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Round Valley v. Top. of
Clinton

7-20-77

Stenographic Record of Trial Proceedings

Volume 5 (~~Round~~ & Hillard)
Mallach

Pgs. 130

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1 A 19 4 SEP 1979

2 A 3 7 SEP 1980

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUNTERDON COUNTY
DOCKET NO. L 29710-74 P.W.
APPELLATE DOCKET NO. A-Jf63'77

3 ROUND VALLEY INC.,
4 a corporation of the State
5 of New Jersey,

OPINION FILED
MAR 8 1980

6 Plaintiff,

STENOGRAPHIC
RECORD

7 v.

8 TOWNSHIP OF CLINTON, a
9 municipal corporation of the
10 State of New Jersey, TOWNSHIP
11 COUNCIL OF CLINTON, and PLANNING
12 BOARD OF CLINTON,

FILED
SUPREME COURT

aop 2^ 1980

13 Defendants.

Stephen Tubansand

VI

Wednesday, July 20th 1977
Courthouse
Flemington, New Jersey

14 TRANSCRIPT ORDERED BY:

15 ROGER M. CAIN, ESQ.

16 B E F O R E :

17 HON. THOMAS J. BEETEL, J.S.C.

18 A P P E A R A N C E S :

19 STERNS, HERBERT S. WEINROTH, ESQS.,
20 By: JOEL H. STERNS, ESQ. and
MICHAEL J. HERBERT, ESQ.,
Attorneys for Plaintiff.

21 FRANCIS P. SUTTON, ESQ.,
22 Attorney for Defendant Planning Board.

23 FELTER k CAIN, ESQS.,
24 By: ROGER M. CAIN, ESQ.,
Attorneys for Defendants Township and Council.

25 MELVIN WEINER, C.S.R.
Official Court Reporter.

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July 20, 1977

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WITNESS DIRECT CROSS REDIRECT RE CROSS

For the Plaintiff:

ALAN MALLACH				
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For Defendants Township
and Council:

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EXHIBIT

<u>NO*</u>	<u>DESCRIPTION</u>	<u>IDENT.</u>	<u>EVIDENCE</u>
P-124	Article	--	27
DPC-3	Prof. Rose ^f s article	12	--

1 ALAN MA'LLACH, resumes.

2

3 REDIRECT EXAMINATION BY MR. STERNS:

4 Q Mr. Mallach, towards the end of the cross-
5 examination you were asked a question relating to an article
6 written by Jerome Rose. That article summarized the status
7 - well, let's identify the article as after the recent
8 New Jersey Supreme Court cases, "What is the status of sub-
9 urban zoning, New Jersey municipalities, 19 May 1977,"
10 and the concluding paragraph of that article, and this was
11 read to you, was: "On one hand, the State Supreme Court
12 has reaffirmed the Mount Laurel principle that requires
13 the zoning ordinance of a developing municipality to pro-
14 vide for its fair share of regional housing needs for low
15 and moderate-income persons.

16 "On the other hand, the Court has withdrawn
17 the trial courts from the process of demarcating the re-
18 gion or calculating fair share."

19 You were asked about that point and rather
20 than characterize your reply, I would ask you first, do
21 you believe that is an accurate statement as made by
22 Professor Rose?

23 A As I believe I stated yesterday, I think the first
24 sentence there is reasonable, but the second sentence,
25 which refers to withdrawing the Courts from region and

1 fair share considerations, is a misstatement of the Madison
2 decision.

3 ^ All right. I would just want briefly to turn
4 to the Madison decision and ask if you can refute that
5 statement by citing from the Madison decision.

6 Let me first draw your attention to the
7 Madison case, 72 N.J. 552 and 553, the section entitled
8 "Remedy and Remand," and ask you if in that opinion, on
9 those pages, you can find language which would justify
10 your opinion that Professor Rose is wrong.

11 A In the discussion of Remedy and Remand in the
12 Madison case, the first point on 552 is that the Court,
13 with this case, the Trial Court retains jurisdiction over
14 the compliance of the defendant with the decision, so
15 that the Court - the language of the decision reads:
16 "Considerations bearing upon the public interest, justice
17 to plaintiffs and efficient judicial administration pre-
18 clude another generalized remand to produce a satisfactory
19 ordinance," and then in terms of the scope of the judi-
20 cial supervision.'

21 Hien go[^].ng on to Page 553, the decision holds that
22 the revision shall zone in the manner specified in this
23 opinion to create the opportunity for a fair and reasonable
24 share of the least cost housing needs of Madison^f's region,
25 the concept of region to be understood as generally set

1 in Roman numeral II and Roman numeral VIII above, and then
2 it continues.

3 While no formulae determination or numerical spe-
4 cification of such a fair and reasonable share is required,
5 we do not preclude it if the municipal planning advisers
6 deem it useful.

7 Now, if you turn to the earlier section that is re-
8 ferred to, which is Section VIII —

9 Q Page 542.

10 A * This is Page 543.

11 Q Go ahead.

12 A They discuss the fair share and region concept from
13 the second sentence on the first paragraph on that page:

14 "If the existing municipal proportions correspond
15 at least roughly with the proportions of the appropriate
16 retion, the formula would appear prima facie fair."

17 And then continuing below in the paragraph that
18 starts with No. 1:

19 "Based upon our analysis and finding in Roman
20 Numeral IV and VT, the 1973 ordinance is clearly deficient
21 in meeting Madison's obligation to share in providing the
22 opportunity for lower-cost housing needed in the region,
23 whether or not the specific fair share estimates sub-
24 mitted by defendant are acceptable.

25 "Those estimates are, in any event, defective at

1 least in not including prospective need beyond 1975»"

2 And then it goes on in Point 3: "The region referred
3 to in II is that general area which constitutes, more or
4 less, the housing market area of which the subject municipi-
5 pality is a part, and from which the prospective population
6 of the municipality would substantially be drawn, in the
7 absence of exclusionary zoning."

8 Finally, Point IV: "Fair share allocation studies
9 submitted in evidence may be given such weight as they ap-
10 pear to merit in the light of statements above."

11 What I understand from this language is a number of
12 points. First, that the Court seems very clear that the
13 concept of fair share and region are still at the crux of
14 framing exclusionary zoning remedies.

15 Secondly, the Court is giving generalized guidelines
16 to Trial Courts for that task, specifically in defining
17 region as being coterminus with housing market area and
18 the region from which the prospective population of the
19 municipality would be drawn and, secondly, by referring to
20 fair share as something that suggests that the proportions
21 of low and moderate-income population in the municipality
22 should correspond with that of the region, and that fair
23 share must provide for prospective need from now through
24 the future.

25 So that at the same time as the Court is saying

1 that a precise mathematical formula is not required at the
2 Trial Court, the Court is certainly saying that fair share
3 and region must be part of the Trial Court's determination.

4 And furthermore, that the Trial Court should take
5 advantage of such expertise in delineating fair share and
6 region as may be available to it toward that end.

7 Q With regard to that expertise that you are
8 talking about, again referring, I guess, to the summary
9 pages which I think are 552 and 553 of the Court's remand
10 order, does that explicitly provide for the Trial Court to,
11 in effect, engage such objective and independent expertise
12 as it may feel necessary to assure these categories?

13 A Yes, it provides that on the bottom of Page 553 and
14 55^> that the Trial Court may, if it sees it necessary,
15 appoint an impartial expert or experts toward that end.

16 Q Going on to the one last question again deal-
n ing with the opinion, Mr. Mallach, I have to apologize to
18 you and the Court. I erroneously stated that you were
19 cited seven times, but I read ahead to the concurring
20 opinion of Justice Eashman to find, in fact, that you
21 were cited eight times, and I would like to go on to that
22 eighth citation which will be found on Pages 589 and 590.

23 First, I will ask you if you are the Alan
24 Mallach who Justice Pashman quotes at that point.

25 A yes, sir.

1 Q In particular, he saw fit, if I am correct,
2 to supply emphasis to a certain sentence there and I be-
3 lieve that was supplied by the Justice; is that correct?

4 MR. CAIN: Aren't we going beyond cross-
5 examination?

6 MR, STERNS: Not at all. Diis is exactly on
7 the same point.

8 OHE CCOURT: Let^fs have one talk at a time.

9 MR. CAIN: I don't recall asking questions
10 about the implications of the Mount Laurel case.

11 THE COURT: You might have asked something
12 about the concept. Let me look at it, please.

13 MR. CAIN: I don't mind this but I wonder
14 if it is beyond the scope.

15 THE COURT: May I look at it? It is 589?

16 MR. STERNS: Of the Madison decision, yes,
17 your Honor.

18 THE COURT: This goes to concept, I would
19 gather, if I understand your point. Your main
20 point on redirect, Mr. Sterns, was to discuss the
21 Rose article.

22 MR. STERNS: That's correct.

23 OHE COURT: About whether or not the Courts
24 had pulled back from the region and fair share con-
25 cepts?

1 MR. STERNS: That's correct.

2 THE COURT: That was the main thrust of your
3 redirect.

4 MR. STERNS: And my point on this, your
5 Honor, is that here is the Justice quoting this
6 witness, saying, in effect, why the Courts can't
7 pull back because of the issue that is underlined
8 there, namely, the question of good faith.

9 THE COURT: I think it is somewhere along
10 the line but different. He is saying (a) that the
11 Courts have indicated, the majority opinion, that
12 the Courts should not pull back but (b) in ordering
13 them not to pull back, they have eliminated from
14 them the device of no formulae determination or
15 numerical specification of such fair and reasonable
16 share as required. He is saying that because at
17 Page 543> going on to Page 544, where it states
18 that the Court is not required in the determination
19 of the matter itself to adopt fair-share housing
20 quotas for the municipality in question or to make
21 findings in reference thereto. That's with regard
> 22 to fair share allocations.

23 In other words, they tell the Trial Court to
24 go ahead but don't make any fact finding, don't allo-
25 cate yourself. When you find yourself caught in a

1 crack, call an expert. That's what they seem to be
2 telling the Trial Court to do,

3 MR. STERNS: The reason why this is being
4 read, Justice Pashman who concurred but wanted to
5 go further, but that is not relevant, but here is
6 Justice Pashman saying that this is why the Courts
7 should stay in.

8 I think it is saying that you don't neces-
9 sarily have to, but the point I want to bring out
10 on this and what I think it stands for, well, what
11 is the reason why Courts can't pull back, and I
12 think the answer there is that if a municipality
13 has had a certain pattern of conduct, then how can
14 you expect it in good faith to change that pattern
15 of conduct.

16 I would submit, your Honor, that this quo-
17 tation from this very witness follows along the
18 subject that was opened by Professor Rose's article
19 that was quoted.

20 THE COURT: I understand your context.
21 That's why I can't sustain your objection, because
22 you are the one that put this up. Therefore, it
23 is leading.

24 MR. STERNS: If we can just have that read
25 in the record, particularly what is underlined on

1 589, that would be it.

2 THE WITNESS: "To require a township to re-
3 vise its ordinance to meet reasonable yet impre-
4 cise standards imputes a measure of good faith that
5 may not exist. It is difficult to believe that a
6 township that systematically has excluded all but
7 the affluent would frame, much less administer, an
8 ordinance that actively would encourage the entry
9 of others."

10

11 BY MR. STERNS:

12 Q Uiat view, as expressed in that opinion but
13 of your article, does that represent your view now today
14 with regard to this issue?

15 A Yes, definitely, and I think that there has been a
16 great deal of evidence since the Mount Laurel decision
17 that this is, indeed, the case.

18 Q What evidence is that?

19 A Well, I think the most substantial experience was
20 the experience of Mount Laurel Township itself, where the
21 Township framed, in response to the Mount Laurel decision,
22 an ordinance which provided for a fair share commitment
23 that was negligible as the fair share commitment was.

24 The zoning that they provided for was so minimal
25 that it almost suggests that it was a conscious and de-

liberate effort to thwart the language of the Court.

The only multi-family zone, for example, that the Township of Mount Laurel created was a tract of land that was half in a flood plain, completely surrounded by industrial development, was utterly inaccessible from any other part of the Township of Mount Laurel, was utterly inaccessible at all except through a private road from the Township of Morristown, and furthermore had already designated as the right-of-way for the Burlington Township Extension for the Patco Speed Line; so this sort of thing is hardly buildable and so it is this sort of experience that is typified in the Mount Laurel ordinances that raises serious questions about municipal compliance which was the issue that I tried to raise in this paragraph.

MR. STERNS: I have no further questions.

THE COURT: Now, on that concept, you may question.

RE-CROSS-EXAMINATION BY MR. CAIN:

Q Referring to the Rose article, do you have a copy of it there?

A Not with me.

MR. STERNS: The same article?

THE COURT: Has it ever been marked, identified, or anything?

1 MR. STERNS: I think it was but I'm not sure.

2 THE COURT: I don't think so.

3 MR. CAIN: Possibly it might be a good idea.

4 For identification. I don't know if it is
5 going to be in evidence.

6 SHE COURT: Please mark it for identification.

7 (DPC-3 for Identification, Professor Jerome
8 Rose's article, is marked for Identification.)

9 Q Mr. Mallach, you indicated yesterday when I
10 questioned as to Professor Rose, I believe you said he has
11 a law degree?

12 A He has a law degree.

13 Q He has a JD from Harvard?

14 A It may well be.

15 Q I am looking for a footnote but I can't find
16 it.

17 Isn't it true, Mr, Mallach, starting at the
18 bottom of Page 5¹ 72 N.J., and going to the top of Page
19 5², the Court states:

20 "The number and variety of considerations
21 which have been deemed relevant in the formulation of fair
22 share plans, such as, to underscore our earlier observa-
23 tion, the entire problem involved is essentially and
24 functionally a legislatively and administrative, not a
25 judicial one." The Court does say that, does it not?

1 A The Court does state that.

2 Q And when you quoted over on Page 5⁴, you
3 were quoting Paragraph 4 which commenced on Page 543 •
4 You stopped reading at the end of the sentence, "Fair
5 share allocation studies submitted in evidence may be given
6 such weight as they appear to merit in light of state-
7 ments 2 and 3 above." You stopped. The Court did con-
8 tinue.

9 "But the Court is not required, in the de-
10 termination of the matter, itself to adopt fair share
11 housing quotas for the municipality in question or to make
12 findings in reference thereto," talking about the Court
13 required; is that correct?

14 A Well, this is consistent with the point made earlier.
15 The Court is not required to arrive at a specific, I think,
16 formula determination.

17 Q Wasn't the original interpretation of Mount
18 Laurel that the Court was required to do this and Pro-
19 fessor Rose, in his article, is in fact stating that the
20 requirement of the Court to do so has been —

21 MR. STERNS: I object to the question in
22 that form. Whose interpretation? Do you mean the
23 Court's or Professor Rose's that you are asking
24 the witness about?

25 THE COURT: It is a little blurry. I under-

1 stand your point. You can rephrase it sharper.
2 Someplace in the Mount Laurel decision they say that
3 this is required, and then show him in this context
4 that it is now no longer required, and then you set
5 up the horns of the dilemma, but you will have to
6 establish the first premise first.

7 "Where are you referring to, what page and
8 line?

9 MR. CAIN: All right.

10 Q What is your understanding of Mount Laurel,
11 Mr. Mallach? Your understanding was that the Court would
12 fix the region and set the quota? Is that your interpre-
13 tation of Mount Laurel?

14 A I am a little hesitant to comment because I haven't
15 reviewed in the last few weeks the actual language of the
16 Mount Laurel decision.

17 It is my recollection that the Court established a
18 principle that the municipality must provide for a fair
19 share of the regional need and in that particular case the
20 Court delineated what they felt to be an appropriate region
21 and left the specific delineation of fair share somewhat
22 open,

23 I think the Mount Laurel decision can probably be
24 read either way in terms of this issue. I think the signi-
25 ficant paragraph with regard to fair share in the Mount

1 Laurel decision is at 67 N.J. at 190, and after having
2 stated that they have defined the region for the purpose
3 of this litigation, the decision then continues to say:

4 "The concept of fair share is coining into more
5 general use and through the expertise of the municipal
6 planning advisor, the County Planning Boards and the State
7 Planning Agency, a reasonable figure from Mount Laurel can
8 be determined which can then be transferred to the alloca-
9 tion of sufficient land therefore on the zoning map."

10 So I think at the time of the Mount Laurel decision
11 the Court was more sanguine about the relative ease or dif-
12 ficulty involved in the fair share process, and later in
13 the Madison decision; but at the same time they were not
14 coming down with a hard and fast rule saying that you must
15 do this, you must do that, you must arrive at a precise
16 number.

