CA- Madison (No date)

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CA001736B

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INTRODUCTORY STATEMENT

The Public Interest Research Group (PIRG) of New Jersey and the Sierra Club by motion requested and were granted leave to file this brief as amici curiae. We made this request because of the importance of the legal issues in this and other similar cases pending and the likelihood that the results in these cases will have a significant impact on the future of housing and of the environment in New Jersey. The Sierra Club's concerns run to the latter matter; PIRG'S, to both.

Even though the brief is directed to the specific facts of this case, what is also intended is a general discussion of the need to carefully incorporate ecological factors into the remedies to be devised for implementing the rights of lower income groups to access to decent housing throughout the state. This analysis is further developed in Williams, Doughty and Potter, The Strategy on Exclusionary Zoning: Towards What Rationale, and What Remedy? , which appears in the January edition of LAND USE CONTROLS, The American Society of Planning Officials, which appears in Appendix A . Our Statement of the Case here is tendered in order to describe to the Court facts about the real case in its entirety, not all developed in the case as litigated, which where not of record or susceptible to judicial notice,

amici will seek to have proven, by intervention or otherwise, if the proceedings are reopened and remanded.

The brief is filed in the expectation that consideration of the propositions developed in this brief and its Appendix will result in a significant improvement in the quality and equity of land use planning in New Jersey.

Summary of Argument:

POINT I: THE RELIEF DECREED BELOW---INVALIDATING THE ZONING ORDINANCE OF MADISON TOWNSHIP, IN ITS ENTIRETY AND WITH IMMEDIATE EFFECT---GOES FURTHER THAN IS NECESSARY TO ADEQUATELY SECURE THE LEGAL RIGHTS OF THE LAWFULLY DESERVING CLASS OF PLAINTIFFS. WITHOUT SUCH POSSIBLE JUSTIFICATION AND THE RESULTING NEED TO WEIGH AND BALANCE COMPETING RIGHTS, THE DECREE UNNECESSARILY AND IMMEDIATELY THREATENS THE LEGAL RIGHTS, INTERESTS AND REASONABLE EXPECTATIONS OF ANOTHER CLASS OF PERSONS---RESIDING OUTSIDE AS WELL AS WITHIN THE MUNICIPAL DEFENDANT---WHO ARE DEPENDENT UPON OR OTHERWISE VALUED BURNT FLY BOG AND ITS ECOLOGICAL FUNCTIONING. AS A MATTER OF REMEDIAL LAW OR SOUND EXERCISE OF REMEDIAL DISCRETION, THIS COURT MAY NOT PROPERLY ALLOW SUCH AN UNBALANCED AND INEQUITABLE DECREE TO COME (BACK) INTO OPERATIVE EFFECT WITHOUT PRIOR MODIFICATION.....

POINT II. THE COURT BELOW WENT BEYOND THE LIMITS OF ITS JUDICIAL POWER WHEN IT PROCEEDED TO ENTER ITS DECREE INVALIDATING THE ZONING ORDINANCE OF MADISON TOWNSHIP, IN ITS ENTIRETY AND WITH IMMEDIATE EFFECT, WITHOUT EITHER (A) SIMULTANEOUSLY DECREEING SOME SUBSTITUTE LEGAL PROTECTION OF COMPARABLE EFFECTIVENESS IN FAVOR OF BURNT FLY BOG AND THE LEGAL RIGHTS AND INTERESTS OF PERSONS DEPENDENT UPON ITS ECOLOGICAL FUNCTIONING---PERSONS WHO WERE NOT BEFORE THE COURT AND WHOSE INTERESTS WERE NOT ADEQUATELY REPRESENTED BY ANY OF THE LITIGANTS---THAT WOULD REPLACE THE LEGAL PROTECTION AFFORDED THE BOG AND ITS BENEFICIARIES BY THE PART OF THE TOTALLY INVALIDATED ZONING ORDINANCE WHICH HAD THERETOFORE PROHIBITED A DESTRUCTIVE OR IMPAIRING DEVELOPMENT OF THE BOG SUCH AS PLAINTIFF OAKWOOD-AT-MADISON PROPOSES OR (B) FIRST REOPENING THE PROCEEDINGS SO AS TO ASSURE THAT THE LEGAL POSITIONS OF THAT ABSENT, AND OTHERWISE IN-

ADEQUATELY REPRESENTED, CLASS OF PERSONS ON THE ECOLOGICAL ISSUES, AND THE RELATED SUBSTANTIVE AND REMEDIAL ISSUES WERE FULLY HEARD AND DELIBERATED BEFORE ANY DECISIONS WERE REACHED AND DECREE ENTERED WHICH IMMEDIATELY AFFECTS THE BOG AND ITS BENEFICIARIES, ADVERSELY.....

POINT III. AS A MATTER OF THIS COURT'S RESPONSIBILITIES FOR THE SOUND ADMINISTRATION OF JUSTICE, AND A SOUND EXERCISE OF ITS REMEDIAL DISCRETION, THE DECREE AND DECISION BELOW CAN NOT BE ALLOWED TO STAND INSOFAR AS THEY IMPERIL BURNT FLY BOG.....

POINT IV. IN VIEW OF THE CURRENT SHORTAGE OF HOUSING AND THE VOLUME OF LITIGATION ON EXCLUSIONARY ZONING, IN AN INTERIM DECISION IN THIS CASE IT IS NECESSARY THAT THE COURT MAKE A GENERAL STATEMENT REGARDING EXCLUSIONARY ZONING WHICH PROPERLY LIMITS THE POWER OF A MUNICIPALITY TO EXCLUDE ALL HOUSING EXCEPT LARGE SINGLE-FAMILY HOUSING ON LARGE LOTS. IT IS ALSO NECESSARY FOR THE COURT TO SET FORTH, AS A GENERAL PRINCIPLE, THAT PROVISION FOR HOUSING MUST BE ACCOMPLISHED CONSISTENTLY WITH PROTECTING THE ENVIRONMENT. SPECIFICALLY, THE COURT SHOULD PROHIBIT ALL DEVELOPMENT OR ALTERATION OF BURNT FLY BOG PENDING A REZONING OF THE TOWNSHIP UNDER SUPERVISION OF THE LOWER COURT.....

