ML - Madison

1973

Oakwood v. Madison

Brief on behalf of Ps / Respondents

~~Petitioners~~

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PS: 41

CA001743B

IN THE

Supreme Court of New Jersey

DOCKET NO. 8972

OAKWOOD AT MADISON, INC., a corporation of the State of New Jersey, BEREN CORPORATION, a corporation of the State of New Jersey, DOROTHY MAE SHEPARD, LOUVENIA ALSTON, WILLIAM BAYLIS, BRENDA SMITH, LIZZIE WALKER and GERALDINE YORK,

Plaintiffs-Respondents,

vs.

THE TOWNSHIP OF MADISON,

Defendant-Appellant,

and

THE STATE OF NEW JERSEY,

Defendant.

CIVIL ACTION—ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION–MIDDLESEX COUNTY

SAT BELOW: HON. DAVID D. FURMAN, J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS-RESPONDENTS

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PROCEDURAL HISTORY

At issue here is the trial court's finding, after remand by this Court, that the newly amended Madison Township zoning ordinance, like the 1970 ordinance previously invalidated by that court, "falls palpably short and must be struck down in its entirety" (Da61). The trial court found that the advances of the 1973 amendments "towards moderate income housing opportunities are token, towards low income housing opportunities nil" (Da60-Da61). It ruled that the new amendments have the effect of excluding substantial portions of the population, particularly low and moderate income families, from new housing in the Township and that the amendments fail to provide Madison Township's fair proportion of the housing needs of the region of which Madison is a part.

Also pending before this Court is plaintiffs' cross-appeal from that portion of the lower court's October 27, 1971 decision which upholds the constitutionality of the New Jersey Zoning Enabling Act, *N.J.S.A.* 40:55-30 *et seq.*

The procedural history of this case is for the most part accurately set forth in defendant's brief, however, a few additional aspects of that history should be noted. The trial court recognized in its first opinion (I Da32)* that the individually named plaintiffs** represent "as a class those who reside outside the township and have sought housing there unsuccessfully." Plaintiffs also include two housing development corporations seeking to build mixed income housing in Madison Township upon which

* References to briefs and appendices filed with this Court in connection with the appeal from the trial court's first decision of October 27, 1971 will be designated by the number "I".

** Initially, plaintiffs included four low income black persons; however, during the course of the litigation, two of those plaintiffs withdrew. Subsequently, four other persons of low income were granted leave to intervene in the action.

the individual plaintiffs and those in the class can live. (These plaintiffs will be referred to as Oakwood-Beren.)

In late 1973, prior to the scheduled reargument before this Court, defendants sent copies of the newly amended zoning ordinance to the Court with a letter stating that the amendments met the requirements of the lower court's first opinion. This cause was remanded to the trial court for a hearing on those amendments and for an evaluation of whether the standards set by that court had indeed been met.

The amended complaint (D-4-Da19) filed upon remand sought judgment against the defendant Township on the grounds that the October 1973 zoning amendments, like the September 1970 zoning ordinance, excluded the individual plaintiffs and their class from the Township and denied the corporate plaintiffs the use of their land without just compensation. Plaintiffs specifically challenged requirements in the newly created planned unit development (hereinafter "PUD") and cluster zones which, they claimed, arbitrarily and unreasonably increased the price of housing which could be built in those zones. They also challenged those provisions of the amended ordinance which placed the vast majority of the vacant residential land in the Township in zones requiring the construction of single family detached houses on large lots. They further challenged the fact that only a limited amount of land had been placed in the multi-family zones, the only zones in which moderately priced housing could be built. Plaintiffs alleged that all of these provisions denied them and the members of the represented class access to decent housing in Madison.

It was further alleged in the amended complaint that land owned by Oakwood-Beren had been placed in large

lot and so-called residential-preservation zones despite the fact, or, perhaps, in response to the fact, that these corporations sought to build housing for persons of low and moderate income. The plaintiffs also contended that the Oakwood-Beren land had been placed in these zones despite the fact that it was served by public utilities and public transportation—in contrast to two of the three new PUD zones which are not so served.

Trial was held April 1-26, 1974. On April 29, 1974 the court issued its opinion voiding the 1973 amended zoning ordinance in its entirety.

THE OPINION BELOW

In its opinion, the court reaffirmed its previous ruling that in zoning, a "municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region" (Da50). In discussing the parameters of the region whose needs, it held, Madison Township was obligated to consider, the court specifically rejected the Township's contention that the region was limited to Middlesex County (Da52-Da53). It ruled that the region, for the purposes of measuring housing need, is the geographical area from which a municipality's population would be drawn absent artificial restraints like zoning (Da53).

The court reviewed all the changes which had been made in the Madison zoning ordinance and the price of housing which was likely to result in each residential zone and concluded that "of the total 20,000 to 30,000 housing units which may be built in Madison Township under the [1973 amended ordinance] about 3500 at most would be within the reach of households with incomes of $10,000 per year, the upper limit of moderate incomes, and virtually none within the reach of households with incomes of $9000 per year or less" (Da60). The court specifically noted that of the 11,000 acres of vacant residential land in the Township only 120 were in the A-F (multi-family) zone (Da55-Da56), a zone which the court found had potential for the development of housing for families of moderate income (Da60). It also found that "low and moderate income single family housing is an illusion on one [R-40] and two [R-80] acre lots, a hope on 7500 [R-7] to 15,000 square foot [R-15] lots" (Da61). It noted, however, that "of the vacant developable land in residential zones over 80% is zoned R-40 and R-80, only about 4% R-7 and R-10" (Da60).

The court found that for Madison Township to meet its fair proportion of the regional housing need each year into the 1980's "500 to 600 . . . low and moderate income units [would be required] according to the testimony on both sides" (Da54). The court also found, however, that the zoning amendments did not create the potential to meet that need. Moreover, it stated that over the last years, "the Township's proportion of low income earners" has been reduced (Da53-Da54) and concluded that it was not unreasonable to expect Madison's new population to approximate at least that proportion of low and moderate income families which remain in the Township (Da53, Da61). Finally, the court ruled that there were specific changes which could be made in the Township zoning ordinance which would make possible, if not encourage, the development of low and moderate income housing (Da61).

The court offered no opinion concerning environmental and ecological factors advanced by the Township to justify some aspects of the zoning ordinance because it found that ordinance fatally defective. Moreover, it noted that the Township had conceded that "ecological and environmental problems have no bearing" except in specific areas of Madison and that "ample land outside these areas is available . . . within which the township can meet its obligation to provide its fair share of its own and the region's housing" (Da62).

COUNTER-STATEMENT OF FACTS

The 1973 amendments to the Madison Township Zoning Ordinance

The October 1, 1973 amendments to the Madison Township Zoning Ordinance were made, according to the letter of the Madison Township Attorney sent to this Court late in 1973, for the purpose of making the ordinance conform to the requirements set forth in the first trial court opinion in this case. In essence these amendments create two new zones, the PUD zone and the residential-preservation (R-P) zone,* add provisions permitting the clustering of dwelling units in the R-40 and R-80 zones (normally requiring minimum lot sizes of one and two acres, respectively), and remap the existing residential zones.**

The residential-preservation (R-P) zone is essentially a holding zone. The provisions governing PUD development are long and complex and are analyzed in detail below.