17 Now, continuing on to your point about the re-
18 lationship of the Mount Laurel and Madison decisions and
19 how this is reflected in Mr. Rose's article, the point is
20 that the Court certainly in the Madison decision raised
21 issues or problems associated with the idea of a formula
22 determination of fair share which were not raised in the
23 Mount Laurel decision and they did say that the Court was
24 not required to arrive at a precise number.

25 They did say, as I believe I've made clear, that

1 the Court was (a) expected to bear in mind fair share in
2 reaching considerations in the decision, the Trial Court,
3 albeit not necessarily from a precise quota standpoint,
4 and I would argue, as I think is logical, that the observers
5 of the phrase "not required" nonetheless thus continued
6 to permit the Court to arrive at a numerical quota if the
7 Trial Court feels it is justified by the weight of expert
8 evidence, and so on.

9 Now, this is a far cry from, and this is a quote
10 from Professor Rose's article, "has withdrawn the Trial
11 Courts from the process of demarcating the regional cal-
12 culating fair share," and I think and I submit to you,
13 Counselor, that there is no relationship between what the
14 Court has done in going from Mount Laurel to Madison, and
15 what Mr. Rose has asserted is done.

16 Q Now, Mr. Mallach, you don't consider then
17 the statement by Professor Rose to be an indication of
18 the responsibility of the Court as to whether they must
19 exercise their judicial authority in demarcating the re-
20 gion or calculating fair share as opposed to an extreme
21 case?

22 A I think it would be indeed far-fatched to read Mr.
23 Rose's as meaning that.

24 Q Now, referring to Page 590 in the Oakwood
25 case, 72 N.J., I think you read something from Page 589,

1 and turning to Page 590, the Court states:

2 i "Ordinarily a challenge that a local zoning
3 ordinance is exclusionary requires an initial determination
4 of the municipality's fair share of regional housing needs
5 during the course of the trial. However, in some cases,
6 such as in the instant case, the exclusionary impact of
7 the challenged ordinance is so patent that there is no need
8 to quantify the municipal obligation under Mount Laurel
9 prior to entering judgment in the case. .

10 "Thus, where no such determination has been
11 made, the Trial Court will have to fix and specify the
12 municipal obligation during the remedial stage of the case."

13 Isn't it true that the portion I am reading
14 here on 589 is referring to the remedy, the remand section
15 of the Court's decision, and the previous two quotes that
16 we had, 542, the Court stated the problem was essentially
17 the function of legislative and administrative and not a
18 judicial one, and on Page 544 where the Court stated that
19 the Court is not required in the determination of a matter
20 itself to adopt fair share housing quota of a municipality
21 in reference thereto, in the earlier part of the decision;
22 is that correct?

23 A Well, Pages 542 and 544 are in the earlier part of
24 the decision from 590. I don't know what distinction you
25 are asking me to make.

1 Q Let us take 552. Isn't it true that Mount .
2 Laurel, that Oakwood,, was not a case where the zoning
3 ordinance;was before the Court the first time. As a mat-
4 ter of fact, doesn't the Court state in the middle of Page
5 552, quote:

6 "In Mount Laurel we elected not to impose
7 direct judicial supervision of compliance with the judg-
8 ment 'in view of the advanced view of the zoning law as
9 applied to zoning laid down by the opinion.'"

10 It cites the case.

11 "The present case is different. The basic
12 law is by now settled. Further, the defendant was correctly
13 advised by the Trial Court as to its responsibilities in
14 respect of regional housing needs in October 1971* over
15 five years ago.

16 "117 N.J. Super. 11, it came forth with an
17 amended ordinance which has been found to fall short of
18 its obligation. Considerations bearing upon the public
19 interest, justice to plaintiffs and efficient judicial
20 administration preclude another generalized remand or
21 another unsupervised effort by the defendant to produce
v 22 a satisfactory ordinance."

23 Isn't this a situation where the Court is
24 really saying that we sent it back and they still didn't
25 do it right, and now we are going to step in, in Oakwood?

1 A In manner of speaking.

2 MR. CAIN: Yes. I have no further questions.

3 THE COURT: In other words, Mr. Cain, are you
4 telling me then that you feel there should be two
5 bites at the apple, the five-year approach?

6 MR. CAIN: In legal argument, the only chal-
7 lenge of the Township^fs ordinance was upheld. They
8 were not remanded.

9 THE COURT: Do you expect me to think that
10 two five-year bites apart is the way to go? I want to
11 disabuse your mind of that concept almost immediately.
12 I don't intend to go that route at all.

13 MR. CAIN: I don't understand what you are
14 saying. I didn't hear you, your Honor.

15 *The* point I am making is that the Oakwood
16 case, the Court had considered the ordinance and
17 remanded it and the municipality did not correctly
18 amend it, and I am saying that that is not the case
19 here.

20 The Court has never sent the Clinton Town-
21 ship ordinance back to be amended. In fact, the
22 only attack on the Clinton Township ordinance is
23 the ordinance having been sustained in the Appellate
24 Division, and my point is, that it is an extreme
25 case such as Oakwood, as you get the judicial

1 interpretation direct.

2 . MR. STERNS: Your Honor, I respectfully submit
3 that that is a complete misreading of the Madison
4 case and a complete misreading of the history of
5 this case and also of the upholding of the ordi-
6 nances of this Township which took place all before
7 Madison Township and Mount Laurel, for that matter.

8 I don't know if that was a question or
9 whether I should ask on redirect, and I don't want
10 " to get into the witness; so let me state in rebuttal
11 to that, the fact that shocked the Court where there
12 were five years in which the Mount Laurel guidelines
13 had been set down and yet made no dent whatever on
14 this community.

15 THE COURT: It certainly did. They picked
16 out a site in the middle of the swamp. I think
17 they tried to comply. Everyone thought they tried
18 to comply.

19 MR. STERNS: The point is that it was not
20 five years judicially but five years when the law
21 of the land was known to them and they didn't do
22 anything about it.

23 MR. SUTTON: Relative to Mr. Sterns' state-
24 ment, I think what the cases indicate the situation
25 today is that this is something which is new for

1 the Planning Board, it is new for the courts, and
2 in the Madison Township case the Court felt it was
3 something administrative and not judicial, and the
4 only way the Judges will intervene is if it is
5 patently clear that the municipality is not making
6 an honest effort to supply the least cost or lower
7 income, fair share of the lower-income housing. I
8 think that is the situation, something that will be
9 a very difficult area for a considerable period of
10 time until better guidelines come from the State
11 and the counties.

12 THE COURT: I tend to agree with that, Mr.
13 Sutton.

14 Justice Gascoyne ran into that problem in
15 Morris County. The first time he gave the munici-
16 palities 60 days to draw a new ordinance and when
17 they did not, he hired a planner and 30 days later
18 there was an ordinance; but that^fs a difficult
19 remedy and I don^t intend to move with that kind
20 of remedy[^] but it would appear to me that what Mr.
21 Cain was suggesting was some kind of a time web of
22 five years between bites, and I just wanted to dis-
23 abuse him that there would not be any five-year
24 time between bites.

25 If you reach or if we reach that point where

1 'It is difficult to believe that a township that
2 systematically has excluded all but the affluent
3 would frame, much less administer, an ordinance
4 that actively will encourage the entry of others,"
5 if we reach that point, if we find that has oc-
6 curred, I want to reassure Mr. Cain it would not
7 be five years between remedies.

8 MR. CAIN: Your Honor, I was not in any way
9 suggesting five years. I was simply quoting a de-
10 cision.

11 THE COURT: That was the inference I got.

12 MR. CAIN: I would like to clear that up.
13 What I thought was a misinterpretation of the case,
14 that the Court would intervene where the municipali-
15 ties would not take over the responsibility, and the
16 particular quote that was referred to, the Court said
17 that the Court had remanded it back and that the
18 municipality had amended the ordinance and it fell
19 short; so it was not an appropriate thing to remand
20 again.

21 I would agree wholeheartedly --

22 THE COURT: Then the nice part about this
23 case is that it is going on while you are rezoning
24 and you have the opportunity, as the case is going
25 on, to make such efforts which would prevent such a

1 remand.

2 MR. SUTTON: I have a question of Mr. Mallach.
3 I have a couple of questions.

4 THE COURT: All right.

5

6 RECROSS-EXAMINATION BY MR. SUTTON:

7 Q Mr. Mallach, Mr. Sterns referred again to
8 the article that you had written.

9 Now, these were two articles, were they not,
10 that were published in the Rutgers Law Review?

11 A No, just one.

12 Q Just one article?

13 A In the Rutgers Law Review.

14 Q What was the other article? I believe there
15 were two articles quoted.

16 MR. STERNS: Be specific. The two articles
17 quoted in the Madison decision?

18 MR. SUTTON: That's right.

19 Q If I had written the articles and they were
20 pulled, I would certainly know what they were.

21 A There is just one Law Journal article that I wrote
22 that is quoted in the Madison decision.

23 I think there is at one point for some reason the
24 quotation that refers - it has my name in it but it has a
25 title of a different article attached to it, but it is still

1 the one article,

2 Q I thought there were two articles mentioned
3 in the footnote, as I remember.

4 Now, the footnotes contain considerable other
5 literature also that the Court read; is that not correct?

6 A Yes.

7 Q Now, the Madison Township case that is broken
8 down into different sections, and one section is fair share
9 in a region, and your article is quoted most principally
10 in an earlier part of the case; is that not correct?

11 A I really haven't checked to find out.

12 MR. STERNS: Your Honor, I object in the sense
13 that I questioned this witness and put on the record
14 that it was quoted and cited at eight different
15 points in the decision.

16 The page number was given for each of those
17 points, so it should be very easy for Mr. Sutton,
18 and it is in the record already, where he is cited
19 and what is cited, and I see no need at this point
20 to burden the record by repeating this. I just
21 don't see that it is relevant and it is certainly
22 repetitive.

23 MR. SUTTON: My question is whether or not
24 the article was cited under fair share and region.

25 THE COURT: I suppose that's it. Let's look

1 at the index, Mr, Sutton,

Z MR. SUTTON: It may have been cited once but
3 I believe the principle —

'4 THE COURT: Fair share approach, the fair
5 share and region, Page 531. Let's start at 531 and
6 put your finger on the first footnote and go through
7 it.

8 MR, STERNS: To save time, I would be glad
9 to read again the places at which he is cited: 496,
10 ~ 519, 535, 550, 557, 560, 561, 571, 589 and 590. I
11 hope that may save some time, I haven't had a
12 chance to reference it to the various sections.

13 THE COURT: The area between 531 and 544 all
14 deal with fair share and region. He is quoted at
15 535> and there is a footnote at 42 where it says:
16 "See Mallach Super., Note 3, 6 Rutgers——"

17

18 BY MR. SUTTON:

19 Q Where your article is quoted, Mr. Mallach,
20 under fair share and region, it is quoted where you refer
21 to a bill that died in committee; is that not correct?

22 A No, it's not correct,

23 THE COURT: 535.

24 A (Continuing.) No - well, that's the approximate
25 cause of the footnote, if you will. My discussion in the

1 article is a much broader discussion of the whole relation-
2 ship of legislative to judicial efforts in this area.

3 ft ^{I-fc} wasn't specifically your article. Your
4 article was not specifically relative to fair share and
5 region; is that not correct?

6 A It is material - there is material in my article
7 on the fair share and region. It's not the principle
8 thrust of the article.

9 Q And in the Madison Township case it is not
10 one of the items of literature that principally refers to
11 fair share and region; is that not correct?

12 Diere are many other articles that are quoted
13 and deal with fair share and region?

14 A I would say using the phrase "principally refers,"
15 I would say that's correct,

16 MR. SUTTON: That's all the questions I have.

17 MR. STERNS: Tour Honor, just one more ques-
18 tion.

19

20 REDIRECT EXAMINATION BY MR. STERNS:

21 Q Referring to the footnote on Page 535, which
22 refers to your article and I believe cites that article,
23 677 to 688, those six pages of the article, I ask you if
24 it is not the case at Page 681 of the article, the alloca-
25 tion or fair share fallacy, and that you discuss fair share

1 from that point on for the balance of those pages that are
2 cited?

3 A That¹ s correct,

4 MR. STERNS: I have no further questions.

5 THE COURT: Can we mark the article?

6 MR. STERNS: Yes. Was this marked? I
7 thought it was marked on qualifications but I will
8 mark it.

9 (P-124, the article referred to, is marked
10 in Evidence.)

11 MR. STERNS: That completes the plaintiff's
12 case.

13 THE COURT: Let us not finish the plaintiff's
14 case until we have all the exhibits.

15 MR. STERNS: I want to go into all that.

16 THE COURT: Gentlemen, is there any problem.
17 I stayed for a half hour hoping you might be able
18 to do that.

19 MR. SUTTON: Your Honor, relative to the ex-
20 hibits, I believe up to P-54, those exhibits have
21 already been entered into evidence; is that correct?

22 MR. SUTTON: That's correct. We are now
23 dealing with the remainder of the exhibits, and
24 most of these exhibits I have no objection to.

25 However, so far as the exhibits presented

1 with Mr. Rahenkamp's testimony, there are a number
2 of articles that he either wrote by himself or
3 wrote with assistance, and there are some other
4 books quoted.

5 THE COURT: What specific number are you
6 talking about?

7 MR. SUTTON: I am referring to P-57* the
8 House and Home article, PUD is good for everybody;
9 P-58, House and Home article, new approach to the
10 ~ suburban home, how to sell your house on PUD zoning;
11 P-51, the House and Home article, P-60, a House and
12 Home article, the town that said no to no growth;
13 P-61, Real Estate Law Journal; P-62, PUD, a better
14 way for the suburbs, the Urban Land Institute; P-63,
15 Land Use Law and Zoning Digest; P-76, House and
16 Home article, "it's time to take the low price."

17 Now, then we go on to Mr. Akahoshi.

18 THE COURT: What do you want to say about
19 these before you leave Rahenkamp?

20 MR. SUTTON: I think their only relevancy
21 might be to Rahenkamp's qualifications and I have
22 no objection to them being used for that purpose.

23 However, we certainly didn't have any reason-
24 able opportunity to read these articles, to cross-
25 examine him on the content of these articles; so

1 that the consent should not be considered as going
2 into evidence. I have no objection to your Honor
3 reading these, any of these articles so far as be-
4 ing educational to any of us, but so far as evi-
5 dence, I don't think it is proper evidence.

6 ftiere is no evidence that these articles are
7 something that are followed or considered more or
8 less gospel by the profession, and under these cir-
9 cumstances I do not feel that they are proper evi-
10 dence.

11 MR. STERNS: Your Honor, may I respond to
12 that briefly?

13 QHE COURT: Do you want to join in that
14 objection?

15 MR. CAIN: Yes, and one addition.

16 P-64(a), the Hunterdon County Master Plan —

17 THE COURT: Le^s not get off. That's not
18 Rahenkamp's.

19 MR. CAIN: Yes, it is.

20 THE COURT: Hunterdon County Land Use, Hunter-
21 don County Master Plan?

22 MR. CAIN: May I finish? I am not going to
23 be long. My only point is that I have no objection
24 to P-64(a), Land Use Alternatives on County Master
25 Plan, or anything else, but I would suggest that we

1 have the official copy of the Hunterdon County Master
.2 Plan and the whole master plan.

3 j I don't know if we have the amendments or
4 part of it or sections, and I have no objection.
5 It is a document published by the county, and so
6 forth, under their rules and regulations, but I Just
7 want to make sure we have a county master plan, an
8 official copy of it, and the entire master plan and
9 all the amendments. That's my only addition to
10 ~ Mr. Sutton's objection.

11 MR. STERNS: If I might start with the last
12 comment first, I believe that is really Mr. Cain's
13 obligation. We certainly intended to put in the
14 full document just as stated. I want to point out
15 in response to Mr. Cain and Mr. Sutton that the
16 documents we have been referring to were introduced
17 on June 6th and your Honor had a specific admonition
18 with regard to them because we did have a two-week
19 hiatus because of your jury schedule; that they were
20 to look at these things during this period, and they
21 did have ample time to raise questions and cross-
22 examine Mr. Rahenkamp on it if it were deemed neces-
23 sary.

