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ML 000628B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NO. L-6001-78 P.W.

MORRIS COUNTY FAIR HOUSING COUNCIL, et al.,	:	
Plaintiffs,	:	
-vs-	:	
BOONTON TOWNSHIP, et al.,	:	Civil Action
Defendants.	:	
	:	

BRIEF OF DEFENDANT TOWNSHIP OF MONTVILLE ON MINI-TRIAL ISSUES

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On the Brief

STATEMENT OF FACTS

On July 18, 1974, the Township Committee of the Township of Montville, New Jersey, enacted an amendment to the Montville Zoning Ordinance, rezoning approximately 2,400 acres of land in the area north of the Erie Lackawanna Railroad in the northern section of Montville Township.

Plaintiffs, Davanne Realty Company and other property owning corporations and individuals, filed a complaint on September 19, 1974 attacking the zoning amendment, which complaint also included a Count III seeking to declare the entire zoning ordinance of the municipality invalid by reason of its alleged failure to provide for low and moderate income housing, which was alleged to be unconstitutional and illegal.

At the pretrial conference in the matter, at the request of the Township, the court bifurcated the issues in the case, and determined that the case would proceed first on the issues of the validity of the zoning amendment of 1974. It further determined that the attack on the entire zoning ordinance, which came to be designated as Phase II or the Mt. Laurel phase (from Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 913 (1975)) would be severed from the attack on the amendment of 1974, and that this phase of the case would follow Phase I.

The matter proceeded to trial on the issues of the July, 1974 amendment in the latter part of September, 1975 with the lengthy trial continuing for some weeks and not concluding until on or about November 13, 1975.

The court concluded by sustaining the three acre zoning as to the 2,400 acres. (Opinion, January 9, 1976, T17, 17-19).

The court then also sustained the 3-acre density as to plaintiffs' lands as well, except as to the cluster provisions, which the court found to be unreasonable for the reasons set fourth in the opinion (T20, 10-25). The court concluded by finding that the entire amendment would be sustained, provided that a more reasonable cluster alternative is enacted (T20, 10-22). The Township amended the cluster provisions in May, 1976. No challenge was ever brought by plaintiffs to the revised cluster provisions.

On April 14, 1976 the court heard argument on Phase II of the matter. By order dated May 10, 1976 the court found that the Townshop was a developing municipality under the Mt. Laurel case and ordered the municipality to complete its master plan study then underway and enact implementing ordinances to comply with the Mt. Laurel decision by January 21, 1977. The order contained a finding that the Township was a developing municipality, with the decision as to the consequences of that finding and how best to provide for a variety of housing being

intentionally left to the judgment of the local legislative body.

Plaintiffs then appealed to the New Jersey Superior Court, Appellate Division, which affirmed the decision of the trial court on both judgments.

Plaintiffs' subsequent petition for certification to the New Jersey Supreme Court was denied in May, 1979.

The Township enacted a comprehensive new zoning ordinance in March, 1977. The revised ordinance contains the revised cluster provisions previously enacted in May, 1976 in response to the trial court's ruling on Phase I, and maintains the three acre lot size in Northern Montville upheld by the trial court in Phase I. In response to the Mt. Laurel decision and the results of Phase II in this case, the new zoning ordinance also contains provision for other housing types and densities elsewhere in the municipality, and now includes provisions for multi-family housing, including two-family housing, senior citizens housing, townhouses and a P.U.R.D. Zone, with a mix of townhouses, apartments and two-family housing.

The new zoning ordinance was also never challenged by Plaintiffs.

Their Petition for Certification to the United States Supreme Court was denied on November 13, 1979.

At no time did the Public Advocate participate in either

the litigation or the public hearings in the Township which resulted in a comprehensive new Land Use Ordinance. In fact at no time did the Public Advocate ever contact the Township in any way regarding the provisions of its zoning ordinance, with or without reference to the Davanne litigation.

The Public Advocate did subsequently bring suit challenging the zoning ordinances of 27 municipalities in Morris County, including the Township of Montville. The allegations against Montville Township, and the issues raised, are the same as those raised in the Davanne case, that is an alleged failure to provide for low and moderate income housing in the context of the Mt. Laurel and subsequent cases.

POINT I

THIS SUIT IS BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

The Township contends that the suit of the Public Advocate is barred by the doctrines of collateral estoppel and res judicata based upon the previous litigation entitled Davanne vs. Township of Montville, Superior Court of New Jersey, Law Division, Morris County, Docket No. L-292-74 P.W.; affirmed by the Superior Court, Appellate Division, February 5, 1979, Docket No. A-3338-75; Petition for Certification Denied 81 N.J. 260 (1979); Certiorari denied November 13, 1979 U.S. (1979), which proceed to final judgment in the Superior Court, Law Division, which judgment was affirmed by the Superior Court, Appellate Division. The New Jersey Supreme Court subsequently refused to grant certification and the United States Supreme Court refused to grant Certiorari.

Reference to the pleadings and the record in this case clearly reveals that the nature of the action was a challenge to the zoning amendment of 1974 involving the three acre zoning of Northern Montville, both as it related to the plaintiffs' lands and on its face, as well as a challenge to the entire zoning ordinance of the Township pursuant to the doctrine of the Mt. Laurel case. As the record further reveals, the Superior Court entered judgment affirming the validity of the three acre

zone, and also entered a judgment on the second phase of the suit involving the challenge to the Township's entire zoning ordinance.

