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Madison

1973

Oakwood v. Madison

Brief for D / Appellant

955-41

CAC001744B

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.

-v-

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:

Furman, J.S.C.

BRIEF FOR DEFENDANT-APPELLANT

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PROCEDURAL HISTORY

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In September, 1970, after lengthy consideration, the Township Council of the Township of Madison enacted a new zoning ordinance which was the initial subject matter of this suit.

On November 9, 1970, the plaintiffs, Oakwood at Madison, Inc., a New Jersey Corporation, Beren Corporation, a New Jersey Corporation, Bernice Shepard, Oscar Duke, Lela Mae Duke, and Louenia Alston, filed an action in the Superior Court of New Jersey, Law Division, Middlesex County, for a Declaratory Judgment in Lieu of Prerogative Writs, demanding judgment as follows:

- (a) Declaring that Madison Township's use of zoning to exclude plaintiffs and the class they represent from using, acquiring or enjoying property in Madison Township is a violation of N.J.S.A. 40:55-30 and of Article 4, Section 6 of the Constitution of the State of New Jersey.
- (b) Declaring that this use of the zoning power is a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of The United States Constitution.
- (c) Declaring that this arbitrary use of the zoning power deprives plaintiffs and the classes they represent of their right to acquire and possess property, to enjoy life, and to pursue and obtain happiness in violation of Article 1, Section 1 of the Constitution of the State of New Jersey.
- (d) Mandating Madison Township to provide in its zoning plan for uses of sufficient variety that

1 all races and economic classes may use, acquire
2 or enjoy property in Madison Township.

3 (e) Enjoining defendant, Madison Township, from
4 enforcing its zoning ordinances which prevent
5 the use, acquisition or enjoyment of property
6 by the plaintiffs and the class they represent.

7 (f) Declaring the enabling legislation, N.J.S.A.
8 40:55-30 unconstitutional because of vagueness
9 and failure to provide proper standards as to
10 Madison Township.

11 (g) Declaring that there is a need for moderate in-
12 come housing projects in Madison Township.

13 (h) Directing Madison Township to adopt a resolu-
14 tion reciting that there is a need for moderate
15 income, multi-family housing in Madison Township.

16 (i) Declaring the said Zoning Ordinance illegal as
17 to plaintiffs' property.

18 (j) Establishing multi-family housing as a permit-
19 ted use in all other residential zones.

20 (k) Mandating that the Director of the New Jersey
21 State Department of Health established a mini-
22 mum floor area for residential units related
23 only to the health, safety, morals and general
24 welfare of the occupants, and that these stand-
25 ards be applied equally throughout the State of
New Jersey.

(l) Mandating that the defendants permit the re-
zoning of plaintiffs, Oakwood at Madison
Corp. and Beren Corp.'s property to enable
the construction of federally or state assisted
multi-family housing, in which plaintiffs and
the classes they represent can afford to live.

(m) For damages.

(n) For such other and further relief as to the Court
seems just.

On December 9, 1970, defendant, Township of Madison,
filed an Answer with the Superior Court, Law Division,

1 Middlesex County, in which it denied the material fact allega-
2 tions of the complaint and entered a seperate defense that
3 plaintiffs, Bernice Shepard, Oscar Duke, Lela Mae Duke, and
4 Lounenia Alston, had no standing to bringing the action.

5 This case was heard by the Superior Court of New Jersey,
6 Hon. David D. Furman, presiding, at a trial commencing on
7 October 4, 1971, and terminating October 14, 1971. The trial
8 court entered judgment for plaintiffs on October 27, 1971,
9 insofar as it declared the Zoning Ordinance of Madison Town-
10 ship invalid in its entirety; the trial court also entered
11 judgment in favor of the State of New Jersey. Thereafter,
12 the defendant, Township of Madison, moved for and received
13 a stay of judgment pending appeal to the Appellate Division
14 of the Superior Court of New Jersey. Plaintiffs filed a
15 cross appeal against that part of the decision dismissing
16 plaintiffs complaint against the State of New Jersey.

17 On July 19, 1972, plaintiff moved for certification of
18 the action to the Supreme Court of New Jersey. The Supreme
19 Court granted the motion.

20 On March 5, 1973, the case was heard by the Supreme
21 Court of New Jersey, on oral argument. It was rescheduled
22 for another hearing and oral argument before the Supreme
23 Court. Said hearing and oral argument was held before the
24 Supreme Court on January 8, 1974.

25

1 During the time between the first and second hearing
2 before the Supreme Court of New Jersey, the defendant, Town-
3 ship of Madison, after a thorough study and considerable
4 deliberation, passed a major amendment to the Zoning Ordin-
5 ance. Said amendment together with a new Madison Township
6 Zoning Map were passed on final reading on October 1, 1973.

7 At the hearing and oral argument before the Supreme
8 Court of New Jersey, held on January 8, 1974, it was deter-
9 mined that the Court needed a trial and determination on
10 the Zoning Ordinance of 1973. Accordingly the action was
11 remanded to the trial court for a hearing and determination
12 of the validity of the Zoning Ordinance of 1973. The
13 parties agreed to file amended pleadings, pre-try the action,
14 complete discovery, and try the action within ten weeks,
15 subject to the availability of the trial judge.

16 Plaintiffs filed their amended complaint, defendant,
17 Madison Township filed its amended answer, the actions were
18 pretried, and trial was held before the Superior Court of
19 New Jersey, Law Division, Middlesex County, Hon. David D.
20 Furman, presiding, on April 1, through April 26, 1974. On
21 April 29, 1974, Judge Furman rendered his decision on the
22 case, declaring the 1973 Zoning Ordinance invalid and granting
23 judgment for the plaintiffs.

24 The action is now before the Supreme Court of New Jersey
25 for review on all issues.

FACTS

1 As it is the intention of this brief to supplement the pre-
2 vious brief filed by the defendant appellant in this case, I
3 will only recite additional facts or changes in facts that have
4 occurred since the previous trial in September, 1971; and update
5 the figures and statistics that appeared in that brief.