When the court invalidated the 1970 ordinance it noted that the multi-family zones were extremely restricted in size (I Da37). The 1973 amendments to the zoning map did little to alter this fact. Only 120 vacant and available acres, representing barely 1% of the total vacant residential land in the Township, were placed in the A-F zone (Da56; Vol. 2 T81-T82).

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* The amended ordinance also created a third new zone designation, "PURC." Although the PURC zone is shown on the 1973 zoning map, no regulations governing that zone have been adopted (Vol. 4 T340).

** Most of the changes in the zoning map related to land which had been in the R-80 zone under the 1970 zoning ordinance. Almost 3000 acres of land simply were transferred from the R-80 zone to the R-P zone (Vol. 3 T128). Approximately 1000 acres were added to the R-40 zone; much of this land also had formerly been in the R-80 zone (Vol. 3 T128). Pursuant to these mapping changes, of the 25,000 acres of land in Madison Township, approximately 16,500 were placed in the R-80, R-P and R-40 zones (Vol. 2 T43-T44).

Pursuant to the 1973 amendments, approximately 575 acres of land were placed in an R-15 zone, requiring single family houses on lots of at least 15,000 square feet and with lot widths of at least 100 feet. According to a member of the firm serving as the Township's planning consultant, only about half of this R-15 zoned land (282 acres) is vacant and developable (Da270).*

The 1973 zoning amendments also made some substantive changes in the provisions governing development in the A-F zone, the effect of which, as explained below, will result in apartment complexes, if built at all, consisting of predominantly one-bedroom units.

Pursuant to the 1973 zoning amendments, the Oakwood-Beren land was placed partially in the R-40 zone and partially in the R-P zone. Under the 1970 ordinance, the land had been partially in the R-40 zone and partially in the R-80 zone. Its zoning designation remained essentially unchanged despite the fact that the corporate plaintiffs had specifically requested that their land be placed in the PUD zone (Vol. 1, T20-T23). They sought PUD designation in an effort to achieve two goals: build mixed income housing while at the same time preserving, as permanent open space, those areas of their property bordering the Burnt Fly Bog (Vol. 1 T20-T23, T32-T33).

The housing which will result from the 1973 amendments

At trial Madison Township relied very heavily on the argument that the newly created PUD and cluster zones

* The R-15 zone in the 1973 amendment constituted a return to a zone which had been totally eliminated by the 1970 ordinance, but which had been a major residential zone under the 1964 zoning ordinance. A 1969 planning study reported that there were more than 3000 acres of vacant developable land in the R-15 zone (I Pa12 at page 28). Thus, while the Township re-established the R-15 category, it reduced the vacant developable land in that zone to a fraction of its original size.

provided opportunities for moderate income housing. The record establishes, however, that the Township has so encumbered these zones with cost-generating requirements that low and moderate income housing cannot possibly result.

This was confirmed by John Chester, architect, planner, engineer and expert on development costs in New Jersey, who analyzed these zones in detail in order to determine the anticipated sales and rental prices of housing which would be built in them and concluded that there would be no low income housing and insufficient middle income housing.

PUD zone

Chester found that costs would be inflated in the PUD zone because of the requirement that the developer build schools and then give them to the Township; the distance of two of the three PUD zones from public utilities; and the extended PUD review process which would result in excessively high carrying charges for the developer.*

* The PUD zone creates three classes of PUD. The size of the tract determines the class in which a proposed PUD falls. The class designation in turn determines the residential densities which will be permitted in the PUD and sets the minimum amount of single family housing which must be included in the PUD. PUD's of 500 acres or more (Class III PUD's) have the greatest permitted residential densities and the smallest required proportion of single family houses. According to plaintiffs' expert planner, John Chester, who analyzed all the land in the PUD zones, as a consequence of ownership patterns in Madison and "compactness" criteria of the PUD ordinance, no landowner could put together a tract of land which would qualify as Class III PUD (Da84, Vol. 1 T161). In no case, however, may the gross density exceed five dwelling units to the acre.

Three tracts of land in the Township have been placed in the PUD zone. Two of these tracts carry an alternative R-40 designation. The third is zoned S-D. Land in these tracts may be developed pursuant either to the regulations governing R-40 and S-D land, or to those governing PUD.

In all PUD's, the developer must build the necessary schools at its own cost and deed them to the local Board of Education. In two of the three PUD tracts, the developer must bring water lines and sanitary sewer lines to the tract before it can develop its property (Vol. 3 T210, T211). The

With respect to the mandated school costs, Chester testified that, depending on the particular PUD tract involved, these costs would range from $2,229,500 to $2,901,-500 or, 66% to 78% of all the central improvement costs involved in a PUD development (Da90). Defendants' experts agreed with these cost estimates (Vol. 3 T340).

Chester further determined the added costs involved in developing the two PUD tracts which are removed from utilities. One of those sites would require almost $300,000 in off-site sewer and water facilities before development; the other would necessitate almost $300,000 in off-site water, sewer and road improvements (Da90).

The PUD ordinance mandates a three-stage approval process which includes submission of documents to 14 government agencies (Vol. 1 T60, T102). The trial court noted that the "PUD approval procedure is protracted . . ." (Da56). According to Chester one effect of this protracted review process is to require a developer to incur excessively high carrying charges (Vol. 1 T60)—charges which would be reflected in the final sales and rental prices of dwelling units in the PUD (Vol. 1 T103, T69).

After determining the magnitude of the added cost factors, Chester concluded that, in a typical PUD development in Madison Township, a single family four bedroom house would sell for $76,000 (Vol. 1 T69). The record shows that 5% of the State's total families and unrelated individuals can afford such a house; 1% of the State's black population can afford that house (Vol. 2 T31).

Chester testified that the average sales price of a three bedroom townhouse in the PUD zone would be $44,200

Township planner testified that the Township hoped that the water lines brought to these tracts by the PUD developers would provide a "main system that would rationally serve one-third of the Township" (Vol. 3 T210).

(Vol. 1 T104, Da86). Six percent of the State's black population and 16% of the total population can afford that townhouse (Vol. 2 T37).

According to Chester, one bedroom garden apartment units in the PUD would probably rent for $290 a month; two bedroom units would probably rent for $365 a month (Vol. 1 T103-T104). Expert planner Paul Davidoff testified that no low and moderate income families could afford to pay those rents (Vol. 2 T73-T75); he testified that these households could barely afford to pay $220 a month for rent (Vol. 2 T73).

