ML – Washington Twp 6/25/75

Pascack Assn & Waldy
v.
Twp of Washtn

Concurring Opinion

Concurring Opinion

Dissenting Opinion

Opinion – Holding the case is not a Mt Laurel case

pgs. 61

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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3790-72
A-1841-73

PASCACK ASSOCIATION, LIMITED,

Plaintiff-Respondent,

v.

MAYOR AND COUNCIL OF THE TOWNSHIP OF WASHINGTON, BERGEN COUNTY, NEW JERSEY,

Defendants-Appellants.

WALDY, INC.,

Plaintiff-Respondent,

v.

THE BOARD OF ADJUSTMENT AND THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF WASHINGTON, BERGEN COUNTY, NEW JERSEY, AND WASHINGTON LAKES ASSOCIATION, a corporation of the State of New Jersey,

Defendants-Appellants.

Argued February 18, 1975 -- Decided JUN 25 1975

Before Judges Michels, Morgan and Milmed

On appeal from Superior Court of New Jersey, Law Division, Bergen County.

Mr. Leonard Adler argued the cause for appellant Township of Washington.

Mr. Russell R. Huntington argued the cause for appellant Washington Lakes Association (Messrs. Randall, Randall & McGuire, attorneys).

Mr. Alan J. Werksman argued the cause for respondents Pascack Association, Ltd. and Waldy, Inc. (Messrs. Werksman, Saffron and Cohen, attorneys; Mr. Anthony J. Giampapa, on the brief).

PER CURIAM

In this exclusionary zoning case, the trial court, by judgment entered January 12, 1973, invalidated the zoning ordinance of Washington Township to the extent that it failed to make provision therein for the construction of multi-family rental units.(*) Washington Township seeks to have the validity of this judgment reviewed on appeal although notice of appeal was filed on August 22, 1973, almost seven months after its entry.

The extensive proceedings in this matter commenced with the filing on September 28, 1970 of a complaint in lieu of prerogative writs in which plaintiff Pascack Association, Limited, the owner of the subject tract (hereinafter Pascack) sought in the first count thereof to invalidate Township's Board of Adjustment denial of a variance to permit construction of a 520 unit garden apartment complex on its property and in the second count to invalidate the zoning ordinance of Washington Township for failure to make any provision for multi-family

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*The same judgment invalidated that portion of the municipality's zoning ordinance mandating two acre minimum lot sizes on premises affected by it. That portion of the judgment is not being challenged on this appeal.

construction. By separate complaint filed almost a year later on August 13, 1971, plaintiff Waldy, the contract purchaser of the subject premises, filed its own complaint seeking the same relief, except that it added a claim that the two-acre zoning provision was also invalid. Both complaints were consolidated for trial. Thereafter, and on May 26, 1972, by leave of court, an amended complaint was filed wherein Waldy joined the Trustees of the Washington Lakes Association as a party defendant in order to test the validity of certain private deed restrictions on file with the Bergen County Clerk's Office covering the subject property which it was feared might preclude the use to which plaintiff intended to put the property in question. After pre-trial and a trial lasting several days during which testimony was taken, the trial court rendered an oral decision in December of 1972 in which it (1) held invalid the two-acre minimum lot size restriction for single family residential construction for which plaintiffs' property was zoned; (2) held Washington Township's zoning ordinance invalid for failure to make any provision for "multiple and rental housing;"(*) (3) reversed the decision of the Board of Adjustment denying plaintiffs a variance to construct their garden apartment complex and remanded the matter

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* But see, Bridge Park Co. v. Borough of Highland Park, 113 N.J. 219, 222 (App. Div. 1971), which precluded municipal regulation of the mode of ownership as distinguished from the type of "use" to which property is to be devoted.

to the Board for reconsideration.(*) The order reflecting the trial court's opinion was entered January 12, 1973.

Toward the end of January 1973, however, and within weeks after the entry of this judgment, Washington Township amended the stricken zoning ordinance by rezoning (for multi-family and non-profit organization uses) the 34-acre site referred to in the consultants' report filed with the court as "The Southeastern Site." The amendment, Ordinance 73-1, left unaffected the previous zoning of plaintiffs' 30-acre tract which continued to be zoned for office-research uses. On June 29, 1973, a hearing was held on a motion filed by plaintiffs to compel the Township to comply with the judgment entered on January 12, 1973. At this hearing plaintiffs urged the ineffectiveness of Ordinance 73-1 as compliance with the court's prior judgment, charging that the amending ordinance, insofar as it permitted multifamily construction therein, because of the diverse ownership of the parcel rezoned for multifamily construction, was in practical terms limited to a five-acre piece thereof and that the zoning restrictions imposed with respect to the permitted multifamily construction were unreasonable and arbitrary in that they precluded construction of units consistent with the economic and social needs of the area. On July 9, 1973, the trial court ordered the Township to carry out

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* On remand, the Zoning Board of Adjustment reaffirmed its prior decision denying plaintiff Waldy's application for a variance to construct 520 garden apartments on the subject site. No appeal has been taken from this determination.

"all rezoning required for compliance with the prior judgment within sixty days," and on July 20, 1973 denied the Township's motion to vacate this order despite advice that the Township Planning Board had recommended adoption of an ordinance similar to Ordinance 73-1 for an area inclusive of plaintiffs' property. It was during this period, on August 22, 1973, that the defendant's notice of appeal was filed.

After expiration of the sixty day period specified in the trial court's order of July 9, 1973 without the required rezoning having taken place, plaintiffs moved for an order directing the township to issue plaintiffs a building permit for a multifamily garden type complex in accordance with the plans and site plan originally submitted in support of plaintiffs' request for a variance. As a result of a hearing held on October 4, 1973 with respect to this application, the trial court concluded that the township had been given sufficient time to comply with the January 12, 1973 judgment and, accordingly, announced its intention to appoint planning and zoning consultants at the litigants' expense to review all previous proceedings in the matter and report to the court on the following questions:

1. Does Washington Township Ordinance No. 73-1 comply with the Court Order dated January 12, 1973?
2. If not, what zoning ordinance amendments would comply with said order?(*)

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* Defendant's motion for leave to appeal from this series of ancillary rulings was denied December 7, 1973.

In accordance with this order, the trial court appointed two consultants who submitted their report under date of January 9, 1974 to the court and to the parties. On January 25, 1974, following receipt of this report, a hearing was held to receive testimony and argument concerning what action should be taken by the court to enforce compliance with its judgment entered during the previous year. Over objections by the township to the effect that the trial court lacked jurisdiction to force adoption of a zoning ordinance, on February 20, 1974, the court ordered entry of the following order:

> Upon proper application being made by the plaintiff to the appropriate municipal departments and agencies having jurisdiction thereof, including but not limited to application to the Washington Township Planning Board for site plan review pursuant to Ordinance 73-1, the Township of Washington is ordered and directed to issue to the plaintiff a building permit for the construction of multiple-family garden-type dwelling units, not exceeding two stories in height on premises known as Lot 1 in Block 3202; Lots 1 through 14, inclusive, in Block 3204, Lots 5 through 10, inclusive, in Block 3203, and Lots 2 and 4 in Block 3201, subject to the following:
>
> (a) The maximum number of multiple-family dwelling units permitted as of right shall be not less than nine (9) units per acre;
>
> (b) The minimum offstreet parking spaces required shall be not less than two (2) spaces for each dwelling unit which shall include enclosed offstreet parking spaces in an amount not less than twenty-five (25) per cent of the number of dwelling units to be constructed;
>
> (c) Fifty (50) per cent of the multiple-family dwelling units shall have one (1) bedroom

and the balance of the multiple-family dwelling units shall have two (2) bedrooms;

(d) The minimum floor area requirements for each dwelling unit shall be as follows:

(1) One-bedroom dwelling unit - 800 square feet;
(2) Two-bedroom dwelling unit - 1,000 square feet;

(e) The building plans and specifications shall comply with the applicable building code of the Township of Washington then in effect on the date of the application;

(f) The Township Planning Board shall be authorized to approve an application for site plan approval increasing the density of units per acre and without the minimum floor area limitations hereinabove set forth upon a finding that such dwelling units shall, by reason of location, amenities and design, provide special requirements to meet the housing needs and requirements of residents of the age of fifty-five and above;

This Court will retain jurisdiction upon proper application being made to enforce the provisions of this order;

BE IT FURTHER ORDERED, that plaintiff and defendant shall pay equally the costs and fees of the court-appointed planners subject to application to this Court for review as deemed necessary of the reasonableness of said charges. No costs allowed."

