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Trial brief of Δ -Rockaway Twp objecting
to U's Theory of housing allocation +
zoning ordinance

P 55

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MORRIS COUNTY
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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 als., :

Plaintiffs, :

v. :

BOONTON TOWNSHIP, et als., :

Defendants. :

Civil Action

TRIAL BRIEF OF THE DEFENDANT
ROCKAWAY TOWNSHIP

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PRELIMINARY STATEMENT

The Township of Rockaway is a land of rugged mountains and deep lakes. It has figured prominently in history as a provider of iron ore to support the war efforts and industrial expansion of a growing nation. Its mines are the oldest in the United States. They have, since 1710, dwarfed the output of all other mining regions of the State. The Township is producing high quality iron ore to this day.

Rockaway Township's mountains have provided a resource more critical to survival than iron ore. Its mountain ridges cradle the headwaters of the Passaic River, forming the drainage basins of the Pequannock River in the north and the Rockaway River in the south. The rivers, lakes and reservoirs of Rockaway Township have, for years, supplied fresh, clean water to quench the thirst of communities all along the Passaic River, the City of Newark and the City of Jersey City.

Rockaway Township's water resources are in peril. The sensitivity of the mountain ecosystem and hazards of development have been appreciated too late. Already, the huge underground aquifers beneath Rockaway Township have become contaminated with carcinogenic pollutants. While the Township's reservoirs and streams continue to supply water to the thousands of residents of New Jersey's central urban areas, the Township's own water supply must be continuously filtered to remove chemicals which have seeped through

its glacial soil and contaminated its ground waters.

Rockaway Township is not opposed to all development in these sensitive areas. However, rational planning demands that, finally, these areas be zoned for use at reasonable density levels consistent with their environ-mentally sensitive character and the absence of municipal services. That is what the present zoning ordinance provides.

The Township's development pattern has historically been dictated by the desires of developers, there having been no zoning ordinance until 1954. Most of its existing housing stock was built prior thereto as summer resorts close to major lakes. These resort communities were developed with extremely narrow lots and small homes which now comprise a huge stock of low to moderate priced housing.

For 30 years, Rockaway Township's comprehensive planning has been based upon the urban service area concept. It now seems likely that even the planned service area will not be fully served by central water and sewer systems. It is imperative that any future high density development be limited to this service area. This planning scheme is consistent with current State, county and regional planning efforts. Within this area, a wide variety of housing types at high densities are permitted by the zoning ordinance.

The northern portion of the Township outside the service area is, in practical effect, a township unto itself. This area has not experienced and will not undergo signifi-

cant development. Because of absolute limitations imposed by the sewer connection ban in Rockaway Township, even the southern portion of the Township has not actually been developing for years.

The plaintiffs' theory of housing allocation based solely upon a policy of income group dispersion is a stark contrast to the comprehensive planning efforts embodied in the Rockaway Township zoning ordinance and is unacceptable. The flaws of this allocation methodology are exposed in the defendants' brief as to common issues. The arguments which follow plead the cause of sound decision-making based upon knowledge of local realities. In these times of dwindling and endangered resources, both physical and economic, nothing less will suffice.

POINT I

ROCKAWAY TOWNSHIP'S EXISTING HOUSING SUPPLY
IS A MAJOR RESOURCE OF LOWER PRICE HOUSING
TO MEET FUTURE NEED.

A. Rockaway Township's existing housing stock c
primarily of small houses on very small lots, high de
apartments and mobile homes.

The overwhelming majority of the single fami
residential lots in Rockaway Township were laid out i
total absence of zoning restrictions. Land use plann
in the Township did not occur until the early 1950s.
Township's first zoning ordinance was not adopted unt
19, 1954. Prior thereto, developers were free to, an
design subdivisions with whatever lot size and config
they desired. As a result, the vast majority of the
family residential lots in Rockaway Township are very
from 50 to 65 feet in width, and are occupied by very
houses, many of which are converted summer homes. In all,
there are approximately 5,800 single family homes in the Town-
ship.

There are five principal areas of single far
development in Rockaway Township: White Meadow Lake;
Village; Lake Telemark; Green Pond and Fleetwood. Of
only the Fleetwood area was subdivided pursuant to cc
sive land use regulations.

White Meadow Lake is the largest residential area in the Township, containing approximately 2,300 homes. Developed as a summer resort after World War II, the area is laid out in very narrow lots 60 feet in width. The depth of these lots varies considerably since in many cases lot lines simply extend from the road to the bank of the lake. Many lots are 122 feet deep while others extend over 400 feet in depth. The lots are, however, uniformly narrow. As a result, the homes in White Meadow Lake are, with a few exceptions, very small in size with the majority being small Cape Cod and Ranch-type dwellings.

The Birchwood Village area is located in the southernmost part of the Township, north of State Highway #46, south of Mount Pleasant Avenue, east of Route #15 and west of Rockaway Borough. Birchwood Village consists of several residential communities and is comprised of a broad range of housing types. There are approximately 2,000 single family homes in this area. Some of the housing stock is over 100 years old and was built by the old iron miners. The majority of the homes are approximately 30 years old. Lots in the Birchwood Village area are approximately 65 feet wide and 120 feet deep. Houses are correspondingly small.

The Lake Telemark community is in the north central part of Rockaway Township, far removed from the more highly developed southern section. Most of the housing in Lake Telemark is also approximately 30 years old, much of it being summer cottages converted to year-round use as in White Meadow Lake. Lots in this area are very small in size. Lot widths are approximately evenly divided between 50 feet and

60 feet. Lot depths average from 125 to 150 feet.

The Green Pond section is at the northernmost tip of the Township and is very isolated. The housing is of a wide variety consisting mostly of small summer bungalows on rented land, many of which have been converted to year-round use. There are also some large contemporary homes overlooking lakes and watershed lands. The majority of the lots in this area measure 50 feet wide and 112 feet deep. There are approximately 500 homes in this area.

The Fleetwood development is the newest single family development in Rockaway Township and the only substantial subdivision to occur under a zoning ordinance. Lots in Fleetwood are predominantly 100 feet wide and 175 feet deep. There are approximately 250 dwelling units in Fleetwood. The development lies between Birchwood Village on the south and White Meadow Lake on the north.