6 As pointed out by Judge Furman on Page 6 of his opinion,
7 the population of the Township of Madison has continued to grow
8 at a tremendous rate increasing since the 1971 trial by about
9 5,000 people or 11% to a total of 55,000 people. This growth
10 was, of course, all developed under the 1970 zoning ordinance
11 with its far more rigid restrictions than the new zoning ordin-
12 ance passed in October, 1973.

*① growth from 1964 under 1970 zoning ordinance
② All growth under 1973 zoning ordinance*

13 The new construction in Madison Township occurring since
14 figures given in the last trial is as follows:

15 1). In 1970 there were thirty-one (31) housing units
16 constructed to sell for under \$20,000.00, one (1) house from
17 \$20,000.00 to \$30,000.00, twenty-five (25) houses from
18 \$30,000.00 to \$40,000.00, and sixteen (16) houses over
19 \$40,000.00 for a total of seventy-three (73) housing units.

20 2). In 1971 there were fifty-four (54) under \$20,000.00,
21 one (1) from \$20,000.00 to \$30,000.00, eight (8) from \$30,000.00
22 to \$40,000.00, and thirty (30) over \$40,000.00 for a total of
23 ninety-three (93) housing units.

24 3). In 1972 there were sixty-nine (69) under \$20,000.00,
25 two (2) between \$20,000.00 and \$30,000.00, five (5) between

1 \$30,000.00 and \$40,000.00, and seventy (70) over \$40,000.00
2 for a total of one hundred and forty-six (146) housing units.

3 4). In 1973 there were thirteen (13) under \$20,000.00,
4 one (1) between \$20,000.00 and \$30,000.00, one (1) between
5 \$30,000.00 and \$40,000.00, and two (2) over \$40,000.00 for
6 a total of seventeen (17) housing units.

7 This contains a total number of units including senior
8 citizens condominiums of three hundred twenty-nine (329) (Vol. 3-
9 T-94-95) even assuming that most of the under \$20,000.00 homes;
10 but at least one hundred and sixty-two (162) other one family
11 homes were constructed in Madison Township of which at least
12 forty-four (44) cost under \$40,000.00. During the same
13 period, certificates of occupancy were issued for eight hundred
14 (800) garden apartments (Vol. 3 T-98) bringing the total
15 number of garden apartments within the Township, presently
16 completed to five thousand one hundred and seventy-seven
17 (5,177) units (Vol. 3 T-81 and T-158). These units were, of
18 course, in addition to the seven hundred fourteen (714) unit
19 senior citizen condominiums of which more than five hundred
20 (500) have been built, the rest being under construction.

21 Of the five thousand one hundred and seventy-seven
22 (5,177) garden apartments presently in existence in the
23 Township, the average monthly rentals are as follows: (Vol. 3-
24 T-81-86)

25 1). Efficiency apartments, one hundred seventy-three
(173) units @ \$169.00 per month.

2). One bedroom units, one thousand eight hundred ninety-
one (1,891) units @ \$188.00 per month.

*more
senior
citizen
apts
of
T-98*

1 3). One bedroom with dining room, two hundred eighty-
2 eight (288) units @ \$190.00 per month.

3 4). One bedroom with den (usable as two (2) bedrooms),
4 five hundred ninety-nine (599) units @ \$223.00 per month.

5 5). One bedroom with den and rec room (usable as two (2)
6 bedrooms) eighty-one (81) units @ \$250.00 per month.

7 6). One bedroom with rec room, twenty-eight (28) units @
8 \$240.00 per month.

9 7). One bedroom (over \$200.00 category), seven hundred
10 eighty (780) units @ \$216.00 per month.

11 8). Two bedrooms (under \$200.00 category), thirty-one
12 (31) units @ \$159.00 per month.

13 9). Two bedrooms (over \$200.00 category), one thousand
14 sixty-seven (1,067) units @ \$225.00 per month.

15 10). Two bedrooms with rec room, one hundred three (103)
16 units @ \$278.00 per month.

17 11). Duplex (Townhouse), one hundred thirty-six (136)
18 units @ \$276.00 per month.

19 An examination of the foregoing figures indicates that of
20 the five thousand one hundred seventy-seven (5,177) existing
21 garden apartment units, all of which have been constructed
22 within the last ten (10) years (See Page 5 of original brief),
23 of two thousand three hundred eighty-three (2,383), three
24 hundred nineteen (319) of which were either two (2) bedrooms or
25 one (1) bedrooms with separate dining room, rent for \$190.00

1 per month or less. Of the remainder, five hundred ninety-nine
2 (599) which are classified as one (1) bedroom with den; but
3 described by the assessor as really being two (2) bedroom
4 apartments rent for only \$223.00 per month. The most
5 expensive category of apartments in the entire Township is the
6 two (2) bedroom duplex or townhouse with an average rental of
7 \$276.00 per month and the two (2) bedroom apartment with a rec
8 room with an average rental of \$278.00 per month.

9 A review of the existing single family housing development
10 in the Township reveals the following average assessments in
11 1973 with assessment equaling ninety-eight (98) percent of true
12 market value: (Vol. 3 T-88-93)

13 1). Sayrewoods South area, over two thousand (2,000) homes,
14 average assessment \$31,230.00.

15 2). Madison Heights area, approximately two hundred (200)
16 homes, average assessment \$38,210.00.

17 3). Pine Haven development, approximately two hundred
18 (200) homes, average assessment \$33,600.00.

19 4). Knollcroft development, approximately two hundred
20 (200) homes, average assessment \$28,054.00.

21 All of the foregoing developments were constructed since
22 1950 and contain at least two thousand four hundred (2,400)
23 homes assessed at under \$35,000.00. There are, of course,
24 more expensive developments such as Lakeridge around \$45,000.00,
25 Timberglenn around \$47,000.00, Heatherwood around \$40,000.00,

1 and Cheesequake Woods around \$48,000.00 (Vol. 3 T-103-104).

