ML - Morris County Fair Housing Council v. Boonton
- Mendham

~ 1980

Trial Brief on Behalf of ~~Defendant~~ Township of Mendham

pgs. 28

ML000636B

SACHAR, BERNSTEIN, ROTHBERG,
SIKORA & MONGELLO, ESQS.
700 PARK AVENUE
P.O. Box 700
Plainfield, N.J. 07061
(201) 757-8800
Attorneys for Defendant
Township of Mendham

MORRIS COUNTY FAIR HOUSING COUNCIL, ET AL., Plaintiffs,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MORRIS COUNTY DOCKET NO. L-6001-78 P.W.
vs.	
BOONTON TOWNSHIP, ET AL. Defendants.	Civil Action

TRIAL BRIEF ON BEHALF OF DEFENANT TOWNSHIP OF MENDHAM

DANIEL S. BERNSTEIN, ESQ.
On the Brief

INDEX

INTRODUCTION

Judge Muir initially required each of the defendant municipalities to prepare a script on the facts which it would produce at trial. Subsequently, the municipalities were relieved of this requirement. However, this author is completing the Mendham Township script which will be submitted to the Court. It will list the factors which support Mendham Township's position in the mini-trial.

A court must consider a number of salient factors prior to making a determination on the exclusionary character of a zoning ordinance. This is referred to as the rational zoning process. These factors, and their specific applicability to Mendham Township, are discussed in the first point of this brief.

This defendant is requesting that the Court employ the rational zoning process in order to determine the validity of each municipality's zoning ordinance. The plaintiffs advocate an allocation of low and moderate income dwelling units based on a single formula. The impropriety of the formulaic approach is discussed in the second point of this brief.

POINT I

THE RATIONAL ZONING PROCESS REQUIRES A TRIAL COURT TO CONSIDER A MULTITUDE OF FACTORS BEFORE DETERMINING WHETHER A ZONING ORDINANCE IS EXCLUSIONARY.

It would be convenient for a court to employ a simple mathematical formula in order to determine whether a zoning ordinance is exlusionary. Unfortunately, this cannot be done. For a court to make a proper determination on the exclusionary nature of an ordinance, a multitude of factors must be considered. The review of the relevant planning factors is referred to in this brief as the rational zoning process.

Professor Jerome Rose has advocated the same process, which he refers to as a balanced community.

> "Balance within a community is not static; it is always in a dynamic and changing state. The forces of social, economic, political, and physical change constantly interact upon each other along a continuum of time. Today's community balance may become tomorrow's imbalance. Today's placid and fallow fields may become a center of tommorrow's teaming activity. All components of community structure do not grow and develop with equal and uniform progress. Houses, streets, utilities, water supplies, schools, and recreational facilities do not emerge abruptly as a monolithic community infrastructure in the required proportions of a balanced community." (Rose, J.G., "The Courts and the Balanced Community," After Mount Laurel: The New Suburban Zoning, Edited by Rose, J. G. and Rothman, R. E., 1977).

This comment is similar to that enunciated in Fisher v. Township of Bedminster, 11 N.J. 194, 205 (1952):

> "It must, of course, be borne in mine that the ordinance which is reasonable today may at some future time by reason of changed conditions prove to be unreasonable. If so, it may then be set aside."

This brief will examine the relevant factors which must be considered in the rational zoning process and their applicability to Mendham Township.

A) STATE DEVELOPMENT GUIDE.

The Division of Planning of the New Jersey Department of Community Affairs published the revised draft of the State Development Guide Plan in May of 1980. It makes recommendations as to growth and development throughout the State. The Guide's suggestions are broad brush rather than site specific. The State is divided into growth, limited growth, agriculture, conservation, and urban areas. Mendham Township is placed in a limited growth area. The following recommendation is made for these locales:

> "Except for the older centers, most of the development in Limited Growth Areas has occurred at very low densities. To some extent, development has been curbed by natural features such as steep slopes which interfere with easy access and increase construction costs. Mostly, however, these areas have only scattered, low density development because other portions of the State are more accessible to markets and population centers.

It is neither desirable nor feasible to prohibit

development in these areas. However, to support significant levels of new growth in such areas would require major public investments in services and facilities and an energy-inefficient pattern of scattered development would be continued. In addition, there would be significant indirect costs due to the diversion of necessary investments and other assistance from urban areas.