The small rural communities of Marcella and Hibernia and the small community of Bowlbyville, near Wharton Borough, contain additional very low cost housing units, numbering roughly 350 homes in all.

A large number of garden apartment units have been built or approved in Rockaway Township. All such development is located in the more populous southern portion of the Township where appropriate infrastructure is either available or planned.

On Rockaway Road, near the Randolph Township municipal boundary, there is a 46 unit apartment complex known as Country Village Apartments built at a density of 13.37 units per

acre. Crestview Apartments, at the intersection of Route 46 and Main Street, has 41 apartment units with a density of 20.5 units per acre. Along Pierson Avenue between Route 46 and Swedes Mine Road is located Rockaway Gardens, consisting of 110 apartment units which were constructed at 15.97 units per acre. The 220 unit Mountain View Manor garden apartment complex is located along Richard Mine Road near Route 15. Excluding land on the tract which is undevelopable due to very steep slopes, this complex has a unit density of approximately 14 units per acre. There are 304 apartment units currently under construction at a density of 10.9 units per acre on Mount Hope Road near the end of Mechanic Street and an additional 207 apartment units approved but not yet built at 9.08 units per acre along Fleetwood Drive.

Hoffman's Trailer Court is located directly south of the Fleetwood subdivision and north of Mount Pleasant Avenue. It contains 73 mobile home sites. An additional 11 mobile homes are located in the immediate vicinity, bringing the total to 84 mobile homes.

An application is now pending before the Rockaway Township Planning Board for the proposed construction of 200 senior citizen housing units at a density of 16 units per acre, a density permitted by the zoning ordinance. It appears likely that this development will be approved, further increasing the housing supply available to moderate income persons.

B. The average sale price of homes in Rockaway Township is well below the County average.

An analysis of "useable" sales in Morris County municipalities shows that sale prices of residential units in Rockaway Township has been consistently below the average for the county as a whole. "Useable" sales are sales likely to have reflected fair market value of the properties transferred and exclude sales between family members, between corporations and their shareholders, sales to or from charitable or governmental organizations, sales substantially improved subsequent to assessment, tax sales and sales conveying only a portion of the assessed unit. Comparing useable sales, from July 1974 to June 1975 the average sale price of a home in Morris County was \$52,295, whereas the average price in Rockaway Township during this period was only \$42,800, \$9,500 or 18.2 percent less than the county average. In 1978-1979, the average sale price in the Township was \$62,000. This was \$16,205 or 20.7 percent below the county average of \$78,205. Whereas the percentage increase in average sale price from 1974-1975 to 1978-1979 for the county was 49.55% or 12.38% per year, the percentage during the same period for Rockaway Township was only 44.86% or 11.22% per year.

As of December 1979, recent comparable sales and listings indicated that homes in the Green Pond area of the Township sold for as low as \$24,000; homes in Lake Telemark sold for as low as \$30,000; homes in Birchwood Village sold for as low as \$37,000 and homes in White Meadow Lake sold for as low as \$38,000.

Data on sale prices further indicate that a substantial proportion of homes sold in Rockaway Township have commanded

relatively low prices. For example, 38.6 percent of the homes sold in the Township during 1978-1979 were sold for under \$50,000. This represented 7.04 percent of all sales under \$50,000 in Morris County, although Rockaway Township has only approximately 4.9 percent of the total population of Morris County.

The consistent trend of decline in average sale price in Rockaway Township relative to the average for Morris County supports the conclusion that the Township has increasingly become a provider of lower cost housing for Morris County residents. The overwhelming predominance of extremely narrow lots and very small houses magnifies the trickle-down effect in the Township as larger and more expensive units are constructed elsewhere in the county. It can be anticipated that the price of these homes will continue to fall behind average price increases in Morris County. This huge existing stock of low cost housing is a major resource for meeting the needs of moderate income persons in the future.

POINT II

RATIONAL PLANNING DEMANDS THAT HIGHER DENSITY FUTURE DEVELOPMENT IN ROCKAWAY TOWNSHIP BE LIMITED TO THE PORTION OF THE TOWNSHIP DELINEATED THE URBAN SERVICE AREA.

The service area concept has been an integral part of comprehensive planning in Rockaway Township since land use planning first began there in 1951. The urban service area encompasses those portions of the Township that will eventually be serviced with full urban services including a central sanitary sewer system and a municipal potable water supply system. This service area includes the southernmost part of the Township extending north to Mount Hope Lake and including the White Meadow Lake development and extending in a narrow corridor along Green Pond Road to and including the Lake Telemark community.

The urban service area has continued without substantial change since Rockaway Township's first planning efforts in the early 1950s. The concept of the service area is particularly important in a municipality like Rockaway Township. The Township is characterized by rugged, steep, glacial terrain with poor soils. A large percentage of the Township, particularly in the north is heavily impacted by steep slope. Large areas to the north and east are reserved as watershed areas for the cities of Newark and Jersey City. Efficient provision of infrastructure facilities can only be achieved by geographically limiting sewer and water services to the urban service area. As will be discussed, infra, in

connection with environmental constraints, it is extremely doubtful that even the urban service area will be fully served by a sanitary sewer system in the foreseeable future due to inadequate final sewage treatment capacity allocations from the Rockaway Valley Regional Sewerage Authority. The number of uses which can be served by sanitary sewer are now and will continue to be absolutely limited by regional sewage treatment allocations. Existing and approved uses awaiting construction will already exceed Rockaway Township's final flow allocation. See POINT IV, infra.

It also appears unlikely that that municipal water service can be extended any further even within the service area due to carcinogenic pollution of the municipal water supply. Costly filtration equipment is now being used to extract these contaminants. However, the equipment is at maximum capacity. Unless additional water sources can be located, the municipal water system will not be extended.

The focus of the instant litigation must be upon future development within the urban service area and not upon the full geographic expanse of Rockaway Township. For purposes of higher density development, Rockaway Township is realistically limited in size to the southeastern portion within the service area. Because of the foregoing limits on expansion of sewer and water service, even the planned urban service area will be effectively reduced in size.