2 In older developments in the Township (Pre 1940) the
3 figures are as follows: (Vol. 3 T-90-91)

4 1). Lawrence Harbor, over seven hundred (700) homes,
5 average assessment \$16,173.00.

6 2). Cliffwood Beach, approximately four hundred (400)
7 homes, average assessment \$19,040.00.

8 In addition, of course, there is in Cheesequake Village
9 Senior Citizens Condominiums of which over five hundred (500)
10 have been completed out of a total of seven hundred fourteen
11 (714); and of which have an average assessment of \$17,155.00
12 (Vol. 3 T-92).

13 As all of the foregoing figures only relate to housing
14 developments, there are many more one (1) family units throughout
15 the Township in all price catagories. It is interesting to note,
16 however, that those listed represent approximately four thousand'
17 (4,000) units at under \$35,000.00 about half of which are
18 under \$30,000.00.

19 In the senior citizens condominiums, approximately two
20 hundred (200) of which are under construction and are still
21 being sold, the sales price is presently around \$19,000.00
22 (Vol. 3 T-92-93).

23 Among the new garden apartments being built, Glenwood
24 Three is charging \$175.00 per month for efficiencies, \$220.00
25 for one bedroom, and \$280.00 for two bedrooms which according
to the assessor is over market price and is inhibiting rentals.

1 Parkwood Gardens which is another new development now built,
2 rents two (2) bedroom apartments at \$240.00 per month (Vol. 3-
3 T-107-108).

4 As previously stated in October, 1973, a new zoning ordin-
5 ance was passed for the Township of Madison which drastically
6 increased population densities permitted throughout most of
7 the Township. At the same time, minimum total floor space
8 limitations in R 40 and R 80 zones were deleted and several
9 new zones including an R15 and a PUD were created. Cluster
10 zoning was also introduced in R 40 and R 80 zones and while
11 the R 80 zones requiring a 2 acre minimum lot size was
12 reduced from approximately 2,500 developable acres to 325
13 developable acres most of the smaller lot size zones were
14 increased substantially. The population increase permitted by
15 these changes in each of the zones would appropriate as
16 follows:

17 1). R 7 zones (7,500 square foot lots) approximately
18 nine hundred (900) people on approximately 100 additional
19 acres (Vol. 3 T-176).

20 2). R 10, a decrease of three hundred (300) people on
21 100 less acres (Vol. 3 T-176).

22 3). R 15 (a new zone of 600 acres 15,000 square foot
23 lot size) four thousand eight hundred (4,800) people (Vol. 3-
24 T-176).

25 4). R 20 (20,000 square foot) three thousand three
hundred (3,300) people on approximately 500 acres (Vol. 3-
T-174).

1 PURC zones at 2.625 persons per household (Vol. 3 T-172).
2 All together this creates an additional housing capacity
3 under the 1973 ordinance over the 1970 ordinance of
4 approximately forty-seven thousand two hundred (47,200)
5 people (Vol. 3 T-170,177)..

6 While the estimates for new home construction in the
7 Township of Madison vary widely, two (2) developers who are
8 currently building in the Township testified as to the
9 sales price of homes in their proposed development.

10 Dante D'Agostine, who is building a thrity-one (31)
11 house development in a R 15 zone, indicates a price range
12 of from \$46,500.00 which is a seven (7) room ranch with
13 three (3) bedrooms to \$49,990.00 for an eight (8) room two
14 (2) story home with four (4) bedrooms. All of these homes
15 come with a one (1) or two (2) car garage, all utilities
16 including curb and sidewalk, under-ground telephone wires
17 and electric, and two (2) to two and one half (2½) baths
18 (Vol. 4 T-52-54, 58).

19 Mr. D'Agostino also indicated that in 1972 he completed
20 a small development of six (6) homes in Madison Township
21 which sold between \$44,500.00 and \$46,500.00 and contained
22 some 1,800 square feet of floor space to 2,150 square feet
23 (Vol. 4 T-60). He also considered the thirty-one (31) homes
24 presently under construction to be luxury homes (Vol. 4 T-57).
25 The land for the new development was just acquired immediately
before the trial.

1 Another builder, Bernard Abramovitz, testified that he is
2 building sixteen (16) bi-level and split-level homes on an 8
3 acre predominately R 7 zone in Madison Township. These homes
4 are planned to sell at approximately \$45,000.00 (Vol. 4 T-63).

5 The bi-level will contain eight (8) or nine (9) rooms,
6 garage, two (2) bathrooms, and approximately 1,800 square feet
7 of floor space; while the split-level will have three (3)
8 bedrooms out of a total of seven (7) rooms, at least one (1)
9 bath and a half ($\frac{1}{2}$) and between 1,250 and 1,500 square feet,
10 as well as a garage. The Split-level will also contain a
11 basement. The homes were built on 7,000 to 11,000 square
12 foot lots with one (1) home which is located in an R 80 zone,
13 being located on a 4 acre lot most of which is swampy and
14 unusable (Vol. 4 T-63-65).

15 Both developers testified that their land costs average
16 from \$10,000.00 to \$11,000.00 per lot (Vol. 4 T-55,65). Both
17 developers testified that land costs were generally on a per
18 unit basis not on an acreage basis i.e. that larger lots
19 would not cost substantially more than a smaller lot (Vol. 4-
20 T-57,65).

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A R G U M E N T

POINT I

THE TOWNSHIP OF MADISON HAS PROVIDED IN ITS ZONING ORDINANCE FOR ITS FAIR SHARE OF THE HOUSING OF THE REGION IN WHICH IT IS LOCATED.

The Township of Madison has provided in its zoning ordinance for its fair share of the housing of the region in which it is located.