POINT V. WHEN THE IMPLEMENTATION OF CONSTITUTIONAL RIGHTS NECESSARILY INVOLVES DEALING WITH A COMPLEX SYSTEM OF INTERRELATED FACTORS, THE JUDICIAL FUNCTION INCLUDES FAR MORE THAN A DECLARATION OF GENERAL PRINCIPLES. IT IS EQUALLY THE JUDICIAL TASK TO DEVISE A REMEDY WHICH WOULD GIVE SUCH RIGHTS REAL MEANING, AND TO SPELL OUT A RATIONALE POINTING TO SUCH A REMEDY. IN A DECISION ON EXCLUSIONARY ZONING, THE TWO CRITICAL ELEMENTS ARE THEREFORE TO SPELL OUT THE RATIONALE, SETTING FORTH THE NATURE OF THE MUNICIPAL DUTY TO PROVIDE VARIOUS KINDS OF HOUSING, AND TO FASHION THE REMEDY ACCORDINGLY. IN DECIDING THIS CASE, THE COURT SHOULD GIVE SERIOUS CONSIDERATION TO

THE PRACTICAL IMPLICATIONS OF EACH ALTERNATIVE RATIONALE AND REMEDY IN THE CONTEXT OF THE PRESENT CRISIS IN THE HOUSING MARKET AND THE LIKELY RESISTANCE OF THE SUBURBS TO THE NEW HOUSING AND THE NEED TO PROVIDE ADEQUATE PROTECTION OF THE ENVIRONMENT.....

POINT I

AS A MATTER OF REMEDIAL LAW OR SOUND EXERCISE OF REMEDIAL DISCRETION, THIS COURT MAY NOT PROPERLY ALLOW THE UNBALANCED AND INEQUITABLE RELIEF DECREED BY THE COURT BELOW TO COME BACK INTO OPERATIVE EFFECT.

The court below (properly) recognized that the plaintiff class of persons of low-income were legally entitled not to be excluded by the operations of the municipality's zoning ordinance from access to housing within Madison Township that is within their means. To secure those legal rights simply and completely, the court entered a decree invalidating the offending zoning ordinance, in its entirety and with immediate effect. The Court seemed to feel free to enter its drastic decree against the defendant Township because that defendant had failed to make out an adequate factual foundation to support the part of its zoning ordinance that operated to prohibit the quite intensive residential development (for the alleged benefit of the plaintiff class) that plaintiff Oakwood-at-Madison proposes to develop (by surfacing over Burnt Fly Bog despite the costs and the risks of impairing the ecological functioning of the Bog that are inherent in that proposal).

By so proceeding to its decision and decree--which immediately affects, adversely, the legal rights and interests of persons who have come to depend on the ecological functioning of the Bog--without first reopening the proceeding to require a sufficiently full development for the court to be able to properly decide the ecological issues raised by Oakwood's proposed development of the Bog, as well as several issues of substantive and remedial law related thereto, all of which vitally concern persons dependent on the Bog, the Court denied those persons rights to be heard in person or by representatives who adequately represent them. See Point II, infra. The Court would not have committed that error if it had paused before coming to decision and decree, to undertake a proper application of remedies law and a proper exercise of remedial discretion, so as to fashion a remedially appropriate decree. Such a remedially appropriate decree would not have adversely affected the class of persons dependent on the Bog and so would not have given rise to the questions whether the court's decree adversely affecting them is not an unlawful decree. See Point II, infra.

In order to adequately secure the legal rights of the deserving class of plaintiffs, it was only necessary and appropriate

for the Court to invalidate (or restrain the operation and enforcement of) only so much of the whole of the zoning ordinance as operated to exclude the deserving class of plaintiffs from access to an appropriate supply of housing somewhere within the township that is within their means. The development of the Bog proposed by plaintiff Oakwood but presently prohibited by the operation of a separable part of the zoning ordinance, would only warrant relief from that legal prohibition only, as a matter of remedies law, if that proposed development was necessary in order to adequately secure the legal rights of access to low-cost housing enjoyed by the class of plaintiffs, and only if such a necessity could legally justify the immediate threat of harm to the Bog and its beneficiaries that is patently present on the face of Oakwood's proposal to surface over part of the Bog relatively high-intensity housing. Moreover, given such a showing of justifying necessity if adequate relief is to be afforded the class of plaintiffs, the court would also have to be persuaded that, on a balancing of the equities, it was remedially the more appropriate to subordinate the legal rights and interests of the class of persons residing

outside, as well as within the boundaries of the Township who are dependent on the Bog, to the legal rights of the deserving class of plaintiffs to enjoy access to housing within the boundaries of Madison Township.

The Court below required neither of these remedially necessary showings of Oakwood before it proceeded to invalidate the part of zoning ordinance operating to prohibit the Oakwood development incident to its simplistic invalidation of the ordinance in its entirety. The court's action and reasoning manifest no careful exercise of remedial discretion appropriate in the circumstances and the decree seems to violate the applicable law of remedies.

Thus, if the Court decides that the plaintiff class does enjoy a right to relief in this case (as we believe the Court should decide), then, as a matter of remedial law and sound exercise of remedial discretion, the decree below must be modified so as not to include relief for Oakwood and a resulting threat to intensive development of the Bog, unless and until such a development in the Bog by Oakwood or others is shown to be necessary in order to adequately secure the rights of the class of plaintiffs and, only then, if, on a weighing

and balancing, the legal rights and interests of those dependent on the Bog who reside outside, as well as within, the boundaries of the Township are properly to be subordinated to the need to afford the class of plaintiff access to low-cost housing within the Township.

(Before so subordinating the Bog and its beneficiaries, a court might well want to inquire whether both sets of competing rights may not be accommodated by some means or other including the possibility of requiring further proceedings and the joinder of further municipalities in the Bog area as additional parties. See Point V, infra.)