24 Now, with regard to the weight of the items
25 P-57 to 76, I would argue that they are admissible

1 in evidence, first of all, because they go to the
2 question of his qualifications and, secondly, be-
3 cause they go to the question of his expertise and,
4 thirdly, because they go to the question of his
5 credibility as an expert witness; fourthly, for the
6 weight to be given his testimony. So they are purely
7 proper as examples of all of these things; so that
8 your Honor will have an opportunity to decide what
9 weight, what credence, what expertise he brings to
10 this matter»

11 OHE COURT: I feel that I can go to the
12 library and do my own independent research, I gen-
13 erally do, and if I ran across the article PUD is
14 good for everybody, I would more than likely look
15 at it. I might accept it. I might reject it. If
16 I quoted it, and there is no reason I couldn't,
17 that I know of.

18 MR. CAIN: We are not now talking about evi-
19 dence, your Honor.

20 THE COURT: Once it is in the opinion it is
21 not only evidence, it is part of the cheese that
22 makes it bind. So therefore if I could approach it
23 that way and it goes to his qualifications, it is
24 in for one purpose and it is in for all.

25 MR. CAIN: Well, I believe the example of

1 doing your own independent research and coming up
2 with an article quoting an opinion, it can be done
3 irrespective if it is done for any reason or if it
4 is even mentioned at the trial. It would be pre-
5 sumptive for Counsel in any case to think that they
6 have exhausted all the resources that the Court might
7 put into an opinion, but I believe such a statement
8 such as PUD is good for everybody going in as evi-
9 dence is like what is good for General Motors is
10 good for the United States, et cetera.

11 I believe the very title itself should pretty
12 much disqualify it as being evidential in a case
13 such as this.

14 I believe Mr. Sutton is correct. The quali-
15 fications, certainly, and then if the Court wants
16 to read it and the Court determines that there is
17 something in there that is useful to put into an
18 opinion, fine; but for it to be considered evidence
19 in the case, I don't think that is appropriate.

20 THE COURT: Well, it is evidence that this
21 man has the qualifications, that much you go along
22 with.

23 Therefore, it is part of his resume, part
24 of his bibliography^ correct?

25 MR. CAIN: It is something that he has

1 written, yes.

2 THE COURT: And it has been published. It
3 is now a published record and if I read it, and I
4 find some language in it, I will quote it.

5 MR. CAIN: That's fine.

6 THE COURT: For that limited purpose, it will
7 be admitted in evidence.

8 MR. CAIN: I had one other comment to make.
9 Counsel has said that Mr. Sutton and I allegedly
10 had two weeks at a time when there was a break in
11 the case to read everything, and I don't believe,
12 unless you retire from the practice of law entirely,
13 and did not go back to the office, that you could
14 even read all of this stuff if you started and non-
15 stop went up to 120 exhibits.

16 Therefore, I don't think the comment was an
17 appropriate admonition to read all of this in two
18 weeks. I am quite frank to admit I haven't read all
19 of it yet.

20 THE COURT: And I would not expect you to.
21 You and Mr. Sutton have been on this case since
22 March and I do not have any admonitions for you,
23 no criticisms. I realize that you hurt your prac-
24 tice in handling this case to this extent, and we
25 would not be under this pressure if the situation

1 wasn't four years old.

2 It is my oldest prerogative writ case, and, to
3 be frank with you, I haven't read all this material,
4 ftiere are five lovely weeks during the summer and
5 you can rest assured that I will spend some of the
6 time in reading the articles. Whether it is good
7 for everybody, I don't know.

8 MR. CAIN: With respect to the age of the
9 case, the case wasn't instituted - the plaintiff
10 chose not to move it until last December.

11 THE COURT: We are getting back to that area.
12 I know when the case started. I can tell when they
13 started to approach the Township.

14 I know how the Madison case has come along
15 and Mount Laurel, and I listened to Judge Furman's
16 speech three years ago, and I know how this thing
17 is evolving, and I am the man who handles preroga-
18 tive writ cases. How lucky can you be?

19 MR. STERNS: Counsel have certain obliga-
20 tions. The defense is about to start its case. I
21 would expect, if I were to cross-examine any of its
22 experts, I would have to do it in the course of
23 time in which those are offered, and I think they
24 have the same opportunity. It is a bad possibility
25 for everybody, the time, but the time has gone and

1 this trial started on May 27th.

2 I only want to say one more point with re-
3 spect to these documents, per se. Die fact is
4 that they did have the opportunity to cross-examine;
5 the fact is, as your Honor stated, they are rele-
6 vant certainly to the witness¹ credibility and his
7 expertise; and the fact is that without objection,
8 for example, only this morning, evidence from a
9 source that was not here has been put into the re-
10 cord and we will have no opportunity to cross-
11 examine Professor Rose nor do I want it, but you
12 can look at that or any other source that you want.

13 I only have one further response to this
14 whole matter and that is, since the subject of PUD^fs
15 are good for everybody came up, I think it is in-
16 structive to note that a public source, the New York
17 Times real estate section on Sunday, July 17th, the
18 Director of State and Regional Planning says that
19 we are encouraging this kind of development as one
20 of the better ways to provide new housing oppor-
21 tunities, a Dr. Richard Ginman of the State Regional
22 Planning, State of New Jersey Department of Urban
23 Community Affairs.

24 MR. SUTTON: That is improper, to read from
25 a newspaper, unless you want to take the stand and

1 we can read it*

2 MR. STERNS: You have brought in Mr. Rose,
3 that PUD's are not good for everybody, and I am
4 saying and quoting somebody who says it is good for
5 everybody.

6 OHE COURT: It hasn't evolved yet to an
7 alley fight. Let's try to keep it on a higher level.

8 "What section of the New York Times?

9 MR. STERNS: The real estate section, No. 8.

10 SHE COURT: I never get to Section 8.

11 MR. STERNS: I withdraw Section 8. The New
12 York Times real estate section, Sunday, July 20,
13 1977* "Eie notion of cluster homes is spreading."

14 THE COURT: No doubt spreading. We are
15 handling this along judicial trial lines and they
16 have said someplace along these footnotes, unless
17 it was a fly speck, that this is the sociological
18 type of investigation; so let's handle it with that
19 type of approach. It is a heavy burden for all of
20 us and fortunately we have only two more days -
21 one more day now to investigate the matter. Let's
22 move along with the exhibits.

23 I have said that they are already admissible
24 for a limited purpose, and so far as the master plan,
25 I will admit this one but if you find it is incorrect,

1 you can submit your own,

2 MR. CAIN: My point was that I wasn't sure
3 we had the entire master plan,

4 THE COURT: Prima facie it looks like the
5 official record. If you find it is not the one
6 when you examine it over the summer, you can say,
7 wait a minute, that's not the whole situation, and
8 in September you can hand me what you think is.

9 All right, Mr. Sutton.

10 MR. SUTTON: Now, the exhibits put in with
11 Mr. Akahoshi's testimony --

12 THE COURT: Beginning with what number?

13 MR. SUTTON: P-94 to P-99j I have no objec-
14 tion to those.

15 THE COURT: They are already in evidence.

16 MR. CAIN: I believe they are already in.

17 THE COURT: That gets you through, I gather,
18 P-107.

19 MR. SUTTON: Kiat takes us to Professor
20 Hordon's and again I would raise the same objection
21 to the publications by Professor Hordon that I
22 raised to the publications of Mr. Rahencamp, the
23 same objections.

24 THE COURT: 100 to 103 is already in evi-
25 dence. He was our hydrologist, you may recall.

1 The Court already has them marked in evidence.
2 101 is 101(a) through (m).

3 MR. SUTTON: I think they should be put in
4 for a limited purpose.

5 MR. CAIN: Same remarks.

6 THE COURT: That was his resume.

7 MR. CAIN: We are delighted to admit that.
8 He is prolific.

9 THE COURT: 100.

10 OHE CLERK: 102 is in evidence. 103.

11 THE COURT: Those reports you cross-examined
12 on. Who could argue with P-104, the New Jersey
13 satellite photo taken 500 miles up?

14 MR. SUTTON: I probably should object.

15 MR. CAIN: I see no problem with those maps.
16 !They may be useful on the region 500 miles out and
17 eventually it will get to Hunterdon County.

18 THE COURT: Right.

19 MR. SUTTON: The remainder of the exhibits,
20 I have no objection.

21 MR. CAIN: I believe, your Honor, that I
22 agree and join with his statement, but I believe
23 there was some magic marker sketches and some re-
24 ports made.

25 THE COURT: Mr. Pearson made something.

1 MR. CAIN: The traffic person, and as long
2 as the understanding is that they were for demon-
3 stration purposes and not intended to be a scaled
4 drawing but rather schematic drawings, I have no
5 objection.

6 THE COURT: That would be P-115, a drawing
7 done by Mr. Pearson. I think that's what he had,
8 he was fooling around with the intersection of
9 Beaver Street and Allerton Road and the area of
10 the country store.

11 MR. CAIN: Yes, he gave some drawings of
12 what the traffic light situation would be. I have
13 no objection to that.

14 THE COURT: We went into 120, 121, 122,
15 photographs 122(a) through (d).

16 MR. CAIN: I have examined the photographs
17 and they seem to be accurate representations. How-
18 ever, as long as they are not intended to do any-
19 thing other than show the terrain, and there are
20 some cars in there and cars not in others; so I
21 don't, think a photograph can be illustrative of
22 traffic there.

23 THE COURT: I won't need it. I have been
24 down through that intersection. Goes past the
25 tavern that sells the pizza pies up through Annandale

1 and down, makes a left turn, and I would agree that
2 Allerton Road and Route 31 is a Har-Kari lane.

3 To cross that is something that requires a
4 great deal of courage but we are all familiar with
5 it. We are building it up so that someone in the
6 Appellate Division, not familiar with this, if they
7 have this case some day, they will be able to see
8 about what the witness was talking.

9 MR. CAIN: I think photographs of Allerton
10 and Route 31 might have been more interesting.

11 THE COURT: Didn't we have some of them?

12 MR. STERNS: If he wants to introduce photo-
13 graphs, fine. We have photographs of the inter-
14 section of that street in Annandale where he was
15 questioned.

16 THE COURT: The other end of it. Perhaps
17 some day we may have some photographs.

18 As I gather, the Court is not supposed to
19 just sit on its laurels. It's supposed to supply
20 some productive information at times. If necessary,
21 if I get to the point that I need help, I have the
22 means to get photographs of the intersection, and
23 so do you.

24 Anything else? Then your exhibits are in
25 carte blanche.

1 The plaintiff has rested, it feeling confi-
2 dent that it has introduced a Mount Laurel —

3 MR. STERNS: And Madison case. There are
4 two bases. That's one basis of it, I will have
5 the opportunity to mention the other,

6 THE COURT: Now, Mr. Sutton, I gather we are
7 at the end of the plaintiff's case where all the
8 inferences are taken most favorably to the plaintiff.

9 MR. SUTTON: I understand the situation but
10 I would like for the record to make a motion at
11 this time.

12 THE COURT: Of course.

13 MR. SUTTON: I will be very brief. We have
14 heard all the testimony in the number of weeks, so
15 I think it is unnecessary to go into detail on the
16 testimony.

17 This would be a motion in favor of the de-
18 fendant Planning Board on the ground that at this
19 stage the plaintiff has not made out a prima facie
20 case.

21 I understand that at this stage all the
22 testimony of the witnesses and all inferences there-
23 from must be in the plaintiff's favor.

24 Now, there are two principle questions that
25 would be involved in this motion. The first question

1 is, whether the plaintiff has made out a prima
2 facie case that the zoning of the Round Valley
3 property is arbitrary and unreasonable and, secondly,
4 whether or not the plaintiff has made out a prima
5 facie case that the overall zoning of Clinton Town-
6 ship is arbitrary and unreasonable.

7 Now, at the present time in Clinton Township
8 we have very recently introduced a new proposed
9 zoning ordinance. This zoning ordinance was recom-
10 mended by the Planning Board to the Township Council,
11 and it will soon be up for hearing by the Township
12 Council.

13 I understand that it has been advertised in
14 the newspaper and for that reason I will address
15 myself to this new zoning ordinance which will be
16 passed very soon.

17 Now, there are two areas of land that we are
18 concerned with that are owned by Round Valley. The
19 total acreage is 700 acres.

20 Round Valley, Inc. owns 469 acres on the
21 east side of Route 31, and this land is zoned ROM.
22 On the west side of Route 31 they own 321 acres,
23 and this land is presently zoned F-1, but under our
24 zoning ordinance that will soon be adopted and under
25 our land use plan that has been adopted, this land

1 will be zoned PRD, three units per acre.

2 Now, the plaintiff's first expert witness
3 relative to the zoning of the property was Mr.
4 Rahenkamp, and I would like to deal first with the
5 469 acres that are zoned ROM.

6 Mr. Rahenkamp in his testimony conceded
7 that so far as the land was concerned, this was
8 suitable ROM land. He testified that the land was
9 flat, that it was near an intersection, and on
10 cross-examination it was also brought out that New
11 York Life, which has settled in Clinton Township,
12 is located near the intersection of the Lebanon-
13 Cokesbury Road and Route 22 and Route 78.

14 Also, that A.M. Best, which is located in
15 Readington Township, is located in the vicinity of
16 the intersection of Route 78 and the road that runs
17 in the White House area.

18 Mr. Akahoshi also indicated in his testimony
19 that this land was suitable for ROM. Mr. Mallach,
20 who testified yesterday and today, stated, and this
21 is the; last page of his report, "Given the excel-
22 lent location of the Township for employment growth
23 in view of its accessibility and visibility, it
24 is likely that its employment share of the county
25 total will exceed ten per cent by that point."

1 Mr. Mallach conceded that industries would
2 settle in this area. His report indicates to me
3 that in his opinion industries will come to Clinton
4 Township; so based upon the testimony of their own
5 witnesses, this area is suitably zoned ROM.

6 The only real objection apparently was to
7 the extent of ROM in Clinton Township, but that
8 does not go directly to zoning of the plaintiff's
9 land. It goes to the overall zoning of Clinton
10 Township, and I will address myself to that later.

11 Now, so far as the property on the west side
12 of Route 313 this property had been zoned F-1 when
13 plaintiff purchased the property in 1974. The zon-
14 ing ordinance was amended and under the amendment
15 to the zoning ordinance cluster zoning was permitted,

16 Hien under the land use plan this area was
17 proposed to be zoned three units per acre under PRD,
18 and under the zoning ordinance that was recommended
19 to the Township Council and now is up for adoption
20 by the Township Council. This area will be zoned
21 three units per acre.

22 The plaintiff raises the question of whether
23 or not this should be higher density for this pro-
24 perty. The plaintiff, by his own testimony, also
25 indicated that there was a golf course on the

1 property that they wanted to continue to have and
2 also indicated the topography of the property, but
3 in addition to that, their own witness, their own
4 witnesses, conceded that there were certain problems
5 so far as water was concerned and disposal of sewage
6 was concerned.

7 As I recall, Dr. Hordon stated that the pro-
8 posed development, that includes not only the west
9 side, of course, but the east side, would use one
10 million gallons of water per day, and that there
11 were only 188,000 gallons of water beneath this
12 property.

13 There is also a question whether Clinton has
14 the sewer capacity for the proposed development and
15 also for Annandale and other proposed areas, and
16 in zoning the Township had the right to take into
17 consideration the underground water situation, the
18 situation relative to sewage.

19 Furthermore, so far as the zoning of this
20 property, we have Route 31 where the traffic is
21 obviously heavy at the present time.

22 Mr. Pearson, the traffic expert, was not
23 able to state when Route 31 would be made four
24 lanes..

25 The property is located near the high school

1 where there are student drivers and the Township,
2 with its broad zoning authority, undoubtedly had
3 the right to take in all these considerations, water,
4 sewer, traffic, in determining the density to zone
5 this property, and under the circumstances the
6 plaintiff certainly has not met its burden of show-
7 ing this zoning of its property is arbitrary and
8 unreasonable*

9 THE COURT: Mr. Cain, do you want to make a
10 motion?

11 MR. CAIN: I believe it would be useful to
12 take it as we go. Yes, I do join in Mr, Sutton's
13 motion thus far. I don't think he is finished.

14 THE COURT: We are not through yet?

15 MR. SUTTON: I just finished the plaintiff's
16 property, not the overall zoning.

17 I want to go briefly into the law relative
18 to the plaintiff's property, also.

19 In the brief that was earlier submitted, I
20 quoted the case of Bow and Arrow Manor v. Town of
21 West Orange, 63 N.J. 335* where the Supreme Court
22 said an O-R is not entitled to have its property
23 zoned for its most profitable use.

24 I also quoted the Mount Laurel case and I
25 believe I also had a quote from the pamphlet by

1 Norman Williams from his book, I believe, "American
2 Land Planning Law" which will be included in his
3 book, recent developments and exclusionary zoning
4 in the Mount Laurel case where Mr. Williams stated
5 in his summary that a town's duty is to accommodate
6 such housing as expressly limited to its fair share
7 of the regional need for such housing.