The Regional Housing Study put forth by the expert for the Township of Madison and marked into evidence as D-27, which was compiled by the expert concurrently with the drafting by his firm of the zoning ordinance in question indicates that the Township of Madison fair share allocation for a percentage of housing needs within the County of Middlesex is 6.1 percent. Mr. Lanning, the author of this study, further indicated (Vol. 3 T-613)

Handwritten note: May study file out

"... we did make estimates and have included them into the land use recommendations and the zoning changes and our estimates of housing population, capacity, are based on those considerations and were presented to the Planning Board."

He also stated (Vol. 3 T-516-517)

"To a large degree the housing study analyzes portions of the land use changes, that is, in the 1973 zoning map, in terms of capacity land usages after they were formally adopted. However, the main purpose of the study was to come up with recommendations that would

1
2 lead to changes in the 1970 zoning in order
3 that we may increase or be effective in in-
4 creasing housing supply in Middlesex County.
5 The suggestions and recommendations that
6 evolved in the course of the study were
7 later incorporated into the 1973 zoning. I
8 might add that the zoning suggestions were
9 implemented prior to the completion of the
10 housing study, but were part of the process
11 of rezoning.

12
13 In addition three (3) other Fair Share Housing formulas
14 were discussed at the trial by the Middlesex County Planner,
15 Douglas S. Powell, which resulted in percentage allocations
16 to the Township of Madison of 4.25 percent, 4.66 percent, and
17 7.8 percent respectively. It is interesting to note, that
18 the formula used in drafting the Madison Township Zoning
19 Ordinance requires the municipality to provide more housing
20 than two (2) out of the three (3) County formulas. It is
21 slightly under the highest County formula and is somewhat
22 more than the average of the three (3) County formulas which
23 should be 5.57 percent (Vol. 4 T-108). On the other hand, the
24 Plaintiffs presented no formula whatsoever to arrive at Fair
25 Share Housing.

26
27 It would also seem to be of great importance that the
28 Township of Madison not only has provided in its ordinance
29 for increased housing well within the range allotted to it
30 by all of the formulas testified to by the Planners, but
31 is already providing from its existing stock of housing

1 vast numbers of units in the low and moderate income ranges
2 including 2,383 existing apartments renting at \$190.00 per
3 month or less, figures agreed to by all to be in the low
4 and moderate range. It is also providing over 2400 units
5 of relatively new one (1) family homes assessed at under
6 ~~\$35,000.00~~ and over 1,100 older units assessed at under
7 \$20,000.00, as well as over 500 senior citizen condominiums
8 with an average assessment of \$17,155.00. Furthermore,
9 the 1970 census which is the most recent overall study of
10 home values in the Township of Madison, other than the
11 study prepared for this recent hearing by the assessor which
12 relates only to developments, indicates that 56 percent of
13 all of the Township's single family dwellings are valued at
14 under \$25,000.00(D-27 pg. 63). This is hardly "an elite
15 community of high income families" as described in Judge
16 Furman's Opinion (A 60a).

17 In my previous brief, I discussed the balance that was
18 sought in the community through its zoning, hence I will not
19 discuss it in detail here. In this brief, I hope to merely
20 supplement it and to point out the changes affected by the
21 1973 amendment and how they have maintained balance and
22 also created housing opportunities.

23 As indicated by the Planner, the new zoning ordinance
24 provides for a population increase in Madison Township, over
25

1 the 1970 ordinance, of approximately 47,200 people. This
2 indicates a total population capacity in the Township of
3 Madison of 139,700 people (See Exhibit D-27) an increase
4 of 84,700 people over the present population.

5 I would further point out as to the lot size require-
6 ments, three (3) zones, R 7, R 10, and R 15 all provide
7 for housing on lots of 15,000 square foot or under and the
8 R 40 zone, the largest area, provides for 12,000 square
9 foot lots where clustering is utilized. The PUD zone, a
10 new zone with a capacity of approximately 13,725 more
11 people, also provides for substantial housing on 12,000
12 square foot clustered lots as well as Townhouses, Garden
13 Apartments and mid-rise apartments.

14 Certainly Madison Township cannot be accused of pre-
15 dominantly large lot zoning. Additionally, as Judge Furman
16 pointed out in his opinion A 56a, the Township of Madison
17 has provided for 120 more vacant acres of AF zoned land
18 exclusive of large single family tracts in AF that can be
19 utilized for garden apartments with an allowable density
20 of twelve (12) units per acre (Vol. 3 T-590), in which
21 1,400 or 1,500 more garden apartment units could be
22 constructed. There is also some vacant AR land available
23 that would provide for approximately two hundred fifty
24 (250) more senior citizen units, (D-27 pgs. 133-135) in
25 addition to the 200 plus presently under construction.

1 Judge Furman, in his opinion, agrees with the Township's
2 Planners figures (A 58a) with the exception that he feels that
3 the R 40 zone would be only 10,000 additional people rather
4 than 18,000 which would mean that the new ordinance provides
5 for increased capacity under the old of 39,000 instead of
6 47,000 for a total Township capacity of 131,700 instead of
7 139,700 people. Again this very substantial increase can
8 hardly be called tokenism.

9 It would seem that based on these figures, which Judge
10 Furman finds provides for a total of 20,000 to 30,000 new
11 housing units which may be built in Madison Township under
12 the present ordinance (A 60a), there is no attempt being made
13 by the Township of Madison to exclude housing but rather
14 every effort has been made to provide for a wide variety of
15 housing both single and multi-family in a wide range of
16 zones to create opportunities for a large number of new
17 families to move into the Township in the near future.

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POINT II

THE CREATION OF LOW COST HOUSING IS
NOT A FUNCTION OF MUNICIPAL ZONING.

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6 It would seem, from a reading of Judge Furman's opinion,
7 that the court below has not in fact found that the Township
8 of Madison is excluding housing, or even low cost housing, by
9 its zoning ordinance, but rather is not creating low cost housing,
10 or forcing builders to create the same. This, I would submit,
11 is not the purpose of zoning.

