has to be one of the worst, if not the worst, site for residential development in all of Mt. Laurel. Nor has the defendant undertaken to ascertain additional sites despite a January 13, 1976 affidavit to Judge Martino assuring the court that

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1 It is uncontroverted that the R-7 site and its potential 31 units could not realistically result in least cost units. The practice of the development industry to reduce costs through standardization in planning and construction has been thwarted by the limitation to 31 units. Abeles, 10T 78-2 to 17. Furthermore, a 31 unit project could not be achieved under a federal or state assistance program. Abeles, 10T 79-1 to 23.

2 Glass, 24T 8-18.

3 This decision exposes further defiance of the Supreme Court's regional mandate.

"further studies will be undertaken in the immediate future to identify additional locations."[1] Over 3 years later, the three sites (maximum potential of 131 units), located in areas that are undesireable for early development or for any residential development at all, remain the only "opportunity" provided in the township.[2]

B. The New Zoning Controls In Ordinance 1976-5 Are Not Least Cost, Duplicate Controls, Already Condemned by the Supreme Court and, In Fact, Include Additional Exclusionary and Cost-Generative Requirements Not Found in Any Other Mt. Laurel Land Use Code:

In addition to evaluating the developability of the R-5, R-6 and R-7 sites, the zoning requirements regulating actual construction on these sites must be reviewed. These controls are found in Ordinance 1976-5 and the municipal subdivision ordinance which is specifically incorporated by reference in 1976-5.[3] Aside from criticizing the alleged incentives for the development of the R-7 zone and Sections 1708, 1709 and 1710 of the ordinance, the trial court did not even recite the undisputed testimony, much less make any factual findings, regarding the unduly restrictive requirements of Ordinance 1976-5

1 Glass, 24T 9-4 to 6; Exhibit D-34 at JA-654a.

2 Additionally, none of the sites could be utilized for a state or federally assisted development. All of the parties' experts agreed that the largest number of potential units on any of the sites is 60 at R-5. Both plaintiffs' expert Abeles and defendant's expert Lynch, who are subsidized housing developers in New Jersey, testified that state and federal financing policies require, for feasibility purposes, a minimum of 100-150 units Abeles, 29T 99-9 to 16, 29T 100-12 to 18; Lynch 18T 96-23 to 25, 18T 97-1 to 6, 18T 97-20. Although Mt. Laurel's planner did not like this fact, the uncontested reality, as testified to by these experts and substantiated by HFA's annual report, is that assisted projects must be so packaged. Glass, 21T 34-22 to 25, 21T 55-1 to 4. This factor may be, at this point, inconsequential since plaintiffs contend that none of these sites could be realistically developed for "least cost" housing anyway.

3 Exhibit P-2 at JA-32a and Exhibit P-26 at JA-219a.

which preclude least cost development in these zones. Mt. Laurel II, supra, 161 N.J.Super. at 347-349.

According to the township planner's affidavit to Judge Martino dated October 28, 1975, the controls regulating these new zones were to be designed in accordance with "minimum standards . . . for project sizes, lot coverage, yard areas, parking ratios, setbacks and all of the usual control features found in zoning ordinances . . . with the intent to implement safety, adequate access and open space rather than increase the value."[1] As documented below by the defendant's own admissions, this objective was not achieved. In fact, the planner readily admitted that many of these "new" controls were simply lifted verbatim from the P.A.R.C. Ordinance (R-4 Zone) despite the Supreme Court's specific criticisms in 1975 of the extensive development requirements contained therein.[2]

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[1] Exhibit D-34 at JA-636a; Glass, 24T 11-9 to 25.

[2] Glass, 24T 99-13 to 14, 26T 49-1 to 6; Mt. Laurel, supra, 67 N.J. at 169.

	P.A.R.C. Ordinance at JA-212a	Ordinance 1976-5 at JA-32a
Section	1600.3.4	1705.2.7 and 1705.2.8
	1600.3.5	1705.2.9
	1600.4.1	1705.3.3
	1600.4.2.1 thru 1600.4.2.6	1705.3.4(a)-(f)
	1600.4.3	1705.3.5 and 1705.3.6
	1600.4.6	1705.4.2
	1600.4.8	1705.4.3
	1600.4.9	1705.6.1
	1600.4.11	1705.6.2
	1600.4.12	1705.6.3
	1600.4.13 thru 1600.4.13.5(e)	1705.6.4
	1600.4.15	1705.2.12
	1604.2	1710.1
	1604.3.1	1710.2.1
	1604.3.2	1710.2.2
	1604.5	1710.3

Furthermore, additional provisions, as detailed below, were included which are more exclusionary than those contained in Mt. Laurel's zoning ordinance. It was uncontroverted that the requirements imposed by Ordinance 1976-5, far from reducing the problems and costs of development in Mt. Laurel to provide an opportunity for low and moderate income housing, actually deter least cost and subsidized housing in the township.[2]

1. The R-5 Zoning Controls: This is the zone in which multi-family housing without undue cost generating requirements was to be provided. The undisputed facts below reveal that many of these requirements are more restrictive than those contained in the PUD ordinance, already criticized by the Supreme Court as precluding housing affordable to families with low and moderate incomes.

a) Permitted Uses, Sec. 1705.1: High-rise construction is a prohibited use. During the trial, the defendant's planner agreed that Ordinance 1976-5 should be amended to allow high-rise construction in the R-5 zone.[3] No reference was made by the trial court to that admission.

b) Density, Sec. 1705.2.1: The Ordinance provides for a maximum density of ten units per acre irrespective of the unit type.[4]

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2 Glass, 24T 11-9 to 24; Exhibit D-34 at JA-636a.

3 Abeles, 10T 124-21 to 23, 10T 87-9 to 12.
Glass, 24T 27-17. Glass said that:

> I would be perfectly agreeable to amend the ordinance for that because when I wrote it my knowledge was based on insufficient facts. I have since updated my knowledge and I agree that the ordinance should permit the high-rise structures. Glass, 24T 27-20 to 24.

4 Abeles, 10T 93-19 to 23. Plaintiffs' expert testified that if all of the units were 3-bedroom dwellings, a maximum of 10 units per acre might be an appropriate limitation. However, if the dwellings are efficiencies or 1 and 2-bedroom units, there is no health, safety or general welfare reason to limit the density to 10 units. Abeles, 10T 93-4 to 14, 10T 93-19 to 23.

The PUD ordinance, while limiting the PUD's net density to 6 units per acre (already criticized by the Supreme Court), permits 16 units per acre on the site of a two-story development, 20 on the site of a three story, and so forth.[1] No reason was given for further restricting the density in the new zones.[2] It should also be noted that the ordinance provides that the ten units per acre is a maximum and will "not automatically be granted". No other ordinance in the township contains this provision.[3] It gives the defendant tremendous discretion with which to barter with a developer. This section also requires a minimum of 2000 square feet of lot area per bedroom.[4] No other ordinance contains this requirement.[5] No reference was made to these facts by the trial judge.

c) Height Limitation, Sec. 1705.2.5: This section limits the height of a unit to 35 feet which serves as a practical matter to limit construction to two stories.[6] No basis was given for this requirement. In fact, Mt. Laurel's planner admitted that he intended that three-story structures be permitted.[7] Yet, nothing was done to correct this "error".

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1 Glass, 24T 18-16 to 21; Exhibit P-27 at JA-250a.

2 Glass, 21T 156-6.

3 Glass, 24T 14-10.

4 Glass, 24T 14-16. This requirement, which would permit 21 one-bedroom apartments per acre, is inconsistent with the 10 per acre maximum. Abeles, 10T 88-5 to 13. If the defendant is going to establish a maximum relationship between the number of occupants per acre and the lot area, it must be reasonably related to the maximum number of units per acre. Under this scheme, 16 units per acre would be more reasonable. Abeles, 10T 88-13 to 19.

5 Glass, 24T 14-19 to 21.

6 Abeles, 10T 94-6 to 9.

7 Glass, 21T 43-2 to 13.

Given the fact that a three-story building may range anywhere from 37 to 45 feet,[1] a three-story maximum would be sufficient and preferable to this unworkable footage limitation and readily permit a developer the cost savings derived from constructing a three-story versus a two-story structure.[2] No reference was made to these facts by the trial judge.

d) Units per Structure, Sec. 1705.2.6: This section limits the development of garden apartments to twelve units in a building. Townhouses are limited to eight units in a row.[3] Although the PUD's presently permit and contain attached garden apartments of sixteen units and the township planner permitted sixteen in his West Lampeter and East Petersburg ordinances, no reason was given the for the restriction here.[4] The township planner admitted that he would amend this ordinance to permit fourteen units per structure in these new zones as well as in the rest of the township.[5] This was not done. No reference was made to these facts by the trial judge.

e) Perimeter Building Setback, Sec. 1705.1.7: This section, incorporated verbatim from the P.A.R.C. Ordinance, Section 1600.3.4, requires that every building be setback 75 feet from the project's property line. Yet, the township planner required only a 25 foot set back in the East Petersburg Ordinance,[6] and there is no such provision in the PUD ordinance. Such a restriction is patently unnecessary and cost generative.[7] There are no health and safety standards which would justify the separation of

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1 HUD recommends 40 feet for a three-story structure. Abeles, 10T 95-2 to 5.
2 Glass, 24T 15-14; Abeles, 10T 94-9 to 20.
3 Glass, 24T 28-19.
4 Glass, 24T 32-18, 24T 30-22 and 25; Exhibit PI-21 at JA-520a and Exhibit PI-22 at JA-534a.
5 Glass, 26T 53-13 to 17.
6 Glass, 24T 36-1; Exhibit PI-22 at JA-534a.
7 Abeles, 10T 95-12 to 18.

buildings by such a distance.[1] No reference was made to these facts by the trial judge.

f) Perimeter Paved Area Setback, Sec. 1705.2.8: This section, taken from the P.A.R.C. Ordinance, Section 1600.2.3, requires a 50-foot setback from the perimeter to a paved or unpaved area.[2] This provision essentially requires a wide landscaped or grass area surrounding the property.[3] This restriction does not appear in the PUD or general zoning ordinance. It was undisputed that there is no planning reason for such a substantial setback.[4] No reference was made to these facts by the trial judge.

g) Street Setbacks, Sec. 1705.2.9: A 100-foot setback from a public street is required. The township planner admitted that this requirement, lifted from the P.A.R.C. Ordinance, Section 1600.3.5, was included in error here.[5] He testified that this provision as it appears here and in the P.A.R.C. Ordinance should be amended.[6] He admitted that he did not know what minimum, if any, would be consistent with health and safety considerations.[7] However, he did require only a 25-foot setback in the East Petersburg ordinance.[8] No mention of these facts was made by the trial judge.

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1 Abeles, 10T 95-18.
2 Glass, 24T 45-23 to 25.
3 Abeles, 10T 95-20 to 24.
4 Abeles, 10T 96-1.
5 Glass, 21T 157-12 to 13.
6 Glass, 24T 47-13 to 15.
7 Glass, 24T 48-7.
8 Exhibit PI-22 at JA-534a. The cumulative effect of these excessive setback requirements (e,f, and g) is to raise costs, reduce the amount of space eventually left for the building, and compact the actual project which may have a direct effect on the quality of the design and life within the project. Abeles, 10T 96-11 to 20; See exhibit P-32 at JA-261a.

h) Landscaped Buffer, Sec. 1704.2.11: On its face, this section requires a 75-foot landscaped buffer of 12-foot trees if the development is adjacent to more than three residential units.[1] No similar provision is included for any other residential zone. The PUD ordinance requires only a 20-foot buffer around apartment areas, and these can consist of grass or trees.[2] The township planner only required 15-foot buffers in West Lampeter's and East Petersburg's ordinances.[3] In his deposition he readily admitted that 15 to 20 feet is the maximum buffer that should be required from a developer due to the substantial cost of this provision.[4] Unable to provide a reason to justify the 75-foot requirement here, he admitted on cross-examination that he didn't intend to require a full 75 feet of landscaping. Rather, he intended to require only a double row (15 feet) of trees with the remainder of the area (60 feet) vacant.[5] Yet, nothing was done to change this provision. No mention of this was made by the trial judge.

i) Parking Setback, Sec. 1705.3.2: Parking must be 25 feet from any building. This requirement is not included in the PUD ordinance where parking, as illustrated in the exhibit of a section of the Larchmont PUD, is adjacent to the building.[6] The township planner admitted that the PUD parking setbacks are consistent with any health and asfety considerations; a fortiori, this provision of Ordinance 1976-5 is excessive.[7] No reason was given for the excessive requirement here. This fact is also not mentioned by the trial judge.

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1 Glass, 24T 42-16.
2 Exhibit P-27, Section 310, C, 2(14) at JA-250a.
3 Glass, 24T 41-15; Exhibit PI-21 at JA-521a and Exhibit PI-22 at JA-535a.
4 Glass, 24T 38-14 to 25, 24T 39-1 to 2.
5 Glass, 24T 43-11 to 18.
6 Exhibit D-77 at JA-719a; Abeles, 10T 98-6 to 13.
7 Glass, 24T 55-1 to 2.

j) Parking Spaces, Sec. 1705.3.1:

Bedrooms	Number of Parking Spaces Required
1	1
2	1 3/4
3	2 1/4
4	2 3/4

This is another control unique to Ordinance 1976-5.[1] There isn't any similar PUD requirement. The township's general zoning ordinance (§ 1101.1 at JA-207a) requires only five parking spaces for every three multi-family units or an average of 1 2/3 spaces per unit. Furthermore, accepted senior citizen parking requirements are much less as readily admitted by the township planner.[2] In fact, he testified that he would amend Ordinance 1976-5 to permit .5 parking spaces per senior's unit.[3] Additionally, the 10 x 20 foot parking bays are excessive for residential parking purposes.[4] No similar restriction is required by the PUD ordinance. HUD minimum property standards require only eight foot wide parking bays.[5] These facts and admission are not mentioned by the trial judge.

k) Green Area, Sec. 1705.4.2: This provision is also adopted verbatim from the P.A.R.C. ordinance, Section 1600.4.8, which requires

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1 Glass, 24T 49-23.

2 HUD minimum property standards require only .5 parking spaces per senior's unit. Abeles, 10T 97-19 to 21. The New Jersey HFA requires only 1/3 parking space per senior's unit. Abeles, 10T 97-21 to 22.

3 Glass, 24T 50-4 to 9. The township planner included such a requirement in the Cherry Hill zoning ordinance.

4 Abeles, 10T 97-23 to 25.

5 Abeles, 10T 98-18 to 20.

that 50% of the development's gross area be devoted to green area.[1] The PUD ordinance requires only 20% be used as green area.[2] No reason was given for the excessive requirement here. No mention is made of this by the trial judge.

l) Recreational Area, Sec. 1705.4.3: This section, also adopted from the P.A.R.C. ordinance, Section 1600.4.8, requires that 15% of the open area shall be passive outdoor recreation area and 10% active recreation area. This provision is not included in the PUD ordinance and is even greater than that required in the defendant's subdivision ordinance.[3] There is no reason for this requirement especially in small scale residential developments.[4] Senior citizens' projects would not even need active recreational space.[5] No mention of these facts is made by the trial court.

m) Lighting for Streets, Sec. 1705.6.2: This provision has been incorporated intact from the P.A.R.C. ordinance, Section 1600.3.11. It is not required in the PUD or general ordinance.[6] No mention of this fact is made by the trial judge.

n) Private Garbage Collection and Snow Removal, Sec. 1705.6.3: This requirement also appears in the P.A.R.C. ordinance, Section 1600.4.12. No such provisions have been included in the PUD or general ordinance. It's effect is to raise costs by requiring the provision of these services which are regularly provided by the township.[7] No mention of this fact

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1 Glass, 24T 50-23 to 25.
2 Exhibit P-27, Sec. 310, H, 13(c) at JA-254a.
3 Exhibit P-26, Sec. 502.14 at JA-235a.
4 Abeles, 10T 101-11 to 14.
5 Abeles, 10T 101-18.
6 Exhibit P-27, Street Requirement at JA-252a and JA-253a; Exhibit P-25 at JA-179a.
7 Abeles, 10T 103-1 to 25, 10T 104-1 to 5.

is made by the trial judge.

o) Aesthetic Reviews, Sec. 1705.6.4: This requirement subjects a proposed development to an aesthetic review. No reason was provided justifying this purely cost generative control on the R-5 zone. It was undisputed that this provision will increase costs by requiring variations in colors, shapes, size and materials; delay procedural reviews of proposed projects pending a consensus on its "aesthetic harmony"; and add to the overall uncertainty in the development process.[1] No mention of this fact is made by the trial judge.

p) Conclusion: As clearly indicated from the above, the constraints imposed on the R-5 zone exceed even those requirements set forth in zones previously condemned by the Supreme Court. This ordinance does not evince any attempt by the defendant to effect minimal controls consistent with health and safety and to provide a realistic opportunity for least cost units.[2]

2. The R-6 Zoning Controls: The R-6 zone provides for single-family detached dwellings. The controls contained in Ordinance 1976-5 for this zone exceed minimum standards for the protection of the public's health, safety and general welfare.

a) Application of Other Township Ordinances, Sec. 1706.4: All of the provisions of the subdivision ordinance are, without change, applicable by reference to the R-6 zone.[3] Furthermore, non-conflicting control provisions of the R-5 zone, including all of the setback and other requirements detailed above, also apply to this zone.[4] These controls reduce the number of units

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1 Abeles, 10T 104-20 to 23, 10T 105-1 to 4.
2 Abeles, 10T 108-2 to 5.
3 Exhibit P-2, Sec. 1705.9 and 1706.4.1 at JA-34a.
4 Abeles, 10T 13-7; Exhibit P-2, Sec. 1706.4 at JA-34a.

from the 40 units hypothesized by plaintiffs' expert, to approximately 30 units which could potentially be developed on the R-6 site.[1] The trial court ignored these facts.

b) Permitted Uses, Sec. 1706.1: Only detached single-family uses are permitted.[2] Semi-detached dwellings, duplexes, mobile homes and mobile home parks, which are compatible with single-family districts, are excluded.[3]

c) Lot Size, Sect. 1706.2.1: The minimum lot size permitted is 6000 square feet. The township planner readily admitted that 5000 square feet would in fact be an acceptable minimum. Yet, he still required 20% more acreage than necessary.[4] The trial court ignored this fact.

d) Interior Floor Space: No minimum floor space requirements have been imposed on single-family houses in this zone. The township planner stated that minimum floor space requirements are unnecessary, that market forces should dictate house size and that he will recommend the elimination of floor space requirements in all residential zones throughout the township.[5] Despite this definitive testimony, nothing has been done

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1 Abeles, 11T 20-12 and 17.

2 Glass, 21T 52-1.

3 Abeles, 10T 108-13 to 18.

4 Glass, 22T 32-15 to 18, 24T 56-25, 24T 57-1 to 3. Plaintiffs' expert also argued that 5000 square foot lots were acceptable minimums consistent with public health, safety and welfare. Abeles, 10T 110-21 to 25, 10T 111-1 to 4, 10T 113-14 to 17.

5 Glass, 24T 57 and 24T 58. His cross-examination testimony regarding minimum floor space requirements follows from 24T 57 and 24T 58:

> Question: Now, let me read you a section from your deposition and ask you whether you still agree to that. Page 74, I asked you, in Ordinance 1976-5 did you provide for any interior floor space requirement in the developing units that were built and your answer no. It has no requirements whatsoever.

(footnote continued on next page)

by the defendant to remove this admittedly unnecessary contraint from the other residential zones throughout the township.

e) Parking Sec. 1706.3.1: This provision requires one 10' x 20' parking bay. No other single-family zone in this township requires a bay of this size. It was uncontroverted that this requirement is more appropriate for commercial parking purposes and is unnecessary for

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(footnote 5 continued from previous page)

Question: Why doesn't it?

Answer: Because I felt it was unnecessary to set up a regulation as to minimum floor space.

Question: Why do you feel it is unnecessary?

Answer: Because first of all, the courts have said it is not proper to regulate the size of the unit and I agree with them. Secondly, I think the free market forces will take care of that situation itself. It is just to the point where a developer is not going to build a unit so small he can't market it. Nor is he going to build it so large that again he can't market it. The market itself will provide the factors necessary to bring about the correct size of the unit. Is that your testimony?

Answer: Yes. I concur with that.

Question: Have you recommended to the Township of Mt. Laurel they eliminate minimum floor spaces that now appear in the various residential ordinance?

Answer: I will do so when the time comes. That's definite.

Question: You have not done so to date?

Answer: We haven't had an opportunity to modify the existing zoning ordinance of the township in that regard. I would hope that in a short while we will get into complete overhaul and I will definitely recommend the elimination of any minimum floor sizes on houses.

residential parking.[1] The trial judge ignored this fact.

3. The R-7 Zoning Controls: The trial judge's findings regarding the mechanics of the R-7 zone are confused and erroneous. As previously discussed, the zone was designated by the defendant as one part (10%) of one section (Section VII) of one PUD (Larchmont) to be developed at the option of one developer (Orleans).[2] The township planner stated that the township chose at this time "to take a cautious approach" and to specifically zone only one section of the Larchmont PUD.[3] Although he admitted that it was totally possible to go ahead and rezone entirely the PUDs to permit the development under the R-7 controls, of 10% of all of the units, this was not done.[4] He stated that the township was in "absolute agreement" that other areas would not be made available for such development until the three sites designated in Exhibit A of Ordinance 1976-5 were filled.[5]

The trial judge appeared to have understood these facts in making its initial comments regarding the location of R-7 in the Larchmont PUD.[6]

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1 Abeles, 10T 112-18 to 25.

2 Exhibit A of Ordinance 1976-5 at JA-35a; Glass, 23T 232-7 to 10. Exhibit A of Ordinance 1976-5 provides:

> R-7 ZONING - MULTI-FAMILY DISTRICT
>
> Ten (10%) per cent of all units to be constructed in the Larchmont PUD in Larchmont Center Section VII may be constructed subject to the provisions of Section 1707 et seq. of this Ordinance entitled R-7 Multi-Family district.