Accordingly, Limited Growth Areas should be left to grow at their own moderate pace. Public resources should be targeted toward other areas where growth can be accommodated more readily. In this way, the needs of future generations--for additional land to develop or to set aside for purposes which cannot now be anticipated--are recognized. Areas which do not now appear to be neccessary to accommodate projected population increases may become critically important resources for the New Jerseyans of the 21st century." (pp. 71 & 72)

Ten factors were considered by the Guide: agriculturally favorable soils, public open space, steep slopes, wetlands, water supply resources, sewage, public water supplies, highway and rail facilities, intensive employment concentrations, and development concentrations. p. 28. These factors will be considered in subsections B through I of this brief.

B. AGRICULTURAL SOILS.

The State Development Guide Plan suggests that: "If agriculture is to remain an important economic activity in New Jersey, than the areas most suitable for agriculture must be protected from intense urbanization. The location of prime agricul-

tural soils and existing farms are indicants for determining such areas." p. 28. One of the purposes of the Municipal Land Use Law is to provide sufficient space in appropriate locations for agricultural uses. N.J.S.A. 40:55D-2.g.

All classes of agricultural soils are found in Mendham Township. According to the Morris County Planning Board, Mendham Township is located in the only part of the county in which there can be any hope of preserving farmland. Future Land Use Element, p. 73. According to the Public Advocate, 1,508 acres in Mendham Township or 13.39 percent of the total land area is under farmland assessment and 1,725.67 acres or 15.31 percent of the total area of the municipality is actually farmed.

Based on the foregoing, it is clear that farming is a viable use in Mendham Township.

C. PUBLIC OPEN SPACE.

The State Development Guide identifies large tracts of land which are owned by the federal, state and county authorities. It does not include smaller tracts and parcels which are owned by municipalities and private parties. While the State Development Guide Plan of 1980 shows a fair amount of public open space in Mendham Township p. 31, the actual amount of open space is substantially larger. According to a planning study which was prepared for this litigation, approximately 26.5 percent of the land area of Mendham Township is owned by public and semi-public authorities.

D. STEEP SLOPES AND WETLANDS.

The State Development Guide recommends limited development in steep slopes and wetland areas. Most planners share this viewpoint.

A planning study shows that of 1940 vacant acres in Mendham Township, 1252, or approximately 2/3's, was encumbered with either steep slopes or flood plains. This illustrates that most of the vacant land in Mendham Township is not susceptible to intense development.

E. WATER SUPPLY RESOURCES.

The State Development Guide of 1980 states that watershed areas: "... should be protected from extensive development to protect their quality and yield." (p. 33) A fair amount of Mendham Township is included within watershed areas in the Guide.p. 34. This comports with the findings of the Mendham Township Master Plan and the reports of the municipal experts in the present litigation.

F. SEWAGE SERVICE and PUBLIC WATER

The State Development Guide states that sewage systems are essential for "intensive suburban and urban development." p. 33. Water service areas are considered desirable for future growth. p. 33.

The New Jersey Supreme Court in So. Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 186 (L.D. 1978) indicated that the lack of sanitary sewers was not an impediment to the construction of multi-family housing on relatively flat land. Even assuming that the statement was true in 1975, it is not so today. The various 201 and 208 studies have delineated limits on the amount of effluent which each watershed may safely absorb. As a practical matter, this puts a ceiling on population growth.

A more realistic approach was taken by the Supreme Court in Oakwood at Madison v. Township of Madison, 72 N.J. 481 (1977). There, two tracts which were zoned for planned unit development were found to be unreasonably zoned because construction on the tracts would require the extension of existing sewer and water facilities. 72 N.J. 521 through 523. If the extension of water and sewer facilities precluded property from supporting least cost housing, then the installation of new sewer facilities would totally prohibit the construction of least cost housing. The unreported case of Caputo v. Chester Township, Docket No. L-42857-74 P.W. (L.D. 1978) recognized the importance of locating multi-family facilities close to existing sewer and water lines. Id. at 21. The specific property owned by the Caputos was found to be inappropriate for high density housing because it lacked public water and

sewers. Id. at 40. The trial court in Round Valley v. Township of Clinton, Docket No. L-29710-74 P.W. (L.D. 1978) (unreported) found certain districts which permitted multi-family housing to be "camouflage" zoned because of a lack of water and sewer. Id. at 49. A basis for the decision in Glenview Development Co. v. Franklin Township, 164 N.J. Super. 563, 567 (L.D. 1978) was that the municipality lacked public water and sewers. According to Frederick C. Mezey, Esq.. who represented the corporate plaintiffs in Oakwood, "land not serviced by sewer and water facilities is frequently subject to a valid defense on the part of the municipality based on health considerations, particularly when the project, as contemplated here, involves such high density uses as apartments and town houses." "Beyond Exclusionary Zoning-A Practitioner's View of the New Zoning," Vol. 5, No. 1, The Urban Lawyer, 61, Footnote 10 (1973).