8 If therefore a town opens up its land to
9 permit some high-density housing, this does not
10 mean that it will have to accept the fate of being
11 overwhelmed by large scale speculative building.

12 It is of course the critical point in secur-
13 ing the cooperation of at least some towns, and
14 then in Paragraph 5, "As long as an appropriate
15 area is zoned so as to permit low and moderate
16 housing, a town may definitely zone other land for
17 lots of an acre or more. If a town does so it
18 seems to be clear that there is no need to rezone
19 for higher density whenever a developer turns up
20 with a request to do so on a different site which
21 he owns."

22 THE COURT: Of course, in our library down
23 below I did not find Professor Williams¹ pamphlet.
24 I will be glad to read it if you provide me with
25 a copy.

1 MR., SUTTON: I will make a photocopy and I
2 will send this copy.

3 THE COURT: I don't pretend to have any
4 knowledge of who Professor Williams is. I have
5 no idea who he is.

6 MR. SUTTON: He wrote the book "American
7 Land Planning Law" put out by Callahan & Company.

8 MR. STERNS: May we have a copy?

9 MR. SUTTON: I will have photocopies made
10 of the pamphlet.

11 THE COURT: I agree with the Bow and Arrow
12 situationj that was the law then.

13 We are dealing with the Mount Laurel-Madison
14 Township concept and cases which have come along
15 since. That seems to be the whole approach to the
16 situation. It is apparently what they are saying
17 in the footnotes.

18 The legislature hasn^ft done it. Cahill asked
19 that it start to begin, and they haven't done it.
20 They come to court, which is the only safety valve
21 in the whole governmental structure, to take it on.

22 MR. SUTTON: I just want to discuss very
23 briefly the overall zoning. I think it is quite
24 clear.

25 THE COURT: This is the proposed zoning. We

1 are treating it as though it is the zoning that
2 affects this case.

3 MR. SUTTON: I think that is the thing to do
4 because there is no need to go into earlier zoning.
5 We would be spending time on something which is
6 unnecessary.

7 THE COURT: I would suppose I have to ap-
8 proach it both ways. If the Township Council now
9 turns it down and remands it to the Planning Board,
10 then we have the old zoning.

11 If they take it, then the question becomes
12 whether or not this is in violation of the principles
13 of Madison and Mount Laurel, and so forth.

14 The old zoning, what do they have?

15 MR. SUTTON: The Planning Board is optimistic
16 that the Township Council will pass it. There was
17 one Mayor-elect and one member of the Township
18 Council that did sit on the Planning Board; so there
19 were five members, and we are quite optimistic.

20 THE COURT: And you have the summer hiatus
21 to see that optimism fulfilled or frustrated.

22 MR. SUTTON: Well, certainly by the fall we
23 will know definitely.

24 Now, so far as the overall zoning is con-
25 cerned, the tack seems to be centered upon whether

1 or not we are providing our share of least-cost
2 housing.

3 i Now, on this motion, of course, there is
4 some problem on that. However, Mr. Rahenkamp did
5 comment upon Mr. O'Grady's report and Mr. O'Grady
6 indicated in his report that there would be apart-
7 ments at eight units per acre, mobile homes at four
8 units per acre, two-family houses at 7#7 units per
9 acre, and also one-family homes at 4.8 units per
10 acre.

11 There is another report where there is a
12 more specific breakdown, but in any regard the
13 witnesses, while they commented upon the proposed
14 zoning, they certainly were not able to show that
15 these units, this proposed zoning, did not give
16 the opportunity for least-cost housing.

17 The other factor was on the extent of the
18 ROM areas. However, Mr. Rahenkamp stated that he
19 did not study the zoning of neighboring municipi-
20 palities and as to what ROM they provided, and
21 there was very strong testimony that this area
22 zoned ROM is a prime ROM area.

23 It could service not only Clinton Township,
24 but Hunterdon County and parts of Warren County.
25 It is ideally located for ROM, and under these

1 circumstances they have certainly not made out a
2 prima facie case in the overall proposed zoning,
3 and under the law, the law still is that there is
4 a very strong burden to overturn a township ordi-
5 nance; that all reasonable inferences are in favor
6 of the ordinance and that by clear evidence the
7 plaintiffs would have to show that the ordinance
8 is arbitrary and unreasonable, and I believe the
9 testimony has fallen far short of this, I am
10 through.

11 OHE COURT: I interrupted you before. I did
12 not want to do it twice.

13 MR. GAIN: Your Honor, very briefly, I will
14 join in Mr. Sutton's motion on behalf of the govern-
15 ing body. I would like to add one additional point
16 that Mr. Sutton didn't cover.

17 The testimony throughout of the witnesses
18 has been consistent in that the plaintiff, first
19 with respect to the westerly side of the tract, has
20 certainly benefited by changes in municipal zoning.

21 The property on the westerly side originally
22 was in the one-acre zoning, at which time evidently
23 one of the predecessors in title had elected to put
24 a golf course on approximately 150 acres of the 320
25 acres.

1 At that time the zoning, being one acre,
2 obviously the owners of the property withdrew from
3 housing use roughly one-half of the available units
4 assuming, your Honor, that it couldn't be developed
5 because of the topography.

6 In 1974 the zoning ordinance was amended and
7 provided for residential cluster, at which time,
8 under the same one-acre zoning, the plaintiff then
9 now had the benefit of having his cake and eating
10 it, too, as it were, because now they can go back
11 and in clustering the units could go back 300-plus
12 units, even on the westerly side, in addition to
13 the golf course.

14 . Now, the proposed zoning provides for a PRD
15 type of use under the new land use law, Chapter 291,
16 which, by the testimony which is before the Court
17 and by the three units per acre, will allow approx-
18 imately a thousand units with housing to be built
19 on that property.

20 Now, in the examination of the witnesses,
21 specifically Mr. Ojierian and Mr. Dishner, the tes-
22 timony was that it was not feasible to develop on
23 the westerly property.

24 Under the Township's zoning, even up to three
25 units per acre under the PRD, finally, Mr. Rahenkamp

1 came along and Mr. Rahenkamp conceded that first
2 that PRD's did not have to be 3500 units; that you
3 could have 1,000 units for a very nice PUD, and
4 there were very many, many successful PUD^fs at that
5 density.

6 And then asked about the feasibility of the
7 development of that, he first said that it was not,
8 and on close examination we found the reason. It
9 was because, in considering the feasibility of de-
10 veloping just the westerly side of the property
11 under the Township's proposed zoning, all the wit-
12 nesses had been taking into consideration the land
13 cost and carrying charges of the easterly property,
14 namely, the Goebbel tract.

15 We certainly submit that that is not appro-
16 priate; that you should include costs of other
17 pieces of land into consideration of whether you
18 can develop a particular tract for the purpose of
19 least-cost housing.

20 Therefore, I believe it has been conceded
21 by the witnesses, and even under the proposed Town-
22 ship zoning, the westerly side can be developed and
23 can provide for some least-cost housing provided
24 that they are not burdened with having to plug in
25 the commission of the land cost and carrying charges

1 of the easterly side of the property.

2 I "believe Mr, Sutton has correctly indicated
3 that the witnesses have indicated the appropriate-
4 ness of the easterly property under the ROM zoning.

5 As a matter of fact, all of the testimony
6 wherein plaintiffs have demonstrated or attempted
7 to demonstrate that there are facilities available
8 to develop the property for PUD, also underpin and
9 support development of property for ROM, and they
10 have so stated.

11 Eae other point with respect to the easterly
12 property is that it was in fact already zoned ROM
13 at the time that the plaintiffs bought it.

14 The plaintiffs had represented that there
15 was no relationship to the prior owners, it was an
16 arm's length transaction and therefore it was ROM
17 at the time they purchased it, namely, the Goebbel
18 tract.

19 In fact, the witnesses and the evidence has
20 shown that it was purchased by a corporation called
21 Round Valley Industrial.

22 Therefore, your Honor, we submit at this
23 stage of the procee<i>iings that the plaintiff's
24 interest as shown by their witnesses has really
25 very little to do with least-cost housing for the

1 municipality. The plaintiff's motives are clearly
2 profit motives.

3 Even though they have gained considerably
4 on the westerly side and gone from perhaps 200 units
5 after they had developed the golf course to 300
6 units under the existing cluster-zoning and now
7 to approximately 1,000 units, that's still not
8 enough.

9 They want to take the easterly side which
10 is now zoned ROM and convert it over to residential
11 use to 3500 units, and we submit their motives have
12 nothing to do with least-cost housing. They are
13 trying to maximize the profit from their own de-
14 velopment,

15 I think that is clearly shown by the wit-
16 ness¹ testimony and that is all I will add, your
17 Honor, to what Mr. Sutton said.

18 OHE COURT: You incorporate his arguments
19 by reference.

20 Mr. Sterns.

21 MR. STERNS: Your Honor, I will attempt to
22 be brief in addressing my opposition to this motion,
23 Counsel have, I believe, taken certain poetic li-
24 cense with regard to the testimony of witnesses and
25 I think, your Honor, I will attempt to state my own

1 view of what those witnesses said.

2 I think your Honor obviously will have to
3 look at the record to find which one of us is closer
4 to the truth, but Counsel have also misstated, I
5 think, rather seriously some of the points of law
6 which are involved at this point, and I would like
7 to dwell with regard to what those are and with re-
8 gard to what our case is, and attempt to relate
9 them.

10 I will try not, except in one brief instance,
11 to repeat any of the law which is in the brief. I
12 do think the relevance of the briefs which were
13 submitted, certainly the plaintiff^f's brief, sets
14 out certain standards and we believe those standards
15 to be the applicable law and we believe the plain-
16 tiff[^] case has touched on every point that indeed
17 it said it would make in its brief and that, there-
18 fore, the law as stated should be operative.

19 Now, clearly the first thing that we do
20 agree on is that Rule 4:37-2(b) provides that a
21 motion to dismiss shall be denied if the evidence,
22 together with the legitimate inferences therefrom,
23 could sustain a judgment in plaintiffⁱ's favor.

24 Well, in this case, your Honor, I don^Tt even
25 ask that the inferences be considered. We don't

1 need inferences, we believe, and I believe strongly
2 that the plaintiffs have made an overwhelming
3 direct case based on the direct evidence to support
4 a prima facie case.

5 Die brief, as I indicated, contains one con-
6 trolling item, and let me say for clarification that
7 it is our view of the case that we are proceeding
8 on two somewhat independent bases for relief for
9 this plaintiff.

10 Number one, there is a standard and tra-
11 dition in this state which pre-dates Mount Laurel
12 and pre-dates Madison, that says that a governing
13 body, a Planning Board, may not act arbitrarily,
14 unreasonably or capriciously with regard to plain-
15 tiff^ land and, indeed, before Mount Laurel and
16 before the Madison cases can be found in the re-
17 cords, and they're often cited which showed that
18 Courts did overrule arbitrary and capricious zoning.

19 I would submit on that case, your Honor, that
20 the plaintiff has demonstrated by witnesses of its
21 own tha^ for years it has faced an impossible battle
22 in even getting the Township to consider this, and
23 that it was not alone in that situation.

24 It was demonstrated yesterday by the fact
25 of the minutes of the Planning Board going back to

1 1969. In particular, in that case the plaintiff
2 has shown through witnesses, and it is undisputed
3 at this point that the very planner on which this
4 defendant will rely recommended to his Planning
5 Board in his master plan that the land in question,
6 the east side of the tract, be designated PUD, and
7 that mysteriously disappeared and it was changed
8 and there were no studies, no response given for
9 it.

10 So on the traditional theories of the Courts
11 of New Jersey, we believe that we have made a case
12 through Mr. ftierian, Mr. Dishner, through the minutes
13 of the Planning Board to show that this is an arbi-
14 trary and capricious act of this municipality.
15 That's absent Mount Laurel and Madison.

16 dat's understanding where you can bring
17 minutes into this Court in New Jersey in this day
18 and age, where a Mayor says "Let's keep the ghetto
19 out of Clinton Township."

20 Now, let us turn to the second of these bases
21 on which we propose that the plaintiff should get
22 relief, and that is the Mount Laurel and Madison
23 axis, the whole question of these concepts of region,
24 fair share, least-cost housing, the filtering-down
25 theory, and that has been, to a large extent, of

1 course, what the plaintiff's case has been addressed
2 to.

3 In that connection, I would read you only
4 one phrase, and that phrase is quoted on Page 25
5 of our brief, but it is of course directly from
6 Justice Hall, from the Mount Laurel opinion, and
7 we believe that it sets forth the standard that
8 should be judged at this point in the case, at the
9 conclusion of the plaintiff's case, and that reads
10 on the full paragraph, and of course the full quota-
11 tion is there.

12 THE COURT: What page is that in Mount Laurel?

13 MR. STERNS: 6j N.J. 180, 181. I am going
14 to read the very last part of it, not because the
15 whole thing isn't relevant but to save time.

16 Procedurally, we think, and I am starting
17 with the full sentence, the second full sentence
18 or third full sentence of the last paragraph, and
19 I believe this is the standard and I believe this
20 is where we are in this case.

21 "Procedurally we think the basic importance
22 of appropriate housing for all dictates that when
23 it is shown that a developing municipality in its
24 land-use regulations has not made realistically
25 possible a variety and choice of housing, including

1 adequate provision to afford the opportunity for
2 low and moderate-income housing or has expressly
3 prescribed requirements or restrictions which pre-
4 clude or substantially hinder it, a facial showing
5 of violation of substantive due process or equal
6 protection under the State constitution has been
7 made out; and the burden, and it is a heavy one,
8 shifts to the municipality to establish a valid
9 basis for its action or non-action."

10 That's Justice Hall, that's Mount Laurel,
11 and that's where I submit respectfully, your Honor,
12 we are in this case.

13 I believe the plaintiff has submitted more
14 than a facial showing of violation of substantive
15 due process and I believe that the burden is now
16 on the municipality to establish that its zoning,
17 proposed or existing, will meet that burden and I
18 believe the plaintiff has reached that facial show-
19 ing in a number of ways, and I would like to go
20 into them for not more than two or three minutes.

21 First of all, witnesses have shown, and let
22 us take the question and I will try to take it in
23 some order, a developing community, and that's not
24 in issue. Even the defendant's expert, even the
25 master plan of the community, which is in evidence

1 here, says that Clinton is a developing community.

2 Region? What is the appropriate region?

3 Both Rahenkamp or all three, Rahenkamp, Akahoshi
4 and Mallach, on multi-county region, that if the
5 issue on cross-examination is the question of the
6 county, all we can repeat is that the Court in
7 Madison itself rejected the county as the appro-
8 priate basis and that not only did the Court in
9 Madison reject it, but all of the witnesses for the
10 reasons testified here rejected the possibility
11 that you could narrowly constrict a region to a
12 county.

13 May I point out respectfully that not only
14 in Madison but in Mount Laurels as well, the defen-
15 dant's effort was to restrict the region to a county,
16 and it just won't work. It won't work because the
17 definition that we are working from is the journey-
18 to-work definition, those places from which people
19 come home to work and vice versa, absent exclusionary
20 zoning.

21 Npw, that's the standard and that's the stan-
22 dard with which the very statistics of Hunterdon
23 County Planning Board, where people work in Clinton
24 Township, will demonstrate a region beyond a shadow
25 of a doubt.

1 Housing fair share has been established by
2 both Akahoshi and Mallach. There is no magic to
3 the number of fair share but there is magic to cer-
4 tain numbers and the magic is this.

5 By anybody's standards there are a handful,
6 and we estimate them to be four multi-family units
7 in the Township of Clinton.

8 In Madison Township there were 3^00 multi-
9 family units and the Court found that 3^00 was not
10 sufficient to meet a need.

11 Are these defendants going to tell us that
12 the three or four that exist are sufficient to meet
13 a need? No, they don't try to do that, and I don't
14 imply they try to do that, but what they do try to
15 do through this zoning ordinance is to say that in-
16 accessible locations with high restrictions, with
17 no utilities, where they themselves have voted down
18 the possibility of adjoining public utilities, where
19 hilly and rocky terrain is located, will somehow
20 meet the fair share.

21 I submit that anyone listening to Mr.
22 Rahenkamp did not hear him say or quibble with
23 those things, but to say it was a sham, absurd for
24 them to say that these kinds of tokens were in any
25 way going to meet the reasonable fair share of a

1 • community which now has three or four multi-family
2 units.