3 Glass, 23T 77-18 to 23.

4 Glass, 23T 76-5 to 10.

5 Glass, 23T 76-4 to 15; 23T 70-4 to 9.

6 Mt. Laurel II, supra, 161 N.J.Super. at 340.

However, later in the opinion, despite the specific language of Ordinance 1976-5 designating this zone in one specific site, the township planner's definitive testimony regarding the location of R-7 in one section of one PUD and the trial judge's own previous description of R-7, the lower court erroneously states that R-7 is a floating zone which "may be invoked by any PUD developer who elects to build thereunder."[1] A review of the testimony in this regard will clarify for this Court the nature of the R-7 zone and clearly indicate that the trial judge was wrong in making this statement.[2]

R-7 is not a floating zone over all of the PUDs in Mt. Laurel. It applies only to Section VII of the Larchmont PUD (up to 10% of the total

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1 Mt. Laurel II, supra, 161 N.J.Super. at 347.

2 The township planner's testimony is clear, 23T 75-17 to 25, 23T 76-1 to 15:

Question: Certainly you could have said for the PUD's they are all zoned R-7 and take 10% of the units, and we will use the zoning controls of Ord. 1976-5; we are only going to accept a certain number a year. Could you or couldn't you have done that?

Answer: Well, I can't answer that yes or no because when you actually come down to writing an ordinance, what you could do in one sense is simply not practical or not done in another.

Question: Why isn't it practical?

Answer: I have not finished with the answer yet. It is totally possible to go ahead and rezone the PUD's in the manner that you suggest.
Our problem is we didn't want to get too heavy-handed or off in the wrong direction before we knew what was going to happen.
Now, if it should in fact be evident that the R-7 zone is extremely reliable and viable as a technique, then I would go ahead and zone more land in the PUD or make the option available, let's say, in the PUD's.

number of units (310) to be built in that section). Incentives are given on paper (Exhibit D of Ordinance 1976-5) which waive certain PUD conditions if the developer chooses to develop those 31 units pursuant to Ordinance 1976-5.[1] Prior to a specific analysis of these alleged incentives for the development of R-7, the following omissions from the R-7 controls are noteworthy:

a) No Developer Guarantee: The ordinance doesn't require the developer to do anything if he takes "advantage" of the waiver; that is, there is no quid pro quo.[2] There is no requirement that the builder actually built "least cost" housing[3]. The township planner admitted that such a guarantee could have been provided by simply stating in the ordinance that the builder taking advantage of the R-7 controls must demonstrate that least cost units will be built or the original zoning controls will be re-instituted.[4] The trial judge ignored this fact.

b) No Change in PUD Ordinance and Conditions: Nothing was done to amend the PUD ordinance itself.[5] The "incentives" only relate to some of the PUD tentative approval conditions.[6] Numerous provisions of both the PUD ordinance and conditions, specifically condemned by the Supreme Court, were not changed even in this "zone".[7] Even those "waivers" contained in Exhibit D of Ordinance 1976-5 for the R-7 zone were not applied PUD-wide in disregard of the Supreme Court's opinion and the township planner's admission that he would have no objection to eliminating those conditions "which are

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1 Glass, 24T 71-17.
2 Glass, 24T 71-3 to 10.
3 Glass, 23T 84-1.
4 Glass, 23T 85-6.
5 Glass, 24T 82-16.
6 Glass, 24T 82-20 to 21.
7 Glass, 24T 82-1 to 3.

standing in the way of having these PUD units count for least cost or low or moderate income units."[1] The trial judge disregarded these facts.

c) Conditions Waived are Illegal or Not Incentives: The conditions "waived" are waived for only this one part of one section of the Larchmont PUD designated as R-7.[2] They are not waived for the PUD as a whole.[3] The waiver of these conditions absolutely does not provide any incentive. They are, in fact, speciously set forth to provide the appearance that something significant has been waived.

(1) Waivers 1, 2, and 3 in Exhibit D relate to the waiver of conditions restricting bedrooms and school age children.[4] These restrictions were declared patently illegal by the Supreme Court. Mt. Laurel, supra, 67 N.J. at 168, 182-83. Accordingly, the trial court determined that "(h)aving been declared void they cannot be regarded as part of the zoning ordinance and their 'waiver' is a futile act." Mt. Laurel II, supra, 161 N.J.Super. at 347.

(2) In regard to the other "waived" conditions, the trial judge stated that:

> (T)he other conditions listed as "removed" do set forth a number of the "cost-generating" requirements criticized by the Court. Their removal would seem to have the potential effect of reducing or conserving development costs. Mt. Laurel II, supra, 161 N.J.Super. at 348.

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1 Glass, 22T 25-12 to 16, 24T 73-13; Abeles, 10T 117-12 to 16; Mt. Laurel, supra, 67 N.J. at 167-68.

2 Glass, 24T 72-14, 24T 73-13, 21T 53-9 to 12; Mt. Laurel II, supra, 161 N.J.Super. at 347.

3 Glass, 23T 77-18 to 23.

4 Glass, 24T 72-23. The township planner stated that he would recommend that these three conditions be deleted for all of the PUDs. Glass, 24T 74-11 to 17.

This is patently incorrect. The waiver of the other five conditions may appear to provide the Larchmont PUD developer with cost-savings; however, even a casual examination of the admitted facts reveals that these provisions do not waive anything which is relevant to the actual development of the R-7 zone. The trial judge knew this, yet made no reference to it.

Specifically, Waiver 5 ostensibly relieves the developer from the requirement that two ambulances be donated to the township. Exhibit D of Ordinance 1976-5. Yet, the ambulances are due to be donated on June 3, 1977 and June 3, 1982.[1] Therefore, they will already have been donated to the township by 1984 or 1985 when the R-7 site is scheduled for development.

Waivers 4, 6 and 7 concern open space in the PUD. Larchmont, however, has already donated all of its required open space to Mt. Laurel.[2] Likewise, the requirement that a non-profit association manage the open space has already been waived for the entire PUD.[3] Thus, as the township planner himself conceded, these waivers do not provide any incentive to develop R-7.[4]

Number 8 "waives" the requirement that single-family houses <u>in this section</u> be limited to three units per acre.[5] However, no single family houses are even scheduled for this section.[6] Furthermore, no section of any PUD contains a mixture of single and multi-family dwellings.[7] Therefore,

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1 Glass, 24T 80-8 to 20; Exhibit P-57, Resolution 74-R-129 at JA-385a.
2 Glass, 24T 76-1 to 7.
3 Glass, 24T 76-21 to 24.
4 Glass, 24T 76-13 to 15.
5 Glass, 24T 77-3.
6 Glass, 24T 77-6; Exhibit P-57 at JA-408a.
7 Glass, 24T 77-12 to 15.

this waiver could never act as an incentive even if made applicable to the entire PUD.[1]

In short, these "waiver" provisions, if not unconstitutional, are illusory and, perhaps, intentionally deceptive. No attempt was made to eliminate those conditions, such as donations for libraries, cultural centers, etc., which were specifically criticized by the Supreme Court.[2] Nothing is really being offered by the defendant. Worse, nothing is even being required of the developer in return if he elects to accept the "waivers". Nothing begets nothing.

4. Other Provisions of Ordinance 1976-5: The trial court declared the control provisions set forth in Sections 1708, 1709 and 1710 illegal and invalid. Mt. Laurel II, supra, 161 N.J.Super. at 348-349. The defendant has not appealed from these findings.

a) 1708 Control Provision: Perhaps nowhere else was the defendant's attitude so clearly exposed. This provision reveals the defendant's intent to do nothing, irrespective of the Supreme Court's order, unless other township's also build low and moderate cost housing. Essentially, the township brazenly and openly stated that it would continue to act illegally if other townships do not provide a "fair share".[3] Finding this to be in wanton disregard of the Supreme Court order, the trial court declared the

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1 Glass, 24T 78-1 to 2.

2 Glass, 24T 82-1 to 3; Mt. Laurel, supra, 67 N.J. at 167-68. It is interesting to note that the defendant did not remove the condition requiring the Larchmont developer to pay $750,000 for educational facilities. Such a waiver might provide more of an incentive to build the 31 least cost units than the alleged savings here on two ambulances. Abeles, 10T 167-15 to 21.

3 Glass, 24T 97, 24T 98-1 to 23.

provisions of § 1708 "void in toto".[1]

b) 1709 Studies: Numerous studies are required to be prepared by a "least cost" developer. None are required in other zones.[2] This creates a tremendous "front-end" expense which impacts on costs and thereby inhibits potential development.[3] Accordingly, the court below declared this provision void stating:

> That these requirements are onerous, difficult with which to comply, and excessively cost-generating is, to put it mildly, an understatement. The provisions fly directly in the face of the Supreme Court's directive that high-density zoning be provided without artificial and unjustfiable minimum requirements. The requirements are illegally and unconstitutionally discriminatory, are of highly questionable utility, and a

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1 Mt. Laurel II, supra, 161 N.J.Super. at 348. Although the court declared all of the control provisions of § 1708 invalid, it did not discuss all of them. In brief, plaintiffs criticisms of these sections are as follows:

The priority list established in 1708.3 is meaningless. Given the fact that only three potential developers exist, there is no real competition anyway. All of these developers will naturally seek to maximize their profits with no opportunity provided for the construction of subsidized housing. Abeles, 10T 121-1 to 3.

The limitations on authorizations for "fair share" units (1708.2) and on the acceptance of applications for these units (1708.4) are ludicrous and will act to constrain development. Abeles, 10T 120-1 to 13. There is no reason to limit these applications or authorizations. The Cross Keys' PUD experience is an important illustration of what may in fact occur under this system. Although this PUD was authorized in 1969, it was not pursued by the developer. Glass, 24T 94-20, 24T 94-22. On May 1, 1978, the township declared the tentative approvals for the Cross Keys PUD null and void and re-instated the original industrial zoning for that tract. Resolution 78-R-96, Brief Appendix at 31a. Similarly, an applicant for "least cost" housing could get an approval, hold it indefinitely and build nothing while foreclosing all others under § 1708 from applying or getting authorizations. A limit on the number of least cost units built, if any, may be provided by the township at the building permit stage rather than on the number of authorizations. Glass, 24T 95-24.

2 Glass, 24T 84-22 to 24.

3 Mt. Laurel II, supra, 161 N.J.Super. at 348.

violation of the letter and the spirit of the Supreme Court's mandate. They must likewise be declared void. Mt. Laurel II, supra, 161 N.J. Super. at 348.

c) 1710 Bonding: Although the trial court did not address specifically the content of this provision, it specifically declared this bonding requirement invalid as having a serious and adverse effect on Ordinance 1976-5 as compliance with the Supreme Court's directive.[1] The defendant at trial admitted that a specific provision should be incorporated into Mt. Laurel's ordinance eliminating duplicate bonding where a state or federal agency also requires bonding.[2] This was done by the defendant's planner in Cherry Hill and other towns.[3] He stated that if this ordinance is rewritten, he would amend it accordingly.[4]

C. Necessary Incentives and Assurances Were Not Included to Insure the Production of Least Cost Units:

The record is clear, as detailed below, that there are substantial disincentives to building "least cost" housing under Ordinance 1976-5 and few positive incentives. In fact, the defendant admitted that Ordinance 1976-5 provides no controls or guarantees to insure that a developer will even build at "least cost" in the new zones.[5] The township planner agreed that the township could simply have required, as a viable means of insuring least cost development on these sites, a reversion to original zoning upon

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1 Mt. Laurel II, supra, 161 N.J.Super. at 348.
2 Glass, 21T 57-1 to 11, 22T 125-1 to 4, 24T 85-21
3 Glass, 24T 86-17 to 21.
4 Glass, 21T 57-8 to 10.
5 Glass, 23T 84-1; Abeles, 10T 18-14 to 7.

a developer's failure to agree to build at least cost.[1] Essentially, the township could have guaranteed that only bona fide least cost developers could take advantage of the "least cost" zones.

Other zoning techniques available to the defendant were also not utilized.[2] The most obvious is the floating zone whereby all, or a substantial part of the township could have been made available for "least cost" housing on a first-come basis.[3] The township could insure least cost units were developed by requiring guarantees or covenants based on a reversion of the land to its prior zoning if "least cost" housing was not designed.[4] The benefits of providing a "least cost" floating zone are that:

1. Numerous potential developers have an opportunity to choose to build low and moderate income housing;

2. Developments can be scattered throughout a the township;

3. Location is determined by operation of the market place;

4. True competition exists minimizing inflation costs which result from a monopoly situation; and

5. "Least cost" developers may reduce costs by buying less expensive land zoned for low density development (R-3) and developing it at higher densities.

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1 Glass, 23T 85-6.

2 Abeles, 10T 12 and 10T 13.

3 Abeles, 10T 13-1.

4 Glass, 23T 84-1. The municipality could retain control of the total number of units constructed by limiting the number of building permits issued. Glass, 23T 85-6 to 18.

Although the defendant has successfully used the floating zone mechanism in implementing the PUD ordinance and has approved thereunder 10,000 units, the township planner testified that he had been instructed by the town council to reject floating zones for least cost development and to zone specific sites.[1]

Additionally, the defendant did not provide for density bonuses despite the planner's use of this technique in two other townships (West Lampeter and East Petersburg, Pa.) to encourage landscaping and covered parking.[2] In fact, the township rejected outright its own planner's recommendation that this technique be used.[3]

D. Non-Least Cost and Cost Generative Requirements of the Original Zoning and Subdivision Ordinances Have Been Retained Which Preclude Least Cost and Subsidized Housing:

This is admitted. None of Mt. Laurel's exclusionary land use controls have been changed aside from the adoption of Ordinance 1976-5.[4]

1. The Original Zones: All of the original zones remain in tact regulating the development of virtually the entire expanse (99.84%) of the

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1 Glass, 23T 65-21 to 23, 23T 60-15 to 23, 23T 62-1 to 2.

2 Glass, 22T 48-10 to 25; Exhibit PI-21 at JA-522a and Exhibit PI-22 at JA-535a.

3 Glass, 22T 49-17 to 24, 22T 49-9 to 10.

4 Glass, 20T 136-3 to 4.

township under exclusionary controls.[1] Little need be said regarding these controls. The initial trial court and the Supreme Court have already ruled definitively as to their unconstitutionality. Extensive factual findings and legal conclusions have already been made.[2] The fact relevant to this appeal is that these zones and their controls remain fully in tact today despite judicial rulings that many of these provisions are per se invalid. Plaintiffs do not argue that all of Mt. Laurel's zones must be at least cost controls. However, when virtually 50 percent of the regional population cannot afford housing which contains any excessive requirements, Mt. Laurel may not dictate that over 99% of its development be built pursuant to these extensive, unnecessary controls.

2. Industrial Overzoning: Industrial/commercial overzoning remains unchanged. The Supreme Court specifically criticized Mt. Laurel's zoning for 4,121 acres of industrial use (2,800 acres more than in 1954).[3] In the trial below Mt. Laurel attempted to disguise its failure to reduce its excessive industrial overzoning by asserting that the 4,121 figure was wrong and that only 2,545 acres were zoned "industrial".[4] Its argument is specious. The 4,121 figure used in the first trial referred to all

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1 Exhibit P-35 at JA-307a.

2 R-1, 2 and 3: See Mt. Laurel, supra, 67 N.J. at 164. R-1D: See Mt. Laurel, supra, 67 N.J. at 165. R4 (P.A.R.C.): See Mt. Laurel, supra, at 168-169. PUD: See Mt. Laurel, supra, 67 N.J. at 166-168. General Controls: See Mt. Laurel, supra, 67 N.J. at 181-185.

3 Mt. Laurel, supra, 67 N.J. at 162. The township planner in the first trial stated that there were 4,300 acres zoned for industrial (non-residential uses. 4T 42-2 (of first trial). The Supreme Court figure is the result of subtracting developed land.

4 Exhibit D-37 at JA-660a.

non-residentially zoned land with the exception of neighborhood business zones.[1] The 2,545 figure used by Mt. Laurel's planner in the second trial refers only to land actually zoned "industrial". He admitted that it omits land zoned commercial, major commercial, neighborhood commercial and business and all non-residential uses in the PUD's.[2] Exhibit D-37, offered in support of this contention, gives the appearance that all non-industrial land is residential. This is false. The fact is that Mt. Laurel's non-residential zoning has actually increased since the first trial with the township's rescission of its approval of the Cross-Keys PUD.[3] That land now reverts back to its original industrial designation increasing industrially zoned vacant land by 160 acres.[4]

3. The Sub-division Ordinance: One major legal issue, regarding the original zoning, has been raised by the second trial court opinion; that is, whether Mt. Laurel's subdivision ordinance must be amended for total compliance with the Supreme Court mandate.[5] This issue is addressed in the legal argument infra. Certain factual matters are relevant to that analysis and are therefore discussed here.

Mt. Laurel's subdivision ordinance has always been challenged by the plaintiffs with the parties contesting issues relating to it in both trials.[6] Extensive testimony was heard regarding this ordinance which

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1 See Mt. Laurel, supra, 67 N.J. at 163.

2 Glass, 20T 38-8, 20T 140-5 to 7, 24T 137-8 to 14, 24T 137-20.

3 Township Resolution 78-R-96 appended here at 31a.

4 Exhibit P-56 at JA-372a.

5 Mt. Laurel II, supra, 161 N.J.Super. at 349.

6 This ordinance was admitted into evidence at both trials. It is Exhibit P-15 at JA-187a of the first trial and Exhibit P-26 at JA-219a of the second trial. Extensive testimony on the ordinance was heard in both cases. In the second trial the testimony of the plaintiffs, plaintiff-intervenor and the defendant experts addressed this ordinance.

regulates all residential development in Mt. Laurel including that in the new R-5, 6 and 7 zones.[1] The subdivision controls are and have been a crucial part of the case of both plaintiffs and the plaintiff-intervenor in that these controls are as impactful on costs as are those set forth in the zoning ordinance.[2] The plaintiff-intervenor's project clearly illustrates this impact. The uncontroverted proofs reveal that the plaintiff-intervenor incurs an additional per unit cost of $3,855 if he is required to construct

1 In fact, application of its provisions to the R-6 site reduces the number potential units from the hypothesized 40 units which could be built at this location. Abeles, 10T 13-7, 11T 20-17.

2 The interrelationship of development standards set forth in a municipality's zoning ordinance, building codes and subdivision regulations (including site design regulations) was analyzed by the National Commission on Urban Problems in its report, Building the American City. This Report acknowledged that housing costs were impacted by all types of land use restrictions, be it building code, zoning or subdivision ordinances. Specifically, the Commission determined that subdivision controls could be unduly cost-generative and exclusionary. The report stated:

> Land improvement costs are becoming an increasingly important part of housing costs. Zoning, as discussed above, affects such costs by determining the number of linear feet of various improvements which are required to serve a given house. Subdivision regulations determine the precise specifications of such improvements, as well as the amount of land within a subdivision which can actually be devoted to housing. The more expensive these requirements are the greater the cost of housing.
>
> Subdivision regulations differ widely from locality to locality. By demanding higher quality improvements, a jurisdiction can effectively increase the cost of housing and thereby exclude a greater number of potential home buyers from the market. Building the American City, p. 216.

The Report further noted that "Many of the standards now incorporated into subdivision regulations are based on tradition or whim rather than on information about actual needs and the performance of various materials." Accordingly, the Commission recommended nation-wide study of subdivision controls with a dissemination of subsequent findings for incorporation into local ordinances. At the local level, the Commission recommended the elimination of restrictive subdivision practices which result in higher site improvement costs. Building the American City, pp. 478-479.

his mobile home park under these controls instead of accepted state approved controls.[1]

Nationally recognized standards do exist which clearly indicate the excessive nature of Mt. Laurel's subdivision controls. These include the HUD Minimum Property Standards;[2] the Urban Land Institute report, "Residential Streets";[3] and, for mobile home parks, Section IX of the New Jersey Health Codes.[4] Plaintiffs offered a detailed critique of the subdivision ordinance, largely if not entirely unrebutted.[5] A comparison was also made between Mt. Laurel's and nationally accepted requirements.[6]

The defendant has not considered these national standards, or, indeed, even reconsidered its subdivision ordinance. Although its planner, in a written submission, had told Judge Martino that the subdivision ordinance would be reviewed, this was not done.[7] Likewise, the township engineer admitted that he never was directed by the defendant to review or analyze the subdivision controls to see what revisions could be made which would lower costs of development in the township.[8] He admitted that it was only

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1 Exhibit PI-9 at JA-493a.

2 Exhibits D-98 and P-70 at JA-746a and JA-449a respectively.

3 Exhibit PI-24 at JA-544a. This report published by the Urban Land Institute was prepared jointly with the American Society of Civil Engineers and the National Association of Homebuilders.

4 N.J.A.C. 8:22-2.1.

5 Exhibit P-39 at JA-316a.

6 Exhibit P-70 at JA-449a.

7 Glass, 22T 130-1 to 18, 22T 125-9 to 15. His affidavit states that he would conduct a "Review of . . . subdivision . . . and other codes to identify all aspects that may need modification to implement housing programs. Exhibit P-62 at JA-433a.

8 Talbot, 27T 76-13 to 18.

upon hearing plaintiffs' expert testify at trial that he attempted to read the multi-volumned federal minimum property standards for health and safety.[1] However, the engineer did state that his review for trial of the subdivision ordinance and improvement requirements revealed that changes could be made which would lower development costs.[2] He agreed that it was possible that there were different design criteria and subdivision requirements which would protect the public health, safety and general welfare and cost less for a developer to install.[3] However, no changes were made.

Ironically, all of the township officials are content to live in older developments which are not built in accordance with Mt. Laurel's excessive standards. The defendant's planner lives in a neighborhood with smaller road widths (24 to 30 feet), no concrete curbs and no driveways.[4] The Mayor, who had lived in Rancocas Woods had no complaints with that area which has no driveways, sidewalks, or curbs and the streets are narrow (22 feet).[5] The public works director for the township for 11 years had no complaints regarding Rancocas Woods, Fellowship or Masonville areas.[6] He lived in Masonville where there are no sidewalks or curbs and the streets are narrow with parking on both sides. The former Mayor and chariman of the MUA lives in Fellowship and has no complaints. He testified that he "wouldn't hear of sidewalks" in his neighborhood which has curbless streets.[7]

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1 Talbot, 28T 58-16 to 19.
2 Talbot, 27T 77-4 to 6.
3 Talbot, 27T 81-4.
4 Glass, 26T 34-4 to 6, 26T 33-22, 26T 24-21, 26T 11 and 15.
5 Anderson, 29T 192-22, 29T 192-12 to 14.
6 Johnson, 29T 194-3 to 8.
7 Alvarez, 24T 115-18, 24T 129-11 to 15, 24T 129-18, 24T 116-11.