The Township submits that both of these judgments are binding and conclusive on the Public Advocate for the following reasons.

Numerous decisions contain definitions of the doctrines of res judicata and collateral estoppel. See, for example Lubliner v. Board of Alcoholic Beverage Control for City of Paterson, 33 N.J. 428 (1960). Continental Can Co. v. Hudson Foam Latex Products, Inc., 123 N.J. Super. 364 (L. Div. 1973).

> "Res judicata is an ancient judicial doctrine which contemplates that when a controversy between parties is once fairly litigated and determined it is no longer open to relitigation. See von Moschzisker, "Res Judicata," 38 Yale L.J. 299 (1929), reprinted in van Moschzisker, Stare Decisis, Res Judicata and Other Selected Essays, p. 30 (1929); Restatement Judgments Sec. 1, p. 9 (1942). Along with its related doctrine of collateral estoppel (see Mazzili v. Accident, etc., Casualty Ins. Co., etc., 26 N.J. 307, 313 (1958)), it rests upon policy considerations which seek to guard the individual against vexations repetitious litigation and the public against the serious burdens which such litigation imposes on the community. See von Moschzisker, supra; 2 Freeman on Judgments Sec. 624-627 (1925); cf. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 596, 68 S. Ct. 715, 92 L. Ed. 898 (1948); Ludy v. Larsen, 78 N.J. Eq. 237, 242 (E. & A. 1911); Passaic Nat. Bank, etc., Co. v. East Ridgelawn Cemetery, 137 N.J. Eq. 603, 609 (E. & A. 1946)."

These principles are even more compelling where attacks on governmental actions are involved, and the courts have developed

special rules where the matters litigated are of general and public interest, as occurred in the Davanne case. In such instances efforts to relitigate the same governmental actions, as the Public Advocate is attempting to do here, are barred.

The rule of res judicata in actions involving adjudications of matters of general and public interest has been clearly set forth in several recent decisions.

In the case of In Re Petition of Gardner, 67 N.J. Super 435 (App. Div. 1961) the Appellate Division stated the rule as follows:

> "It is consequently clear that the legal issue which lies at the heart of the present petitioner's objection to an approval of the 1960 budget, resolution of which in her favor is an absolute prerequisite to the successful maintenance of her proceeding herein, has been determined against her position by judgment of a court of competent jurisdiction. That judgment is consequently res judicata of the present controversy if the circumstance that the taxpayers in the two proceedings were different does not otherwise dictate as a matter of law. Hudson Transit Corporation v. Antonucci, 137 N.J.L. 704 (E. & A. 1948).
>
> Petitioner first seeks to avoid the effect of the prior judgment on the ground that the subject matter of the two respective proceedings differs. However, this is not, properly speaking, a case of different subject matter, but of different causes of action. Such a difference is immaterial if a postulate of law essential to the success of the partly in the later proceeding has been distinctly put in issue and adjudicated contra. in the earlier, particularly where, as here, the subject matter in both proceedings arises out of the same transaction. See 30A Am. Jur., Judgments, Sec. 360, p. 401; Restatement, Judgments, Sections 68, 70, comment pp. 319, 320; N.J. Highway Authority v. Renner, 18 N.J. 485, 493, 494 (1955); Mazzilli v. Accident, etc., Casualty Inc. Co., etc., 26 N.J. 307, 314 (1958)(quotation from City of Paterson v. Baker, 51 N.J. Eq. 49 (Ch. 1893).

Nor will it avail petitioner that the taxpayer in the earlier action was one other than herself. A taxpayer attacking governmental action in which he has no peculiar personal or special interest is taken to be suing as a representative of all taxpayers as a class. The general rule is that in the absence of fraud or collusion a judgment for or against a governmental body in such an action is binding and conclusive on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest. 50 C.J.S. Judgments Sec. 796, p. 337; cf. Edelstein v. Asbury Park, 51 N.J. Super. 368, 389 (App. Div. 1958); see also 18 McQuillin, Municipal Corporations (3d ed. 1950), Sec. 52.50, pp. 124, 125; 52 Am. Jur., Taxpayers' Actions, Sec. 38, p. 26.

Although our courts have had no prior occasion to consider the rule of conclusiveness in taxpayers' actions, the rule of virtual representations to bar relitigation of issues decided in other kinds of class suite has frequently been applied in situations where policy implications were not as strong as those obtaining here. See, e.g., Collins v. International Alliance, etc., Operators, 136 N.J. Eq. 395 (E. & A. 1945); Commercial Trust Co. of N.J. v. Kohl, 140 N.J. Eq. 294 (Ch. 1947); Speizer v. Lerner, 11 N.J. Super. 563 (Ch. Div. 1951); Harker v. McKissock, 12 N.J. 310 (1953); cf. Bano v. Ward, 12 N.J. 415 (1953); Bd. of Directors, Ajax, etc., v. First Nat. Bank of Princeton, 33 N.J. 456, 462-465 (1960).

