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Supp. Trial Brief on behalf of defendant Borough of Mendham

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MLC000633B

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.

Defendants.

Civil Action

SUPPLEMENTAL TRIAL BRIEF ON BEHALF OF DEFENDANT BOROUGH OF MENDHAM

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PREFATORY STATEMENT

A nine-point brief on behalf of numerous municipal defendants (including the Borough of Mendham), addressing the common issues to be litigated, has been filed under separate cover, and this defendant reaffirms its subscription to and reliance upon that brief (hereinafter referred to as "Maxi-trial Brief"). The purpose of this supplemental brief is to address certain arguments which relate particularly to the Borough of Mendham, for reference at the appropriate phase of the trial as determined by the Court, and occasionally to augment the general arguments in the Maxi-trial Brief.

SUMMARY OF CONTENTS

STATEMENT OF FACTS

A combination of environmental and cultural factors have imposed a low density, rural-residential character on Mendham Borough since colonial days. This character is expressed by its small village center, well maintained farmlands, and large lot rural non-farm residences. The Borough, which covers an area of 3,800 acres (5.94 sq. miles), has a current population of 4,735 person, or 1.25 persons per acre. Mendham's small village center serves as the commercial district for the Borough's rural-residential lands as well as for rural-residential Mendham Township, which surrounds the Borough on three sides. The relationship of the village center and the Borough's and Township's rural and large lot residential areas represents a logical sequence of development intensity from the densely developed village area to low density agricultural lands.

Mendham is a residential community. As noted in the 1978 master plan, there are no industrial uses in the community. Commercial land uses and mixed commercial-residential uses total only 39 acres of land, just 1 percent of the Borough. The municipal zoning ordinance does not provide for any industrial manufacturing, research laboratory or similar types of uses. The ordinance nominally projects increases for business and commercial purposes to essentially serve the needs of the Borough.

Table I, which follows, indicates a comparative analysis of the prior ordinance and the 1978 zoning code. The analysis indicates a substantial decrease in the amount of non-residentially zoned lands. The decrease of 259 acres of land is principally due to the elimination of two OBRL zone districts.

The overall increase in residentially zoned lands took place at both ends of the residential scale. Larger lot zoning increased by 142 acres for the 5 Acre Residential zone and 61 acres for the 3 Acre Residential District. Smaller lot zoning also increased by an almost equal amount. The 1/4 acre residential zone increased by 145 acres and the 1/2 acre zone by 52 acres. The only residential zone to decrease was the one acre zone by 141 acres.

The overall increase in large lot zoning was based upon both environmental and neighborhood characteristics. The increase in smaller lot zoning was based upon housing need studies as well as other planning criteria.

Although Mendham Borough is considered to be a "developing community" within the spirit and intent of the "Mount Laurel and Madison" cases, it is not a community of tremendous land areas and substantial zoning alternatives. Rather, Mendham is a community of moderate land areas and development resources. Approximately 60 percent of the Borough is developed as a

rural-suburban residential community with most of this development served by sewer and water. The service limits of this infrastructure are being approached, however, and as such, most future development in the Borough will have to observe the natural carrying capacity of the land with respect to water supplies and septic tank suitability. This will limit new development to generally large lots of three to four acres or more, according to the NJ Geological Survey.

The Borough of Mendham is served neither by a railroad nor a major State highway. The Erie-Lackawanna, which has commuter services to 11 municipalities in Morris County, bypasses Mendham to the north and south; Route 287, which currently intersects seven municipalities in Morris County, and is planned to extend through three more municipalities, passes to the east of the Borough; Route 80 and 280, which intersect 13 municipalities in Morris County, pass well north of the Borough; Routes 46 and 10, the heaviest trafficked non-interstate highways in Morris County, also pass well north of the Borough.

Other limitations to development densities include steep slopes, wetlands and floodplains, preservation of qualified farmlands and surface water quality considerations. Excluding these areas, and excluding approximately 70 acres currently under development, there are approximately 390 acres of vacant, developable land in the Borough.

Mendham's infrastructure is limited in its capability to support suburban densities. Continued expansion of the current infrastructure in the Borough would adversely affect the beneficial environmental resources of the area, particularly with regard to stream and groundwater quality and quantities. To the extent that these environmental resources are degraded, the entire region is adversely affected.

TABLE I

COMPARATIVE ANALYSIS OF ZONING
1978 ORDINANCE AND PRIOR ORDINANCE
BOROUGH OF MENDHAM, N.J.