The Courts need not and never did specifically detail each and every section of every Mt. Laurel land use code as to its excessive and exclusionary nature. The mandate is to eliminate all controls to the extent they exceed least cost standards; that is, to the extent they exceed recognized health and safety minimums. Mt. Laurel has not done this despite the undisputable impact of the subdivision ordinance. It sets forth virtually all of the development controls in the township from the width of streets to the required strength of poured concrete.[1] It effects costs as much, if not more so, than the zoning controls themselves. Least cost and subsidized housing cannot be built unless these controls are reduced to minimum necessary standards consistent with health and safety.

E. Barriers to Subsidized Housing Have Been Retained:

It was uncontroverted that the availability of housing for low income and some of the moderate income population depends upon the availability of state and federal subsidies and municipal cooperation.[2] If housing opportunities for persons of low income are in fact to be realized, a municipality must not act to bar than opportunity by refusing to cooperate and facilitate that development.[3] These actions, at no direct cost to to the municipality, include: 1) participation in the federal Community Development Block Grant Program; 2) payment in lieu of tax agreements with subsidized developers; 3) passage of a Resolution of Need; and 4) designation of a local public agent to administer the Section 8 Program in the township. Mt. Laurel

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1 Exhibit P-26 at JA-219a.

2 Abeles, 10T 7-1 to 25, 10T 8-1 to 7, 11T 100-18; Bishop, 12AT 18-20.

3 Abeles, 10T 7-21 to 25, 10T 8-1 to 7. As detailed above, Mt. Laurel's zoning and subidivision ordinances themselves create insurmountable barriers to subsidized development. See I. A,B,C and D.

has openly refused to take advantage of these programs which would facilitate the realization of housing opportunities for low income persons in the township. In fact, Mt. Laurel has repeatedly refused to utilize these programs or to pass these needed ordinances.[1]

1. Community Development Program: This program, administered by Burlington County,[2] provides federal funds to all municipalities in the United States which choose to participate.[3] These funds can be used to facilitate "least" cost and subsidized housing by providing funds for the purchase of land and needed site improvements. A detailed description is provided infra at pp. 101-103 of III.

2. Payment in Lieu of Tax Agreements: A subsidized housing development cannot occur without a payment in liue of tax agreement between the municipality and the developer. Plaintiffs' and defendant's experts as well as the New Jersey Housing Finance Agency's manual, were conclusive that such

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1 This posture is in sharp contrast to its active role in other areas such as the creation of an M.U.A. and the application and use of federal funds to build its own library rather than share the county's library. Glass, 22T 221-11 to 21, 22T 221-25, 22T 222-1; Exhibit P-51 at JA-340a.

2 In 1975, 24 of the 40 municipalities comprising Burlington County agreed to participate as an Urban County (aggregate population of 200,000) in the Community Block Grant Program receiving $509,000 of federal funds. Bishop, 12AT 18-9, 12AT 5-20 to 22, 12AT 13-3. 42 U.S.C. § 5301 (1974). In 1976, 26 of the 40 municipalities applied for and received an additional $1,182,000 of Community Development money. Bishop, 12AT 8-15, 12AT 18-9. In 1977, 29 of the municipalities in Burlington County joined the Burlington County Community Development application. Bishop, 12AT 9-20 to 21.

3 Abeles, 11T 26-3.

4. Local Public Agent (L.P.A.): Mt. Laurel has also refused to designate a local public agent to administer available housing programs for persons of low incomes. This decision means that the Section 8 existing housing program cannot occur in the township.[1] An L.P.A. must be designated by a municipality to administer the Sectino 8 program in a municipality.[2] All administrative expenses for an L.P.A. would be paid by HUD without cost to the township.[3]

No reasons were given for the defendant's refusal to designate an L.P.A. The township planner stated in his affidavit to Judge Martino that the Section 8 Program is:

> (O)ne of the most active programs -- an understanding of this program's details will enable the township to structure efficient and acceptable responses to fulfill the need for low and moderate income housing. Exhibit D-34 at JA-623a-624a.

He applauded the Burlington County Freeholders for designating itself as an L.P.A. to utilize 300 existing Section 8 subsidies made available to the county.[4] However, the defendant has not designated its own L.P.A. or joined in the county program to take advantage of this opportunity.[5]

5. Conclusion:

The plain fact is that major municipal barriers remain to the provision of housing opportunities for lower income persons in Mt. Laurel. Absent judicial intervention, Mt. Laurel clearly will not act to remove these barriers.

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1 Abeles, 11T 33-7, 13T 111-1 to 15, 13T 128-1 to 4.
2 42 U.S.C. 1437, 1437a(6); Abeles, 11T 31-20 to 25, 11T 33-10.
3 Abeles, 11T 33-11 to 13.
4 Glass, 21T 148.
5 Glass, 22T 229.

F. Conclusion:

Ordinance 1976-5 is at best a subtrefuge; at worst, it is a blatant attempt to thwart the Suprme Court's mandate. It provides for an inadequate number of units (at most 131) on three (3) horrendous sites, at excessive controls with substantial disincentives for least cost or subsidized development. Ordinance 1976-5 represent a total lack of compliance with the Supreme Court mandate.

II.

ORDINANCE 1976-5 DOES NOT SATISFY THE SUPREME COURT MANDATE REGARDING THE PROVISION OF HOUSING OPPORTUNITIES EVEN IF IT DOES PROVIDE A REALISTIC OPPORTUNITY FOR 131 LEAST COST HOUSING UNITS

Ordinance 1976-5 does not provide a realistic housing opportunity for any least cost or subsidized units. See I above. Plaintiffs maintain that even if it did, it is unquestionably unreasonable and inadequate to satisfy the Supreme Court mandate. Essentially, Mt. Laurel has failed to provide its fair share of the present and prospective regional housing need for persons of low and moderate incomes. The township's zoning and planning are as exclusionary as they were in 1975. It is designed to attract non-residential ratables and upper-income housing. The unreasonableness of this land use scheme, as it relates to the needs of lower income persons, can be clearly shown factually in several ways by evaluating and comparing:

1. the number of acres zoned for "least cost" units compared to the number of acres zoned for non-least cost residential units;

2. the number of "least cost" units zoned compared to the number of other units;

3. the number of acres zoned for non-residential (i.e., employment generating) uses compared to the number of acres zoned for "least cost" units;

4. the number of least cost units provided as measured against the regional percentage of low and moderate income persons, projected residential development in the township and available fair share plans relevant to Mt. Laurel.

This uncontroverted analysis clearly demonstrates that even if Ordinance 1976-5 realistically provides for some least cost opportunities, it does not provide for a sufficient number of such units to fulfill the constitutional

mandate. Furthermore, as presented in Point III below, Ordinance 1976-5 or, for that matter any other action by the defendant, fails to address, much less reverse, the pattern of neglect and discrimination against the township's low and moderate income neighborhoods.

A. Mt. Laurel's Response - An Overview: "the frosting on the cake":

Despite the unanimous opinion by the Supreme Court that Mt. Laurel had discriminated in its land use practices, the defendant continued to maintain throughout the second trial, that regardless of what the Court said, it has always provided a realistic opportunity for a reasonable amount of least cost housing.[1] The township's planner, however, recognizing that the Supreme Court had specifically denounced the undue cost-generating features in Mt. Laurel's land use codes, stated that he knew that the township "had to come up with something new".[2] That "something new" was an amendment to the zoning ordinance entitled Ordinance 1976-5.[3] The township's planner referred to this amendment as "the frosting on the cake."[4]

1 Glass, 20T 131-6 to 9, 20T 135-22 to 25, 20T 136-1 to 6, 21T 15-8 to 9, 22T 9-12 to 17. In making these statements, Mt. Laurel's planner, specifically referred to the planned unit developments in the township whose ordinance and developer agreements were specifically addressed and criticized by the Supreme Court. Mt. Laurel, supra, 67 N.J. at 167. These criticisms were reiterated by the Supreme Court in a later case. Oakwood-at-Madison, Inc. v. Tp. of Madison, 72 N.J. 481, 507 and 523 (1977).

2 Glass, 21T 18-16 to 19. He admitted that "since the decision had very clear language regarding the opinion of the PUDs, it was quite obvious to me that I had to create new districts in order to show good faith and compliance with the decision." 21T 126-7 to 11.

3 Exhibit P-2 at JA-32a.

4 Glass, 22T 19-7.

The Court must appreciate the impact of this statement. Nothing else was done. The undisputed fact is that Mt. Laurel, has not changed at all. All of the zones previously condemned by the Supreme Court have been left intact. Every provision specifically criticized by the Supreme Court (even those declared per se invalid such as the PUD bedroom restrictions and charges for school-age children) were unchanged.[1] Ordinance 1976-5 provides an opportunity for 131 units on 23 acres. Mt. Laurel has a land mass of 14,176 acres[2] of which 14,153 acres will be developed under the ordinances as previously condemned. Mt. Laurel itself anticipates full development at approximately 22,260 units[3] of which 22,129 units will be developed under the ordinances as previously condemned.[4]

In 1975 the Supreme Court could not swallow the "cake", Mt. Laurel now expects it will do so with the aid of some "frosting". The trade-off is unbelievable: 14,153 acres for 23; 22,129 units for a potential 131. The defendant's position is preposterous. The fact that the court below bought it is inexplicable. The undisputed fact is that Mt. Laurel remains today what it was in 1971 when the initial complaint was filed: a municipal entity where discrimination is official policy, where exclusionary land use practices prevail and where the neighborhoods of the resident poor are officially ignored in the hope that these residents ultimately will go

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1 Over 18,000 units remain to be built under such restrictions. Exhibit D-50 at JA-680a.

2 Glass, 23T 68-13 to 15.

3 Exhibit D-50 at JA-680a; Glass, 20T 95-20 to 23.

4 Even if Mt. Laurel ultimately zones for the 515 units it considers its fair share, see Ordinance 1976-5, Section 1703.1.5 at JA-32a; 21,745 units will be developed under the ordinance previously condemned. Exhibit D-50 at JA-680a.

away; which, unfortunately, as their neighborhoods continue to deteriorate, they must do.[1]

B. Evaluation and Comparison of the Number of Acres Zoned for "Least Cost" Units and Acreage Zoned for Other Units: Ordinance 1976-5 designates three new "zones" on three sites in Mt. Laurel. The total acreage for each zone is:

R-5:	13 acres
R-6:	7 acres
R-7:	3 acres
ORD. 76-5	23 acres[2]

This total may be measured against the township's total land area of: 14,176 acres,[3] and the township's own assessment of vacant developable land area of 7,718 acres.[4] Two rather obvious but extremely revealing conclusions may be drawn:

1. Mt. Laurel has zoned less than two tenths of one percent (only .16%) of its total land area under Ordinance 1976-5.

2. Mt. Laurel has zoned three tenths of one percent (.3%) of its total vacant developable land area under Ordinance 1976-5.

Thus, 99.7% of its vacant, developable land and 99.84% of its total land remain under land use controls condemned by the Supreme Court four years ago and the initial trial court seven years ago. Those three new zones are

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1. See Point III infra regarding the plight of the resident poor.
2. Glass, 23T 66-14 and 15; Abeles, 10T 14-12 to 22.
3. Glass, 23T 68-13 to 15.
4. Exhibits D-36 at JA-569a and D-37 at JA-660a; Glass, 20T 36-1, 23T 69-2.

virtually microscopic dots on the township's land mass.[1] See zoning and land use map on following page. Exhibit P-36, also at JA-308.

A crucial aspect of the defendants selection of only 23 acres under Ordinance 1976-5 is the fact that only three (3) land owners have an opportunity to build under the controls set forth therein.[2] Thus, even if Ordinance 1976-5 provided adequate least cost controls, development is hindered by the nuances associated with the particular sites and the decisions of three individuals. This is the case with all of those sites (see I above). The defendant's planner himself admitted that a determinative factor in evaluating whether a realistic opportunity is actually being provided is the number of potential developers who could take advantage of the opportunity to build at least cost.[3] The limitation to only three potential developers is again in sharp contrast to the myriad of land owners who are given the "opportunity" to build at controls already condemned by the Supreme Court.

C. Comparison and Evaluation of Opportunities for Least Cost Units Versus Non-Least Cost Units: Assuming that Ordinance 1976-5 provides a realistic opportunity for least cost units, only 131 such units could be built even under the most liberal interpretation of its provisions.[4] The

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1 Exhibit P-35 at JA-307a and Exhibit P-36 at JA-308a.

2 Glass, 23T 102-14 to 15; Abeles, 10T 17-4 to 12.

3 Glass, 23T 79-14 to 16.

4 This was the estimate of plaintiffs' expert. Abeles, 10T 125-6 to 11. Defendants' expert Glass estimated a maximum of 115-120 units. Glass, 21T 148-17 to 20, 21T 16-24 to 25.

reasonableness of providing for 131 units of least cost may be evaluated by comparing that number to the total number of non-least cost units projected for development under present zoning and approvals. The following facts are relevant to such an analysis.[1]

Existing Units in Mt. Laurel in 1977:	4,063
Projected Future Units :	18,197
Total Units at Full Development :	22,260

The following comparisons can be drawn between the 131 "least cost" units provided for in Ordinance 1976-5 and those existing and projected for development under Mt. Laurel's exclusionary land use controls. Least cost units will be:

1) less than 1% (.7%) of projected future units, and

2) less than 1% (.5%) of the total number of units projected in Mt. Laurel at full development.[2]

A further comparison can be made by unit types. Ordinance 1976-5 provides for a maximum of 40 single-family (detached) units in the R-6 zone and 91 multi-family units[3] in the R-5 and R-7 zones. The 40 single-family detached units permitted in Ordinance 1976-5 may be compared to what Mt. Laurel has provided for in zones already condemned by the Supreme Court.[4]

Single-Family Detached (Existing) :	3,559
Single-Family Detached (Projected) :	8,891
Total Single-Family Detached Units :	12,450

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1 These figures are all derived directly from the defendant planner's own calcualtions. Exhibit D-50 at JA-680a.

2 In fact, if no growth occurred in Mt. Laurel other than the 131 units they would comprise only 3% of the residential development which has occurred to date (4,063 units).

3 Abeles, 10T 125-6 to 11.

4 Exhibit D-50 at JA-680a.

Thus, Ordinance 1976-5 provides for "least cost" single-family detached units at a rate of:

1. .4% of projected single-family detached units to be built in exclusionary zones; and

2. .3% of the total single-family detached units at full development of Mt. Laurel's exclusionary single-family zones.

The 91 multi-family units permitted in Ordinance 1976-5 may be compared to what Mt. Laurel has provided for in zones condemned by the Supreme Court.[1]

Multi-Family Units (Existing)	: 504
Multi-Family Units (Projected)	: 9,306
Total Multi-Family Units	: 9,810

Thus, Ordinance 1976-5 provides for "least cost" multi-family units at a rate of:

1. .97% of projected multi-family units to be built in exclusionary zones; and

2. .92% of the total multi-family units at full development of Mt. Laurel's exclusionary multi-family zones.

The above comparisons conclusively illustrate the fact that the defendant has not even made a token effort to comply with the judicial mandate. Far from "overzoning" for least cost units as directed in Madison,[2] the defendant has decidedly underzoned for least cost units. The inadequacy of this opportunity is further discussed below as it relates to the township's fair

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1 Exhibit D-50 at JA-680a.

2 Oakwood at Madison, Inc. v. Madison Tp., supra, 72 N.J. at 519. Although the decision post-dated the Mt. Laurel decision, the township was aware of it. In fact, the township's planner had reviewed the overzoning requirement and "disagreed" with it. Glass, 25T 96-22 to 24. This did not stop the defendant from overzoning for every conceivable use other than least cost residences. See discussion infra.

share. However, without any additional analysis it is inescapably clear that Mt. Laurel has overzoned for its present and future needs for every type of use other than least cost units:

> 1) 3,559 single-family detached units have already been built under exclusionary controls; land is now designated for an additional 8,891 units at these controls. (A ratio of 2.5 potential units for each unit already built);[1]
>
> 2) 504 multi-family units have been built under exclusionary controls; land is now designated for 9,306 additional units at these controls. (A ratio of 18.5 potential units for each unit already built);and[2]
>
> 3) 371 acres have been developed for industrial uses; 2,174 vacant acres have been set aside for future industrial growth. (A ratio of 6 vacant industrial acres for every acre already developed. This does not include vacant land zoned for commercial, major commercial, neighborhood commercial and business districts and those commercial and industrial uses within the PUDs).[3]

D. Evaluation and Comparison of Least Cost Units with Employment Projections and Industrial/Commercial Zoning: Despite the pointed mandate of the Supreme Court and the initial trial court that Mt. Laurel comprehensively zone "to meet the needs, desires and resources of all categories of people who may desire to live within its borders,"[4] the township's planner and engineer admitted that nothing was done to comprehensively plan in response to those decisions.[5] The impact of this failure is revealed in the total lack of any relationship between the number of units zoned at least cost and the commercial and industrial development, existing and projected, for the township.

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1 Exhibit D-50 at JA-680a.
2 Exhibit D-50 at JA-680a.
3 Exhibit D-37 at JA-660a.
4 Mt. Laurel, supra, 67 N.J. at 179.
5 Glass, 21T 216-25, 21T 217-1 to 4, 22T 44-10 to 13; Talbot, 23T 53-1 to 2.

The initial trial court and the Supreme Court decision emphasized that the defendant must relate employment growth and the realistic potential for such growth to residential planning for persons of low and moderate incomes.[1] The township planner himself indicated in an affidavit to Judge Martino (after the Supreme Court decision) that he would evaluate employment opportunities by income category in the township.[2] At trial he admitted that sound planning required that:

> (W)hen a town zones for industry and commerce for local tax benefit purposes, without question it must zone to permit adequate housing within the means of employees involved in such uses.[3]

Despite these judicial admonitions and its own planner's admissions, the defendant totally ignored employment and industrial/commercial zoning in assessing its low and moderate income housing needs[4] and in providing an opportunity for such housing. Only 131 units on 23 acres have been set aside for "least cost" housing while 2,545[5] acres have been set aside for industrial use (not including other zones for commercial, major commercial, neighborhood commercial, and business districts and PUD industrial and/or commercial area).[6]

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1 Mt. Laurel, supra, 67 N.J. at 187.

2 Exhibit P-62 at JA-431a.

3 Glass, 24T 140-8 to 14.

4 See also discussion of the fair share plans presented below at pp.75-83 infra and comprehensive critique set forth in the Brief Appendix at 1a, et seq.

5 Exhibit D-37 at JA-659a (371 developed plus 2,174 vacant).

6 PUD land in commercial use is approximately 229 acres. Exhibit D-41 at JA-672a. The major commercial district is a large area designated for an expo-center. Exhibit P-36 (zoning map) at JA-308a and Exhibit P-25 (zoning ordinance) at JA-178a. Glass, 20T 40-10, 20T 38-8, 24T 140-5 to 7, 24T 137-8 to 14.

Since 1970 Mt. Laurel has increased its industrial floor space by 1,300,000 square feet and office space by 700,000 square feet.[1] Three-hundred and seventy-one (371) acres of industrial land have been developed,[2] an increase of almost 300 acres since the first trial.[3] Over 1,200 employees have been added to the labor force in the township since 1970.[4] From 1975 to 1976 alone, the number of jobs in Mt. Laurel increase by 559.[5] According to D.V.R.P.C. projections for the region, 8,663 employees will work in Mt. Laurel by the year 2000.[6] Under existing zoning there is a potential for over 43,000 employees.[7]

Using these conservative figures, the need for housing for low income employees working in Mt. Laurel is evident. Assuming a conservative estimate that 40% of workers are lower income:[8] 1) Since 1970 Mt. Laurel has generated a need to house 480 lower-income workers; 2) Between 1975 and 1976 alone, Mt. Laurel has generated a need to house 224 lower-income workers; 3) By the year 2000, using D.V.R.P.C.'s conservative projection

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1 Rabin, 14T 45-18 to 21.

2 Exhibit D-37 at JA-660a.

3 Mt. Laurel, supra, 67 N.J. at 184.

4 Exhibit P-4 at JA-104a.

5 Compare DCA employment growth data for 1975 and 1976. Exhibit P-4 at JA-56a and JA-104a.

6 Exhibit P-6 at JA-127a. This projection prepared by D.V.R.P.C. is most conservative. Its conservative nature is evident by comparing it to D.V.R.P.C.'s population projection for Mt. Laurel which also appears at JA-127a. D.V.R.P.C. projected a year 2000 population for the township of 15,476. Yet, by 1977 the township's population was already 15,221. (See Exhibit P-4 at JA-56 which indicates that Mt. Laurel's 1970 population was 11,221). The township planner estimated 4,000 new residents between 1970 and 1977. See Exhibit D-50 at JA-680a.

7 Mt. Laurel, supra, 67 N.J. at 163.

8 Abeles, 10T 83-20 to 25, 10T 84-1 to 4.

3,465 lower income workers will be employed in the township; and 4) given current zoning for employment generating uses, 17,600 lower-income workers will need to be housed.

The Court must appreciate that the defendant has admitted that it has not and will not provide housing opportunities commensurate with employment opportunities planned and realized in the township regardless of the Supreme Court order.[1] The testimony of its own planners made the township's recalcitrance very clear. It is now the official position of the township that it is or soon will be a commercial/industrial center for the region.[2] However, it will not provide housing for its present or prospective lower income employees (as opposed to upper income employees).[3] In fact, its planner baldly asserted that the large number of needed units generated by employment growth in Mt. Laurel is "really an obligation on all townships surrounding the western end of Mt. Laurel."[4] This is open defiance of the Supreme Court decision.

Plaintiffs contend that the defendant cannot have it both ways; that is, it may not expect to be a regional commercial/industrial center

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1 Glass, 21T 37-4 to 10, 21T 35-13 to 17, 21T 36-7 to 24

2 Glass, 21T 35-18 to 25, 21T 36-2 to 5

3 As noted by the Supreme Court in 1975:

> Each of the resolutions of tentative approval of the (PUD) projects contains a similar fact finding to the effect that the development will attract a highly educated and trained population base to support the nearby industrial parks in the township as well as the business and commercial facilities. Mt. Laurel, supra, 67 N.J. at 167-168.