12 Judge Furman has found that the new ordinance provides
13 for approximately 39,000 more people than the old (A 58a),
14 which would be a total capacity of 131,700 people or an in-
15 crease of 78,700 over the present population (D-27 pg. 133
16 deduct 8,000 from Abeles' projection of 139,700). As Judge
17 Furman indicates in his opinion (A 54a-58a), many thousands
18 of these people will be housed in multi-family dwellings or
19 single family houses located on 15,000 square foot or smaller
20 lots. His main objection is that of the 20,000 to 30,000
21 new housing units which may be built in Madison Township
22 under the present ordinance, about 3,500 at most would be
23 within the reach of households with incomes of \$10,000 per
24 year and only 10% of the multi-family housing to be built or
25 1,000 to 1,500 (A 60a) units will be for this category. He

1 also indicates that virtually no new housing will be constructed
2 for households with incomes of \$9,000 per year or less (A60a).

3 The testimony of witnesses for both the plaintiffs and
4 the defendants indicates that housing within the reach of low
5 and many moderate income families cannot be constructed without
6 some form of subsidy. Peter Abeles, the Township Planner,
7 testified that "all my experience in having been involved in
8 this area is that any real amount of low and moderate income
9 housing under today's conditions require large subsidies."
10 (Vol. 3 T-264) He also points out that the creation of subsidized
11 low and moderate income housing within the Township would in-
12 crease the cost of shelter to the Township's existing large
13 low and moderate income population (Vol. 3 T-285-286) a
14 seemingly self-defeating project. He does feel, however, that
15 provisions for a large supply of middle income housing, as in
16 the Madison Township Ordinance, will create housing opportunities
17 for the lower income groups through the process of filtering
18 i.e. the movement of middle income families to the new housing
19 thus leaving the present housing available for the lower income
20 families (Vol. 3 T-264-265).

21 Even the plaintiff's expert on housing costs, John P.
22 Chester, admits that without subsidies, housing costs can only
23 be brought down to the moderate income level (Vol. 1 T-207).
24 He further indicates that the best that can be done without
25

¹The testimony of County Planner Douglas Powell (Vol. 4 T-111)
is to the same effect.

1 subsidy is a \$190.00 per month rental, the average rental of
2 existing apartments in the Township (Vol. 1 T-189) and a
3 sale price of \$25,000.00 for a Townhouse unit (Vol 1 T-59),
4 a figure above the reach of a family making \$10,000.00 a
5 year if we use the formula established by the plaintiffs'
6 expert Paul Davidoff, "that a family can afford to pay
7 roughly twice its income for a house ..." (Vol. 2 T-30).

8 The testimony of Mr. Abeles also indicated that reduced
9 lot size would not substantially effect sales prices (Vol. 3-
10 T-245) and that even if all of the residential land in Madison
11 Township were rezoned AF, "there would be little or no effect
12 in terms of meeting the needs of low and moderate income
13 families" (Vol. 3 T-258-259). He also indicated that the
14 most important factor in establishing rental rates, was not
15 construction costs, but interest rates, which are presently
16 extremely high. (Vol. 3 T-255)

17 The two developers, Mr. D'Agostine and Mr. Abramovitz,
18 both testified that they were building houses in the \$45,000
19 to \$50,000 class (Vol. 4 T-52-63) and that their land costs
20 were only \$10,000 to \$11,000 per unit including improvements
21 (Vol. 4 T-55,65), approximately 20% to 22% of the package.
22 Simple arithmetic will show that even if the land and the
23 improvements thereon were free, the cost of the house would
24 exceed the capabilities of a family making \$10,000 per year
25

1 or less.

2 Assuming then that only through subsidization can new
3 housing be provided for the groups that Judge Furman seeks to
4 reach, is this the function of zoning and can the courts
5 compel a municipality to undertake this through the use of
6 the general welfare provisions of the State enabling act?

7 The answer it would seem would be no.

8 Nowhere in the enabling act is there any mention whatsoever
9 of a responsibility on the part of a municipality to subsidize
10 housing. Rather the act itself deals solely with the regulation
11 of land use and not with the economics of home construction.

12 The recent United States Supreme Court Case of Village
13 of Belle Terre v. Boraas 94 S.Ct. 1536 (1974) reaffirms the
14 traditional function of zoning. Justice Douglas, speaking
15 for the majority, reaffirms the principals of the classic
16 case of Euclid v. Ambler Realty Co. 272 U.S. 365 (1962)
17 stating:

18 "The main thrust of the case in the mind
19 of the Court was in the exclusion of
20 industries and apartments and as respects
21 that it commented on the desire to keep
22 residential areas free of 'disturbing
23 noises'; 'increased traffic'; the hazard
24 of 'moving and parked automobiles'; the
25 'depriving children of the privilege of
quiet and open spaces for play, enjoyed
by those in more favored localities.
Id., at 394. The ordinance was sanc-
tioned because the validity of the
legislative classification was 'fairly
debateable' and therefore could not be
said to be wholly arbitrary. Id., at
388."

1 Justice Douglas goes on to say:

2
3 "We deal with economic and social legislation
4 where legislatures have historically drawn
5 lines which we respect against the charge of
6 violation of the Equal Protection Clause if
7 the law be 'reasonable, not arbitrary'
(quoting Royster Guano Co. v. Virginia, 253
8 U.S. 412, 415) and bears 'a rational relation-
9 ship to a (permissible) state objective.'
10 Reed v. Reed, 404 U.S. 71, 76."

11 And

12
13 "But every line drawn by a legislature leaves
14 some out that might well have been included.
15 That exercise of discretion, however, is a
16 legislative not a judicial function."

