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(1976)

● Direct Examination of Allen Mallach

PI #3365

21 pgs

CA 001527V

1 SUPERIOR COURT OF NEW JERSEY
2 CHANCERY DIVISION-MIDDLESEX COUNTY
DOCKET NO. C-4122-73

3 URBAN LEAGUE OF GREATER :
4 NEW BRUNSWICK, et al, :

5 Plaintiffs, :

6 -vs- :

Direct Examination of
Allan Mallach

7 MAYOR AND COUNCIL OF THE :
BOROUGH OF CARTERET, et al., :

(Metuchen)

8 Defendants. :

9
10
11 New Brunswick, New Jersey
February 24, 1976

12
13 B E F O R E:

14 HONORABLE DAVID D. FURMAN, JSC

15
16 A P P E A R A N C E S:

17 DANIEL SEARING, ESQ.,
18 Attorney for the Plaintiffs.

19 MARTIN A. SPRITZER, ESQ.,
20 Attorney for the Borough of Metuchen.

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22 Daye F. Fenton,
23 Official Court Reporter
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I N D E X T O W I T N E S S

WITNESS	PAGE
Allan Mallach	
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I N D E X T O E X H I B I T S

EXHIBIT	DESCRIPTION	EVIDENCE	IDEN.
P-126	Document	2	
P-127	Document	3	2

1 MR. SEARING: I have two documents to
2 mark for identification.

3 MR. SPRITZER: Your Honor, to make it easier
4 for the court and for counsel and the witness the
5 Zoning Ordinance, which is being presented now, was
6 presented in request for interrogatories, subsequent
7 to that time it's been newly bound and will be much
8 more easier to handle than this new book and I suggest
9 that this be the ordinance used. In fact I may have
10 another copy. It will really be easier for you and for
11 everyone. It has the entire ordinance plus--

12 THE COURT: Accept that?

13 MR. SPRITZER: 1974 change and 1975 change.

14 MR. SEARING: Yes, I will accept that as a
15 substitute so, can we mark this P-126 for
16 identification.

17 THE COURT: All right, P-126 in evidence.

18 (P-126 marked in evidence.)

19 (P-127 marked for identification.)

20
21 A L L A N M A L L A C H, previously sworn.

22 DIRECT EXAMINATION BY MR. SEARING:

23 Q Mr. Mallach, I would ask you to identify P-127,
24 please. A P-127 is the summary of

25 zoning ordinance provisions, the Borough of Metuchen, prepared

1 by me.

2 MR. SEARING: Thank you.

3 Your Honor, I move P-127 into evidence.

4 THE COURT: P-127 in evidence.

5 (Document received and marked P-127 in
6 evidence.)

7 Q Mr. Mallach, would you describe for us the
8 principal features of this zoning ordinance?

9 A Yes, sir. The Borough of Metuchen has six residential
10 zones, two are single family, one is a one and two family,
11 one is a town house and two are multi-family garden apartment
12 and senior citizen housing zones.

13 There are three business zones and one manufacturing
14 zone.

15 The R-1 single family zone requires minimum lot size
16 of 10,000 square feet, minimum frontage of 60 feet at the
17 street line, 75 feet at the setback line and 1400 square feet
18 of floor area.

19 The R-2 Zone requires 7500 square feet lots, 50-foot
20 frontage at the street line, 62.5 at the setback line, 1,000
21 square foot floor area.

22 The R-3 Zone provides for 5,000 lots, 45 and 50-foot
23 frontage and 800 square feet floor area for single family,
24 7500-foot lots, 50 to 55-foot frontage and 800 square feet
25 per unit for two family.

1 The R-2A Zone provides for town houses of a minimum of
2 1000 square feet floor space, maximum density of 8 units to
3 the acre.

4 Town house parcels must have a minimum size of one
5 acre and 150-foot frontage.

6 The R-4 Garden Apartment Zone provides for two story
7 garden apartments, density is set on the basis of available
8 density per bedroom, it's one bedroom units are allowed up
9 to approximately 17 units an acre, two bedrooms to 12 units
10 an acre, three bedroom to nine units an acre.

11 Let's see, two parking spaces are required per
12 dwelling.

13 Each garden apartment parcel must contain two acres and
14 have 150 feet frontage.

15 The R-5 Zone provides for alternatively modern income
16 senior citizen housing or garden apartment. The moderate
17 income senior citizens housing program requires a lot of
18 two acres and frontage of 200 feet, parking of .5 cars per
19 unit.