There is no suggestion in the present appeal that the prior action was collusive or that the taxpayer there was inadequately represented. Nor can it be said that the earlier action was not of a nature likely to come to the attention of taxpayers generally, so as to make unfair the preclusion of an action by a second taxpayer not actually congnizant thereof (nor is the latter here asserted to be the fact). Strong considerations of public policy dictate that after a bona fide and well-contested litigation by a taxpayer of a specific question asserted to affect the validity of municipal action in respect of an important and well-known public enterprise, the judgment entered should conclude all other taxpayers, they having been free to intervene if they so chose, in the litigation. It is of incidental note that counsel for the present petitioner was also

counsel for the taxpayer plaintiff of the earlier action, in a recent appeal before the Supreme Court in another phase of the same general course of litigation over the relationship between Jersey City and Seton Hall Medical and Dental College. See Jersey City Association for Separation of Church and State v. The City of Jersey City, 34 N.J. 177 (decided February 6, 1961).

We are clear that in all the circumstances presented the adjudication of the controlling substantive question involved herein by judgment of the Law Division in the previous action should be held binding and conclusive against the attempt to relitigate it in this proceeding.

67 N.J. Super. 447-49

This rule was very recently reaffirmed by the New Jersey Supreme Court in the case of Roberts v. Goldner 79 N.J. (1979) where the Supreme Court held as follows:

The subject matter of the Roberts suit was precisely the same as that previously adjudicated in Adams. Indeed, the Appellate Division in its opinion therein so noted. On this basis, the issue of res judicata raised by defendants was squarely presented and should have been decided.

(1,2) A cause of action once finally determined between parties on the merits by a tribunal having jurisdiction cannot be relitigated by those parties, or their privies, in a new proceeding. Washington Tp. v. Gould, 39 N.J. 527, 533 (1963); In re Petition of Gardiner, 67 N.J. Super. 435, 447-448 (App. Div. 1961). Here the facts pleaded, issues raised, relief sought and defendants involved are identical with those in Adams. The only difference is the named plaintiff in each suit. However, each plaintiff was suing as "a resident, citizen and taxpayer" of Union City.

It was held in Gardiner, supra, in a situation similar to that here presented, that

(a) taxpayer attacking governmental action in which he has no peculiar personal or special interest is taken to be suing as a representative of all tax-

payers as a class. The general rule is that in the absence of fraud or collusion a judgment for or against a governmental body in such an action is binding and conclusive on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest.

(167 N.J. Super. at 448)

The rule is stated in Corpus Juris Secundum as follows:

In the absence of fraud or collusion, a judgment for or against a governmental body, *** or a board of officers properly representing it, is binding and conclusive on all residents, citizens, and taxpayers with respect to matters adjudicated which are of general and public interest ***. The rule is frequently applied to judgments rendered in an action between certain residents or taxpayers and a *** municipality ***, it being held that all other citizens and taxpayers similarly situated are represented in the litigation and bound by the judgment ***.

(50 C.J.S. Judgments Sec. 796 at 337-338; emphasis supplied; footnotes omitted)

Roberts, plaintiff taxpayer herein, was asserting precisely the same grievances set forth by another taxpayer in Adams and ruled on by a competent tribunal in that case. The issue presented herein was, therefore, res judicata, and the complaint was properly dismissed by the trial court. It is immaterial that the trial ruling in Adams ultimately was held to be erroneous. The judicial determination in that case, first by the trial judge and then by the appellate court, was dispositive of the issues presented.

(79 N.J. 84-86)

A review of the record in the Davanne case indicates that the legal issues presented with reference to the attack on the Township's zoning ordinance are exactly the same as those pre-

sented in the Public Advocate suit. It is further clear that the issues were reduced to judgment, in both phases of the case, and that the issues were of general and public interest. Under the well-established law cited herein, the second action in such circumstances, in this case the Advocate's suit, is barred.

First, plaintiffs instituted the Davanne suit based on their standing as property owners and taxpayers in the Township of Montville. See Complaint, Count I, Paragraph 1. The decision of the trial court to permit the comprehensive attack on the entire ordinance was based on this status of the plaintiffs. See Transcript, January 30, 1976, page .

Secondly, the plaintiffs attack on the zoning was very broad in scope and not limited to the effect of the ordinance as applied to its particular property. See Count II of the Complaint, which was an attack on the entire A-1 district and Count III, which was an attack on the entire zoning ordinance of the Township.

Thirdly, the Supreme Court of New Jersey has expressly indicated that comprehensive attacks on zoning ordinances by property owners such as the one in question do constitute public interest litigation. Oakwood at Madison, Inc. v. The Township of Madison 72 N.J. 481, 550 (1977). Thus the Public Advocate, who by his own admission is basing this lawsuit upon an alleged public interest, is likewise bound by the result of previous litigation in that same public interest.

Additionally, the governmental action attacked by the Advocate is identical to that attacked in the Davanne litigation by the plaintiffs therein. See the allegations contained in Count III, which are clearly framed in the Mount Laurel case context, and in many instances almost identical to the language and relief sought in the complaint filed by the Public Advocate herein.

This is also made clear by the express provisions of the pretrial order and also the judgment entered in Phase Two, that is the Mount Laurel phase of the case, which specifically recites the Mount Laurel issues and rendered a determination thereon.

