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Borough of Lincoln park

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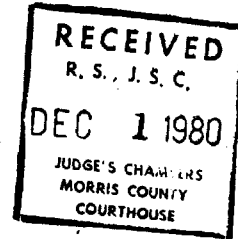
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NO.: L-6001-78 P.W.

MORRIS COUNTY FAIR HOUSING :
COUNCIL, et al., :
 :
 Plaintiffs, :
 :
 Vs. :
 :
 BOONTON TOWNSHIP, et al., :
 :
 Defendants. :
 :

TRIAL BRIEF ON BEHALF OF DEFENDANT, BOROUGH OF LINCOLN PARK

SCANGARELLA, FEENEY & KATZ, ESQS.
Attorneys for Defendant
Borough of Lincoln Park
565 Newark-Pompton Turnpike
Pompton Plains, N.J. 07444
(201) 839-5100

FRANK SCANGARELLA, ESQ.
LAWRENCE D. KATZ, ESQ.
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TREATISES CITED

Davis, Foote and Kelley, Survey Theory and Practice (5th Ed. 1968)	28
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Goldshore, Trends in Environmental Litigation 9 Rutgers Camden Law Journal 21 (1977)	60

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Division of Planning, Department of Community Affairs, State Development Guide Plan	70, 71
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- L.P. 20 PUBLIC TRANSPORTATION GUIDE TO MORRIS
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- L.P. 26 SOIL SURVEY FOR MORRIS CO., PUBLISHED BY MORRIS CO, SOIL CONSERVATION DISTRICT,
- L.P. 27 REGIONAL DEVELOPMENT GUIDE 1977-2000, TRI-STATE REGIONAL PLANNING COMMISSION, MARCH, 1978.
- L.P. 28 RUTGERS UNIVERSITY REPORT NO. 9, MORRIS CO., ENGINEERING SOIL SURVEY.
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STATEMENT OF CASE

This is a prerogative writ action challenging the land use regulations and practices of the Defendant, Borough of Lincoln Park and 26 Morris County municipalities, and asserting such regulations and practices to be unconstitutional and illegal by precluding housing for low income families in the context of So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975) and Oakwood at Madison v. Madison Twp., 72 N.J. 481 (1977). Lincoln Park avers that it is not a developing municipality and not subject to the Mt. Laurel mandate; that it is inappropriately placed in the same region with the other co-defendants; and that in any case this Defendant has made provision for its fair share of least cost housing.

STATEMENT OF FACTS

INTRODUCTION

Lincoln Park Borough is situated on the easterly edge of Morris County. The Borough is bounded on the east by the Township of Wayne in Passaic County, on the south by the Borough of Fairfield in Essex County, on the west by the Township of Montville and on the north by the Township of Pequannock and the Borough of Kinnelon.

Lincoln Park contains a land area of 6.6 square miles of a total of 4,290 acres¹. The Borough population, established by the 1970 United States Census, was 9,034; however, the preliminary 1980 Census returns indicate that the population has declined to 8,798.

¹L.P. 6, Table I shows land as 4,290 acres, river as 178 acres for a total of 4,468 acres, land area at 644 acres per square mile equals 6.6 square miles.

TOPOGRAPHY

In terms of topography, the Borough is situated in the Pompton and Upper Passaic Water Shed and is bounded on the south by the Passaic River and on the east by the Pompton River, both rivers comprising, in total 3-1/2 to 4 miles of water frontage. Borough of Lincoln Park Master Plan,²1979 , L.P. 2, page 6.

Except for Hook Mountain, which dissects the Borough from west to east and ranges in elevation from 200 to 400 feet, and the Jacksonville Road area with moderate to high slopes, the Borough can be characterized as being low, flat and, in many cases, swampy. Supra, page 6³.

²The Land Use Plan element of the Lincoln Park Master Plan was adopted on July 21, 1977. The Land Use Plan was based upon certain studies, reports and maps detailed on pages 35 through 37 of this brief and collated in the 1979 Master Plan.

³See footnote #2 above.

ENVIRONMENTAL CONSTRAINTS

FLOODING: Lincoln Park is located in the Passaic River Watershed, one of the most severe flood prone areas in New Jersey. L.P. 2, page 17. 66% of all lands in the Borough lie within the flood plain and are otherwise classified as wetland. L.P. 2, Map 3; L.P. 24.

The low lying Bog & Vly meadows and Great Piece meadows together, compromise over 2/3 of the Borough and due to their proximity to the confluence of the Passaic and Pompton Rivers, have a long history of flooding. As a consequence, the Federal Insurance Administration has designated these areas as Flood Hazard Areas requiring special development constraints as a condition to the local eligibility in the National Flood Insurance Program. L.P. 2, page 29.

Additionally, of the 2,450 acres remaining vacant in the Borough, 1,850 acres fall within the flood plain, principally within the Great Piece Meadow and Bog and Vly Meadow. L.P. 2, pages 31 and 32.

Associated with its location within the watershed and flood plain, virtually all the lands in the Borough evidence soil conditions with water within four (4) feet or less of the ground surface. L.P. 2, page 30, Map 3. The effect of this condition upon development will be considered below. Annual

periodic flooding also has the effect of restricting access to the community and totally bars access to Route 23 and Route 80, except by the most circuitous routes.

VACANT DEVELOPABLE LAND: Unlike much of Morris County, Lincoln Park has little vacant developable land. Even though only 37.2% of the community is developed, L.P. 6, Tables I and II, the remaining vacant lands, except for 261 acres, remain undevelopable. L.P. 5; L.P. 6, Tables I, II and III; L.P. 12. Of the 4,290 total acres in the Borough, 2,583.9 (66%) constitute wetlands, 607.8 acres of land with greater than 12% slope, and 144 acres qualified farm land. Subtracting roads, improved or built upon lands and lands in or dedicated to public use, there remains but 261 vacant developable acres or SIX PERCENT (6%) of the total land area. L.P. 5; L.P. 6; Tables I, II and III; L.P. 12; See "Restatement of Report Allocation", page 28 , infra. A graphic, if not dramatic, presentation of developable lands in the Borough is contained in Exhibit L.P. 12, entitled: Map, "Conditions Which Limit Development, Borough of Lincoln Park, February, 1979". The map, based upon the Flood Insurance Rate Map, August 6, 1976, Lincoln Park Topographic Map, April, 1968 and Lincoln Park Land Use Map, April, 1977, delineates wet lands, lands with greater than 12% slope, qualified farm land, public land and developed land.

NATURAL CONDITIONS RESTRICTING DEVELOPMENT: The Borough

Master Plan deals particularly with the subject of "Restrictions on Development Due to Natural Conditions", L.P. 2, pages 28-31:

"RESTRICTIONS ON DEVELOPMENT DUE TO NATURAL CONDITIONS

Natural physical features in a high proportion of Lincoln Park's land area limit or complicate development.⁴ Two distinct types of geography make up the bulk of Lincoln Park's area; low lying, often marshy areas and hilly, often rocky areas. Each of these areas has its own set of development constraints.

The low lying areas of Boy and Vly Meadows and Great Piece Meadows comprise over 2/3 of the Borough's total area. They have a long history of flooding, the result of their proximity to the confluence of the Passaic and Pompton Rivers (see Flooding, page 17). The Federal Insurance Administration has designated these low lying areas as "Flood Hazard Areas" and required special strict regulations for development which the Borough must enforce as a condition of participation in the National Flood Insurance Program.

The Hook Mountain area, which comprises about 1/4 of the Borough, has development constraints due to poor soil conditions. The area has a history of drainage and septic problems largely the result of steep slopes and rocky soils. The Morris County Soil Conservation District has categorized the majority of the vacant land in this area as having soils which limit or complicate development (see Map #5). The two basic categories of development limitations, flooding and soil capabilities, taken together effect more than 90% of Lincoln Park's total area.

⁴Emphasis added by underlining throughout quote.

FLOOD HAZARDS

Flood plains, during a flood, act as reservoirs temporarily containing excess water that cannot be immediately discharged by the river. Development in these areas characteristically results in a reduction in flood water storage potential, just as if a cup were gradually filled with stones. The cumulative effect is a reduction in the amount of flood water that the flood plain can hold, which in turn results in a rise of the flood level for any given flood. This occurs to varying degrees depending upon the type of development and the flooding characteristics of the specific area. In general, however, the greater amount of filling of the flood plain, the greater the impact on future flood potential.

Inundation is another problem for developments in flood hazard areas. This can to an extent be controlled by raising the structure above flood level, however, this has the correlary effect, mentioned above, of increasing the future flood hazards. In addition, raising a structure often greatly increases the cost of construction. This may be offset in certain cases of commercial or industrial development by the advantage offered in specific sites in terms of superior access to markets, but even in those cases, there is a limit to how much filling is economic.

The differential between existing ground elevation and the flood water elevation is the crucial factor for the impact on flood storage capacity and the economics of development. If the difference is too great, then filling (or raising the structure) becomes a prohibitive expense and results in a large reduction of flood storage capacity due to the large quantity of fill necessary to raise the structure.

Access to developments located in flood plain areas is a serious problem, especially for those located in severely flood prone areas. A development that is raised out of the flood plain can still be cut off from vital services by a flood. This is a special concern in the case of high density residential development where large numbers of people could be cut off from emergency services.

* * * * *

Thus, it is evident that many natural conditions severely limit development in the Borough over more than "90% of Lincoln Park's total area". L.P. 2, page 29. Equally significant is an analysis of all vacant lands in the Borough set forth on pages 31 and 32 of the Master Plan, id.

"Vacant Lands

Great Piece Meadows

This area of about 1,000 acres in the southern extreme of the Borough is the most severely flood prone area..... having an annual incidence of flooding. The ground elevation is 9 or more feet below the elevation of flooding It has been mentioned in the Corps of Engineer's plans as a site for (a) reservoir and the State Development Guide Plan and the Regional Development Guide have classified it for open space. Soils have poor bearing capacity for structural development. (emphasis supplied).

Pio Costa Lake Area

Extensively mined this area of about 250 acres in the northeastern corner of the Borough is to a large extent now a water

body for much of the year. Most of the remaining land is severely flood prone. The ground elevation of land is 8 or more feet below flood elevation.....

Borinski Tract Area

The western portion is qualified farmland..... The main limitation to development in this area of over 100 acres is due to flood hazards. The ground elevation is largely 5 to 8 feet below requiring a large amount of fill for structural development. Structural development may, however, be feasible albiet expensive on pockets of higher land. (emphasis supplied).