The map in the State Development Guide shows that a limited portion of Mendham Township is served by public water. p. 34.

It is not clear from the map in the State Development Guide as to whether portions of Mendham Township are within a sewage service area. p. 36. Mendham Township is not within such an area. The 201 and 208 water studies do not recommend any public sewage facilities for the community.

Because of the purity of the townships streams, the state and federal policy of antidegradation would preclude the

construction of all package plants except those having the most advanced and sophisticated equipment.

These facilities are not compatible with least cost housing.

G. EXISTING HIGHWAY AND RAIL SYSTEMS.

According to the State Development Guide:

> "As a result of past investments in transportation, some areas of New Jersey are more accessible than others and are, therefore, relatively more appropriate for future growth." p. 33.

The existence of highways has been recognized by the courts as being an important zoning consideration. Wilson v. Mountainside, 42 N.J. 426, 448 (1964). Highways and other transportation facilities are significant in exclusionary zoning cases on two grounds: first, they make commuting easier; and second, highways attract industrial and commercial users which increase the housing demand in the area. The latter factor was recognized by the trial court in Oakwood at Madison v. Township of Madison, 128 N.J. Super. 438, 441 (L.D. 1974) and the New Jersey Supreme Court in Oakwood, 72 N.J. 500. The municipal planner in the Round Valley case admitted that the construction of Route 78 made Clinton Township a growth area. p. 36. On the other hand, the absence of major transportation facilities will diminish a municipality's responsibility for housing. Judge Muir stated in the Caputo case:

> "It is true that Chester is a rural area. It is not strategically located for purposes of transportation that would be required of low income groups. It has no bus lines. The available train station is (sic) in Peapack, Morristown and Dover require automobiles to be reached. Additionally, the railroad lines are an expensive type of transportation going east to the edge of Union County and to Essex County with other transportation facilities to get to New York City. It is not the type of transportation required by lower income groups and thus the area is too remote in that sense." p. 81.

A major goal of the New Jersey Transportation Plan is the upgrading of transportation facilities in urban areas. It would discourage the development of land in suburban and rural areas which would overtax existing transportation systems.

The map on page 37 of the State Development Guide Plan shows that none of the major highways or commuter rail lines pass through Mendham Township. This is substantiated by the reports which the Mendham Township witnesses prepared for this litigation. In addition, the existing streets in Mendham Township are not capable of handling a substantially increased population. The population growth which is recommended by the Public Advocate would require extensive improvements to the Township's streets. This would take new construction out of the least cost category.

H. EMPLOYMENT CONCENTRATIONS.

The State Development Guide Plan of 1980 recommends that:

"Most future growth should be encouraged in areas which are in proximity to employee residences to minimize commutation distances and energy costs." p. 38.

The Supreme Court in Mt. Laurel indicated that 29.2% of the municipality was zoned for industrial use. 72 N.J. 162. The substantial industrial zoning was not justified by industrial development in the municipality. Only 100 acres of the 2800 acres which was zoned for industry was presently being utilized for said purpose. 67 N.J. 162, 163. Madison Township had also overzoned for industry. The municipality had zoned 4000 acres for industrial and office use, yet only 600 acres were industrially developed. Oakwood at Madison v. Township of Madison, 72 N.J. 504. Of the 2,297 acres in Clinton Township which were zoned for industrial use, only slightly more than 100 were developed for this use. Round Valley v. Township of Clinton, Docket No. L-29710-74 P.W. (L.D. 1978) (unreported) at p. 54

The nexus between industrial and multi-family zoning is two-fold. In those communities where industrial zoning produces industrial jobs, the municipality should provide housing for the workers. Judge Furman found that Madison Township's responsibility for housing was based in part on its encouragement to industrial development. Oakwood at Madison v. Township of Madison, 117 N.J. Super. 11, 17 (L.D. 1971). Where substantial amounts of a community's industrially zoned land are not being utilized, it should be rezoned for residences.