The Township appealed this order, as well as the previous "supplemental and interlocutory Orders" on March 21, 1974 and re-iterated its intention to appeal from the original judgment entered on January 12, 1973.

No decision was made with respect to the validity of the private deed restrictions made the subject of the amended

complaint filed by plaintiff Waldy in the January 12, 1973 judgment and the matter remained unresolved until dismissal without prejudice by the court on February 6, 1974.

At the outset, we consider whether this court can or will consider the appeal from the judgment of January 12, 1973 in light of the late filing of the notice of appeal questioning its validity. Although the Township admits that the notice of appeal was filed almost seven months after entry of the judgment being appealed from, it contends that the reason for the lateness in filing was because it had originally considered the judgment to be moot when, within weeks after its entry, it enacted Ordinance 73-1 which was believed to have effectively corrected the omission in the stricken ordinance by rezoning the so-called "Southeastern Site" for multifamily construction. The judgment of January 12, 1973 was characterized by the trial court as being a final one, the trial court relinquished jurisdiction and no further proceedings with respect thereto were contemplated. It was only in June of 1973 with plaintiffs' motion to compel compliance with the judgment of January 12, 1973 and in the later ancillary proceedings before the trial court that the township was placed on notice that the trial court had not, in fact, relinquished jurisdiction and that Ordinance 73-1 might be viewed by the court as insufficient compliance with the prior judgment which could not be therefore regarded as moot. It was at this

time, in August of 1973, that the notice of appeal from the judgment of January 12, 1973 was filed.

We are denying plaintiffs' motion to dismiss Township's appeal from the judgment of January 12, 1973 for late filing and have elected to consider the appeal on its merits for the following reasons. The issues determined by the trial court in its judgment of January 12, 1973 are of great and current public importance and are inextricably intertwined with the issues emerging subsequent to its entry from which timely appeal has been taken. To deal only with these later emerging issues concerning the validity of Ordinance 73-1 and the propriety of measures taken to enforce a judgment which cannot be reviewed on appeal would create a highly artificial context in which to reach decisions of great moment without any counter balancing benefits to the opposing parties. Moreover, there seems to be considerable merit to the Township's argument that the ground rules in this matter were changed midstream. Although the judgment of January 12, 1973 recited that it was a final judgment, that jurisdiction was not being retained and that the trial court declined to order rezoning, future events undermined the essential content of these representations. The trial court did retain jurisdiction, several orders of great importance were entered subsequent thereto; and the trial court did order rezoning, together with the content of the new zone plan. The adoption of Ordinance 73-1 did not, contrary to

the Township's reasonable expectations, result in the judgment of January 12, 1973 being moot. Rather, the judgment derived renewed vitality from the orders subsequently entered, the first of which was entered in June of 1973 almost five months after entry of the judgment from which appeal is sought. The Township, however, could not be expected to foresee the unprecedented course this litigation would follow after entry of the original judgment and its lateness in appealing from a judgment it reasonably viewed as moot, in our view, is excused in these unique circumstances. We take such action pursuant to the general power granted us by R. 1:1-2 to construe all rules to secure substantial justice. DeSimone v. Greater Englewood Housing Corp., No. 1, 56 N.J. 428, 434 (1970).

Washington Township is small. Its total land area is approximately 3.5 miles and a 1970 population of 10,500 gives it a density of 3,500 persons to the square mile, a typical suburban density, according to the court's consultants. It is one of eight Pascack Valley communities located in northern Bergen County, although it, unlike the other seven communities, is almost completely developed. As of 1973, only three per cent, or approximately 106 acres, of the land in the township was readily and quickly available for development unlike the Pascack region as a whole wherein 3,000 acres, or 18% of the total, was vacant.

The principal land use in Washington Township is for single family dwellings. Almost 900 acres are devoted to this use, 21 acres to a small commercial zone and none for industrial purposes. The court consultants noted that in this respect, too, Washington Township differs from the other Pascack Valley communities. All of the other communities have at least minimal amounts of industry and most have more commercial acreage.

As of January 12, 1973, the date upon which the original judgment was entered, no provision was made in the then existing township zoning ordinance for multiple family construction and there is, even at present, no apartment house or condominium development. This zoning pattern is in accord with that existing in the Pascack Valley Region and, indeed, in Bergen County as a whole. As of 1970, only 10.3 acres of vacant land in the Pascack Valley Region was zoned for garden apartment construction and none for high rise units. In Bergen County as a whole, only 131 acres were so zoned as compared with over 27,000 vacant acres zoned for single family detached dwellings.

The 1950-1970 period witnessed rapid population growth in Washington Township. In 1950, population was only 1,200; in 1970, it had grown to 10,600 persons. The Bergen Planning Board estimated a further increase of 3,600 persons between 1970 and 1985, an estimate deemed high by the trial court's consultants if higher density uses continue to be avoided. The consultants

adopted the estimate of the Washington Township experts who foresaw a 2,000 persons increase during that period of time, assuming development limited to single family dwellings.

The residents of Washington Township rely almost exclusively upon the automobile for transportation. In 1970 over 80% of the 3,819 employed residents in the township used automobiles to get to work. The trial court's consultants noted that Pascack Road, the main access road for all the possible sites for apartment construction, is one of the two most heavily traveled streets in the community and that Pascack Road is, at present, operating at or near capacity. Road improvement and upgrading would be necessary even at present traffic volume and any significant additional development would accelerate the timetable for such work.

The trial court's consultants classified Washington Township as an upper middle class community, a classification including those whose annual incomes fall within the $24,000 to $40,000 range and whose family head is in his years of peak earning capacity. The average value of an owner-occupied home in the township in 1970 was $37,600, which compares to an average of $31,700 for the average owner-occupied home in Bergen County as a whole. $8000 is the usual downpayment needed for the purchase of a home in this township.

The trial court's consultants remarked on the need for multifamily housing throughout the Pascack Valley region and

in Bergen County as a whole, noting that the extent of the need, with reference to Washington Township, was distorted by the fact that zoning restrictions throughout the county and region have created a backlog of demand for apartments. According to their report, that fact would insure a market for such apartments in Washington Township despite its inadequate shopping and transportation facilities, as well as other services, normally desired by the typical apartment house dweller. Caution was, however, advised with respect to the method of meeting this artificially created demand:

> *** The widespread failure to permit housing markets to operate freely should not however be a guiding principle in municipal or regional planning. Locating large numbers of apartments in improper locations would, in the long run, compound rather than solve the Region's development problems.

Were the Pascack Valley Region one single community rather than an agglomeration of the eight communities which actually comprise it, "it is clear that the greater part of any apartment house construction would normally be allocated and would normally occur in the Region's relatively high density commercial centers, Westwood and Ridgewood." Apartment seekers ordinarily desire a safe environment offering convenient shopping and other services available without the need of long trips with an automobile. According to these consultants, logical planning would dictate locating new apartment construction in proximity to centers affording these facilities, and since Washington

Township is deficient with respect to such services, "it is appropriate to place sharp limits on the number of apartment units constructed in the Township."

A distillation of the significant aspects of Washington Township as revealed by independent investigation and analysis of the consultants retained by the court reveals a small upper middle class community, almost completely developed with single family dwellings, served by a rudimentary commercial and transportation facilities, with major vehicular thoroughfares already operating to capacity, located in a larger region in which apartment units constitute a distinct need. It was in this context that the trial court invalidated the township's ordinance to the extent that it failed to make provision for multi-family construction, saying:

> *** Where, as here, the zoning power has been exercised in a manner which contributes in a substantial way to deprive people, because of the economic circumstances, of all opportunity to continue residence within the municipality or to locate there, the mandated statutory criteria have not been met ***

Although the ordinance was held invalid on statutory, not constitutional grounds, the trial court declined to order that the plaintiffs' property be rezoned to permit apartment construction:

> While the experts who testified on both sides were in general agreement that the subject premises would be suitable for this type of land use and development, it is not the province of the court to specify what land in any given municipality should be

> devoted to a particular use. Nor is it for the court to specify zoning densities or to exercise any other control at this juncture over the manner in which the Township must meet its obligation to provide for multi-family or rental-type housing within its borders. Obviously, in view of the Township's state of development the range or choices available to it is limited but those choices are properly a function of the legislative power which it must exercise with reasonable promptness and in accordance with the requirements of the statute.