Beaver Brook Road Area (Bog & Vly Meadows)

This area is about 500 acres Limitations to development are due to poor soil conditions and flood hazards. The soils in most cases have poor bearing capacity requiring extensive excavation and refilling for structural development. (emphasis supplied). The existing elevation in much of this area is 3 or 4 feet below base flood elevation. Again, structural development may be feasible albiet expensive because of the extensive site preparation necessary.

Tom's Point

This area of about 65 acres has no serious on-site development limitations due to natural conditions.⁵

⁵ Designated planned residential development (PRD) in the zoning ordinance, L.P. 1, providing for townhouse development at 8 units per acre. A developer has received site plan approval for 345 units in mid 1980, however, development has been stalled due to pending litigation.

Northwestern Highlands (Jacksonville Road Area)

This area of about 250 acres a number of large tracts remain vacant Natural limitations to development are due mainly to stony soil conditions, moderate to high slopes.⁶

Hook Mountain Peak and Southern Slope

..... this area of about 300 acres ranging in elevation from about 200 to 400 feet slopes generally run above 12% and in some cases above 15%..... Soil conditions for development are characteristically poor due to shallow bedrock conditions....."

It is evident from the foregoing analysis of 2475 vacant acres of land that Lincoln Park has almost no developable land. Even the data contained in the Report, L.P. 5, pg. 17, relied upon by the Plaintiffs, shows Lincoln Park with only 396 developable acres.

⁶Lincoln Park and The Pequannock, Lincoln Park and Fairfield Sewerage Authority (Authority) received grants from the U.S. Environmental Protection Agency and N.J. Department of Environmental Protection for the construction of a sanitary sewer collection system, pumping station and Authority lines within the Borough of Lincoln Park. On December 7, 1979 a grant, however, was denied for the construction of the Borough collector system to service the Jacksonville Road area (Contract No. 4) situate in the northwest corner of the Borough. L.P. 43 and L.P. 44. Funding requires satisfaction of two criteria: (1) justification of need, and (2) justification of cost effectiveness. Lincoln Park completed a need study on August 14, 1980 and believes that such requirement has been established. On September 24, 1980 Lincoln Park applied for a grant to undertake the cost effective study and such application is pending. As contemplated Authority lines were to extend from the Greenview treatment plant northerly along Beaverbrook Road to the intersection of Jacksonville Road and westerly along Jacksonville Road to Farm Road approximately at the west ditch crossing. Lincoln Park and Pequannock were to share in the cost of the construction of an interceptor from Farm Road westerly along Jacksonville Road to the Voorhis Road pumping station to service the respective municipalities. Pequannock Township has not committed, however, to date, to contribute flow to this line and is itself undertaking a needs study. The authority lines will be dependent upon Lincoln Park and Pequannock's needs and both municipalities and the Authority must thereupon file construction grant applications for funding purposes.

DEVELOPING MUNICIPALITY

Lincoln Park does not exhibit the attribute of a developing municipality. The Borough does not possess a sizeable land area having an area of 6.6 square miles⁷. Of 39 Morris County municipalities, the average size is 12.25 square miles⁸. Nor, as illustrated above, does the Borough possess any significant quantity of vacant developable land. 261 acres, or 6% of the total land area in the Borough remain vacant and developable. Nor can it be maintained that the Borough is exhibiting growth. Preliminary 1980 census counts record a population decline between 1970 and 1980, from 9,034 to 8,798. During that same period solely 102 housing units were constructed⁹. In the Mount Laurel sense, (So. Burl. Cty v. Tp. of Mt. Laurel, 67 N.J. 151 (1957), App. Dison. and Cert. Den. 423 U.S. 808, 462 Ed.2d 28 (1978)), Lincoln Park is not a developing municipality, supra at 160.

REGION

Contrary to the assertions of the plaintiffs in this action, there exists no legal or factual justification for the 8-county region established by the Report, L.P. 4, even though

⁷See Footnote #1, *infra*.

⁸Data Book, Morris County, N.J., State of New Jersey, Dept. of Education.

⁹Records of Lincoln Park, Dept. of Planning & Building.

the region has come to mean "the area from which, in view of available employment and transportation, the population of the municipality would be drawn absent invalidly exclusionary zoning. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481,537 (1977), the Department of Community Affairs has departed from the journey to work criteria in the formulation of the eight-county region. It will be demonstrated that this departure has created significant distortions in the application of the journey to work and other housing region criteria respecting Lincoln Park, its co-defendants and the County in general.

On October 24, 1980, in response to certain questions raised by the New Jersey Supreme Court following 3 days of argument in the six zoning cases, Urban League of Greater New Brunswick v. Carteret, et al., and related matters, the Attorney General filed a letter response brief with the Court, L.P. 17, addressing inter alia, the subject of "Justification of Regional Divisions":

"Justification of Regional Divisions

Four criteria were used by the Division as a basis for the twelve regions established in the Report. The first, and perhaps most important, is based on the principle articulated in Mount Laurel that municipalities be responsive to local and regional low, moderate income housing needs, 67 N.J. at 187-188. In metropolitan area where the concentration of housing needs exceeded available county resources, the region accordingly incorporated adjoining counties, as necessary. See AGb7-24 to AGb8-8. In this regard, a significant consideration in establishing regions in accordance

with county boundaries was the relative availability of statistical data on this basis in comparison with configurations balance, the regions selected demonstrated positive relationships, as discussed in greater detail below, between such considerations as housing, job location, community facilities and availability of transportation and other services. Finally, county-based regions were consistent with the recurring references in Executive Order No.35 under which the Initial Report was developed, see AGb6-6 to 16, supporting the allocation of housing needs in accordance with the boundaries of individual or groups of counties. Allocation Report at 8-11.

Contrary to the criticism which the Court indicates was presented at oral argument, the Division did not consider the "journey to work" factor in establishing regions. The Division utilized 1970 Bureau of the Census data suggesting that a clear preponderance of employees reside in the same county where they are employed. See Department of Transportation - Tri-State Census Bureau Joint Project, Recoded, Reprocessed Worker File (1974.)* Further analysis by the Division in delineating the 12 housing regions indicated that large numbers of trips per day occurred between counties that were subsequently grouped into the respective northeastern and southwestern New Jersey regions, while the remaining ten regions which consisted of single counties did not evidence strong home to work trip linkages with adjoining counties. See Journey to Work: New Jersey 1970, Office of Business Economics, August 13, 1973.

In addition to the degree of commuter interaction noted above, the northeastern New Jersey eight-county region was developed in recognition of the absence of sufficient available land resources to accommodate local housing needs in such counties as Essex, Hudson and Union. The specific counties composing this region were selected on the basis of relative geographic proximity and socio-economic interdependence. Allocation Report at 1-11; AGb 8-8. Clearly, to incorporate more remote counties in this region as was apparently suggested at oral argument is unwarranted, in that it would promote

urban sprawl and result in longer employee trips to work as new housing is constructed in these outlying locations to meet regional housing needs." L.P. 17 at pages 6 & 7.

The Attorney General's justification of the Region is based, in part, upon the availability of statistical data on a county-wide basis "in comparison with configurations which were not county-based". Supra, page 5. Further in metropolitan areas where housing needs exceed county resources "the region accordingly incorporated adjoining counties as necessary". Id. In that regard it was acknowledged that the eight-county region was "developed in recognition of the absence of sufficient available land resources to accomodate local housing needs in such counties as Essex, Hudson and Union". Supra, page 6. The Attorney General's response constituted neither a legal nor rational justification of regional composition and such response serves instead to underscore the criticism of the 8-county region made at oral argument in the six zoning cases,¹⁰ Urban League of Greater New Brunswick v. Carteret, et al., and related matters:

"5. Please justify the regional divisions of the Report (10 counties as separate regions plus one region of three counties and one of eight counties).

¹⁰The Attorney General's October 24, 1980 letter response was in reply to a letter from Stephen W. Townsend, Clerk of the Supreme Court, for the Court, dated October 23, 1980, addressing certain questions and criticisms made at oral argument. L.P. 17A, page 1 & 2.

In addition to a general justification of the regions, please respond to the following criticisms made at oral argument by counsel:

b. The eight-county region incorrectly assumes that the appropriate counties for Essex and Hudson County needs are those to the west only, whereas it is quite clear that counties outside that eight-county region are more likely candidates to meet those needs.

6. The Fair Share allocations, it was alleged, have led to clearly incorrect results. Again, the Public Advocate in the Morris County case has presented, the Court was told, an expert indicating that the appropriate allocation for one municipality was at least double the Report allocation.

7. The population projections used to determine Fair Share allocations are inaccurate--in some regions, the population during the past decade has been declining.

Nor is the county data based criteria justified by resort to additional criteria:

"An additional criteria was that on balance, the regions selected demonstrated positive relationships as discussed in greater detail below, between such considerations as housing, job location, community facilities and availability of transportation and other services."

However, the Plaintiff's expert, Mary Brooks, indicates in her December, 1979 Report, page 7, that significant factors to be considered in a fair share housing plan include distance to employment, availability of public transportation and existence of adequate infrastructures (i.e. water, sewer, schools).

L.P. 38.

THE 4-COUNTY REGION

Lincoln Park has undertaken employment, transportation and other socio-economic data base studies, L.P.18,18A,19 & 19A which show that Lincoln Park is not part of the 8-county region but instead, a 4-county region consisting of Morris, Passaic, Essex and Bergen counties. The studies were undertaken by the Borough Planning Department and its planning consultants, the Planning Association of North Jersey. The following studies were undertaken:

1. place of employment of Lincoln Park workers;
2. place of residence of workers employed in Lincoln Park;
3. where Lincoln Park residents food shop;
4. where Lincoln Park residents shop for clothing, household items, etc.;
5. where Lincoln Park residents receive medical care;
6. where Lincoln Park residents receive dental care;
7. where Lincoln Park residents engage in sports and recreation;
8. where Lincoln Park residents attend movies, theater, etc.

The survey of place of employment of Borough residents was based upon 356 telephone responses and revealed that 88% of all workers are employed in the 4-county region, L.P. 18, page 2, 4-6, L.P. 18A, page 1.

Excluding the New York State employment (28), 95% of all workers are employed in the 4-county region. Hudson, Union, Middlesex and Somerset counties account for 4.6%. id.