The importance of "least cost siting" as a means of avoiding cost generating features of residential development has been fully discussed in defendant's brief as to common

issues. Proper siting decisions have been recognized by the courts as essential for least cost housing. See N.A.A.C.P. v. Township of Mt. Laurel II, 161 N.J. Super. 317 (Law Div. 1978). Indeed, an improper siting decision is itself a prohibited cost-generating factor. Oakwood at Madison, Inc. v. Madison Township, 72 N.J. 481, 507, 510 (1977). Proximity to industrial and business areas with employment opportunities, proximity to shopping areas and recreation facilities, convenient access to state, county and local road networks, availability of sewer and water services, and relative absence of environmentally inappropriate land are all factors which have been cited in this regard. Mt. Laurel II, supra, 161 N.J. Super. 338-339.

The relative weight of these factors varies from municipality to municipality. In a town replete with rough, mountainous terrain, important, irreplaceable and sensitive watersheds and crucial steep slope vegetation, as is Rockaway Township, environmental factors weigh heavily in planning decisions. The prevalence of steep slopes and absence of major north-south arterial roads in the Township also places great weight on a site's proximity to established road networks. Even a light-moderate snowfall can leave Township roads impassable or dangerous for lengthy periods of time. In Rockaway Township, least cost siting is necessarily within the urban service area. Outlying areas are suited only to relatively low density development.

Rockaway Township's urban service area corresponds almost precisely to the area designated as Growth Area by the Department of Community Affairs in its State Development Guide Plan (May 1980). The remainder of Rockaway Township is designated by the Development Guide Plan as Limited Growth Area and Conservation Area. As argued in the brief as to common issues, the Development Guide Plan represents a sound approach to comprehensive planning on a state and regional level and an appropriate standard by which to judge local planning decisions. The Development Guide Plan mirrors the comprehensive planning objectives embraced by Rockaway Township for 30 years.

The Development Guide Plan states, with respect to Limited Growth Areas:

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

It is neither desirable nor feasible to prohibit development in these areas. However, to support significant levels of new growth in such areas would require major public investments in services and facilities and an energy-inefficient pattern of scattered development would be continued. In addition, there would be significant indirect costs due to the diversion of necessary investments and other assistance from urban areas.

Accordingly, Limited Growth Areas should be left to grow at their own moderate pace. Public resources should be targeted toward other areas where growth can be accommodated more readily. In this way, the needs of future generations - for additional land to develop or to set aside for purposes which cannot now be anticipated - are recognized.

Id. at 71-72

A vast portion of Rockaway Township to the north and northeast has been designated a Conservation Area. This area is currently watershed area providing potable water to the cities of Newark and Jersey City. As such it is unavailable for high density development. The Development Guide Plan states:

The need to protect floodplains, wetlands, steep slopes, stream corridors and other environmentally critical areas from development is also recognized. The Conservation recommendations shown on the Concept Map, therefore, should be viewed as only one part of a broader program of natural resource and recreation land preservation involving local, county and federal agencies as well as the State government.

Id. at 69.

The Conservation Areas delineated in the Development Guide Plan are those with Statewide significance. Within Rockaway Township an enormous proportion of the land area outside the designated Conservation Area also demands natural resource protective measures which render it inappropriate to plan for high density development. These environmental constraints will be discussed, infra.

The Development Guide Plan emphasizes the present day public policy to revitalize urban areas, curb suburban sprawl and promote more efficient use of infrastructure and energy resources. The problem of inadequate infrastructure is a very real one. As stated in the Guide Plan:

Our present-day, modern society requires substantial investments in utilities and services. Public health considerations necessitate sewerage systems to collect, treat and discharge liquid wastes. Sanitary landfills and incinerators have to be provided to dispose of solid wastes. Sufficient water has to be obtained, treated and distributed. Transportation networks are needed to move large volumes of goods and people.

In recent years, additional health considerations have been recognized. In many places the quality of the water supply has deteriorated as a result of indiscriminate development and new types of industrial discharges. Similarly, air quality has been affected by the increasing amounts of vehicular, residential and industrial emissions. Further, the abundance of disposable goods has created problems for landfill and incineration techniques for solid waste disposal.

* * *

[T]he suburban process has proved to be expensive and wasteful. Facilities and services were duplicated elsewhere while urban facilities and services declined.... There is a need now in New Jersey to alter this unplanned pattern of spread development. A compact development pattern for the future can serve to promote the utilization of the existing infrastructure and service systems in an economical way. This is especially important in an era of scarce and expensive fuels, and at a time when limited public funds are needed to restore and maintain rather than duplicate what already exists.

Id. at 16-17, 24-25.

Rockaway Township's urban service area concept represents a long-term effort to achieve this goal of economical provision of infrastructure services. Due to the Township's mountainous terrain, extension of sewer lines and water mains tends to be particularly costly. This is especially so in

view of the fact that generally only a small portion of any particular tract in the northern section is actually developable. Moreover, substantial extension of present sewer and water systems is necessary just to serve the urban service area.

High density development is inappropriate outside the service area. To permit or encourage high density development outside this area would be to risk exacerbating already critical environmental problems and would be contrary to comprehensive planning principles outlined not only in the Township's master plan but also in the State Development Guide Plan.

The service area takes into consideration the relative accessibility of various parts of the Township. For example, only one road, Green Pond Road, serves as a direct connection between the more populous southern portion of the municipality and the area north of White Meadow Lake. It is the southern area which is served by major connecting highways such as State Highway #46 and Interstate Route 80. The New Jersey Department of Transportation has, in its plans for surface passenger transportation, set the goals of improving existing facilities rather than creating new ones and promoting compact development patterns, energy conservation and reduction of the use of motor vehicles. All of these planning goals are furthered by Rockaway Township's policy of encouraging high density development only in the service area. A further important siting factor favoring the urban service area concept is the service area's proximity to extensive shopping facilities and existing schools.

Outside the urban service area, development must occur, if it occurs at all, at low densities consistent with the need to provide individual sanitary septic systems and wells on each building site, the need to avoid wasteful expansion of highway and road systems, the need to protect steep slopes, vegetation and aquifer recharge areas, the need to provide for compact development and efficient use of infrastructure resources and the need to preserve land for open space and for use by future generations. The planning principles implemented by Rockaway Township's zoning ordinance, including the siting of high density development, are sound, comprehensive and in accord with state, regional and county planning decisions.