17
18 Finally Justice Douglas restates clearly the one of the
19 principal goals of zoning

20
21 "A quiet place where yards are wide, people few,
22 and motor vehicles restricted are legitimate
23 guidelines in a land use project addressed to
24 family needs. This goal is a permissible one
25 within Berman v. Parker, supra. The police
power is not confined to elimination of filth,
stench, and unhealthy places. It is ample to
lay out zones where family values, youth values,
and the blessings of quiet seclusion, and clean
air make the area a sanctuary for people."

26
27 Furthermore, as it relates to the present case even the
28 dissent appears to be in agreement with the use of zoning in
29 the traditional manner. Justice Marshall dissenting states:

1 "Zoning officials properly concern themselves
2 with the uses of land---with, for example,
3 the number and kind of dwellings to be con-
4 structed in a certain neighborhood or the
5 number of persons who can reside in those
6 dwellings."

7 And

8 "This is not a case where the Court is being
9 asked to nullify a township's sincere efforts
10 to maintain its residential character by
11 preventing the operation of rooming houses,
12 fraternity houses or other commercial or high-
13 density residential uses. Unquestionably, a
14 town is free to restrict such uses. Moreover,
15 as a general proposition, I see no constitutional
16 infirmity in a town limiting the density of
17 use in residential areas by zoning regulations
18 which do not discriminate on the basis of
19 constitutionally suspect criteria."

20 Finally, Judge Furman states in his opinion (A 61a) that
21 even without government subsidies multi-family housing may be
22 provided for low and moderate income families. He proposes
23 that this be done by setting incentives; such as extra density
24 for the production of these units. The proofs, however, run
25 contra to this opinion.

John Chester, the plaintiffs' expert on construction
costs, indicates that without subsidy it is impossible to
build multi-family units renting for less than \$190.00 per
month (Vol. 1 T-189), the price for which the majority of
existing apartment units in the Township presently rent.

It is, of course, extremely doubtful that without com-

1 pulsion of some sort, a builder would construct nonprofit units
2 if he could also use his land to build profit making housing.
3 Why risk capital, time and effort to build additional units
4 with no return? None of the plaintiffs' experts could point
5 out any development where this was successfully done and Mr.
6 Abeles, the expert for defendants has indicated (Vol. 3 T-273-
7 274) that as far as he knows it has never been done. He
8 gives as the reasons for its non-existence the tremendous
9 cost to the "non-skewed" unit of housing of the type suggested
10 by Judge Furman and the obvious effect on its marketability.
11 (Vol. 3 T-272)

12 As a matter of fact, Mr. Abeles's uncontradicted testi-
13 mony is that it would be possible with subsidies to build low
14 and moderate income housing in virtually any of the residential
15 zones in Madison Township with the exception of R 80 and R P
16 (Vol. 3 T-270).

17 He further indicated that the major problem today in
18 providing housing for low and moderate income families is not
19 land cost, but financing (Vol. 3 T-268). Financing for low
20 and moderate income subsidized housing is almost non-existent
21 (Vol. 3 T-269). Without subsidies, he feels that construction
22 of this type of housing cannot take place, regardless of
23 zoning (Vol. 3 T-264).

24 Furthermore, to provide by ordinance for a certain
25

1 percentage of all housing capacity to be devoted to the poor,
2 in and of itself implies compulsion, for how else can its
3 attainment even be assumed.

4 The recent case of Board of Supervisors v. DeGroff
5 Enterprises, Inc., 198 S.E. 2nd 600 (Sup. Ct. Va. 1973) dealt
6 with a zoning ordinance passed by Fairfax County, Virginia,
7 which required developers of 50 or more dwelling units in
8 certain zoning districts to build at least 15% of their units
9 as low or moderate income housing to be sold only to low and
10 moderate income families. At the trial below, the urgent
11 need for this type of housing in Fairfax County was clearly
12 demonstrated. In fact the uncontroverted evidence indicated
13 that the need more than exceeded for at least 10,500 of such
14 units. The Supreme Court of Virginia held that the ordinance
15 constituted socio-economic zoning and was hence an improper
16 attempt to control compensation for the use of land and the
17 improvements thereon. Justice Harmon in speaking for the
18 Court at Page 602 said:

19 "Of greater importance, however, is
20 that the amendment requires the
21 developer or owner to rent or sell
22 15% of the dwelling units in the
23 development to persons of low or
24 moderate income at rental or sale
25 prices not fixed by a free market.
Such a scheme violates the guar-
antee set forth in Section II of
Article 1 of the Constitution of
Virginia, 1971, that no property

1 will be taken or damaged for pub-
2 lic purposes without just com-
3 pensation."

4 To require, in New Jersey, by zoning that such low cost
5 housing be furnished by developers would, as in Virginia,
6 exceed the authority of the enabling statute and be a violation
7 of the due process clause of the Fourteenth Amendment to the
8 United States Constitution and Article I Section 20 of the
9 Constitution of the State of New Jersey.

10 To require a builder to construct low cost housing on
11 his property in order to utilize his property for its proper
12 and intended use would be to shift the responsibility for
13 providing for the poor from the State as a whole to certain
14 individuals. To use their land for that purpose without
15 affording to them proper compensation for same, in effect
16 constitutes a hidden subsidy required of selected private
17 citizens for the benefit of the poor and is not appropriately
18 a function of zoning, but rather an unconstitutional depri-
19 vation of property without due process.