	Area in Acres		
	1978 Ordinance	Prior Ordinance	Difference
Residential Zone Districts			
5 Acre	1,801	1,659	142
3 Acre	251	190	61
1 Acre	924	1,065	-141
1/2 Acre	324	272	52
1/4 Acre	280	135	145
SUB-TOTAL	3,580	3,321	259
Non-Residential Zone Districts			
Business - West	26	{43}	{7}
Business - East	24		
Limited Business	8	8	0
OBRL - 10 Acre	---	128	-128
OBRL - 25 Acre	---	138	-138
SUB-TOTAL	58	317	-259
TOTAL	3,638	3,638	0

SOURCES : 1978 Mendham Borough Master Plan
1978 Zoning Ordinance calculations by
Malcolm Kasler and Associates, P.A.

Revised 12/11/79

POINT I

THE PLAINTIFF BEARS THE BURDENS OF PRODUCTION AND PROOF THAT MENDHAM BOROUGH'S ZONING ORDINANCE IS EXCLUSIONARY

(Note: This point also appears in substantially the same form, as Point II in the Brief of the Borough of Mountain Lakes.)

A. The Oakwood at Madison Approach. The Oakwood at Madison opinion directs a subtle but we think fundamental change in the conduct of Mount Laurel litigation. As Justice Mountain takes care to note in his concurring and dissenting opinion:

> In place of the fair share-regional approach, the majority now postulates a rule directing attention to the substance of the zoning ordinance and the bona fide efforts of those responsible for the administration of plans of use regulation.

72 N.J. at 625. The legal standard adopted by the Oakwood at Madison Court is whether there has been reasonable mitigation of cost-generating requirements in at least a reasonable area of a developing municipality, 72 N.J. at 449.

The "least cost housing" concept implements "minimization of cost-generating requirements." The "fair share-regional approach" is but one (albeit an important) factor in the quantification of "reasonable areas." In light of such factors, the

Court is directed to form a judgment concerning the substance of the Ordinance under attack and the bona fide efforts of municipal officials to determine whether such ordinance and such action taken together amount to an unconstitutional failure to zone in the general welfare of all citizens of this State.[3]

There was very good reason for the Supreme Court to have so stepped back from the logical follow-up of Mount Laurel, a more rigorous development of the "fair share-regional" approach. Experience has taught that the "fair share-regional" approach has produced principally "statistical warfare." See, e.g., Southern Burlington Cty. NAACP v. Twp. of Mt. Laurel, 161 N.J. Super. 317 (Law Div. 1978). In the words of Judge Conford in Oakwood at Madison: "The breadth of approach by experts to the fact of the appropriate region and the criteria for allocation * * * is so great and the pertinent economic and sociological considerations so diverse as to preclude the judicial dictation or acceptance of any solution as authoritative." 72 N.J. at 499.

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[3]The danger that such an approach will result in ad hoc determinations rather than the uniform application of a well understood governing principal is expressly recognized, but "there is probably nothing better to offer as a judicially devised alternative." 72 N.J. at 625 (J. Mountain, concurring and dissenting).

Moreover, even if they were judicially determinable, numerical housing goals are not translatable into zoning changes, much less the actual production of housing on any rezoned sites in accordance with methods which can be implemented pursuant to judicially manageable standards. 72 N.J. at 449.

B. Burden of Proof. Plaintiff bears burden of proving a constitutional violation. The Advocate here must quantify by proof, expert proof, for each municipality, what would constitute a "reasonable area" which should be rezoned for least cost housing, and also produce sufficient evidence concerning the substance of each zoning ordinance and the efforts of local officials, to show a lack of reasonable mitigation of cost generating requirements and the lack of bona fide efforts by the responsible municipal officials toward that end.

Frankly, we do not believe that the Advocate has any intention of presenting such evidence; nor do we believe that the Advocate will offer competent expert zoners or planners who can testify the substance of the Mendham Borough zoning ordinance in relationship to Borough's characteristics and the actual uses presently in existence. Rather, what we believe will be offered will be speculative observations based principally

on the HUD minimum occupancy standards (developed for an entirely different purpose) by a supposed expert (see The Municipality's Maxi-Trial Brief).

In short, we believe that the presentation of a fair share study, the articulation of what is asserted to be "least cost" housing principles, and a facial review of a municipality's zoning ordinance does not constitute that sufficient quantum of proof required to make out a plaintiff's prima facie case in a Mount Laurel action and therefore this case must be dismissed at the close of plaintiff's proofs.

POINT II

THE DCA HOUSING ALLOCATION REPORT IS NOT INDICATIVE OF MENDHAM BOROUGH'S FAIR SHARE OF THE REGIONAL HOUSING NEED.