3 Now, they say, well, this is acceptable land
4 for ROM, Everybody said it. Of course it is
5 acceptable land for ROM. It is good building land.
6 It is probably the best building land at that inter-
7 section that there is in the community. That's
8 where the planner said it is PUD when he was per-
9 mitted to do so.

10 What he doesn't say, of the witnesses that
11 testified, that there is too much ROM in this Town-
12 ship; that they haven't adequately provided for
13 housing and that they have no other alternatives
14 for housing with regard to the needs that have been
15 specified^ so certainly the ROM argument can be
16 seen for the sham it is and for the stall it is,
17 and I just want to conclude with this thought.

18 There have been arguments now which I think
19 directly distort what the testimony of the experts
20 say with regard to housing, with regard to water,
21 with regard to traffic.

22 But here, on the one hand, the defendants
23 argue that there is not adequate water, there is
24 not adequate housing, the children who are driving
25 out of the high school, learning how to drive, can

1 be clipped, but ROM can come in, trucks can pull
2 in out of that ROM, water can be used for that ROM,
3 impervious cover can be added there, and that's
4 particularly all right. Now, you can't have it
5 both ways.

6 If you want to develop something, then you
7 got to look at the alternatives of that develop-
8 ment. If you don't want to develop something, then
9 call it by what it is, an attempt to stall and to
10 keep this Township from providing its need on any
11 reasonable basis for housing in the area.

12 For all of these reasons, I submit to you
13 that under this second or under Mount Laurel phase
14 the burden of proof has been met and it now shifts
15 to the Township, because a prima facie case of ex-
16 clusionary or restrictive zoning has indeed been
17 made, and I respectfully request that the motion be
18 denied.

19 THE COURT: The motion is made at the end
20 of the plaintiff's case pursuant to Rule 47, and
21 the inferences and facts to be drawn from the tes-
22 timony are to be drawn most favorably in favor of
23 the moving party.

24 Now, this being so, I have the testimony of
25 all of the witnesses who testified for the plain-

1 tiff-applicant. We have not only had a sociologist
2 testify, a man widely quoted and recognized in the
3 Madison decision; he teaches at Rice; he headed up
4 various commissions; and indicates that the present
5 proposed zoning ordinance falls short of the cri-
6 teria.

7 I had Mr. Rahenkamp, a planner with some
8 repute, experienced in PUD¹s, has written and
9 studied this problem, has done initial studies,
10 maps, graphs, diagrams, statistical approaches,
11 and so forth, indicating that among other things
12 the present proposed ordinance falls short of the
13 criteria and that the land is suitable and would
14 support its population.

15 We have had a hydrologist who indicated the
16 availability of water and how the site could sup-
17 port the number of people and who may be placed
18 thereon.

19 Again, it was the various criteria, the
20 catch basins, recharge, preservation, open space,
21 and so forth. We^fve had or we have a land ap-
22 proach by way of an easement where connection
23 could be made to the Clinton town sewer plant.

24 We have had an approach by Mr. Akahoshi of
25 what is a region, what is fair share. We even had

1 a map, which I mentioned facetiously, indicating
2 a 500-mile view from the satellite of the State of
3 New Jersey, and the first time that I learned that
4 New Jersey might be considered an island or penin-
5 sula. I never knew that.

6
7 Be that as it may, the applicant has, accord-
8 ing to its testimony, attempted to bring about so-
9 called PUD contract zoning with the Township for a
10 period of some four years. In that four-year period,
11 of course, the landmark decisions of both Mount
~~Laurel~~ and Madison have come down.

12
13 Both of those have done a great deal to
14 indicate that the original approach to this prob-
15 lem, taken by Governor Cahill and I believe it was
16 in the first or second message to the legislature,
17 that the time was coming, that you could see on
18 the horizon, how the Federal cases, cases through-
19 out the country, in New York and California, that
20 the approach of exclusionary zoning was already
21 dead.

22 The old concepts that we had under Creskill
wherein Chief Justice Vandervli* said "v...

1 to exclude out, and could do this and could do that.
2 These were all to be handled at the constitutional
3 convention at which he was the great moving party,
4 I understand, and beefed up the zoning powers of
5 municipalities, passed through legislation, and
6 R.S. 40:55, which was originally passed in 1952,
7 and to which most of the zoning ordinances then
8 followed somewhat restrictively.

9 Of course, the cases show and became such
10 an unwieldy document that it finally had to be
11 revised and made a new law on August 1, 1976.

12 As a consequence, now, we are hearing this
13 type of case and I gather the Trial Court is not
14 trying the case in the approach of either a civil
15 litigant attempting to win a judgment in terms of
16 monies or a criminal case wherein someone is trying
17 to impress the commission of a crime upon the other.

18 Rather, I gather the footnotes indicate we
19 are engaged in a sociological investigation due to
20 the fact that various approaches to the legislature
21 have not gone through the legislative process where-
22 in these matters can be handled administratively,
23 although certainly we can see in the foreseeable
24 future that there probably will be regional county
25 planning boards where this type of case will go and

1 be handled on an administrative level with all of
2 the input that those experts can put into a case,
3 such as the PUC does at the present time, if only
4 to mention one illustration of how the administra-
5 tive process could work, and it could very well
6 work now that there has been some 25 years of ex-
7 perience in this area.

8 Since this is the Trial Court's burden,
9 with the original approach, what is it at the end
10 of the plaintiff's case that we have. All three
11 Counsel, in effect, the Planning Board as an inde-
12 pendent party, and we are giving the Township the
13 benefit of having two attorneys whereas, really,
14 there is only one party, that is, the Township of
15 Clinton, and certainly if I have the privilege of
16 trying one of these cases again, I will not ap-
17 proach it from that standpoint, and we will treat
18 it as one government.

19 Now, at the end of the plaintiff's case,
20 faced with the criteria which are outlined by the
21 Oakwood - Madison case, and I am faced with the
22 so-called shifting of the burden, the burden to go
23 forward, I gather, and it would appear to me that
24 as with Point 3 in the Madison opinion, that's what
25 Mr. Sterns points out, it does develop that Clinton

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•Township is a growing community. It is strategically located at the intersection of Route 31, 78, the¹ old 22 still runs through it, and it is in a direct corridor, as is shown by the subsequent State Housing Authority allocations.

While that corridor hasn't extended all the way to the Delaware River, nevertheless it penetrates Hunterdon County in depth.

Colorably, at least facially, Mr, Rahenkamp^fs "comments with regard to the existing and the proposed zoning ordinances demonstrate a failure to fulfill the philosophy of the Madison - Oakwood decision, and while there has been an attempt to fulfill that criteria, nevertheless on the evidence as it stands at this moment, he has indicated that these various attempts have been made in such a way and in such areas as to be unrealistic, inaccessible, lacking in sewer, that even if they were used, that forced sewer mains would have to be installed, placed in a remote portion of the Township, in hilly, according to his testimony, undesirable areas; that there has been refusal to join in various sewer schemes.

therefore, the fiscal non-responsibility approach taken by the Township Council, according

1 to Mr. Rahenkamp which stands uncontradicted at
2 this point, it would appear then that what he is
3 saying to the Court is, yes, there has been an
4 attempt to comply under the pressure of the Oakwood
5 and Madison decision, and under the pressure indeed
6 of our application; but the net result is camouflage,

7 Bierefore, he penetrates the camouflage and
8 points to its inadequacies, at least on the proofs
9 as they stand at this moment, and if this be so and
10 if this were the end of the case and that stood un-
11 contradicted, I think it would be unquestionable
12 that the remedial portion of Oakwood and Madison
13 will immediately go into effect.

14 But the point is, does the burden shift,
15 since I gather the defense will not collapse at
16 this point? It has been vigorous and tenacious
17 and somewhat Churchillian in its approach, and I
18 assume we will be fighting on the beaches. that's
19 all that is left.

20 We have gone through the cities and we are
21 now down to the beaches, and taking that into con-
22 sideration, the fair-share approach of the defendant
23 seems to fall within the interdiction of Madison;
24 that the environmental considerations have been
25 given; that the affirmative action or lower income

1 or least-cost housing have been put strongly in
2 issue by Mr. Rahenkamp, Mr. Akahoshi and Professor
3 of Sociology Mallach, and therefore when all of
4 this is considered, considering that in Point 12
5 of the Oakwood and Madison decision there has been
6 relief for a corporate plaintiff as reward for
7 bringing the inadequacies of the legislation into
8 strong judicial light and disfavor, and coupled
9 with the remedy of remand provisions allowed and the
10 ability of the Court to of course engage independent
11 advice, if that be necessary as part of the remedy,
12 then I therefore feel at the end of the plaintiff's
13 case that the plaintiffs have made a very strong
14 case indicating that their application is more than
15 plausible.

16 Therefore, under the test as set forth by
17 Chief Justice Hall and taking only the evidence at
18 this point, that a developing municipality and its
19 land-use regulations has not made realistically
20 possibly variety of choice of housing, including
21 inadequate provision to afford the opportunity for
22 low and moderate-income housing or, as expressly
23 prescribed, requirements or restrictions which pre-
24 clude or substantially hinder it, a facial showing
25 of violation of substantive due process of equal

i protection, under the State constitution has been
2 made out and the burden, and it is a heavy one,
3 shifts to the municipality to establish a valid
4 basis for its action or non-action.

5 Thus, we approach the problem as to whether
6 or not the walls of Jericho still exist around the
7 Township of Clinton and whether or not Mr. Sterns
8 has been able to bugle them down, or whether Mr.
9 Cain or Mr. Sutton will be able to uphold them.

10 As a consequence, the motions are denied.

11 Since it is 12:20 and my time schedule has
12 been ruined this morning, come back at 1:45. I
13 have a juvenile matter at 1:30.

14 (Luncheon recess.)
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A F T E R N O O N S E S S I O N

1
2
3 R A Y H I L L A R D , residing at 116 Hermanthau Road,
4 Annandale, New Jersey, sworn,
5

6 DIRECT EXAMINATION BY MR. SUTTON:

7 Q Dr. Hillard, how long have you lived at your
8 present address?

9 A Since May 1969.

10 Q Where did you reside before that?

11 A Franklin Township, in Somerset County.

12 Q Where are you now employed?

13 A American Cyanimid Company, in Bound Brook.

14 Q What is your position with this company?

15 A I am in research development, chemical research
16 division.

17 Q Will you tell us your educational background,
18 please.

19 A I have a Bachelor of Science Degree in chemistry
20 from Franklin and Marshall College, and a Master^fs of Science
21 and a Doctorate in chemistry from the University of Delaware.

22 Q Were you at one time a member of the Clinton
23 Township Council?

24 A Yes, sir.

25 Q When were you a member of the Clinton Township

1 Council?

2 A 1972 and 1973.

3 Q While on the Clinton Township Council did you
4 serve on any special committees?

5 A I was the Township representative to the two sewer
6 study groups that were active at that time, the North
7 Hunterdon Regional Study Group and Readington Township-
8 Lebanon Borough Study Group.

9 Q Were you subsequently appointed to the Clinton
10 Township Planning Board?

11 A I served as a counsel representative to the Planning
12 Board in 1972 and 1973 yes.

13 Q And after that were you appointed as a member
14 of the Planning Board?

15 A Yes, sir. I was appointed for a four-year term. I
16 served on the Planning Board in 1974 and 1975. I was Chair-
17 man of the Planning Board during those two years.

18 Q You were chairman during 1974 and 1975; is
19 that correct?

20 A Yes, sir.

21 Q When did you leave the Clinton Township Plan-
22 ning Board?

23 A I submitted a resignation in February of 1976.

24 Q During the period when you were Chairman of
25 the Planning Board, do you know approximately how many

1 meetings would be held each month or, if you want to use a
2 different period, use a different period?

3 A The Planning Board met for various activities approx-
4 imately 50 times, 45 to 50 times a year, during that two-
5 year period,

6 Q While you were Chairman of the Planning Board,
7 did the Planning Board have special committees that were
8 appointed for different projects or different services?

9 A Well, there was a normal sub-division committee; there
10 was a site plan and review committee; and then we had com-
11 mittees appointed from time-to-time to look into special
12 situations.

13 Q During the time you were Chairman of the
14 Clinton Township Planning Board, did major sub-divisions
15 come before the Planning Board for preliminary or final ap-
16 proval?

17 A There was a building moratorium on for part of that
18 period of time when we heard only sub-division applications
19 that had already been presented, but there were a number of
20 sub-divisions considered during that two-year period, yes.

21 Q Do you know what sub-divisions these were and
22 how many lots were involved in the sub-divisions?

23 A The Lanid Corporation came in for several sections
24 on their application. The total application, I think, was
25 for about 220 single-family and they were dealing only with

1 the single-family part of that at that time.

2 Whispering Hills, which was approximately 45 to 50
3 lots, Sunny Meadows, which I think was 19 lots, Stanton
4 Heights, possibly 17 to 20, and MAC Builders was perhaps
5 10 to 12, and Round Valley had an application on their
6 Ellice tract for 25 lots.

7 THE COURT: How many units would be on that?

8 THE WITNESS: 25 units on that.

9 THE COURT: These are all singles that we have
10 "so far. These are all single-family, one-acre lots?

11 THE WITNESS: They varied. The Round Valley
12 Ellice tract and the Lanid Corporation applications
13 were under the cluster provision of the zoning
14 ordinance. The Lanid Corporation would have been
15 under the cluster provision, providing for some
16 multi-family, also.

17 THE COURT: And multi-family under Lanid?

18 THE WITNESS: Yes.

19 THE COURT: The rest were the usual sub-
20 division, one-acre lot?

21 THE WITNESS: One-acre or two-acre; yes.

22 Q Could you tell us approximately where each of
23 these sub-divisions are located, where the land is located?

24 A The Lanid tract is just south of Clinton on Hamden
25 Road. Whispering Hills is in the southern part of the

1 Township on Lilac Drive; Stanton Heights and Sunny Meadows
2 are in the area of these Stanton Grange on County Road 18;
3 MAC, I believe, is on Valley Crest Road, and Ellice, Round
4 Valley Ellice tract is on Haytown Road, Petticoat Lane.

5 Q Any of these sub-divisions served by public
6 water or public sewers?

7 A The Lanid Corporation is being served by public water
8 and public sewer, I believe the Whispering Hills is also
9 served by public water but not by sewer.

10 Q Now, you mentioned that there had been a
11 moratorium on new major sub-divisions; is that correct?

12 A Yes, sir.

13 Q What was the purpose of the moratorium?

14 A It was to give the Planning Board and the Planning
15 Board planner an opportunity to work on a master plan, a
16 land use plan and a revised zoning ordinance.

17 Q When did the moratorium come to an end?

18 A Well, the moratorium, as I recall, went into effect
19 in November of 1973 and was to extend until", I think, July
20 of 1974.

21 We subsequently requested and got an extension of
22 that moratorium to finish up the zoning ordinance.

23 The zoning ordinance was then turned over to the
24 Council, I believe, in August or September and subsequently
25 adopted by the Council, I believe, in November of 197^,

1 at which time the moratorium was automatically cancelled,

2 Q During the period, Dr. ftillard, when you
3 were chairman, were there also minor sub-divisions that
4 came before the Planning Board?

5 A Yes. All minors were received and acted on.

6 DIE COURT: What is the criteria, four and
7 over?

8 THE WITNESS: Four and over. Up to three is
9 a minor, including three.

10 Q Was there a special minor sub-division com-
11 mittee?

12 A Yes, sir. Three members of the Planning Board were
13 appointed to that sub-division committee.

14 Q Do you know approximately how many minor
15 sub-divisions were approved during the period of time that
16 you were chairman?

17 A It would be roughly, I guess, in the neighborhood
18 of about 80 to 100 during that two-year period.

19 Q Now, when you were chairman, what ordinances
20 did Clinton Township have that pertained to zoning?

21 A We were operating under the 1962-69 zoning ordinance
22 and the sub-division ordinance which had been in effect
23 quite a few years, I don't recall exactly when that was
24 first adopted and numerous amendments to that ordinance,
25 there were a few other ordinances, such as drivewa5^ opening

1 permits, a few other things of that type, which the Planning
2 Board had the responsibility of administering.

3 Q Were any of the ordinances under study for
4 the purpose of updating or for revision or for amendment?

5 A Yes, sir. The Planning Board had a program outlined
6 to, well, first to do the land-use study and develop a
7 land-use plan and update the zoning ordinance, and subse-
8 quent to that to follow up on several of our other ordinances
9 which we felt were deficient in many respects, such as the
10 sub-division ordinance, and a great deal of work was done
11 on that.

12 There was an interim ordinance to the '69 zoning
13 ordinance providing for cluster development and multi-
14 family in the Township.