As noted, the Township did act and with promptness by adopting within weeks after entry of judgment, Ordinance 73-1 setting aside 34 acres for multi-family construction. One of the issues submitted to the court-appointed consultants was whether Ordinance 73-1 complied with the trial court's mandate embodied in the January 12, 1973 judgment. These consultants opined that it did not because almost half of the 34 acres set aside (16.3 acres) is owned by the Young Men's Hebrew Association which had announced plans to use the property for non-residential purposes; 6.5 acres are owned by the township itself; and four acres are owned by an organization known as the Columbian Club. The remaining five acres within the rezoned district was proposed for development by a four-story, 82 units, condominium complex. The trial court apparently accepted the consultants' conclusion of non-compliance with the court's prior mandate, and, accordingly, ordered the township to issue a building permit to plaintiffs on request for the construction of a two-story garden apartment complex, containing 520 dwelling units, subject to

certain limitations recommended by the trial court's consultants.(*)

Since the date of both trial court decisions, the Supreme Court decided Southern Burlington NAACP v. Mount Laurel, A-11, March 1975, and we therefore deal first with altered context in which the validity of the trial court's decisions must be evaluated. The intended application of the newly announced prohibition against zoning excluding low and moderate income multifamily housing is carefully described at the outset of Justice Hall's profound analysis of the problem:

> As already intimated, the issue here is not confined to Mount Laurel. The same question arises with respect to any number of other municipalities of sizeable land

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* It should be noted that soon after the adoption of Ordinance 73-1 in January of 1973, several residents of Washington Township launched their own challenge to the validity of that newly adopted ordinance, contending that it lacked harmony with the comprehensive plan, did not further statutory purposes, that it was arbitrary, constituting spot zoning and was therefore unconstitutional.

That lawsuit proceeded independent of the case being considered on this appeal and recently resulted in an unreported opinion wherein Ordinance 73-1 was upheld as against these contentions. This later unreported opinion, however, did not purport to deal with the issue determined by the trial court as to whether this ordinance complied with the judgment of January 12, 1973, and therefore, strictly speaking, is not in conflict with the judgment being appealed from. Nonetheless, better practice would have dictated either consolidation with the pending matter or, at the least, transfer of this later case to the same trial judge who was deliberating the issues which became the subject matter of this appeal. The court which upheld the validity of Ordinance 73-1 determined only its compliance with statutory and constitutional criteria; the trial court in this case ruled, in substance, it was, nonetheless, insufficient to comply with local and regional housing need.

> area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas (and surrounding some of the smaller cities outside those areas as well) which, like Mount Laurel, have substantially shed rural characteristics and have undergone great population increase since World War II, or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commerical and industrial demand and growth. Most such municipalities, with but relatively insignificant variation in details, present generally comparable physical situations, courses of municipal policies, practices, enactments and results and human, governmental and legal problems arising therefrom. It is in the context of communities now of this type or which become so in the future, rather than with central cities or older built-up suburbs or areas still rural and likely to continue to be for some time yet, that we deal with the question raised.

Moreover, throughout the decision, the Supreme Court was careful to limit application of the doctrines announced therein to the so-called "developing communities." The fact that Justice Pashman found it necessary to issue a concurring opinion disagreeing with this restriction serves to underscore the intentional and conscious decision of the Supreme Court to adhere to basic limitation expressly referred to throughout the carefully explored analysis of the problem presented. We therefore conclude that Mount Laurel means precisely what it says. Its mandate applies only to a municipality of "sizeable land area" which remains at the present open to substantial future development. Hence, the dictates of Mount Laurel are inapplicable to Washington Township, a small, almost completely developed

municipality whose demographic, geographical and social profile sharply differs from Mount Laurel's.

It yet remains for us to consider whether, apart from the dictates of Mount Laurel, the Washington Township's zoning ordinance as amended by Ordinance 73-1, violates statutory or constitutional criteria by its failure to rezone its one remaining sizeable parcel of land (34 acres) for multifamily construction. We conclude that the ordinance violates neither. The trial court's consultants uncovered only five possible sites for such development within the confines of the Township. One of the five, the southeastern site has been rezoned by Ordinance 73-1 to accommodate this kind of development. Three of the other sites, referred to by the consultants as the "smaller sites" were deemed to have "significant disadvantages" for apartment construction. None of them were over 11 acres in size, and all of them were divided in ownership with portions thereof already devoted to other productive uses. None of these "smaller sites" were therefore deemed suitable. That leaves only plaintiffs' parcel in the entire township as being appropriate for apartment house construction.

We are unprepared to conclude that the failure of the defendant township to rezone this one parcel for apartment house construction runs afoul of statutory or constitutional requirements. Requiring the township to permit plaintiffs' proposed development of this site would result in increasing the township's

population by approximately 20% within a relatively brief period of time. While such an influx of residents would in some measure aid in alleviating population pressures presently felt throughout the Pascack Valley Region as a whole, we conclude that by requiring Washington Township to make such an accommodation, it would be shouldering more than its fair share of the burden of providing for those in need of apartments in the region. Although industry is located in several municipalities of the Pascack Valley Region, Washington Township has none, nor has any been sought. Unlike other Pascack Valley communities, Washington Township's commercial zone is extremely limited and was clearly designed to serve only the local needs of its residents. As noted by the trial court's own consultants, "Washington Township, in practical terms, serves as an outlying dormitory neighborhood within the Pascack entity and as such it is appropriate to place sharp limits on the number of apartment units constructed in the Township."

It is in this context that we hold that the Township's zoning ordinance as amended by Ordinance 73-1 is not invalid in failing to zone plaintiffs' tract for multifamily construction. In light of this holding, it becomes unnecessary for us to determine the propriety of the trial court's efforts to secure compliance with its judgment of January 12, 1973.

The order of February 20, 1974 is reversed with the exception that the portion thereof requiring the parties to

share equally in the costs and fees of the court appointed planners, subject to proof of reasonableness, is hereby affirmed.

A TRUE COPY

Elizabeth M. Laughlin

Clerk

SUPREME COURT OF NEW JERSEY
A-130 September Term 1975

PASCACK ASSOCIATION, LIMITED,

Plaintiff-Appellant,

v.

MAYOR and COUNCIL OF THE TOWNSHIP OF WASHINGTON, BERGEN COUNTY, NEW JERSEY,

Defendants-Respondents.

WALDY, INC.,

Plaintiff-Appellant,

v.

THE BOARD OF ADJUSTMENT AND THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF WASHINGTON, BERGEN COUNTY, NEW JERSEY, and WASHINGTON LAKES ASSOCIATION, a corporation of the State of New Jersey,

Defendants-Respondents.

SULLIVAN, J. (concurring).

I am in general agreement that this is not a Mount Laurel case for two reasons. First, the Township of Washington is not a developing municipality. Second, the proposed housing is not for low or moderate income families. The trial judge, while he properly struck down the 1967 amendment to the zoning ordinance which

increased the minimum lot requirements of the property in question from 10,000 square feet to two acres, unnecessarily became enmeshed in rezoning in order to allow for multi-family housing on plaintiff Waldy's 30-acre tract of land.

I recognize that where there is a need for a particular type of conventional housing in an area, such as multi-family housing, a municipality in that area has some obligation as to that need, provided it has land available and suitable for such use, and provided its overall zone plan and the public good are not adversely affected to a substantial extent. This is so even though, as here, the municipality may be largely developed on a single-family residence basis with only 2.3% of its area remaining vacant land. The solution lies in meaningful utilization of the statutory special exception or variance processes. Indeed, I would hold that a demonstrated need for a particular type of conventional housing would constitute a special reason authorizing the grant of a variance, provided the negative criteria of the statute are satisfied.[1]

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[1] An application for a variance was made in this case. However, it was ultimately denied and this decision was not appealed by plaintiffs.

This case points up the inherent weakness in the present statutory provisions which, with few exceptions, vest exclusive control over zoning in the particular municipal government. Pascack Valley is a typical example. There is an admitted need for multi-family housing in this area yet five of the eight municipalities in the Valley do not permit this type of housing unit. However, if you consider each one of these municipalities separately, some basis can be demonstrated for the particular zone plan. Until regional zoning is established based on comprehensive planning, the problems we are now grappling with cannot be resolved except on an ad hoc basis.