4 Glass, 21T 35-13 to 17, 21T 36-7 to 24.

without providing residential opportunities, especially for those employees of low and moderate incomes. If, in fact, Mt. Laurel is or will be an industrial/ commercial center of its region, then it is rational that in the very near vicinity of this employment growth, high density, least cost zoning should occur to accommodate the low and moderate income employees for whom travel is a relative hardship.[1] Having in fact overzoned for industrial/commercial uses (only 371 of the 2,545 acres zoned industrial have been developed), then the township rationally should re-zone a significant amount of its land for high density, least cost residential use.[2]

Thus, Mt. Laurel has refused to lessen its industrial zoning (except for the 13 acres in the R-5 tract) and it has refused to create housing opportunities for generated employment. This is a patent affront to the decision of the Supreme Court and clearly exposes the unreasonableness of the provision of 131 units for least cost housing.

E. Evaluation and Comparison of Least Cost Units With the Regional Lower Income Proportion, Township's Annual Growth Rate and Relevant Fair Share Plan: Plaintiffs contend that the foregoing amply demonstrates the total lack of rationality of zoning for 131 units of least cost housing in Mt. Laurel. Plaintiffs believe it is, therefore, unnecessary for the Court

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1 Abeles, 13T 110-1 to 12.

2 Mt. Laurel, supra, 67 N.J. at 187; Abeles, 13T 109-1 to 2. It is interesting to note how Mt. Laurel's position has changed since 1972. It then argued that it need not provide housing for lower income persons since it was a "bedroom community" for Philadelphia and not an industrial/ commercial center. See transcript of testimony of Mt. Laurel's expert Shepard in the first trial. 4T 41.

to perform a detailed fair share analysis in order to find that Mt. Laurel has disregarded the Supreme Court decision and openly defied its mandate. With some guidance, a master appointed to insure implementation could be charged with the responsibility for evaluating how many least cost units should be provided for by Mt. Laurel. The following analysis briefly evaluates fair share considerations and will further reveal the utter absurdity of what the defendant has or, more appropriately, has not done. A more detailed analysis of the fair share concept in the record is appended hereto at p. 1a.

1. Regional Percentage of Low and Moderate Income Population: One measure of the reasonableness of the number of least cost units provided for by a municipality is whether, as reflected in its zoning, the projected low and moderate income population for the municipality roughly corresponds to the regional percentage of low and moderate income persons. This standard was articulated by the Supreme Court in Madison, supra, 72 N.J. at 543. The Court stated:

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

Thus, using the Madison test, Mt. Laurel's rezoning can be evaluated to determine whether there is a correspondence between municipal and regional proportions.

In 1970 the annual income of such persons in the Mt. Laurel region (comprised of Burlington, Camden and Gloucester counties) was approximately $10,000 and below. (This was admitted by Mt. Laurel's planner and, in fact,

used by him for his own calculations).[1] In this tri-county region, 42.5% of the total number of families have incomes below $10,000.[2]

Using the unanimously agreed upon 42.5% proportionality test, it is patently clear that Mt. Laurel's purported "compliance" is incredibly inadequate. Plaintiffs have indicated above that 131 units provided for is less than one percent (.7%) of the units yet to be built and less than one percent (.5%) of all of the units in Mt. Laurel at full development. (See pp. 68-71 supra). The following is still another comparison of the 42.5% standard with Mt. Laurel's growth rate and relevant fair share plans.

2. Township's Annual Growth Rate: One measure of the reasonableness of the provision of least cost units is how it compares to the projected annual growth rate in the municipality.[3] In a "reasonable" plan, the percentage of growth for least cost units would equal or approximate the

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1 Glass, 22T 115-12 to 17; see also Brooks, 8T 18-13 to 15.

2 Brooks, 8T 14-8; Mallach, 6T 61-23. This is a conservative estimate. It does not include unrelated individuals in calculating the percentage of low and moderate incomes persons residing in the tri-county region. The total number of families and unrelated individuals reporting annual incomes of $10,000 or less in 1970 in the Mt. Laurel region was approximately 49%. Brooks, 8T 14-20. It may be noted that the total number of families reporting annual incomes of $12,000 or less in 1970 in this tri-county region was over 50%. Mallach, 6T 62-5.

3 This is a conservative approach to take since it does not account for the present pattern of exclusion. The Court must appreciate that the present growth rate is, itself, a reflection of that pattern. In other words, the rate might be much higher absent exclusionary zoning. Exhibit P-19 at JA-172a.

regional percentage of low and moderate income persons (or 42.5%).[1]

Since 1970, Mt. Laurel has been experiencing an annual growth rate of approximately 200 units.[2] This rate is expected to continue (or accelerate).[3] If least cost development occurred at the regional percentage, approximately 85 least cost units would be constructed annually (42.5% of 200). Thus, of the projected 6,000 units between 1970 and the year 2000, 2,550 would be least cost (85 per year for 30 years).[4] The addition of the 1970 deficit of 453 units (see fn. 1) results in a growth rate projection of 3,003 least cost units in Mt. Laurel by the year 2000. Mt. Laurel has now provided, at best, for 131 units of least cost housing. This is 2% of its own projection of 6,000 added units and only 4% of the necessary 3,003 least cost units under the regional percentage test.[5]

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1 This approach must also account for a prior history of exclusion in Mt. Laurel. In 1970 Mt. Laurel had 2,669 households of which only 681 or 25.5% were low and moderate income. If the low and moderate income population had not been precluded from sharing in Mt. Laurel's growth in proportion to its share of the regional population, presumably 1,134 of the units (42.5% of 2,669) would be of low and moderate income. Thus, as of 1970, Mt. Laurel had experienced a deficit of 453 least cost units. This deficit would not be made up even if lower income persons fully participated in the future growth of Mt. Laurel; i.e., if 42.5% of the future growth resulted in least cost development. Therefore, the deficit of 453 units must be added to the projected growth rate figure for least cost development.

2 Exhibit D-50 at JA-680a. In the six years between 1970 and 1977 Mt. Laurel added 1,143 units.

3 Exhibit D-52 at JA-682a indicates that Mt. Laurel's planner projects the rate to continue through the year 2000. Thus, between 1970 and 2000, Mt. Laurel anticipates at least 6,000 units. Anticipated PUD development alone will probably exceed that number. Exhibit D-42 at JA-673a indicates that of the total 10,569 PUD units, 8,797 were still to be constructed as of 1977. Larchmont alone will involve 6,054 units of which 5,367 were still undeveloped as of 1977. Exhibit D-40 at JA-667a.

4 This is a minimal figure also because it does not include any overzoning as required in Madison, supra, 72 N.J. at 519.

5 Even if Mt. Laurel had zoned (overzoned) for 515 units pursuant to its own fair share estimate, that number is unreasonable. An additional 515 units would barely make up for the 1970 deficit (see footnote 1 above). 515 units is only 8.6% of Mt. Laurel's total growth (6,000 units) and only 17% of the necessary least cost development of 3,003 units under the regional percentage test.

3. Relevant Fair Share Plans: Another test for evaluating the reasonableness of a municipality's provision for least cost units is to measure it against fair share plans relevant to that particular municipality. As previously indicated, plaintiffs believe that Mt. Laurel has so blatantly failed to provide for a reasonable number of least cost units that a fair share analysis is almost superfluous to this Court's findings. This Court may simply find a complete lack of compliance and remand to a master to carry out implementation of its order under guidelines set forth in its opinion. Certainly the analysis, given above, of the township's expected growth rate should be adequate to establish a minimal fair share number based on actual growth projections. This number would be approximately 3,000 units to the year 2000.[1]

However, to assist the Court, plaintiffs have presented in an appendix to the brief a detailed analysis of the uncontroverted testimony regarding fair share plans relevant to Mt. Laurel. The following is a brief evaluation of the plans' reasonableness.

The reasonableness of a fair share plan may be measured against the two standards set forth above: comparability between the plan and the annual growth rate[2] and between the plan and the regional proportion of

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1 This figure is easily derived by adding projected least cost units (based on a percentage of current growth rates) plus the 1970 least cost deficit:

Projected	:	2,550	(42.5% of 6,000 units)
1970 Deficit:		453	(see footnote 1, p.78)
Total	:	3,003	least cost units

Interestingly, this number, although conservative (see footnote 2 and footnote 3 of p. 77 and footnote 1 of p. 78) is midpoint between the 2,278 units projected for Mt. Laurel under the adjusted 1970 D.C.A. plan and the 3,672 units in the plan prepared by plaintiff's expert Mallach. See infra.

2 200 units per year or 6,000 units between 1970 and the year 2000. Glass, 21T 88-14 to 16, 21T 83-25, 25T 49-1 to 4, 25T 48-10 to 25.

low and moderate income households.[1] Four plans were presented below. They were prepared by: plaintiffs' expert Mallach,[2] the New Jersey Department of Community Affairs,[3] the Burlington County Planning Board[4] and defendant's planner Glass.[5] These plans, when adjusted for purposes of comparability,[6] resulted in the following allocations for Mt. Laurel for least cost housing production through the year 2000:

Mallach	:	3,672 units
D.C.A.	:	2,278 units[7]
Burl. Co.	:	997 units
Mt.Laurel	:	515 units

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1 42.5%. Brooks, 8T 14-8; Mallach, 6T 61-23.

2 Exhibit P-11 at JA-132. See detailed analysis on pp. 12a to 14a of the attached appendix.

3 Exhibit P-4 at JA-39a. The D.C.A. plan was the 1976 Draft. Subsequent to the trial, but before the decision below, the final 1978 D.C.A. plan was published and released by the Governor. The plan was submitted to the trial court in May, 1978. JA-57a. It involved some modifications and resulted in a 6.6% increase in Mt. Laurel's allocation. JA-59a. See detailed analysis on pp. 8a to 12a of the attached appendix.

4 Exhibit P-6 at JA-106a. See detailed analysis on pp. 14a to 19a of the attached appendix.

5 Exhibit P-2 at JA-32a and Exhibit P-10 at JA-130a. See detailed analysis on pp. 19a to 30a of the attached appendix.

6 It was necessary to adjust the D.C.A. plan for purposes of comparing it to all of the others. Both plaintiffs' and defendant's experts agreed that the plan should be targeted to the year 2000. Their plans and that of the Burlington County Planning Board used the year 2000 date. D.C.A. had used the year 1990. Likewise, all plans but D.C.A.'s used $10,000 as the income limit for persons of low and moderate income. D.C.A. used $8,567.

7 This is the adjusted D.C.A. figure. The 1976 draft called for 1,356 units which, when adjusted, resulted in 2,137 units. The 1978 draft called for 1,445 units or an increase of 6.6%. The resulting adjusted number is 2,278 (or 6.6% increase over 2,137).

Of the plans, only that of D.C.A. and Mallach even approach the standards of reasonableness. In fact, the effect of the other two plans is to decrease Mt. Laurel's own low and moderate income household percentage. Exhibit P-20 at JA-173a illustrates this fact. In 1970, Mt. Laurel's low and moderate income population comprised 25.5% of its total population. The effect of each fair share plan would result in a year 2000 low and moderate income population of:

Mallach :	42.0%
D.C.A. :	28.8%
Burl. Co.:	18.1%
Mt.Laurel:	13.2%

Thus, only the Mallach plan brings Mt. Laurel's population of low and moderate income households to the 42.5 regional percent. The adjusted D.C.A. plan approximates it by the year 2000 at 28.8%. On the other hand, both the Burlington County and Mt. Laurel plans would essentially exacerbate the exclusionary nature of the township by decreasing its percentage of low and moderate income households by 7.4% (25.5 to 18.1) and 12.3% (25.5 to 13.2) respectively.

The total unreliability of Mt. Laurel's calculations is revealed by its planner's cavalier attitude toward the whole process. At one point, quite as an aside, he accepted that his own 515 number could be doubled:

> Even if you want to go to 997 units, I have no qualms with that particular number, 997.[1]

Then he blithely accepted the D.C.A. formulation, virtually quadrupling his own calculations:

> (I)t was always my opinion that eventually we would end up with a statewide or county-wide set of allocations that would be more equitable

[1] Glass, 25T 29-19 to 20.

to each township, in that, at that time, the township should defer in essence, of getting some coordination to a higher agency.[1]

In any event, the absurdity of the 515 number is virtually self-evident:

1) even if it were reasonable, Mt. Laurel has zoned for at most 131 units or 25% of its own total assessment;

2) 515 units is only 8.6% of the 6,000 units projected to be built during this period in Mt. Laurel;

3) it is only one-sixth of the 3,003 least cost units required under the regional percentage (42.5) test;

4) 515 units is only 2.8% of the 18,197 units projected to be built in existing exclusionary zones; and

5) 515 units is only 2.3% of the 22,260 units expected in Mt. Luarel at full development.

This plan is clearly ludicrous, the 997 units provided for in the Burlington County plan only slightly less so.

The adjusted D.C.A. and Mallach plans, on the other hand are facially reasonable. D.C.A. would bring Mt. Laurel substantially in line with the regional percentage by the year 2000. Mallach's plan, if implemented would have accomplished the proportionality by that date. These plans not only closely approximate the regional percentage, they also conform most closely to Mt. Laurel's own growth rate of 200 units per year. As previously indicated an application of the regional percentage to the annual growth rate results in a number for Mt. Laurel of 3,003 units by the year 2000.[2] Furthermore, they most closely approximate the 3,465 lower-income workers

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1 Glass, 26T 58-22 to 25.

2 42.5% of 6,000 units is 2,550. The 3,003 is derived by adding 453 units to make up for the 1970 deficit. In 1970 only 681 units of 2,669 units in Mt. Laurel were low and moderate (or 25.5%). Applying the 42.5% to 1970 households results in a number of 1,134 or a deficit of 453 (1,134-681).

conservatively projected for Mt. Laurel by the year 2000.[1]

Year 2000

Lower Income Employees	:	3,465
Least Cost as % of Annual Growth	:	3,003
Adjusted D.C.A. Goal	:	2,278
Mallach Goal	:	3,672

Clearly, a detailed analysis is not necessary to establish the reasonableness of these plans and the unreasonableness of those prepared by the defendant's planner and the county.[2] Plaintiffs' argue that the Mallach plan is the most reasonable and that the D.C.A. plan, as adjusted, is satisfactory. It is certainly the only reasonable regionally approved plan.

F. Conclusion: The conclusion is inescapable that Mt. Laurel has failed to comply with the Supreme Court mandate even if Ordinance 1976-5 were an impecable example of "least cost" zoning. The fact that it is not, only exacerbates the defendant's recalcitrance. The fact that it is a sham further reveals Mt. Laurel's intent to disregard the Supreme Court's decision absent specific judicial intervention.

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1 40% of the D.V.R.P.C. 2000 projection of 8,663 employees. Exhibit P-6 at JA-127a. See fn. 8 on p. 73 supra.

2 Plaintiffs have prepared, however, a detailed analysis and comparison of each of the plans pursuant to the Court's critique of fair share plans provided in Madison, supra, 72 N.J. at 543-544. See appendix to this brief at 1a.

III.

MT. LAUREL HAS CONTINUED TO NEGLECT THE CONDITIONS OF ITS LOWER INCOME NEIGHBORHOODS WHICH HAVE FURTHER DETERIORATED SINCE THE FIRST TRIAL

In 1972 Judge Martino, in the initial trial court decision in this matter, specifically addressed the plight of Mt. Laurel's lower income residents. It should not be forgotten that it was their experience which first moved the court to rule in plaintiffs' favor. Judge Martino's opinion begins with a detailed recitation of those conditions, Mt. Laurel I, supra, 119 N.J.Super. at 166-167, and ends with a finding that:

> The patterns and practices clearly indicated that defendant municipality . . . has used federal, state, county and local finances and resources solely for the betterment of middle and upper-income persons. Mt. Laurel I, supra, 119 N.J.Super. at 178.

The Supreme Court in 1975 affirmed and reiterated these findings:

> All this affirmative action for the benefit of certain segments of the population is in sharp contrast to the lack of action, and indeed hostility, with respect to affording any opportunity for decent housing for the township's own poor living in substandard accommodations, found largely in the section known as Springville (R-3 zone). The 1969 Master Plan Report recognized it and recommended positive action. The continuous official action has been rather a negative policy of waiting for dilapidated premises to be vacated and then forbidding further occpuancy. Mt. Laurel, supra, 67 N.J. at 169.

The second trial of this matter involved, in part, a substantial amount of testimony updating the record regarding the plight of the resident poor since Judge Martino's ruling in 1972. Despite virtually uncontroverted testimony that their conditions had changed only for the worse, the court below essentially washed its hands of the matter.

First, the trial judge below denied the existence of discrimination in municipal services.[1] Second, he denied that previous courts had found that such discrimination did exist.[2] Third, he denied the court's power to remedy such discrimination even if it existed.[3] Lastly, he calmed whatever concerns he might have had by taking solace in the fact after the second trial, that the township repaired one road in a lower income neighborhood.[4] He was able to do this despite the fact that this was the only act undertaken by the defendant to improve the lower income neighborhoods in the township since the first trial. This single act must be measured against the enormous problems in those neighborhoods and the wealth of municipal resources devoted to the maintenance of Mt. Laurel's middle and upper income neighborhoods. The undisputed facts are:

> 1. Since 1972 conditions in the lower income neighborhoods have worsened;
>
> 2. Since 1972 no municipal resources, aside from the road repair, have been devoted to upgrade and maintain these neighborhoods;
>
> 3. Since 1972 municipal funds have been regularly and continuously expended to improve and maintain the conditions in middle and upper-income neighborhoods.

The above, factually uncontroverted actions and inactions constitute a land use practice by the township which is as discriminatory and more insidious than its exclusionary zoning. The continued failure of the defendant to change these patterns and practices despite the Supreme Court's findings is outrageous.

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1 Mt. Laurel II, supra, 161 N.J.Super. at 352.
2 Mt. Laurel II, id.
3 Mt. Laurel II, supra, 161 N.J.Super. at 353.
4 Mt. Laurel II, id.

The result has been, is and will continue to be that lower income residents of Mt. Laurel will be condemned by municipal neglect to remain in the township on borrowed time until the lack of municipal action, substandard conditions, landlords and speculators force them to seek housing elsewhere: a process which began prior to the first trial court decision and which has continued unabated.

A. Overview of Present Conditions - The Lower Income Neighborhoods:

The Springville neighborhood in Mt. Laurel is the dominant low and moderate income area.[1] It is located along Hartford Road between Elbo Lane and Mount Laurel-Hainesport Road.[2] Many of the homes throughout this section are in substandard, deteriorating condition.[3] Through this section of the township, Hartford Road is a bumpy, narrow road.[4] According to the trial court's post-trial inspection, it has been recently paved.[5] It is a heavy, arterial road and carries significant pedestrian traffic with no shoulder or sidewalk.[6] The six residential side streets which intersect Hartford Road are dirt streets, totally unpaved.[7] No sidewalks exist or are planned for any street in the area.[8] No drainage facilities (except

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1 Glass, 25T 79-20 to 21; Blackwell, 19T 106-19; Rabin, 14T 55-19 to 22.

2 Rabin, 14T 55-23 to 25. Additional residential streets, Cedar, Locust, Washington, Grove and two which are still unnamed, intersect perpendicularly with Hartford Road. See Exhibit P-45 at JA-331a.

3 Glass, 22T 79-20.

4 Exhibit P-45 at JA-331a.

5 Mt. Laurel II, supra, 161 N.J.Super. at 353.

6 Talbot, 26T 131-16 to 20.

7 Rabin, 14T 60-11; Grooms, 12AT 47-11.

8 Rabin, 14T 62-21 to 24; Grooms, 12AT 49-16; Paynter 15T 43-24, 15T 44-4 to 9.

for a ditch on Hartford Road), public water or sewer facilities exist or are planned.[1] No street lights have been provided aside from a few existing lights on Hartford Road which are old with minimal illumination.[2] A run-down recreational area serves this neighborhood. It is inadequate, not safely accessible and not comparable to those built and maintained by the defendant elsewhere in the township.[3] Additionally, the township has permitted non-conforming commercial/industrial uses to intrude into this residential neighborhood.[4]

The Texas Avenue neighborhood (between Church Street and Elbow Lane) is a much smaller, low and moderate income area in the township.[5] Texas Avenue is an extremely narrow road which curves sharply and dangerously.[6] The 1969 Master Plan recommended its realignment.[7] The street is in extreme disrepair although potholes were carelessly filled on the eve of the lower court's site inspection.[8] No curbs, shoulders, sidewalks or street lights are present despite the dangerous curve, narrow streets and residential character of the area.[9] Elbo Lane in this neighborhood is also narrow, bumpy, without curbs, sidewalks or street lights.[10] Water and sewer does

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1 Lawrence, 15T 60-4 to 12.

2 Rabin, 14T 69-1, 14T 65-19 to 22.

3 The dilapidated "tot lot" is located near the heavily travelled Hartford Road. It is not fenced and no benches exist for attending adults. Exhibit P-46 at JA-332a.

4 Lawrence, 15T 51-21 to 25; Rabin, 14T 88-16 to 19.

5 Rabin, 14T 56-1.

6 Rabin, 15T 69-25.

7 Talbot, 28T 57-21 to 24.

8 Rabin, 14T 59-24, 14T 60-1 to 3; Lawrence, 15T 64-7 to 16.

9 Lawrence, 15T 64-17 to 24, 15T 65-3 to 8; Talbot, 28T 54-11, 28T 55-24.

10 Lawrence, 15T 63-5 to 10; Rabin, 14T 183-2.

not serve this area despite adjacent new developments and a force main which runs in front of the neighborhood.[1] Commercial and industrial uses have also been permitted to intrude in this area and a variance has been granted for still another non-conforming use.[2] No recreation area serves this neighborhood.[3]

Conditions elsewhere in Mt. Laurel are in sharp contrast. The defendant has engaged in a significant street improvement program repairing most areas of the township, while leaving unpaved streets in Springville. New street lights, curbs, drainage facilities have been built throughout the township.[4] New recreation facilities have been maintained by the defendant in all the other residentially developed areas in the township.[5] In addition to all of these improvements undertaken by the township, municipal resources have been expended to build a new municipal building, library and public works buildings, and applications have been made for state and federal assistance for road repairs and open space preserves.[6]

Since the preparation of the township's first Master Plan in 1959, the defendant has been advised by its planners of the conditions of the poor living in Mt. Laurel and the need for assistance.[7] The 1969 Master Plan also indicated the need for state and federal assistance and

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1 Rabin, 14T 34-10 to 16, 14T 34-17 to 21.
2 Lawrence, 15T 61-12 to 25.
3 Lawrence, 15T 72-18 to 20; Rabin, 14T 80-2 to 14. Talbot, 28T 40-2 to 14; 28T 45-2; Rabin, 14T 60-4 to 14; Exhibit P-45 at JA-331a.
4 Talbot, 26T 135-11 to 15; Rabin, 14T 65-16 to 19.
5 Rabin, 14T 80-20 to 23; Exhibit P-46 at JA-332a.
6 Exhibit P-51 at JA-340a.
7 Rabin, 14T 40-15 to 23.