Cluster zone

The clustering provisions of the 1973 amendments allow lot sizes of single family detached dwellings in the R-40 and R-80 zones to be decreased if 20% of the tract is devoted to "common open space" by the developer.*

It is clear that by clustering dwelling units one can reduce the ultimate sales price of these units. Chester

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* The new ordinance provides that densities may then be increased by 33 1/3% above what would otherwise be allowed. Single family units may then be built on lots of 18,000 square feet in the R-40 zone and 36,000 square feet in the R-80 zone. If the developer gives up to 20% more of his total land to the Township, densities may be increased up to 66 2/3% above what would be allowed in a non-clustered R-40 or R-80 zone. Single family units may then be built on lots of 12,000 square feet in the R-40 zone and on lots of 18,000 square feet in the R-80 zone. Additionally, if land is given to the Township, the developer may build a certain number of attached units in the R-40 zone. The number must bear the same relations to the total number of units that the land given to the Township bears to the total amount of land in the tract; in no case may the developer attach more than 20% of the units. Neither may the developer attach more than four housing units to each other. No attached units may be built in the R-80 zone.

For each four attached units which a developer builds in the R-40 zone, it must initially own 12 acres of land. It must then give 2.4 acres of land to Madison and devote an additional 2.4 acres of land to common open space (Vol. 3 T30-T32).

Clustering is not permitted in any other residential zones. Neither is it permitted on those lands in the R-40 zone which carry the alternative PUD designation.

testified that while a house built on a 40,000 square foot lot in the R-40 zone would sell for $80,000 (Vol. 1 T69), single family detached homes built pursuant to the R-40 cluster provisions would sell for approximately $64,000 (Da100) and the attached units permitted in the R-40 cluster upon dedication of land to the public would sell for $52,000 (Vol. 1 T70). According to both Chester and Davidoff, the requirements in the R-40 cluster that no lot be smaller than 12,000 square feet and that no more than 20% of the units be attached—and then only in groups of four units or less—prevents significant reductions in the price of housing built in that zone (Vol. 1 T70, T175; Vol. 3 T30-T37). Chester also testified that a developer would be far more likely to build detached units in an R-40 cluster rather than deeding land to the Township merely for the right to attach a small number of those units. He further noted that by keeping the proportion of attached units permitted in an R-40 cluster so small, the Township all but guaranteed that those attached units which did get built would be luxury units. A builder would be unable to economize in the way that is possible when many townhouses are constructed at one time (Vol. 1 T175-T176).

A-F zone

According to Davidoff, only one zone in the Township, the A-F zone, presently has the potential for meeting the housing needs of those with moderate incomes (Vol. 2 T81-T82). Yet, as noted above, only 1% of the Township's vacant land has been placed in this zone (Vol. 2 T82).*

* The 1973 zoning amendments also made some substantive changes in the provisions governing development in the A-F zone. These amendments removed the provisions of the 1970 ordinance which had restricted the number of bedrooms that could be included in each garden apartment unit. The amendments also removed the density regulations which had established the maximum number of units per acre that could be constructed in the A-F zone. In their place, the 1973 amendments created what is

The over-all effect

There is a real question of whether development will even occur in the two zones—the R-40 and PUD—to which the Township points in claiming that the 1973 amendments conform to the requirements of the trial court's first opinion. The Middlesex County Planning Board reviewed the Madison PUD provisions and concluded that the two PUD zones removed from water and sewer lines probably would not be developed within the next ten years (Vol. 4 T146).

Chester analyzed the PUD and R-40 zones from a developer's point of view and concluded that there is a question of "whether development will occur at all in the PUD zone" (Vol. 1 T57-T58). He testified that if a landowner whose land was in the PUD/R-40 zone could develop his land according to the R-40 cluster provisions rather than as a PUD, he would do so (Vol. 1 T66). However, given that clustering is not allowed on those tracts of land in the R-40 zone which also carry the PUD designation, it is as likely as not that the landowner simply will not build anything on his land since "R-40 is generally not a marketable kind of project" (Vol. 1 T68).

Davidoff concurred in the judgment that little development would occur in the R-40 and R-80 zones (Vol. 2 T84). He noted that since the adoption of the 1970 zoning ordinance virtually no development has occurred on one

known as a floor area ratio (Vol. 1 T76). The floor area ratio states that no more than 10,000 square feet of building may be constructed on any one acre of land. (This is expressed as a floor area ratio of .23) (Vol. 2 T76). Before 1970, the zoning ordinance had permitted a floor area ratio of .50 or 20,000 square feet of building per acre (Vol. 2 T76-T79). This does not mean that one-half acre of land was necessarily built upon; rather the total size of all the stories of all the buildings could not exceed 20,000 square feet per acre (Vol 2 T76-T79). The effect of these amendments will be to continue an informal limitation on the number of bedrooms in each garden apartment unit. The trial court found that "the undisputed testimony was that builders' profits are maximized in apartment units with one or no bedroom. This court must therefore accept the forecast by plaintiffs' expert that, without a maximum unit density per acre, construction of efficiency and one bedroom units will dominate" (Da55-Da56). (For testimony on this issue see Vol. 2 T76-T80; Vol.1 T84).

or two acre lots in the Township. He further testified that there is no market for the housing which could be built in those zones (Vol. 2 T84-T85). He believed that the zones were intended to serve, and would act as, holding zones (Vol. 2 T85).

Davidoff concluded that the 1973 amended ordinance would have the same basic effect on development patterns in Madison as the 1970 ordinance. He stated that the 1973 law, like its predecessor, would "bring about a population shift that would lead to an imbalanced growth in the number of persons of relative wealth who would have access to Madison Township" (Vol. 2 T97). Indeed, on the basis of an analysis of 1970 census data, Davidoff concluded that such a trend is already clear. According to Davidoff, while Madison's population was concentrated in the middle income groups as of the 1960 census, during the period 1960-1970, and under the influence of a zoning ordinance less restrictive than either the 1970 ordinance or the 1973 amendments, "there was a distinct movement towards a population having a higher degree of wealth than was the case in 1960" (Vol. 2 T101). Davidoff concluded that the 1973 amendments "will tend to exacerbate the movement towards a wealthy population in Madison and a movement away from a balanced representation of different classes within the Township" (Vol. 2 T102).

The purpose of the 1973 zoning amendments

The same fiscal concerns which led to enactment of the invalidated 1970 ordinance (I Pb16-20, I Da39) also dominated the Township's attention when it enacted the 1973 amendments. Minutes of the Township Council and Planning Board show that when the PUD ordinance was adopted, Township officials focused their efforts on creat-

ing a zone which would provide the Township with schools, ratables and open space at the developers' expense; the minutes evidence no concern for the regional housing need or for provision of low and moderate income housing in Madison (See Vol. 2 T112-T116 and Da695-Da1033).

Township planning consultant Abeles testified that he had recommended to the township that it pay for schools in a PUD by leasing them back from the PUD developer after construction. He testified that planning board members told him that the PUD ordinance would not be adopted if the Township had to bear the costs of school construction and he then redrafted the PUD regulations to their present form (Vol. 3 T296).

Abeles also testified that two of the three PUD tracts were located away from the utilities so that, as a result of the PUD owners' investment, the water system would be brought around to serve the entire western third of the Township (Vol 3 T210). One PUD tract was situated so that its owner, "rather than the Township, would pay for the widening and improving of a section of the Union Hill Road, which is proposed as part of the Trans Madison Highway" (Vol. 2 T112-T113).