I am constrained to add the following. Our decision in Mount Laurel and its progeny admittedly deal with difficult and far-reaching problems involving the public welfare. I wonder, though, if the opinions we are handing down in this area of the law of zoning have not become so complicated that they are beyond the comprehension of the average member of a local planning board, board of adjustment or governing body (not to mention many members of the bench and bar). In directing local government as to how it must exercise its zoning

power pursuant to law, it is essential that we speak with more clarity, directness and simplicity.

I join in the modification of the Appellate Division judgment and the affirmance of that judgment as modified.

SUPREME COURT OF NEW JERSEY
A-130 September Term 1975

PASCACK ASSOCIATION, LIMITED,

Plaintiff-Appellant,

v.

MAYOR and COUNCIL OF THE TOWNSHIP OF WASHINGTON, BERGEN COUNTY, NEW JERSEY,

Defendants-Respondents.

WALDY, INC.,

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Defendants-Respondents.

SCHREIBER, J., concurring.

The Mt. Laurel[1] principle, as I view it, of prohibiting a municipality from utilizing its zoning power to exclude low and

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1 So. Burlington County N.A.A.C.P. v. Mt. Laurel Tp., 67 N.J. 151, appeal dismissed and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975).

moderate income families in order to escape an adverse financial impact, should be applicable to all municipalities. See Oakwood at Madison, Inc. v. Madison Tp., ___ N.J. ___, ___ (1977) (Schreiber, J., concurring).[2] Equitably I cannot envision any sound policy which would justify a differentiation in the duty owed by a developing or a fully developed community. If a municipality, motivated by fiscal reasons, has zoned to exclude low and moderate income people and has successfully accomplished that end, contrary to the general welfare, the courts should not absolve that municipality from its underlying duty simply because it has already completed its illegal objective.

The fact that a settled and developed community may not have any vacant or undeveloped land does not and should not bar fulfillment of that obligation once it is found that the zoning has been enacted with fiscal considerations in mind. As soon as the wrong is adjudicated, the municipality must rezone. The municipality's duty, as Justice Hall stated in Mt. Laurel, would be satisfied if its zoning afforded the opportunity for low and moderate income income housing. 67 N.J. at 174 and 179. Although rezoning un-

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2 The majority recognizes, as I have previously indicated in Oakwood, that the intent of Mt. Laurel was to relieve the housing needs "of persons of low and moderate income." (Slip opinion at 12).

developed land for this purpose may be desirable, developed acreage may likewise be utilized. In each of these developed communities there appear to be some vacant tracts, and, in addition, some sections may be ripe for redevelopment. Irrespective of sufficient vacant land and areas in need of redevelopment, the municipality should rezone whatever area is needed to permit the construction of low and moderate income housing, even though those projects may not become economically feasible until sometime in the future. In this manner, the municipality will acquit its obligation.

However, the enactment of zoning ordinances in some municipalities, such as in the Township of Washington, was not motivated by fiscal considerations. As Judge Conford suggests, the Township adopted its ordinance for reasons consistent with N.J.S.A. 40:55-32, "its most dominant notes being (a) avoidance of undue crowding of uses: e.g., 'lessen congestion in the streets; ... provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population ...'; and (b) consideration of the character of the district and its peculiar suitability for particular uses and encouraging the most appropriate use of land throughout the municipality." (Slip opinion at 15-16). He points out that "[d]uring the period of

development of Washington Township it served a widespread contemporaneous demand of people employed elsewhere for single-family residential housing--a kind of housing traditionally highly valued by the American family--and until fairly recent years affordable by the average family." (Slip opinion at 17-18). Its initial zoning ordinance in 1941 encouraged construction of single-family homes, and the 1963 master plan recognized the municipality had and was "predominantly developed" as a single-family community. Thus we find that the invidious motive condemned by Mt. Laurel is non-existent and its principle inapplicable.

I concur and join in the judgment as modified by the majority.

SUPREME COURT OF NEW JERSEY
A-130 September Term 1975

PASCACK ASSOCIATION, LIMITED
v.
MAYOR and COUNCIL OF THE TOWNSHIP OF WASHINGTON

and

WALDY, INC.
v.
BD. OF ADJ. AND COUNCIL OF THE TOWNSHIP OF WASHINGTON, et al.

Outline of Dissenting Opinion

SUPREME COURT OF NEW JERSEY
A-130 September Term 1975

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Plaintiff-Appellant,

v.

MAYOR and COUNCIL OF THE TOWNSHIP OF WASHINGTON, BERGEN COUNTY, NEW JERSEY,

Defendants-Respondents.

WALDY, INC.,

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THE BOARD OF ADJUSTMENT AND THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF WASHINGTON, BERGEN COUNTY, NEW JERSEY, and WASHINGTON LAKES ASSOCIATION, a corporation of the State of New Jersey,

Defendants-Respondents.

PASHMAN, J., dissenting

The majority's decision restricts to "developing" communities the affirmative obligation to provide for regional housing needs. By allowing municipalities without sizeable land areas or significant available open spaces to ignore regional demands for multi-family housing, the Court extends its tacit approval to exclusionary zoning practices. In doing

so, it disregards the intent and spirit of our decision in So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151 (1975), cert. den. and appeal dismissed, 423 U.S. 803, 96 S.Ct. 18, 46 L.Ed.2d 28 (1975), which we recently reaffirmed in Oakwood at Madison, Inc. v. Tp. of Madison, N.J. (1977) (slip opinion)(hereinafter "Madison Tp."). The majority's decision permits a significant number of communities to horde what may be the State's most precious scarce resource: available developable land. For the reasons set forth below, I dissent.

I

DEFINING THE DUTY TO PROVIDE FOR REGIONAL NEEDS

Two years ago this Court decided the landmark case of So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, supra (hereinafter "Mt. Laurel"). That decision followed attempts by various courts to deal with exclusionary zoning by attacking specific exclusionary planning techniques.[1] See, e.g., Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (Sup. Ct. 1970)(invalidating two to three acre minimum lot size requirements); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (Sup. Ct. 1970)(invalidating de facto ban on apartment buildings);

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[1] For a summary of the problems inherent in exclusionary zoning, see Madison Tp., slip opinion at 3-6 (Pashman, J., concurring and dissenting).

Nat'l Land & Inv. Co. v. Easttown Tp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (Sup. Ct. 1965)(striking down four acre minimum lot size requirements); Molino v. Mayor and Council of Bor. of Glassboro, 116 N.J. Super. 195 (Law Div. 1971)(holding unconstitutional bedroom restrictions designed to restrict population). Rather than continue with piecemeal solutions, the Court in Mt. Laurel ordered developing municipalities to respond affirmatively to regional needs for multi-family housing. Justice Hall, speaking for a unanimous Court, held:

> [E]very such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it 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. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.
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> [67 N.J. at 174; footnote omitted.]

In Madison Tp. this Court reaffirmed its belief in the necessity of requiring affirmative action on the part of municipalities to meet regional housing needs. Accordingly, in order to determine whether the ordinance in Madison Township was exclusionary in character, the Court considered whether or not it "operate[d] in fact to preclude the opportunity to supply any substantial amounts of new housing for low and moderate income

households now and prospectively needed in the municipality and in the appropriate region of which it forms a part." N.J. at (slip opinion at 12). Primarily on the ground that the community had zoned the bulk of its available developable land for one and two acre family residences, this Court upheld the finding of the lower court that the ordinance "ignored the housing needs of the township and the region, and failed 'to promote reasonably a balanced community in accordance with the general welfare.'" N.J. at (slip opinion at 5).

The emphasis on meeting regional needs in Mt. Laurel and Madison Tp. was based on the well-established principle that zoning enactments must benefit the public, health, safety, morals or the general welfare. See, e.g., Roselle v. Wright, 21 N.J. 400, 408-10 (1956). In determining what served the general welfare, in Mt. Laurel and Madison Tp., we placed primary emphasis on meeting the critical need for housing in the respective regions in which the defendant municipalities were located, and not on local fiscal pressures or social considerations. In Mt. Laurel Justice Hall stated:

> It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the

> presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.
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> [67 N.J. at 179-80.]