Not a single acre of ground in Mendham Township is zoned for industrial use. There are a few commercial uses in Mendham Township which occupy approximately 4 acres. Mendham Township formed an ad hoc committee to study the advisability of industrial development in the community. The committee's conclusion was that industrial development should not be permitted. Neither the Mendham Township Master Plan nor the Morris County Master Plan recommends commercial or industrial uses within the municipality. According to statistics which were supplied by the Public Advocate, covered employment in Mendham Township fell from 241 in 1970 to 230 in 1978.

I. EXISTING DEVELOPMENT

The courts should recognize that a host of communities are swept under the phrase "developing municipality." However, each locale is in a different stage of development and should be treated accordingly. The Court in Round Valley, supra, p. 35 effectively made this point:

> "It is apparent, however, that Clinton Township's population increase is not as explosive as was that of Mt. Laurel or Madison Township for the same period of time. Studies of future growth by the Hunterdon County Planning Board indicate that Clinton Township will experience relatively constant population expansion reaching approximately 14,000 persons by the year 2000. As a result, it is fair to say that Clinton Township is a

'developing municipality' but it is hardly an 'archetypal developing municipality' characterized by explosive growth such as Mt. Laurel or Madison Township. The difference is significant and while the principals enumerated in Mt. Laurel and Madison are valid in the instant situation, they will require less in quantatative terms from a municipality like Clinton Township to meet its obligations as set forth in the above named cases. The courts have already recognized the logic of this proposition.

'It may be that the rate at which a particular municipality is developing, a reflection of the need for housing in the area, should govern to some extent the amount of housing for which provision should be made in its zoning ordinance. A municipality undergoing development of less than explosive proportions, although considered developing in the Mt. Laurel context, may be required to make provision for fewer units of "least cost" housing than would a municipality resisting strong pressures for population influx by the exclusionary features of its zoning ordinance. Rate of development, and the need it reflects, may well be considered in the equation determining "fair share." The requirement for "least cost" housing may alter as rate of development changes; an ordinance is not immutable but must respond to changing needs and circumstances.' Middle Union Associates v. Holmdel Tp., Docket No. L-1149-72 P.W. (Law Div. 1975) (unreported)."

A rural community which lacks jobs and infrastructure may have a limited need for least cost housing. In the landmark case of Fisher v. Township of Bedminster, 11 N.J. 194 (1952),

the defendant municipality was described as "distinctly a rural community with no industry, light or heavy and with little activity ..." p. 196. It had a slow growth pattern, a limited water system, and no public sewers. p. 198. "In short, the Township, although only 40 miles from New York, is essentially rural, as if it were 400 miles away, as its population of 62 per square mile demonstrates." p. 198. Not only was the community rural, but so were the surrounding municipalities. p. 198. Given this situation, the court found 5 acre zoning to be valid. Even Judge Furman recognized that a community with established residential character would have a different obligation from a developing municipality. Oakwood at Madison v. Township of Madison, 117 N.J. Super 11, 19 (L.D. 1971).

The same principal was recognized in Glenview Development Co. v. Franklin Township, 164 N.J. Super. 563, 571 (L.D. 1978):

> "By any definition, Franklin Township is a rural community of low population with no major employment centers, no industry, no capital infrastructure, but with a dedication of most of its lands to agriculture. To be sure, it is on the threshold of change, and what applies to it now may not be applicable in ten or even five years. But while it is on the threshold, it has not yet crossed that threshold."

Justice Pashman, in his dissenting opinion in Pascack Association v. Washington Township, 74 N.J. 470, 512,

513 (1977), recognized that many undeveloped municipalities were not appropriate for substantial numbers of low and moderate income housing. "... a community which has vast open spaces but has yet to develop facilities to service that area may be ill-equipped to cope with an influx of new residents."

There is a valid reason for limiting the responsibility of developed communities. "Thus, maintaining the character of a fully developed predominantly single-family residential community constitutes an appropriate desideratum of zoning to which a municipal governing body may legitimately give substantial weight in arriving at a policy legislative decision as to whether, or to what extent, to admit multi-family housing in such vacant land areas as remain in such a community." Pasack Association, supra, 483, 484.