POINT II

THE COURT BELOW WENT BEYOND THE LIMITS OF ITS JUDICIAL POWER WHEN IT PROCEEDED TO ENTER ITS DECREE INVALIDATING THE ZONING ORDINANCE OF MADISON TOWNSHIP, IN ITS ENTIRETY AND WITH IMMEDIATE EFFECT, WITHOUT EITHER (A) SIMULTANEOUSLY DECREEING SOME SUBSTITUTE LEGAL PROTECTION OF COMPARABLE EFFECTIVENESS IN FAVOR OF BURNT FLY BOG AND THE LEGAL RIGHTS AND INTERESTS OF PERSONS DEPENDENT UPON ITS ECOLOGICAL FUNCTIONING---PERSONS WHO WERE NOT BEFORE THE COURT AND WHOSE INTERESTS WERE NOT ADEQUATELY REPRESENTED BY ANY OF THE LITIGANTS---THAT WOULD REPLACE THE LEGAL PROTECTION AFFORDED THE BOG AND ITS BENEFICIARIES BY THE PART OF THE TOTALLY INVALIDATED ZONING ORDINANCE WHICH HAD THERETOFORE PROHIBITED A DESTRUCTIVE OR IMPAIRING DEVELOPMENT OF THE BOG SUCH AS PLAINTIFF OAKWOOD-AT-MADISON PROPOSES OR (B) FIRST REOPENING THE PROCEEDINGS SO AS TO ASSURE THAT THE LEGAL POSITIONS OF THAT ABSENT, AND OTHERWISE INADEQUATELY REPRESENTED, CLASS OF PERSONS ON THE ECOLOGICAL ISSUES, AND THE RELATED SUBSTANTIVE AND REMEDIAL ISSUES, WERE FULLY HEARD AND DELIBERATED BEFORE ANY DECISIONS WERE REACHED AND DECREE ENTERED WHICH IMMEDIATELY AFFECTS THE BOG AND ITS BENEFICIARIES, ADVERSELY.

This point does not seem to require elaboration. And the basic legal proposition is a commonplace that will not benefit from a citation of any particular line of authorities. The point enjoys some support as a matter of parties law, remedies law, jurisdictional law and Constitutional law.

That the class of persons dependent on the Bog were not adequately represented by any of the litigants is obvious. (In its attending to other issues), the Township was found by the court to have developed the issues of ecology, and the remedial and substantive issues related thereto, that pertain to development of the Bog so insufficiently that they were not susceptible to resolution judicially. Those are the only issues of vital concern to persons dependent on the Bog. They are, as the point states, legally entitled to be fully heard on the issues and the issues must be resolved against them before the decree immediately affecting them adversely may be allowed to come into operation. In such further proceedings (whether in this Court or more appropriately in this case, on remand for proceedings below) amici would seek to intervene and, that failing, seek to assist whoever else represents the people dependent on the Bog.

It would, of course, be possible to avoid such further proceedings and yet not wrong the people dependent on the Bog, if as a matter of remedies law, this Court were to modify the decree so as to include a provision in the decree immediately affording substitute judicial protection for the Bog of some kind at least as strong as the prohibition of the invalidated zoning ordinance.

POINT III

AS A MATTER OF THIS COURT'S RESPONSIBILITIES FOR THE SOUND ADMINISTRATION OF JUSTICE, AND A SOUND EXERCISE OF ITS REMEDIAL DISCRETION, THE DECREE AND DECISION BELOW CAN NOT BE ALLOWED TO STAND INSOFAR AS THEY IMPERIL BURNT FLY BOG.

This point is addressed to the Court's ultimate responsibilities for a sound administration of justice. In the event the Court has not been persuaded that the decree below must be modified, so as to expressly protect the Bog from environmentally adverse development, then the decree below should be reversed and remanded so as to afford persons relying on Burnt Fly Bog a full hearing and determination of their legal rights and interests.

Due to the over-riding reasons of public policy, future litigation involving important questions concerning the conservation of environmental assets can not be disposed of on evidentiary grounds, in the manner relied on below, which, if not erroneous on precedent, are nonetheless inadequate bases for judgments imperiling such important environmental assets. More specifically here, no decision which may imperil an important environmental asset like Burnt Fly Bog, can be allowed to turn on a judicial

holding that a litigant, allocated the border of proof or persuasion, has failed--for any reason--to supply the court with a record adequate for a fully informed decision.

For the sake of the environmental asset and all its beneficiaries, the courts must assure themselves that an adequate and appropriate record for decision of such important questions becomes available by appointment of additional counsel if necessary and other procedural innovations.

In this case, a reading of the lower court opinion makes it clear that this important ecological issue was given little consideration, and indeed was merely brushed aside:

> ...Only engineering data and expert opinion and, it may be, ecological data and expert opinion could justify the /environmentally protective/ ordinance under attack. These were lacking both in the legislative process and at the trial. (Bracketed words and emphasis added). (117 N.J. Super at 21-22, 283 A. 2d at 359).

If this proceeding is reopened for a full trial of these issues, Sierra Club and the Public Interest Research Group of New Jersey, are prepared to move to see that this much needed

evidence is presented to the court.

Admittedly, there are risks that, in view of increasing concern for environmental values, some towns will raise frivolous environmental defenses to avoid any action on much needed more intensive residential development. The likely argument will be that the local ecology is too fragile to permit more intensive residential development anywhere within the town. Such cases can be dealt with when and if they arise.--But they have nothing to do with the present case. See Points IV and V for a further clarification of differences in relative municipal duty to permit new multiple dwellings as of right.

POINT IV.

IN VIEW OF THE CURRENT SHORTAGE OF HOUSING AND THE VOLUME OF LITIGATION ON EXCLUSIONARY ZONING, IN AN INTERIM DECISION IN THIS CASE IT IS NECESSARY THAT THE COURT MAKE A GENERAL STATEMENT REGARDING EXCLUSIONARY ZONING WHICH PROPERLY LIMITS THE POWER OF A MUNICIPALITY TO EXCLUDE ALL HOUSING EXCEPT LARGE SINGLE-FAMILY HOUSING ON LARGE LOTS. IT IS ALSO NECESSARY FOR THE COURT TO SET FORTH, AS A GENERAL PRINCIPLE, THAT PROVISION FOR HOUSING MUST BE ACCOMPLISHED CONSISTENTLY WITH PROTECTING THE ENVIRONMENT. SPECIFICALLY, THE COURT SHOULD PROHIBIT ALL DEVELOPMENT OR ALTERATION OF BURNT FLY BOG PENDING A REZONING OF THE TOWNSHIP UNDER SUPERVISION OF THE LOWER COURT.