POINT III

ROCKAWAY TOWNSHIP'S ZONING PLAN PROVIDES
FOR AN APPROPRIATE VARIETY AND CHOICE OF
HOUSING

Rockaway Township adopted its new Zoning Ordinance on May 31, 1979. This Ordinance followed comprehensive revision of the Township Master Plan in 1977. The Ordinance has undergone clarifying amendment since adoption and has been modified to increase densities available for senior citizen housing. The Zoning Ordinance provides for a wide array of residential housing types.

In its brief as to common issues, Rockaway Township has argued the view that land use regulation must be dictated by principles of comprehensive planning as opposed to single-minded adherence to "fair share" housing allocation plans. It has further urged the "numberless fair share" approach to testing compliance with Mt. Laurel obligations. These arguments will not be reiterated here except to stress that plaintiffs' theory of housing dispersal based upon the allocations contained in the D.C.A. Revised Housing Allocation Report is totally inconsistent with comprehensive planning for Rockaway Township and with comprehensive plans at the state, regional and county level. See D.C.A. State Development Guide Plan¹, Tri-State Regional Development Guide: 1977-

¹Department of Community Affairs, "State Development Guide Plan, Revised Draft" (May, 1980).

2000²; D.E.P. 208 Water Quality Plan. Rockaway Township certainly does not dispute that it must satisfy its fair share zoning obligations in accordance with the principles enunciated in Mt. Laurel and Madison. However, the Township cannot agree that the numerous other factors relevant to comprehensive planning should be ignored or relegated to a level of minor importance. Viewed in the light of comprehensive planning, Rockaway Township's Zoning Ordinance more than fulfills the Township's constitutional responsibility.

The realities of environment and infrastructure availability are compelling components of Rockaway Township's comprehensive planning. Also important is the Township's recognition, reinforced by the State Development Guide Plan, that the proximity of road and highway networks, shopping areas and schools to the southern portion of the Township will make that area the focus of future demand for both residential and commercial development. Accordingly, provision has been made for a wide variety of residential uses within this southern service area.

Single family detached homes are permitted on a variety of lot sizes. There are clustering provisions in each zone. The R-25 zone is located between the recent Fleetwood development and the high density White Meadow Lake area and requires a 25,000 square foot lot size on 20,000 square feet with clustering. This zone is as yet unsewered.

²Tri-State Regional Development Guide Planning Commission, "Regional Development Guide 1977-2000" (March, 1978).

The R-20 zone covers the Fleetwood development and has already been completely subdivided and partially developed.

The R-15 zone is a mixed residential or planned residential neighborhood zone. It is located just outside the traditionally demarked urban service area between White Meadow Lake and Lake Telemark to the north. The R-15 zone permits single family detached units, duplex or two-family units on 85 by 100 foot lots and townhouses on 20 by 125 foot lots at a maximum density of 3 units per acre. Senior citizen's housing is also permitted at 16 units per acre. It is questionable whether sewer service will be provided to this area due to limited capacity of the proposed Rockaway Valley Regional Sewerage treatment plant.

The R-13 zone covers much of the older developed portions of the Township, including Birchwood Village, White Meadow Lake, Hibernia, Lake Telemark and Green Pond. Permitted in this zone are single family detached homes on 13,175 square foot lots with minimum width of 75 feet or clustered lots with a minimum area of 10,500 square feet and a minimum width of 60 feet. Also permitted are duplex homes or two-family structures on 85 by 100 foot lots at a maximum density of 3 units per acre.

The RMF zone is a multi-family zone which permits a broad range of housing types. Single family detached homes are permitted at a density of 4 units per acre. Two-family or duplex units are permitted on 8,500 square foot

lots and 4 units per acre. Townhouses are allowed on 2,500 square foot lots at a density of 6 units per acre. Garden apartments are permitted at a density of 8 units per acre and senior citizen's housing is permitted at a density of 16 units per acre. The existing and already approved garden apartments discussed in Point I, supra, are within the RMF zone. There is room within the zone for approximately 552 additional apartment units once sewage treatment capacity becomes available.

Multi-family housing is also permitted at 8 units per acre in the OR (office-residential) zone which is located in close proximity to the Rockaway Mall. It should be noted that apartments in both the RMF and OR zones are permitted to be three stories in height.

The RMF-1 zone is located in the heart of the White Meadow Lake development and permits townhouse units on 2,500 square foot lots with no minimum frontage requirement at 8 units per acre.

All of Rockaway Township's larger lot zoning is located outside of the urban service area in portions of the Township which are particularly rugged and characterized by poor soils which limit use of individual septic systems. The R-88 zone requires two acre lots or clustered lots of one acre in size. This zone is situated in the northern end of the Township in environmentally sensitive areas which lack both potable water supply and sanitary sewers. The R-44

zone is also located in the northern end of the Township. It requires a minimum lot size of one acre or clustered lots of 3/4 acre. It is not contemplated that any of the lands in the R-88 or R-44 zones will be provided with either water or sanitary sewers. These areas are in the Limited Growth Area as delineated by the D.C.A.'s State Development Guide Plan.

The Rockaway Township Zoning Ordinance does not impose any cost-generating minimum floor area or bedroom ratio requirements in any of its residential zones.

The reality of land development in Rockaway Township is that there are few, if any, parcels of land which are not to some degree impacted with severe environmental constraints, most often steep slopes, shallow bedrock, rock outcroppings and soils with severe septic limitations.

As is the usual course of events, the "good" land in the Township was developed first. As a result, most of the remaining parcels of land are heavily impacted and have only a small percentage of their acreage actually useable for dwelling units, sanitary septic systems, wells, parking, access drives, recreation area and open space. Zoning in these areas acknowledges and reflects these limitations on useable space.

In POINT I, supra., the existing housing stock of Rockaway Township was discussed. The overwhelming majority of Rockaway Township's existing single family detached homes are very small and stand on extremely small lots. Almost all

of the lots with larger square footage are extremely narrow but very deep either because of the distance from the road to a lakefront or because the houses back up to a steep slope. The great depth of those lots does not contribute to any appreciable increase in cost. Sale prices of these homes on very narrow lots, many of which are converted summer cottages, have fallen further and further behind average sales prices in Morris County and will probably continue to do so.