A. Authority. There is no legislative authority in this State for the adoption of a fair share housing plan and in the absence of such authorizing legislation, no municipality, whether it is developing or not, is obligated by law to abide by any plan promulgated by any agency of state government.

The DCA Allocation Report has been prepared by an agency of State government and purports to be no more than a study, entitled to what ever evidential weight or merit it may have but nor more. It is certainly not the kind of plan which the Supreme Court in Oakwood at Madison, 72 N.J. at 538, suggested might be given prima facie judicial acceptance (and for that matter only prima facie acceptance). It is not even a regulation adopted by the Department of Community Affairs, no municipality is "affected" by it, and no municipality would be entitled to appeal even though it contained some improper or arbitrary and capricious elements as it is contended here. It has not been "adopted" by the Department of Community Affairs, nor does the Department of Community Affairs have any intention of adopting it. Amicus Brief of Department of Community Affairs, Urban League of Greater New Brunswick v. Mayor and Council of Carteret, Docket No. 16, 492 (herein "Urban League Community Affairs Brief" at). Indeed, as the Department of Community Affairs has indicated in its supplementary brief in the same action dated October 24, 1980 at p. 5, "The Housing Allocation Report is not presently intended to have the binding force and effect of law with respect to the matters discussed therein." In short, the DCA Report represents only the view of a handful of planners in one agency of government.

POINT III

THE INCLUSION OF THE BOROUGH OF MENDHAM IN THE "REGION" DEFINED BY THE PLAINTIFF FOR PURPOSES OF DETERMINING ITS FAIR SHARE OF THE HOUSING NEED IS INAPPROPRIATE, AND PLAINTIFF'S COMPLAINT SHOULD THEREFORE BE DISMISSED AS TO THE BOROUGH OF MENDHAM

A. Employment and Transportation

As already argued under Point III A. of the Maxi-trial brief heretofore filed, the only meaningful criteria in establishment of a participatory housing region are levels of employment in the municipality itself, and functional proximity to employment in other areas given available transportation.

As will be shown by expert testimony based on reports already submitted, Mendham Borough has a lower ratio of jobs to population than have most other defendant municipalities, or the county as a whole, or any "journey-to-work" or other functional region which can be fairly imagined. There is, in fact, no industry in the Borough, and the Borough has neither undertaken to attract, or in fact attracted, industrial or commercial or other "employment-generating" growth and development within its borders. To the contrary, the most recent zoning ordinance of the Borough has taken land out of industrial zoning and placed it in high-density residential zoning, thereby turning the balance even further away from creation--and toward absorption--of regional housing need.

Turning to the matter of available transportation, it may be quickly noted that no railroad, busline, or major state

highway provides transportation directly to the Borough. The only road classifiable as a primary thoroughfare serving the Borough is Main Street (N.J. Route 24), and both lay and expert testimony will clearly establish that there already exists a steadily-worsening problem of traffic congestion on that artery. Moreover, it is idle to contemplate any improvement in that condition unless and until the problem of relocating Route 24 is resolved. Certainly, any widening of the existing road through the Borough itself is unthinkable, given the large number of historic sites (55) situated on both sides of the street.

B. The Appropriate Region

As already discussed, the proper region for planning purposes is one which relates to "journey-to-work" time, as affected by employment distribution and available transportation.

Such a region has been defined for the Borough of Mendham, based upon a study by a highly qualified Professional Planner, whose testimony will be presented at the trial and whose study has already been submitted in discovery proceedings.

That region, embracing most of Morris County and parts of Sussex, Warren, Hunterdon, Somerset, Union, Middlesex, Essex and Passaic, is properly based upon a typical commuter trip to and from the Borough. Included in

its area are population in excess of one million, and jobs in excess of 400,000.

While the precise boundaries of such a region may be debated, the underlying approach to defining it will be well-supported by expert testimony at various points in the trial, and is already well-grounded in the relevant jurisprudence and scholarly literature. See sources cited in Maxi-trial Brief at Point III A.

C. Entitlement to Dismissal

If the Court finds, as we anticipate it must find based upon testimony to be adduced at trial, that a housing region approximating that defined by defendant is more appropriate than that posed by Plaintiffs, then it is submitted that the Borough is entitled to a judgment dismissing the Complaint.