Our reservations on this case as an appropriate test case to review the problems created by exclusionary zoning extend far beyond the presence of the additional ecological issue. Even if there were no ecological issue of great importance in this case we would oppose the action taken by the lower court due to the insufficiency of the remedy and the lack of a supporting rationale. First, Madison Township is one of the few suburban townships in Central New Jersey where a substantial number of multiple dwellings have been permitted as of right in recent years. Madison was one of the fastest-growing towns in New Jersey during the 1960's, with over 10,000 new dwelling units; and slightly

over half of these dwelling units were new multiple dwellings---a situation probably unique in the state. Consequently, the case of Madison Township does not present the more extreme situation as of a town in a major growth area which has long excluded all types of multiple housing. (Multiple dwelling units are the only type of housing potentially within reach of the low- and moderate-income groups most commonly excluded by restrictive zoning practices).

Second, there are some indications that Madison Township has been attempting to keep up with new growth by providing additional public facilities. It is not necessary, in order to dispose of this appeal, to rule on the question of whether New Jersey municipalities may regulate rate and sequence of their growth. Many serious arguments may be made on both sides of this question.[2] It is important to avoid a decision which would expressly or implicitly attempt to settle this issue without the fullest consideration of all its implications. In this case, however, a two-year building moratorium and the three years of litigation have in effect given Madison Township a five year moratorium on new residential development---so that the Township is now hardly in a position to argue that it needs a breathing period.

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2. See, e.g. Golden v. Planning Board of Town of Ramapo, 334 N.Y.S.2d 138, 30 N.Y. 2d 359, (Ct. of App. 1972); Josephs v. Clarkstown, 24 N.Y. Misc. 2d 366, 198 N.Y.S. 2d 695 (Sup. Ct. 1960).

Moreover, the present zoning pattern in Madison has shifted to the pattern prevailing in adjacent counties: almost no land zoned for multiple dwellings or mobile homes, and almost all land zoned to require large single-family houses on large lots. As a permanent pattern, these arrangements are unacceptable under any of the rationales now evolving in connection with exclusionary zoning.

In view of the current shortage of housing and the volume of litigation on exclusionary zoning, in an interim decision in this case, it is necessary that the Court should issue some general guidelines for municipalities to follow in dealing with the interrelationship of exclusionary zoning and protection of the environment. The remand should include instructions to the trial court to deal with the problem in more specific terms. (See discussion of Brown v. Board of Education, 347 U.S. 483 (1954) and 349 U.S. 294 (1955) under Point V, infra.) For example, on remand in this case the Court may uphold restrictions on Burnt Fly Bog but would order an affirmative plan to zone other land somewhere within the Township for those who cannot afford large homes on large lots.However, the Court should specifically prohibit all development or alteration of Burnt Fly Bog pending a rezoning of the Township under supervision of the lower court.

The most obvious point requiring consideration here is also the one which is most important to change in order to make more land available for lower-cost housing; the almost

complete exclusion of new multiple dwellings from Madison Township. The legal rationale for such exclusion of multiple dwellings and for the adoption of single-family zoning over almost an entire township is in fact far weaker than has generally been realized. All of the relevant case law supporting this principle has come from the 1920's; there was literally no case passing on the principle between 1930 and 1970.[3] There are two reasons for this weakness.

First, the cases from the 1920's were primarily concerned with a building form which was characteristic of that period--four to five-story bulky apartment houses towering over the rest of a single family neighborhood. The rationale for the exclusion of such buildings was based on the special characteristics of those buildings---in particular, that they robbed the

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3. The only possible exceptions are in a few Illinois cases: See, e.g., Anderson v. County of Cook, 9 Ill. 2d 568, 138 N.E. 2d 485 (1956); Wasemann v. Village of La Grange Park, 407 Ill. 81, 94 N.E. 2d 904 (1950); Speroni v. Board of Appeals of City of Sterling, 268 Ill. 568, 15 N.E. 2d 302 (1938).

neighboring homes of access to light and air. Such a rationale simply has no relevance to the type of modern multiple housing most common in suburban areas, especially in Madison Township -- two-story garden apartments and townhouses. The basic cases from the 1920's supporting this principle of exclusion are therefore barely in point.

Second, and more importantly, most of the early leading cases upholding this principle raised and explicitly passed upon a basic question involved in exclusionary zoning: would single-family zoning result in segregation along economic lines? These decisions concluded that it would not. The approval of single-family zoning in these decisions was clearly based on a caveat, or at least an assumption, that such zoning would not be exclusionary on economic grounds. The reason for this conclusion was the judges' knowledge that, at that time in those states, new single-family housing was being built within the economic reach of the lower-income groups. In a striking analogy, the early lot-size decisions in the 1940's also contained a caveat -- that such regulations would not be valid if they were used to exclude people on the basis of lower incomes.[4] In these two critical lines of

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4. Simon v. Town of Needham, 311 Mass. 560, 42 N.E. 2d 516 (1942); Dilliard v. Village of North Hills, 276 App. Div. 969, 94 N.Y.S. 2d 715, (1950)(mem.) rev'g 195 Misc. 875, 91 N.Y.S 2d 542 Sup. Ct. 1949); Gignoux v. Village of Kings Point, 199 Misc. 485, 489, 99 N.Y.S. 2d 280, 284, (Sup. Ct. 1950).

cases, from the beginning the courts clearly adopted a principle that it would be statutorily if not constitutionally invalid to use such controls to exclude low-income groups from access to good housing.

This point is developed in detail in the text of Professor Williams' forthcoming treatise on Land Use and the Police Power, and the relevant sections are reproduced in Appendix F.