The trial judge in Davanne chose not to go beyond the provisions of the order entered by the court. It was up to the plaintiffs in that previous litigation and the court, to determine whether or not its provisions had been complied with. The Advocate, however, chose not to participate in the litigation, has no basis to intrude on that judgment, and is now bound by it.

In short, all of the elements of the cases cited herein have been satisfied here. There is an identity of grievances and issues set forth in both suits the only difference being that this time the plaintiff is the Public Advocate instead of a private citizen. The litigation was clearly a matter of public record and of general public interest, and the Public Advocate was free to intervene, if he so chose, in the litigation. He chose not to intervene and is therefore now bound by the judgment entered.

It must also be noted that the judgment in Phase II was followed by a long series of public hearings in the Township of Montville which resulted in a comprehensive new Master Plan and Land Use Ordinance being enacted. The Public Advocate did not attend a single hearing or offer any objections or criticisms of the new zoning ordinance whatsoever.

If, as the Public Advocate claims, the public interest is involved, then surely it was as much stake in the protracted Davanne litigation and the public hearings that followed. And yet, the Advocate was nowhere to be seen in any of these proceedings.

There has seldom been a clearer case demonstrating the compelling reasons behind the res judicata doctrine than that presented here. The municipality would be forced to defend its entire zoning ordinance over and over again, relitigating the same issues endlessly at endless public expense, if suits involving these same issues brought at the whim of plaintiffs who slept through previous litigation are sanctioned by the courts. This is precisely what is sought to be done here, and such an effort is clearly barred by the well-established law cited hereinabove.

Thus the validity of the ordinance has been fully and completely litigated, and both the results and the conclusions which led to the results are binding upon the Public Advocate

and the court in this case, and conclusive against the attempt to relitigate the zoning ordinance of the Township of Montville.

For the foregoing reasons the suit must be dismissed.

POINT II

THE DECISION IN THE DAVANNE CASE, WHICH IS THAT OF AN APPELLATE TRIBUNAL, IS BINDING UPON THE TRIAL COURT.

It is well recognized that decisions of appellate tribunals are binding upon the trial court. The trial court is bound to following the rulings of an appellate court, which decisions are binding when the same issues are presented. Reinauer Realty Corp. v. Paramus 34 N.J. 406, 415 (1961); Caldwell v. Rochelle Park Township 135 N.J. Super. 66 (L. Div. 1975). In this instance, there has been a fully litigated zoning lawsuit concerning of the legality of the Montville Township Zoning ordinance. Decisions have been entered at the appellate level, including binding upon this court and may not be disturbed in this case.

POINT III

THIS ACTION IS BARRED BY RULE 4:69-6 PROVIDING FOR A 45-DAY PERIOD WITHIN WHICH TO REVIEW THE REVISED ZONING ORDINANCE OF THE TOWNSHIP.

The Public Advocate is also in clear violation of the Rules of Court in this State, particularly Rule 4:69-6 which clearly mandates a 45-day time period within which to challenge a local zoning ordinance. No such action was ever brought within this time period, and it is therefore barred by this Rule.

Here, plaintiff's complaint is a direct attack on the revised zoning ordinance of the Township, which was enacted in March, 1977.

This suit was not commenced until November, 1978, and is therefore barred by the Rules.

This action clearly constitutes a proceeding in lieu of prerogative writ and is clearly governed by the provisions of the Rule, and it must have been instituted on a timely basis. No such action was ever brought, and it is now barred by the limitations of the Rule. Marini v. Wanaque, 37 N.J. Super. 32 (App. Div. 1955); Kent, et als. v. Bor. of Mendham, et als., 111 N.J. Super. 67 (App. Div. 1970).

These cases are clear that a delay in seeking a review of municipal action beyond the time provisions of the Rule is fatal. To permit such a belated attack in this matter would do violence to the Rule, the zoning principles at issue in this case (Kent v.

Mendham, supra), and obviously the public interest in having the ordinance challenged on a timely basis.

POINT IV

THE TOWNSHIP'S ZONING ORDINANCE IS IN COMPLIANCE WITH THE TWO JUDGMENTS ENTERED IN THE DAVANNE LITIGATION WHICH CONTAINED COMPREHENSIVE FINDINGS OF FACTS AND LAW IN THE CONTEXT OF THE MT. LAUREL CASES, AND ARE BINDING UPON THIS COURT.

The two judgments entered by Judge Gascoyne, both of which were affirmed by the appellate courts, were comprehensive in nature both as to northern Montville and as to the municipality generally. These judgments were in turn based upon important findings of fact and law as a result of extensive litigation in the Mt. Laurel context. They include not only the final conclusions of the Court, but the specific findings which led to those conclusions and which are also binding upon this court as a matter of law. These important findings are as follows.

As to northern Montville, there was substantially no dispute, and the trial court so found, that the area is generally characterized by hilly topography and steep slopes, erodable soil and wetlands; is underlain by precambrian gneiss bedrock; that the soil conditions and rock outcroppings pose limitations on development; and that severe septic disposal limitations are present.

There was also no dispute that development has occurred very slowly in northern Montville, there being only 47 homes in the area, this condition occurring in the opinion of the trial court because of the natural limitations of the area. It was also not disputed that there are no public water and sanitary sewer facilities in this area of the Township, that there are no such facilities presently contemplated.