20 The most analagous situation in New Jersey is
21 that explored by the Supreme Court of New Jersey in West Park
22 Ave., Inc. v. Ocean Tp., 48 N.J. 122, 224 A.2nd 1 (1966). In
23 that case Justice Weintraub at Page 3 pointed out:
24
25

1 "But as to services which traditionally
2 have been supported by general taxation,
3 other considerations are evident. The
4 dollar burden would likely be unequal
5 if new homes were subjected to a charge
6 in addition to the general tax rate.
7 As to education, for example, the vacant
8 land has contributed for years to the
9 cost of existing educational facilities,
10 and that land and the dwellings to be
11 erected will continue to contribute
12 with all other real property to the pay-
13 ment of bonds issued for the existing
14 facilities and to the cost of renovating
15 or replacing those facilities. Hence
16 ~~there would be an imbalance if new con-~~
17 ~~struction alone were to bear the capital~~
18 ~~cost of new schools while being also~~
19 ~~charged with the capital costs of schools~~
20 ~~serving other portions of the school dis-~~
21 ~~trict. And if new construction were re-~~
22 ~~quired in like manner to contribute~~
23 ~~specially to other programs supported by~~
24 ~~general taxation, for example, police~~
25 ~~and fire protection, then a municipality,~~
~~if its hands were wholly unguided, could~~
~~so deal with new housing as to burden,~~
~~perhaps intolerably, the right of every~~
~~citizen to seek a better home."~~

*Just like
W.P. 2/2*

16 What applied in West Park Avenue to schools and has
17 by way of dicta been applied in that case to police and fire
18 protection surely also applies to low cost housing. This
19 has been traditionally a public function and far exceeds the
20 authority, let alone the requirements of the State "Municipal
21 Planning Act (1953)."
22
23
24
25

POINT III

THE TRIAL COURT ERRED IN REFUSING TO HEAR DEFENDANT'S EXPERT TESTIMONY ON THE ENVIRONMENTAL EFFECTS OF MADISON TOWNSHIP ZONING.

At the trial of this action, held on April 1, through April 30, 1974, the Trial Court refused to hear the testimony offered by defendant, Township of Madison, that the Zoning Ordinance of 1973, had set out the proper uses of the land from an ecological point of view. The Trial Court ruled (Vol. 3 T-640-653) that the testimony on the environmental ramifications of the 1973 Zoning Ordinance was not to be heard. Appellant asserts that this ruling was in error.

N.J.S.A. 40:55-32, sets down the purpose of zoning legislation as follows:

"Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, flood, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to suitability for particular uses, and with a

1 view of conserving the value of property
2 and encouraging the most appropriate use
3 of land throughout such municipality. As
4 amended L.1964, c. 150. 1."

5 Although the statute does not specifically mention "the
6 environment", it is apparent that the purposes outlined
7 in the statute correspond with the purpose of maintaining
8 a healthful environment within the municipality. Appellant
9 maintains that the statute mandates that every municipality
10 consider all competent evidence produced by the environmental
11 sciences in considering zoning legislation. Not only must
12 the municipality consider the overall environmental effect
13 of the zoning ordinance; but it must consider the environ-
14 mental effect of the ordinance on every tract of land in the
15 municipality; but, at the trial, the Court refused to con-
16 sider the competent environmental evidence, and, therefore,
17 it ignored the mandate of the statute.

18 During the last decade, a strong public policy has
19 emerged in the State toward protecting the environment. That
20 public policy has been extended to the municipalities through
21 N.J.S.A. 40:56A-1 et seq., which encourages the municipalities
22 to form environmental commissions and N.J.S.A. 12:1H - 1, et
23 seq., which provides for State Aid to such municipal environ-
24 mental commissions. It is the contention of the Appellant
25 that the strong public policy of the State mandates that
environmental factors must be considered in decision making

1 by all levels and branches of the State and Local government.
2 The decision of the Trial Court in excluding environmental
3 factors from its decision violated the public policy of the
4 State.

5 In a recent decision, the State Department of Environ-
6 mental Protection has affirmed the public policy of the State
7 which is that government units must consider the environmental
8 effects of any proposed development before approving that
9 development. In this recent decision, the Environmental Com-
10 mission denied an application by a developer to build a high
11 rise condominium unit in Toms River, New Jersey. The reasons
12 given for the denial are that the proposed development would
13 have adverse environmental effects on the area. Appellant
14 asserts that this most recent decision clearly points out the
15 public policy of the State to protect the environment from
16 the adverse effects of this type of development.

17 Sound public policy dictates that government at all
18 levels must consider the environment when they consider leg-
19 islating any land use controls. Although, this concept is so
20 true as to be almost self-evident, the Courts have only begun
21 to express the concept in modern environmental terms. But
22 where the issue has been considered the Courts have clearly
23 pointed government in the direction of greater environmental
24 concerns. In the case of In the Matter of Spring Valley

25

1 Development, 300 A2nd 736, (February 9, 1973), the Supreme
2 Judicial Court of Maine stated:

3 "We consider it indisputable that the
4 limitation of the use of property for
5 the purpose of preserving from unrea-
6 sonable destruction the quality of air,
7 soil, and water, for the protection of
8 the public health and welfare, is within
9 the police power."

10 Where the issue of development and its environmental
11 impact have come before other Courts, notably those of the
12 State of California, these Courts have ruled that development
13 should not be allowed without consideration of the environ-
14 ment. In the case of Friends of Mammoth v. Board of Super-
15 visors of Mono County, 104 Cal Rpt. 16, (Cal. Sup. Ct. 1972),
16 held that a County Commission was in error to allow the con-
17 struction of a commercial use in undeveloped countryside
18 without first authorizing an environmental impact statement
19 and incorporating the facts of the environmental report into
20 its deliberations. Other cases in both State and Federal
21 Courts have resulted in similar holdings, City of Orange v.
22 Valenti, 112 Cal. Rts. 379 (App. Jan. 1, 1974) held that a
23 City could require an environmental impact statement before
24 allowing the construction of an office building to continue.
25 Hanly v. Mitchell, 460 F2nd 640, (2nd Cir. 1972) and Hanly v.

was
EIS
required

1 Kleindienst, 471 F2nd 823 (2nd Cir. 1972), held that even the
2 Federal Government must make an environmental study before
3 locating a federal facility in an urban neighborhood.

Required
by NEPA

4 Where the conflict between economic hardship of a land-
5 owner and the environment was considered by an Oklahoma Court
6 in Eason Oil Company v. Uhls, 518 P2nd 50 1974, it was deter-
7 mined that economic hardship could not justify a variance
8 where the City shows potential pollution of the water supply.