POINT V

WHEN THE IMPLEMENTATION OF CONSTITUTIONAL RIGHTS NECESSARILY INVOLVES DEALING WITH A COMPLEX SYSTEM OF INTERRELATED FACTORS, THE JUDICIAL FUNCTION INCLUDES FAR MORE THAN A DECLARATION OF GENERAL PRINCIPLIES. IT IS EQUALLY THE JUDICIAL TASK TO DEVISE A REMEDY WHICH WOULD GIVE SUCH RIGHTS REAL MEANING, AND TO SPELL OUT A RATIONALE POINTING TO SUCH A REMEDY. IN A DECISION ON EXCLUSIONARY ZONING, THE TWO CRITICAL ELEMENTS ARE THEREFORE TO SPELL OUT THE RATIONALE, SETTING FORTH THE NATURE OF THE MUNICIPAL DUTY TO PROVIDE VARIOUS KINDS OF HOUSING, AND TO FASHION THE REMEDY ACCORDINGLY. IN DECIDING THIS CASE, THE COURT SHOULD GIVE SERIOUS CONSIDERATION TO THE PRACTICAL IMPLICATIONS OF EACH ALTERNATIVE RATIONALE AND REMEDY IN THE CONTEXT OF THE PRESENT CRISIS IN THE HOUSING MARKET AND THE LIKELY RESISTANCE OF THE SUBURBS TO THE NEW HOUSING AND THE NEED TO PROVIDE ADEQUATE PROTECTION OF THE ENVIRONMENT.

The attack upon exclusionary zoning, and the fashioning of an effective remedy involves many complex issues: the need for low-cost housing, the maintenance of pleasant residential neighborhoods, a broad variety of environmental and ecological issues, the validity of the present system of local financing

for major public services, the adequacy of programs in local public schools. Normally, many of these questions would be appropriate for legislative solutions. The problem is that the legislatures presently are paralyzed in dealing with such issues--for a simple reason. Suburban legislators play a dominant role in many legislatures. The present system of governmental controls on land use serves to provide major benefits for precisely those suburban areas--not only zoning protection, but also the opportunity for tax shelters and for location of major public works. The present local tax system encourages a suburban community actively to seek "good ratables", and to discourage "bad ratables" such as low-cost housing; in effect, the system provides a financial subsidy for those municipalities which adopt exclusionary zoning practices. In this situation, it is not reasonable to expect legislatures to take the initiative in abolishing such major benefits for their principal constituents.

In such a situation the judicial function therefore must have two aspects. The first is to declare the basic rights--in this case, equality of access to housing, to a pleasant, healthful environment, and to good public services, as against governmental

interference directed explicitly against those with lower incomes. The second is to supervise the development and the implementation of effective remedies in view of all the complex interrelationships indicated above. It is in the latter context that the difficult questions arise. This situation is not without persuasive precedent, for in two other supremely important and analogous situations during the last decade the courts have successfully undertaken and completed a similar role. In connection with the reapportionment of legislatures, ever since Baker v. Carr, 396 U.S. 186 (1962), the courts have not only declared the general principle but have also reviewed proposed legislative remedies, evaluated the practical problems involved, and approved (or disapproved) proposed solutions. In connection with the desegregation of public schools, the Supreme Court declared the general principle in Brown v. Board of Education, 347 U.S. 483 (1954), but in the second Brown case, 349 U.S. 294 (1955), the Court wisely recognized the inevitable complexity of the problems involved in implementing the newly-

declared right, and returned the problem to the lower courts with instructions to supervise the job of working it out.

The parallel between the problems of desegregation and reapportionment, and the problem of the termination of exclusionary land use controls, is a close one. The case is persuasive that in this situation the courts should follow the procedures set in those two sets of precedents--and that to do so will not provide a precedent for doing so in all sorts of other situations. In those few particularly important and special situations, judicial action can appropriately include both (a) fashioning a remedy and (b) supervising its implementation. The criteria which will define and de-limit these situations may be described as follows:

First, in such situations the implementation of the newly-declared right requires some rather elaborate action by governmental agencies other than the court. Moreover, such implementation will often require complex reorganization of administrative (or even legislative) arrangements, where the importance of the declared right must be consistently balanced against other considerations--or against intransigent resistance, masked as other legitimate considerations. Second, in such a situation those who are in charge of the machinery by whichthe right would

normally be implemented are in reality adversary parties; for by implementing the right they would be losing what they regard as substantial personal advantages for themselves--jobs for legislators facing reapportionment, segregated schools for segregationists, zoning protection and a tax shelter in these zoning situations. It is therefore to be expected that many of them will react by resisting implementation---and plentiful means of evasion exist. To put the point bluntly, it is not realistic to depend on the good faith reaction to such people in carrying out implementation of the right.[5] Third, the type and the amount of action required in implementation of the right may vary widely as between different geographical situations. The point is obvious in connection with desegregation and re-apportionment; in connection with zoning, a town with rapidly

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5. Even though no similarly vital ecological issue was involved one lower New Jersey court has already taken upon itself the task of overseeing the implementation of just such an "affirmative plan" remedy. Judge Martino in Southern Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super 164, 290 A. 2d 465 (Law Div. 1972), after holding that Mt. Laurel's zoning ordinance unlawfully prevented plaintiffs from obtaining access to land suitable for the construction of government-subsidized housing, expressly retained jurisdiction pending the development of a new ordinance consistent with the principles enunciated in his opinion.

growing employment and large areas of vacant land zoned for industry is in quite a different situation from a remote rural township where there is almost no employment at all. Finally, in some instances what looks like the simple and obvious remedy may in fact accomplish nothing at all. For example, if the attention is focussed upon the principle of lot size, a decree merely authorizing smaller lot sizes is likely to result merely in increased profits for the developer, rather than lower costs for consumers of housing. It is also likely to exacerbate efforts to preserve what environmentally valuable and ecologically fragile open space remains in the state.

There has been a great deal of discussion on exclusionary land use controls, in both legal and planning literature, particularly in the last three years. Almost all of this discussion has been directed at establishing the general principle that such zoning is invalid. Much of this discussion has not even made clear precisely what is meant by "exclusionary."