Place of residence of workers employed in Lincoln Park, based upon personnel data provided by employment establishments in the Borough is corroborative. Of 1,300 employees, 84.5% reside within the 4-county region. Excluding New York State workers, the number is 88%. Hudson, Union, Middlesex and Somerset counties account for 1.4%, L.P. 19, pages 1-7, L.P. 19A.

Socio-economic dependence is likewise heavily weighted in favor of the 4-county region. Except for newspaper subscription or readership accounting for 82.9%, at least 93% of Lincoln Park residents shop, obtain medical services and attend movies and theater in the 4-county region. L.P. 18A page 2-8.

In terms of transportation, two (2) separate studies were undertaken: L.P. 18, page 7 & 8.

1. Method of transportation for Lincoln Park residents.
2. Travel time to work.

Of 395 telephone responses, 83.88% of all workers travel to work by use of private conveyance and only 5.73% make use of public transportation. id. The reason for resort to private transportation is that, generally speaking, while there are

rail and bus connections to some of the other parts of the Newark-New York Metropolitan region, the level of service is such that use of those facilities is limited. There is infrequent service during limited hours of the day. There is no direct service to Bergen County, Union County, Hudson County, Middlesex County and Somerset County; only limited service to parts of Passaic and Essex Counties. See Public Transportation Guide to Morris County, published by the Department of Public Transportation and the Morris County Board of Freeholders, 1978, L.P. 20.

While Route 287 is mentioned as a major access to other parts of the region, Route 287 does not extend to Lincoln Park. There is now serious question as to whether Route 287 will ever be completed. Many regional groups, Regional Planning Association and Paterson Regional Development Corp., are arguing a no-build alternative.

Data base studies reveal that there exists little in the way of employment, transportation and socio-economic interdependence between Lincoln Park and the other co-defendants in this action and Morris County in general. Except for Pequannock Township, a co-defendant neighbor to the North, statistical contacts between Lincoln Park and other Morris County communities is insignificant. There is, however, an overwhelming interdependence between Lincoln Park and the 4-

county region. This divergence demonstrates the validity of the criticism of the criteria and methodology employed in the establishment of the eight-county region. Annexation of counties may represent a convenient numbers solution, however, what legal or planning principles justify such a concept? Similarly, what legal or planning principle justifies the inclusion of Lincoln Park Borough as a co-defendant in a housing region in which it bears no positive relationship with other co-defendants? It is respectfully argued that housing units may not fairly be allocated among a fractional number of municipalities and counties within a region on a patch work basis but such allocation should be uniformly determined and administered at one time throughout the State.

HOUSING

There exists no correlation between housing criteria and Lincoln Park's inclusion in the subject action. As demonstrated above, Lincoln Park has little developable vacant land upon which to build new housing. In terms of existing housing, data reveals that this community is supplying substantially more least cost housing than is generally available in Morris County. L.P. 34, L.P. 2, page 33-40, Map 7 and 8, L.P. 6 "Comparison of Existing Housing to Future Housing". 1970 U.S. Census data showed the following:

Single family	1982	78.3%
Two family	66	2.6%
Multi-family	485	19.1%

Rental units were also available in the Borough in single family homes as well as two-family homes. The Census revealed 645 renter units, 25% of total housing was renter-occupied.

Through its revised Master Plan and Zoning Ordinance, Lincoln Park has provided approximately 965 additional units of least cost housing. L.P. 6, Table I, II and III.

(1) Low/Moderate Income Senior Citizen Housing	150
(2) Townhouse	58
(3) Planned Residential Development Townhouses	439 ¹¹

¹¹The Planned Residential Development District has received project approval for 345 townhouse units.

(4) Apartments over Stores	25
(5) Two-family	<u>293</u>
	<u>965</u>

Throughout the pendency of this action, the Plaintiffs have steadfastly maintained that except for units zoned for senior housing and perhaps the apartment units over stores, no other newly zoned two-family or multi-family districts were in accord with the Plaintiff's concept of least cost housing. Development Standards for all such districts are set forth in the Development Regulations, Code of the Borough of Lincoln Park, L.P. 1, pages 1 through 50. However, standards for the 2-family district, deemed non-least cost by Plaintiffs, are included in the body of this brief so as to demonstrate the divergence of interpretation of the concept of "least cost housing". L.P. 1, pages 12 through 14.

" Sec. 28-41 - R-15. Residential Zone.

Within the R-15 Residential Zone, no premises, lot, building or structure shall be used, and no building or structure shall be erected or altered to be used in whole or in part for any other than the following purposes:

A. Permitted Uses:

1. All uses permitted in the R-40 and R-20 zones.
2. Two-family dwelling used as a residence by

not more than two (2) families.

B. Special Requirements for Two-Family Dwellings:

1. Minimum lot size for two-family dwellings shall be twenty-two thousand five hundred (22,500) square feet.
2. Minimum floor area for a two-family dwelling shall be a total of one thousand seven hundred fifty (1,750) square feet.
3. Each dwelling unit in a two-family dwelling shall contain a minimum floor area of six hundred fifty (650) square feet.
4. Professional offices shall not be permitted in a two-family dwelling.

The following rooms shall be provided in each of the dwelling units: Living room, kitchen-dining room, one or more bedrooms, bathroom and an accessory storage area and two separate entrances.

Requirements for All R-40, R-20 and R-15 Residential Zones.

- A. Accessory uses on the same lot and customarily incidental to the permitted dwelling unit shall not include a business but may include:
1. Detached garages of a capacity not to exceed three (3) automobiles and tool sheds; however, such structures shall be located not less than thirty-five (35) feet to the rear of the front line of any existing dwelling or, if no dwelling exists, thirty-five (35) feet to the rear of the legal set-back line.
 2. Stands for the sale of farm or garden products raised on the premises, excepting, however, the sale of fowl or livestock. Stands shall be located at least twenty-five (25) feet from any

property line and said stand shall be of a temporary nature and removed from the front or side yard when not in use.

B. Off-street Parking Required:

1. Residential - Two (2) off-street parking spaces for each dwelling unit, at least one (1) of which shall be enclosed in a garage or carport.
2. . . . " supra, pages 12 and 13.

It is notable that unit density in the two-family district barely exceeds the four unit per acre limit espoused by Mary Brooks¹².

The remaining newly zoned 672 least cost housing units are all either multi-family or townhouse units permitting densities of up to 8 units per acre, except for the low-moderate income senior citizen district which permits densities of up to 15 units per acre.

Besides provision for least cost housing, lot sizes in this community are characteristically modest. Although 63.6% of all residentially zoned acreage in Morris County is one (1) acre or more¹³, only 9% of vacant and improved lands in Lincoln Park fall within the same category. Additionally, 61% of all residential lands in Lincoln Park vacant or improved are 1/3 acre or less. L.P. 6, Table I.

¹²December, 1979 Report, pg. 1, Brooks Report, L.P. 38 pgs, 12-13 and March, 1979 Report, pgs. 24-25.

¹³1975 Zoning Inventory by Municipalities, Morris County Planning Board.

In summary, by combining existing housing stock with newly zoned least cost housing opportunities, the result is -

Single family	68%
Two-family	7%
Multi-family and Townhouse	25%

L.P. 6 "Comparison of Existing Housing to Future Housing".

INFRASTRUCTURE AND COMMUNITY FACILITIES

Although Lincoln Park has recently constructed a sewerage collection system, service will not be available to the few larger developable tracts in the Borough situated in the Jacksonville Road area. Lincoln Park's application for Federal funding for sewerage for this portion of the community has been rejected and existing criteria for such approval would make it extremely difficult to ever secure such funding.

Lincoln Park has no local water source except for one municipally operated well that produces 200,000 gallons per day. Lincoln Park purchases its water supply from Pequannock Township.

In terms of the public school system, it should be noted that Lincoln Park has no public high school nor are there any current plans to construct such a facility. Lincoln Park high school students are bussed to Boonton.

DEMOGRAPHICS

The 1970 U.S. Census, although now ten (10) years old, reveals that Lincoln Park is a blue collar community. If any demographic imbalance exists, it lies in the relatively small numbers of upper and middle income families residing in the community. 26.8% of Lincoln Park families have incomes below \$10,000.00; 41.6% have incomes between \$10,000.00 and \$14,999.00. In sum, 68.4% of families have income below \$15,000.00. Comparative census data reveals that median income in the Borough is 8th lowest in Morris County. L.P. 42. Additionally, residential sales prices in Lincoln Park, averaging \$47,200.00 for the period 7/77-7/78 are also one of the lowest in Morris County. L.P. 41.

In addition to having one of the lowest per capita incomes in the county, Lincoln Park has the fourth highest tax rate in the county and suffers declining trends in its ratable base due to the effect of flood plain development constraints upon property values. This occurs at a time when Lincoln Park has incurred major capital expenses, a significant portion of which will be reflected in the tax rate¹⁴. Obviously, Lincoln Park is not a community which caters to middle and upper income families nor may its residents be expected to bear any additional tax burden to defray the cost of improvements required to support additional housing having a negative cost benefit ratio.

¹⁴Lincoln Park will be required to raise by taxation, an additional \$500,000. in 1981 and \$750,000 - \$1,000,000 annually thereafter for payment of debt service for the sanitary sewer program and for sewage plant user fees.

Finally, an underlying principle of planning is the concept of a balanced zone scheme and plan implicit in the provisions of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. The Plaintiffs in this action seek a housing allocation for the Borough of Lincoln Park of 1,574¹⁵ low moderate income housing units. L.P. 38. Lincoln Park already has an imbalance of lower family income ranges. There presently exists approximately 2,300 housing units in the Borough, 25% of which constitute rental housing. The addition of 1,574 low-moderate income multiple-family units will constitute an increase of 68% in the total number of housing units and result in double the multiple family-single family ratio from 25% to almost 50%. This imbalance does not take into account the 965 multi-family and 2-family housing units provided for pursuant to the newly adopted Master Plan and Zoning Ordinance. Such a result would constitute major reorientation of this community's housing stock and demographic base.

1980 CENSUS

1980 Census preliminary counts reveal that Lincoln Park has sustained a population decline from 9,034 to 8,798. That residential growth stabilized during this period is also evidenced by the fact that solely 102 housing units were constructed during that period.¹⁶ Although the Lincoln Park

¹⁵The REPORT allocation is 702 units.

¹⁶Certificate of Occupancy based upon records of Lincoln Park Department of Planning and Building.

Planning Board granted preliminary site plan approval for a 345 unit planned residential complex in mid 1980, development of that site has been stalled as a result of litigation challenging the validity of the approvals granted.