In Urban League of Greater New Brunswick v. Mayor and Council of Borough of Carteret, 170 N.J. Super. 461 (App. Div. 1979), the Appellate Division reviewed a case strikingly similar to the one at bar. There, as here, plaintiffs had concocted a "housing region" on the basis of how well it appeared to serve the sought-for result, rather than upon any sound and relevant planning considerations. After finding that the plaintiffs' region was inappropriate, the Appellate Division held that "since the definition of such a region is essential

to prove that defendants exclude such housing through their choice of zoning policies, . . . it follows that the proofs were insufficient to support the claim of exclusionary zoning." 170 N.J. Super at 475, 477.

The Appellate Division then, quite properly, entered a reversal rather than a remand, noting that a remand "would merely serve the purpose of allowing plaintiffs to pursue a theory [i.e., an alternative region] which they eschewed in the earlier trial on an issue as to which they had the burden of proof." Id at 477.

We most strongly urge the Court to resist what will surely be attempted by plaintiffs in the trial of this case, that is, a shifting of the burden of proof on the issue of "region" to defendants once it becomes apparent that plaintiffs' own "region" is arbitrary and without relevance to proper land use planning.

POINT IV

DEVELOPMENTAL CONSTRAINTS AFFECTING VACANT LAND IN THE BOROUGH OF MENDHAM, AS REFLECTED IN THE BOROUGH ZONING ORDINANCE, ARE REASONABLY NECESSARY FOR PROTECTION OF VITAL PUBLIC INTERESTS

The Supreme Court specifically recognized, as part of the Mount Laurel opinion, the importance of environmental factors in municipal land use regulations. As a test for assessing the validity of zoning provisions directed to environmental concerns, the Court declared that any such regulations "must be . . . reasonably necessary for public protection of a vital interest." 67 N.J. at 187. And again in Oakwood at Madison, the Court affirmed its recognition that environmental constraints may necessarily preclude development. 72 N.J. at 545.

It is submitted that environmental concerns recognized by the Borough of Mendham, and reflected in its planning and zoning activities long before the Mount Laurel decision, clearly meet the test of validity established in that opinion, and dictate constraints upon development of the sort acknowledged in Oakwood at Madison.

A. Potable Water Supply

In its responses to interrogatories, factual contentions submitted in response to the pre-trial order, and proofs to be elicited at trial, the Borough has and will continue to demonstrate that supplying potable water to its residents and those of joining municipalities has been and continues to be an item

of long-standing concern. Over the past decade, the Borough has been before the Department of Environmental Protection on two occasions seeking permission to divert underground water by development of new wells to meet the needs of its growing population. Prospecting for new potential water sources has been a continual activity in the Borough during that period. Many thousands of dollars have been expended in pursuit of this goal, and concurrent efforts have been made by the Borough to educate the public in water conservation. Indeed, in the context of the current regional water shortage, the Borough of Mendham on its own initiative imposed legislative constraints on water usage considerably before the State government moved to do so.

Expert testimony to be adduced at trial, based upon reports already produced in discovery proceedings, will establish that the area of the Borough which is maintained in low-density zoning--i.e., virtually the southerly one-half of the Borough--consists largely of wetlands whose water quality preservation is essential to long range resource planning.

B. Sanitary Sewage Disposal

A Borough-owned and operated sewage collection and treatment system, which has been in place for many years, serves virtually all developed properties in the northerly one-half of the Borough. As testimony will indicate, however, demands

placed upon the treatment plant by increased residential development in the past several years have given rise to serious operational problems which have required substantial expenditure of public funds merely to maintain the adequacy of treatment at the present demand level. Indeed, the existing plant is operating at or near its capacity.

Even so, changes in the zoning ordinance in recent years designed to accommodate higher density housing have been geared to the remaining capacity of the existing plant, rather than to the projection of any future expansion of facilities in the low-density (southerly) portion of the Borough.

Expert testimony to be adduced at trial, and reflected in reports already submitted, will indicate the wisdom of this policy from the perspective of long range resource planning.

C. State and Regional Planning

The land development policy of the Borough alluded to above and contained in its Master Plan and Zoning ordinance--i.e., permitting gradual in-fill of the already developed northerly half of the Borough where the infrastructure is in place--is on all fours with the concept espoused in the D.C.A.'s State Development Guide Plan, Revised Draft of May, 1980.

That plan places the Borough of Mendham in the development category of "Limited Growth", wherein communities "should

be left to grow at their own moderate pace", thereby obviating the need for "major public investments in services and facilities" and the continuance of "an energy-inefficient pattern of scattered development." Id. at p. 72.

While the State Development Guide Plan is not "law", it has been judically recognized as "the product of objective analysis on a statewide basis", and has been admitted into evidence in exclusionary zoning litigation as probative of State planning policy for orderly growth and development. Glenview Development Co., v. Franklin Tp., 164 N.J. Super 563, 576, (L. Div. 1978).