A decision in Oakwood at Madison, therefore, requires consideration of the appropriate remedy, and also of the accompanying rationale. Moreover, it does so under particularly difficult

circumstances, because--along with all the inevitable complex political interrelationships--there are so many corollary ecological issues involved. In a first attempt at an exploration of the various complex problems, Professor Williams and two of his students have prepared an article on the subject, entitled The Strategy of Exclusionary Zoning: Towards What Rationale, and What Remedy?, which will be published by the American Society of Planning Officials in the next issue of Land Use Controls. The entire article is attached due to its more extensive development of these issues. See Appendix A. Note in particular pages 16 to 22 and pages 32 to 39.

APPENDIX A:

Williams, Doughty and Potter, The Strategy on Exclusionary Zoning: Towards What Rationale and What Remedy?

APPENDIX B:

Letter/memorandum on
Burnt Fly Bog and its
importance to the
Perth Amboy Water Company.

January 8, 1973

Mr. R. Stocton Gaines, Chairman
New Jersey Chapter, Sierra Club
360 Nassau Street
Princeton, N. J. 08540

Re: Deep Run Brook
Madison Township

Dear Mr. Gaines:

In response to your inquiry, the Department of Municipal Utilities, Water Utility, of the City of Perth Amboy, has diverted water from the Deep Run Brook for the past forty years, as far as I can determine. On the average, we use 4 million gallons per day for the artificial recharge of the well field at Runyon.

The quality of the water, at present, is such that no pre-treatment is necessary, and the water is conducted by a canal system, to the close proximity of the wells. We particularly depend on the Deep Run during the summer, to supplement the ground water storage.

In addition, we maintain a series of ten suction wells along a canal in the Deep Run Basin. Nine more exist on a line across the Deep Run flood basin, at Runyon, which were shut down because of salt intrusion. It is necessary to rehabilitate these wells to meet our demands of the immediate future, and in order to do so, this Department is recommending the construction of surface reservoirs in the Deep Run Basin, at Runyon, to the City Council, this year.

It is anticipated that the two reservoirs will supplement the waters available for artificial recharge and well diversions, as well as create a hydraulic head as a barrier to further salt intrusion. In order to achieve this, it is necessary to maintain the quality of the flows in Deep Run at as high a level as possible.

At present, this water utility provides 10.5 million gallons per day. Our peak demands are in the area of 12 MGD; hence, our interest in developing the reservoirs. County planning projects a yield from Runyon of 14 MGD by 1985, and

consumption demands of 19 MGD, in Perth Amboy, by the year 2000. While we feel that the 1985 figure is somewhat conservative, the County planning does depend on the maintenance, as well as the full development, of the ground water supplies in the Runyon area.

Very truly yours,

Martin E. Langenohl, Director
Department of Municipal Utilities

MEL/dgl

CC: Mr. Robert Hacken, B.A.
Mr. William Potter
Rutgers Law School
180 University Ave.
Newark, N. J. 07102

APPENDIX C:

Text of Resolution of
Middlesex County Planning
Board calling for preser-
vation of Burnt Fly Bog (1966).

MIDDLESEX COUNTY PLANNING BOARD

COUNTY ADMINISTRATION BUILDING
JOHN F. KENNEDY SQUARE
NEW BRUNSWICK, NEW JERSEY 08901
CHARTER 6-0400 - EXT. 462

Rec Com Fish

DOUGLAS B. POWELL
DIRECTOR OF COUNTY PLANNING

MRS. JOAN A. RIHA
SECRETARY

February 27, 1970

To: Hon. William Cahill, Governor
Hon. Joseph Barger, Dept. of Conservation & Economic Develop.
Mr. George R. Shanklin, Division of Water Policy & Supply
Monmouth County Board of Freeholders and Planning Board
Ocean County Board of Freeholders and Planning Board
Governing Bodies and Planning Boards of:

Allenhurst Borough
Borough of Avon-by-the-Sea
Borough of Bay Head
Belmar Borough
Brielle Borough
Lakewood Township
Lavallette Borough
Madison Township
Matoloking Borough
Plumsted Township
Point Pleasant Borough
Borough of Red Bank
Borough of Sea Girt
Borough of Spring Lake
Borough of Spring Lake Heights

Gentlemen:

At its meeting of February 25, 1970 the Middlesex County Planning Board adopted the enclosed resolution concerning the Burnt Fly Bog area situated in Middlesex and Monmouth Counties. This resolution is being forwarded to you for your information and files.

Sincerely yours,

Joan A. Riha

Mrs. Joan A. Riha
Secretary

enc.

RESOLUTION

WHEREAS, the Burnt Fly Bog embraces more than 1,300 acres of open lands at the Marlboro-Madison Township borders in Monmouth and Middlesex Counties, respectively; and,

WHEREAS, the Township Councils of the City of Asbury Park and Madison Township; the planning boards of Marlboro Township, Monmouth County, and Middlesex County; and the Boards of Chosen Freeholders of Ocean, Monmouth, and Middlesex Counties have all previously adopted resolutions endorsing the acquisition of Burnt Fly Bog to be maintained for public purposes; and,

WHEREAS, the Middlesex County and Monmouth County Water Supply Advisory Committees have endorsed the project to preserve and protect the Burnt Fly Bog area; and,

WHEREAS, a preliminary report of the Division of State and Regional Planning entitled "A Pilot Open Space Plan for New Jersey" proposes this area as a "major high priority land management area" and a responsibility of the State; and,

WHEREAS, the State at one time indicated definite interest in allocating Green Acres funds for the project; and,

WHEREAS, the waters of the bog are in direct contact with water in the Englishtown sand acquifer; and,

WHEREAS, the Englishtown sand is a most important acquifer in this part of New Jersey and is the source of supply for portions of three counties and twenty municipalities which include Middlesex, Monmouth, and Ocean Counties and the municipalities of Allenhurst, Asbury Park, Atlantic Highlands, Avon, Bay Head, Belmar, Brielle, Farmingdale, Freehold, Highlands, Lakewood, Lavallette, Madison, Mantoloking, Plumsted, Point Pleasant Borough, Red Band, Sea Girt, Spring Lake and Spring Lake Heights; and,