Further, projections of regional and county agencies on continuing growth of population and housing units are now outdated. They were based on earlier growth rates. Birth rates have slowed down; housing starts are down. Preliminary returns of the 1980-Census show population declines and very limited increases in residential development. High mortgage interest rates and spiraling construction costs have also recently contributed to the decline.

Restatement of Report Allocation

Lincoln Park maintains that it is not a developing municipality nor is it appropriately placed in the 8-county region. Should the Court sustain the plaintiff's position on these issues and determine that the allocation methodology is not flawed, Lincoln Park nevertheless maintains that it has provided its fair share of, least, cost housing. Further, that the allocation of 702 units as contained on sheet A-27 of the REPORT; L.P. 4, should be restated or corrected to reflect a more accurate count of vacant developable acres.

Sheet D-17 of the REPORT, shows the existence of 396 vacant developable acres in Lincoln Park. Vacant developable acres is defined "as the vacant land in a municipality less land with greater than 12 percent slope, wetlands, qualified farmland and public lands". supra pages 15 and 16. Lincoln Park, in application of REPORT criteria and based on several studies concludes that a more accurate count of such acreage is 261. L.P. 5; L.P. 6 - Table I, II, III; L.P. 12 Map "Conditions Which Limit Development" etc. Acreage determination was arrived at by detailed measurement of the respective areas shown on L.P. 12 by employment of a polar planimeter, a survey instrument accurate to within 1% on small scale maps. Survey Theory & Practice, Davis, Foote & Kelley, 5th ed. (1968).

The amount of vacant developable land in a municipality

of course by REPORT criteria is directly related to housing allocations:

"Based on this index, each municipality's share of the acreage of vacant developable land is also its share of the prospective housing need. For example, if a municipality's share of vacant developable land is 10% of the total of such land in the region, then it would receive 10% of the prospective housing need of the region."

supra at page 16. A reduction from 396 to 261 vacant developable acres represents a 66% reduction in vacant developable acres. This correction should significantly lessen Lincoln Park's allocation of 702 units. This reduction, taken together with Lincoln Park's provision for 965 new least cost housing opportunities is a compelling additional argument for dismissal of this suit as to Lincoln Park Borough.

POINT I.

THERE IS A PRESUMPTION IN FAVOR OF THE VALIDITY OF THE BOROUGH ZONING ORDINANCE WHICH CAN BE OVERCOME ONLY BY AN AFFIRMATIVE SHOWING THAT THE ORDINANCE IS ARBITRARY OR UNREASONABLE AND DEBATABLE ISSUES OR QUESTIONS OF POLICY MUST BE RESOLVED IN FAVOR OF THE BOROUGH.

It is fundamental that zoning is a municipal legislative function. Bow and Arrow Manor v. Town of West Orange, 63 N.J. 335, 343 (1973). The role of the judiciary in reviewing legislative action exercised pursuant to the statutory grant of zoning powers is narrow. The court may not pass upon the wisdom of a particular ordinance or legislative determination, and debatable issues or questions of policy must be resolved in favor of the municipality. Vickers v. Township Co. of Gloucester Township, 37 N.J. 232, 242 (1952), appeal dismissed 371 U.S. 33 (1963).

"The zoning statute delegates legislative power to local government. The judiciary of course cannot exercise that power directly, nor indirectly, by measuring the policy determination by a Judge's private view. The wisdom of legislative action is reviewable only at the polls. The judicial role is tightly circumscribed. We may act only if the presumption in favor of the ordinance is overcome by a clear showing that it is arbitrary or unreasonable."
(citations omitted) Kozesnik v. Montgomery Township, 24 N.J. 154, 167 (1957)

It is axiomatic that the municipal governing body is presumed

to have acted reasonably and that the resulting legislation is valid. Ward v. Montgomery Township, 28 N.J. 529, 539 (1959); Bartlett v. Middletown Township, 51 N.J. Super 239, 261 (App. Div. 1958), certification denied 28 N.J. 37 (1958). Indeed, liberal construction of municipal powers is mandated by the Constitution:

"The provisions of this Constitution and of any law concerning municipal corporations formed for local government ... shall be liberally construed in their favor."
N.J. Const.; Art. IV, Sec. VI, par. 11

Clearly, the burden of proof rests upon the Plaintiffs.

"There is a presumption that the regulation is reasonable, and the burden is upon plaintiffs to establish the contrary. (citations omitted). The rule is that even if the validity of the action be fairly debatable, the legislative judgment prevails."
Appley v. Bernards Township, 128 N.J.L. 195 (Sup.Ct. 1942)."
Guaclides v. Englewood Cliffs, 11 N.J. Super 405, 511 (App.Div.1951).
Accord; Hyland v. Mayor and Township Comm. of Township of Morris, 130 N.J. Super 470, 476 (App.Div. 1974).

As Judge Clapp stated in Hochberg v. Borough of Freehold, 40 N.J. Super 276, 290 (App.Div.1956):

"We have some doubts; but when in doubt we sustain. Indeed, we should always be most reluctant to interfere with the legislative process, whether at the municipal or higher level."

Thus, the court is not free to compare the views of the municipal governing body with its own in an attempt to determine what policy would be in the best interests of the municipality

"The decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination is presumed to be reasonable and valid, and will be conclusive, beyond interference from the courts unless shown to be arbitrary, unreasonable or capricious." Jones v. Zoning Board of Adjustment, Long Beach Twp., 32 N.J. Super 397, 405 (App.Div. 1954).

"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 testimony adduced at a trial is at variance with the local legislative judgment. If the latter is at least debatable it is to be sustained. (Citations omitted)." Bow and Arrow Manor v. Town of West Orange, supra, at 343.

The reluctance of the judiciary to substitute their judgment for that of the municipality reflects that judicial and legislative functions are separate and distinct. The legislative body is charged with the responsibility to enact laws which properly regulate and protect the interests of its inhabitants. If the legislature fails in its task the voters at the polls provide the necessary checks and balances. The court can concern itself only with an abuse of delegated legislative power, and may set aside the legislative judgment only if that judgment is clearly arbitrary. United Advertising

Corp. v. Metuchen, 42 N.J. 1, 8 (1964).

The presumption in favor of the validity of a municipality's zoning ordinance was not changed by Mount Laurel or the cases decided subsequent thereto. See Mt. Laurel at 180-181. As noted in Pascack Ass'n Ltd. v. Mayor and Council of Washington Tp., 74 N.J. 470, 483-485 (1977), a zoning case in which the Court was faced squarely with the issue of imposing upon developing municipalities the obligation to provide by zoning for the low and moderate income segments of the population, where the Court stated:

"Without in any way deprecating the recent salutary judicial, executive and legislative efforts at promoting the construction of multi-family housing to meet an obvious and urgent need therefor, see Mount Laurel, supra, 67 N.J. at 178-180; Oakwood at Madison, supra, 72 N.J. at 531-532, 535, there has been no fundamental change beyond the holding of Mount Laurel itself in the statutory and constitutional policy of this State to vest basic local zoning policy in local legislative officials. N.J. Const. 1947, Art 4, Sec. 6, par. 2. Cf. Art. 4, Sec. 7, par. 11 (liberal construction of powers of municipal corporations).

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 decisions as Bow & Arrow Manor and Kozenik, 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 plaintiffs' or the courts' conception of the requirements of the general welfare, whether within the Town or the region". See also Home Builders League of So. Jersey, Inc. v. Tp. of Berlin, 81 N.J. 127, 137 (1979).

The power to zone is, in its essential policy and purpose. a component of the police power which serves common social and economic needs. Rockhill v. Chesterfield Twp., 23 N.J. 117 (1957). The enabling legislation, N.J.S.A. 55D-62, provides:

"Power to Zone: a. The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the Planning Board has adopted the Land Use Plan element of a Master Plan, and all of the provisions of such a zoning ordinance or any amendment or revision thereto, shall either be substantially consistent with the land use plan element of the Master Plan, or designated to effectuate such plan element;"

In the case at bar, the Planning Board of the Defendant Borough, after due deliberation, public hearing and conformance with the statutory mandates, adopted the land use element of the Borough's Master Plan.

The extent and nature of the deliberations which occurred prior to the adoption of the land use element is apparent from the "Resolutions of Adoption" which appear in the first page of the Master Plan. L.P. 2.

The introduction to the Master Plan reveals the effort that was put into its formulation.

"INTRODUCTION

The Planning Board has, for over a decade, worked on the development of a Master Plan for the Borough. To this end, a number of studies analyzing existing conditions were developed by the Planning Association of North Jersey under the direction of Grace C. Harris, P.P. These studies were carefully considered in the development of this plan.

In 1975, the Planning Board initiated a survey of every household in the Borough. Response was received from approximately 30% of the town. An analysis of the survey was undertaken as a joint project of the Lincoln Park Planning Department and the Morris County Data Processing Center. The results of the survey were carefully considered by the Planning Board in the development of the objectives of the Master Plan and it was a guide throughout the development of the plan.

It is the Planning Board's hope that this plan will offer guidance for future development in the Borough."

Specifically considered were the following:

1. Topography map prepared by the Lincoln Park Planning Department, October 1977;
2. Map entitled "Drainage Areas", prepared by the Lincoln Park Planning Department, September 1977;
3. Report on Drainage Study, prepared by Peter S. Marra, P.E., Borough Engineer, December 1971;
4. Map entitled "Flood Hazard Areas". prepared by the Lincoln Park Planning department, June 1977; 17

17 It is particularly noteworthy to consider the vast extent to which property in the Borough is situated in "Zone A" - areas of the 100 year flood.

5. Passaic River Report, prepared by Corps of Engineers, June 1972;
6. Report on Flood Plain Study, prepared by Peter S. Marra, P.E., December 1973;
7. Map entitled "Soils", prepared by the Lincoln Park Planning Department, September 1977;
8. Map entitled "Soils which limit Development", prepared by the Lincoln Park Planning Department, April 1977¹⁸;
9. Map entitled "Prime Agricultural Lands", prepared by the Lincoln Park Planning Department, July 1977;
10. Environmental Assessment Report; Local Sanitary Sewerage System, July 1975, prepared by Malcolm Pirnie, Inc.;
11. Engineering Soil Survey of New Jersey, Report No. 9, Morris County, prepared by Rutgers University, 1953;
12. State Development Guide Plan, Preliminary Draft, New Jersey Department of Community Affairs, Division of State and Regional Planning, September 1977;
13. Regional Development Guide 1977-2000, Tri-State Regional Planning Commission, March 1978;
14. Map entitled "Existing Land Use", prepared by the Lincoln Park Planning Department, April 1977;
15. Map entitled "Existing Land Use, Central Business District", prepared by the Lincoln Park Planning Department, January 1977;
16. Map entitled "Future Land Use Plan", prepared by

¹⁸Said map clearly reflects that the vast majority of the lands in Lincoln Park has water within four feet of surface.

the Lincoln Park Planning Department, April 1977;

17. U.S. Bureau of the Census, Population estimate for Lincoln Park, July 1, 1976;

18. Map entitled "Conditions Which Limit Development", prepared by Peter S. Marra, Consulting Engineer, February 1979.

These restrictions severely limit or complicate development. As noted in the Borough's Master Plan:

"Two distinct types of geography make up the bulk of Lincoln Park's area; low lying, often marshy areas and hilly, often rocky areas. Each of these areas has its own set of development constraints.