Housing development under the 1970 ordinance

At the hearing on remand, evidence was introduced relating to the quantity and cost of housing which had been built pursuant to the invalidated 1970 zoning ordinance. That evidence shows that housing production virtually stopped in Madison after 1970, as is documented by the dramatic drop in the number of building permits issued by the Township. The following chart lists the number of building permits issued in each year for the period 1965 through 1973:

YEAR	TOTAL PERMITS	SINGLE FAMILY	5 UNITS or MORE
1965	1,062	196	886
1966	2,167	337	116
1967	197	97	100
1968	628	80	548
1969	787	63	724
1970	62	60	0
1971	70	66	0
1972	28	28	0
1973	36	NA	NA

(1973 data may be incomplete; as of the hearing on the remand, the State had not yet broken down the information by category) (Vol 2 T15-17).

During the 1960's Madison Township accounted for 15% of the housing starts in the County (Vol. 3 T15, I Pa14 at page 30). During the first years of this decade, Madison Township has experienced only 6% of the housing starts in the County, despite the fact that the Township contains 20% of the County's vacant residentially zoned acreage (Vol. 3 T13, T6-7).

Township planners prepared an analysis of the number of building permits issued in East Brunswick, Monroe, Sayreville, and South Brunswick in the three years, 1970-1972. They picked those four communities because they contended they "demonstrate similar characteristics to Madison Township" (Vol. 3 T312-T313). While Madison issued building permits for an average of 53 dwelling units a year during the three year period, East Brunswick issued permits for an average of 368 units a year; Monroe for an average of 309 units a year; Sayreville for an average of 89 units a year; and South Brunswick for an average of 212 units a year (Vol. 3 T315-T316; Da263).

Defendants point to the number of housing units completed and the number of certificates of occupancy issued in the Township for the period 1970-1973 apparently to substantiate their claims that moderate income housing was produced under the 1970 zoning ordinance and that Madison is providing a "fair share" of the region's low and moderate income housing (Db5-6). In so doing, defendants ignore the critical fact that all the garden apartments and senior citizen condominium units to which they make reference were approved under the pre-1970 zoning ordinance (Vol. 3 T507-T510). The approval of these units had been the subject of testimony at the 1971 trial (I Da218). According to the Township Building Inspector, no building permits for garden apartments have been issued in the Township since September 1970, the month the 1970 zoning ordinance was adopted (Vol. 3 T507-T510).*

The garden apartment and condominium units which were added to the housing stock in Madison in 1970-73 are predominantly one and two bedroom dwellings. None of the condominiums have more than two bedrooms (Moreover they are restricted by ordinance to residency by senior citizens) (Vol. 3 T106). Approximately 75% of the newly constructed garden apartment units in the township have one bedroom or less (Vol. 3 T100).

The growing regional need for low and moderate income housing

In its opinion on remand the trial court restated a finding from the 1971 decision that desperate housing needs exist in the county and region. The court wrote, "factually a crisis in housing needs continues . . .and a disadvantaged population remains trapped in the ghettos of the central cities" (Da52).

* See testimony of Paul Davidoff indicating that the building permit, not the certificate of occupancy, is the preferred measure of housing supply (Vol. 3 T27-T28).

Evidence at the hearing on remand documented the extent to which housing starts are failing to keep pace with the need in the State (Vol. 2 T13-14). Review of the number of building permits issued in the entire State for the period 1970-73 indicates that only about 50% of the needed housing is being constructed (Vol. 2 T13). According to the Regional Plan Association (hereinafter "RPA"), a private agency which studies and attempts to guide development in the New York-New Jersey-Connecticut region, Middlesex has the greatest need for housing of all the New Jersey counties it studied in 1973 (Da198). In the period 1973-74, 10,666 new housing units a year will be needed in the county. In projecting this need, RPA studied growth trends and demand generated in the 31 counties which comprise the New York Metropolitan Area (Da174-Da192). According to the RPA, Middlesex met only 35% of its annual housing need in the first three years of this decade.

RPA expects the four New Jersey counties, Middlesex, Morris, Somerset and Monmouth, to experience the greatest rates of growth in the Tri-State area in the period 1970-2000. Its projections are based in part on the assumption "that over the rest of the century zoning will not be allowed to prohibit needed housing of appropriate types in any county . . ." (Da170).

There is a particular need for units with three, four, and five bedrooms (Vol. 4 T28-T29). According to the 1970 census, at least 25% of the families in New Jersey are composed of five or more persons; these families need dwelling units with three or more bedrooms (Vol. 4 T29).*

* Of the 23,600 units of low and moderate income housing which the Middlesex County Planning Board said were needed in the County in a 1969 report, only 3,094 required one bedroom as compared to 7,026 requiring two bedrooms; 5,008 requiring three bedrooms; 3,501 requiring four bedrooms; and 4,976 units requiring five bedrooms or more (Vol. 4 T117, I Pa14).

Based on the available data relating to the need for housing in the region as determined by RPA, Davidoff made an estimate of Madison Township's fair proportion of that need.* Looking at past rates of housing construction and the vacant land in the county, he determined that it was reasonable to expect Madison to experience almost 10% of the new housing development in Middlesex in the next decade (Vol. 3 T5, 12-13). He calculated that the zoning ordinance should therefore permit construction of 500 to 600 units of low and moderate income housing each year (Vol. 2 T137).

The Oakwood-Beren land

Even as the individual plaintiffs and their class have been denied access to Madison Township by, first, the 1970 zoning ordinance and, now, the 1973 amendments, so Oakwood-Beren has been denied the use of its land and the opportunity to meet a part of the housing need. The Oakwood-Beren land is now partially in the R-P zone and partially in the R-40 zone. Were the approximately 400 acres of land owned by Oakwood-Beren to be developed under the applicable R-40 cluster provisions, more than 700 houses selling for a minimum of $63,000 each would result (Vol. 1 T212). These houses clearly would be too expensive for moderate income families to afford—in fact, it would not be possible to market that many units at that price in Madison Township to anyone (Vol. 1 T213, Vol. 2 T86). The zoning ordinance has the effect of requiring that the Oakwood-Beren land be held undeveloped (Vol. 1 T213).

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* In performing this computation, Davidoff stressed the need to avoid rigid mathematical formulas, advocating, instead, that these numbers be used simply to determine the general parameters for municipal action (Vol. 2 T136).

At the time the Township was considering creation of a PUD zone, the owners of the Oakwood-Beren land requested that their tract be included in such a zone (Vol. 1 T21-23, Da63). They indicated that if the land were placed in that zone, they would make at least 10% of their housing units available to persons of moderate income (Vol. 1 T22, Da73). The Township never acted on that modest proposal.