15 Q Now, I believe you testified that during the
16 period of the moratorium on new major sub-divisions, the
17 Planning Board met to work on the zoning ordinance; is that
18 correct?

19 A Yes, sir.

20 Q Do you know approximately how often the Plan-
21 ning Board would meet to work on the new zoning ordinance?

22 A That varied from time-to-time, depending on what
23 the planner was doing and the amount of material for review.

24 I would guess that during the early part of 1974,
25 during 197^- through the recommendation of the zoning

1 ordinance to the Council, that we probably met with the
2 planner at least twice a month. *Tti&t* would have been
3 through the first eight, nine months of 1974.

4 Q And I believe you testified that subsequently
5 an amended zoning ordinance was recommended to the Township
6 Council; is that correct?

7 A Let^fs make sure we are talking about the same thing.

8 There was an amendment offered in March or April of
9 1974 to the existing zoning ordinance. Biere was a revised
10 zoning ordinance offered to the Council in September of 1974.

11 Q Now, first the amendment. Do you know what
12 the amendment consisted of, the March amendment?

13 A The basic change that the amendment provided was to
14 permit clustering in the F-1 zone areas, the one-acre zoned
15 areas, and the opportunity, if desired, to provide multi-
16 family in those areas under certain conditions.

17 Q Then subsequently a revised zoning ordinance
18 was recommended to the Township Council; is that correct?

19 A - Yes.

20 Q Was this revised zoning ordinance passed by
21 the Township Council?

22 A Yes, it was.

23 Q And could you tell us generally what changes
24 the revised zoning ordinance made in the existing ordinance,
25 the zoning ordinance at that time?

1 THE COURT: Do you have a copy of the re-
2 vised zoning ordinance marked as an exhibit?

3 MR. SUTTON: I believe it is a joint exhibit.

4 THE COURT: Would it be fair to show him that
5 and ask him what kind of changes you are talking
6 about, to have some kind of sequence to have it
7 fit.

8 THE WITNESS: It's always better to look
9 at something.

10 MR. SUTTON: I believe those were put in as
11 joint exhibits.

12 THE COURT: Let him look at it.

13 MR. STERNS: Is there an exhibit number?

14 THE COURT: The revised ordinance of Sept-
15 ember of 197[^]. Let's get a number for it.

16 MR. SUTTON: That would be J-2.

17 THE COURT: J-2?

18 MR. SUTTON: Yes.

19 THE COURT: All right.

20

21 BY MR. SUTTON:

22 Q Dr. Hillard, would you tell us generally
23 what changes this revised 1974 ordinance made from the
24 earlier ordinance?

25 A This revision contained basically the multi-family

1 cluster provision that we had in the amendment that was
2 earlier-offered to the Council.

3 It was extended in a sense that the earlier amend-
4 ment did not include F-2 zones. This one now includes
5 F-2 zones which can be clustered, also.

6 There was a special use permit section added that
7 was not in the earlier zoning ordinance and the zoning map
8 itself has some changes in that the lands in the northern
9 part of the Township, part of the lands in the northern
10 part of the Township that had been previously zoned F-1,
11 were re-zoned F-2.

12 It's an area of land north of 78 and there was an
13 area in the southern part of the Township between Route 31
14 and the Round Valley Reservoir lands that was expanded.
15 That was changed from an F-1 to an F-2; also.

16 There were some relatively minor changes in some
17 commercial zones. There may have been some very minor
18 changes in some of the zoned areas. I don't recall exactly
19 what they were.

20 Q Do you know generally the reason why there
21 were changes in certain areas from F-1 to F-2?

22 A There was a land-use plan done back in approximately
23 1960 by a planner for the Township at that time, and some
24 of the lands in the northern part were recommended to be
25 F-2 at that time.

1 The Council, for reasons probably best known to
2 them at that time in roughly 1962, chose to change those
3 zones and make them F-1.

4 The reason that they were made F-2 were because of
5 steep slopes, questions of water availability, things of
6 that type; so these were recommended back to F-2 as back
7 in the earlier master plan that was done.

8 Q When you became chairman, the Township also
9 had a subdivision ordinance. Do you know the year that
10 that subdivision ordinance had been adopted?

11 A No, I don't.

12 Q The question that I wanted to ask is, was
13 work done or any study being made of the subdivision
14 ordinance?

15 A Yes, there were. I don't recall the year of adop-
16 tion of the original subdivision ordinance, but during its
17 existence up until approximately 1975, early '75> late
18 '7^j there had been a number of amendments to that ordi-
19 nance.

20 As a result of this, there were a number of incon-
21 sistencies that had developed in the ordinance. There
22 were a number of other changes primarily related to engin-
23 eering factors that should have been improved, we felt,
24 so there was a comprehensive study done on the subdivision
25 ordinance to update, reduce the inconsistencies and hope-

1 fully make it more readable and understandable to the
2 public.

3 Q Do you know of the approximate period of
4 time when work was done improving the subdivision ordi-
5 nance, when the changes were adopted?

6 A The work on the subdivision ordinance would have
7 been started sometime in early 1975> March, something like
8 that. I don't recall when that was adopted.

9 Q Now, was work also performed while you were
10 chairman on any other ordinances pertaining to zoning?

11 A The Planning Board, as a whole or members of the
12 Planning Board as committees, worked on the flood plain
13 ordinance which was part of the plan to delineate the
14 flood hazard areas along the South Branch, in agreement
15 with the Army Corps of Engineers¹ delineation. This was
16 necessary, I believe, to permit the people in that area
17 to obtain flood insurance.

18 There was a storm water management plan to cover
19 surface water run-off. There was a commercial site plan
20 ordinance that was adopted at that time and adopted by
21 the Council. ,

22 There was also some fair amount of work put on a
23 trailer ordinance to try to work out some sort of a trailer
24 fee schedule. That was never sent to Council for adoption.

25 Q You had mentioned a land use plan.

1 During the time when you were chairman, was
2 there any activity so far as a land-use plan is involved?
3 Was any contract entered into relative —

4 A Yes. The Planning Board or the Council applied to
5 the State for a state grant to develop a comprehensive land-
6 use plan.

7 That application was made sometime in February of
8 1975. I don't recall exactly when that application was
9 made, but the application was made and the grant was ob-
10 tained to carry out a land use, comprehensive land-use
11 study.

12 Q Was a contract entered into with a planning
13 consultant firm to work on the land-use plan?

14 A Yes, sir.

15 Q What was the name of the firm?

16 A Robert Catlin Associates; Robert O'Grady was the
17 planner.

18 Q Did the State contribute funds for this plan?

19 A It was -a matching grant. The Township put up \$10,000
20 and the State provided \$10,000.

21 Q And of course this land-use plan was not com-
22 pleted until after you resigned from the Planning Board?

23 A That's correct.

24 Q During the time you were chairman, were you
25 approached by Round Valley, Inc. relative to a PUD de-

1 velopment of the property located on Route 31 for 790
2 acres?

3 A Yes. Round Valley made a presentation to the Plan-
4 ning Board and Council in January of 197^.

5 Q Did you have communication with any repre-
6 sentatives of Round Valley?

7 A After the presentation?

8 Q Yes.

9 A Yes, there was communication from time-to-time,
10 some oral and some written communication, correspondence
11 between the Planning Board and the Round Valley repre-
12 sentatives or their attorney.

13 Q Now, you mentioned a presentation. Will you
14 tell us what the presentation consisted of?

15 A The presentation was held at the Township Municipal
16 Building. It was given, to the best of my recollection,
17 primarily by Mr. Rahenkamp.

18 It consisted, as I recall, of some slides and a
19 number of drawings, outlining what their proposal was.

20 Biey provided a fair number, I think, a sufficient
21 number probably for all the Township and Council members
22 of a booklet outlining their proposal, along with some
23 other documents.

24 Q Were there any other meetings held on this
25 proposal with representatives of Round Valley, Inc.?

1 A There was a subsequent meeting, I think, sometime
2 in late March or early April which was, to my recollection,
3 basically just a review of whether we had any questions
4 and what their interests werej general discussion.

5 Q Were members of the Planning Board invited
6 to see a PUD development by Round Valley?

7 A Yes. Round Valley extended an offer to visit Flying
8 Hills in Readington, Pennsylvania.

9 Q Did members attend?

10 A Members of the Council and Planning Board both at-
11 tended. I can't say all of them did. The bulk of the
12 members of the Council and Planning Board attended.

13 Q Did you attend?

14 A Yes.

15 Q At the time you first became chairman, who
16 was the planning consultant?

17 A Thomas E. Moore was the planner in 1974, and sub-
18 sequently we hired Robert O'Grady in, I believe, the end
19 of January or early February of 1975.

20 Q At what time while you were chairman was a
21 determination made to obtain a new planner?

22 A The Board determined in September of 1974 to not
23 renewMr. Moore^fs contract for 1975.

24 His contract in 1974 required that he be notified
25 three months prior to its expiration if the contract was

1 not to be renewed. To meet that requirement of his con-
2 tract he was notified in September and action was taken
3 to hire a new planner at that time.

4 Q For what period of time did his contract
5 run? Was it a one-year contract?

6 SHE COURT: Moore or Catlin?

7 MR. SUTTON: Moore.

8 **THE COURT: You are still on Moore?**

9 **MR. SUTTON: Yes.**

10 **A Yes, Moore's contract at that time was a one-year**
11 **contract.**

12 THE COURT: And you replaced him with Catlin,
13 O'Grady? Was that a two-year contract?

14 THE WITNESS: No. O'Grady was also a one-
15 year contract.

16 Q Did the Planning Board subsequently inter-
17 view planners in order to obtain a new planner?

18 A Yes, sir. When the decision was made not to renew
19 Mr. Moore's contract, I appointed a committee to contact
20 and interview planners, which they did.

21 Q Who was on the committee?

22 A Mr. Wetstein was heading the committee. I believe
23 the other two members of the committee were Mr. Wurtz and
24 Mr. VanNess.

25 Q Did Round Valley submit any recommendations

Hillard-def-direct

1 to the Planning Board as to the planner?

2
3 A Yes, sir. About the time we decided not to renew
4 Mr. Moore^f's contract, I had a phone conversation with Mr.
5 Eherian and indicated to him at that time that an earlier
6 schedule which we hoped to meet with respect to reviewing
7 their application could not be met because we would be
8 switching planners, and at that time he sent a note to me
9 recommending planners.

10 I am sorry. I would not say he recommended plan-
11 ners. He simply gave me the names of one or two people
12 that Mr. Rahenkamp felt were qualified to review PUD^f's.

13 Q Did you interview any of those persons named
14 by Mr. Eherian?

15 A Yes. Mr. Queale was one of those people, and Mr.
16 Queale was interviewed.

17 Q Did you interview a number of people.

18 A There were six or seven individuals interviewed,
19 yes.

20 Q Now, who made the final determination as to
21 the planner? Was it the committee or the full Planning
22 Board?

23 A The committee recommended two of the ones that they
24 had interviewed. They recommended two to the full Board
25 for consideration.

It is my recollection that the full Board then

1 interviewed those two individuals and selected Mr. O'Grady.

2 Q Who were the two that were recommended?

3 A - Mr. Queale and Mr. O'Grady.

4 Q After Round Valley, Inc. proposed the PUD,
5 was any study made by the planner, Mr. Moore, at that time
6 of their application?

7 A Yes, sir. Shortly after the presentation I had
8 asked Mr. Moore at that time to review the information
9 given to us by Round Valley and to give us a report on his
10 review.

11 Q Now, Dr. Hillard, I show you P-10 and ask
12 you if that is the report that Mr. Moore submitted?

13 A Yes, it is.

14 THE COURT: May I have the date on it,
15 please?

16 THE WITNESS: February the 21st, 1974.

17 THE COURT: The presentation was made in
18 January and you got the report in February of the
19 same year?

20 THE WITNESS: That's right. The presenta-
21 tion, I think, was on January 28, 1974; the review
22 was requested and the report was written on February
23 21, 1974, and there was a meeting, to the best of
24 my recollection, held a week following that regard-
25 ing this report.

1 Q Were the members of the Planning Board sup-
2 plied with copies of that report to read?

3 A Yes, they were.

4 Q And there was a discussion relative to the
5 report?

6 A Yes, there was,

7 Q, And what was determined as a result of the
8 discussion?

9 A The basic feeling, I suppose, was that the PUD
10 application before us was a very extensive thing, some-
11 thing which neither the Planning Board and perhaps even
12 the planner, almost by his own admission, was really not
13 fully understood, all the ramifications of it, and it was
14 felt that there would be some time required to review this
15 adequately before making a determination one way or the
16 other on the application or on the proposal.

17 Q You had testified, Dr. Hillard, that at
18 some subsequent time there was a determination to obtain
19 a new planner.

20 Do you know when the determination was made
21 to obtain a new, planner?

22 A The determination was made to not renew Mr. Moore's
23 contract in September of 1974 and at the same time, as I
24 mentioned before, the committee was appointed to interview
25 planners.

1 Q Well, was their discussion before September
2 of 1974 as to whether or not the Planning Board desired
3 to renew Mr. Moore's contract?

4 A There had been some problem with the relationship
5 between the Planning Board and Mr, Moore for sometime,
6 possibly the fault of both parties.

7 In 1972, prior to my being Chairman of the Planning
8 Board, discussion was held on the renewal of Mr. Moore's
9 contract and it was decided not to renew Mr. Moore's con-
10 tract at that time.

11 However, there was a change of mind, I don't re-
12 call the reasons at the time. Mr. Moore's contract was
13 extended into 1973. I am sorry. I have my years wrong.

14 The discussion, I believe, was held in 1973 and
15 his contract was renewed for 197^.

16 I suppose I'd have to say that the Board was not
17 entirely satisfied with a relationship with Mr. Moore and
18 it was - even without the PUD application - I doubt
19 seriously that Mr. Moore's contract would have been renewed.

20 THE COURT: You are saying the PUD applica-
21 tion had something to do with his dismissal or non-
22 renewal? I am trying to see where it is relevant.

23 THE WITNESS: Well, I don't think his con-
24 tract would have been renewed without the PUD, but
25 the PUD made it evident to the Board that we would

1 not be renewing his contract because we did not
2 feel he had the background or experience to give
3 us the guidance that we needed on this.

4 OHE COURT: That's the relevancy of this.

5 Q Now, Dr. Hillard, after Mr. O'Grady or
6 Catlin Associates were retained under contract, Mr. O'Grady
7 became the principal Clinton Township planner from the
8 firm, and was the Round Valley application and papers sub-
9 mitted to Mr. O'Grady to examine?

10 A Mr. O'Grady was given access to all information in
11 the Planning Board office which included the Round Valley
12 proposal.

13 At the time the contract was signed, we met with
14 Mr. O'Grady and pointed out information that was avail-
15 able to him, that he may not have had already, but was
16 given the Round Valley information to be considered in any
17 land-use study that he would be undertaking.

18 Subsequent to that, he was specifically asked to
19 report on the Round Valley application following - I
20 guess I should say more formal submission by Round Valley
21 to the Planning Board in June, I think, of 1975.

22 Q Let me ask you this question first.

23 THE COURT: Do you mean for a zoning change?
24 Is that the idea, to allow PUD? Your ordinance
25 didn't allow PUD?

1 THE WITNESS: No, it did not.

2 THE COURT: You never adopted so-called PUD-
3 enabling legislation, did you?

4 THE WITNESS: No, we did not.

5 THE COURT: You were asking for a zoning
6 change in June of 197^?

7 THE WITNESS: Yes.

8 Q When was Mr. O'Grady retained?

9 A His first contract, I think, started February 1,
10 1975.

11 Q Let me ask you this question. Did Mr. O'Grady
12 submit a report to the Planning Board relative to the
13 Round Valley proposal?

u A Yes, he did.

15 Q I show you P-25 and ask you to examine this
16 and let me know if that is the report.

17 A Yes, it is.

18 Q And would you read for us the last paragraph
19 of the report.

20 A "Without the benefit of these comprehensive studies,
21 i, as a professional planner, am in no position to make a
22 judgment on the merits of the zoning request, and I would
23 urge the Township to take no favorable action on the re-
24 quest until the studies are completed.

25 "The land-use plan studies will be completed within

1 a year and I consider this to be a reasonable period of
2 time in terms of the magnitude and possible ramifications
3 of the proposed development."

4 Q Now, after receiving this letter, was this
5 letter distributed among the members of the Planning
6 Board?

7 A Yes, it was.

8 Q And was there a discussion of this letter
9 by the members of the Planning Board?

10 A I am sure there was a discussion of it. I can't be
11 absolutely positive that I can pinpoint any particular
12 date.