Rockaway Township has planned and zoned for a wide variety of new high density residential uses in its urban service area. It has also taken cognizance of the fact that its huge existing lower cost housing stock will supply a portion of the future demand for lower and moderate cost housing in the Township. This existing housing stock must be taken into account in assessing the breadth and appropriateness of housing choice in Rockaway Township as it develops under its zoning regulations.

POINT IV

ROCKAWAY TOWNSHIP'S ZONING ORDINANCE REPRESENTS
AN ACCURATE ASSESSMENT OF DEVELOPMENT POTENTIAL
IN VIEW OF ENVIRONMENTAL AND INFRASTRUCTURE
RESTRAINTS.

Most of Rockaway Township's vacant land area is undevelopable. Except within the urban service area in the south, that land which is developable can be developed only at relatively low density in order to provide for adequate on-site potable water supply and sewage treatment and protection of watershed and underground aquifers. The recent groundwater pollution crisis in Rockaway Township exemplifies the environmental sensitivity of this mountain ecosystem.

Rockaway Township is the site of Picatinny Arsenal, a United States Government Reservation. Picatinny Arsenal occupies a site 5,240 acres in area, none of which is available for development.

The Cities of Newark and Jersey City own large land areas in the northerly portion of the Township which are used as watershed, including their water supply in the Charlottesburg and Split Rock Reservoirs. This watershed area is part of the Pequannock River Drainage Basin. These public and semi-public lands occupy an area of 5,256 acres which cannot be utilized for high density development. It should be noted that this is not all of the watershed area in the Township, but only the portion actually owned by Newark and Jersey City. Because of its mountainous terrain, nearly all of the Township is watershed area.

Picatinny Arsenal and the Newark and Jersey City watershed lands account for more than half (nearly 54 percent)

of all the vacant land in Rockaway Township. Of the remaining 9,057 vacant acres*, only 26 percent is developable, that is, is not impacted by slopes of 15 percent or more, soils with severe septic effluent disposal limitations or flood plain. Only 6 percent of the vacant land, or 554 acres, is both free from the aforementioned environmental constraints and located within the urban service area.

Of the 7,702 vacant acres outside the service area, 24 percent, or 1,845 acres, can be considered developable. This latter figure is, however, misleading. First, none of those 1,845 acres is ever likely to be served by either a sanitary sewer system or a public potable water supply system. Second, these developable acres are dispersed homogenously among the 5,857 acres outside the urban service area which are severely impacted. This drastically reduces their utility compared to an identical developable land area concentrated into large uninterrupted tracts.

One of the environmental constraints which is used to determine undevelopable land area is excessive slope. In its analysis, Rockaway Township has considered any land with a slope equal to or in excess of 15 percent to be undevelopable. This is a conservative figure. The Department of Community Affairs, in its Revised Statewide Housing Allocation Report, considers any land impacted with slopes equal to or in excess of 12 percent (a less steep grade) to be undevelopable. Rockaway Township's estimate of developable land is therefore probably optimistic.

*Henceforth, whenever vacant land is referred to, it should be understood to mean only these 9,057 acres.

Based upon topographic surveys, 2,524 acres of land not within Picatinny Arsenal or the Newark and Jersey City watershed are characterized by slopes of 15 percent or greater, of which 285 acres are in the service area and 2,239 acres are outside the service area.

The second limiting factor in determining developable land area is soils which have severe effluent disposal problems. Such problems are primarily caused by permeability and a high seasonal high water table or restricting layers of rock, slope and stoniness. The various soil types in Rockaway Township are briefly described in the 1977 Master Plan. Of the 9,057 acres of vacant land, 6,310 acres are classified by the Morris County Soils Conservation Service as presenting severe effluent disposal problems. Within the service area, 800 of the 1,355 vacant acres have severe effluent disposal limitations.

Lands located in flood plains are also considered undevelopable. The problems created by past development in flood plain areas in other areas of New Jersey are well-known. Further development in flood plains is clearly undesirable. A total of 149 acres of vacant land in Rockaway Township are in flood plains. Of these, 23 acres are in the urban service area.

Finally, much of Rockaway Township is subject to a serious man-made environmental constraint in the form of old, abandoned iron mines. The location and extent of these mines have been described in detail in a report prepared by the Mine Safety Section of the New Jersey Department of Labor

Industry.³

Rockaway Township is one of the oldest mining regions in the United States. Its iron ore deposits have been mined for nearly 300 years, providing ore as long ago as 1710. The Department of Labor and Industry lists some 32 different iron mines which operated in widely scattered parts of the Township. The Richard, Hibernia and Mt. Hope mines in Rockaway Township were among the most productive in the State. They each yielded immense quantities of ore from extensive underground workings. The Mt. Hope mine, located to the west and north of Mt. Hope Lake, is the oldest iron ore mine in the country and the largest producer in New Jersey. In 1977 it was reopened by the Halecrest Company. This mine marks the northern limit of the urban service area in the area of Mt. Hope Lake.

One of the largest vacant areas within the urban service area is the 470 acres of land north of Route 15, adjacent to Picatinny Arsenal. This area is riddled with the shafts and workings of the abandoned Richard, Allen, Teabo and Dolans mines. From 1856 to the 1950s, these mines yielded in excess of 5,700,000 tons of ore, nearly as much as the Mt. Hope mine. In its description of the Richard-Allen-Teabo mines, the Department of Labor and Industry alludes to the potential dangers of these abandoned workings:

The timber supports around the shafts and stopes gave way allowing earth to wash into underground workings. These may be adequately plugged or

³Department of Labor and Industry, "Abandoned Iron Mines of Rockaway Township, Morris County, New Jersey" (1978)

filled, however, they should be avoided.
Id. at 11.

The Report further states:

The shaft [the Sweetser shaft of the Richard Mine] is along side the north end of the mill foundations and is covered by concrete blocks and dirt. The first 80 feet of the shaft is timbered, below that the shaft is concrete lined. In time the timber could give way causing a cave-in.
Id. at 12.

It is fortunate that none of the vast, unregulated residential development in Rockaway Township occurred over the workings of a major iron ore mine. The hazard posed by these underground voids is a very real one. In nearby Mine Hill Township, residential and other development did take place in the area of abandoned iron mines. The documented history of cave-ins in these developed areas is startling and frightening.