Plaintiffs introduced testimony on the nature of the Oakwood-Beren proposal to demonstrate that construction of moderate income housing is feasible in Madison under reasonable zoning regulations. Planner Chester determined that if the number of units built on the Oakwood-Beren tract were increased by 20% beyond the density which would otherwise be allowed, the developer would be in a position to make the additional units available to families with moderate incomes. This could be accomplished by allocating certain development costs away from those units (Vol.1 T208). The architect who prepared a schematic plan for Oakwood-Beren testified that densities which would result from the 20% increase "are . . . some of the lowest that I have ever seen" (Vol. 1 T28).

According to Chester, one bedroom garden apartment units in the moderate income component of the Oakwood-Beren proposal would rent for between $135 and $190 a month; two bedroom units would rent for between $175 and $240 a month; and three bedroom units would rent for between $195 and $270 a month (Da109-Da110; Da80). Rents would vary with the form of construction and depending on actions which might be taken by the municipality to further reduce the cost of housing (Da109-Da110). Two bedroom townhouses would sell for $21,500; three bedroom townhouses for $25,000; four bedroom townhouses for $27,800; and five bedroom townhouses for

$31,400 (Da80, Vol. 1 T59). Chester emphasized that one factor contributing to the relatively low development costs on the Oakwood-Beren tract was that water and sewer lines already serve the site (Vol. 1 T60). He also testified that given the onerous cost requirements in the PUD zone, development would be so expensive as to make it impossible to replicate the Oakwood-Beren moderate income proposal in that zone (Vol. 1 T62). He stated that the Madison PUD regulations penalize development and add costs (Vol. 1 T60).

Although he never commented on the proposals for moderate income housing contained in the Oakwood-Beren submission to the Planning Board, as long ago as 1972, planning consultant Abeles did write to the Township attorney to offer some observations on the proposed development. He stated that the acreage could support a total number of units not to exceed 2,400 and that the garden apartment densities should not exceed 10 units to the acre (Vol. 3 T447). No reference was made to either Burnt Fly Bog or Deep Run in the letter (Vol. 3 T449-T450). The only reference to environmental concerns took the form of a statement that a first class development team should be put together given the very important environmental problems in the area (Vol. 3 T450). Thus it would appear that the Township, itself, believes that the Oakwood-Beren mixed income housing proposal is feasible.

ARGUMENT [1]

POINT I

The trial court applied the proper legal standard when it evaluated the 1973 zoning amendments: A municipal zoning ordinance must permit residential development in response to a regional housing need.

In its initial opinion, rendered in 1971, the trial court set forth the standard which it held must govern municipalities when they zone. The court wrote:

> In pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region. . . Large areas of vacant and developable land should not be zoned, as Madison Township has, into such minimum lot sizes and with such other restrictions that regional as well as local housing needs are shunted aside (Da50).

It was against this standard that the trial court measured the 1973 amendments and found them wanting. The standard which the court applied was correct. It is the necessary and logical extension of doctrine which has evolved in this Court during the last twenty-five years. It represents the union of this Court's repeated admonition that the zoning power must be exercised for the benefit of all citizens (and that local officials therefore have a "duty . . . to look beyond municipal lines in the discharge of their zoning responsibilities," *Quinton v. Edison Park Devel. Corp.*, 59 N.J. 571, 578 (1971)) with the perception that "housing needs are encompassed within the general welfare" (Da50).

1. Plaintiffs set forth their legal claims at length in their initial brief on appeal. Accordingly, they will argue only those points which bear directly on the court's April 29, 1974 opinion here.

In the seminal decision concerning the relationship between municipal zoning decisions and the needs of the region, *Duffcon Concrete Prods. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347, 349-50 (1949), Chief Justice Vanderbilt wrote:

> 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 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.

Thus, by evaluating the reasonableness of local zoning regulations in the context of the region of which a municipality was a part, this Court gave substance to the United States Supreme Court's often cited caveat in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926): "it is not meant by this, however, to exclude 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." This Court has given further substance to these principles in a number of recent cases.

In ruling on the question of whether a Catholic school should have been permitted by zoning variance in a residential zone, this Court stated that "local authorities should consider . . . the fact that regional needs must be met somewhere" and observed that a variance could not be

refused on the ground that the cost of meeting that regional need (a tax exemption to which the school would be entitled) would fall on one municipality rather than on the region as a whole. *Roman Catholic Diocese of Newark v. Ho-Ho-Kus Borough,* 47 N.J. 211, 217 (1966).

Similarly, after reviewing trial testimony which established the need for hospitals for the emotionally disturbed in New Jersey, this Court ruled that it was proper to grant a use variance for that purpose. *Kunzler v. Hoffman,* 48 N.J. 277 (1966). Observing that "[r]ecently there has been recognition that local zoning authorities should look beyond their own provincial needs to regional requirements," the Court stated that the concept of the 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" *Id* at 287-288.

This Court has already recognized that, like hospitals, low and moderate income housing is critically needed in the State. It has noted the existence of a housing crisis in New Jersey, *Marini v. Ireland,* 56 N.J. 180 (1970), and has lamented the fact that minority citizens are "compelled in large numbers to live in circumscribed areas under substandard, unhealthy, unsanitary and crowded living conditions." *Jones v. Haridor Realty Corp.,* 37 N.J. 384, 392 (1962). In *DeSimone v. Greater Englewood Housing Corp. No. 1,* 56 N.J. 428, 267 A.2d 31, 38 (1970), this Court ruled that the zoning power may be used to respond to that need for decent housing and a suitable living environment, holding "as a matter of law in the light of public policy" that a use variance could properly be granted "to provide safe, sanitary and decent housing, to relieve and replace substandard living conditions or to

furnish housing for minority or underprivileged segments of the population outside ghetto areas. . . ." Indeed, this Court noted that given the facts of the case a denial of the variance "could not well be sustained" 267 A.2d at 39.

In a lawsuit involving Piscataway, like Madison, a Middlesex County community, this Court has gone even further. This Court (in dictum) criticized as "legally dubious stratagems" "zoning wide expanses of vacant land for industrial use only, requiring large lots for undeveloped vacant land, and rigidly regulating multi-family dwellings." *Rutgers, The State University v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972).

Confronted by the persistence of desperate housing needs and the spectre of a "disadvantaged population . . . trapped in the ghettoes of the central cities" (Da52), the trial court in the instant case carried the above-cited cases to their logical conclusion. It held that a zoning ordinance was invalid if its requirements unreasonably added to the cost of residential development and prevented the construction of low and moderate income housing which was needed in the region.[2] To have ruled otherwise, in the words of Justice Hall, would have been to "bless selfish zoning regulations which tend to have the effect of precluding people who now live in congested and undesirable city areas from obtaining housing within their means in open, attractive and healthy communities." *Vickers v. Gloucester Township*, 37 N.J. 232, 265-266 (1962) (Hall, J., dissenting).

Nor has the trial court been alone in perceiving that changed conditions and the increasing shortage of moderately priced housing have turned once-valid zoning

2. The trial court was, of course, not the first to reach this conclusion. See, in particular, Justice Hall's dissent in *Vickers v. Gloucester Township*, 37 N.J. 232, 252 (1962).

tools into devices which "endanger the needs or reasonable expectations of . . . segments of our people" *Pierro v. Baxendale,* 20 N.J. 17, 29 (1955). See also, *Fischer v. Township of Bedminster,* 11 N.J. 194, 199 (1952). During the last few years the lower courts in this State have repeatedly been asked to determine the validity of zoning provisions which create barriers to the construction of moderately priced housing. These courts have consistently ruled that zoning ordinances which have such an effect are invalid.