The Township's determination of the need for low density zoning in this particular area of the Township was based upon a combination of zoning considerations. These factors were a) that the area is hilly and characterized by steep slopes throughout; b) that soils throughout present severe limitations for community development because of limitations on septic effluent disposal and considerable erosion potential; c) the absence of public water and sanitary sewer facilities in northern Montville; d) that the area is remote from conveniences and municipal facilities and services.

Without reviewing in detail the extensive record in the case, the trial court, and the reviewing courts, based upon the zoning considerations demonstrated by the Township, sustained the validity of the zoning and such findings were fully supported by the evidence and applicable law.

In its opinion the trial court found as follows, noting first that it had approached the 3 acre lot size with caution, and had considered all available information in arriving at its decision (Opinion, January 9, 1976, T4-5).

1) That the testimony was basically undisputed that the area in question is a steep slope area, with exceptions (January 9, T5, 18-24); that the area was underlain with precambrian gneiss, and that because of the topography the general pattern of drainage was from north to south, from the Lake Valhalla area toward Central and Southerly Montville (January 9, T6, 1-8); that the area in question serves as a drainage basin for the

Lake Valhalla area, constituting a headwater (January 9, T6, 9-21): and that the topography is characterized by outcroppings of rock and wetlands (January 9, T6, 22-24), and highly impermeable soil (January 9, T9, 21-24).

The court further concluded that these conditions make development "very, very difficult" (January 9, T9, 24-25).

2) That as far as road accessibility is concerned, the area is not easily accessible (January 9, T7, 1-20), expressly accepting the testimony of the Township planner in this regard (January 9, T17, 1-6).

3) That water is not presently available and is not easily accessible to the 2,400 acre tract, although it could be made accessible to the plaintiffs' tract (January 9, T8, 1-21).

4) That a sewer system is not available and will not be available in the foreseeable future, this conclusion being based in part upon the very slow growth being experienced in the area of the Township (January 9, T8-9).

5) That the natural limitations of the area render the use of septic systems very difficult. The Court accepted Mayor Eckhardt's testimony on the matter of the problems experienced with package plants and expressed doubt as to the proposal of the plaintiffs' engineer on package plants as a solution.

The Court concluded that, while septic system may not be the best mode, "given a choice between septic system in a low density zoning, based upon what is before me, may be far more reasonable than package sewer plants within the same area" (January 9, T11, 7-11).

6) In an extremely important finding, that any deterrents to development are because of the natural environment, not municipal zoning, as discussed in Point II herein.

After making these findings of fact with respect to the Township's actions on selecting a 3-acre density, the court then accepted the testimony of the Township Planning Consultant with respect to the purposes for which this area was increased from a 1-acre to a 3-acre zone (January 9, T17, 3-8). The court further was satisfied with Mr. O'Grady's thorough knowledge of the area (January 9, T16, 13-15), and that his recommendations properly took into account such factors as the impact of the expansion of the water and sewer system that would be required by high density zoning (January 9, T16, 15-35).

The court, taking into account all of the above factors as bearing on the question of reasonableness, then held the 3-acre zoning to be reasonable and appropriate from the proofs both for the 2,400 acres as well as plaintiffs' lands, subject to the cluster provisions being amended as set forth below.

The court stated that it was satisfied the municipality properly took into consideration the natural detriments of the area, and found that no matter how it is zoned "there are large areas that are not going to be developable because of the steep slopes, because of the wetlands, because of many factors" (January 9, T18, 16-25).

It also found, based upon the proofs, that the amendment was in accordance with a comprehensive plan for the municipality,

noting that a great deal of land in southern and central Montville can still be developed; that the municipality is not required to develop everything at one time, this being completely contrary to a comprehensive plan, with the municipality retaining the right to reasonably control its own development (January 9, T17-T18).

The court further found that the municipality had the right to take into consideration the slow growth in the area, and that this was a valid consideration as far as a comprehensive zoning plan is concerned, expansion within southern and central Montville being far more reasonable from both a land use standpoint and from the standpoint of providing services and utilities.

The court also expressly recognized the validity and purposes of the cluster concept and the need to preserve open space, citing Chrinko v. So. Brunswick Tp. Planning Board, 77 N.J. Super. 594, 600-602 (L. Div. 1963). (N.J.S.A. 40:55D-2, also expressly sets forth the conservation of open space as a statutory purpose of zoning.)

The basic intent of the new provisions is to achieve greater flexibility and use of the cluster option by taking into account the areas with natural limitations for development and to allow the reservation of such areas for uses which are compatible with those limitations, and which do not require construction. It is the intent of these provisions to meet the objections of the court to the previous conditions of the cluster requiring

that the lands dedicated accomodate the public uses and that they be adaptable for the public uses without public expenditures because of topography, drainage or soil conditions, etc.

The Township submits that all of the foregoing findings are binding upon this court.

POINT V

A. Under Long-Established Standards of Judicial Review Which Have Been Specifically Restated and Emphasized In All of the Post--Mt. Laurel Cases, Where, As Here, The Record Demonstrates A Reasonable Basis for the Zoning It Must Be Sustained By the Courts

The proper scope of judicial review is a fundamental point in a consideration in any zoning case. The New Jersey courts have always recognized that zoning is a municipal legislative function that is beyond intervention by the courts unless clearly arbitary or unreasonable.