The danger to life and property is the result of the mining practices followed by the 18th, 19th and early 20th century miners. Access and ventilation shafts were sunk and ore was extracted from veins from depth to surfact. These workings extend hundreds and, in many cases, thousands of feet from the surface at varying angles. With time, the surface (overburden) has dropped and continues to drop into the underground voids along most of the mined length of the veins.

The situation of Mine Hill Township is instructive. As previously mined areas were developed, they were "papered over" with paving, houses, streets, lawns, etc. without eliminating the danger of voids below or installing surface markers locating the line of veins which have been mined. Nature also obscured the

surface evidence of mining operations as trees and vegetation were restored. This has made it even more difficult to locate, evaluate and eliminate the hazards. As erosion, decomposition and fluctuation in ground water levels take place, sudden collapses, as well as gradual subsidence, have occurred.

A few examples of the numerous cave-ins in Mine Hill Township will illustrate Rockaway Township's concern over the future development of its mined areas. In 1966 an enormous hole opened immediately to the rear of the Canfield Avenue School into which a tall, full-grown tree disappeared. Twenty-four thousand dollars was spent on corrective work. The following year, nearly the entire parking lot of the Mine Hill municipal building collapsed into a yawning hole 80 feet wide and 40 feet deep. In 1966 several cave-ins took place in the Valley View Estates development; one of which was directly beneath a house which had to be raised two separate times to finally fill and cap the hole. A spate of cave-ins occurred in 1973. That year a collapse occurred at 4 Alan Court in Mine Hill right at the corner of a house. A shaft extending downward at an angle with no visible end was revealed. Efforts to fill the hole proved fruitless and the hole is still visible today.

It may not be impossible to develop these exploited areas. However, it is clear that extensive exploratory and corrective work is necessary in order to render such areas safe for human occupation, particularly at higher densities. The monetary costs of such rehabilitation can be considerable.

It is impossible to quantify the acres of vacant land adversely impacted by abandoned mines without detailed engineering studies. Although the general locations of the mine workings are known, much less is known about the precise configuration of the ore veins and the extent of underground excavation. Absent correction of the mined areas, they should be avoided. It would be patently irresponsible to plan the Township's development scheme otherwise. Although the exact acreage impacted by mine workings is not known, it is clear that this constraint causes further reduction of developable land area including a reduction of the 554 otherwise developable acres within the service area.

Those lands which are free from environmental restraints severe enough to preclude development but which are situated outside the urban service area must be developed at low density. Such lands are not totally free from environmental problems. While development may take place, significant environmental risks are presented. This requires not only precautionary site preparation work but also lots large enough to provide for on-site sanitary effluent disposal, on site-potable water supply, minimization and control of storm water runoff and soil erosion and a margin of protection for watershed lands. It is known that the cumulative effect of non-point sources of pollution, including residential development, can present serious dangers to regional stream and river systems and underground aquifers.

Rockaway Township lies in the drainage basins of the Pequannock River and the Rockaway River, both of which are major tributaries of the Passaic River. The New Jersey Department of Environmental Protection has classified the rivers in this area as FW-2 waters (water quality limited). They are approved as sources

of public water supply following required treatment. The Pequannock River in the area of Rockaway Township is considered trout waters.

The more developed southern portion of the Township is in the Rockaway River drainage basin. The waters of the Rockaway River are impounded in the Jersey City Reservoir just downstream of Rockaway Township in Boonton. This reservoir provides potable water to the residents of Jersey City.

The northerly portion of the Township is in the Pequannock River drainage basin and is the location of the Newark watershed encompassing lands surrounding the Charlottesville Reservoir and Split Rock Reservoir. The Passaic River, of which the Rockaway and Pequannock Rivers are tributaries, serves as a potable water source for the Passaic Valley Water Commission.

It is important to remember that streams and watershed areas have a maximum assimilative capacity for pollutants. This has been recognized in the various 201 and 208 studies. No sewage treatment system removes all of the bacteria and other pollutants from effluent. Individual septic systems certainly do not, particularly in the soils prevalent in Rockaway Township. The cumulative effect of these residual pollutants would easily exceed stream assimilative capacities in Rockaway Township and impact upon downstream areas if development in the steep slope, unsewered watershed areas of the Township were to take place at high density.

The United States Environmental Protection Agency (E.P.A.) recognizes and has stated that a single family dwelling on one-half acre of land should have central sanitary sewer service and that if water is supplied by a private well on the same parcel of land, the minimum lot size should be one acre.⁴

⁴Environmental Protection Agency, EPA Technology Transfer Seminar Publication, Booklet 1, Alternatives for Small Wastewater Treatment Systems, On-Site Disposal/Septage Treatment and Disposal, (October 1977).

Whereas the assimilative capacity of surface waters is fairly well understood, the assimilative abilities of soils are not well understood. The E.P.A. acknowledges this fact in its technology transfer publications:

[T]he assimilative capacities of soil and [evapotranspiration] systems are poorly understood,....and need to be reviewed.⁵

Exacerbating this lack of knowledge is the fact that the reliability of percolation tests as a standard for installation of individual sanitary septic systems is low. Tests run in the same soil vary by as much as fifty percent. The E.P.A. has thus concluded that percolation tests are unreliable.⁶

In an area which is a critical water resource area, as is most of Rockaway Township, it would be irresponsible for local officials to engage in environmental risk taking. Once soils and underground aquifers are polluted it may take decades and huge expenditures of money to rectify the contamination. It may well be that the one-half to two acre lots now permitted will ultimately prove to be a too-intensive use of these lands. With the potable water supplies not only of Rockaway Township but also of Newark, Jersey City and the communities in the Passaic River Basin hanging in the balance, we can hardly afford to condone a higher risk policy and a wait and see approach.

Rockaway Township has recently had a bitter experience in this regard. The Township is underlaid by three different

⁵Id. at 7.