Distinctions between rural, developing and developed municipalities require different treatment in exclusionary zoning cases. These distinctions are not dependent upon limiting fair share responsibility to developing municipalities, but are grounded in rational planning considerations.

Mendham Township is unusual in that it is a rural, substantially developed community.

J. THE COUNTY MASTER PLAN.

The State Development Guide recognizes that reports from the county and regional bodies are relevant to the planning process. The Guide took these studies into account. p. 38.

N.J.S.A. 40:27-2 provides:

> "The county planning board shall make and adopt a master plan for the physical development of the county. The master plan of a county, with accompanying maps, plats, charts, and descriptive and explanatory matter, shall show the county planning board's recommendations for the development of the territory covered by the plan, and may include, among other things, the general location, character, and extent of streets or roads, viaducts, bridges, waterway and waterfront developments, parkways, playgrounds, forests, reservations, parks, airports, and other public ways, grounds, places and spaces; the general location and extent of development areas for purposes of conservation, food and water supply, sanitary and drainage facilities, or the protection of urban development, and such other features as may be important to the development of the county."

When adopting a municipal master plan, the community's planning board must take the county master plan into account. N.J.S.A. 40:55D-28(d). The courts have often relied upon the county master plan in exclusionary zoning cases. The opinion in the Caputo case mentioned the Morris County Master Plan on pages 13, 63, 65 through 69, 73, 76, 82, 84, 86, 96 and 97. In the Allan-Deane case, the county master plan was cited on pages 12 through 15 of the decision.

The Morris County Master Plan suggests low density development for Mendham Township.

K. TRI-STATE PLANNING COMMISSION.

Tri-State statistics were quoted by the Supreme Court in Oakwood, 72 N.J. 500. The importance of the Tri-State Planning Commission was attested by the Somerset County Planning Director in the Allan-Deane case:

> "The Tri-State Regional Planning Commission is the official regional planning agency for the region, and because it is such a complicated region, the Tri-State Regional Planning Commission--to comply with their planning requirements--they require the counties in New York and New Jersey to comply with their planning requirements, and the regions in Connecticut. Tri-State must adopt plans. Counties must adopt plans. And then they must be compatible, and they must be cross-examined by the respective constituent agencies...H.U.D. carries a club of rejecting any municipal application for any federal grant, for more than 100 federally funded programs. In other words, if we haven't done what they said we should do, if (a municipality) applies for a storm drainage grant, they would tell (the municipality), 'you can't have this storm drainage grant because Somerset County has not gone through the planning operation as we have required.' So it is a big club they carry." p. 9.

In March of 1978, Tri-State published the "Regional Development Guide, 1977-2000." In the report's covering letter to the Governors of Connecticut, New Jersey and New York, the major goals of Tri-State were set forth as follows: "(1) to enhance our older cities as desireable places to live and do business. (2) to protect our farms, wetlands, mountains, stream valleys, watersheds, and forests, and (3) to coordinate the location of homes and work places with public utilities, facilities, services

and public transportation in order to conserve energy and promote social equity. This plan is a break from the commission's earlier land-use plans, which were based on expectations of continued rapid growth. Now we must husband our resources and get the most out of what is already in place."

The study made a number of specific recommendations:

1. Older Cities - the deterioration of the older cities should be stopped. Instead of losing population, it was projected that the cities would grow by 10%.

2. Critical lands - wetlands, watersheds, prime farmlands, flood plain and other natural sites should not be developed.

3. Transportation supporting densities - resist suburban sprawl and encourage higher densities in appropriate areas. A density of 7 dwelling units per acre is required for a local bus service.

4. Sewered areas - the extension of public sewers and water into rural lands should be stopped. Development should be contained in those areas already served by public utilities.

5. Jobs - Housing balance - each region should have a rough balance between households and jobs. New jobs would be encouraged in the central cities and away from the suburbs.

6. Multiple centers - higher densities in outlying regions would be restricted to centers. pp. 10 through 12.

Tri-State has also prepared maps which indicate where intense and limited development should occur. The Tri-State Planning Commission recommends a maximum residential density in

Mendham Township of one unit per two acres and preferably larger lots.

Justice Hall recognized that a court could consider county and regional environmental plans and direct growth to those areas which the plans designated for more intense residential development. ("A Review of the Mount Laurel Decision," After Mount Larel, supra, p. 43).