20 The garden apartments require one acre and 100-foot
21 frontage, maybe up to three stories, 1.75 parking spaces per
22 unit.

23 The bedroom provisions are or rather the bedroom and
24 density provisions are similar to those in the R-4 Zone except
25 that there may be higher density for the same bedroom type on

1 the three-story building that is a two-story building.

2 So for example, one bedroom unit can be up to 17 units an
3 acre in a two-story building and up to just short of 22 units
4 an acre in a three-story building and so on.

5 There's no reference in this section to units larger
6 than two bedrooms but it's, I guess one can assume that it
7 would follow the same density provisions as in the R-4 Zone
8 since they're not specifically prohibited.

9 Residences are permitted generally in the business
10 zones, subject to either garden apartments or the R-3 one and
11 two-family single units, except in the B-1A business zone
12 which provides only for garden apartments under the R-5
13 provisions.

14 Residences are not permitted in the manufacturing
15 zone.

16 According to the information provided by the Borough
17 of Metuchen there are a total of 38.5 acres vacant in the
18 Borough, this includes 5 acres in the single family zones,
19 R-1 and R-2, 7.5 acres in the apartment zones, R-4 and
20 R-5, two acres in the business zones, 24 acres in the
21 manufacturing zone and the Borough appended a notation to
22 that that much of this is undevelopable for reasons including
23 being an old railroad right of way, marshy, hilly, in flood
24 plain or lacking access from within the Borough of Metuchen.

25 THE COURT: Was that a footnote to the entire

1 38.5 or only 24 manufacturing?

2 THE WITNESS: To the 24 for manufacturing.

3 THE COURT: Do you accept that?

4 THE WITNESS: I don't really know, I'm willing,
5 for purposes of the chart I do, but I don't have
6 real knowledge of it.

7 Q Mr. Mallach, what if any of the features that
8 you have described have an adverse effect on the provision of
9 housing for low and moderate income purposes?

10 A There are certain numbers of features which has a
11 potentially adverse effect on housing opportunity in the
12 provisions of the R-1 Zone are excessive with regard to both
13 lot size and the minimum floor area required for dwelling
14 units.

15 MR. SPRITZER: I would object, your Honor,
16 answers to interrogatories it was stated the exact
17 sections and the reasons, the minimum lot area was
18 not mentioned, only minimum living area was mentioned.
19 I would object to any testimony on that basis as a
20 complete surprise and prejudice.

21 MR. SEARING: Your Honor, I would have to say
22 that the contents of the zoning ordinance are not a
23 surprise, I would have to determine--

24 THE COURT: Well, apparently the surprise
25 and contention of surprise is your position that the

1 10,000 square foot limit in the R-1 Zone has an
2 exclusionary effect or an adverse effect as to low
3 and moderate income housing.

4 MR. SEARING: Your Honor, I would have to check
5 my interrogatories to be sure but as a bottom line the
6 provision appeared on the chart, that is plaintiff's
7 exhibit, well over a week ago and there was also
8 opportunity there for the defendant at deposition.

9 MR. SPRITZER: I don't know what counsel is
10 talking about your Honor, when I submit interrogatories
11 and ask for the heart of the case, what are you against
12 specifically and everything, I think I'm entitled to
13 every single thing.

14 Mr. Mallach's not the plaintiff--

15 THE COURT: It presents something of a problem,
16 Mr. Spritzer because as to at least one other
17 municipality I think more than one, testimony has been
18 admitted that in the opinion of Mr. Mallach even a
19 10,000 square foot lot was an excessive requirement.

20 What's your--if I reject it as to Metuchen it
21 poses a very difficult sorting out in the court's
22 mind.

23 MR. SPRITZER: I can see your problem. What you
24 are saying to me, your Honor, it poses a big problem to
25 me because I was diligent in getting answers to

1 interrogatories and when we weren't diligent, other
2 attorneys were not diligent and when we didn't proceed
3 with depositions or discovery, you know, we were
4 impliedly criticized on that score.

5 THE COURT: Now, suppose we reserve on that
6 application and if it becomes significant or critical
7 at some later stage of the case you may renew it.