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1 Rabin, 14T 34-10 to 16, 14T 34-17 to 21.

2 Lawrence, 15T 61-12 to 25.

3 Lawrence, 15T 72-18 to 20; Rabin, 14T 80-2 to 14. Talbot, 28T 40-2 to 14; 28T 45-2; Rabin, 14T 60-4 to 14; Exhibit P-45 at JA-331a.

4 Talbot, 26T 135-11 to 15; Rabin, 14T 65-16 to 19.

5 Rabin, 14T 80-20 to 23; Exhibit P-46 at JA-332a.

6 Exhibit P-51 at JA-340a.

7 Rabin, 14T 40-15 to 23.

recommended affirmative municipal action to upgrade those areas.[1] Yet, the defendant has for at least two decades rejected its most needy citizens and admittedly done nothing to upgrade the low income areas of the township. The defendant has arrogantly refused to seek funds to help them, although at no local cost, while applying for numerous other grants to assist the new, upper-income majority in the township.[2] Despite the specific policies and statements set forth in the township's 1959 and 1969 Master Plans, the new municipal planning consultant has chosen to ignore this needy group.[3] The township's engineer admitted that he has never even read the Master Plans' descriptions of the needs and recommendations for upgrading the Springville area although it is his responsibility to make recommendations for these kinds of improvements in the township.[4]

This pattern, practice and history of municipal neglect and discrimination is a public outrage and disgrace. The defendant has turned against its richest legacy: the residents whose very ancestors helped found the township itself.[5] Historical cemeteries, churches and buildings stand as a tribute to Mt. Laurel's first generation of citizens

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1 Mt. Laurel, supra, 67 N.J. at 169.

2 Glass, 22T 198-4 to 6; Exhibit P-51 at JA-340a.

3 His unbelievably insensitive opinion is that the needs of these residents can be satisfactorily addressed by the township building inspector's code enforcement activities. Glass, 25T 80-4 to 9.

4 Talbot, 28T 49-16, 28T 53-15 to 21.

5 Lawrence, 15T 68-1 to 13, 15T 71-19 to 24.

while their grandchildren and great-grandchildren are ultimately forced to leave.[1] The resident plaintiffs, perhaps the most aggrieved, have come to this Court to put an end to these discriminatory practices once and for all. The court below, finding Hartford Road finally paved after six years of litigation, refused to require more. The responsibility now rests with this Court. It is the resident's last resort.[2]

B. Growth Outside of Lower Income Neighborhoods:

Considerable growth has occurred in Mt. Laurel in residential, industrial and office development since 1970.[3] However, the two lower income residential areas remain essentially unchanged. Since 1970, 1200 additional dwelling units (500 apartments) have been built in the township.[4] Industrial floor space has been increased by 1,300,000 square feet, and 700,000 square feet of office space have been added.[5] Additional recreational facilities in the township and improved roads have been provided by the municipal

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1 Plaintiff Ethel Lawrence resides in Mt. Laurel where she was born and four other generations of her family have lived. 15T 57-7 to 13. Her great, great, great-grandfather settled in what was to become Mt. Laurel upon coming up through the underground railroad. Her children continue to reside in Mt. Laurel although two are living in substandard dwellings. 15T 58-5.

2 Lawrence, 15T 70 through 15T 73.

3 Rabin, 14T 45-14 to 16. Yale Rabin, an associate professor of urban and environmental planning at the University of Virginia, is an expert in the field of planning, evaluation of municipal services and use of development controls as they impact on persons of low and moderate income. 14T 26-5 to 11. His extensive credentials, include consultant work in this specialized field for such groups as HUD, United States Commission on Civil Rights, N.A.A.C.P. Legal Defense Fund, and City of Minneapolis Department of Civil Rights. 14T 20 through 14T 26.

4 Rabin, 14T 45-15 to 18.

5 Rabin, 14T 45-18 to 2.

governing body.[1] However, aside from a reduction in their size,[2] no changes have occured in the low income areas of Mt. Laurel since the initial trial in 1972.[3] The condition of housing in these areas has not been improved;[4] additional dwelling units for persons of low incomes have not been built;[5] and additional public facilities have not been built nor existing facilities improved or maintained.[6]

C. Street Conditions:

It is a principle of planning that street construction and improvements should be similar for roads with similar volume and usage.[7] Mt. Laurel has made one important exception to this policy. Middle or upper class neighborhoods, no matter how small, get excellent municipal service for street paving, repairs and lighting; the roads in the poverty areas, Springville and Texas, which are more densely populated and more frequently

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1 Rabin, 14T 45-22 to 25.

2 In the Springville area alone, the housing stock since the first trial has been reduced by 20 percent. Rabin, 14T 96-5 to 6, 14T 91-2 to 5.

3 Rabin, 14T 46-2 to 5.

4 Despite active community organizations advocating the improvement of housing conditions and the expansion of housing opportunities, the town council has refused to do anything. Lawrence, 15T 65-23 to 25, 15T 66- 1 to 17.

5 Springville Action Group proposed a low income housing development which was rejected by the town council. Lawrence, 15T 76-6 to 22.

6 Rabin, 14T 46-2 to 10.

7 Rabin, 14T 47-4 to 19.

travelled receive virtually no improvements or servicing.[1]

1) Street Paving: Exhibit P-45[2] is a graphic compilation by all the parties' witnesses regarding the Street Conditions and Street Improvements in Mt. Laurel from 1970 to 1976.[3] This map graphically illustrates that the defendant has constructed, paved, and re-paved streets throughout the township, but has not improved the streets in the low income areas of Springville and Texas.[4]

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1 Rabin, 14T 49-3 to 16, 14T 57-22 to 25, 14T 58-1, 14T 68-1 to 12.

2 JA-331a.

3 This exhibit which details the nature and extent of the defendant's street expenditures was prepared from expert Rabin's testimony as to his personal inspection of every local street in the township, from the township building inspector's testimony, from a map prepared by the township's Superintendent of Public Works, and from information contained in the Mt. Laurel Capital Account Budget (Exhibit P-58 at JA-415a). Rabin, 14T 49-3 to 19, 14T 50-1 to 4; Blackwell, 19T 56 through 19T 89; Johnson deposition, 19T 10-4 to 17, 19T 76-6 to 25, 19T 74, 19T 75-1 to 7.

4 Rabin, 14T 59-22. Hartford Road is designated by county and municipal plans as a main arterial street. Talbot, 28T 46-20; Grooms, 12AT48-12; Rabin, 14T 60-15 to 18. No sidewalks or road shoulders exist for pedestrian traffic requiring the plaintiffs' children to walk in the street to the school bus stop and recreational area. Rabin, 14T 62-21 to 24; Grooms, 12AT 48-16; Paynter, 15T 42-24, 15T 44-4 to 9. Although the Springville section is the most densely developed area of Hartford Road, it had been left unimproved. Rabin, 14T 61-3 to 13. Although the township's engineer and expert Lynch testified that sidewalks are necessary in higher density neighborhoods for safe pedestrian traffic to recreation sites, schools and other points of interest; no sidewalks have been provided along heavily travelled Hartford Road in the densely concentrated Springville area. Talbot, 26T 185-12 to 14. Lynch, 18T 62-9 to 15, 18T 63-8 to 15. It was only at the time of trial that the defendant decided to improve the section of Hartford Road in Springville. Talbot, 26T 131-16 to 20. The township's engineer testified that on June 20, 1977, the township passed an ordinance to fund the completion of the Hartford Road improvements. Talbot, 26T 131-22 to 23.

Similarly, the defendant did not attempt to improve the hazardous street conditions of Texas Avenue, a main thoroughfare through the other low income neighborhood in the township, until trial. Although Texas Avenue was characterized by the township engineer as a collector street, it remained a roughly paved street with deep and hazardous potholes until the day preceding the trial court's tour of Mt. Laurel.[1] At that time, the potholes were crudely filled by the defendant leaving a roughly paved street with bumps over the entire stretch of road.[2] Although the 1969 Master Plan recommended the realignment of the dangerous blind curve on Texas Avenue, nothing has been done.[3] Although the township engineer testified that he was familiar with Texas Avenue and that he knew that children must use the street to walk to school, no sidewalks or road shoulders have been provided.[4]

2) Street Lighting: Every residentially developed area in the township except for those in Springville and on Texas Avenue have been furnished with new street lights.[5] Since 1970, 881 mercury vapor fixtures have been installed by the township on local and county roads

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1 Talbot, 28T 55-21.

2 Rabin, 14T 59-24, 14T 60-1 to 3; Lawrence, 15T 64-7 to 16.

3 Talbot, 28T 57-21 to 24.

4 Talbot, 28T 54-5 to 24; Lawrence, 15T 65-13 to 14. In the middle class areas of Masonville, Fellowship and Rancocas, almost every smaller local street was paved and repaved during this period. Even dead-end streets in the middle class areas with only a few homes (Orchard Way, Wedell Avenue, Walnut Avenue) were repaved. Rabin, 14T 58, 14T 59. T14 58-1 to 3; T14 58-1 to 59-5. Springville streets with a higher density remain unpaved and unimproved; in some cases, they've been left as dirt roads. Rabin, T14 60-5 to 14.

5 Alvarez, 24T 117-5 to 9; Rabin, 14T 65-16 to 19.

replacing 335 of the older fixtures.[1] The township engineer stated that these lights were installed pursuant to the township's policy to install lights along those roads where there is substantial concern over traffic safety, traffic volume, sight distance, etc.[2] Although the areas of Springville and Texas are densely developed, they remain without street lights or are poorly lit by the old fixtures making it dangerous to travel along these roads at night.[3] Perhaps the most telling and striking example of the defendant's neglect of these lower income areas is the fact that as one travels down Hartford Road before and beyond the Springville area, new lighting fixtures have been installed.[4]

D. Recreational Facilities:

1) Standard for the Provision of Recreational Facilities: Mt. Laurel's 1969 Master Plan sets forth standards for providing recreational and open space areas.[5] The plan states that children's playlots should service an area of four blocks or less and that the service radius for neighborhood playgrounds should be no more than one-half mile.[6] The plan also recommends that "tot lots" be located in areas sheltered from busy streets and that sidewalk or walkway access to these areas be designed for small children.[7] Mt. Laurel abides by these standards in all areas other than in Springville and Texas.[8]

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1 Blackwell, 19T 103-11, 19T 104-7; Rabin, 14T 65-11 to 16.
2 Talbot, 26T 135-11 to 15.
3 Paynter, 15T 44-14 to 20; Lawrence, 15T 63-19 to 25, 15T 65-17 to 18; Grooms, 12AT 77-4.
4 Rabin, 14T 66-23. Mt. Laurel II, supra, 161 N.J.Super. at 353.
5 Rabin, 14T 76-1 to 14.
6 Rabin, 14T 76-21 to 22.
7 Rabin, 14T 76-22 to 25.
8 Rabin, 14T 78-6 to 25.

2) Recreational Facilities in Mt. Laurel: Exhibit P-46 and accompanying description, Exhibit P-46A (JA-332 and 333a), indicate the recreational facilities maintained by the township.[1] The nearest "tot lot" for the children living in the Springville area is 1½ miles away, accessible only through a vehicular right of way, unfenced and open to the adjacent street.[2] The play area is run down with inadequate and even dangerous equipment.[3] There is an immense disparity between monies spent by the township in maintenance and development of recreation areas in middle and upper-income areas with that spent in Springville. The Texas neighborhood has no recreational area.

E. Zoning:

The zoning ordinance of Mt. Laurel generally affirms and stabilizes the nature of existing development in the township with the exceptions of the development in the low income areas of Springville and Texas.[4] In these areas, where there is the largest concentration of low income families, the township has destabilized the pattern of residential development by rendering the existing residential uses non-conforming and permitting the introduction of disruptive uses.[5]

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1 This exhibit is a compilation of Rabin's testimony as to his personal observations of the facilities, the township building inspector's testimony of his personal knowledge of the facilities and data supplied by the township's Superintendent of Public Works. Rabin, 14T 70-20 to 22; Blackwell, 18T 163, 19T 16 through 19T 20, 19T 37-21 to 23.

2 Rabin, 14T 79-1 to 14

3 Paynter, 15T 45-1 to 16; Lawrence, 15T 72-18 to 20.

4 Rabin, 14T 87-24, 14T 88-1 to 9.

5 Lawrence, 15T 61-11 to 25, 15T 62-1 to 5. The existing residential areas of Springville have been rendered non-conforming by the defendant's designation of the area as "R-3", that is an area requiring a minimum lot size of 20,000 square feet. Rabin, 14T 88-15 to 17. In Springville, a substantial number of properties are smaller than that and have thereby been rendered a non-conforming use. Rabin, 14T 154-12 to 19, 14T 88-17 to 19.

(footnote 5 continued on next page)

F. Code Enforcement:

A program of municipal code enforcement when accompanied by adequate relocation assistance may upgrade the housing supply in a municipality by requiring improvements to substandard housing and the elimination of unfit housing.[1] On the other hand, code enforcement without relocation assistance has the effect of reducing the supply of housing opportunities affordable to persons of lower incomes and actually forcing them out of the community.[2] The defendant's code enforcement program is inadequate by failing to regularly inspect substandard housing in the township and to relocate within the township the residents affected thereby.[3] The inevitable consequence of this kind of program is to force displaced persons out of the township.[4] This could be avoided by providing, at no cost to the municipality, relocation assistance through New Jersey's Department of Community Affairs or rehabilitation money through the federal Community Development program.[5]

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1 Rabin, 14T 33-16 to 23.

2 Rabin, 14T 33-23 to 25; Mt. Laurel, supra, 67 N.J. at 169.

3 Grooms, 12AT 50-11 to 18; Paynter, 15T 39-20 to 24, 15T 47-3, 15T 51-21 to 24.

4 Rabin, 14T 98-11 to 13.

5 Rabin, 14T 101-22 to 25, 14T 101-2 to 5.

(footnote 5 continued from previous page)

5 This lack of correspondence between the pattern of development in the Springville section and the zoning for the area has a destabilizing influence. Rabin, 14T 32-23 to 25. Renewal and rehabilitation of existing homes are deterred since loans to renovate or repair a non-conforming use are more difficult to obtain. Rabin, 14T 88-23 to 25, 14T 89-1 to 2. New development is made more difficult since a number of existing sites must be assembled to meet the larger lot size of the R-3 zone. Rabin, 14T 89-2 to 5.

The defendant has granted only four industrial variances in residential areas. All of these are located in the Springville or Texas areas. Rabin, 14T 89-10 to 23. These include a tool and dye factory on Texas Avenue, a machine shop at the southern end of Hartford Road, and a storm window company on the east side of Hartford Road. These uses, as testified to by Rabin and resident-plaintiff Ethel Lawrence, have adversely impacted and disrupted this residential area by introducing pollution, noise, and additional traffic. Rabin, 14T 90-2 to 6. Lawrence, 15T 61-11 to 25.

1) Inspections: By Ordinance 1972-13, Mt. Laurel adopted the New Jersey Housing Code and authorized its building inspector to make inspections of the dwelling units in the township to safeguard "the health and safety of the occupants of dwellings and of the general public." The township's building inspector testified that the township's program of code enforcement consists of his exterior surveys of housing conditions as he performs his other municipal duties and investigations of specific complaints.[1] He forwards any complaint to the Burlington County Department of Health which actually inspects the unit under a contract with the township.[2] If the unit is in violation of the housing code, the owner is ordered by the township to repair the unit within 30 days or to vacate and demolish it.[3]

Although the inspector characterized this program as adequate, he admitted that his exterior surveys did not reveal all of the units in substandard condition in Mt. Laurel.[4] He readily admitted that he has no knowledge of the housing in the township which is in fact uninhabitable due to interior or overcrowded conditions absent a specific complaint or request for a building inspection.[5] However, even from this limited

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1 Blackwell, 19T 129-21 to 25, 18T 147-11 to 15, 18T 156-7.

2 Blackwell, 18T 144-15 to 17, 19T 107-9 to 22, 19T 114-7 to 17.

3 Blackwell, 18T 147-18 to 25. Janelle Sanders' experience is particularly enlightening as to how the defendant executes this program. On April 6, 1977, a man representing himself as an employee of the Mt. Laurel Health Department simply told Sanders that the house was condemned, posted it and told her that she had 14 days to vacate it. Sanders, 15T 15-21 to 25, 15T 16-1 to 12, 15T 18-22 to 25; Blackwell, 18T 158-4, 19T 108-12, 19T 110, 19T 11, 19T 115-24.

4 Blackwell, 19T 155-9.

5 Blackwell, 19T 124-8 to 11, 19T 128-13.

procedure, over 100 units in the township were found to be in a deteriorating condition during the past year and in need of rehabilitation under the New Jersey Housing Code.[1]

2) Relocation Assistance: Upon the defendant's determination that a dwelling unit is in violation of the New Jersey Housing Code, the township orders that the unit be repaired or vacated and demolished.[2] The building inspector testified that better than one-half of the units occupied at the time of citations are emptied by the time the township actually grants the permits for their demolition.[3] Although persons have been and continue to be so displaced from their homes as a result of the defendant's program of code enforcement, the township does not provide these residents with any relocation assistance. Since 1972, three of these individuals have received relocation assistance through the Burlington County Welfare Board which has contracted with the New Jersey Department of Community Affairs to provide relocation assistance to residents of the County outside of Burlington City.[4] The building inspector testified that Mt. Laurel has not made

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1 Blackwell, 19T 120-18 to 25, 19T 121-1 to 10.

2 Blackwell, 19T 132-4, 19T 139-10 to 12, Example Letters at 19T 141-6 to 15, 19T 145, 19T 148, 19T 151.

3 Blackwell, 19T 134-20 to 25, 19T 135-9, 19T 158-7. The building inspector failed to supply a list of persons who vacated their house subsequent to Blackwell's citation of the unit although he stated at his deposition that he would supply such a list and that he had personal knowledge of such facts. 19T 136-5 to 14, 19T 138-7 to 13.

4 Rabin, 14T 95-5.

any effort to insure that its residents who are displaced by the township's program of code enforcement are relocated in the township, relocated elsewhere or, in fact, are even referred to the county relocation program. Residents Catherine Grooms and Janelle Sanders testified that they learned of their right to relocation assistance from Camden Regional Legal Services while plaintiff Thomasene Paynter was forced to move from her condemned home without ever being informed that she could obtain relocation assistance.[1]

The defects in Mt. Laurel's program openly violate state law and regulations:

(1) The township does not have a relocation officer nor does it plan and provide for the relocation of persons through the preparation and execution of a Workable Relocation Assistance Program (WRAP).[2] See N.J.S.A. 52:31B-5(a)(c); N.J.S.A. 20:4-7(a).

(2) The township's planner does not know whether the township plans or provides for relocation within the township or even what a relocation program is.[3]

(3) The building inspector was also unfamiliar with the New Jersey Relocation Assistance Laws and regulations and had no knowledge of and makes no inquiries as to the relocation of persons who are affected by the township's code enforcement activities.[4] See N.J.S.A. 52:31B-5(b); 20:4-7(b); N.J.A.C. 5:11-2.3(a)(4).

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1 Grooms, 12AT 52-13 to 16; Paynter (formerly Thomasene Lawrence), 15T 42-12 to 15; Sanders, 15T 16-13 to 25.

2 Blackwell, 19T 158-12, 19T 159-24.

3 Glass, 25T 81-19, 25T 82-2.

4 Blackwell, 19T 112-7 to 8, 19T 159-10 and 12, 19T 160-3, 19T 161-4, 19T 163-7.

(4) No effort is made to inform displaced persons of their rights to relocation assistance to determine the needs of persons who may be displaced N.J.S.A.. 52:31B-5(b)(1), 20:4-7(b)(1); N.J.A.C. 5:11-2.2(a)(1)(2); or to ascertain whether tenants ultimately obtain adequate relocation in the township or elsewhere.[1] N.J.S.A. 52:31B-5(b), 20:4-7(b); N.J.A.C. 5:11-2.2(a)(4), (10); 5:11-2.3(b)(1).

(5) No inventories or referrals to available replacement housing are made.[2] N.J.A.C. 5:11-2.2(a)(2);

(6) No transportation to available units, counselling, or assistance in obtaining credit is provided to displaced persons in need of such relocation services.[3] N.J.A.C. 5:11-1.6(g); 5:11-2.2(a)(6); 5:11-2.2(a)(7); 5:11-2.2(a)(8).

(7) No township policy exists of informing tenants that they need not vacate their residences until replacement units are available;[4] N.J.A.C. 5:11-2.2(a)(9); 5:11-2.3(a)(3); and

(8) No provision is made to assure that displaced persons receive fair and reasonable relocation assistance payments.[5] N.J.S.A. 52:31B-4, 52:31B-5(b)(5); N.J.A.C. 5:11-2.3(a)(3).