The low lying areas of Bog and Vly Meadows and Great Piece Meadows comprise over 2/3 of the Borough's total area. They have a long history of flooding, the result of their proximity to the confluence of the Passaic and Pompton Rivers (see Flooding, page 17). The Federal Insurance Administration has designated these low lying areas as "Flood Hazard Areas" and required special strict regulations for development which the Borough must enforce as a condition of participation in the National Flood Insurance Program.

The Hook Mountain Area, which comprises about 1/4 of the Borough, has development constraints due to poor soil conditions. The area has a history of drainage and septic problems largely the result of steep slopes and rocky soil. The Morris County Soil Conservation District has categorized the majority of the vacant land in this area as having soil which limits or complicates development (see Map #5). The two basic categories of development limitations, flooding and soil capabilities, taken together effect more than 90% of Lincoln Park's total area." (at 29)

The foregoing is most dramatically revealed by examination of the Map entitled "Conditions which Limit Development", prepared by the Borough's Consulting Engineer, Peter S. Marra, P.E., February 1979.

In conformity with the master plan, the subject zoning ordinance was enacted in June of 1978. It should be noted that the Municipal Land Use Law, N.J.S.A. 40:55D-2 provides:

"It is the intention and purpose of this act:
a. To encourage municipal action to guide the appropriate use or development of all lands in this state in a manner which will promote the public health, safety, morals and general welfare; b. To secure safety from fire, flood, panic and other natural and man-made disasters.
c. To provide adequate light, air and open space...; e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well being of persons, neighborhoods, communities, regions and preservation of the environment...
g. To provide sufficient space and appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens; i. To promote a desirable visual environment through creative development technique and good civic design arrangements; J. To promote the conservation of open space and valuable natural resources, and to prevent urban sprawl and degradation of the environment through improper land use." (emphasis supplied).

Further, pursuant to N.J.S.A. 40:55D-65(e), a zoning ordinance may:

"Designate and regulate areas subject to flooding (1) pursuant to P.L. 1972, c. 185 (C.58:16A-55 et seq.) or (2) as other-

wise necessary in the absence of appropriate flood hazard designations pursuant to P.L. 1962, c. 19 (C58:16A-50 et seq.) or floodway regulations pursuant to P.L. 1972, c. 185 or minimum standards for local flood fringe area regulation pursuant to P.L. 1972, c. 185."

Certainly the severe flood-prone nature of the land within the Borough, the Hook Mountain area with grades in excess of 12%, and other restrictions on development due to natural conditions, were factors of considerable importance in the Planning Board's and Governing Body's deliberations and ultimate conclusion.

Notwithstanding the constraints imposed by these environmental factors, Lincoln Park's Zoning Ordinance permits broad and diverse uses within the Borough and provides for an appropriate variety and choice of housing.

In order to shift the heavy burden of proof to Defendant, Plaintiffs must make a prima facie showing that Lincoln Park's ordinance is arbitrary. Plaintiffs must prove that Lincoln Park's ordinance does not provide its fair share of least cost housing to satisfy the demands of an appropriately defined housing region. These proofs must take into account the environmental and planning considerations and comprehensive planning needs which are unique to Lincoln Park, and which influenced the Borough Planning Board and Governing Body in the formulation and enactment of the Zoning Ordinance. Failure to do so, failure of the Plaintiffs to prove all the elements of their case, requires dismissal of same.

POINT II

PLAINTIFFS' RELIANCE ON THE
DCA REVISED HOUSING ALLOCATION
REPORT IN THE MATTER "SUB JUDICE"
IS MISPLACED.

In support of its contention that Plaintiffs' reliance on the DCA Revised Housing Allocation Report in the instant action is misplaced, Defendant, Lincoln Park, adopts and incorporates herein the argument set forth in POINT III of the brief submitted by McCarter & English, Esqs., on behalf of Defendant, Chester Township.

POINT III.

THE BOROUGH OF LINCOLN PARK IS NOT A DEVELOPING MUNICIPALITY AND THEREFOR HAS NO MT. LAUREL ZONING OBLIGATIONS.

Mt. Laurel specifically applies only to developing municipalities, 76 N.J. 160, 173-174, Rowe V. Pittsgrove Tp. 153 N.J. Super 274,282 (Law Div. 1977); Pascack, supra. Accordingly, in order for the plaintiffs to succeed in the instant action, they must demonstrate that Lincoln Park is a developing municipality. 19

In Mt. Laurel Justice Hall delineated the following six criteria by which to ascertain whether a particular municipality is developing:

1. has a sizeable land area
2. lies outside the central cities and older built-up suburbs
3. has substantially shed rural characteristics
4. has undergone great population increase since World War II or is now in the process of doing so

¹⁹Defendant is aware that the Supreme Court has recently asked for briefing and argument on "the wisdom" of limiting Mt. Laurel to developing municipalities (Question #7). In the proceedings before the Supreme Court, the Public Advocate and other parties including Amicus Curiae (e.g. The American Planning Association), took the position that the "developing community" classification should be discarded and that Mt. Laurel should apply to all municipalities. Although this issue may not have any relevance in the future to "exclusionary zoning" claims, at this time it remains pertinent to this proceeding and therefore Defendant, Lincoln Park, addresses such issue herein.

5. is not completely developed
6. is in the path of inevitable future residential, commercial and industrial demand and growth.

66 N.J. at 160
See also Glenview Development Co. v. Franklin Twp.,
164 N.J. Super 563, 567
(Law Div. 1978)

Application of these criteria provides an analytical framework requiring the exercise of judgment. They are factors which must be considered and applied to the given set of facts applicable to the subject municipality. Glenview Development Co. v. Franklin Twp., Supra at 571. This requires a review of the character of Lincoln Park.

Lincoln Park is situated on the easterly edge of Morris County. It contains a land area of 6.6²⁰ square miles, or a total of 4,290 acres. L.P. 6, Table I. Of the 4,290 total acres in the Borough, 2,583.9 acres, or 66%, constitute wetlands. Id., Table II; 607.8 acres or 14%, are lands with greater than 12% slope, and 144 acres or .03%, constitute qualified farm land. Id.; See "Restatement of Report Allocation, Page 28", infra. Subtracting these undevelopable acres, roads, improved or developed property and property in or dedicated to public use, there remains but 261 vacant,

²⁰In comparison, the average area of New Jersey municipalities is 12.25 square miles. See footnote 8 page 11.

developable acres or 6% of the total land area²¹. These statistics are borne out in the data compiled and addended to Defendant's answers to interrogatories and referenced in Defendant's maxi-trial statements. They are particularly borne out by exhibit L.P. 12, entitled: "Conditions which Limit Development, Borough of Lincoln Park, February 1979." This exhibit, based upon the Flood Insurance Rate Map, August 6, 1976, Lincoln Park Topographic Map, April 1969 and the Lincoln Park Land Use Map, April 1977, delineates wet lands, lands with greater than 12% slope, qualified farm land, lands devoted to public use and developed land. It is evident from the foregoing that Defendant, Lincoln Park, has a minimal amount of land available for future development. Even the data contained in the REPORT, relied upon by the plaintiffs herein, reflect that Lincoln Park has only 396 developable acres, or 9% of the total land area. Thus, not only does Lincoln Park lack "sizeable land area" but a substantial portion of tis vacant land is not developable.

In terms of population growth, preliminary 1980 censue data reveals that Lincoln Park has sustained a population declaine from 9,034 in 1970 to 8,798 in 1980; a loss of 236 or 2.6%. This stands in contrast to the outdated population projections relied upon in the REPORT, which was based on earlier growth rates. The preliminary census

²¹These statistics stand in contrast to those referred to in Rowe v. Pittsgrove Twp., Supra, at 285, which the Court determined was a developing municipality. Pittsgrove Twp. encompasses 46.5 square miles or 29,700 acres, of which 91.6% was undeveloped.

also shows that residential growth stabilized in Lincoln Park during this period as reflected in the fact that only 102 housing units were constructed since 1970, an increase of only 4%. Certainly, an increase of approximately ten units per year for the last ten years represents an extremely slow rate of growth in residential development, and seemingly reflects that residential growth in Lincoln Park has stabilized.

When one considers the lack of developable land in Lincoln Park, its declining population and slow rate of growth of residential development, it becomes apparent that Lincoln Park is properly classified as a developed, older suburb, akin to the older Passaic County municipalities which link this community by transportation routes, job patterns, shopping habits and social contacts ²².

The mandate of Mt. Laurel is not attainable by every municipality.

"The ideal of the well balanced community, providing all kinds of housing for a cross-section of the regional population pattern, is quite obviously, realizable physically only in the kind of developing municipality of sizeable area identified in Mount Laurel as such, see 67 N.J. at 160, or perhaps in a developed municipality undergoing thorough-going redevelopment of blighted areas." Pascack Assn. Ltd. v. Mayor & Coun. Washington Tp., 74 N.J. 470, 486-487 (1977).

²²See Point IV. wherein surveys conducted by the North Jersey Planning Associates, clearly reflect Lincoln Park's positive relationship with Passaic County. The results of these surveys indicate that Lincoln Park is atypical of Morris County communities.

Lincoln Park is incapable of accomodating more growth than is presently contemplated in its Master Plan. Requiring high density, multi-family use of its remaining vacant lands would subject the Borough to ill-conceived growth, akin to an "Oklahoma land rush". Vickers v. Tp.Counc. of Gloucester Tp., 37 N.J. 232, 254 (1962), cert den. & app. dismiss 371 U.S. 237 (1965).