8 MR. SPRITZER: Thank you.

9 BY MR. SEARING:

10 Q Would you continue, Mr.Mallach.

11 A Yes, sir.

12 The other feature, I don't know if I mentioned it or
13 not was the minimum floor area.

14 THE COURT: You did mention it.

15 A Okay.

16 The minimum floor area in the R-2 single family zone is
17 also higher than what I believe is necessary for reasonable
18 modest accommodation.

19 I do not take issue with the provisions of the R-3 Zone,
20 the minimum floor area for the town houses of 1000 square
21 feet in the R-2 Zone is also excessive.

22 MR. SPRITZER: I rise to the same objection,
23 your Honor, absolutely no mention of the town house
24 zone or the R-2A Zone in answer to interrogatories.

25 MR. SEARING: Your Honor, I think that what

1 the--

2 THE COURT: You mean the thousand square foot
3 minimum square floor area is excessive?

4 THE WITNESS: For town houses, yes, sir.

5 THE COURT: Again I'll reserve on that.

6 You're not foreclosed from making that point if--

7 MR. SPRITZER: Thank you, your Honor.

8 THE COURT: --if it appears to be critical or
9 timely.

10 A With reference to the garden apartment zone, there are
11 a number of features which I'd like to cite, I don't know
12 whether or not these features were listed in the responses
13 to interrogatories, specifically--

14 MR. SPRITZER: Your Honor, at this point I
15 consider this critical, if he's going into the
16 R-4 area, the R-4 Zone which is for garden apartments
17 and after my interrogatories, without amendment,
18 believe that I have a perfect non-exclusionary R-4
19 Zone.

20 THE COURT: You want to refer to the answer
21 to interrogatories?

22 MR. SPRITZER: Yes, I do, your Honor. There
23 is nothing--

24 THE COURT: All right, read it in the record.

25 MR. SPRITZER: Read the answer to interrogatories--

1 "State each and every provision of the Metuchen
2 Zoning Ordinance by reference to article and section
3 number which plaintiffs allege--"

4 THE COURT: Slow. Which plaintiffs allege--

5 MR. SPRITZER: "--are invalid as tending to
6 exclude low and moderate income families and minority
7 families from living in Metuchen.

8 "One, at this time plaintiff states the
9 following, Article 3, Section 19C specifically prohibits
10 trailer coach parks.

11 "B, Article 3, Section 21 requires minimum
12 living areas in R-1 Zones of 1400 square feet and
13 in R-2 Zones of 1000 square feet.

14 "C, Article 7A, Section 5, modifies minimum
15 yard requirements for moderate income, senior citizen
16 housing projects but not for low and moderate income
17 housing for families.

18 "D, Article 7A, Section 8 modifies maximum
19 building height limits for moderate income, senior
20 citizen housing but not for low and moderate income
21 housing for families.

22 "E, admittedly plaintiffs challenge the deletion
23 of municipal zoning for high rise apartments and high
24 rise apartment developments--"

25 They were not in the R-4 Zone, by the way, your

1 Honor.

2 "F, Article 7A, Section 6 exempts moderate
3 income senior citizen housing from schedule density
4 requirements but not low and moderate income housing
5 for families."

6 Now I can say to the court that beginning in
7 June up through December I went through my
8 interrogatories and supplemental interrogatories,
9 whenever I found an omission, whenever I found a change,
10 whenever I found anything I did wrong I wrote a letter
11 to these plaintiffs and put them on notice so that
12 when they came to court they would/^{not}be in the position
13 which I now find myself and I vehemently object to
14 any testimony other than what is in here. I don't care
15 whether Mr. Mallach may be an expert in respect to
16 that but he has to be an expert I think within the
17 confines of the rules.

18 Thank you.

19 THE COURT: All right, you may proceed with your
20 answer and this will be subject to motion to strike or
21 motion to strike may be made and the court may reserve
22 on it.

23 A Yes, sir.

24 With regard to the R-4 garden apartment zone there are
25 a number of features, first, the minimum lot and frontage

1 requirements specifically two acres and 150 square feet,
2 150 feet frontage again restricts the flexibility and the
3 feasibility of constructing in a community where smaller
4 parcels may exist and may be suitable for multi-family
5 developments and would not be available under this provision.

6 Secondly, the density provisions that I mentioned which
7 provide for substantially differing density standards for
8 one, two and three bedroom units tend, other things being
9 equal, to discourage the provision of larger units because
10 from a straight economic standpoint if there's a market for
11 both small and large units, the small units can be constructed
12 and more land costs can be assigned against small units by
13 the builder and more, it becomes more economically feasible
14 and profitable to construct smaller units because you can put
15 more, substantially more of them in to a given piece of
16 ground.