13 Q What was the determination made by the Plan-
14 ning Board at about that time, so far as the Round Valley
15 proposal was concerned?.

16 A The Board's position was that we had obtained the
17 State grant for the land-use plan, we had the planner work-
18 ing on this, he had been given specific instructions to
19 consider PUD in that land-use plan, how it would fit into
20 the Township, and that until he could come back with a
21 possible recommendation to include PUD provisions in our
22 ordinance, that we were not in a position to act.

23 Q As I understand your earlier testimony, you
24 resigned from the Planning Board before the land-use plan
25 was completed; is that not correct?

1 A That's right.

2 THE COURT: You had seen drafts, hadn't you?

3 THE WITNESS: I don't recall seeing a draft
4 of the land-use plan. I had seen copies of the
5 initial three studies which did not include the
6 land-use plan.

7 THE COURT: It came in study form like interim
8 reports?

9 THE WITNESS: Biree interim reports, and the
10 fourth would have been the land-use plan.

11 THE COURT: We have those exhibits, I be-
12 lieve, Mr. Sutton, if you would like to show him
13 those documents. It might help him and it would
14 also tie our record closer together. P-51(b), (c)
15 and (d).

16 Q Dr. Hillard, I show you P-51(a), Interim
17 Report No. 1, and ask you if that was presented.

18 MR. STERNS: Would you identify it by —

19 Q It is Interim Report No. 1.

20 A Existing development, yes, sir. I received this
21 one.

22 Q But did you read the report, did you study
23 it?

24 A Yes.

25 THE COURT: And discuss it with your fellow

1 Planning Board members somewhere along the line?

2 I would like to know what part you played.

3 THE WITNESS: As each of these reports were
4 presented to the Planning Board, we had discussions
5 on them with the planner.

6 Q I show you P-51(b), Interim Report No. 2,
7 and ask you if you received that while you were on the
8 Planning Board?

9 A Yes. This is entitled "Financial Conditions;" yes,
10 sir, I did see this one.

11 Q Were there discussions with the planner on
12 that, also?

13 A Yes.

14 Q And I show you P-51(c), Interim Report No. 3,
15 "The Natural Environment," and ask you if that was also
16 presented by the planner while you were still chairman.

17 A I have a copy of this one and I assume from that
18 that it was presented. I don't specifically recall review-
19 ing this one.

20 Q I show you Interim Report No. 4 and ask you
21 if you had that report and whether you reviewed it.

22 A The same applies to this report. We may have. I
23 don't specifically recall reviewing it, this report.

24 MR. STERNS: The title?

25 MR. SUTTON: That's "Population."

1 Q "Environmental Assessment," have you seen that?

2 A I don't recall seeing that one.

3 TOE COURT: Who has that? Mr. Sutton, may
4 I have those?

5 MR. SUTTON: Yes. I believe that's all the
6 questions I have.

7 THE COURT: Let Mr. Cain go ahead. I assume
8 a continued direct, and then you cross-examine the
9 witness as to everything.

10 MR. STERNS: Yes, your Honor. I just won-
11 dered procedurally, since I am not raising any
12 objection and since he is a Planning Board member,
13 his direct examination is going to be afforded to
14 the attorney for the Town Council, as well?

15 THE COURT: There is really one government.

16 MR. STERNS: As long as it is not repetitious.

17 MR. CAIN: Repetition sometimes enhances the
18 learning process. However, we try to avoid that
19 because we know in this company it only has to be
20 said once.

21

22 DIRECT EXAMINATION BY MR. CAIN:

23 Q Dr. Hillard, you mentioned the moratorium,
24 and I believe you referred to it as a building moratorium.
25 What is a building moratorium?

1 A The moratorium applied to really the subdivision,
2 the new subdivision. The only moratorium, the only thing
3 we were not doing was reviewing new subdivision applica-
4 tions.

5 We were reviewing all existing applications, pre-
6 liminary and final, site-plan review, minor subdivisions.
7 Those were still being handled in the normal manner.

8 The only thing that was not being done was that we
9 were not accepting new major subdivision applications.

10 Q Then the term "building moratorium" actually
11 doesn't apply, does it?

12 A No restriction on building.

13 Q Permits could still be issued?

14 A There was a fair amount of building at the time,
15 yes, sir.

16 Q Now, they are words of art, subdivision,
17 moratorium, interim ordinances, and so forth. I wanted
18 to make sure we have the terms clear.

19 You indicated that in 1973, while you were
20 a member of the Board, there was a discussion not to renew
21 Mr. Moore's contract.

22 How long was Mr. Moore a planner with the
23 Planning Board; do you recall? When was he initially
24 hired?

25 A I don't recall exactly when he was hired. He was

1 hired before I went on the Council, which was in January
2 of 1972. I am not sure if he was just completing his
3 first year as Board planner or second year as Board plan-
4 ner at that time.

5 Q He was the planner during your first year's
6 membership on the Board in 1972?

7 A Yes.

8 Q And in 1973?

9 A Yes.

10 Q When the Board interviewed Mr. O'Grady and
11 Mr. Queale, did I hear you say that you had the Round
12 Valley submissions already in hand, the materials which
13 came from Round Valley? Were they in the Board's posses-
14 sion at the time —

15 A Yes. The original presentation by Round Valley to
16 the Planning Board was in January of 197[^]. She planners
17 were interviewed in September, October of 197[^]->

18 Q I understand then that one of the concerns
19 was to hire a planner who had experience in planned de-
20 velopmentj is that correct?

21 A We had several guidelines set up in hiring a plan-
22 ner. Based on our experience with our planner at the
23 time, we were looking for a planner that we felt we could
24 work together with better than we could with Mr. Moore.

25 We had a number of problems trying to work with Mr.

1 Moore.

2 Secondly, we were looking for someone who was not
3 working as a single individual or a single planner. We
4 wanted a member of a firm so that we would have whatever
5 back-up resources that firm would have,

6 Thirdly, we were looking for someone who was at
7 least indicated to us that they had a greater familiarity
8 with planned unit developments than Mr. Moore had.

9 Q And you had asked that Mr. O'Grady, while
10 doing his master plan, to take into consideration the
11 concept of PUD and whether it would fit in the Township?
12 Was that part of his mission?

13 A Yes, sir.

14 Q I take it, then, that he did not complete
15 this after his tenure with the Board was over?

16 A Yes, sir, that's correct.

17 MR. STERNS: I object to the form of the
18 last two questions. We are on direct examination.

19 I think the last two questions, although in
20 another form appropriate, were leading and Counsel
21 was stating conclusions.

22 THE COURT: They are definitely leading.
23 Trailing along to find out when Mr. Moore was
24 executed and when Mr. O'Grady came aboard, nothing
25 material in nature —

1 MR. CAIN: I don't think we are particularly
2 critical of the plaintiff in their direct. Wide
3 latitude has been allowed on both sides.

4 Q When did you go to Flying Hills?

5 A I think it would have been April, late April, early May,
6 perhaps, the middle of May of 197^-

7 Q Was there any discussion of that project by
8 the Board members at a Board meeting after you returned?

9 A There was a general discussion of the whole concept
10 of PUD, a concept admittedly none of us were familiar with
11 at the time the Round Valley proposal came in. I say a
12 general discussion.

13 Everybody sort of expressed their feelings about
14 what they thought about PUD, if this was PUD in its
15 physical aspect. We didn't get into the discussions of
16 social or economic impact, things of that type; just the
17 physical aspect of PUD.

18 THE COURT: This was up in Reading?

19 THE WITNESS: Reading, Pennsylvania, yes,
20 sir.

21 Q Other than indicating that the Board wasn't
22 familiar with the concept, did the Board reach any con-
23 elusions after visiting Flying Hills?

24 A If there was any conclusion reached, it would have
25 been that we have a great deal more to learn about PUD's,

1 We did not reach any conclusion or even discussion of PUD
2 in terms of a yes or no situation.

3 THE COURT: Do you think your cross-examina-
4 tion will be extensive?

5 MR. STERNS: I don't think it will be more
6 than an hour.

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1 CROSS-EXAMINATION BY MR. SOERNS:

2 Q! Dr. Hillard, will you indicate when you
3 terminated your responsibilities with the Planning Board?
4 What date were you completely finished with your respon-
5 sibilities as a chairman of the Planning Board?

6 MR, CAIN: I am having difficulty hearing
7 Mr, Sterns.

8 Q What was the last date on which you had re-
9 sponsibilities as Chairman and member of the Planning
10 Board?

11 A I submitted a resignation some date in the first
12 week of February of 1976. I was inactive on the Board
13 about three or four weeks prior to that.

14 Q So that, roughly speaking, from January 1976
15 on, would you not be familiar with the activities of .the
16 Planning Board? Would that be a fair statement?

17 A Yes.

18 Q Going back, I believe, when you were em-
19 ployed at the American Cyanamide in Bound Brook, how long
20 had you been employed at that location? How long have
21 you been employed by American Cyanamide?

22 A Since 1974.

23 Q Has it always been at that location?

24 A Yes, sir.

25 Q I have just taken a quick look at a road

1 map. Would it be fair to say that it is about 30 miles
2 from Clinton Township?

3 A From my home to the plant it is 23 miles if I take
4 Route 78 and 287, and 18 miles if I take Route 22.

5 Q When did you move to Clinton Township?

6 A In 1969.

7 Q Where did you reside before that?

8 A Somerset County, Franklin Township.

9 Q About how far was that from the plant?

10 A About nine miles.

11 Q Turning now to some of the issues that were
12 raised; first off, I would like to talk to you a bit about
13 the various applications that were approved by the Planning
14 Board during your tenure, and I believe you cited them as
15 Lanid, Whispering Hills, Sunny Meadows, Stanton Heights,
16 Mack Builders. Were they all single-family detached units?

17 A All except the Lanid Corporation. The Landi
18 Corporation application is for approximately 220 single-
19 family units under the cluster multi-family provision,
20 which would give them an equal number of multi-family units,
21 also.

22 Q Did they indeed during your tenure apply
23 for multi-family units?

24 Let's define terms. My question was single-
25 family detached, in other words, detached residences. Did

1 they build anything else other than single-family detached?

2 A They have not as of this date built anything other
3 than the single-family.

4 Q !• During your tenure on the Board, did they
5 apply for multi or attached multi-family, or apartments,
6 or anything of that nature?

7 A They submitted a site plan for the multi-family
8 portion of that.

9 Q Was it considered by the Board during your
10 tenure?

11 A The plan they submitted was considered, yes.

12 Q Was action taken on it?

13 A They came in with a proposal and it was discussed
14 and they went back to review their proposal, and I have no
15 idea where that situation stands today. We did not turn
16 their proposal down.

17 Q Nor did you approve it; is that correct?

18 A There was nothing to approve at that point.

19 Q, So that again, tore-ask the question, during
20 your tenure on the Planning Board, did you approve for
21 Lanid any multi-family housing, anything other than single-
22 family detached housing?

23 A We did not approve anything because we did not have
24 anything to approve.

25 Q You did approve something for Lanid, I think?

1 A Yes.

2 Q I "What was that?

3 A We approved the single-family portion which they
4 came in for.

5 Q Now, with regard to all of those that I
6 have mentioned, that I repeat what you mentioned, do you
7 have any idea what the price range of those houses are?

8 A No, I don't know. Any numbers I would have had
9 would have been several years old.

10 Q Would you have had numbers at that timej
n was that a consideration of the Planning Board, the price
12 range? Was the information available to you?

13 A It was not. I mean, it was not requested. It may
14 have been volunteered. It was not a factor in our con-
15 sidering anything.

16 MR. SUTTON: Your Honor, I would object to
17 the question if it is not a factor in the considera-
18 tion of the Planning Board.

19 MR. STERNS: I am sorry.

20 MR. SUTTON: Any witness who would have hear-
21 say knowledge as to the price range - Dr. Hillard
22 has testified that this is not something that is
23 asked, the price range. If you have any informa-
24 tion on what he heard, but I don't think that is
25 proper testimony.

1 THE COURT: He went out of business in
2 February of 1976. Mount Laurel has been on the
3 books since March of 1975. It should have been a
4 factor.

5 MR. STERNS: My question is what Mr. Sutton
6 answered, but I don't think the witness answered
7 it, namely, did you consider price as a factor.
8 Mr. Sutton said they did not, and that's the ques-
9 tion I am asking.

10 A (Continuing.) No, sir. Price was not considered
11 as a factor on the applications that we had before the
12 Board at that time.

13 Q Did you conceive it as a responsibility of
14 the Planning Board to ascertain the price of the housing
15 or the kind of income level that purchasers of the housing
16 would have to have? Was that ever a consideration of the
17 Planning Board during your tenure?

18 A You have to repeat the question.

19 Q So that I don't repeat it, I am always ask-
20 ing questions only with regard to your tenure. I don't
21 expect you to have any knowledge since the time you left.

22 Did the Planning Board consider as a factor
23 the price of housing that was proposed to it?

24 A I don't think at anytime we asked any applicant
25 for the price range of the housing that they were going

1 to be putting on their subdivisions.

2 Q Now, Dr. Hillard, you testified at a certain
3 point in time that there was an amendment to the zoning
4 ordinance to permit cluster housing, and I believe you
5 testified that was in about March or April of 197^?

6 A Yes.

7 Q Is it not a fact that that amendment was
8 adopted because Judge Beétel ordered it in a case?

9 A No, sir. The work on that amendment was started
10 in the latter part of 1973 and I don't think we had any-
11 thing before Judge Beétel at that time regarding multi-
12 family.

13 Q Was Mayor Walls a member of the Planning
14 Board during any of the time that you were?

15 A Yes, sir.

16 Q Did Mayor Walls ever state at a Planning
17 Board meeting, "We are adopting this because the Judge
18 ordered it"?

19 A No, sir, I never heard him say that.

20 THE COURT: I don't recall ordering them,
21 either. I think the statement was made in the
22 newspaper. "We are passing this to satisfy Judge
23 Beetel."

24 MR. STERNS: Eiat's correct. I shouldn't
25 have used the word "order."

1 THE COURT: That's quite right.

2 MR. STERNS: I definitely don't want to
3 create --

4 THE COURT: We have a meeting once a year of
5 all the municipal officials. I believe I gave a
6 talk or Judge Furman gave a talk, and I think Mr.
7 Walls, as Mayor, heard Judge Furman say this, and
8 confused it. We didn't have any case before me at
9 that time that I know of.

10 MR. STERNS: Let me withdraw the question
11 because I did state it inaccurately.

12

13 BY MR. STERNS:

14 Q Did you, in recommending the amendment to
15 the ordinance to the Township Council, have in mind any
16 considerations of judicial decisions or to satisfy Judges,
17 or anything like that? Was that a matter that the Planning
18 Board discussed?

19 A No, sir. I don't think that that was the factor
20 that initiated the cluster and multi-family concept. Per-
21 haps it would be appropriate to review a little bit what
22 was happening at this particular time.

23 Q I will get to that but I would like you to
24 answer the question.

25 A To answer your question --

1 MR, SUTTON: Your Honor, it might be neces-
2 sary to go into that in order to fully answer Mr.
3 Sterns¹ question.

4 MR. STERNS: Your Honor, they can get into
5 that on redirect.

6 THE COURT: He asked a very direct question.
7 You got your answer. His answer is no.

8 Q Turning next to the revised zoning ordinance
9 which you testified to, which would have been in 197^{^j} as
10 well, later in the year, the entire revision of the zoning
11 ordinance; is that correct?

12 A Yes, sir.

13 Q First of all, with regard to that revised
14 zoning ordinance, what expertise or what support did the
15 Planning Board have in revising it?

16 A The planner was working on this with us.

17 Q Was Mr. Moore principally responsible for
18 it?

19 A Mr. Moore was responsible for the drafts. The Board
20 reviewed all drafts, that he had presented and there was
21 discussion on many points on his draft, on his drafts, and
22 there were some changes made as a result of some of the
23 discussions.

24 Q Were there any other professionals involved
25 other than Mr. Moore?

1 A Only the engineer and the attorney on engineering
2 or legal questions.

3 Q The engineer being the Township engineer?

4 A Yes, sir.

5 Q Does the Township engineer generally play a
6 role in the Planning Board, during your tenure, in Planning
7 Board matters, considerations? Was he available to you
8 as an expert regularly?

9 A Yes, sir.

10 Q Now, anybody else other than who you men-
11 tioned in terms of professionals?

12 A Those were the people we used directly, the at-
13 torney - I mean, the planner and engineer may have used
14 other resources available to them, but these are the two
15 people we relied on, three people.