The standard of judicial review have been specifically restated and emphasized in virtually every major recent zoning case, including Mt. Laurel and succeeding decisions:

> It is fundamental that zoning is a municipal legislative function beyond the purview of interference by the courts unless an ordinance is seen in whole or in application to any particular property to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute, N.J.S.A. 40:55-31, 32. It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently or because the preponderance of the weight of the expert tesimony adduced at a trial is at variance with the local legislative judgment. If the latter is at least debatable it is to be sustained. (at 343)..

Bow & Arrow Mannor v. West Orange, 63 N.J. 335, 343 (1973)

The Supreme Court specifically took occasion to repeat and reaffirm the rule of Bow & Arrow Manor in Pascack Ass'n, Ltd. v. Mayor & Coun. Washington Tp., 470 (1977),

> Stating that "... it would be a mistake to interpret Mount Laurel as a comprehensive displacement of sound and long established principles concerning judicial respect for local policy decisions in the zoning field." The Court dwelt on this critical point at length at pages 481-483, concluding that "... there has been no fundamental change, beyond the holding in Mt. Laurel itself, in the statutory and constitutional policy of this State to vest basic local zoning policy in local legislative officials."

Both of these decisions, together with other cases discussing this long-established rule, are also cited at length in the very recent case of Swiss Village Assoc's v. The Mun. Coun. Wayne Tp. 162 N.J. Super. 138 (App. Div. 1978).

Thus this vitally important standard in governing judicial review of a zoning ordinance has been strongly reaffirmed by the Supreme Court following Mt. Laurel. Where the record demonstrates a reasonable basis for the zoning, as it undeniably does in this case, the zoning must be sustained by the courts, even though the weight of expert testimony might be at variance with the local legislative judgment.

As the Supreme Court itself stated in the Pascack case, supra at pg. 485:

> But the overriding point we make is that it is not for the courts to substitute their conception of what the public welfare requires by way of zoning for the views of those in whom the Legislature and the local electorate have vested that responsibility. The judicial role is circumscribed by the limitations stated by this court in such decision as Bow & Arrow and Kozesnik, both cited above. In short, it is limited to the assessment of a claim that the restrictions of the ordinance are patently arbitrary or unreasonable or violative of the statute, not that they do not match the plaintiff's or the court's conception of the requirements of the general welfare, whether within the town or the region.

B. Montville's Zoning Has Been Enacted In Accordance With A Comprehensive Plan As Required by Mt. Laurel and Madison And Must Be Sustained.

As noted hereinabove the Township of Montville enacted a comprehensive new zoning ordinance in March, 1977. The revised ordinance contains the revised cluster provisions previously enacted in May, 1976 in response to the trial court's ruling on Phase I, and maintains the three acre lot size in Northern Montville upheld by the trial court in Phase I. In response to the Mt. Laurel decision and the results of Phase II in the Davanne case, the new zoning ordinance also contains provision for other housing types and densities elsewhere in the municipality, and now includes provisions for multi-family housing, including two-family housing, senior citizens housing, townhouses and a PURD Zone, with a mix of townhouses, apartments and two-family housing.

The three acre zoning provisions in northern Montville have remained unchanged.

This zone plan for the municipality has been approved by the courts, and was never challenged again by the plaintiffs in the Davanne suit.

Such balanced zoning is envisioned and supported by not only the Davanne decision itself, but by the Mt. Laurel case and every court decision thereafter, both on the merits of such zoning as well as the proper standards of judicial review and the reluctance to interfere with local legislative judgments where a reasonable basis for the zoning exists, as it does here. See Point VI A.

In Oakwood at Madison, Inc. v. Township of Madison 72 N.J. 481, the Supreme Court stated at pg. 505, footnote 9:

> "We have no intent to impugn large lot zoning per se. If a developing municipality adequately provides by zoning for lower income housing it may zone otherwise for large lots to the extent that the owners of the property so zoned have no other legitimate grievance therewith."

This same decision also rejects the argument that multi-family housing must be scattered throughout the municipality. See Oakwood at Madison at 545, where the Supreme Court held that the municipality "should have the widest latitude" in determining where multi-family housing should be located, taking into account the environmental constraints "in respect of density or type of housing".

In Swiss Village Assoc's. v. The Mun. Coun. Wayne Tp., 162 N.J. Super. 138 (App. Div. 1978) the Appellate Division held that: "It is now clear that a municipality need not provide for every use within its borders." (pg. 143).

The court again reiterated the rule of tightly circumscribed judicial review cited by the Township, holding once again at page 143 that if the zoning is at least debatable that the judgment of the municipality must be sustained.

Finally, Justice Hall stated in the Mount Laurel case:

> "There is no reason why developing municipalities like Mount Laurel, required by this opinion to afford the opportunity for all types of housing to meet the needs of various categories of people, may not become and remain attractive, viable communities providing

> good living and adequate services for all their residents in the kind of atmosphere which a democracy and free institutions demand. They can have industrial sections, commercial sections and sections for every kind of housing from low cost and multi-family to lots of more than an acre with very expensive homes. Proper planning and governmental cooperation can prevent over-intensive and too sudden development, insure against future suburban sprawl and slums and assure the preservation of open space and local beauty. We do not intend that developing municipalities shall be overwhelmed by voracious land speculators and developers if they use the powers which they have intelligently and in the broad public interest. Under our holdings today, they can be better communities for all than they previously have been. (67 N.J. at 190-191).