17 Thirdly, the provision of two parking spaces per
18 dwelling unit is high. The similar provisions--

19 MR. SPRITZER: I would like to be heard before
20 he gets--

21 THE COURT: Similar provisions, will you
22 complete it as to R-4.

23 THE WITNESS: I'm completed as to R-4, yes,
24 sir.

25 THE COURT: All right.

1 MR. SPRITZER: This is a completely different
2 type of case than I thought I was called upon to
3 defend here after 18 months. I assert to your Honor
4 that I have met with my planner, I also have another
5 expert witness, as your Honor knows I prepared in this
6 case I guess the most expensive, it wasn't the ^{most} expensive,
7 the most ~~extensive~~ pretrial in the case, it had, oh,
8 well over 100 pages of appendencies, at that time it
9 was completely related to the six points that I think
10 that it stated in the interrogatories. I've given
11 these, my brief and appendencies to two planners in
12 order to come up with a proper defense. I've been
13 served by a notice of motion, not a notice of motion
14 but a notice of, to produce certain exhibits three days
15 before its Metuchen's turn to make its presentation,
16 now, and the three days may be in three days, your
17 Honor.

18 I am now faced with, with truly an intolerable
19 burden which I am, I have no ill feeling towards the
20 attorneys for plaintiffs, we've had a very cordial
21 relationship, your Honor, and, but I simply cannot
22 understand after 18 months of discovery going on one
23 basis and not even the beginning of the trial three
24 weeks into trial, being hit with this test of
25 Metuchen's ordinance.

1 I frankly, your Honor, I don't know how to
2 handle it, I'll be frank, I'll, I'm really, to put it
3 candidly in bad shape as far as defending on this
4 particular thrust.

5 MR. SEARING: Your Honor, I feel a very
6 definite need to respond. I hardly feel that this is a
7 completely different case from what Metuchen expected
8 under our continuing duty to update and in response
9 to interrogatories from codefendants, we provided the
10 exhibits prepared as summaries from the zoning
11 ordinances and in response to a notice of motion filed
12 by, notice to produce filed by attorneys from Madison,
13 these exhibits which we are here discussing today.
14 Now I think that there was an awareness certainly of
15 many of the provisions that we were going to challenge,
16 I do not feel that this consitutes at this time
17 surprise, at best we would be more than willing to have
18 Mr. Mallach's cross-examination on this material post-
19 poned for whatever your Honor feels is necessary.
20 I, certainly, it's going to be overnight in any case
21 because he isn't even finished with his direct and
22 there was no effort made on the part of the plaintiffs
23 to surprise counsel or to put an undue burden upon him
24 at this point.

25 Our relationship has been very cordial and there

1 was, and has been no effort made to, there was no
2 desire to surprise or overburden counsel, opposing
3 counsel.

4 THE COURT: Can I see that answer to
5 interrogatories, please?

6 MR. SPRITZER: Yes, your Honor. And your Honor
7 if I may follow up for a moment, your Honor, neither
8 does the specifications in the complaint even hint
9 about that.

10 Now, other, other communities are described
11 as prohibiting apartments with more than two bedrooms
12 and having certain, doing certain things in respect
13 to garden apartment units but it's not, it's not even
14 in the complaint, broadly. So there is nothing for me
15 to expect, I received a copy of what is going in for
16 Metuchen, summary of zoning provisions, nowhere does
17 it say what's objected to there. I don't see how
18 this paper, I don't know--what is it, Mr. Searing?
19 A summary of zoning provisions? What's the exhibit
20 on that?

21 MR. SEARING: P-127.

22 MR. SPRITZER: I don't see this puts me on
23 notice as anything as merely a summary of provisions,
24 doesn't even say summary of provisions objected to,
25 summary of exclusionary provisions. I am surprised.

1 THE COURT: I'll allow the testimony into the
2 record at this time. I'm aware that there is a
3 reference in the answer to interrogatories, interrogator
4 number one, the schedule density requirements applicable
5 to low and moderate income housing.

6 MR. SPRITZER: That's only in respect to
7 senior, the distinction between senior citizen housing
8 and low, moderate income.

9 THE COURT: I know. I will let him finish his
10 testimony at this time reserving on your motion,
11 Mr. Spritzer for your objection.