In order to achieve the goals of a code enforcement program, rehabilitation of substandard units or the relocation of residents to standard units within the township must be provided.[6] The failure to provide replacement housing results in a reduction of the housing stock within the township affordable to persons with low incomes and forces those residents

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1 Blackwell, 19T 158-18 to 20, 19T 159-2 to 5, 19T 164-3 to 9.
2 Blackwell, 19T 164-15.
3 Blackwell, 19T 166-20 to 21, 19T 172-6.
4 Blackwell, 19T 150-5 to 9.
5 Blackwell, 19T 158-18 to 20, 19T 159-2 to 5.
6 Rabin, 14T 98-8 to 11, 14T 101-22 to 25.

to move out of the township to find housing.[1]

G. Use of Federal and State Programs:

While Mt. Laurel has recently expended money for a new municipal building, library and public works building and has received federal and state money for road repairs and open space, it adamantly refuses to take advantage of programs that would aid its lower income residents. Mt. Laurel's refusal to participate in the federal Community Development Block Grant Program exemplifies such discriminatory action.[2]

This program administered by Burlington County provides federal funds to lower income neighborhoods in municipalities throughout the county which choose to participate.[3] These funds can be used to upgrade deteriorating

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1 Lawrence, 15T 68-14 to 20, 15T 71-19 to 25; Sanders, 15T 17-6 to 12, Paynter, 15T 39-20 to 24. Catherine Grooms and her two daughters were ultimately relocated in Lumberton, New Jersey. 12AT 53-21 to 22. Plaintiff Thomasene Paynter and her three children moved to Burlington City for two years after her home in Mt. Laurel was condemned. 15T 39-20 to 24. She presently resides in Mt. Laurel in a substandard dwelling. 15T 40. However, she has not reported the uninhabitable conditions to the township because of her past experience of being forced out of her home without relocation assistance. 15T 42-2 to 11. Janelle Sanders remains in her home cited as uninhabitable. 15T 14-9 to 12. She cannot afford to move without relocation assistance. 15T 12 and 15T 22.

2 Previously mentioned has been Mt. Laurel's failure to utilize state relocation programs.

3 Abeles, 11T 26-3; Bishop, 12AT 18-9. Charles Bishop is the director of the Burlington County Community Development office which supplies for and administer the federal funds that are granted to Burlington County through the CDBG Program. 12AT 4-11 to 13.

neighborhoods or assist in facilitating "least cost" housing.[1] Mt. Laurel could be eligible simply by passing an ordinance which authorizes the township to cooperate with the County in its application for these funds.[2]

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1 Abeles 11T 28-24 to 25; Bishop, 12AT 10-34 to 14, 12-5 to 25. Under this program, money can be used by participating municipalities for the:

(1) acquisition of real property to build new housing; e.g., land banking in which a municipality uses this federal money to purchase property and to hold it until a local sponsor of subsidized housing purchases it. Abeles, 11T 28-2 to 5.

(2) acquisition, construction, reconstruction or installation of public works facilities and other improvements; e.g., municipal development of low and moderate income areas with such improvements as curbs, gutters and sidewalks. Abeles, 11T 28-4 to 9.

(3) clearance, demolition, removal and rehabilitation of buildings and improvements; e.g., Moorestown new housing subsidized development funded in part with these funds. Glass, 22T 169-20 to 22; Bishop, 12AT 12-8 to 14.

(4) development of a comprehensive community development plan and a policy-planning-management capacity.

(5) payment of reasonable administrative costs related to planning and execution of community development and housing activities, 42 U.S.C. § 5305(a)(1),(2),(4),(12),(13).

In Burlington County, these funds have been used, among other activities, for:

(1) housing rehabilitation loans for households of low and moderate income. Bishop, 12AT 10-3 to 6, 12AT 34-25, 12AT 38-15 to 16.

(2) improvements to upgrade lower income neighborhoods. Bishop, 12AT 38-16 to 16.

(3) land purchases for new housing developments for low income persons. Bishop, 12AT 12-18 to 25.

2 Bishop, 12AT 16-2 to 9, 12AT 14-14 to 20; Exhibit P-43 at JA-320a and Exhibit P-44 at JA-330a.

However, Mt. Laurel is one of only 11 of 40 the municipalities in Burlington County which has refused to participate.[1] The township's planner testified that he was initially opposed to joining the program due to his fears of paperwork and red tape (which he could not detail).[2] He now views the program as a possibility to be looked into and recommends to the township that it seriously undertake a re-examination of its decision not to join.[3] Absent the defendant's participation, the eligible and needy residents of Mt. Laurel cannot receive these federal funds available to the township.[4] Plaintiffs submit that the only possible reason which Mt. Laurel could have for not participating is its desire to eliminate rather than improve the low income areas of the township.

H. Conclusion:

The conclusion is irresistible that conditions in lower income neighborhoods have continued to deteriorate as a result of an official policy of neglect and the funnelling of municipal resources into middle and upper-income neighborhoods. Plaintiffs submit that absent judicial intervention, the patterns and practices found by the first trial judge, affirmed by the Supreme Court and which remain unabated today, will continue until the last resident of Mt. Laurel's lower income neighborhoods has departed from the township. These residents will have left behind their historic church and graveyard, a township which succeeded in its policy of discrimination and their hopes for vindication and relief from this state's highest court.

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1 In 1977, 29 of the municipalities in Burlington County joined the Burlington County Community Development application. Bishop, 12AT 9-20 to 21.

2 Glass, 83T 16-25.

3 Glass, 25T 85-11 to 13.

4 Bishop, 12AT 18-20, 12AT 21-12 to 15.

ARGUMENT

INTRODUCTION

Two questions are presented in this appeal: first, has the defendant complied with the mandate of the Supreme Court as set forth in its March, 1975 decision; and second, if the defendant has failed to comply, what is the scope of the remedy to be afforded the plaintiffs.

Plaintiffs submit that the proofs on the question of the defendant's failure to comply are overwhelming and clearly demonstrate that it has blatantly, if not contemptuously, thwarted the Supreme Court's order. Only a modicum of effort has been made even to create the appearance of compliance, presumably to avoid overt contempt. Eight years after filing suit, seven years after Judge Martino's decision and four years after the Supreme Court's specific mandate, Mt. Laurel's exclusionary land use controls remain unchanged.

Furthermore, the plight of the resident poor has worsened. The national and state-wide implications of the exclusionary zoning aspect of this case have overshadowed, if not totally eclipsed, this significant aspect of the case. Judge Martino was keenly aware of it. The Supreme Court affirmed his findings. Yet nothing has been done. The neighborhoods of the resident poor are still without adequate housing and municipal services. The resident plaintiffs still reside in dilapidated, substandard housing with no effort by the defendant to upgrade their neighborhoods through municipal planning, financing or applications for available state and federal programs. All of this is in stark contrast to the rapid growth of non-residential ratables and upper-income areas and to the municipal services and resources rendered to upper income neighborhoods in the township.

The only result of the defendant's alleged effort to comply was the adoption of a zoning amendment designating three new "zones" in the township (23 acres) with a maximum development potential of 131 units. These new zones themselves contain undue cost-generating controls which preclude the opportunity for the development of even these few units as "least cost" housing. Mobile homes and mobile home parks remain prohibited use in the township.[1]

In short, the defendant has continued to neglect its lower income neighborhoods, has done nothing realistically to provide housing opportunities in the township affordable to persons of low and moderate income and, by its own admission, has failed to provide a realistic opportunity to satisfy its share of the regional housing need.[2] Despite a continuous string of landmark legal victories, the plaintiffs, resident and non-resident, remain without a remedy. Economic discrimination remains an official policy in Mt. Laurel. It now must be clear that only strong judicial intervention will produce a change. An effective remedy must now be ordered.

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1 The mobile home issue was the subject of defendant's cross-appeal. Plaintiff will respond to their position in a reply brief. Plaintiffs' position is that the exclusion of and discrimination against mobile homes and mobile home parks is per se arbitrary, capricious and void and that the plaintiff-intervenor's plans should be processed consistent with the Order below.

2 It was never disputed, despite the trial court's unsupported finding, that the defendant had not provided an opportunity to meet even its own assessment of its share of the regional housing need. The defendant admitted to a "fair share" of at least 515 units of which 103 were assessed as an existing, local need in the township. Glass, 21T 148-20 to 23. Mt. Laurel admittedly only zoned, by its new amendment, an opportunity to meet that local need on a one-for-one basis (no overzoning). Glass, 21T 148-17 to 20. The defendant did not ever purport to have provided by Ordinance 1976-5 to provide for its share of the present or prospective regional housing need of persons of low and moderate income.

POINT I

MT. LAUREL HAS FAILED TO PROVIDE A REALISTIC HOUSING OPPORTUNITY, THROUGH ITS LAND USE ORDINANCE, FOR ITS FAIR SHARE OF THE REGIONAL HOUSING NEED

This is not a contested issue. The opinion below notwithstanding, Mt. Laurel did not deny, nor could it deny, that:

1. it has failed to provide an opportunity for more than a fraction of its own indefensibly low "fair share" estimate;

2. it has failed to provide a least cost housing opportunity commensurate with planned residential and industrial/commercial growth in the township;

3. under its own assessment, Mt. Laurel's low and moderate income population will drop from 25.5% in 1970 to 13.2% in the year 2000 despite a regional percentage of 42.5%;

4. its zoning ordinance still contains undue cost-generating controls which admittedly exceed minimums necessary for the protection of health and safety;

5. its new zones, created ostensibly to comply with the Supreme Court mandate, themselves contain controls previously condemned by the Supreme Court and, in fact, embody new cost-generative provisions never seen before even in prior Mt. Laurel codes; and

6. the new zones are designated on sites which present extraordinary development problems due to their location or prior developer commitments.

Essentially, the uncontroverted record documents the fact that Mt. Laurel's land use scheme has not changed despite the Supreme Court's specific directives. Growth continues as planned in the township, in zones and under controls first condemned in 1972. To date, the defendant has refused to fulfill its constitutional and statutory responsibilities, choosing to thwart a Supreme Court mandate. A lower court has now bestowed its imprimatur to this travesty. Only decisive appellate action can insure compliance. The decision below must be reversed[1] and a master appointed to implement the mandate.

[1] Plaintiffs support only that part of the decision relating to mobile homes and, specifically, the plaintiff-intervenor's mobile home park.

A.

MT. LAUREL HAS NOT PROVIDED A
REALISTIC HOUSING OPPORTUNITY
FOR ANY LEAST COST OR SUBSIDIZED UNITS

Even if Ordinance 1976-5 did provide a realistic opportunity for some units, it was grossly inadequate to satisfy the Supreme Court mandate. (See B infra). Regardless, Mt. Laurel has not, in fact, provided a realistic housing opportunity for the development of any least cost or industrial units. The factual statement above clearly documents that:

1) Ordinance 1976-5 contains zoning controls far in excess of least cost standards;

2) Ordinance 1976-5 designates sites which are unbuildable, undesirable, or impractical for least cost and/or subsidized development. Furthermore, none of the sites will be developed in the foreseeable future;

3) No other changes were made in Mt. Laurel's previously condemned zones; nor were any of Mt. Laurel's other land use codes such as its subdivision ordinance changed.

4) Barriers to the provision of subsidized housing have not been removed.[1]

These facts, in the context of the clear judicial mandate, require reversal of the decision below.

1. The Judicial Mandate: Mt. Laurel was required to provide a realistic housing opportunity for its fair share of the regional housing need. A realistic opportunity is provided if:

1) the zoning controls set forth are minimally necessary for health and safety; i.e., at least cost;

2) the zones or sites are developable for least cost and subsidized housing; and

3) the owners of the sites realistically expect to develop them at least cost as such.

[1] This is addressed in the legal argument at Point II infra.

Mt. Laurel was obliged to eliminate all land use regulations which "preclude or substantially hinder" housing for low and moderate income persons. Mt. Laurel, supra, 67 N.J. at 181. The obligation was clarified in Madison where the Court stated that "(n)othing less than zoning for least cost housing will . . . satisfy the mandate of Mt. Laurel." Madison, supra, 72 N.J. at 513. "Least cost" was defined as housing subject to standards set at the minimum necessary for the protection of health and safety. Madison, supra, 72 N.J. at 513, n. 21.

The location of the sites is also a factor in the Court's evaluation of the opportunity provided. Mt. Laurel was required to select sites that were "consistent with all relevant considerations as to suitability." Madison, supra, 72 N.J. at 545. This includes consideration of environmental factors and the desireability of the site for development (such as accessibility to transportation, proximity to existing residential development, availability of water and sewer, developer interest). Madison, supra, 72 N.J. at 522, 545.

The judicial mandate also included criticisms of Mt. Laurel's land use provisions over and above their impact on housing for lower income persons. Thus, all of the then existing zones (all of which remain essentially in tact today) were criticized for embodying unlawful controls such as non-occupancy based, excessive floor area requirements, bedroom restrictions, required amenities (e.g., air-conditioning, open space, educational facilities) and developer exactions (e.g., tuition for school-age children, fire apparatus, ambulances, etc.). Mt. Laurel, supra, 67 N.J. at 167, 168, 183.

The facts unequivocably demonstrate Mt. Laurel's total failure to abide by the Supreme Court ruling and to correct these deficiencies. No

excuse can be given justifying the defendant's failure to act pursuant to these specific directives.

2. Ordinance 1976-5 does not provide for housing at least cost controls or on acceptable sites: The defendant admitted that this amendment to its zoning ordinance was the only action taken to comply with the Supreme Court mandate. The comparison above of the controls imposed by Ordinance 1976-5 for the construction of 131 units with the mandates set forth in the Mt. Laurel and Madison decisions clearly demonstrates that this amendment does not provide for least cost housing. In fact, by the township's own admissions, the requirements imposed by Ordinance 1976-5 are more restrictive in some instances than those contained in Mt. Laurel's general zoning ordinance and preclude the construction of least cost and subsidized housing.

The trial judge did not set forth any analysis in reaching his conclusion that Ordinance 1976-5 was sufficient and in full compliance with the Supreme Court's directives. The trial judge provided no reasons for finding that the three zones created by Ordinance 1976-5 permitted the "type of housing which the Court said must be permitted." Mt. Laurel II, supra, 161 N.J.Super. at 347. Plaintiffs submit that upon reviewing the undisputed record and making such comparisons, Ordinance 1976-5 cannot be labelled "least cost" much less full compliance with the mandates of our state constitution.

Ordinance 1976-5 created three new zones: R-5, a multi-family zone; R-6, a single-family zone; and R-7, which is 10% of one section of the Larchmont PUD scheduled for terrace apartments in 1985. Although the controls regulating development in the new zones were allegedly to be designed

in accordance with minimally necessary standards, that objective was not achieved. First, the defendant failed to reduce its controls to those minimally necessary to protect the public health and safety. Second, the defendant selected sites which are severely impacted by environmental factors, location problems and developer dissatisfaction. Third, the defendant admittedly lifted verbatim many of the extensive development requirements contained in the P.A.R.C. Ordinance in spite of the fact that this ordinance had been explicitly and severely criticized by the Supreme Court. Mt. Laurel, supra, 67 N.J. at 168-169. Fourth, the defendant made no provision in these allegedly "least cost" zones for a variety and choice of housing types. A detailed discussion of the admitted and uncontroverted proofs regarding these controls and sites is set forth at pp. 10 through 51 above. That analysis is not repeated here. It is inconceivable that any rational review could result in approval of this amendment to Mt. Laurel's land use code.

3) The original zoning controls, condemned by the Supreme Court, remain unchanged: This is uncontroverted. Despite the Supreme Court's extensive and pointed criticisms of each zone in the township, no changes were made. The extensive zones for industry, commerce and business remain. The exclusive single-family zones (R-1, 1D, 2 and 3) remain. The exclusive senior citizen zone (R-4, P.A.R.C.) remains. The exclusive PUD controls and agreement conditions remain. Over 99% of Mt. Laurel's land and future units will be developed under these controls absent judicial intervention.

4) Mt. Laurel failed to amend its subdivision ordinance. This is uncontroverted. The lower court accepted this failure merely stating that the Supreme Court only required a modification of the zoning ordinance.

Mt. Laurel II, supra, 161 N.J.Super. at 349-350. This unsupported finding essentially undercuts the entire thrust of the Supreme Court decision by a specious word game.

The impact of the subdivision ordinance on development in Mt. Laurel is indisputable. It sets forth virtually all of the development controls in the township from the widths of streets to the required strength of poured concrete. The subdivision ordinance effects costs as much, if not more so, than the zoning controls themselves. Certainly least cost and subsidized housing cannot be constructed unless subdivision controls are set at the minimum necessary for the protection of health and safety.

This was known to the township. As detailed above, the township planner, in an affidavit to Judge Martino during the "compliance" period after the Supreme Court decision, averred that he would undertake a . . .

> review of . . . subdivision . . . and other codes to identify all aspects that may need modification to implement housing programs. Exhibit P-62 at JA-433a.

Such a review would have been consistent with the Supreme Court mandate. The Court stated that:

> Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing. . . 67 N.J. at 187. (emphasis added).

It referred to "unjustifiable minimum requirements as to lot size, building size and the like. . ." 67 N.J. at 187 (emphasis added).

Although the Court used the term "zoning ordinance" in the opinion, it is clear that reference is being made to all "land use regulations" which were the subject of the case below. Accordingly, specific references

are made in the opinion to the extensive PUD agreements which were not part of the PUD ordinance or zoning ordinance. Mt. Laurel, supra, 67 N.J. at 167-168. It is also clear that Judge Martino meant to refer to more than just the precise "zoning ordinance." He refers to "the patterns and practice" as evidenced by Mt. Laurel's "zoning ordinances." Mt. Laurel I, supra, 119 N.J.Super. at 178. The reason for the plural reference is that the Court was asked to review and did review several "zoning" ordinances including: the township zoning ordinance, PUD ordinance, PUD agreements and subdivision ordinance. All were exhibits in the first trial, all were the subject of extensive testimony and all were considered by the trial court.[1]

The failure of Judge Martino and the Supreme Court to specify each and every provision of every ordinance and PUD agreement which is exclusionary is not proof that the decisions did not relate to them. Both Courts called for an end to exclusionary land use controls. This directive was further defined in Madison as an end to undue cost-generative controls. The mandate is for controls at least cost, consistent with minimal standards of health and safety. It is folly to argue that this is inapplicable to the subdivision ordinance.

The Court below heard detailed testimony on the subdivision ordinance from experts for all parties. The ordinance was received into evidence. Exhibit P-26 at JA-219a. No objection was made that it was irrelevant.

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[1] References to the joint appendix of the first trial are: Zoning Ordinance (JA-161a); PUD Ordinance (JA-178a); PUD Agreements (JA-64a) and Subdivision Ordinance (JA-187a).

In fact, its relevancy was admitted prior to trial by the defendant's own planner who, as previously stated, averred in an affidavit that he would review it. Yet, he did not (Glass, 22T 130-1 to 18, 22T 125-9 to 15); nor did the township's engineer. (Talbot, 22T 76-13 to 18).

The fact is that issue was joined on this ordinance seven years ago. The fact is that least cost and subsidized housing cannot be built unless the extensive, excessive design requirements set forth in that ordinance are minimized or eliminated. The fact is that state and national standards are significantly less rigorous than the controls in Mt. Laurel's code. Exhibit P-70 at JA-449a. The fact is that these state and national standards are sufficient to protect health and safety. The incredible fact is that the trial judge below realized this and relied upon it as to mobile homes; yet ignored it as to conventional housing.

The lower court dismissed plaintiffs' contentions regarding the subdivision ordinance by saying that even if it exceeded minimum standards it was not exclusionary. Mt. Laurel II, supra, 161 N.J.Super. at 350. He went on to say that the choice of changing the ordinance was "within the sound discretion of the governing body" and the failure to do so was not unreasonable, arbitrary or capricious. Mt. Laurel II, id. Ten pages later in the opinion the court dramatically ignored the subdivision ordinance when referring to mobile home development. Here it ruled that a mobile home park:

> . . . shall presumptively be deemed to conform to such least cost principles and adequately to protect the public health, safety and welfare if such plans conform

to Chapter IX, New Jersey State Sanitary Code applicable to mobile home parks and the minimum property standards for mobile home parks published by the Department of Housing and Urban Development. Mt. Laurel II, supra, 161 N.J.Super. at 360.

State Health and Sanitary Codes as well as the federal Minimum Property Standards apply equally to conventionally-built housing as well as mobile homes. There is no possible reason that the trial court should be willing to rely upon one for mobile homes and another for conventional housing.[1] The mandate in Mt. Laurel was to eliminate barriers to low and moderate income housing. In Madison, the Court stated that: (n)othing less than zoning for least cost housing (consistent with official health and safety requirements) will . . . satisfy the mandate of Mt. Laurel." Madison, supra, 72 N.J. at 513. Mt. Laurel's subdivision ordinance is not at least cost. The township engineer admitted this and promised to modify it "the next time (a subdivision) ordinance is passed." Talbot, 27T 77-4 to 6.

This Court must not allow this to continue. Lower income persons must not be left to await Mt. Laurel's actions "next time". This Court should mandate for all development what the trial court limited to mobile home parks. Consistency with recognized state and national standards is sufficient, the lesser restrictive control (as between these officially recognized minimums and Mt. Laurel standards) must apply.

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[1] Plaintiff-intervenor introduced evidence to show that reliance on the Mt. Laurel subdivision ordinance as opposed to state and federal codes would result in an increased cost of $3,855 per unit. Exhibit PI-19 at JA-493a. Detailed testimony was taken on the Mt. Laurel code as compared to federal standards. The excessive nature of Mt. Laurel's provisions were proved and, in fact, admitted by the township engineer.

B.

EVEN IF MT. LAUREL HAS PROVIDED A REALISTIC OPPORTUNITY FOR SOME LEAST COST UNITS, IT HAS FAILED TO COMPLY WITH THE SUPREME COURT MANDATE

Mt. Laurel's sole response to the 1975 Supreme Court decision was, after a year's delay, to adopt an amendment to its zoning ordinance. Nothing else was changed. All of the original zones remain in tact, as does the township's subdivision ordinance which establishes excessive design and development standards for all residential construction in the township.

The amendment, Ordinance 1976-5, created a housing opportunity for at most 131 units on 23 acres. These units are not least cost both from the perspective of their development controls and site locations. This has been thoroughly evaluated above. Even if the controls and sites provided by Ordinance 1976-5 were adequate, the total opportunity provided is grossly deficient, failing to even approximate the defendant's share of the regional housing need as mandated by the Supreme Court.

1. The Judicial Mandate: The Supreme Court clearly ruled that Mt. Laurel had an affirmative responsibility to afford a realistic housing opportunity: "at least to the extent of the municipality's fair share of the present and prospective regional need therefor." Mt. Laurel, supra, 67 N.J. at 174. The Court reiterated this mandate in its discussion of Mt. Laurel's constitutional obligations under the general welfare concept definitively stating that Mt. Laurel must "affirmatively plan and provide . . to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries." Mt. Laurel, supra, 67 N.J. at 179.

Specifically, Mt. Laurel was to:

1) provide a reasonable housing opportunity "for all categories of people . . . including those of low and moderate income." Mt. Laurel, supra, 67 N.J. at 187. Mt. Laurel did not do this. It zoned almost no land and few, if any, units at least cost while providing thousands of acres and units for middle and upper-income households under excessive land use controls.