Rather than sacrifice the development of multiple-family housing for low and middle income people in the interests of a more favorable tax base, the Court noted that municipalities would have to seek tax relief from other branches of government. See 67 N.J. at 186.

In Mt. Laurel the Court reviewed the statutory and constitutional basis for requiring zoning which conformed to a regional view of the general welfare. Although regional zoning can also be justified on the basis of sound planning principles, this Court was necessarily guided by statutory and constitutional considerations in holding that a community must recognize and serve the welfare of the state's citizens beyond its own particular municipal boundaries. Mt. Laurel, supra, 67 N.J. at 177. Relying on cases involving the zoning of facilities which were of broad public benefit, we noted the importance of "values which transcend municipal lines" in determining the general welfare. 67 N.J. at 178, citing Roman Catholic Diocese of Newark v. Ho-Ho-Kus Borough, 47 N.J. 211 at 218 (1966). See also, Kunzler v. Hoffman, 48 N.J.

277, 288 (1966)("general welfare ... comprehends the benefits not merely within municipal boundaries but also those to the regions of the State relevant to the public interest to be served").

We also concluded in Mt. Laurel that the zoning enabling legislation, N.J.S.A. 40:55-30, specifically required zoning which anticipated regional needs. Although the Legislature revised the zoning statute by enacting the "Municipal Land Use Law," L. 1976, c. 291, effective August 1, 1976, we held in Madison Tp. that the new statute also required a regional approach in determining the general welfare. N.J. at (slip opinion at 10). The new law specifically provides for land use planning which will best satisfy the general welfare of all citizens of the State. Section 2 of the Act, stating the intent and purpose of the new legislation, provides in pertinent part:

> a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;
>
> * * *
>
> d. To ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole;

e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;

* * *

g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open spaces, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens.

[Emphasis added.]

The clear intent of the new statute is to implement the broad definition of the general welfare enunciated in Mt. Laurel by requiring all zoning enactments to be based on regional concerns.[2]

2

The Court's decision today should not be read as foreclosing an argument that the new statute, which became effective August 1, 1976, goes beyond even our holding in Mt. Laurel. See Windmill Estates v. Zoning Bd. of Adjustment of Totowa, slip opinion (Law Div. Jan. 17, 1977). The complaints in this case were filed on September 28, 1970 by Pascack Association Limited, and on August 13, 1971 by Waldy, Inc. Because all arguments have been directed to the zoning statute then in force and to the applicability of our decision in Mt. Laurel, any references to the new Act must be regarded as dicta. Nevertheless, it should be noted that one of the purposes of the new act, as enunciated in the sponsor's statement, is "broadening the statutory municipal purposes of zoning, planning and land use control, ..." Additionally, since the new law was passed after our decision in Mt. Laurel, it must be presumed to have been passed with knowledge of that holding. Barringer v. Miele, 6 N.J. 139, 144 (1951); In Re Keogh-Dwyer, 45 N.J. 117, 120 (1965). Although the legislation clearly reflects the broad definition of the general welfare which we enunciated in Mt. Laurel, it makes no reference, either explicitly or implicitly, to any exemption for communities which are "developed."

The new legislation is consistent in all respects with our State Constitution, which requires adherence to a rational approach to land use planning based on a regional perspective. See Madison Tp., supra (slip opinion at 10); Mt. Laurel, supra, 67 N.J. at 175. "The basic importance of housing and local regulations restricting its availability to substantial segments of the population" impelled us in Mt. Laurel to conclude that a zoning ordinance which failed to provide for regional housing needs would violate the state constitutional requirements of equal protection and due process as found in Art. I, ¶ 1.[3] 67 N.J. at 174-75.

Yet as the majority correctly indicates, (slip opinion at 14), we have never adopted a requirement that all communities, regardless of their unique circumstances, be required to accept unlimited multi-family housing. Instead, we have specifically limited each community's obligation to a "fair share" of the regional housing need. 67 N.J. at 188, 189. Recognizing the inherent limitations of judicially imposed zoning mandates, I wrote in Mt. Laurel:

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[3] The paragraph reads:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

> While municipalities must plan and provide for regional housing needs, no municipality need assume responsibility for more than its fair share of these needs. The purpose of land use regulation is to create pleasant, well-balanced communities, not to recreate slums in new locations. It is beyond dispute that when the racial and socioeconomic composition of the population of a community shifts beyond a certain point, the white and affluent begin to abandon the community. While the attitudes underlying this "tipping" effect must not be catered to, the phenomenon must be recognized as a reality.
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> [67 N.J. at 212; Pashman, J., concurring.]

Rather than call for uncontrolled growth, we advocated planning to anticipate regional demand. Only in this manner could municipalities avoid future overcrowding and cope with the urban slums and suburban sprawl which had resulted from the absence of such controls.

Despite the clear directive in Mt. Laurel to affirmatively require municipalities to provide for their "fair share" of regional housing needs, the majority today retreats from its constitutional duty, relying on the statutory delegation of decision-making power to the municipalities. The majority opinion states:

> But the overriding point we make is that it is not for the courts to substitute their conception of what the public welfare requires by way of zoning for the views of those in whom the Legislature and the local electorate have vested that responsibility.
>
> [Slip opinion at 19.]

While the majority correctly states one of the fundamental precepts of law limiting this Court's power to review local decision-making power, its over-simplification of the problem results in the misapplication of the above principle to the instant case.

Though the State Legislature may have vested the power in Washington Township and Demarest to determine the general welfare, it was constitutionally barred from granting those communities the right to ignore the welfare of citizens not living within their municipal boundaries. We underscored this principle in Mt. Laurel when we stated:

> [I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.
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> [67 N.J. at 177; emphasis added.]

See also, Roselle v. Wright, supra, 21 N.J. at 408-10; Katobimar Realty Co. v. Webster, 20 N.J. 114, 122-23 (1955); Schmidt v. Board of Adjustment of Newark, 9 N.J. 405, 413-19 (1952); Collins v. Board of Adjustment of Margate City, 3 N.J. 200, 206 (1949). This basic principle was recognized by

Mr. Justice Sutherland when first upholding the constitutionality of zoning in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390, 47 S.Ct. 114, 119, 71 L.Ed. 303, 311 (1926), where he noted "* * * the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." [Emphasis added.]

II

LIMITING OBLIGATIONS UNDER MT. LAUREL TO "DEVELOPING" COMMUNITIES

The Court in Mt. Laurel limited its discussion to "developing communities." As a consequence, the Court's decision was taken by some to excuse communities which could be characterized as "developed" from the affirmative duty to provide for regional housing needs. I have repeatedly criticized this proposition as being inconsistent with the spirit of that decision and an impediment to any attempt at requiring affirmative action to counteract exclusionary zoning. Mt. Laurel, 67 N.J. at 208-09, 217-18 (Pashman, J., concurring). Today, four members of the Court have indicated their desire to prolong the "developed-developing" distinction, thereby seriously impairing the ability of the Court to continue seeking broad solutions to the problem of exclusionary zoning. I would apply the dictates of Mt. Laurel to all municipalities, and therefore welcome the endorsement of this view by Mr. Justice Schreiber and Mr. Justice Sullivan. See ante at (slip opinion at 2, Schreiber, J., concurring), ante at (slip opinion at 2, Sullivan, J., concurring).

The Court in Mt. Laurel defined "developing communities" as those municipalities which have "sizeable land area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas (and surrounding some of the smaller cities outside those areas as well)." 67 N.J. at 160. Additionally, the Court noted that under its definition of "developing communities," such municipalities have "substantially shed rural characteristics and have undergone great population increase since World War II, or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth." Id. The Court today applies this definition by granting Washington Township and the Town of Demarest immunity from any affirmative obligation to plan and provide for low and moderately priced housing. Insofar as it affirms the trial court's order striking down two acre minimum lot size requirements, the majority indicates its limited willingness to police exclusionary land use controls.

The majority's application of the Mt. Laurel definition of "developing communities" to Washington Township and Demarest demonstrates a willingness on the part of the Court to adhere to a restrictive interpretation of the Mt. Laurel decision. Both communities are physically small; Washington Township comprises three and one-quarter square miles and Demarest amounts to less than two and one-half square miles in area. Both are located in densely populated Bergen County, adjacent to New York City.