WHEREAS, a U.S. Geological Survey report requested by Monmouth County finds now that the Bog is a discharge area and feeder for streams which empty out of the acquifer; and,

WHEREAS, this same U.S. Geological Survey study indicates that with the eventual development of the area, the Bog could become a recharge area for the acquifer; and,

WHEREAS, the population increases expected in this area will require more water from this acquifer and thus increase the need to preserve the Bog as a recharge area to assure the proper functioning of the sands; and,

WHEREAS, the General Development Plan for the Western Monmouth Region which was adopted as the Monmouth County Master Plan by the Monmouth County Planning Board, recommended that the Burnt Fly Bog area be utilized as a conservation area; and,

WHEREAS, the Middlesex County Planning Board and the Monmouth County Planning Board have met and have found it advisable and necessary to preserve this area;

THEREFORE, BE IT RESOLVED, that the Middlesex and Monmouth County Planning Boards reiterate and strongly urge that the State acquire the land with State Green Acres and Federal Open Space grants;

BE IT FURTHER RESOLVED, that if the State does not have the financial means at present to acquire said lands, policies and actions to proceed with the following steps should be adopted:

1) the State purchase and set aside only the core area of the Bog for park land and conservation uses;
2) means be determined whereby the remaining lands in the Bog can be preserved from encroachment by municipalities directly involved through the requirement of appropriate zoning restrictions on the land; and,

BE IT FURTHER RESOLVED, that copies of this resolution be forwarded to Honorable William T. Cahill, Governor, State of New Jersey; Honorable Joseph Barger, Commissioner, New Jersey Department of Conservation and Economic Development; Mr. George R. Shanklin, Director, Division of Water Policy and Supply; the Boards of Freeholders and Planning Boards of the Counties of Monmouth and Ocean; and the Governing Bodies and Planning Boards of Allenhurst Borough, City of Asbury Park, Borough of Atlantic Highlands, Borough of Avon-by-the-Sea, Borough of Bay Head, Belmar Borough, Brielle Borough, Lakewood Township, Lavallette Borough, Madison Township, Mantoloking Borough, Plumsted Township, Point Pleasant Borough, Borough of Red Bank, Borough of Sea Girt, Borough of Spring Lake, and Borough of Spring Lake Heights.

Elmer C. Easton

Dr. Elmer C. Easton, Chairman
Middlesex County Planning Board

ATTEST:

Mrs. Joan A. Riha, Secretary
Middlesex County Planning Board

DATED: February 25, 1970

MIDDLESEX COUNTY PLANNING BOARD

COUNTY ADMINISTRATION BUILDING
JOHN F. KENNEDY SQUARE
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DIRECTOR OF COUNTY PLANNING

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February 27, 1970

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Sincerely yours,

Joan A. Riha

Mrs. Joan A. Riha
Secretary

enc.

RESOLUTION

WHEREAS, the Burnt Fly Bog embraces more than 1,300 acres of open lands at the Marlboro-Madison Township borders in Monmouth and Middlesex Counties, respectively; and,

WHEREAS, the Township Councils of the City of Asbury Park and Madison Township; the planning boards of Marlboro Township, Monmouth County, and Middlesex County; and the Boards of Chosen Freeholders of Ocean, Monmouth, and Middlesex Counties have all previously adopted resolutions endorsing the acquisition of Burnt Fly Bog to be maintained for public purposes; and,

WHEREAS, the Middlesex County and Monmouth County Water Supply Advisory Committees have endorsed the project to preserve and protect the Burnt Fly Bog area; and,

WHEREAS, a preliminary report of the Division of State and Regional Planning entitled "A Pilot Open Space Plan for New Jersey" proposes this area as a "major high priority land management area" and a responsibility of the State; and,

WHEREAS, the State at one time indicated definite interest in allocating Green Acres funds for the project; and,

WHEREAS, the waters of the bog are in direct contact with water in the Englishtown sand acquifer; and,

WHEREAS, the Englishtown sand is a most important acquifer in this part of New Jersey and is the source of supply for portions of three counties and twenty municipalities which include Middlesex, Monmouth, and Ocean Counties and the municipalities of Allenhurst, Asbury Park, Atlantic Highlands, Avon, Bay Head, Belmar, Brielle, Farmingdale, Freehold, Highlands, Lakewood, Lavallette, Madison, Mantoloking, Plumsted, Point Pleasant Borough, Red Band, Sea Girt, Spring Lake and Spring Lake Heights; and,

WHEREAS, a U.S. Geological Survey report requested by Monmouth County finds now that the Bog is a discharge area and feeder for streams which empty out of the acquifer; and,

WHEREAS, this same U.S. Geological Survey study indicates that with the eventual development of the area, the Bog could become a recharge area for the acquifer; and,

WHEREAS, the population increases expected in this area will require more water from this acquifer and thus increase the need to preserve the Bog as a recharge area to assure the proper functioning of the sands; and,

WHEREAS, the General Development Plan for the Western Monmouth Region which was adopted as the Monmouth County Master Plan by the Monmouth County Planning Board, recommended that the Burnt Fly Bog area be utilized as a conservation area; and,

WHEREAS, the Middlesex County Planning Board and the Monmouth County Planning Board have met and have found it advisable and necessary to preserve this area;

THEREFORE, BE IT RESOLVED, that the Middlesex and Monmouth County Planning Boards reiterate and strongly urge that the State acquire the land with State Green Acres and Federal Open Space grants;

BE IT FURTHER RESOLVED, that if the State does not have the financial means at present to acquire said lands, policies and actions to proceed with the following steps should be adopted:

1) the State purchase and set aside only the core area of the Bog for park land and conservation uses;
2) means be determined whereby the remaining lands in the Bog can be preserved from encroachment by municipalities directly involved through the requirement of appropriate zoning restrictions on the land; and,

BE IT FURTHER RESOLVED, that copies of this resolution be forwarded to Honorable William T. Cahill, Governor, State of New Jersey; Honorable Joseph Barger, Commissioner, New Jersey Department of Conservation and Economic Development; Mr. George R. Shanklin, Director, Division of Water Policy and Supply; the Boards of Freeholders and Planning Boards of the Counties of Monmouth and Ocean; and the Governing Bodies and Planning Boards of Allenhurst Borough, City of Asbury Park, Borough of Atlantic Highlands, Borough of Avon-by-the-Sea, Borough of Bay Head, Belmar Borough, Brielle Borough, Lakewood Township, Lavallette Borough, Madison Township, Mantoloking Borough, Plumsted Township, Point Pleasant Borough, Borough of Red Bank, Borough of Sea Girt, Borough of Spring Lake, and Borough of Spring Lake Heights.