⁶Id. at 22.

aquifers. The municipal water supply system which currently services a portion of the urban service area is drawn from three wells which tap these underground aquifers at a point in the southern area of the Township off Green Pond Road. In November 1979 it was discovered that one of the wells was contaminated with Trichloroethylene, a cancer-causing agent. Using the middle well as a flushing buffer, the Township was forced to draw all of its water from only the one remaining well. In September 1980 the remaining well was found to have excessive amounts of Diisopropylether, which presented an immediate health hazard.

The Township has since had to purchase costly filtration equipment to remove this contamination. The equipment is already at maximum capacity. It is estimated that the filters will have to be changed twice yearly at a cost of approximately \$50,000 for each replacement. No one can say how long the contamination will continue, but it is most likely that filtration will be required for the foreseeable future. It is too early to identify the source of these pollutants. Trichloroethylene, however, is a degreasing agent which, among other things, is commonly used to flush residential septic systems.

The Township has been actively seeking new potable water supply sources for several years, so far with no positive result. Unless and until a new unpolluted water source can be located, extension of the municipal water system is

out of the question.

Groundwater pollution is not unique to Rockaway Township. However, it is only recently that the problem has generated widespread concern. Arnold Schiftman, director of the State's Division of Water Resources, in testimony before a joint hearing of the House Subcommittees on Transportation and Commerce and Health and Environment on August 22, 1980, drew attention to what he termed a crisis in New Jersey caused by pollution of groundwater and surface waters. He noted that, even without any formal pollution seeking program, 13 public water supply wells and 500 individual wells have already been closed.⁷ It may well be that numerous private wells in Rockaway Township will have to be closed once a thorough testing program has been undertaken.

The realities of sewage treatment facilities in the Rockaway Valley render it certain that the central sewer system will not extend beyond the urban service area and questionable whether even the service area can be fully served. Rockaway Township, along with other nearby municipalities, has been under a court-imposed sewer connection since the early 1970s due to a public health emergency created by inadequate treatment facilities. Gallonage allocations are jealously guarded and eagerly sought after.

The Rockaway Valley Regional Sewerage Authority's final allocation of flows for Rockaway Township (based upon the capacity of the proposed new treatment facility) is 4.9 million gallons per day (mgd). Picatinny Arsenal used 0.5 mgd. This

⁷"Water Crisis Warning", The Star Ledger, Newark, New Jersey (August 23, 1980).

leaves the Township with 4.4 mgd to cover both existing and proposed uses. Totalling estimated existing sewerage flow, flow from lots in subdivisions not yet sewerred (but assessed for interceptor costs), flow from proposed apartment units already approved, estimated industrial flow and flow from existing temporary package treatment plants, yields a figure of 5.251 mgd. This anticipated immediate need already exceeds the Township's final flow allocation for the proposed treatment plant. The final allocation would be exceeded even if existing package plants were able to continue operating.⁸

So called alternative waste treatment techniques provide no answer. They are in a fledgling state of experimentation. None of these techniques has proven effective or reliable over either the short or long run in areas with the topography of Rockaway Township. Their long range effectiveness and reliability has not been proven anywhere. Both short and long range costs are unknown. Furthermore, it is unlikely that overall development densities can be increased by their use even in unremarkable terrain due to the large amount of land area that must be utilized for waste treatment. Of course, the limitations of stream assimilative capacity are unaffected by alternative systems.


The E.P.A. has attempted to stimulate experimentation with alternate technologies by granting bonus financing for their use. They have also offered to finance replacement costs if the system does not work. Given the limits of stream

⁸This is not likely inasmuch as the DEP permit for these plants specifically provides that they are temporary only and must be abandoned when sewer capacity becomes available.

assimilative capacity and unavailability of additional sewerage treatment capacity, there would be no "fix" if such a system failed in Rockaway Township. The harsh reality is that in such an event, homes would have to be abandoned. Despite its incentives, E.P.A. recognizes that alternative technologies are in a purely experimental stage. For one thing, much more must be learned about soil assimilation capacities.

It is not the business of responsible municipal officials to engage in high or even moderate risk experiments where the public health is involved. This is unquestionably so where the issue is waste treatment in an area as rugged and environmentally sensitive as Rockaway Township. Alternatives to sewers and individual septic systems are totally unproven, except for a few short-term examples, even in areas which are in theory ideally suited to their use. Rockaway Township is not such an area. To plan for high density development in reliance on these technologies would be irresponsible.

As previously stated, lands in Rockaway Township located outside the urban service area correspond closely to the Limited Growth area designation of the D.C.A.'s State Development Guide Plan. A large part of this area is also designated Conservation Area. The Township's planning of these areas is consistent with the state policy embodied in the Development Guide Plan. As indicated, it is also consistent with E.P.A. density recommendations and with considerations of reasonable prudence in the management of Rockaway Township's extensive steep slope and watershed lands. The Development Guide Plan expressly recognizes the statewide importance of



these resource areas:

Steep slopes and wetlands serve important functions in flood control and water resource protection. Development in such areas is possible, although site preparation and construction costs may be high. However, there are environmental costs. The State's undeveloped hillsides protect the quality of water flowing into water supply storage areas. The vegetation on steep slopes serves to retard the flow of storm water run-off and soil erosion and, thereby, flooding in river valleys.⁹

Rockaway Township's zoning ordinance is a product of comprehensive planning and reflects a reasonable accommodation of anticipated development needs with environmental and infrastructure realities.

⁹Id. at 30.

POINT V

ROCKAWAY TOWNSHIP IS A DEVELOPING MUNICIPALITY TO ONLY A VERY LIMITED THEORETICAL EXTENT AND IS NOT ACTUALLY DEVELOPING.

Rockaway Township is, in practical effect, two distinct localities. The more populous southern portion of the Township has in the past experienced development and population growth, although this has slowed enormously in the last decade. The northern bulk of the Township, roughly north of White Meadow Lake, has not experienced development and growth and will not do so in the foreseeable future. The developing/non-developing status of these areas will be separately treated.

The urban service area concept has been fully discussed, supra, as representing a sound, comprehensive planning approach to future development in Rockaway Township. To the extent that fair share obligations should be satisfied, they should be satisfied in the service area for compelling planning reasons including all of the factors involved in the selection of least cost siting and the extreme environmental considerations which characterize the Township.