Consequently, under a literal interpretation of the Mt. Laurel definition of "developing communities," both municipalities might be considered to have no "sizeable land area outside the ... older built-up suburbs." They would both be considered "developed" under either of two interpretations: (1) they have no sizeable land area at all, and (2) they are completely situated within the older built-up suburban area which completely surrounds the New York City-Newark Metropolitan area. Under the former interpretation, most of northeastern New Jersey might also be considered developed; under the latter, a court could conceivably conclude that the major portion of the entire state was intended to be excluded from Mt. Laurel. Cf., Urb. League New Bruns. v. Mayor & Coun. Carteret, 142 N.J. Super. 11, 21 (1976)(finding that "Middlesex County is part of the New York metropolitan region").

The majority decision fails to provide lower courts with a workable definition of "developing communities." In describing its application of the Mt. Laurel definition to the facts in Washington Township and Demarest, the majority expands rather than contracts the number of communities which might have a basis for claiming to be "developed":

> ... sizeable, developing, not fully developed municipalities - particularly small ones - which may vary in character from such a tiny municipality as Winfield in Union County, developed in a dense, moderate-income, multi-family residential pattern to one like the subject municipality, homogeneously and completely developed as a middle-upper income, moderate to low density, single-family community.
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> [Slip opinion at 21.]

As a result, the majority's definition can only add to the litigation which has surrounded the term "developing communities." In addition to the instant litigation and that in the companion case, Fobe Associates v. Mayor and Council & Bd. of Adjustment of the Borough of Demarest, slip opinion, see, for example, Nigito v. Borough of Closter, 142 N.J. Super. 1 (App. Div. 1976); Segal Construction Co. v. Wenonah Zoning Bd. of Adjustment, 134 N.J. Super. 421 (App. Div. 1975); Urb. League New Bruns. v. Mayor & Coun. Carteret, 142 N.J. Super. 11 (Ch. Div. 1976); and unreported cases discussed in Rose, "From the Courts: The Trickle Before the Deluge from Mount Laurel," 5 Real Estate Law Journal 69 (1976).

III

PRACTICAL EFFECT OF THE MAJORITY DECISION

The Court's characterization of some communities as "developed" allows municipalities which have already attained "exclusionary bliss" to forever absolve themselves of any obligation for correcting the racial and economic segregation which their land use controls helped to create. By rewarding the past unlawful use of the zoning power to accomplish racially and economically discriminatory planning, we encourage future abuse of land use planning controls. The existence of developed, insular communities which are allowed to reap the benefits of their illegality without being required to share in the costs is a constant reminder to developing communities of the benefits to be gained from illegal and exclusionary zoning. Similarly,

remaining communities and inner cities will be required by today's decision to take more than their "fair share" of low and middle-income multi-housing; that specter can only encourage municipalities to avoid the label of "developing."

The most damaging result of today's decision is its abandonment of the innovative spirit of Mt. Laurel. First, in place of considerations aimed at determining whether or not a community can effectively cope with additional multi-family housing, the majority lays down a blanket exemption for municipalities solely on the basis of physical size. While in Mt. Laurel we were concerned with "over-intensive and too sudden development" which our decision might have produced, 67 N.J. at 191 and 67 N.J. at 212 (Pashman, J., concurring), and with ecological and environmental effects, 67 N.J. at 186, the majority now concludes that preserving the character of a community is more important than providing solutions for the problems created by exclusionary zoning.

Washington Township illustrates the unfortunate results of the majority's obsession with preserving the character of the community, even if at the expense of the general welfare. Planning experts appointed by the trial court concluded that even within the Township, young married couples and older couples with grown children living elsewhere, represent a sizeable need for multi-family housing. Additionally, the planning experts noted the regional need for housing:

> The failure of the Township to make provision for moderate rental apartments would not be serious if such units were available elsewhere in the surrounding Pascack Region. Such is not the case. The failure to meet public need for this type of housing is general. Communities in the Region and in Bergen County have enacted land use controls which effectively limit their regional role to serving as single family residential dormitories for middle and upper income families.

Moreover, the majority ignores the findings of the court appointed planning experts that Washington Township would not be detrimentally affected by the proposed multi-family development:

> Proposed large scale apartment development in other communities may pose difficult problems but it seems clear that Washington Township can absorb a modest amount of middle income apartment development without suffering damage to the community's social fabric and its amenities. Moreover, if such development is properly planned and controlled, it should not only remain physically and socially stable but should contribute significantly to the housing needs of the community.

The experts pointed out that Washington Township's schools are presently under-utilized and that existing roadways would not be adversely affected by the proposed development. In fact, apartment development would have produced a smaller volume of peak hour traffic than the office-research facilities for which the property is presently zoned.[4]

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[4] Mt. Laurel clearly envisioned that a community which is not developed for the purposes of encouraging future employment growth would be required to provide housing to meet the needs of persons who are encouraged to work in and around that community. The Court stated: "[c]ertainly when a municipality zones for industry and commerce for local tax benefit purposes, it without question must

Second, by determining whether a community is "developed" on the basis of its physical size, the majority returns to evaluating the general welfare on the basis of a municipality's territorial limits — a methodology which this Court has consistently rejected. Chief Justice Vanderbilt commented on the impropriety of this type of analysis in Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509 (1949), when he said:

> What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously. The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning. The direction of growth of residential areas on the one hand and of industrial concentration on the other refuses to be governed by such artificial lines. Changes in methods of transportation as well as in living conditions have served only to accentuate the unreality in dealing with zoning problems on the basis of the territorial limits of a municipality.
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> [1 N.J. at 513; emphasis added.]

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4 (cont.)

zone to permit adequate housing within the means of the employees involved in such uses." 67 N.J. at 187. Yet the majority encourages Washington Township to disregard Mt. Laurel; despite its cries that Washington Township cannot accommodate additional housing, the community's current zoning anticipates office and research facilities which also burden municipal facilities. Washington Township is an example of an attempt to extract the benefits of growth while avoiding any incidental burdens.

See also, Kunzler v. Hoffman, 48 N.J. 277, 288 (1966); Roman Catholic Diocese of Newark v. Ho-Ho-Kus Borough, supra, 42 N.J. at 566; Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 247-49 (1954). Additionally, in Mt. Laurel we recognized "[i]t is now clear that the Legislature accepts the fact that at least land use planning, to be of any value, must be done on a much broader basis than each municipality separately." 67 N.J. at 189, n. 22.

The inadequacies of a system of land use planning which apportions the task of accomplishing regional zoning among many different component municipalities are accentuated where the Court orders an affirmative response to housing problems, yet exempts a significant number of these communities from any responsibility. Though calling for a legislative response to the problem, Justice Mountain, concurring and dissenting in Madison Tp., noted the unsatisfactory nature of relying solely on "developing" communities and municipal boundaries to accomplish regional zoning:

> * * * Any municipality in the State is at liberty to adopt a zoning ordinance or plan of land use regulation, and presumably most have done so. Of these municipalities a goodly number must surely qualify — albeit reluctantly — as 'developing.' Their land use plans are therefore required to meet the test of Mt. Laurel. But it must be obvious that the housing needs with which we are concerned can be better met in some municipalities within a region than in others. From a purely rational point of view, it makes little sense to apportion the regional obligation, willy-nilly, among some number of diverse political entities, set off from one another by boundary lines placed where they are by historical accident. * * * *

> Any comprehensive review of our zoning problems should take account of a state-wide or regional allocation of zoning power as a possibly preferable alternative to present arrangements.
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> [Madison Tp., slip opinion at 11-12 (Mountain, J., concurring and dissenting); emphasis added.]

In spite of the repeated criticisms rejecting strict adherence to municipal boundaries as a determinant of zoning policy, the Court today returns to that discredited approach.

The Court's decision will have a dramatic impact on the regions surrounding Demarest and Washington Township. The planning consultants appointed by the trial court found that five of the eight municipalities forming the Pascack Region, of which Washington Township is a part, have completely zoned out multi-family housing. The largest community in the region, River Vale, is only 766 acres larger than Washington Township, and hence, easily within the majority's emerging definition of a "developed" community. As a result, the entire region, consisting of 16,265 acres, would be free to zone-out multi-family housing. Significantly, because of the size of component municipalities, the Court is exempting from our decision in Mt. Laurel an area which is over 2,000 acres larger than Mt. Laurel itself.