It is submitted that the dictates of Mt. Laurel were not directed or applicable to municipalities such as Lincoln Park. The distinction between communities such as Mt. Laurel and Lincoln Park was perhaps best described by Justice Hall in his dissent in Vickers v. Tp.Counc. of Gloucester Tp., Supra at 252-253, which was quoted at length by the Court in Pascack, supra:

"The instant case, both in its physical setting and in the issues raised, is typical of land use controversies now current in so many New Jersey municipalities on the outer ring of the built up urban and suburban areas. These are municipalities with relatively few people and a lot of open space, but in the throes, or soon to be reached by the inevitable tide, of industrial and commercial decentralization and mass population migration from the already densely settled central cores. They are not small, homogeneous communities with permanent character already established, like the settled suburbs surrounding the cities in which planning and zoning may properly be geared around things as they are and as they will pretty much continue to be." (emphasis added).

POINT IV.

PLAINTIFFS HAVE FAILED TO DEMONSTRATE THE APPROPRIATE REGION FOR WHICH LINCOLN PARK HAS AN OBLIGATION TO PROVIDE ITS FAIR SHARE OF LEAST COST HOUSING.

In Mt. Laurel, supra, the Court concluded that:

".... (E)very such municipality²³ must by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefore." (emphasis supplied). (at 174). See also Urban League of New Brunswick v. Mayor and Council of Carteret, 170 N.J. Super 461, 477 (App. Div. 1979).

Clearly, in order to ascertain a municipalities fair share housing allocation there must initially be a demarcation of the appropriate region of which such municipal forms a part. Urb. League New Brunswick v. Mayor and Council of Carteret, supra at 477.

In his discussion of this concept, Justice Hall noted that "the composition of the applicable 'region' will necessarily vary from situation to situation and probably no hard and fast rule will serve to furnish the answer in every case. Confinement to or within a certain county appears not to be realistic, but restriction within the boundaries of the state seem practical

²³"Developing" municipality.

and advisable". 67 N.J. at 189-190.

The applicable region in Mt. Laurel was identified as "those portions of Camden, Burlington and Gloucester Counties within a semi-circle having a radius of 20 miles or so from the heart of Camden City". 67 N.J. at 190. Material to this demarcation was the proximity of Mt. Laurel to the highly urbanized Camden area, its residential development due to the influx of new residents from nearby central cities, existing and projected employment patterns, the "highway network" linking Mt. Laurel with all parts of the Camden area and the contracts of its vacant land acreage with the land supply situation in those nearby central cities. See 67 N.J. at 161-162.

Subsequently, in Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super 438, 441 (Law Div. 1974), Judge Furman succinctly defined the region as "the area from which, in view of available employment and transportation, the population of the Township would be drawn, absent invalidly exclusionary zoning". This definition was subsequently approved by the Supreme Court which observed:

"...(T)here is no specific geographical area which is necessarily the authoritative region as to any single municipality in litigation. Different experts may quite reasonably differ in their concepts of the pertinent region But in evaluating any expert testimony in terms of the Mount Laurel rationale, weight should be given to the degree to which the

expert gives consideration to the areas from which the lower income population of the municipality would substantially be drawn absent exclusionary zoning This is broadly comparable to the concept of the relevant housing market area...." 72 N.J. at 539-540.

The Court further noted that:

"The factors which draw most candidates for residence to a municipality include not only, for employed persons and those seeking employment, reasonable proximity thereto of jobs and availability of transportation to jobs, as mentioned by Judge Furman and stressed by most of the experts, but proximity to and convenience of shopping, schools and other amenities." 72 N.J. 540-541.

Thus, while it may be difficult to delineate the precise criteria which should be considered in the demarcation of a geographic area as the definitive region, careful consideration should be given to the housing market area of which the municipality is a part and from which the future population of the municipality would be drawn in the absence of exclusionary zoning. See Justice Pashman's concurring and dissenting opinion in Madison, supra, at 592.

Based on the foregoing, it would appear that any attempt to identify an appropriate region should have as its cornerstone the "journey to work" criterion, which by its nature, implicates existing job and transportation patterns, or some other similarly relevant criteria, including relevant socio-economic factors. See Madison, supra, at 540, FN. 44.

In the case at bar, Plaintiffs seemingly rely exclusively on the REPORT to support their contention that the region applicable to Lincoln Park encompasses an eight-county geographic area consisting of Middlesex, Bergen, Essex, Hudson, Morris, Passaic, Somerset and Union Counties. This "region" or "super region", contains 63% of the State's population.

It is submitted that the Plaintiffs' reliance on the REPORT to demarcate the region applicable to Lincoln Park is in error inasmuch as such reliance conflicts with the basic concepts of comprehensive zoning and is, in fact, contrary to the approach espoused in the Mt. Laurel and Madison cases.²⁴

Lincoln Park will demonstrate by its proofs that the DCA eight-county report is inapplicable to it. The proofs will reflect that Lincoln Park is part of a four-county region consisting of Morris, Passaic, Essex and Bergen counties. This conclusion is based on data base studies conducted by the Lincoln

²⁴The report demarcates "housing regions" defined and selected prior to the Court's opinion in Madison. 72 N.J. at 539-541. Indeed, ten of the Report's twelve regions are comprised only of single counties, Report at 11, notwithstanding that the Courts have uniformly condemned inflexible adherence to county boundaries in determining applicable housing region. Madison, supra at 189-190; Urban League v. Carteret, supra at 471. Moreover, in demarcating the eight county region, the Report placed undue emphasis on the availability of vacant land to the west for the purpose of satisfying the housing needs of Hudson, Essex & Union counties. Clearly, little or no consideration was given to the question of where the individual Defendants would substantially draw for their population in the absence of exclusionary zoning. Many of the Report's defects could have been obviated had there been an attempt to closely tailor a housing region to a particular municipality's housing market. Madison, supra at 539-540. Superimposing the eight county region upon Lincoln Park would extend the Defendant's fair share of regional housing to areas with which it bears no relationship.

Park Planning Department and the Borough's planning consultants, Planning Association of North Jersey. L.P. 18, 18A, 19, 19A.

Specifically, the following surveys were undertaken:

1. place of employment of residents of Lincoln Park;
2. place of residence of those employed in Lincoln Park;
3. where Lincoln Park residents shop for food;
4. where Lincoln Park residents shop for clothing, household items, etc.
5. where Lincoln Park residents obtain medical care;
6. where Lincoln Park residents obtain dental care;
7. where Lincoln Park residents go for sports and recreation;
8. where Lincoln Park residents go to movies, theater, etc.

The journey to work data revealed by a telephone survey reflects that out of 356 residents of Lincoln Park who responded, 328 individuals are employed in New Jersey while 28 individuals are employed in New York City. Of those responding, 120 individuals are employed in Morris County, 110 in Passaic County, 58 in Essex County and 25 in Bergen County. L.P. 18A at Pages 2-8. The foregoing reflects that 88% of those responding to the survey are employed within Morris, Passaic, Bergen and Essex counties; 95% of those who are employed in New Jersey, work in these four counties. In contrast, of the 328 individuals who are employed in New Jersey, only 15 individuals, or 4.6%, work in the other four counties included in the DCA region²⁵. Id.

²⁵Union, Hudson, Middlesex and Somerset.

A further survey, relating to residence of persons employed in the Borough of Lincoln Park, is also revealing. L.P. 19A. Of a total of 1300 responses, 1143, or 88% indicated that they resided in New Jersey; 157, or 12%, reside in New York. Id. Of the total number of responses, 1098, or 84.5%, reside in either Morris, Passaic, Essex or Bergen counties. Thus, 96% of those individuals who work in Lincoln Park and reside in New Jersey, reside in these four counties. Taken one step further, 965 individuals, or 84.4%, of those residing in New Jersey indicated that they lived in either Morris or Passaic County. Id. In contrast, 18 individuals, or 1.4% of the total responses, indicated that they lived in either Hudson, Union, Middlesex or Somerset counties; this constitutes 1.6% of those individuals who work in Lincoln Park and reside in New Jersey. Id.

Pertinent socio-economic factors were also considered. These factors were food shopping, shopping for clothing and household items, travel for medical and dental care, travel for sports and recreation, including movies and theatres, and newspapers read by Lincoln Park residents. L.P. 18A Pages 2-8. Examination of these factors as revealed by a telephone survey conducted by the Planning Associates of North Jersey reflect except for newspaper subscription or readership accounting for 82.9%, at least 93% of Lincoln Park residents shop, obtain medical services and attend movies and theatre in the 4-county

region. L.P. 18A Page 2-8.

Clearly, the Plaintiffs have failed to establish a realistic expectation that Lincoln Park's prospective population will be drawn from the alleged eight-county region. The particular circumstances applicable to Lincoln Park provide for no expectation. Accordingly, Plaintiffs have failed to prove the appropriate region for which Lincoln Park has an obligation to provide its fair share of least cost housing.

The Plaintiffs have the burden to demarcate Lincoln Park's approximate housing region and, failing to do so, its action must be dismissed.

"....Plaintiffs have failed to prove the appropriate region for which Defendants have an obligation to provide their fair share of opportunity for construction of low and moderate income housing. Since the definition of such a region is essential to prove that Defendants exclude such housing through their choice of zoning policies (a choice, we add, which must be proved "arbitrary", Pascack Assn. Ltd. v. Washington proofs were insufficient to support the claim of exclusionary zoning." Urb. League of New Brunswick v. Mayor and Council, Carteret, supra at 477.

POINT V.

LINCOLN PARK'S ZONING ORDINANCE
SHOULD BE SUSTAINED IF IT MEETS
THE HOUSING NEEDS OF ANY REASON-
ABLY CONSTITUTED HOUSING REGION.

The composition of Lincoln Park's housing region will play an important role in the determination of whether the Borough has met its Mt. Laurel and Madison obligation to enact zoning which reasonably accommodated regional least cost housing needs. Proof of the Defendant's appropriate housing region is therefore one of the primary issues in this action.

The Court, in Madison, supra, at 539, recognized that "different' experts may quite reasonably differ in their concepts of the pertinent region." Accordingly, while the Plaintiffs may be able to prove one housing region for Lincoln Park, the Borough may quite reasonably demonstrate that it is part of a different housing region whose least cost housing needs it reasonably accommodates. As Plaintiffs are required to prove pertinent arbitrariness or unreasonableness, Pascack Ass'n v. Washington Tp., 74 N.J. 470, 485 (1977), Plaintiffs should be required to prove that there exists no housing region whose general welfare Lincoln Park could reasonably have found to have been served by its zoning ordinance. If Plaintiffs cannot sustain their burden in this regard, this Court should uphold Lincoln Park's zoning ordinance.