L. THE MASTER PLANS AND ZONING ORDIANCES OF ADJACENT MUNICIPALITIES.

The Municipal Land Use Law requires a municipality to consider the master plan of adjacent communities when preparing its own master plan. This merely codifies the existing case law which holds that a municipal zoning ordinance must take adjacent municipalities into account. Cresskill v. Dumont, 15 N.J. 238; Roselle Park v. Union, 113 N.J. Super. 87 (L.D. 1970).

Communities have zoned their lands which border Mendham Township for predominantly large lot single-family use. (Map following p. 44 of the Mendham Township Master Plan). This is an indication of the reasonableness of Mendham Township's large lot zoning.

M. REASONABLENESS OF THE ZONING.

A zoning ordinance which zones property into inutility should be struck down by the courts. In Oakwood at Madison v. Township of Madison, 117 N.J. Super. 11, 16 (L.D. 1971), the court

discussed the difficulty in developing the one and two acre zones in the municipality. No two acre project had been developed since the 1930's and the last one acre subdivision to be proposed was in 1964. The lack of development in these zones was an indication that the land was not properly zoned. While, theoretically speaking, the inability to develop property because of restrictive zoning might be considered a due process issue rather than an exclusionary zoning question, in reality the considerations go hand in hand. Oakwood, supra.

The testimony in the present litigation will prove that large lots are readily developable in Mendham Township. A study has shown that more homes have been built on large lots in Mendham Township than in Bedminster Township, Bernardsville, and Peapack-Gladstone. There is a demand for attractive homes on large lots and that demand is being satisfied in Mendham Township.

N. VACANT DEVELOPABLE LAND.

This criterion was considered by the trial courts in Mt. Laurel, 119 N.J. Super. 170 (L.D. 1970); Oakwood, 117 N.J. Super. 11, 14 (L.D. 1971); and Urban League of Greater New Brunswick, 142 N.J. Super. 28 (C.D. 1976).

Of the approximately 11,511 acres in Mendham Township, only 1940 are vacant. Of that total, 1252 are constrained with steep slopes and flood plains, leaving a total of 688 acres which are potentially developable. This constitutes 6 percent of the land area of Mendham Township.

POINT II

THERE IS NO FORMULA WHICH CAN EQUITABLY ALLOCATE LOW AND MODERATE INCOME DWELLING UNITS TO MUNICIPALITIES.

Much interest is centered on schemes for allocating low and moderate income dwelling units to each municipality in a region. It is argued that a formula can equitably distribute the units. However, any formula would be overly simplistic and would preclude serious analysis. If simple formulas were a panacea, then why has the judiciary failed to impose such standards in other areas of the law? One could make a simple definition of pornography which could easily apply to all cases. However, the United State Supreme Court has required proof that the average person, applying contemporary community standards, would find the work to appeal to a prurient interest. Miller v. California, 413 U.S. 15; 93 S. Ct. 2607 (1973); Jenkins v. Georgia, 418 U.S. 153; 94 S. Ct. 2750 (1974). Equitable distribution in a matrimonial case is merely concerned with the division of the spouse's assets. It had been suggested that there be a presumption that the property be equally divided between the parties. The court dismissed this approach in Rothman v. Rothman, 65 N.J. 219, 232, 233, (1974). "Rejecting any simple formula, we rather believe that each case should be examined as an individual and particular entity." The Supreme Court in Painter v. Painter, 65 N.J. 196, 209, 210 (1974), stated that equitable distribution required a matrimonial judge to apportion the assets in a just

manner. The court cited numerous cases where an equitable standard was employed. If the courts cannot establish a formula in relatively simple cases dealing with pornography and equitable distribution, how can the courts establish formulaic fair share allocations for an entire region which would require extensive knowledge of economics, housing, transportation, environmental constraints, community development patterns, and a host of other factors? The litigants in other matters are entitled to full plenary trials with decisions based on the record. Should zoning be treated as the step-child of the law, with its disputes settled by a formula?