Similarly, the Demarest region, the Northern Valley, is a composite of small homogeneous municipalities which have no zoning for multi-family units. Ten of the fifteen towns in the

larger Northern Valley sector have no multi-family housing. Yet the majority indicates that 24% of the housing units in the region are multi-family. See ante at (slip opinion at 10). Assuming that these statistics indicate that the remaining communities have already taken their "fair share" of the region's multi-family housing, and have fulfilled their obligations under Mt. Laurel, where will the remaining multi-family housing be built?

The answer under the majority's decision today is that multi-family housing will probably not be built in Bergen County. While county lines are not necessarily definitive of regional housing needs, available county statistics demonstrate the impact that today's decision will have. See Madison Tp., slip opinion at 49-50. Fifty out of the seventy municipalities in the county are less than three and one-half square miles in size and hence, "developed" under today's decision. New Jersey County and Municipal Work Sheets, at 4-7, New Jersey Department of Community Affairs, 1971. Although these communities comprise an area of almost 100 square miles, id., none of the 50 municipalities would be required to provide housing to meet regional housing needs. If housing demands are to be met anywhere in the county, the remaining 20 communities, many of which are only slightly larger in size, would be required to carry the additional burden. Such a result distorts any rational definition of a "fair share" formula.

By evaluating only the vacant land in a given municipality, the majority neglects to consider the accumulation of vacant land in the region surrounding that community. Even though a particular community may only have relatively small parcels of vacant land within its municipal boundaries, there may be sizeable amounts of developable land if the region as a whole is taken into account. For instance, the Pascack Valley Region has 3,028 acres of vacant, developable land. Bergen County, New Jersey Comprehensive Plan, Existing Land Use, Final Report, Report No. 11, June 1970. County Planning Board, County of Bergen. Yet as a result of today's decision, no community in the Pascack Region has an affirmative obligation to provide for multi-family housing. Although there are over 3,000 acres which could be used for multi-family housing, eight municipalities may block any part of that land from being used to supply any portion of the estimated 2,000 units of housing which are required annually to meet the present demand in Bergen County.

Municipal boundaries, which may have been drawn decades ago, bear no relationship to the considerations which we found relevant in Mt. Laurel. On the contrary, we held in Mt. Laurel that the "housing needs of persons of low and moderate income now or formerly residing in the township in substandard dwellings and those presently employed or reasonably expected to be employed therein" to be appropriate standards for determining a community's "fair share." 67 N.J. at 190. Various commentators

and operative fair share allocation programs suggest additional factors which should be considered in arriving at a community's "fair share."[5] In Madison Tp., I listed some of these factors:

> ... the percentage of the region's vacant, developable land which lies within the municipality; whether this land is suitable for low cost housing in terms of its proximity to utilities, transportation facilities and other services; whether it is accessible to available or prospective employment opportunities; whether the town's population density is smaller or greater than in the region at large; whether the town's relative proportion of lower income families is greater or lesser than that in the region as a whole and the extent to which the municipality has heretofore violated the precepts of Mt. Laurel by excluding low and moderate income persons.
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> [Madison Township, slip opinion at 54-55; Pashman, J., concurring and dissenting.]

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[5] See, e.g., Madison Tp., slip opinion at 53, n. 21 (Pashman, J., concurring and dissenting); Brooks, Lower Income Housing: The Planner's Response (Am. Soc'y of Planning Officials 1972); Rubinowitz, "Exclusionary Zoning: A Wrong in Search of a Remedy," 6 Mich. J. L. Reform 625 at 658-61 (1973); Rubinowitz, Low Income Housing: Suburban Strategies at 65-84, 219-220 (1974); Lindbloom, "Defining 'Fair Share' of 'Regional Need': A Planner's Application of Mount Laurel," 98 N.J.L.J. 633 (1975); Kelly, "Will the Housing Market Evaluation Model Be the Solution to Exclusionary Zoning?," 3 Real Estate L.J. 373 (1975); Rose, "Exclusionary Zoning and Managed Growth: Some Unresolved Issues," 6 Rutgers-Camden L.J. 689 at 709-17 (1975); Rose, "From the Courts: The Trickle Before the Deluge from Mount Laurel," 5 Real Estate L.J. 69 (1976); Rose, "Fair Share Housing Allocation Plans: Which Formula Will Pacify the Contentious Suburbs?," 12 Urban L.Ann. 3 (1976); N. Williams, American Land Planning Law §66.13(o)(1975 Supp.); Bisgaier, "Some Notes on Implementing Mt. Laurel: An Admittedly Biased View," 99 N.J.L.J. 729, 738, Cols. 3-5 (1976).

On the basis of these criteria, Washington Township's "fair share" can hardly be zero, as the municipality argues. Washington Township has allocated no space to provide suitable housing for the persons now living in the 145 substandard units already existing in that community. Brief of Amicus Curiae, Public Advocate of New Jersey, at 15. Nor has it attempted to set aside a place for the older couples and young married persons who currently seek housing in Washington Township, or the employees who would work in the office and research facilities which the Township seeks to develop. Washington Township is close to Paramus and Hackensack, and hence shopping and employment opportunities. Nevertheless, it argues that it has no obligation to provide housing for persons in the region who would take advantage of these opportunities.

Significantly, the majority omits population as a relevant criterion in evaluating a municipality's "fair share" of multi-family dwellings. But population may be an indication of whether a community has sufficient existing facilities to accommodate an influx of new residents. Although a court must be sensitive to potential overcrowding, it is more likely that roads, schools, and sewage facilities which were constructed to meet the demands of a densely populated community are already available for the needs of a modest amount of multi-family housing. Conversely, a community which has vast open spaces but has yet to develop facilities to service that area may be ill-equipped to cope with an influx of new residents.

The majority offers no logical reason why Washington Township, which it classifies as "moderate to low density," should not be required to accommodate its fair share of multi-family housing.

Lastly, the majority carves out vast exceptions, in terms of geography, to the duty which we imposed on communities in Mt. Laurel. Obviously, this not only interferes with any attempt by this Court to implement its own decision in Mt. Laurel, but impedes any legislative or executive attempt as well. Despite numerous calls for a legislative solution, see Madison Tp., slip opinion at 69-70; id. at 22-23, 29 (Pashman, J., concurring and dissenting); id. at 4 (Schreiber, J., concurring in part and dissenting in part); id. at 8-10 (Mountain, J., concurring and dissenting); id. at 2-3 (Clifford, J., concurring), today's decision presents a major stumbling block for any institution or agency which attempts to equitably apportion housing obligations. Because it places exclusive emphasis on municipal boundary lines, as opposed to housing needs, accumulations of vacant developable land, population, and the availability of existing municipal facilities, it makes it virtually impossible to retain the notion of a "fair share" in apportioning housing obligations.

It is hardly surprising that today's decision conflicts with preliminary attempts to fix an equitable apportionment of housing needs among communities. For instance, in response to our decision in Mt. Laurel and Governor Byrne's Executive Order No. 35, April 2, 1976, the Division of State and Regional Planning issued a report attempting to quantify municipal housing obligations. In arriving at each community's "fair share" of housing needs, the report states:

> In [Mt. Laurel], the New Jersey Supreme Court made it clear for the first time that municipalities must take into account not only local housing needs, but also the housing needs beyond the municipality's boundaries in the region of which it is a part. The regional delineation should be reflective of the intent of the Mt. Laurel decision and permit the equitable sharing of housing needs between areas with high levels of present housing needs and few resources and areas with the opposite characteristics.
>
> ["A Statewide Housing Allocation Plan for New Jersey," State of New Jersey, Preliminary Draft, November 1976 at 7-8.]

Contrary to the majority's current analysis, the State Regional Planning Office concluded that an equitable allocation of present and prospective housing needs required Washington Township and Demarest to build 398 and 280 housing units, respectively. Since that calculation was based on an attempt to assure that "[n]o municipality would be responsible for more than its proportion, or 'fair share' of the region's present housing need," one can only wonder where these 678 units will be constructed if Washington Township and Demarest have, as a result of today's decision, a "fair share" commitment of zero.