In *Southern Burlington Co. NAACP v. Township of Mount Laurel,* 119 N.J. Super. 164 (L. Div. 1972), appeal pending, a case argued together on appeal with this case, the Burlington County Superior Court entered judgment for a group of ill-housed, low income plaintiffs after finding that the zoning ordinance under attack discriminated against the poor. Similarly, in *Pascack Ass'n., Ltd. v. Township of Washington,* Docket No. L-2756-70 P.W. (L. Div. Bergen Co., Dec. 20, 1972), the Bergen County Superior Court ruled that, given the severe housing shortage which existed in that area, a zoning ordinance which failed to permit multi-family development was invalid. In *Schere v. Township of Freehold,* 119 N.J. Super. 433 (App. Div. 1972), the court invalidated a zoning classification which it found was designed to inhibit residential development, writing:

> . . . a deliberate government attempt to prevent by zoning the residential utilization of land, apt for the purpose, on behalf of the generality of the population in need thereof, in favor of reserving such land for future utilization by more affluent users, would seem to conflict with present-day judicial thought as to appropriate relationships between zoning policy and social housing needs. *Id.* at 437.

See also, *Chandler Associates v. Township of Middletown,* Docket No. A-2326-71 (App. Div. Jan. 22, 1974); *Molino v. Borough of Glassboro,* 116 N.J. Super. 195 (L. Div. 1971); and *Hughes v. Harding Township,* Docket No. L-35302-71 (L. Div., Morris Co., May 29, 1973).

This it seems clear that this Court, as well as these several lower courts, have recognized that times have changed and the problems attending regional development in New Jersey necessitate that local zoning officials "look beyond municipal lines in the discharge of their zoning responsibilities." *Quinton v. Edison Park, supra,* 59 N.J. at 578. The trial court therefore was well within the traditions of New Jersey law when it ruled that Madison Township could not adopt zoning regulations which "shunted aside . . . regional as well as local housing needs" (Da50).

The United States Supreme Court's recent decision in *Village of Belle Terre v. Boraas,* 94 S. Ct. 1536 (1974), relied on by defendants in their brief, does not require that the doctrine which has been evolving in New Jersey with respect to exclusionary zoning be abandoned. The *Belle Terre* case is factually distinguishable from the New Jersey cases just discussed. It involved neither needed low and moderate income housing nor a regional housing shortage. Rather, it concerned a group of unrelated students who were interested in living as a single house-keeping unit in a small, fully developed community characterized by one family houses, and who did not conform to the local zoning ordinance's definition of a housekeeping unit or family,

Belle Terre is also legally distinguishable from the relevant New Jersey decisions set forth above. *Belle Terre* involved claims that the zoning provision in question violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court found no "fundamental interests" were affected by

the challenged provision and therefore rejected the claim. Neither the instant case nor any of the relevant New Jersey cases discussed above turn on tests of what constitutes a denial of equal protection of the laws; rather, all involve the proper interpretation of *N.J.S.A.* 40:55-30, *et seq.* requiring that municipalities, when they zone, promote the general welfare.[3]

POINT II

The trial court's application of the legal standards to the 1973 zoning amendments was reasonable and should be sustained.

Having set forth the legal principle that "the general welfare [is] thwarted by exclusionary zoning restrictions against new low and moderate income housing" (Da52), it remained for the trial court to decide whether, factually, the 1973 amendments were exclusionary. The test which was formulated by the trial court is reasonable and should be sustained.

The court performed a four-part analysis: it defined the parameters of the region of which Madison was a part; ascertained the housing needs in that region; estimated the proportion of that housing which it was reasonable to expect would be built in Madison Township, and analyzed the zoning amendments to learn whether they permitted the development of that housing. This analysis was designed to tell the court whether the amendments provided "for the township's fair share of new low and

3. Plaintiffs note that this Court has routinely decided cases according to state constitutional and decisional law, rather than according to whatever federal law alternatively might be applicable. See, *e.g.*, *Robinson v. Cahill*, 62 N.J. 473 (1973). Plaintiffs further note that applying doctrine relating to the proper scope of the police power, this Court has already invalidated a zoning provision similar to that involved in *Belle Terre*. *Kirsh Holding Co. v. Borough of Manasquan*, 59 N.J. 241 (1971).

moderate income housing, as well as new high income housing" (Da52).

Initially it should be noted that, superficially, there may appear to be a difference between saying that a municipality may not exclude low and moderate income housing and saying that a municipality must zone so as to provide its fair proportion of the low and moderate income housing needs of the region. In fact, however, the two statements are identical. A zoning ordinance which prevents the development of a municipality's fair proportion of the region's new housing must, by definition, be exclusionary.

By stating the test in terms of the fair proportion of the regional need, the courts are provided a yardstick against which to measure a given zoning ordinance. Simply stating that a municipal zoning ordinance may not restrict the development of moderately priced housing, will not, except in the extreme case, give the courts or municipal officials needed guidance in deciding whether a given ordinance is defective or what changes will render it inclusionary.

Defendants apparently quarrel with the lower court's definition of the region. In fact, that definition comports both with common sense and with those decisions in which courts previously have come to grips with the concept of regionalism as it relates to zoning. The trial court expressly rejected defendant's contention that for the purposes of evaluating the 1973 zoning amendments, the region to be studied should be limited to Middlesex County (Da52-Da53). Instead, the court ruled that the region was that geographical area from which the Township's population would be drawn "absent invalidly exclusionary zoning" (Da53). To determine the scope of the geographical area, the court studied existing commutation patterns and major transit and highway routes. In effect, it

performed what plaintiffs' expert planner Davidoff had termed a "transactional analysis" (Vol. 2 T132-T135). That is, the court determined the logical extent of the region in which any given community is located by studying the *transactions* of the relevant population—*i.e.* where present residents work and shop; what communities present residents have left in order to move into the municipality in question; where the major highways in the community go.

In performing such an analysis, the trial court applied the concept of region which was alluded to by this Court in *Kunzler v. Hoffman, supra.* There, this Court spoke of regions as areas "of the State relevant to the public interest to be served" 48 N.J. at 288. Surely the fact that the Garden State Parkway bisects Madison and that 10% of its work force is employed in Essex County are as relevant to a definition of the region as is the fact that Madison is located in Middlesex County.

At least one other court in New Jersey has explicitly recognized the significance of transportation arteries and living conditions in defining the region for purposes of determining the validity of zoning regulations controlling residential development. The Union County Superior Court upheld a zoning variance which permitted construction of needed senior citizen housing, citing *Duffcon Concrete Products, Inc. v. Cresskill, supra,* and writing:

> Changes in methods of transportation, as well as in living conditions, have only served to accentuate the unreality in dealing with zoning problems and the use of property on the basis of the territorial limits of a municipality. Improved highways, new transportation and communication facilities have made possible the use of property not contemplated in the earlier stages of zoning. The resulting advantages advance the general welfare of the entire region.