Other recognized planning authorities are in accord with the State Development Guide Plan vis-a-vis the future development of Mendham Borough. Thus, the Tri-State Regional Planning Commission's Regional Development Guide recommends retention of low-density development in the Borough, and the Morris County Master Plan reflects the same approach in its Future Land Use Element.

As the Appellate Division noted in N.J. Builders Assoc. v. Dept. of Environmental Protection, 169 N.J. Super. 76, 95 (App. Div. 1979), numerous legislative efforts at the State level have been directed toward limiting development in ecologically fragile areas of statewide significance, and have been

upheld by the Courts. Id. at 95, and sources cited therein. It is submitted that the Borough of Mendham should be permitted (rather, encouraged) to do no less to protect the critical natural areas found within its borders. This it has attempted to do through its planning and zoning, and will continue to attempt to do with the blessing of this Court.

POINT V

PLAINTIFFS SHOULD BE REQUIRED TO PAY THE DEFENDANT'S LEGAL AND OTHER REASONABLE EXPENSES OF LITIGATION

This action was commenced by plaintiffs in October of 1978. The cases upon which the action is ostensibly based were decided on March 24, 1975 (Mount Laurel) and January 26, 1977 (Oakwood at Madison), and the ancillary sources cited in paragraphs 17 through 20 of the Complaint were, with the single exception of the Revised D.C.A. Allocation Plan, published and available to plaintiffs not later than November, 1976.

Had plaintiff Public Advocate possessed even the most rudimentary sense of responsibility as a government agency contemplating an attack in this Court against the ordinances of another echelon of government, it might at least have taken the trouble to familiarize itself with the content of the ordinances being attacked. Indeed, given the lapse in time between the gathering of legal source material and the commencement of the

action, it was assumed by everyone at the outset of this litigation that plaintiffs had in fact done so.

This modest assumption, incredibly, was proven false by plaintiffs' own admission as early as December, 1978 at a hearing en masse of myriad defense motions for severance, more particular statements, dismissal, and similar types of relief. Later depositions, exchanges of interrogatories, and other discovery devices served only to underscore the basic conceptual flaw in this whole lawsuit, to wit, that plaintiffs swept in 27 municipalities as defendants all charged with maintaining exclusionary zoning practices, without having any idea as to what the actual situation was with respect to any defendant (except, possibly, Chester Township, with whom plaintiffs had recently been involved in zoning litigation).

Defendant maintains that its counterclaim states a claim for damages resulting from plaintiffs' breach of the duty imposed upon them pursuant to R. 1:4-8 and DR 7-102(A)(2).

R. 1:4-8 provides as follows:

> "The signature of an attorney or party pro se constitutes a certificate by him that he has read the pleading or motion; that to the best of his knowledge, information and belief there is good ground to support it; that it does not contain scandalous or indecent matter; and that it is not interposed for delay. If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed

> as though the pleading or motion has not been served. For a willful violation of this rule an attorney may be subject to appropriate disciplinary action, and an attorney or a party appearing pro se may be subject to punishment for contempt."

This rule is binding upon pro se parties as well as attorneys. See State v. Bass, 141 N.J. Super. 170, 171 (App. Div. 1976); see S. Pressler, supra, R. 1:4-8 Comment.

DR 7-102(A) provides in part as follows:

> "In his representation of a client, a lawyer shall not:
>
> (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he believes that such action would serve merely to harass or maliciously injure another.
>
> (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."

The obligations imposed by this disciplinary rule were applied to a pro se party. See State v. Bass, supra, 141 N.J. Super. at 171.

Attorneys acting in violation of these rules have been subject to disciplinary action because such conduct constitutes "a fraud upon the court." In re Backes, 16 N.J. 430, 435 (1954). See also, In re Greenberg, 15 N.J. 132, 135-137 (1954) (attorney cannot make false statement of facts or inferences therefrom

and must advise Court of all legal authorities even if adverse to client's contentions). Violation of these responsibilities is not only a fraud upon the Court but a severe injustice to the parties to the action. Moreover, the fact that the plaintiffs' case is funded entirely (or virtually so) by public tax revenues and the defenses must be similarly so funded cannot but place upon plaintiff an even heavier responsibility to ascertain that there is a basis for such a suit before bringing it.

Surely, in these circumstances, the general equity jurisdiction of this Court will admit of judgment against plaintiff for the enormous costs to local government of this needless litigation.

Respectfully submitted,

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