The Township of Montville has adopted such a zone plan in the context of the Mt. Laurel and Madison decisions and extensive previous litigation. This result is conclusive upon the Public Advocate and this court, and the suit must be dismissed.

POINT VI

THE MONTVILLE TOWNSHIP ZONING ORDINANCE IS IN COMPLIANCE WITH THE MUNICIPAL LAND USE LAW, CHAPTER 291, LAWS OF 1975.

Montville's Master Plan was adopted February 8, 1977 with the purpose of meeting the requirements of the Municipal Land Use Law.

The Master Plan considers the planning and zoning policies in adjoining areas of surrounding municipalities and plans of Morris County. Master Plan, Phase 1, pages 10 and 11, Phase 2, page 34.

At the time of adoption of the Master Plan, the State Development Guide had not been published. However, reference to the Preliminary State Development Guide Plan, September, 1977, and the State Development Guide plan, Revised Draft, May, 1980, reveals no conflicts with local planning policies. In fact, they are consistent.

Additionally, the Municipal Land Use Law does not require that local master plans incorporate provisions for low and moderate income housing or "least cost" housing. See N.J.S.A. 40:55D-28.

Montville's zoning regulations were adopted March 17, 1977 in compliance with the Municipal Land Use Law. The Zoning regulations are consistent with the Land Use Element of the Master Plan. See Master Plan, Phase 2, and Land Use Ordinance, Part 6.

The Municipal Land Use Law contains no requirement that local coning ordinances contain inclusionary or affirmative provisions

specifically directed at providing low and moderate income housing or "least cost" housing. Article 8, Municipal Land Use Law.

The Township's zoning policies were based upon numerous considerations. However, the primary motivating factors influencing the selection of sites and densities were as follows:

(1) Proximity to utility systems.

(2) Traffic accessibility.

(3) Existing development pattern including impact on or from adjoining uses.

(4) Environmental constraints.

POINT VII

MONTVILLE TOWNSHIP HAS EXTENSIVE SENSITIVE ENVIRONMENTAL FEATURES WHICH LIMIT ITS GROWTH POTENTIAL.

A. Extensive portions of the northern portion of Montville Township (north of Conrail) fall within a Precambrian geologic formation involving shallow and exposed bedrock, steep slopes and, as a result, severe limitations to all forms of development. The area is remote geographically, has limited road access and lacks utilities. Master Plan, Phase 1, pages 14-28.

1. In refusing to hear an appeal in the Davanne case, the New Jersey Supreme Court sustained 3-acre zoning in the R-1 Zone covering a large portion of Northern Montville.

2. Portions of the R-2 Zone in Northern Montville fall within the same geologic formation and contain similar constraints.

3. A ground water aquifer encompassing over 1,000 acres and having an estimated water yield of 3-4 ngd has been identified in the Towaco Valley area of Northern Montville. This area contains the existing municipal well which serves the entire Township. In order to protect the area and the quality and quantity of the water supply, the following development limitations have been recommended:

(a) Development of any kind should be generally precluded from the prime water bearing zone (130 acres).

(b) Development within 1,000 feet of the prime acquifer zone should be carefully controlled. (450 acres).

(c) Sanitary sewerage should not be provided since this would result in removal of significant recharge. Geonics, The Towaco Valley Aquifer, 1979.

4. Most remaining portions of Northern Montville, i.e., north of Conrail are either developed or involve wetland and steep slope characteristics. It is estimated that only portion of two parcels of land north of Conrail and totaling not more than 100 acres have physical and environmental characteristics that might be favorable to higher density development. This represents only 1.7 percent of the total area of 5,722 acres north of Conrail. Lacking sanitary sewers, intensive development cannot be justified.

B. Extensive portions of the southern portion of Montville (south of Conrail) contain significant impediments to development.

1. Extensive flood hazard areas extend along the Rockaway and Passaic Rivers. Federal Flood Insurance Maps and NJDEP Flood Hazard Area Delination Maps.

2. There are extensive areas of steep slope and shallow bedrock particularly in the easterly portion

of Southern Montville. Master Plan, Phase I, pages 14-28.

3. High water table soils incompass large parts of the westerly portion of Southern Montville. Soil Survey of Morris County, Soil Conservation Service.

POINT VIII

RESIDENTIALLY ZONED VACANT LAND IN SOUTHERN MONTVILLE IS NOT SUITABLE FOR INTENSIVE DEVELOPMENT.

A. There are approximately 1,700 acres of residentially zoned vacant land in Southern Montville. These involve 29 separate sites. Evaluation of these sites reveals that only 415 acres or 24 percent are without severe limitations to development. In all but one instance, each vacant site has some critical condition, so that only a portion of a site would be suitable for intensive development. On an average, only 30 percent of a site has non-critical conditions.

B. Numerous vacant sites are not served by sanitary sewers and are located a considerable distance from existing sewers.

POINT IX

DESPITE DEVELOPMENT LIMITATIONS, MONTVILLE TOWNSHIP HAS MADE EFFORTS TO PROVIDE FOR HOUSING VARIETY.