Borough of Roselle Park v. Township of Union, 113 N.J. Super. 87, 93 (L. Div. 1970).

Defendants also object to the trial court's statement that "Madison Township's obligation to provide its fair share of the housing needs of its region is not met unless its zoning ordinance approximates in additional housing unit capacity the same proportion of low income housing as its present low income population, about 12%, and the same proportion of moderate income housing as its present moderate income population, about 19%" (Da61). Defendants, in their brief, totally misunderstand the logic and the purpose of this statement (Db37-38).

The lower court is not saying that poor communities must remain poor and that rich communities may stay rich—quite the contrary. The trial court is saying that Madison may not become increasingly wealthy, relative to the rest of the State, by excluding low and moderate income housing. Here it should be remembered that Madison has always claimed that it wanted a "balanced" population (See, *e.g.* Db16 and the initial opinion of the trial court, I Da38). The court is merely seeking to determine whether the 1973 amendments do in fact promote "balance." The trial court reviewed income statistics and found that Madison is becoming progressively more wealthy to the detriment of the state and the region. As of the 1970 census, only 31% of Madison's population had incomes in the bottom two income brackets, compared with 40% in the State as a whole; by contrast, 45% of Madison's families had incomes in the top two income brackets, compared with 40% in the State as a whole (Da53). (For the relevant trial testimony see Vol. 2 T96-101). It found that Madison's "proportion of low income earners [was] below that of nearby urban and industrial centers" (Da53-Da54). It therefore concluded that, if Madison is to zone for its fair proportion of low and moderate income housing, at

the very least, its future low and moderate income population should approximate the proportion of low and moderate income families who live in the Township now. In this way its population will become no more imbalanced in the direction of relative wealth than it is at present.

Plaintiffs would emphasize that in setting forth the above standard, the court was very careful to state that it was not imposing a "rigid mathematical formula" (Da61). Rather, it sought to formulate a general guideline to assist itself in evaluating the 1973 amendments and to aid Madison in formulating a valid new ordinance.

Point III

The trial court was correct in finding that the 1973 amendments fail to provide for Madison's fair proportion of the regional housing need.

While many words were added to the Madison zoning ordinance by the 1973 amendments, no significant changes were accomplished. The PUD and cluster zoning provisions were so encumbered with cost-generating requirements[4], that it is impossible to build moderately priced

4. Those requirements may be illegal as well. In *West Park Ave., Inc. v. Township of Ocean*, 48 N.J. 122 (1966), this Court ruled that a developer could not be required to pay for the costs of constructing schools which would be attended by the children who would live in the housing which it wished to construct. See also *Midtown Properties, Inc. v. Madison Township*, 68 N.J. Super. 197, 209 (L. Div. 1961), *aff'd per curiam*, 78 N.J. Super. 471 (App. Div. 1963). This Court's statement in *West Park Ave.* that developers may not be made to pay for "services which traditionally have been supported by general taxation" (48 N.J. at 126) may also apply to the dedication of public land which is required before additional clustering may occur in the R-40 and R-80 zone under the 1973 amendments. See also, *Kirsh Holding Co. v. Borough of Manasquan, supra*, 59 N.J. at 251, for the proposition that the means selected must have a real and substantial relation to the object sought to be attained. Davidoff testified with regard to the cluster requirements that there is no planning consideration which would justify the requirement that landowners donate land to the Township before they may build attached units on their remaining land (Vol. 3 T33).

housing in those zones (Da60) (See discussion at pages 9-11, above). Significantly, single family detached houses on lots of at least one-quarter acre remain the preferred form of development in Madison Township. Yet, even Madison's own planning consultant agreed that at least one-third of the population cannot afford single family detached dwellings (Vol. 3 T268).

Davidoff testified that it was his conclusion and that of virtually all experts in the housing field that in the future the housing needs of low and moderate income families will "have to be met in units of a two or three family nature, garden apartments and townhouses" (Vol. 2 T18). Yet, only 1% of the available vacant acreage in the Township is in the multi-family zone; and two-family dwellings are permitted on only 168 of the 8,143 acres of land in the Township which a Township planning consultant testified were vacant and in no way "environmentally sensitive" (Da270). (Reference is here made to land in the R-7 zone, the only zone in which the construction of two-family houses is permitted). In its initial opinion, the court expressly noted that "minimal" acreage was vacant and developable in the R-7 zone and that the multi-family zones were "restricted in land area" (Da37). Thus, Madison has completely failed to remedy the basic deficiencies which the trial court found in the 1970 ordinance.[5]

In their brief, defendants seem to suggest that the effect of the lower court's decision is to require them to build housing. In this, they are wrong. The trial court's decision places no obligation on the Township beyond the obligation to make sure that its zoning ordinance permits development of housing in a manner which is responsive to

5. In theory it might have been possible to have left the acreage in those zones relatively unchanged if moderate priced multi-family housing were the preferred use in the PUD zone; however, the trial court found that this clearly was not the case.

the region's needs. The Township was not required to build housing, to compel individual landowners to build housing, or to grant tax abatements. All that is required is that the Township again amend its zoning ordinance—this time in a sincere effort to allow satifaction of housing needs.

What the trial court's opinion does do is suggest changes which might be made in the zoning ordinance to increase its provisions for the development of moderately priced housing. The requirements which encumber PUD and cluster development with added costs can be deleted; clustering can be allowed in more districts, at increased densities, and with greater amounts of attached dwellings; the acreage in the multi-family zone can be increased.[6]

The court also recognized that the Township could encourage the construction of housing for families of low and moderate income by adopting zoning regulations which granted developers the right to build additional units of housing if such housing were made available to low and moderate income families (*i.e.* by giving density bonuses). Developers could accomplish this by allocating certain costs away from the additional units in the manner proposed by plaintiffs Oakwood-Beren and set forth above

6. Alternatively, the Township can adopt density zoning, discussed in plaintiffs' Supplemental Brief on Remedies submitted to this Court on March 23, 1973. In that case the distinction between single family and multi-family zones would be abolished and regulations would be adopted which established the maximum number of units per acre which could be built in any given zone. Developers could then build either detached or attached units at those given densities. For example, the R-7 zone could be converted into a six dwelling unit to the acre zone. (It is now possible to build approximately six single-family detached houses, each on a plot of land of 7500 square feet, in that zone). It would then be possible to build townhouses at the density of six to an acre in that zone. The Township has already begun to move in this direction by allowing some attached units in the R-40 cluster. The effect of such a regulation is to reduce the ultimate sales costs of housing. Even in the R-40 cluster as it presently exists the attached unit is expected to sell for about $10,000 less than the detached unit. (See pages 10-11 above).

at pages 19-20. Interestingly, the Township has recognized the advantage of "bonus" zoning and the potential for moderate income housing which exists in the technique of rent averaging; nonetheless it has failed to act on the concepts with regard to the provision of low and moderate income housing.