The Court's decision is all the more unfortunate because the available data indicate that the problem of providing decent housing for the citizenry of the State is becoming more acute. Consultants appointed by the trial court cited data by the County Planning Board indicating that in the Pascack Valley Region and in Bergen County alone, a production of 2,052 units per year is needed to accommodate population growth and replacement of existing units. In spite of the expressed need for housing in Bergen County, 99.4% of the residential land supply is zoned for single family dwellings, leaving a mere 141 acres zoned for multi-family housing. Land Use Regulation, The Residential Land Supply at 10a, New Jersey Department of Community Affairs, April 1972, Table V. Nor has any attempt been made to balance housing production with future industrial development. Though 3,551 acres of vacant and developable land are zoned in Bergen County for industrial development, id. at 6A, no provision has been made for employees who will desire housing near their place of work.[6]

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[6] Employment opportunities, both present and future, are obviously an important factor to be considered in determining housing requirements. The Division of Regional and State Planning notes in its report, "A Statewide Housing Allocation Plan for New Jersey" (Preliminary Draft, 1976), that employment growth is one of four indexes which reflect suitability and ability to accommodate low and moderate income housing needs. Id. at 13-14. Professor Rose in an article to appear in Suburban Housing for the Poor (to be published in 1977) also notes that existing jobs is a valuable factor in that it would "impose the greatest obligation on those municipalities that reap the advantage of tax revenues from the industrial enterprises that now provide the jobs and that would provide suburban jobs to city residents." In Mt. Laurel, the court stated in its discussion of fair share criteria

Moreover, the housing crisis is not confined to Bergen County. Governor Cahill spoke of the statewide crisis proportions of the problem in Blueprint for Housing in New Jersey[7] (1970) and New Horizons in Housing (1972), and this Court recognized the severity of the shortage in Mt. Laurel when we noted that, "[t]here is not the slightest doubt that New Jersey has been, and continues to be, faced with a desperate need for housing, especially of decent living accommodations economically suitable for low and moderate income families." 67 N.J. at 158. See also, Inganamort, et al. v. Bor. of Fort Lee, et al., 62 N.J. 521, 527 (1973). Yet, as in Bergen County, statewide planning has ignored the critical need for multi-family housing, particularly for low

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6 (cont.)

that "in arriving at such a determination the type of information and estimates ... concerning the housing needs of persons of low and moderate income now or formerly residing in the township in substandard dwellings and those presently employed or reasonably expected to be employed therein, will be pertinent." 67 N.J. at 190; emphasis added.

7 Governor Cahill noted the relationship between exclusionary zoning and the housing crises:

> Whatever the reasons for the perversion of zoning and planning laws that exists today, I am convinced that we cannot afford the luxury of continuing the status quo in this area. My purpose today is not to condemn the 'home rule' concept in relation to land use. My purpose is to warn you that the system is failing. It is failing because it is not meeting the needs of our people.
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> [Id. at 12.]

and middle income persons.[8]

IV

APPLYING AN AFFIRMATIVE OBLIGATION TO "DEVELOPED" COMMUNITIES

The majority's decision to limit Mt. Laurel to "developing" communities obscures the fact that "developed" municipalities must also have a role in providing low and moderate income housing. An excellent example is Englewood. Justice Hall, speaking for the Court in DeSimone v. Greater Englewood Housing Corp., No. 1, 56 N.J. 428 at 435 (1970), described that municipality as "one of the older suburban residential communities adjacent to New York City," and "as almost wholly built up." Based on the Court's decision today, Englewood would be considered "developed," and have no obligation

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See Land Use Regulation: The Residential Land Supply, New Jersey, Division of State and Regional Planning (1972). The study indicates that although 82% of the net land supply in 16 counties surveyed was allocated for residential use, only 6.2% of that land was zoned to allow multi-family housing. Id. at 6A, 10A. Furthermore, 59% of the net land supply in the 16 counties was limited to one-bedroom or efficiency apartments, 20.5% was allocated to two-bedroom apartments, and only 20.5% remained for apartments consisting of three bedrooms or more. Id. at 11A. The report included in its findings:

> With the exception of several rural municipalities, only a very small amount of the net land supply has been zoned to permit multi-family housing. In addition, they are often restricted to small units which are not suitable for families with children.
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> [Id. at 25]

to provide needed low and middle income housing. Nevertheless, a unanimous court held that a special reason existed for granting a variance in Englewood, pursuant to N.J.S.A. 40:55-39(d), as a way of replacing substandard housing or of furnishing new housing for minority and underprivileged persons outside of ghetto areas.[9] 56 N.J. at 442. Although we were primarily concerned with providing decent living accommodations for persons already living in Englewood, any such limited application of our holding in that case would contradict our broad definition of the general welfare.

In Mt. Laurel we explicitly referred to the continuing role of "developed" communities in providing for regional housing needs. Quoting from a report by the New Jersey County and Municipal Study Commission, Justice Hall emphasized the importance of built-up areas:

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Similarly, federal courts have granted no exemption for "developed" communities when requiring the construction of multi-family housing for low and moderate income persons as a way of correcting prior racial discrimination. See, Hills v. Gautreaux, U.S. , 96 S.Ct. , 47 L.Ed.2d 792 (1976); Kennedy Park Homes Ass'n v. City of Lackawanna, N.Y., 436 F.2d 108 (2 Cir. 1970), cert. den. 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971); Bailey v. City of Lawton, 425 F.2d 1037 (10 Cir. 1970); Gautreaux v. Chicago Housing Authority, 304 F.Supp. 736 (N.D. Ill. 1969).

> We further agree with the statement ... '[w]e recognize that new development, whatever the pace of construction, will never be the source of housing for more than a small part of the State's population. The greater part of New Jersey's housing stock is found and will continue to be found in the central cities and older suburbs of the State * * *.' (Substantial housing rehabilitation, as well as general overall revitalization of the cities, is, of course, indicated.)
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> [67 N.J. at 188, n. 21.]

Cf., Sente v. Mayor and Mun. Coun. Clifton, 66 N.J. 204, 209 (1974). It would be unfair to expect cities and municipalities to revitalize and rehabilitate ghetto areas, but require no commitment from them to supply any of the multi-family housing for which there is a pressing regional demand. The affirmative obligation to provide housing for low and middle income persons must be imposed on "developed," as well as "developing," communities if the Court is to implement the principles it enunciated in Mt. Laurel.

V

CONCLUSION

The majority today effectively neutralizes our holding in Mt. Laurel. The Court neglects to consider the troublesome effect that its decision will have on "fair share" allocations and defining appropriate regions; by exempting from any affirmative obligations under Mt. Laurel a significant number of municipalities,

the majority makes an equitable distribution of the burdens of providing for low and moderate family housing impossible. Rather than order a sharing of responsibilities under Mt. Laurel, the majority fragmentizes the State by selectively targeting areas which must affirmatively provide for multi-family housing.

Furthermore, today's opinion seriously underestimates the depth and magnitude of the measures needed to correct decades of exclusionary development. I have referred to the tactics of municipalities in avoiding their "fair share," Madison Tp., supra (slip opinion at 18-22)(Pashman, J., concurring and dissenting); and the reluctance of courts to forcefully implement our decision in Mt. Laurel, supra, 67 N.J. at 83. Today's decision can only provide new incentives to communities which seek to escape their constitutional and statutory duties. Consequently, we can offer no hope that new advances will be made in our efforts against exclusionary zoning.

Unfortunately, the effect of today's decision will be long lasting. State regulation embodied in the zoning power deeply affects the racial, economic, and social structure of our society, and locks people into an environment over which they have no control. Generations of children are relegated to a slum schooling and playing in the overcrowded and congested streets

of the inner cities. Men and women seeking to earn a living for themselves and their families are barred by distance from job markets. Society as a whole suffers the failure to solve the economic and social problems which exclusionary zoning creates; we live daily with the failure of our democratic institutions to eradicate class distinctions. Inevitably, the dream of a pluralistic society begins to fade.

This Court has been in the vanguard declaring the right of children to a thorough and efficient education, Robinson v. Cahill, 62 N.J. 473 (1973); the right of all persons to acquire, own, and dispose of real property, Jones v. Haridor Realty Corp., 37 N.J. 384, 391 (1962); and the right of all persons to share equal access to the State's resources, Neptune City v. Avon, 61 N.J. 296 (1972). Today we make a mockery of those rights by perpetuating a ghetto system in which residents live in inferior and often degrading conditions. Unless and until we open up the suburbs to all citizens of the State on an equal basis, the cherished ideals of our constitutional rights will remain illusive and unattainable.