POINT VI.

LINCOLN PARK, THROUGH ITS REVISED
MASTER PLAN AND ZONING ORDINANCE,
HAS PROVIDED ITS FAIR SHARE OF
LEAST COST HOUSING.

Lincoln Park maintains that it is not a developing municipality nor is it appropriately placed in the 8-county region. Should the Court sustain the Plaintiffs position on these issues and determine that the allocation methodology is not flawed, Lincoln Park nevertheless maintains that it has provided its fair share of least cost housing by provision for 965 least cost housing units in its revised Zoning Ordinance.

Indeed, the REPORT allocation of 702 units should be revised downward to reflect a 66% reduction in vacant developable land. Apart from this reduction however, the Plaintiff has consistently taken the rigid position in this suit that nothing less than cheap housing at low income standards will satisfy the Mount Laurel mandate. So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975). Therefore, the Plaintiff accords no credits against the REPORT allocation for the Borough's newly zoned 965 multi-family, townhouse and 2-family units except for the 150 units of senior housing.

Lincoln Park avers that all such 965 units qualify as least cost housing constituting higher density development opportunities that private industry will undertake to construct.

The Supreme Court in Mt. Laurel recognized that "Courts do not build housing nor do municipalities" 67 N.J. at 192.

Indeed, as the Court went on to note:

"That function is performed by private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government. The municipal function is initially to provide the opportunity through appropriate land use regulations." 67 N.J. at 192.

The Supreme Court in Oakwood was also cognizant of the fact that private industry cannot, without subsidies, build new rental or privately owned housing that is affordable to lower income persons. 72 N.J. at 510-511.

As a result, it was determined that municipalities could fulfill their Mt. Laurel obligation by provision for least cost housing opportunities:

"To the extent that the builders of housing in a developing municipality like Madison cannot through publicly assisted means or appropriately legislated incentives...provide the municipality's fair share of the regional need for lower income housing, it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the "least cost" housing, consistent with minimum standards of health and safety, which private industry will undertake and in amounts sufficient to satisfy the deficit in the hypothesized fair share." Madison, 72 N.J. at 512.

The Court then added:

"Nothing less than zoning for least cost housing will, in the indicated circumstances, satisfy the mandate of Mt. Laurel. While compliance with that direction may not provide newly constructed housing for all in the lower income categories mentioned, it will nevertheless through the 'filtering down' process referred to by defendant tend to augment the total supply of available housing in such manner as will indirectly provide additional and better housing for the insufficiently and inadequately housed of the region's lower income population." Madison, 72 N.J. at 513-514 (footnote omitted).

The Court saw that zoning ordinances do not operate free of prevailing market conditions. In the absence of housing subsidies or other legislative devices, lower income housing goals may only be attainable through adoption of zoning regulations affording a broad spectrum of lesser cost housing opportunities that private industry would be willing to undertake. In such case, the "only acceptable alternative" is a conservative "filtering down" process to meet the housing demands of lower income groups.

Measured against this standard, Lincoln Park has made reasonable provisions for its fair share of least cost housing.

Through its revised Master Plan and Zoning Ordinance, Lincoln Park has provided approximately 965 units of least cost housing. Included are (1) 150 low-moderate income senior citizen housing; (2) 58 townhouse units; (3) 439

planned residential development townhouses; (4) 25 apartments over stores; and (5) 293 2-family housing units. By percentage of new housing provisions, 55% is single family; 31% multi-family, and 14% 2-family. L.P. 6, Table III, See in general the discussion on "Housing" contained in the Statement of Facts, pages 20 through 24.

The foregoing demonstrate a conscientious compliance with the Least Cost Doctrine. The Court in Oakwood, 72 N.J. at 513-514, recognized this as the best a municipality can do, as the "only acceptable alternative", is to rely on a filtering down process. id. at 512-514.

Clearly, it is this filtering, not actual construction, which is to ameliorate lower income housing needs. Oakwood, supra, 72 N.J. at 513-514. The Court in Oakwood expressly acknowledged that while the required "zoning for least cost housing may not provide newly constructed housing for all in the lower income categories, it will nevertheless through the filtering down process tend to augment the total supply of available housing ..." 72 N.J. at 513-514.

The Plaintiffs' expert, Alan Mallach, filed a "Report on Least Cost Housing and Zoning Ordinance Provisions" dated March 12, 1979 and a least cost analysis of Lincoln Park's Zoning Ordinance. L.P. 40. A review of the standards applicable to the 2-family housing, townhouses, P.R.D. and

Senior Citizen districts even in Mallach's report shows that the zoning provisions are not unreasonably cost generating.

Plaintiff, however, takes the position that Borough standards exceed minimum standards established by Mallach and, therefore, do not qualify as least cost housing. It is submitted that standards developed by Mallach are principally based upon H.U.D. Minimum Property Standards (MPS) and as such are relevant for purposes of subsidized housing. Such standards however, are low cost and not least cost by nature and not representative of the type of housing private industry would undertake to construct.

Indeed, Oakwood does not demand that municipalities zone for the cheapest housing which could physically be built, but rather requires municipalities to zone for the least costly housing which in light of market conditions a developer would undertake to construct.

"Least cost" housing does not simply mean cheap housing. The doctrine does not call for the construction of new housing particularly for low and moderate income groups, but rather constitutes a freeing-up process to set the "filtering" of low and moderate income groups into decent housing in motion.

Clearly, Lincoln Park is in step with this process and its existing and newly zoned least cost housing units should be credited against the allocations sought to be imposed by Plaintiffs.

POINT VII.

ENVIRONMENTAL FACTORS AFFECTING LINCOLN PARK ARE REAL AND SUBSTANTIAL AND ANY EXAMINATION OF THE BOROUGH'S ZONING ORDINANCE MUST CONSIDER THE ENVIRONMENTAL CONSTRAINTS IMPOSED BY NATURAL CONDITIONS.

The quality of the environment is substantially dependent on the cumulative effect of local and state land use regulations. The importance of integrating environmental considerations in the local land use process was recognized by the Legislature, N.J.S.A. 40:55D-2 and N.J.S.A. 40:55D-28 and by our Supreme Court. As Justice Hall observed in Mt. Laurel:

"This is not to say that land use regulations should not take due account of ecological or environmental factors or problems. Quite the contrary. Their importance, at least being recognized, should always be considered."
67 N.J. at 186.

It was further noted in Oakwood, supra, 72 N.J. at 545-546, that:

"The environmental constraints must be substantial and very real and supported by ecological or engineering evidence."

Thus, even in the presence of competing societal interests - the need to provide a fair share of the region's low and moderate income housing needs - environment considerations must be taken into account. It is submitted that the environmental factors applicable to Lincoln Park are "real and

substantial" and greatly influenced the formulation of the Borough's zoning ordinance. Accordingly, any examination of the Borough's zoning ordinance must take into account these factors.

Lincoln Park is situate in the Passaic River watershed. 66% of all lands in the Borough lie within the flood plain and are otherwise classified as "wet lands" associated with its location within the watershed and flood plain, all lands in the Borough evidence soil conditions with water within four (4) feet or less of the ground surface. Clearly, this condition renders development exceedingly costly and difficult. L.P. 2.

Indeed, the Passaic River basin, which has been intensively developed since the disastrous flooding of 1902 and 1903, has been identified as the area with the highest potential for flood damage in the United States. Trends in Environmental Litigation, 9 Rutgers Camden Law Journal at 37 FN 109.

Forcing Plaintiffs' sweeping low and moderate income population dispersal scheme on an environmentally sensitive municipality with almost no vacant developable land, such as Lincoln Park, would result in disastrous consequences that Plaintiff has chosen to ignore.

It is evident that Lincoln Park's land use regulations were influenced to a great degree by the aforementioned environmental constraints. These natural constraints are

"substantial and real" and are amply supported by data contained in the Lincoln Park Master Plan and the study performed by Peter S. Marra, P.E., as exhibited in the Map entitled "Conditions Which Limit Development". L.P. 12. See the discussion "Environmental Constraints" ²⁶ detailing natural conditions that severely constrain development. L.P. 24. Thus, a significant portion of the remaining vacant acreage in the Borough falls within the flood hazard areas.

These environmental considerations are to be given great weight in light of recent State and Federal legislation in the area of environmental protection. As was noted in Duhamel, Exclusionary Zoning: A Question of Balancing Due Process, Equal Protection and Environmental Concerns, 8 Suffolk Law Rev. 1190, 1211 (1974):

"Outcries from the populace for the initiation of steps to protect natural resources are too numerous to require citation. The judgment of elected representatives that land-use controls may further this desire must be weighed heavily by the courts in balancing the protection of the environment with the possible discriminatory effects of exclusionary zoning."

One such example, intimately related to the case at bar, is the National Flood Insurance Program. The enactment of the National Flood Insurance Act, P.L. 90-448, August 1, 1968, 42 U.S.C.S. 4001, et seq., marked the entry of the federal

²⁶Infra, pages 4 through 10.

government into the local land management control area with respect to the flood plain. The Act, including its most recent amendments through P.L. 95-128, imposes a concept upon the municipalities in the nature of an offer which is difficult to refuse. In short, the Act conditions the issuance of flood insurance on the adoption of a comprehensive land management program in accordance with the Federal flood insurance criteria by the municipality. 42 U.S.C.S. § 4102. In 1973, Congress went even further and enacted P.L. 93-234, Title I, Section 102 87 Stat. 978 U.S.C.S. Section 412A. The net effect of this section is to prohibit Federal assistance and loans from lending institutions in any flood plain unless the municipality has enacted flood plain management regulations. The message of Congress to the municipalities was clear: zone in accordance with federal standards or be denied financing. Clearly, if environmental considerations are so important so as to foster the aforementioned legislation, they deserve to be balanced against the Plaintiffs' allocations in the instant case.

It is submitted that Lincoln Park has demonstrated "substantial and real" environmental constraints amply supported by ecological and engineering evidence. Moreover, this non-developing, environmentally-constrained Borough has

in its new Zoning Ordinance provided for a housing allocation that exceeds the revised, statewide housing allocation for this community. Clearly, the Mt. Laurel doctrine was not intended to extend to circumstances like these, and Plaintiffs' claim cannot stand.

POINT VIII.