The Township apparently views the alternative PUD/R-40 zoning classification which applies to certain tracts of land in the Township as creating a density bonus situation. A developer normally may build only single family houses on tracts of at least 40,000 square feet in this zone. According to the Township attorney, if the developer agrees to build schools, parks, and highways, the zoning ordinance gives it a density bonus: it may develop a PUD (Vol. 2 T281-T282).

Township planning consultant Abeles testified that, through internal skewing of development costs and without government assistance, from 5 to 15% of the medium density housing in large scale developments could be brought within the range of moderate income families. He also testified that if the opportunity were offered to them, builders would be interested in skewing costs to make a certain proportion of their units available to moderate income families. He stated that the housing construction industry itself would be interested in reaching a part of the housing market which is not now being served (Vol. 3 T200); it is only the township's zoning laws which have impeded this development process.

A report presented to the Madison Township Planning Board by the Township planning consultants suggested that the Township should work with private developers so that, upon the adoption of the relevant ordinances, these developers would make some of the housing units they built available to low and moderate income

households. It suggested that developers could accomplish this by providing "a number of units at a reduced [rent] . . . with the difference averaged into the remaining rentals" (Vol. 4 T196-T197). The author of the report testified that rent averaging "is a technique that should be considered by municipalities" (Vol. 4 T196). If that technique was considered by Madison Township, there is no evidence of it in the 1973 zoning amendments.

Contrary to defendants' assertions, nowhere in its opinion does the lower court indicate that the Township must compel developers who build in Madison to construct a certain percentage of low and moderate income housing. Thus, defendants' reliance on *Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600 (Sup. Ct. 1973) is totally misplaced. It should also be noted that *DeGroff* may prove not to be the law of New Jersey if the issue is ever raised here. For the moment, however, it is well to remember that to the extent that an issue which has been wrestled with by the Virginia courts is before this Court, that issue is not raised in *DeGroff;* rather, it is raised in *Board of County Supervisors of Fairfax County v. Carper*, 200 Va. 653, 107 S.E.2d 390 (Sup. Ct. 1959) where the Virginia Supreme Court invalidated a zoning ordinance whose effect was to exclude low income persons from part of the County. (For discussion of *Carper* and other, comparable, cases from other jurisdictions, see IPb 52).

Point IV

The 1973 zoning amendments deprive plaintiffs Oakwood-Beren of the use of their land and prevent them from devoting any of that land to the construction of low and moderate income housing.

Just as the 1970 zoning ordinance and 1973 amendments are identical in their exclusionary impact on the in-

dividual plaintiffs and their class, so the 1970 ordinance and 1973 amendments are identical in their impact on the land-owner plaintiffs: both zone the Oakwood-Beren land into idleness. The evidence at the first trial established that houses built on the one and two acre minimum lots then required on the Oakwood-Beren tract would sell for between $55,000 and $75,000 and that there was no market for such housing in Madison (IPb38). The record at the hearing on remand showed that, pursuant to the R-40 zoning regulations which now govern its development, only houses selling for a minimum of $63,000 can be built on the tract. Seven hundred such houses theoretically could be constructed. Davidoff and Chester agreed that no market existed for seven hundred $63,000 houses in Madison and that the Oakwood-Beren land therefore simply could not be developed under the 1973 zoning amendments. These amendments effectively confiscate the Oakwood-Beren land.

The trial record also establishes that the amendments are invalid because they are manifestly arbitrary and unreasonable, *Bogert v. Washington Township*, 25 N.J. 57 (1957). See also, *Kozesnik v. Township of Montgomery*, 24 N.J. 154 (1957). Just how unreasonable the R-40 and R-P designations are as applied to the Oakwood-Beren land is evidenced by the fact that Township planning consultant Abeles has determined that the tract can be developed with up to 2,400 units of housing, including garden apartments at a density of up to ten dwelling units to the acre. (See decision at page 20, above). Moreover, unlike two of the three tracts of land placed in PUD zones by the 1973 amendments, the Oakwood-Beren land presently is served by public utilities. Thus it is clear that the potential for development of the tract in a manner which would respond to the regional housing need exists.

Yet, the Township has never acted to place the Oakwood-Beren land in a zoning category which would allow it to fulfill this potential.

It has done so despite the fact that plaintiffs Oakwood-Beren have repeatedly and formally proposed building low and moderate housing on their land since 1970, and despite the fact that Oakwood-Beren is the *only* developer who has offered to build such housing. Plaintiffs can only conclude that the Oakwood-Beren land was zoned into idleness because its owners expressed interest in building low and moderate income housing on the tract. They, like the individual plaintiffs, have fallen victim to Madison Township's exclusionary zoning.

POINT V

The trial court correctly excluded testimony relating to ecological and environmental factors.

There was no need for the trial court to hear evidence relating to ecological and environmental factors which the Township claimed justified certain portions of its zoning ordinance since the court found that the zoning ordinance failed to adequately provide for the development of low and moderate income housing and since defendants conceded that there was sufficient vacant, developable land in the Township on which a remedy could be effectuated. At trial the following exchange between the court and defendants' counsel took place:

> The Court: . . . Now, you have offered a defense that you have, you have low density housing because of environmental factors and ecological factors. Isn't that so?
>
> Mr. Plechner: That's correct, your Honor.

> The Court: But that defense, as I understand it, applies to specific areas.
>
> Mr. Plachner: Or specific zones. That's correct.
>
> The Court: And it doesn't apply to approximately, well, I have said 5,000 to 6,000 vacant acres elsewhere in the Township.
>
> Mr. Plechner: That would be correct, yes, sir (Vol. 3 T645-T646).

Moreover, before this exchange occurred, one of the Township's consultants had testified that on the basis of his study of the Township and conversations with the Township's environmental experts he had determined that there were more than 8,000 acres of vacant, developable land in the Township (Vol. 3 T587-T592; Da270).

The Middlesex County Planning Board, after reviewing the 1973 amendments to the Madison ordinance, had suggested that Madison zone land in the eastern portion of the Township, around the area designated PURC on the zoning map, for more intensive development (Vol. 4 T153). This has not been done. Questioned by the trial court, the Middlesex County Planning Director stated that this proposal for increased residential densities in the eastern-central portion of the Township extended to the special development zone (an industrial zoning category) on Route 9 which the County Board had previously recommended be developed as a mixed income community. None of these areas were considered environmentally sensitive by the County Planning Board.

Thus, it is clear that there is ample land in Madison which is not subject to environmental or ecological problems and which will ultimately be developed on which low and moderate income housing could be built. Once the Township's own consultant testified to the existence of

8,000 acres of developable land in the Township and the Township counsel conceded the availability of at least 5,000 acres, the issue of whether ecological factors required limitations on development in other areas of the Township became irrelevant and evidence bearing on that issue was properly excluded.

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CONCLUSION

Public policy and the relevant New Jersey precedents make it clear that this Court should sustain the lower court's opinion on remand in all respects.

Respectfully submitted,

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