16 Q With regard to that zoning ordinance, if I
17 recall, you said that you retained cluster and extended it
18 to F-2 zones.

19 Can you please first describe for me the
20 difference between F-1 and F-2 zones?

21 A F-1 is a one-acre and F-2 is a two-acre zone.

22 Q You then indicated with regard to the zoning
23 map that you put a portion of land in the northern part of
24 the county from F-1 to F-2.

25 In other words, you moved that from the one-

1 acre to two-acre zone, and also a portion of land on
2 Route 31 to the reservoir from F-1 to F-2?
i

3 A That's correct.

4 Q Would the portion along 31 include part of
5 the land that's the subject of this case?

6 A No, sir, I don't think any of the lands that is
7 the subject of this case for change, I don't see that they
8 were.

9 THE COURT: You still have F-1 and F-2?

10 THE WITNESS: The lands involved are ROM-1
11 and F-1 in the '74 revised ordinance.

12 THE COURT: ROM on the east side and F-1 on
13 the west side where the golf course is; is that
14 right?

15 THE WITNESS: That's right.

16 Q Now, I believe you indicated with regard to
17 the changes that were made in that ordinance, - let me
18 ask you this first.

19 Were those changes where you did change from
20 F-1 to F-2, from one-acre to two-acre zoning, were those
21 changes recommended by Mr. Moore? •

22 A I don't know if those - I don't recall if those
23 changes were initiated by Mr. Moore. They may have been
24 in some cases. I don't know that they were in all cases.

25 Q Now, you did testify that that had been

1 recommended by a previous planner in 1960?

2 A Approximately that time, yes. -

3 Q Do you know who that planner was?

4 A Russell VanNess Black.

5 Q How long was he the planner for the community?

6 A I don't know. That was before I was involved.

7 Q But, in any event, they had been recommended
8 in 1960 and now sometime late in 1974, 14 years later, you
9 act on it. How did you happen to act on it at that time?

10 Well, what was the special impetus or cause,
11 if any, that made you say, "Well, look, this guy recom-
12 mended it 14 years ago. We are going to do it now"?

13 A As I understand the sequence of events and again
14 it goes before my time —

15 Q I don't mean to interrupt you. I am only
16 asking you what you did and knew on the Board. I don't
17 expect you to know what went before.

18 A You are asking me the difference of what happened
19 14 years ago and what happened now?

20 Q Why you decided to pick it up at this time,
21 that's right.

22 A I think to understand that you have to understand
23 what happened 14 years ago.

24 Q Go ahead.

25 A Fourteen years ago - I shouldn't put it 14 years

1 ago.

2 "When the VanNess Black proposal was submitted, the
3 land-use plan was submitted and it included two-acre zon-
4 ing in this area. It was a political decision on the part
5 of the Council at that time to make that an F-1 zone. It
6 was not a Planning Board decision. It was a political
7 decision.

8 As development came into this area, there were
9 more and more questions being raised about the advisability
10 of having those areas F-1, and we felt that evidence that
11 we seemed to be gathering was that these should not be F-1,
12 that they should in fact be F-2.

13 We said, well, there's nothing wrong with this be-
14 cause this is what it was recommended for in the first
15 place. It was not a technical decision to change F-2. It
16 was a political decision which we didn't feel was valid.

17 Q What evidence did you accumulate that indi-
18 cated that you should change it to F-2?

19 A Well, for example, the area in the eastern portion
20 of the Township, north of Route 78, an area which we re-
21 fer to as Blossom Hill area, there has been a fair amount
22 of sewer disposal problems in those areas. We felt that
23 larger lots would be advisable for that reason.

24 Q What was the evidence of this sewer dis-
25 posal problems that you had?

1 A Failure of the systems.

2 Q How was that quantified? Was a report made?
3 Did you have a study?

4 A As far as the quantity of failures, the number of
5 failures?

6 Q How was it brought to your attention? Was
7 there any document that said we studied this and it was
8 so many failures? How did it come to your attention?

9 A We did not have - I cannot sit down and say we
10 have documented that 38 or 50 per cent, or whatever the
11 number happened to be of the systems failed in five years.

12 Again, this was from experience that individuals
13 on the various Boards had of a fair number of failures in
14 that particular area, first-hand knowledge of quite a
15 number of failures in that area, of systems failing,
16 neighbors¹ systems failing.

17 Q What were the failures attributable to;
18 poor maintenance?

19 A No; poor percolation in the area.

20 Q How did you know that?

21 A Because there was an ordinance passed in 1970, 1972
22 or 1973, which provided for more extensive soil logs and
23 percolation tests to be taken, and the data that we were
24 gathering on that indicated that again there was probably
25 a problem with the percolation in this area.

1 Q But that is what I am getting at. Did you
2 have data?

3 I think you have said thus far that you have
4 had individual experience. I am asking what kind of data
5 did you gather.

6 A Well, the soil logs and the percolation tests are
7 taken and reported to the Township and to the County Board
8 of Health. This information is available to us.

9 Q You get that regularly, the Planning Board
10 does? -

11 A Whenever they're reported. We don't get them
12 directly to us. We have access to that information.

13 Q Was somebody on the Planning Board designated
14 to look at that and report to the Planning Board?

15 A One of the members of the Planning Board was the
16 Chairman of the Board of Health.

17 Q And was that person responsible for looking
18 at this material and reporting it to the Planning Board?

19 A In a formal report?

20 Q Well, so that you would have it as the basis
21 for deciding to change zoning.

22 In other words, what I am trying to get at
23 really is, what was your basis for changing the zoning?

24 Did you sit around a table, and I am not
25 trying to mislead you. I want to know how you decided to

1 change from F-1 and F-2. Did you have a bunch of infor-
2 mation, reports? Did you sit around the table and dis-
3 cuss it?

4 Whatever factors went into it, that's what
5 I want to know.

6 A The fact that it was recommended initially from a
7 planner that it should be F-2 was important to us.

8 Secondly, the first-hand knowledge that many members
9 of the Planning Board had of failures, specific failures
10 in that particular area, indicated that there was a poten-
11 tial problem here.

12 Knowledge of the percolation tests that were being
13 taken, and in fact Hearth Hills Development, I believe,
14 was the title of it, approximately a 32-lot subdivision
15 in that area, had information that indicated that in fact
16 this should probably be a larger area.

17 Q That information you are referring to is
18 the information that you would have regularly in those
19 logs that you talked about?

20 A Yes, sir.

21 Q Now, you said a member of the Planning Board
22 was also a member or chairman of the Health Department?

23 A Yes.

24 Q Who was that member?

25 A Mr; Heaney.

1 Q Did he bring that to the Board's attention?

2 A I don't think he had to bring it to the Board's
3 attention. Kie Board was well aware of this.

4 Q So is it fair to say then that you were
5 talking about first-hand knowledge and no report or docu-
6 mentation of these, but you had first-hand knowledge and
7 you acted on that?

8 A That's correct.

9 Q Now, in arriving at your decision with re-
10 gard to F-1 to F-2, did you consider the possibilities
11 at that time or in the future of public sewerage of the
12 area in question?

13 A At the time that this ordinance was adopted there
14 was considerable activity going on in both the eastern
15 drainage basin and western drainage basin regarding sewers.

16 Q What was the activity that you refer to?

17 A Well, there was Clinton Township which was partici-
18 pating in a study, a sewer study, with Lebanon Borough
19 and Lebanon Township, Readington Township.

20 That study included the drainage basin that would
21 have drained in that direction, v/hat we would term the
22 eastern drainage basis.

23 Q I believe you testified that you partici-
24 pated in that?

25 A In the earlier stages of the study, yes.

1 Q Is it reasonable to assume that public
2 sewerage could come from that study for this area?

3 A Well, the stage that I was involved in was the
4 generalized overall engineering concept as to where trunk
5 lines would have to be, rough estimates of capital, and
6 the earlier stage is necessary to apply for funds to
7 carry out the various phases of the environmental studies,
8 all the rest involved in getting construction funds and
9 approval.

10 ~Q You say those were earlier stages?

11 A No. I was involved in the earlier stages.

12 Q In earlier stages?

13 A Yes.

14 Q These studies that you had with regard to
15 location, did you have any question as to feasibility at
16 some point of public *sewers?

17 A Sir, at the point I left, the feasibility aspect
18 had not been fully determined. Again, it was a generalized
19 concept necessary to apply for funds.

20 Q But the object was to apply for funds; is
21 that correct?

22 A Yes, sir.

23 Q All right. Then under that circumstance,
24 as Chairman of the Planning Board, was it reasonable to
25 change the zoning with the knowledge that there could be

1 public, sewerage, and what kind of time frame——

2 A Yes, sir. It was very reasonable to change it be-
3 cause we had estimates of the quantity of what water, what
4 our sewage would be, and we had estimates of what kind of
5 capacities would be available to us.

6 Each of the three communities, and it was obvious
7 from the capacity available, at least the studies at that
8 time that the capacities that would be available, we would
9 not be able to sewer major portions of the eastern part
10 of the Township.

11 As a result, the Board, along with the engineer
12 and the Council, reviewed this and determined that in
13 fact the portion of the Township that begins to rise could
14 not be sewered and as a result again we proposed to move
15 it back to an F-2 zone.

16 Q As I understand it, on this discussion of
17 this particular study that we are talking about, you were
18 about to design a new system that was ——

19 A That's correct.

20 Q When you say there wouldn't be sufficient
21 capacity, wasn't it within the control of the members to
22 decide what was the reasonable capacity that they would
23 need?

24 A No, that was controlled by the State and what we
25 would be able to do.

1 Q In other words, the State told you this is
2 as much as you can build?

3 A This was dependent on the flow, the out-fall of
4 the treatment plant.

5 THE COURT: Included the town?

6 THE WITNESS: *This* would have been in the
7 White House Station area, Readington Township,
8 Lebanon.

9 THE COURT: The other basin?

10 " THE WITNESS: Yes.

11 THE COURT: Not talking about the Clinton
12 Town basin?

13 THE WITNESS: That's correct.

14 THE COURT: Thank you.

15 Q Did you know what the flow was? What did the
16 State say?

17 A I don't have - I wouldn't have specific numbers,
18 but the State had determined from the flows that would be
19 available what we would - what the maximum capacity of
20 the plant would be,,and when that was back allocated, it
21 was actually allocated four ways, Clinton Township, Lebanon
22 Borough, Readington Township, the White House area, and
23 the State for the Round Valley recreation area, when that
24 was allocated, we were limited greatly by the capacity
25 that would be available to us.

1 Q • And you are saying that allocation was made
2 by the State?

3 A It was made by information that was available from
4 the State. The engineers, we knew the flows of the stream
5 at the outfall of the treatment, where the treatment plant
6 would have been located.

7 Knowing that and other information on stream quality,
8 this is engineering information which I don't fully under-
9 stand.

10 Q "Well, I don't want to pursue it except to
11 ask you where would that information be? Who would be the
12 person or body to have information that would lead you to
13 a conclusion as a responsible planning board that this had
14 to be zoned F-2?

15 A The Township engineer participated in this study.

16 Q And did he give you that direction? Would
17 you say he said "Well, it will have to be F-2. That's
18 the most capacity we have?"

19 A No. He said this is the capacity we have and this
20 is the capacity you need to serve existing housing in the
21 area, plus some additional housing, and that could be de-
22 veloped in there, and that was the limit and therefore
23 there was nothing else left but to zone -

24 Q He is the person that told you this is the
25 State limits?

1 A He is the person that would have indicated what
2 our allocation would have been.

3 Q Who is that person?

4 A Robert Bogart. The numbers may have actually been
5 generated by Neal Van Cleef, who is another engineering
6 firm.

7 Q Following through on that, if you know, what
8 has been the result of that study that you participated
9 in?

10 A - What has resulted from that study?

11 Q Yes.

12 A Clinton Township has removed themselves from par-
13 ticipation in that facility as far as I know. Again, am
14 only quoting what I read in the newspapers.

15 Q If Clinton Township removed itself, in other
16 words, there's no sewerage there?

17 A That's correct.

18 Q So that it is possible, is it not, even
19 reasonable, for it to be F-2 zoning; is that correct?

20 MR. SUTTON: Again, I think Mr. Sterns should
21 confine his questions to the period of time that
22 Dr. Hilliard was on the Planning Board, not some-
23 thing that he may have read in the newspapers after-
24 wards.

25 Q I certainly have not asked you, and I hope I

1 haven't given you the impression that I want you to answer
2 anything that you don't know of your' own knowledge.

3 I am just trying to follow through on the
4 method by which the Planning Board made basic decisions
5 in this case, to move from one acre to two acres.

6 THE COURT: Your question is that it is not
7 even feasible for an F-2 zone. I think it is de-
8 velopable in line with what you are driving at of
9 CR-1 and CR-2. I know where you are going.

10 Q Dr. Hillard, just to finish this aspect, in
11 regard to F-1 and F-2, we have done an analysis which is
12 in evidence here, and I just ask if it sounds reasonable,
13 in light of your knowledge during your tenure on the Board,
14 that the 1962 zoning of the Township had approximately 6500
15 acres of F-2 and the 1974 zoning went to 10,420 acres.

16 Those are both within one acre. Does that
17 sound reasonable to you, based on your knowledge of zoning
18 changes?

19 THE COURT: What is reasonable?

20 Q Does, it sound right, the numbers? Does it
21 sound correct? Is that correct?

22 A It may be. I really don't know the numbers.

23 Q Would it be correct to say that there was
24 a substantial increase in F-2 zoning in the 1974 zoning
25 ordinance?

1 A Yes, There was a substantial increase in the F-2
2 zone. That has to be viewed in light of the cluster pro-
3 vision of the F-2 zoning, though.

4 THE COURT: What is that viewed, in what
5 light?

6 THE WITNESS: We moved from F-1 to F-2, but
7 under the cluster provisions you can still build
8 on one-acre lots. It would still reduce the density,
9 however.

10 THE COURT: In F-2 you didn't have cluster,
11 did you?

12 THE WITNESS: Yes.

13 THE COURT: You did have cluster provision
14 in F-2?

15 THE WITNESS: F-2, there's a provision that
16 permits you to put houses on one-acre lots.

17 You would still maintain the two-acre density
18 but it would permit you to build on one-acre lots,
19 shorten your streets, lot frontage, reduce your land
20 area per house.

21 THE COURT: You would increase the area in
22 the eastern part of the Township to F-2?

23 THE WITNESS: Yes, sir.

24 THE COURT: Would it do any good if you
25 could not sewer it and you were not capable of hav-

1 ing percolation?

2 THE WITNESS: That was a provision that
3 had to be satisfied to do the clustering. You had
4 to have adequate percolation.

5 THE COURT: What was the probability or
6 possibility of being able to satisfy it if you
7 didn't have percolation there before? How would
8 you get it, just by changing the ordinance?

9 THE WITNESS: The geology in the area around
10 here changes dramatically from one area to another
11 which makes it difficult to zone specifically on
12 the percolation on a given particular lot.

13 With this provision, if the percolation
14 wasn't there, a person had to build on a two-acre,
15 and if the percolation was there, you could reduce
16 your lot size*

17 In fact, Round Valley utilized this concept
18 on an F-2 zone on their Ellice tract.

19 MR. STERNS: I am very tempted to get off on
20 that but I won't. Let me follow on what you are
21 saying.

22

23 BY MR. STERNS:

24 Q In other words --

25 A I was only on the Board, sir ---

1 Q Let me not leave the subject. Pursuant to
2 that, you had a control, even with your two-acre zoning,
3 to cluster the one-acre, but you had a control to assure
4 adequate sewerage just as you told the Judge?

5 A Yes.

6 Q Now, that control was a non-zoning control;
7 is that correct?

8 In other words, you said you got to show
9 us or you don't get your approval; that you can meet the
10 percolation requirements?

11 A Q's correct.

12 Q Why couldn't you zone it for any other
13 density as long as you had that control?

14 In other words, what I am driving at is that
15 there are ways, are there not, to control development be-
16 cause of lack of sewerage than zoning?

17 A There are probably other alternatives, yes.

18 Q And you have used them in this case?

19 A And there are probably ones that we didn't use.

20 THE COURT: Just a moment.

21 (Discussion off the record.)

22 (Court adjourns.)

23 * * *

24

25

CERTIFICATE

1
2
3 I hereby certify that the foregoing
4 is a true and accurate transcript of the pro-
5 ceedings as taken by and before me at the
6 time and place and on the date hereinbefore
7 noted.

8
9 Melvin Weiner
10 MELVDt •WEINER, C.S.R.
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