Montville's zoning regulations permit the development of a variety of housing types as follows:

Zone	Unit Type	Area	Units/ Acre	No. of Units
R-3B	Townhouse	26	4.0	104
R-3C	Sr. Cit.	10	8.0	80
R-4B	2 Family	52	2.0	104
PURD	Townhouse	95	3.0	157
	Apartment			126
				571

Although permitted densities are conservative, physical and environmental constraints preclude higher densities.

1. R-3B Zone. The R-3B Zone allows townhouses at a density of 4 dwelling units per acre. It is located in an area bounded by Route 287, Route 202 and River Road and contains approximately 26 acres that could effectively be used for townhouse development. Because of physical features and proximity to Route 287, one-family home development was not considered the most appropriate use of the land and townhouses were, therefore, selected as an optional use. The site has good access to main transportation routes and has access to public water. Unfavorable conditions include the following:

-Existing sanitary sewer facilities are located a considerable distance from the site.

-The site is traversed by Crooked Brook, a primary internal drainage course in the Township. A flood hazard area extends beyond the Brook.

-A significant portion of the site contains slopes with a grade of 15 percent or greater and reaching 50 percent or more in part.

-An estimated 50 percent of the site combines high water table, flood prone and steep slope soils.

Because of these factors, it was found essential to establish a conservative density.

2. R-3B Zone. This site is intended for senior citizen housing. It is located north of Horseneck Road and east of Change Bridge Road. It was selected for this type of housing because of proximity to recreational, cultural and potential future shopping facilities. Public water is available in the area and sanitary sewers are within reasonable proximity. The primary negative factor dictating a moderate density of 8 unites per acre for this type of housing are the severe wetland conditions throughout the entire site.

3. R-4B Zone. This zone is located on the westerly side of Change Bridge Road and contains approxi-

mately 52 acres. Conditions favorable to two-family development include water and sanitary sewer utilities which are in close proximity and the site is served directly by Change Bridge Road, a County road. Limiting factors, however include the following:

-The northerly and southerly sides of the site and property on the opposite side of the street are developed or being developed for one-family dwellings on lots of one-half acre or larger in size. Preserving the integrity of this neighborhood character is a concern.

-The rear portion of the zone is in the flood hazard area of the Rockaway River and contains utility easements which limit the area available for development.

-According to the Morris County Soil Survey, land outside the flood hazard area contains soils with a moderately high seasonal water table (1/2 to 1 1/2 feet of the surface). Moreover, the zone is located in a stratified drift formation which presumably serves a groundwater or acquifer recharge function. Because of these factors, limited land coverage is desirable.

Although the minimum lot size for a two-family structure in the R-4B Zone is 40,000 square feet, the Ordinance allows lot clustering whereby the lot may be reduced to 20,000 square feet. This feature will allow total utilization of the properties, at the same time avoiding development in the flood hazard area and the more severely wet areas.

As a reslut of the zoning provisions, development of the site will be keeping with the character of adjoining neighborhood character, but at double the dwelling unit density where lots are clustered, and will preserve environmentally sensitive features.

4. PURD Area. The area designated for PURD is located east of Change Bridge Road and south of the railroad. It consists of 105 acres, 90 percent of which may be developed for townhouses and apartments at a density of 3 units per acre. The site has direct access to Change Bridge Road and is very near Route 202 and Route 287. Public water is available but sanitary sewers are a considerable distance.

Site D was once an extensive soil mining operation for extracting sand and gravel. This operation has created a large depression extending through most of the site with the perimeter consisting of high, steep embankments. PURD was considered to be an appropriate vehicle for rehabilitatitng the area and providing

a potential for viable future use, at the same time establishing an opportunity to add to the housing variety of the Township.

While the site has these advantages, the soil mining operation has left extensive areas unsuitable for development along the steep slope outer boundaries. Moreover, because of the physical depression of the site, on-site storm water disposal will be necessary as will on-site sewage treatment and disposal. These conditions dictate a low density approach to development.

Alternate housing sites are not more suitable for multi-family housing. In the process of developing the Master Plan, numerous vacant lands, and particularly those in reasonable proximity to sanitary sewer facilities, were evaluated in terms of potential use for multi-family housing. These investigations revealed that any of the sites that might feasibly be used for this purpose also contain physical and environmental impediments that discourage densities higher than those allowed on sites zoned for multi-family use.

POINT X

ANALYSIS OF MONTVILLE'S LAND USE AND ZONING REGULATIONS APPLICABLE TO MULTI-FAMILY DEVELOPMENT REVEALS THAT, IN GENERAL, THEY REPRESENT REASONABLE REQUIREMENTS IN TERMS OF THE PHYSICAL AND ENVIRONMENTAL CONSTRAINTS OF THE LANDS INVOLVED AND ARE NOT UNNECESSARILY COST-GENERATING. REDUCTION IN STANDARDS AND REQUIREMENTS COULD NOT BE EFFECTED TO THE DEGREE THAT WOULD PRODUCE HOUSING SIGNIFICANTLY MORE AFFORDABLE.

All of the foregoing will be documented by the Township's proofs at trial.