THE REPORT ALLOCATION SOUGHT
BY PLAINTIFFS MUST BE WEIGHED
AGAINST THE CONCEPT OF A BAL-
ANCED ZONE SCHEME.

Mt. Laurel and its progeny, are zoning cases. They stand for the principle that a developing municipality may not erect barriers to housing in order to serve their own parochial interests. It must be noted, however, that, with regard to the implementation of this noble principle, our Courts have never failed to emphasize the importance of sound zoning and planning.

The concept of a balanced zone scheme and plan is implicit in the provisions of the Municipal Land Use Law. Clearly, the Act envisions comprehensive and balanced planning. This requires consideration of an entire range of factors contributing to the public health and general welfare. NJSA 40:55D-28. These factors include not only housing but land characteristics, population densities, traffic, environmentally sensitive land, utilities and various community facilities (schools, hospitals, etc.). NJSA 40:55D-28(b).

While the development and redevelopment of housing is certainly a factor to be considered in the development of a zoning plan, particularly in light of Mt. Laurel and subsequent case law, it is by no means the sole factor. The Supreme Court in tailoring the Mt. Laurel mandate, clearly envisioned orderly progress in the public interest, not a single-minded, ill-conceived dispersal of low and moderate income units

throughout the State without the slightest regard for "proper planning and governmental cooperation."

The housing allocation sought for Lincoln Park by plaintiff makes a mockery of the concept of a balanced zone scheme and plan. Plaintiffs in this action seek a housing allocation for the Borough of Lincoln Park of 1,574 low moderate income housing units. The community already has an imbalance in lower family income ranges. There presently exists approximately 2,300 housing units in the Borough, 25% of which constitute rental housing. The addition of 1,574 low moderate income multiple family units will constitute an increase of 68% in the total number of housing units and result in doubling the multiple family-single family ratio from 25% to almost 50%.

Indeed, Lincoln Park is a blue collar community as reflected in 1970 census data. If any demographic imbalance exists, it lies in the relatively small numbers of upper and middle income families residing in the community. Twenty-five (25%) percent of Lincoln Park families have income below \$10,000; 41.6% have income between \$10,000.00 to \$14,999.00. In sum, 67.6% of families had income below \$15,000.00.

In addition to having one of the lowest per capita income in the county, Lincoln Park has the fourth highest tax rate in the county and suffers declining trends in its ratable base due to the effect of flood plain development constraints

upon property values. This occurs at a time when Lincoln Park has incurred major capital expenses, a significant portion of which will be reflected in the tax rate.²⁷ Obviously, Lincoln Park is not a community which caters to middle and upper income families nor may its residents be expected to bear any additional tax burden to defray the cost of improvements required to support additional housing having a negative cost benefit ratio. See discussion on "Demographics", infra, page 25 .

This significant imbalance does not even take into account the several hundred multiple family housing units provided for in the newly adopted Master Plan and Zoning Ordinance.

Clearly, should plaintiffs succeed, the Court will be presiding over not only the revision of the zoning ordinances of this community, but the revision of its entire character and social composition as well. It is submitted that the Courts of this State have never considered nor advocated such an intrusion.

²⁷See Footnote #14, Page 25.

POINT IX.

MARY E. BROOKS' ALLOCATIONS ARE
BASED ON FLAWED METHODOLOGY AND
SHOULD BE DISREGARDED.

Plaintiffs' expert, Mary Brooks, prepared two allocation reports adjusting the CDA REPORT Allocations, L.P. 4, L.P. 38, L.P. 39.²⁸ Brooks retained the basic approach employed in the REPORT, but made certain adjustments resulting in a near doubling of Lincoln Park's housing allocation. It is submitted that Brooks' allocations are invalid, and represent a narrow dispersal scheme bearing little relationship to sound zoning and planning, or the concept of least cost housing.

Brooks' Report is aimed at the needs of low and moderate income persons exclusively. The Report identifies a specific number of units to be provided for low and moderate income households, and this objective is not deemed satisfied until the necessary housing units are actually constructed.²⁹ Her testimony, on deposition, was as follows:³⁰

²⁸ Preliminary Report on adjustments to New Jersey DCA, A Revised Statewide Housing Plan for N.J., April 1979; Addendum Report, Housing Allocation Adjustments For Morris County, N.J. August 1979, L.P. 38 & L.P. 39 respectively.

²⁹ Brooks, A Discussion of Fair Share Planning, March 1976, Page 1.

³⁰ Lincoln Park's deposition of Mary E. Brooks, on February 25, 1980, will be cited: "
(T-)"

"Q Actually then going back to the question of provisions under current zoning for least cost housing, if there were such provisions in Lincoln Park's zoning ordinance there would really be no credit given in your adjustment to the allocation, the DCA allocations, is that correct?

A That's correct.

Q What is the rationale behind that?

A Really what we just discussed, the fact that unless the units are provided there is no reason to assume that the need as identified should be reduced.

Q So that it would be very possible in Lincoln Park, for example, that there could be provision in its current zoning ordinance for a sufficient number of least cost housing units to meet the need, however, by your analysis unless these units are constructed that need remains?

A That's true.

MR. SCANGARELLA: That's all I have.
Thank you very much."

However, "courts do not build housing nor do municipalities" and "the municipal function is initially to provide the opportunity through appropriate land use regulations"

Mt. Laurel, supra 67 N.J. at 192.

The New Jersey Supreme Court also has recognized the contemporary reality that private industry cannot, without subsidies, construct new rental or privately owned housing that is affordable to persons of low or moderate incomes and that provision for least cost housing opportunities would constitute an acceptable alternative. See the discussion of least cost housing in

POINT VI. *infra*.

Inasmuch as the duty to zone for least cost housing is not a duty to provide housing specifically affordable by low and moderate income families, Oakwood, supra 72 N.J. at 512-514, Brooks' allocation of low and moderate income housing that must actually be provided has no relevance as a matter of law.

Lincoln Park has zoned for a variety of least cost housing opportunities which Brooks, of course, would not credit.

Brooks also ignored the issue of developing municipalities (T-70), nor did she consider Lincoln Park's tax rate and capital debt to be important in the development of a housing allocation report (T81-82, 73), despite the effect such factors would have upon a municipality's capacity to absorb development and a population increase. The ultimate distortion produced by the Brooks' adjustment methodology is the final allocation of 1,574 units, L.P. 39, page 7, for Lincoln Park. Existing housing in the Borough numbers approximately 2,600 units. See HOUSING, *infra*, Page 20. Brooks allocation represents a 60% increase in total housing units. Further, Brooks' allocation does not factor the 965 newly zoned least cost housing units.

Clearly, the Brooks' allocation methodology has produced a distorted result that is contrary to the concept of sound planning and a balanced community and, as such, her adjusted allocation should be disregarded.

POINT X.

THE STATE DEVELOPMENT GUIDE
PLAN IS A DRAFT PROPOSAL FOR
FUNDING PURPOSES AND NOT A
"FAIR SHARE" HOUSING PLAN.

The State Development Guide Plan (hereinafter "Guide Plan") was prepared by the Division of Planning, Department of Community Affairs. The Preliminary Draft was released in 1977. A revised draft was published in May 1980. It is in draft form only and has not been adopted by any governmental unit; it is not law. The Guide Plan purports to be:

"a broad - based policy guide which recommends where future development and conservation efforts in New Jersey should be concentrated ...essentially an advocacy plan for the preservation and efficient use of the State's physical resources." Guide Plan, at ii.

To implement this policy, the Guide Plan delineates areas of growth conservation, agriculture, and limited growth within the State: Id. at 43-45. If read as a framework for development, it would encourage the channeling of capital investments into the so-called "growth" areas. It must be noted, however, that these growth areas are not synonymous with the concept of "developing municipality" in the Mt. Laurel sense.

The Guide Plan advocates a policy of diverting capital expenditures into areas where extensive development has already taken place, such as cities and older, built up suburbs. If growth area is read synonymously with developing municipality,

the burden to provide housing for low and moderate income persons would not fall on the "municipalities of sizeable land areas outside the central cities and older built up suburbs" but rather on those very central cities or older built up suburbs which are not subject to the Mt. Laurel mandate. The Guide Plan does not purport to be a fair share housing guide and using it to define a municipality's Mt. Laurel responsibilities is inappropriate.

Moreover, Mt. Laurel and the cases decided subsequent thereto, are zoning decisions. The Guide Plan is not a zoning guide; it does not supercede local zoning laws. The concept map which lays out the delineated areas only consists of "broad generalized areas without site-specific detail or precise boundaries." Supra, at ii, iii.

As the Plan states at page 43:

"Since it is not the purpose of the Guide Plan to supplant more detailed plans prepared by municipalities and counties or other State departments, the categories depicted on the concept map are general. It is recognized that environmental constraints as well as development opportunities may be found in virtually every part of the State, and that the principle responsibility to plan and regulate land use is at the local level."

CONCLUSION

Lincoln Park Borough, situate on the easterly edge of Morris County, has been inappropriately made a Defendant in this action and included in the 8-county region. Independent surveys undertaken by Lincoln Park show that this community clearly has little relationship with the rest of Morris County and instead is more appropriately situate in a 4-county region consisting of Morris, Passaic, Essex and Bergen Counties.

Further, Lincoln Park is not developing in the context of Mount Laurel. More than ninety (90%) percent of its land area is subject to severe development and environmental constraints consisting of flood hazards, soils having poor bearing capacity for structural development, and steep grades or slopes. Only 261 vacant acres may be properly classified as developable and most of this area is not serviced by sanitary sewers.

Should the Court rule contrary to Lincoln Park's position on region and developing municipality, a judgment dismissing Plaintiffs' action should nevertheless be entered because reasonable provision has been made in the Borough's Zoning Ordinance for its fair share of least cost housing units. The reasonableness of Lincoln Park's zoning regulations should be measured against (1) existing housing stock; (2) provision for newly zoned least cost housing units, (3) 261 acres constituting a reduction in available vacant developable land, and

(4) The demographic profile of the community, the concept of a balanced zoning plan and local fiscal capacity.

It is respectfully submitted that a contrary ruling taken in the factual context of this case would represent a departure from the "statutory and constitutional policy of this State to vest basic local zoning policy in local legislative officials." (citations omitted). Pascack Ass'n Ltd. v. Mayor and Counc. Washington Tp., 74 N.J. 470, 483 (1977).

Respectfully submitted,
SCANGARELLA, FEENEY & KATZ

By: Frank Scangarella
FRANK SCANGARELLA,
Attorney for Defendant,
Borough of Lincoln Park