2) zone to permit adequate housing within the means of potential employees, Mt. Laurel, supra, 67 N.J. at 187, and to insure a reasonable relationship between its industrial/commercial zoning and the potential for such growth. Mt. Laurel, id. Mt. Laurel did not do this. It drastically overzoned for potential employment and drastically underzoned for housing for low and moderate income employees.

3) Mt. Laurel was to overzone for least cost housing. Madison, supra, 72 N.J. at 519. Mt. Laurel knew of this obligation. Its planner disagreed with the concept and the township refused to adhere to it. Moreover, it underzoned for least cost units while overzoning for every other type of use.

Mt. Laurel's total response to this mandate was to zone for 131 units on 23 acres of land. It admitted that this was an inadequate response. The defendant argued that this was a first step designed to accommodate only its existing, local housing need (as opposed to regional and future needs). This response is in flagrant violation of the Court order and totally inadequate. The reasonableness of zoning for 131 units has been thoroughly discussed above.[1] These facts are briefly reviewed here as they pertain to a legal analysis of the defendant's failure to act in compliance with the Supreme Court decision.

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[1] See pages 64 to 83.

2. Mt. Laurel did not provide a reasonable housing opportunity for low and moderate income persons: The proofs on this point are overwhelming. A maximum of 131 units were provided on 23 acres. The amount of land provided is itself conclusive that Ordinance 1976-5 is inadequate: 23 acres out of 7,718 vacant acres; only .3% of the vacant land was made available for allegedly least cost units.[1] The number of units provided is also conclusive: 131 units out of 18,197 projected for future development; only .7% of the total number of units yet to be built in Mt. Laurel by its own projections.[2]

A comparison with the regional percentage of low and moderate households provides further confirmation of this conclusion. Such a comparison was established by the Supreme Court in Madison as a means of measuring the reasonableness of the opportunity (quantitatively) provided:

> (I)f the existing municipal proportions correspond at least roughly with the proportions of the appropriate region the formula would appear prima facie fair. Madison, supra, 72 N.J. at 543.

The proportion of low and moderate income households (earning under $10,000 in 1970) in the Mt. Laurel region (Burlington, Camden and Gloucester Counties) is 42.5%. In 1970, only 25.5% of Mt. Laurel's total population consisted of families with low and moderate incomes. Mt. Laurel

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[1] The vacant land statistic is Mt. Laurel's. Mt. Laurel has 14,167 total acres of which .16% has been designated for "least cost".

[2] At full growth, Mt. Laurel estimates 22,260 units. The 131 will be .5% of that total.

is actually experiencing a growth rate of 200 housing units per year. At that rate, at least 6,000 new units are expected to be built in Mt. Laurel between 1970 and 2000.[1] The 131 units are less than 2% of the total anticipated new units by the year 2000, hardly, a reasonable share of its growth.

The unreasonableness of Mt. Laurel's compliance is also evident when measured against Mt. Laurel's allocation under various fair share plans.[2] The regional proportionality test of 42.5% applied to the fair share plans for Mt. Laurel indicates that only two of the plans presented below achieve that standard: the D.C.A. plan (as adjusted for conformity) and the plan presented by plaintiffs' expert Mallach.[3] The D.C.A. plan assesses Mt. Laurel's fair share to the year 2000 at 2,276, the latter at 3,672.[4] The

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1 This is a conservative figure based on the growth which occurred between 1970 and 1977, a period of economic stagnation. Mt. Laurel witnessed the construction of 1,143 units during those years. This figure should be compared to the fact that over 8,000 units are expected to be developed in the PUDs alone prior to 1990.

2 Plaintiffs believe it is not necessary to actually enumerate the defendant's fair share in this case. Mt. Laurel's actions are so inadequate as to be condemnable regardless of any fair share analysis. Plaintiffs believe the Court need only set forth guidelines for a master who will be charged with the responsibility of determining a reasonable share of future growth for least cost units.

3 See comprehensive critique of all plans appended hereto at pp. 1a.

4 These figures may be compared with Mt. Laurel's own growth rate and the regional proportion. The resulting year 2000 figure based on growth rate alone would be 2,550. Adding 453 to that figure (the 1970 deficit of low and moderate income households) the growth rate figure would be 3,003 units.

impact of the D.C.A. plan, if implemented would be to increase Mt. Laurel's low and moderate income percentage from the 1970 figure of 25.5% to a year 2000 proportion of 28.8%. The Mallach plan, if implemented, would increase it to 42.0%.[3]

It is patently clear that whether evaluated from the perspectives of the amount of land zoned for least cost housing, the number of units zoned for least cost development, the municipal growth rate or relevant fair share plans, Mt. Laurel has failed to provide a reasonable opportunity for least cost housing. This is further documented when one considers industrial/commercial zoning and employment and overzoning for least cost development.

3. Mt. Laurel has failed to zone to permit adequate housing within the financial means of potential employees; nor has it provided a rational relationship between its industrial/commercial zoning and the potential for such development: Mt. Laurel's failure to abide by the

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1 The plan prepared by the defendant's planner and adopted by the township called for 515 least cost units through the year 2000. The planner, himself, discredited this figure. The effect of its implementation would be to lower the low and moderate income portion of Mt. Laurel's population from 25.5% in 1970 to 13.2% in the year 2000. The Burlington County plan would have a similar, although less dramatic detrimental effect. It called for 997 units, lowering the low-moderate percentage from 25.5% to 18.1%. Both plans also suffered from internal inconsistencies and reflect unsupportable assumptions and calculations. These and the D.C.A. and Mallach plans are evaluated in detail infra, see pp. 8a to 30a.

Supreme Court's edict regarding housing for potential employees was intentional and admitted. In fact, it is municipal policy not to do so. This policy was unaffected by the 1975 decision. The municipal planner himself testified that the provision of needed housing for Mt. Laurel's low and moderate income employees is "really an obligation on all townships surrounding the western end of Mt. Laurel."[1]

2,174 vacant acres have been set aside for industrial uses alone. This does not include industrial/commercial uses in the PUDs and land zoned commercial, major commercial, neighborhood commercial and business. 371 industrial acres have been developed; most of it since the first trial in 1972. At least 3,465 added lower income employees can be expected in Mt. Laurel between 1970 and the year 2000. (This is 40% of the conservative D.V.R.P.C. projection of 8,663 new employees). Over 200 lower income workers were added between 1975 and 1976 alone. Yet, Mt. Laurel has chosen not to accommodate these employees while setting aside ample land to house middle and upper income employees. In fact, the tentative approvals of each planned unit development state, as was paraphrased by the Supreme Court, "that the development will attract a highly educated and trained population base to support the nearby industrial parks in the township as well as the business and commercial facilities." Mt. Laurel, supra, 67 N.J. at 168.

Thus, while the defendant has actively sought to attract and provide a housing opportunity for middle and upper income workers, it has unlawfully delegated to other townships the responsibility of housing low and moderate income employees generated by its own non-residential zoning. Those most

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1 Glass, 21T 35-13 to 17, 21T 36-7 to 24.

in need of housing in close proximity to their employment are excluded and told to live elsewhere.

4. Mt. Laurel did not overzone for least cost housing: The fact that Mt. Laurel did not overzone for least cost housing opportunities is also undisputed and a reflection of official policy. It zoned for a maximum of 131 allegedly "least cost" units. This is approximately one-fourth of its own absurd fair share estimate of 515 units and 2% of the total anticipated new units (6,000) based on its annual growth rate. While underzoning for least cost development, Mt. Laurel has overzoned for every other type of use.

> 1) Non-least cost single-family: 3,599 units have been built under exclusionary controls. Land zoned for 8,891 units remains vacant (a ratio of 2.5 potential units for each unit already built;
>
> 2) Non-least cost multi-family: 504 units have been built under exclusionary controls. Land zoned for 9,306 units remains vacant (a ratio of 18.5 potential units for each unit already built); and
>
> 3) Industrial land: 371 acres have been developed. 2,174 industrial zoned acres remain vacant (a ratio of 6 vacant industrial acres for every acre already developed. This does not include vacant land zoned for other non-residential purposes).

This result is indefensible. The Court cannot permit such a flagrant violation of a Supreme Court mandate. A much less obvious violation would deserve judicial censure. Mt. Laurel's actions deserve immediate and forceful judicial reaction to insure compliance with the mandate and the integrity of the judicial process.

POINT II

THE DEFENDANT HAS FAILED TO TAKE OTHER NECESSARY AND ADVISABLE ACTION NEEDED TO FULFILL ITS CONSTITUTIONAL OBLIGATION

The Supreme Court recognized that changes in the defendant's land use regulations alone would be insufficient and that other necessary and advisable action would be necessary to fulfill its constitutional obligation. The Court stated:

> The municipality should first have full opportunity to itself act without judicial supervision. We trust it will do so in the spirit we have suggested, both by appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of its fair share of the regional need of low and moderate income housing may be indicated as necessary and advisable. Mt. Laurel, supra, 67 N.J. at 192.

The impact of this direction on the defendant's compliance is two-fold: first, on such action as might be necessary to stimulate or encourage development of new least cost housing; and second, as discussed in Point III below, on such action as might be necessary to stabilize and improve existing neighborhoods of low and moderate income persons.

The defendant has admittedly failed and, in fact, has refused to take necessary and advisable action to encourage new housing opportunities for low and moderate income persons and families. Such action, has not even been attempted.[1] Furthermore, the defendant has refused to take those steps necessary to the realistic provision of subsidized housing opportunities. The proofs show that although minimum land use controls are a necessary prerequisite to providing opportunities for subsidized housing, they are not sufficient. More than zoning is needed. See also, Mt. Laurel,

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[1] One example is the provision for density bonuses. Madison, supra, 72 N.J. at 547.

supra, 67 N.J. at 170 n. 8. Federal and state subsidy programs are preconditioned on certain municipal action. These include the adoption of an adequate "resolution of need", a willingness to enter into a "payment in lieu of taxes" agreement and, in the case of the federal "existing" housing program, the designation of a local public agent.

Absent the township's cooperation, subsidized housing opportunities cannot be realized in the township. This was specifically acknowledged by the Supreme Court. Mt. Laurel, supra, 67 N.J. at 169-170.[1] The uncontroverted evidence is that subsidized housing is the only means available to provide housing for a significant portion of the group in need. The reality is that if subsidized housing cannot be built in Mt. Laurel, if the Court fails to deal directly with its exclusion, the lowest income people, those most deprived, will continue to be excluded from the township, and the resident poor will ultimately be forced out.

Plaintiffs are not seeking injunctive relief on this issue. A master, appointed by the Court, could satisfactorily resolve questions as to what is necessary and advisable action consistent with the judicial mandate. However, the judicial mandate, as expressed by the Court in its declaratory ruling, must specifically state that the defendant is required to take whatever action is necessary to participate in these federal and state programs.[2] If the Court fails to so declare, municipalities will have the unfettered ability to exclude the most needed housing in the state.

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1 The resident plaintiffs have already experienced the effects of Mt. Laurel's intransigence in this regard. See Mt. Laurel, id.

2 It may be noted that such participation may be limited in accordance with the defendant's "fair share" obligations. If all municipalities participate on such a basis, none will experience burdensome tax concerns.

The Court unquestionably has the power to require municipal participation in state and federal programs where appropriate to protect and secure fundamental needs. "There cannot be the slightest doubt that shelter, along with food, are the most basic human needs." Mt. Laurel, supra, 67 N.J. at 178. The Court is now confronted with the legal issue as to whether municipal "discretion" encompasses the right to refuse to undertake those necessary pre-requisites to the creation of a housing opportunity where no alternative exists for the needy class.

The Court must appreciate that lower income persons will be sheltered. The question is not whether they will be, but how and where. The opportunity, presented by the state and federal programs, is to provide affordable, safe and healthful shelter on a fair share basis. A municipal entity must not be permitted the discretion to condemn its citizens to substandard housing in deteriorated neighborhoods. It would be one thing for local government not to act if no state or federal programs existed. It is another for government to sit idly by when such programs are available and the need to utilize them is desperate.

Ample authority exists to require governmental participation in such programs. In United States v. Bd. of School Comm'rs of Indianapolis, 503 F.2d 68, 78 (7th Cir. 1974), cert. den. 421 U.S. 929 (1975), a school desegregation case, the court stated:

> Finally, in regard to the IPS board's attacks on the district court's orders, we hold that the court did not abuse its discretion in ordering IPS to seek available federal funds to expedite desegregation. This method of implementation of a decree intended to eliminate a dual school system has been approved by several courts. United States v. Texas, 342 F.Supp. 24, 29 (E.D. Tex. 1971), aff'd 466 F.2d 518 (5th Cir. 1972); Whittenberg v. Greenville Cty School Dist., 298 F.Supp. 784, 790 (D.S.C. 1969) (three-judge panel).

The district court in United States v. Texas, 342 F.Supp. 24 (E.D. Tex. 1971), aff'd 466 F.2d 518 (5th Cir. 1972) included in its order the following:

> It is recognized that implementation of the foregoing Plan will require an expenditure of funds greater than the amount now being expended by the district. It is also understood that the implementation of some programs contained in the Plan is dependent upon availability of additional funds from Federal, State, local or other sources.
>
> Taking into account the funding problems confronting the San Felipe Del Rio consolidated Independent School District, the following will be done immediately.
>
> > . . . (b) The District will, in good faith, continue to make application for sufficient funds from Federal, State and other sources to effectuate all elements of the Comprehensive Plan. Assistance in locating, making application for and securing funds for the Comprehensive Plan will be sought and provided on a continuing basis through the Department of Health, Education and Welfare, the United States Office of Education, the Texas Education Agency and elsewhere in compliance with the orders of this Court. 342 F.Supp. at 38.

It may be true, as the Court stated in Mt. Laurel, that municipalities, technically, do not build housing. Mt. Laurel, supra, 67 N.J. at 192. However, they are a necessary instrumentality in the production of subsidized housing. As such, when their action is necessary, their inaction is at least presumptively contemptable, illegal and unconstitutional.

A. Payment in Lieu of Taxes and Tax Concessions:

In Madison, supra, 72 N.J. at 546, the Supreme Court stated that tax concessions cannot be ordered absent appropriate enabling legislation. Tax

concessions are different from "payment in lieu of taxes agreements" which are a necessary part of a subsidized housing program. The Supreme Court's decision regarding tax concessions as reflected in Madison is not relevant or applicable to payment in lieu of tax agreements.

A tax concession is a device to encourage developers to come into a township. It has been used to attract commerce and industry in some areas pursuant to enabling legislation which permits a municipality to offer tax benefits to the particular commercial/industrial developers. The Supreme Court stated that to use this commercial/industrial tax program to aid housing "would unquestionably require enabling legislation and perhaps constitutional amendment." Madison, id.

However, payment in lieu of taxes agreements, to assist the development of subsidized housing, are an altogether different matter from tax concessions. In fact, enabling legislation for them exists. The realities of federal and state subsidy housing programs require a payment in lieu of taxes agreement. This has been recognized by our Legislature. See N.J.S.A. 55:14I-5; 14J-8(f), 9(a)(8) and 16-19. It is a system whereby the municipality agrees to take a percentage of gross rent in lieu of usual real estate taxes. Its purpose is not to attract development of subsidized housing but to make such housing financially feasible. It was uncontroverted at trial that absent a willingness to enter into such an agreement, subsidized housing, needed by a significant portion of the low and moderate income class of plaintiffs, cannot be built. If a developer is willing to build a housing project pursuant to state and federal programs to satisfy part or

all of Mt. Laurel's fair share obligations, plaintiffs submit that the defendant township can and must be required to enter into such supportive and essential "in lieu of taxes" agreements.

B. Housing Authority and Local Public Agents:

In Madison, the Supreme Court also stated that "mandatory sponsorship of or membership in public housing projects" cannot be ordered. Madison, supra, 72 N.J. at 546. However, the Court continued:

> It goes without saying however, that the zoning in every developing municipality must erect no bar or impediment to the creation and administration of public housing projects in appropriate districts.

This statement would indicate that the defendant must permit such agencies as do exist to create and administer housing in the township if they elect to do so. Furthermore, the Court did not discuss, since it did not then have before it, the new federal "existing" housing Section 8 program. This program provides funds for housing the poor in existing units. It is a rent subsidy. The program, however, requires the designation of a local public agent (L.P.A.). The program cannot operate without such a designation. The agent's responsibility is simply to apply for federal set-asides for "existing housing" subsidies, contract with existing landlords and certify the eligibility of applicants. This is solely an administrative function and does not involve the township in housing production, per se. In fact, the building inspector or other appropriate official could undertake this task. Absent the designation of such an agent, the housing program for

subsidization of existing units cannot be implemented in the township and no existing unit, regardless of whether or not it was built at least cost, will be available for rental subsidies.

C. Resolution of Need:

The defendant has refused to adopt an adequate resolution of need. Mt. Laurel, supra, 67 N.J. at 169-170. Absent such a resolution, no developer can obtain or utilize funds from the New Jersey Housing Finance Agency for a project proposed in Mt. Laurel. In other words, no state subsidized development can occur in Mt. Laurel by virtue of its refusal to draft an appropriate resolution of need.

D. Participation in the County Community Development Program:

The defendant need only pass a resolution to participate. The County administers the program at no expense to the local government. The program provides loans and grants for rehabilitation and water and sewer tie-ins. Money can be used to purchase land for lower income housing and generally improve conditions in lower income neighborhoods. Mt. Laurel has refused to participate in this program.

POINT III

THE COURT BELOW ERRED AGREGIOUSLY IN NOT GRANTING RELIEF TO THE RESIDENT POOR

If this Court does nothing more, it must act decisively to secure the rights of the resident plaintiffs. Despite the pointed declarations of the initial trial court and the Supreme Court regarding the living conditions of Mt. Laurel's own resident poor, the court below essentially washed its hands of the matter. Nothing will be done to protect their constitutional and statutory rights absent judicial intervention. After eight years of litigation, after a generation of living on borrowed time in this township, the final adjudication cannot ignore them.

It was the plight of the resident poor that first moved the initial trial court to act. These are the offspring of some of Mt. Laurel's founding families. Their ancestry in the township goes back several generations. Since the earliest planning activities in Mt. Laurel in 1959, recommendations have been made to improve the conditions of the neighborhoods of these residents. They are the helpless victims of at least a twenty-year history of municipal neglect and discrimination in the planning and provision of publicly-financed municipal services.

The pattern and practice of municipal neglect was thoroughly reviewed by the Supreme Court in 1975. Referring to these conditions the Court stated:

> The 1969 Master Plan Report recognized it and recommended positive action. The continuous official reaction has been rather a negative policy of waiting for dilapidated premises to be vacated and then forbidding further occupancy. Mt. Laurel, supra, 67 N.J. at 169.

The impact of this negative policy would be significant even if uniformly applied to all of the neighborhoods in Mt. Laurel, rich and poor, since the poor are most in need of sound municipal planning and corrective action. This negative policy, however, is even more abusive in this case since it has been applied only to the lower income neighborhoods in Mt. Laurel. As the Supreme Court stated:

> All of this affirmative action for the benefit of certain segments of the population is in sharp contrast to the lack of action, and indeed hostility, with respect to affording any opportunity for decent housing for the township's own poor living in substandard conditions. . . Mt. Laurel, supra, 67 N.J. at 169.

This lack of action has continued and will continue absent judicial intervention. As originally found by the first trial court and affirmed by the Supreme Court:

> (Mt. Laurel) has used federal, state, county and local finances and resources solely for the betterment of middle and upper class persons. (119 N.J.Super. at 178). Mt. Laurel, supra, 67 N.J. at 170.

This is illegal. It is as much a discriminatory municipal land use practice as exclusionary zoning, per se. It is, perhaps, even more insidious. Moreover, it is not simply the unfortunate effect of an otherwise benign policy. As the initial trial court found, and the Supreme Court affirmed, Mt. Laurel's actions have been deliberate. Mt. Laurel, supra, 67 N.J. at 174 n. 10.

The original trial court had mandated that Mt. Laurel affirmatively plan for and implement a program to secure the housing needs of the resident poor. Mt. Laurel I, supra, 119 N.J.Super. at 178-179. The Supreme Court

modified this decision giving the township an opportunity to act first. Mt. Laurel, supra, 67 N.J. at 172. This refusal by the Supreme Court to issue specific injunctive relief has now been seized upon by the court below as a means of avoiding the problem altogether. Mt. Laurel II, supra, 161 N.J.Super. at 352.

The failure of the Supreme Court to mandate specific relief in this regard cannot be construed to embody a finding that such municipal action is unnecessary. One should have been able to presume that the declaration itself would be sufficient. It was wrong to so presume. Despite the findings, the defendant did nothing to change its patterns and practice. However, now a trial court has condoned this failure to act, essentially reversing the Supreme Court's findings and those of Judge Martino.

The record overwhelmingly demonstrates that the land use practices first condemned in 1972 continue today. In the entire area of municipal services - streets, sidewalks, lights, recreation, water and sewer - the low income neighborhoods have essentially been abandoned by the defendant.[1] The factual statement above details the disparity which exists in muncipal services and resources. Plaintiffs will not repeat them here. It is

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[1] Plaintiffs submitted unrebutted proofs regarding the continued disparity in: (1) road construction and maintenance; (2) curb and sidewalk construction and maintenance; (3) street names (the only public streets in Mt. Laurel without name designations are in the Springville area); (4) street lights; (5) recreation facilities; (6) storm drains; (7) water and sanitary services; and (8) relocation programs.

sufficient to say that the court below disregarded these facts, taking solace that after the second trial the defendant had repaved the portion of Hartford Road which extends through the Springville area.[1] The court ignored the fact that up until the second trial this was the only poorly paved section of this major thoroughfare as it transversed the entire township.[2] It also disregarded the following facts:

1) many streets in the lower income neighborhoods remain completely unpaved and all are poorly maintained;

2) streets which are major arteries and which provide access to school buses and recreation areas have no curbs or sidewalks;

3) modern street lights have not been installed in the lower income neighborhoods;

4) recreational areas in these neighborhoods are non-existent, not safely accessible or are deteriorated;

5) storm drains, water and sanitary sewer lines do not serve these areas;

6) non-residential uses have been permitted by variance;

7) state relocation laws have been violated;

8) federal funds to assist in housing rehabilitation neighborhood revitalization, relocation and water/sewer tie-ins, at no cost to the township, have been ignored;

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1 Mt. Laurel II, supra, 161 N.J.Super. at 353.