On a practical basis, a judicially imposed housing allocation plan must fail for a number of reasons. First, the allocation cannot take each of the relevant considerations into account. Point I of this brief indicates many of the pertinent factors which should be considered by the court. It is submitted that no formula can accurately reflect each of these attributes. Second, what weight is to be given to each of the factors. Third, what period should be used in computing the allocation. Even those commentators who advocate fair share allocations suggest a time frame of one, two, or five years. Accurate projections cannot be made for a longer period of time. Franklin, H.M.; Falk, D.; Levin, A.J.; In-Zoning, 155, 156 (The Potomac Institute, 1974).

The Municipal Land Use Law makes the land use element of the master plan the basis for municipal zoning. N.J.S.A. 40:55D-62. The law requires a municipal planning board to review a master plan and to make the necessary revisions every six years. N.J.S.A. 40:55D-62. Can a court impose an allocation plan for a longer period of time? Lastly, in those few instances where fair share allocations have been implemented, they have been done as a result of the political process rather than through litigation.

Tschangho John Kim, who was the principal planner for the Middlesex County Planning Board, prepared a study on "Low and Moderate Income Housing in Middlesex County, New Jersey, Analysis, Forecast with Allocation for 1975." It was cited in Oakwood, 72 N.J. 525 through 527. Kim is an adherent of housing allocations. His report discussed various methodologies. Kim believed that an objective formula could be obtained.

> "However, what has been formulated and reported in this study is simply the first stage in adequately responding to this vitally important task. The basic model structure should only be considered a first approximation to be used to establish community dialogue. These data should form the basis for discussions that will result in the actual allocations, which in the end is a political decision." p. at 86.

The New Jersey Department of Community Affairs prepared allocation plans for 1970, 1976, and 1978. The allocations to particular municipalities from the three plans are widely divergent. If the Department of Community Affairs, which has the manpower and expertise, keeps changing its plans, how can a court be expected to allocate housing units?

The Oakwood decision should have layed judicially imposed formulaic fair share allocations to rest:

> "It would not generally be serviceable to employ a formulaic approach to determination of a particular municipality's fair share." p. 539.

> "However, we deem it well to establish at the outset that we do not regard it as mandatory for developing municipalities whose ordinances are challenged as exclusionary to devise specific formulae for estimating their precise fair share of the lower income housing needs of specifically demarcated region. Nor do we conceive it as necessary for a trial court to make findings of that nature in a contested case. Firstly, numerical housing goals are not realistically translatable into specific substantive changes in a zoning ordinance by any technique revealed to us by our study of the data before us. There are too many imponderables between a zone change and the actual production of housing on sites as zoned, not to mention the production of a specific number of lower cost units in a given period of time. Municipalities do not themselves have the duty to build or subsidize housing. Secondly, the breadth of approach by the experts to the factor of the appropriate region and to the criterian for allocation of regional housing goals to municipal subregions' is so great and the pertinent economic and sociological considerations so diverse as to preclude judicial dictation or acceptance of any one solution as authoritative." pp. 498 and 499.

> "We take this occasion to make explicit what we adumbrated in Mount Laurel and have intimated above -- that the governmental-sociological-economic enterprise of seeing to the provision and allocation throughout appropriate regions of adequate and suitable housing for all categories of the population is much more appropriately a legislative and administative function rather than a judicial function to be exercised in the disposition of isolated cases." p. 534.

"Quite apart from the uncertain efficacy of this newly formulated rule, there are a number of reasons why courts should abstain from seeking ultimate solutions in this area, but should rather urge a legislative, or legislative-administrative approach. In the first place courts are not equipped for the task. If a court goes beyond a declaration of validity or invalidity with respect to the land use legistlation of a particular municipal body, it invites the fairly certain prospect of being required itself to undertake the task of rezoning. Of course, it has neither the time, the competence nor the resources to enter upon such an undertaking." Justice Mountain, concurring and dissenting opinion, pp. 625 and 626.

CONCLUSION

It is requested that the Court employ the rational zoning process as the test of the exclusionary nature of a municipality's zoning ordinance. It is conceded that this is a difficult task, but it is the only fair way of measuring a municipality's responsibility.

Based on the rational zoning approach, Mendham Township's responsibilty for low and moderate income housing is either non-existent or nominal.

The plaintiffs will be submitting a formula for the countywide allocation of low and moderate income families. It is suggested that the formula be ignored by the Court, as is has no significance in the present litigation.

Respectfully submitted,

SACHAR, BERNSTEIN, ROTHBERG, SIKORA & MONGELLO

Daniel S. Bernstein

By: Daniel S. Bernstein