12 All right, go ahead.

13

14 BY MR. SEARING:

15 O Mr. Mallach, do you recall what you were
16 commenting on or would you like the last--

17 THE COURT: He's finished R-4.

18 THE WITNESS: Oh, yes.

19 THE COURT: Anything else?

20 A With regard to the R-5, the same comments as the R-4
21 apply to the minimum lot and frontage requirement in those,
22 that zone as well as to the similar density provisions for
23 garden apartments under R-5 as under R-4 which have the
24 same discouraging effect on larger units. Again, I think
25 it stated these provisions of exemption from the restrictions

1 ofthe ordinance for purposes of senior citizens housing and
2 not for purposes of housing for low and moderate income,
3 non-elderly families is a restraint.

4 In view of the apparently substantial amount of un-
5 developable or difficult to develop land in the manufacturing
6 zone there's really nothing of particular significance about
7 the distribution of vacant land in the town, that would have
8 a direct effect on the exclusionary features.

9 O Thank you, Mr. Mallach.

10 Does this municipality have a public housing authority?

11 A No.

12 Q Is there any state or federally subsidized
13 housing within the confines of the Borough?

14 A It's my understanding that there is a senior citizen
15 project at some stage of the development for, under the
16 New Jersey Housing Finance Agency Program.

17 O Mr. Mallach, I would like to draw your attention
18 to Page 68 of Exhibit P-53, could you tell us what this is
19 please?

20 A Yes, sir. This
21 is the summary table from the Community Development Revenue
22 Sharing Application dealing with survey of housing conditions,
23 1970 and housing assistance needs of lower income households,
1970.

24 MR. SPRITZER: Your Honor, in response to

25 a, I believe a motion or statement by other counsel

1 I thought you had ruled that the issue of substandard
2 housing here was, was irrelevant or that just to--

3 THE COURT: No, I've allowed in testimony,
4 I don't believe there's been any objection so far to the
5 testimony as to the number of substandard units but I
6 have not created that as a basis for maintaining an
7 action against a municipality on some theory that I
8 could order the substandard units to be replaced.

9 MR. SPRITZER: I withdraw my objection.

10 O Is there an entry on that document for Metuchen?

11 A Yes, sir.

12 O Would you read it to us, please.

13 A Yes, in column one which refers to the number of sub-
14 standard units in 1970 figure for Metuchen is 166, in column
15 two which refers to the elderly and non-elderly lower income
16 households in need of housing assistance I assume financial
17 assistance, the number is 723, the total in column three is
18 889.

19 O Thank you, Mr. Mallach.

20 I will draw your attention to the request for admissions
21 submitted to Metuchen and responded to, dated June 9th, 1975
22 signed by Harold M. Klein, the Borough Administrator, it
23 specifically, Mr. Mallach, to Question 8, would you read the
24 question and the response, please.

25 A Does, the question is, "Does defendant admit that the

1 number of building permits it issued between 1965 and 1973
2 was as follows: Specifically, 1965, single family, 36,
3 multi-family, zero.

4 "1966, single family, 21, multi-family, zero.

5 "1967, single family, 17, multi-family, zero.

6 "1968, single family, 31, multi-family, zero.

7 "1969, single family, 18, multi-family, zero.

8 "1970, single family, 30, multi-family, zero.

9 "1971, single family, 29, multi-family, zero.

10 "1972, single family, 29, multi-family, zero.

11 "1973, single family, 16, multi-family, zero."

12 The answer to the question was, "Yes."

13 O Thank you Mr. Mallach.

14 MR. SFARING: Your Honor, we have no
15 further questions.

16 THE COURT: Do you wish to wait until
17 tomorrow morning to cross-examine?

18 MR. SPRITZER: Yes, your Honor.

19 (Whereupon direct examination of
20 Allan Mallach was concluded.)

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - MIDDLESEX COUNTY
DOCKET NO. C-4122-73

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URBAN LEAGUE OF GREATER :
NEW BRUNSWICK, et al, :

Plaintiffs, :

-vs-

CERTIFICATE

MAYOR AND COUNCIL OF THE :
BOROUGH OF CARTERET, et al., :

Defendants. :

I, DAYE F. FENTON, a Notary Public and
Certified Shorthand Reporter of the State of New
Jersey, certify that the foregoing is a true and
accurate transcript.

Daye F. Fenton

DAYE F. FENTON, C.S.R.
Official Court Reporter