2 The court below did admit that:

> The evidence before the court disclosed that, particularly in the areas mentioned, street paving was poor and street lighting was less than adequate. Mt. Laurel II, supra, 161 N.J.Super. at 353.

9) in the six year period, 1970-1976, almost $1,000,000 was spent by the township on street improvements, lighting, recreational facilities and the like in upper-income areas. Exhibit P-58 at JA-415; and

10) numerous applications were made by the township for federal and state assistance to improve the township generally or specific middle and upper income areas. Exhibit P-51 at JA-340a.

Despite this unrefuted record, the court below found no discrimination in the use of municipal services and no authority to remedy it even if it did. Mt. Laurel II, supra, 161 N.J.Super. at 353-354. This was gross error, a reversal of the Supreme Court and initial trial court decisions and not within the province of a court whose sole function was to determine the adequacy of compliance.

The Supreme Court in Reid Development Corp. v. Parsippany-Troy Hills, 10 N.J. 228, 233 (1962), established the legal context for the review of such action:

> (I)t is elementary that the exercise of the power must be in all respects fair and reasonable and free from oppression. There can be no invidious discrimination in the extension of the service thus undertaken by the municipality as a public responsibility. Equal justice is of the very essence of the power. Impartial administration is the controlling principle. The rule of action must apply equally to all persons similarly circumstanced.

In 1975, the Supreme Court upheld a trial court determination that Mt. Laurel had intentionally violated this ruling. The defendant and the court below have made a mockery of its principles. The plain facts are that while middle and upper-income neighborhoods receive a wealth of municipal services, undertaken by the municipality, the lower income neighborhoods do not and that this disparity was recognized and condemned by the Supreme Court in 1975.

The time for delay is over.[1] The Court must now issue a definitive ruling mandating an end to these land use practices and specifically instructing a master to devise and implement a plan to equalize services and upgrade conditions in Mt. Laurel's lower income neighborhoods.

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[1] Originally the Supreme Court vacated "as at least premature" that portion of the first trial court's order which directed the preparation and submission of a study, report and affirmative plan to implement the defendant's housing responsibility. Mt. Laurel, supra, 67 N.J. at 192. Judge Martino had stated. Mt. Laurel I, supra, 117 N.J.Super. at 179:

> The plan shall include an analysis of the ways in which the township can act affirmatively to enable and encourage the satisfaction of the indicated needs and shall include a plan of action which the township has chosen for the purposes of implementing the program. The adopted plan shall encompass the most effective and thorough means by which municipal action can be utilized to accomplish the goals set forth above.

The Supreme Court, acknowledging it had the power to order the relief stated that: "The municipality should first have the full opportunity to itself act without judicial supervision". Mt. Laurel, supra, 67 N.J. at 192. The record clearly demonstrates that the Court's trust has been misplaced.

POINT IV

THE REMEDY

Eight years after filing suit, seven years after Judge Martino's decision, and four years after the specific Supreme Court mandate, Mt. Laurel's exclusionary land use controls, aside from the rezoning of 23 acres, remain unchanged. The resident plaintiffs, after eight long years of struggle, continue to endure dilapidated, substandard housing conditions. Their neighborhoods, are still without adequate housing and municipal services. Despite a continuous string of landmark legal victories, they remain without a remedy.

Initially, the Supreme Court was satisfied, upon declaring the land use practices of the defendant township unconstitutional, to permit Mt. Laurel an opportunity to remedy these wrongs.[1] Judicial trust, as

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[1] In 1975, the Supreme Court stated:

> The township is granted 90 days from the date hereof, or such additional time as the trial court may find it reasonable and necessary to allow, to adopt amendments to correct the deficiencies herein specified. It is the local function and responsibility, in the first instance at least, rather than the court's to decide on the details of the same within the guidelines we have laid down.
>
> It is not appropriate at this time, particularly in view of the advanced view of zoning laws as applied to housing laid down by this opinion, to deal with the matter of the further extent of judicial power in the field or to exercise any such power. See however, Pascack Association v. Mayor and Council of Township of Washington, 131 N.J.Super. 195 (Law Div. 1974), and cases therein cited, for a discussion of this question. The municipality should first have full opportunity to itself act without judicial supervision. We trust it will do so in the spirit we have suggested, both by appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of its fair share of the regional need for low and moderate income housing may be indicated as necessary and advisable. Mt. Laurel, supra, 67 N.J. at 191-92.

this detailed undisputed record substantiates, was misplaced. The defendant has done nothing and apparently will only respond, to a specific judicial order. This Court must act to fill the vacuum created by Mt. Laurel's failure to comply with the Supreme Court's order. Plaintiffs' rights are meaningless if this Court does not take the necessary steps to guarantee results. The Court, as detailed below, is respectfully requested to act decisively by:

1. Declaring Mt. Laurel's discriminatory land use controls invalid for failing to:

   a) Provide a realistic opportunity for Mt. Laurel's fair share of the regional need for housing for persons of low and moderate incomes; and

   b) Cease its pattern and practice of neglecting its lower income neighborhoods in the provision of municipal resources and services.

2. Appointing a master, acceptable to plaintiffs, to submit and enforce a plan to effectuate the Court's judgment including:

   a) Revision of Mt. Laurel's zoning, subdivision and PUD ordinances and PUD conditions to eliminate all unnecessary requirements which unduly add to the cost of housing in order to permit the construction of least cost and subsidized housing in the township, including mobile homes and mobile home parks;

   b) Revision of Mt. Laurel's zoning map to provide a realistic and sufficient opportunity for least cost and subsidized housing in the township;

   c) A comprehensive plan to remedy the defendant's history of discrimination in the provision of municipal resources and services to the neighborhoods inhabited by the resident poor; and

   d) A comprehensive plan setting forth any other necessary and advisable action for the creation of a realistic housing opportunity in the township for persons of low and moderate income.

3. Ordering the issuance of a building permit to the plaintiff-intervenor for the development of his mobile home park unless the defendant can demonstrate that the proposal does not meet minimal standards of health and safety.

Every aspect of this requested relief is directed to remedy a specific wrong documented throughout the past eight years of litigation. This Court must act in a definitive manner and exercise its power to grant an effective remedy when confronted by a recalcitrant defendant who continues to deny plaintiffs their constitutional rights.

This is no longer a "first case". The defendant can no longer assert that it has just recently been advised of its constitutional obligations. It has had the full benefit of two Supreme Court decisions in both Mt. Laurel and Madison and still refuses to comply. The Supreme Court's evaluation of Madison Township's inaction is on point and relevant to the Court's consideration of the remedy to impose here. In Madison, the Supreme Court stated:

> In Mount Laurel we elected not to impose direct judicial supervision of compliance with the judgment "in view of the advanced view of zoning law as applied to housing laid down by (the) opinion". 67 N.J. at 192. The present case is different. The basic law is by now settled. Further, the defendant was correctly advised by the trial court as to its responsibilities in respect of regional housing needs in October, 1971, over five years ago. 117 N.J.Super. at 11. It came forth with an amendment ordinance which has been found to fall short of its obligation. Considerations bearing upon the public interest, justice to plaintiffs and efficient judicial administration preclude another generalized remand for another unsupervised effort by the defendant to produce a satisfactory ordinance. The focus of the judicial effort after six years of litigation must now be transferred from theorizing over zoning to assurance of the zoning opportunity for production of least cost housing. Madison, supra, 72 N.J. at 552-53.

Madison Township, it should be noted, was deemed a recalcitrant municipality because the law was then settled. Mt. Laurel, a fortiori, must be held to a higher standard since it has already been the subject of a Supreme Court mandate. Thus, in this case, an effective remedy must be rendered in order to avoid placing the plaintiffs in the same position that they have been in since the initiation of this litigation: no housing opportunities while challenging Mt. Laurel's contemptuous effort to "comply" with theoretical court orders.

A. Declaratory Relief: Mt. Laurel has failed to amend its land use controls so as to eliminate the specific exclusionary features of its land use regulations condemned by the Supreme Court and to end its pattern and practice of discrimination in the provision of municipal resources and services to its lower income neighborhoods. The most fundamental relief required here is to definitively declare, once and for all, that Mt. Laurel's land use controls are invalid. This Court must find that:

1. Mt. Laurel's Ordinance 1976-5, zoning ordinance, map, subdivision and PUD ordinances and PUD conditions do not provide a realistic housing opportunity for persons of low and moderate income in the township.

2. Mt. Laurel has failed to end and reverse the practice of economic discrimination against its own resident poor in the provision of municipal resources and services.

3. Mt. Laurel has unreasonably prohibited mobile homes and mobile home parks from its borders.

4. Mt. Laurel has failed to take other necessary and advisable action to realistically provide a housing opportunity in the township for persons of low and moderate income.

B. Appointment of a Master: In Madison, the Supreme Court noted the possibility of a need to appoint an impartial expert to report to the Court

"as to a recommendation for the achievement by defendant of compliance" with the Court's order. Madison, supra, 72 N.J. at 554. Plaintiffs submit that compliance with the Court's order here may be achieved only by the appointment of a master, acceptable to the plaintiffs.[1] The role of the master will be to submit and enforce a plan to expeditiously effectuate the Court's order.

The appointment of masters has been extensively used by federal courts to implement plans for school desegregation,[2] the improvement of prison

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1 In Hart v. Community School Bd. of Brooklyn, 383 F.Supp. 699 (E.D.N.Y. 1974), aff'd 512 F.2d 37 (2d Cir. 1975), the Court stated that the selection of a Master should be made, if possible, with the concurrence of the parties. Hart, supra, 383 F.Supp. at 764. Similarly, in Construction Industry Ass'n. of Sonoma Cty. v. Petaluma, 375 F.Supp. 574 (N.D. Cal. 1974) rev'd on other grounds 522 F.2d 897 (9th Cir. 1975), each party was invited to suggest three names.

2 Swann v. Charlotte Mechlenberg, 402 U.S. 1 (1971) (school desegregation plan adopted by a master and approved by the district court upheld); Swann v. Charlotte Mechlenberg, 306 F.Supp. 1261, 1313 (W.D.N.C. 1969) (court appointment of "expert consultant" in educational administration to prepare school desegregation plan with which defendant directed to comply); U.S v. Bd. of Comm'rs of Indianapolis, 503 F.2d 18 (7th Cir. 1974), cert. den. 421 U.S. 929 (1975) (court rejected challenge to district court's appointment of a two-person commission to prepare desegregation plan); Armstong v. O'Connell, 416 F.Supp. 1325 (E.D. Wisc. 1971), aff'd 359 F.2d 625 (7th Cir. 1976), rev'd on other grounds, 97 S.Ct. 2907 (1977) (Court held designation of master to assist court by preparing school desegregation within judicial power Hart v. Community School Bd. of Brooklyn, supra, (appointment of skilled master crucial to preparation of workable remedy); other school desegregation cases in which a master was appointed include Keyes v. Denver School District, 380 F.Supp. 673 (D.Colo. 1974); Bradley v. Miliken, 402 F.Supp. 1096 (E.D. Mich. 1975) rev'd on other grounds 418 U.S. 717 (1974); Morgan v. Kerrigan, 401 F.Supp. 216 (D. Mass. 1975), aff'd 530 F.2d 406 (1st Cir. 1976); U.S. v. Texas, 342 F.Supp. 24 (E.D. Tex. 1971), aff'd 466 F.2d 518 (5th Cir. 1972).

conditions[1] and schools for retarded children,[2] and housing desegregation.[3]

Five years after the initial trial court decision in Gautreaux v. Chicago Housing Authority, supra, which enjoined the Chicago Housing Authority from racially discriminating in the selection of construction sites for new assisted housing, the court articulated a clear mandate:

> The master is directed to study and review segregation in Chicago public housing to determine and identify the precise causes of the five-year delay in implementing my judgment orders, and to recommend a plan of action that will expedite the realization of my various orders and judgments. In so doing, the master shall not be limited to determining whether HUD and CHA have employed their 'best efforts,' but shall examine all possibilities to expedite the mandate of this Court that the supply of dwelling units in Chicago shall be increased as rapidly as possible, including, without limitation, utilization of new housing programs established by the Housing and Community Development Act of 1974. 384 F.Supp. at 38. (Emphasis added).

Masters have also been appointed in exclusionary zoning cases. In Construction Industry Ass'n. of Sonoma Cty. v. Petaluma, supra, the Court stated its intention to appoint a special master and invited the parties to submit names of qualified persons to perform this task. Likewise,

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1 Prison cases in which a master was appointed include Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Taylor v. Perini, 413 F. Supp. 189 (N.D. Ohio 1976) and Hamilton v. Landrieu, 351 F.Supp. 549 (E.D. La. 1972).

2 Masters have been appointed in other school cases including those regarding the education of retarded children. N.Y. State Ass'n. for Retarded Children v. Carey, 409 F.Supp. 606 (E.D.N.Y. 1976); Pennsylvania Ass'n. for Retarded Children v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972).

3 Gautreaux v. Chicago Housing Authority, 384 F.Supp. 37 (N.D. Ill. 1974); Construction Industry Assn. of Sonoma Cty. v. Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), rev'd on other grounds 522 F.2d 897 (9th Cir. 1975); Pascack Associates v. Tp. of Washington, 131 N.J.Super. 195 (Law Div. 1974), rev'd on other grounds 74 N.J. 470 (1971).

the trial court in Pascack Associates v. Tp. of Washington, supra, appointed a master. In Pascack, supra, 131 N.J.Super. at 207 the court stated:

> The only viable remedy is a limited intervention by the court in the zoning process. Since judges have not been known to possess any particular expertise in either zoning or planning, it is incumbent upon the court to utilize the services of independent expert consultants to assist in formulating a remedy consistent with effectuating the judgment. See Swann v. Charlotte-Mechlenberg Board of Education, supra. With guidance "judicially discoverable and manageable standards" are readily available for resolving this controversy. See Baker v. Carr, supra, 369 U.S. at 217.

Plaintiffs submit that a master with clear directives from this Court can act effectively and expeditiously to realize the Court's order in Mt. Laurel.

C. Site Specific Relief: Plaintiff-intervenor[1] is the first developer known to the plaintiffs who has come to the township ready, willing and able to provide a housing opportunity for the poor[2] and to provide a section of subsidized housing for the very poor.[3] Ordinance 1976-5 has been in

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1 Roger Davis, president of Davis Enterprises, the plaintiff-intervenor has sought to build a mobile home park on a 107 acre tract he owns in Mt. Laurel. 1T 58-20, 1T 60-7 to 10. The proposed plan is for 590 mobile home units on 5,000 square foot lots or a density of 5.4 units per acre.

2 Davis estimated that park rentals would range from $80-86 a month. 28T 144. The consumer would decide which type of mobile home to purchase. If the consumer chose the least expensive new mobile home, costing approximately $13,000, the total monthly cost of living in the mobile home park would be $268 per month. Of course, a resident could choose to purchase a more expensive home. Davis also indicated that he would permit into the park pre-owned mobile homes provided they were built in accordance with the HUD standards. This could lower the cost for the consumer even further. 3AT 62.

3 Davis also made a commitment to build 20% of the mobile home pads with rental units so that they could qualify for HUD Section 8 subsidies. Under the Section 8 program, the tenant would not pay more than 25% of his income for the rental of his mobile home and space in the park. 1T 73-8 to 15. This subsidy would open the park up to those persons in the lowest income groups which need subsidies to afford decent housing.

existence for over three years. It has produced no development and no movement toward development of least cost or subsidized housing. Nor have any of the other zones produced this opportunity. However, it was uncontroverted that within 90 days of the township's approval of the Davis plans and the issuance of a building permit, construction of the mobile home park could be started. Six months from the first hearing on these plans, the first residents could move into the park.[1]

Plaintiff-intervenor's proposal is clearly within parameters established by health and safety.[2] Yet, the defendant has done nothing to encourage this developer. Despite the dramatic need for these units, admitted by defendant in its own ordinance, Ordinance 1976-5, Article XVIII, Section 1702.2.6 and Section 1703.1.5, the developer was rebuffed.[3] The trial court finding no possible justification for the exclusion of mobile homes stated that:

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1 Davis, 2T 70-2 to 20.

2 The drafter of the park's preliminary plans testified at trial that the layout plan for the park was prepared in conformity with three recognized national standards, HUD Minimum Property Standards for Mobile Home Parks; the Urban Land Institute Report, Technical Booklet 68: Mobile Home Parks; and the A.S.P.O. (American Society of Planning Officials) Report on Mobile Homes. 28T 173, 28T 174-1 to 10.

3 The trial court found:

> His (Davis') efforts have been to date wholly unsuccessful. Indeed, it is clear that the governing body has totally ignored his proposals, declining to give him even a hearing, although he was prepared to make a detailed presentation, with maps, structural data, aerial photographs and slides. Mt. Laurel II, supra, 161 N.J.Super. at 356.

> From the evidence and testimony in this case I am satisfied that not only are mobile homes an acceptable form of moderate-cost housing, but as their development is proposed by the intervenor, they constitute the only prompt and realistic relief that can be given to plaintiffs to make available an actual supply of least-cost housing in the near future. Indeed, the township does not argue seriously to the contrary. Mt. Laurel II, supra, 161 N.J.Super. at 359.

Accordingly, he ordered the review of the plaintiffs-intervenor's plans within 90 days consistent with the "least cost principle enunciated in Madison."[1] Mt. Laurel II, supra, 161 N.J.Super. at 359.

Plaintiffs submit that they are entitled to this site specific remedy. Anything less could very well mean that plaintiffs will be

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[1] The following order was issued:

> The appropriate Mount Laurel agencies and authorities shall forthwith review the application of Davis for development of a mobile home park and such review shall be in a manner consistent with the least-cost housing principles enunciated in Oakwood at Madison. The mobile home park shall presumptively be deemed to protect the public health, safety and welfare if such plans conform to Chapter IX, New Jersey State Sanitary Code applicable to mobile home parks and the minimum property standards for mobile home parks published by the Department of Housing and Urban Development. In the event the reviewing authorities determine that it is necessary to impose additional conditions upon any approval to be granted by them, such conditions shall be supported by written reasons for imposing such conditions, including an estimate of the additional cost generated by such conditions, and the basis for the estimate.
>
> Review of plans submitted by Davis shall be completed by the reviewing authorities within 90 days. Mt. Laurel II, supra, 161 N.J.Super. at 359.

trapped in their uninhabitable homes indefinitely[1] as Mt. Laurel redraws its zoning map and revises its zoning ordinance. The consideration of this specific development proposal on the other hand will provide an immediate housing opportunity for a number of the plaintiff class who need housing.

The choice for this Court is clear: issue a pyrrhic paper victory or order implementation of the judicial mandate. The reasons articulated in Madison for granting a meaningful remedy are even more applicable here. In Madison, the Court stated that specific relief "creates an incentive for the institution of socially beneficial but costly litigation such as this and Mt. Laurel". Madison, supra, 72 N.J. at 551. If the low-income plaintiffs who brought the first exclusionary zoning case in the country devoting over eight years of their lives to its prosecution are not entitled to such relief, who is? Municipal officials and low-income persons all over the country are looking at Mt. Laurel, New Jersey, to see if exclusionary zoning suits are ultimately an exercise in futility. A specific remedy serves the purpose of "getting on with the needed housing for at least some portion of the moderate income elements of the population." Madison, supra, 72 N.J. at 551. This purpose is particularly appropriate in Mt. Laurel. The facts demonstrate that this is the clearest of all cases for upholding the trial court's order directing construction.

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[1] The low income plaintiffs have been involved in this litigation since the Spring of 1971 when the complaint was filed. Their goal eight years ago was to move their families out of homes that were unfit for human habitation to decent, safe and affordable homes. The conditions they were living in were vividly described by the trial court in the initial Mt. Laurel decision.

The primary basis in this case for awarding specific relief is the housing needs of the plaintiffs. However, relief is also justified by the developer's involvement in this litigation. Having fully participated in this massive 29 day trial, the plaintiff-intervenor is entitled to this relief in his own right. Courts throughout the United States, particularly in Illinois,[1] Michigan,[2] and Pennsylvania,[3] have ordered that building permits be issued to developers who have successfully challenged the exclusion of mobile homes. The concept of specific relief to developers in exclusionary zoning cases has also been strongly endorsed by legal commentators in addition to those cited in Madison.[4] As a New Jersey commentator concluded:

> More than three years have passed since the Mt. Laurel decision and it appears that very few units for those in need of housing have actually been constructed. While courts may not be directly responsible for building housing, their judgments should not be frustrated, and a re-examination of judicial remedies in light of experience may be appropriate. Goldshore, Survey of Recent Developments in Land Use Law, 103 N.J.L.J. 391, 402 (1979).

1 Oak Forest Mobile Home Park v. Oak Forest, 326 N.E. 2d 473 (Ill. App. 1974).

2 Nickola v. Grand Blanc, 232 N.W. 2d 604 (Mich. Sup. Ct. 1975). There the court while declining to rezone, held that its declaration of invalidity "leaves plaintiff without any inhibition or restriction from exercising the restricted use of the land in issue." Nickola, supra, 232 N.W. 2d at 615.

3 East Plainfield v. Bush Bros., 319 A. 2d 701 (Pa. Comnwth Ct. 1974); Bd. of Supervisors v. Moland Development, 339 A. 2d 141 (Comnwth Ct. 1975); McKee v. Tp. of Montgomery, 364 A. 2d 775 (Pa. Comnwth Ct. 1976); Meyers v. Lower Makefield Tp., 394 A. 2d 669 (Pa. Comnwth Ct. 1978).

4 An exhaustive note, Developments in the Law - Zoning, 91 Harv.L.Rev., 1427 (1978), strongly endorses "site-specific relief" as a basic judicial remedy (by itself or in conjunction with more complex declartory and injunctive relief) to eliminate exclusionary zoning. Developments, supra 91 Harv. L. Rev. at 1694-1708. See also Judicial Relief in Exclusionary Zoning Cases: Pennsylvania's Definitive Relief Approach, 21 Villanova L. Rev. 701 (1976).

CONCLUSION

For the forementioned reasons, plaintiffs assert that this Court must reverse all of the opinion below with the exception of that part specifically relating to the plaintiff-intervenor's proposed mobile home park. A suitable remedy must be ordered to assure compliance with the Supreme Court mandate.

Respectfully submitted,

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