9 Certainly, the best zoning is that zoning which is
10 based on environmental factors. If the Trial Court's exclu-
11 sion of the environmental evidence is upheld, the municipalities
12 will be given little incentive to have environmental reports
13 of their town prepared or considered in the deliberation of
14 zoning legislation. An extreme example might be that of
15 Medford Township which commissioned a study of its environment
16 at a cost of \$150,000.00; that study was incorporated into its
17 zoning legislation. If a Court refused to consider the environ-
18 mental evidence, in case of a review of Medford's zoning, then
19 the municipality has really wasted the tax payers funds. It
20 would seem to fly in the face of reason for the Courts of New
21 Jersey to discourage the municipalities from attempting to
22 preserve the environment through scientific study and good
23 zoning legislation.

24

25

1 In its decision the Trial Court did touch on the en-
2 vironmental factors, merely to dismiss them as irrelevant.
3 In the view of the Trial Court, ecological and environmental
4 problems have no bearing except in Burnt Fly Bog, the Old
5 Bridge Sands, Raritan Bay beachfront, the salt marshes in
6 back of Raritan Bay and the four (4) water courses running
7 northwesterly through the Township into South River. The
8 Court stated that there was ample land outside of the above
9 areas to construct high density housing. The view of the
10 Trial Court is in error on three (3) points.

11 First, the Trial Court in its opinion assumes facts
12 which it never considered at the Trial. Admittedly, the
13 Trial Court had access to depositions and it heard the
14 opinions set forth by various counsel, but this is no sub-
15 stitute for the arduous process of extracting the facts
16 from the testimony of witnesses at an actual hearing.

17 Secondly, the Trial Court's assumption that adequate
18 land exists outside of environmental problem areas is not
19 supported by the facts. Most of the undeveloped property,
20 primarily in the Central and Western areas of the Township
21 are drained by either Deep Run, Tennent Brook, Iresick
22 brook, or the Matchaponix System. All of these areas have
23 environmental features inimical to massive high density
24
25

1 housing. (See Map of Drainage Basins A254a)

2 Finally, the Trial Court was in error when it deter-
3 mined that areas in the Township or anywhere else for that
4 matter, could be divided into areas of "environmental prob-
5 lems" and areas free of environmental problems. The actual
6 fact is that every tract of land has its own environmental
7 features. Some of those features make that land good for
8 certain types of use and bad for other types of use. A
9 sound land use policy will take into account the entire envi-
10 ronmental inventory of an area as found by the environmental
11 scientists. There is no arbitrary decision between problem
12 land and problem free land. Some land, such as Burnt Fly
13 Bog in Madison Township, is probably unsuited to any type of
14 extensive development and should be kept as open space; other
15 lands, such as the land owned by the Runyon Water Works of
16 Perth Amboy, is better used as a watershed; other land is
17 suited for development, but not all of it for high density
18 housing. Appellants asserts that it is impossible for the
19 Trial Court to demarcate that land which is suitable for
20 high density development within the Township, and that land
21 which is not, until the Trial Court has considered all of
22 the available environmental evidence.

23

24

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POINT IV

BASING FAIR SHARE HOUSING FORMULAS
ON EXISTING PERCENTAGES OF LOW AND
MODERATE INCOME POPULATION WOULD
SERVE TO AGGRAVATE RATHER THAN ALLE-
VIATE HOUSING PROBLEMS.

Judge Furman in his opinion held:

"... 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%." (A 60a)

In doing so he totally ignored the fair share housing formulae devised by both the County and the Municipal Planning experts. He disregards all of the factors of location, job opportunity, transportation, utilities, availability of shopping areas, social and economic balance, existing housing, etc. that were considered in the creation of these formulas (See D-27 and all of the testimony of Douglas Powell Vol. 4 T-3-158) and simply based his decision upon existing population by income. Following this plan out to its logical

1 conclusion, would create a situation where poor communities
2 would get poorer and the rich communities richer; as the
3 majority of new low income housing would be required of the
4 towns that already house most of the poor, while wealthier
5 communities would remain relatively untouched.

6 It is difficult to see how such an approach can in any
7 way be related to general welfare. Under this holding, the
8 mere existence in a given locality of a high percentage of
9 poor people would result in the maintenance of a poverty
10 area in this community in perpetuity. This would be so,
11 regardless of whether or not there is any showing that the
12 interests of the poor would best be served by residence in
13 the subject municipality.

14 No consideration here is made for jobs which, according
15 to the testimony of Peter Abeles (Vol. 3 T-289-292), and the
16 statistics reproduced on Pages 38 to 44 of D-27, are in short
17 supply in the Township of Madison and are not readily available
18 within easy commuting reach of the poor.

19 There is also a total lack of consideration here of the
20 costs and availability of transportation, which when added to
21 even more subsidized housing rentals, would result in
22 prohibitive monthly expenses to families earning less than
23 \$10,000.00 per year (Vol. 3 T-293-294).

24

25

1 Finally, there is no consideration given to the effect
2 of large developments of new low cost housing on the tax rate
3 of the Township of Madison, which presently, and for many
4 years past, has been the highest in Middlesex County and
5 the effect that such a rate, as increased by low income
6 subsidized housing, would have on the large low income
7 population presently living in the Township, many of whom
8 own their own homes. ² To create new housing opportunities
9 for some individuals presently living outside of the
10 community, while taxing the poor and elderly within the
11 community out of their homes, would be a self-defeating
12 exercise.

13 In summary, the Furman approach would seem to result
14 in the exact opposite of balanced planning. It would create
15 socially highly unacceptable segregated communities of poor
16 on the one hand and wealthy on the other, and in no way
17 relate housing needs to economics or social necessities.

18

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25 ² Low and moderate income housing requires a tax abatement
equal to fifteen percent of the gross shelter rent, the
burden for which must be carried by the remainder of the
real property in the municipality. (Vol. 3 T-286)