Elmer C. Easton

Dr. Elmer C. Easton, Chairman
Middlesex County Planning Board

ATTEST:

Mrs. Joan A. Riha, Secretary
Middlesex County Planning Board

DATED: February 25, 1970

APPENDIX D:

Text of Resolution of Township Council of Madison calling for protection of Burnt Fly Bog.

(4)

Be it Resolved, by the Township Council of the Township of Madison, County of Middlesex, New Jersey, that:

WHEREAS, the preservation of BURNT FLY BOG is important to the preservation of an adequate water supply for the entire Madison Township, Middlesex County, Monmouth County area; and

WHEREAS, the preservation of BURNT FLY BOG as a natural area is important to the preservation both of wildlife and plant life and will be a valuable asset for a future nature study; and

WHEREAS, the area in and around BURNT FLY BOG provides suitable areas for active recreation facilities; and

WHEREAS, the Township of Madison does not have the resources to properly and fully develope the potential of BURNT FLY BOG area.

N O W , T H E R E F O R E :

BE IT RESOLVED, by the Township Council of the Township of Madison, County of Middlesex, New Jersey, that the Township Council of the Township of Madison does hereby petition the Board of Chosen Freeholders of the County of Middlesex, New Jersey to take necessary steps to acquire the land in the BURNT FLY BOG area and develope the same as a natural wildlife and active recreation area the same to be made a county or state park.

Moved: Councilman Dealy.

Seconded: Councilman Tierney.

and so ordered on the following roll call vote:

Ayes: Mayor Messenger, Councilmen Cancellieri, Dealy, Hornster, Macrae, O'Brien and Tierney.

Nays: None.

Dated: December 6, 1965.

(SEAL)

[redacted]
COUNCIL

I certify the following to be a true and correct abstract of a resolution regularly passed at a meeting of the Township Council of the Township of Madison.

December 6, 1965

and in that respect a true and correct copy of its minutes

Mary W. Brown
Clerk of the Township of Madison

FP

RESOLUTION

WHEREAS, the Burnt Fly Bog embraces more than 1,300 acres of open lands at the Marlboro-Madison Township borders in Monmouth and Middlesex Counties; and

WHEREAS, the Township Council of Madison Township and the planning boards of Marlboro Township and Monmouth County have adopted resolutions endorsing the acquisition of Burnt Fly Bog and to maintain it for public purposes; and

WHEREAS, the Middlesex County and Monmouth County Water Supply Advisory Committees have endorsed the project to preserve and protect the Burnt Fly Bog area; and

WHEREAS, a preliminary report of the Division of State and Regional Planning entitled "A Pilot Open Space Plan for New Jersey" proposes this area as a "major high priority land management area" and a responsibility of the State; and

WHEREAS, the State at one time indicated definite interest in allocating Green Acres funds for the project; and

WHEREAS, the waters of the bog are in direct contact with water in the Englishtown sand acquifer and the bog serves as a vital intake area for this acquifer; and

WHEREAS, the Englishtown sand is a most important acquifer in this part of New Jersey and is the source of supply for portions of three counties and twenty municipalities which include Middlesex, Monmouth, and Ocean Counties and the municipalities of Allenhurst, Asbury Park, Atlantic Highlands, Avon, Bay Head, Belmar, Brielle, Farmingdale, Freehold, Highlands, Lakewood, Lavallette, Madison, Mantoloking, Plumsted, Point Pleasant Borough, Red Bank, Sea Girt, Spring Lake and Spring Lake Heights; and

WHEREAS, the intake area of the acquifer is being reduced by development; and

WHEREAS, the population increases expected in this area will require more water from this acquifer; and

WHEREAS, the General Development Plan for the Western Monmouth Region which was adopted as part of the Monmouth County Master Plan by the Monmouth County Planning Board, recommended that the Burnt Fly Bog area be utilized as a conservation area; and

WHEREAS, a six member committee of Middlesex County and Monmouth County officials have met and have found it advisable and desirable to preserve the underground water source in this area;

THEREFORE, BE IT RESOLVED, that the Middlesex County Planning Board urges the State to acquire the land with State Green Acres and Federal Open Space grants;

BE IT FURTHER RESOLVED, that copies of this resolution be forwarded to Honorable Robert A. Roe, Commissioner, New Jersey Department of Conservation and Economic Development; Mr. George R. Shanklin, Director, Division of Water Policy and Supply; the Boards of Freeholders and Planning Boards of the Counties of Monmouth and Ocean; and the Governing Bodies and Planning Boards of Allenhurst Borough, City of Asbury Park, Borough of Atlantic Highlands, Borough of Avon-by-the-Sea, Borough of Bay Head, Belmar Borough, Brielle Borough, Lakewood Township, Lavallette Borough, Madison Township, Mantoloking Borough, Plumsted Township, Point Pleasant Borough, Borough of Red Bank, Borough of Sea Girt, Borough of Spring Lake, and Borough of Spring Lake Heights.

Signed: (SIGNED)DR. ELMER C. EASTON
Dr. Elmer C. Easton, Chairman
Middlesex County Planning Boar

ATTEST: (SIGNED)ELIHU P. JOSEPH
Elihu P. Joseph
Secretary, Middlesex County
Planning Board

Date: July 14, 1966

APPENDIX E:

Department of Environmental Protection amicus curiae brief in Allan-Deane v. Bedminster on need to consider environmental factors in zoning and land use planning.

APPENDIX F:

Williams, Land Use and The Police Power; excerpts on legality of excluding multiple dwellings from single-family districts.