The area outside this service area should not be considered in this litigation for the further reason that this area simply cannot be characterized as developing. It is true that Mt. Laurel does not discuss the developing municipality distinction in terms of portions of municipalities. Nevertheless, the ultimate point of zoning is to

encourage appropriate use of land in accord with the needs and characteristics of the area in question. In a municipality with the peculiar shape, size and location of Rockaway Township, it is entirely appropriate to look beyond artificial municipal boundary lines to recognize the real character of the physical locales which are the subject of the exclusionary zoning litigation.

The factors which enter into the determination of whether a municipality is developing were first described in Mt. Laurel. Recent case law has further refined and articulated these factors. They are, it is submitted, equally applicable to the evaluation of only a portion of a large municipality, at least where that portion has consistently maintained a character entirely distinct from the remaining areas of the municipality.

In Glenview Development Co. v. Franklin Tp., 164 N. J. Super. 563 (Law Div. 1978), six criteria of a developing municipality were articulated. The Court stated:

A developing municipality (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, (5) is not completely developed and (6) is in the path of inevitable future residential, commercial and industrial demand and growth. 164 N.J. Super. at 567-568.

See Mt. Laurel, 67 N.J. 151, 160.


These criteria are not to be applied mechanically. The presence or absence of any one factor is not determinative. In a given situation one factor may be far more significant than the others. Glenview Development, supra, 164 N.J. Super. at 571.

It is clear that the northern area of Rockaway Township has sizable land which is not completely developed. Two of the six criteria are therefore satisfied.

Criterion number two requires that the area be outside the central cities and older suburbs. This does not, however, automatically include every area which is not either a central city or an older, built-up suburb. The criterion has been held to require some reasonable geographic relationship to those areas which generate a need or demand for housing. Glenview Development, supra, 164 N.J. Super. at 570.

The northern reaches of Rockaway Township do not bear such a geographic relationship. This area lies outside the Interstate Route 80 corridor. There is only one, narrow arterial road connecting it with the southern portion of the Township. It is now and will remain geographically isolated from the remainder of Rockaway Township and from the New York metropolitan area.

The northern area of Rockaway Township has not substantially shed its rural characteristics. There are no municipal sewer or water services in this area. The road



network is meager. There has been no significant commercial or industrial development. Residential housing is in small, scattered rural communities. The area is characterized by undeveloped mountainous terrain scattered with long-abandoned iron mines.

There has been no residential development in northern Rockaway Township of any significance since the Green Pond community was developed approximately 30 years ago. Population increase in this area has been so small over the last two decades as to be insignificant. This vast northern area is not in the path of inevitable future growth. As stated, supra, none of this area has been designated by the D.C.A.'s State Development Guide Plan as Growth Area. It is certain that municipal services will not extend to this portion of the Township. Despite years of zoning for industrial and commercial uses in parts of this northern region, no such uses were developed. No future demand for residential, commercial or industrial use in this region can now be foreseen.

This entire area, corresponding to the area outside the urban service area which has been traditionally used for planning purposes, is now and will continue to be rural in character. It is not developing and should not be considered by this Court in assessing Rockaway Township's obligations under the Mt. Laurel decision.

The southern service area of Rockaway Township is a distinct community from the remainder of the municipality. It cannot be denied that substantial development has occurred there in the past, that it has undeveloped land, that it has shed its rural characteristics, that it is geographically related to other population centers in Morris County and that it lies in the path of future residential, commercial and industrial demand. From all appearances, this southern area would seem to be a typically developing community.

This perception must, however, be tempered with the reality that over the last decade, from 1970 to 1980, increase in population in the Township has been minimal. Based upon preliminary 1980 census data, the total population of Rockaway Township increased by only 672 persons in the ten-year period from 1970 to 1980. In 1979, only 34 building permits were issued for new residential units. In 1980, this figure dropped to 21.


A factor in this small increase in population is the court-imposed ban on sewer connections which has been in effect throughout the decade. This constraint, however, is not likely to disappear in the near future. Optimistic projections place the completion of the proposed new regional sewage treatment plant in the late 1980's. As discussed, supra, final flow allocations derived from the design capacity of this proposed treatment plant are already

exceeded by demand from existing unsewered units and already approved development in the Township.

In actual fact, Rockaway Township has not been developing, at least in terms of population growth. The major reason for this will continue to be a population limiting influence to the same degree throughout the balance of the 1980's. Commercial development in the form of the Rockaway Mall has occurred in the decade of the 1970's. This, however, was aberrational and was feasible only because the developer was able to provide a self-contained, albeit temporary, waste treatment package plant. No other significant commercial or industrial development has occurred. In a very real way, then, Rockaway Township is not developing. Development has been halted and will remain essentially halted.

This slow to non-existent pace of development must be taken into full account in any assessment of Rockaway Township's zoning obligations under the Mt. Laurel and Madison decisions. It makes little sense to plan at either a local or regional level without consideration of such limitations on a municipality's ability to satisfy demand for commercial and industrial development.

It should be stressed that Rockaway Township has, despite these practical development constraints, zoned its urban service area as if it were developing and consistent with the need to provide a variety and choice of



housing, including least cost housing. It is nevertheless submitted that this urban service area has not been developing and will not be developing within the meaning of the Mt. Laurel decision.

POINT VI

PLAINTIFF BEARS THE BURDENS OF PRODUCTION
AND PROOF THAT ROCKAWAY TOWNSHIP'S ZONING
ORDINANCE IS EXCLUSIONARY.

Burden of proof in Mt. Laurel type litigation is discussed in the trial Brief on issues common to all defendants. Rockaway Township incorporates pages 1 through 19 of that Brief herein and adds the following comments:

The long-standing principle clothing municipal zoning enactments with a strong presumption of validity and eschewing judicial intervention as a substitute for the legislative process emerged from the Supreme Court decisions in Mt. Laurel and Madison unscathed. In Pascack Ass'n., Ltd. v. Mayor and Council of Washington Tp., 74 N.J. 470 (1977), the Court stated unequivocally:


We have recently reaffirmed and faithfully enforced the principles of Mount Laurel in an appropriate fact situation. See Oakwood at Madison, supra. But it would be a mistake to interpret Mount Laurel as a comprehensive displacement of sound and long established principles concerning judicial respect for local policy decisions in the zoning field. What we said recently in this regard in Bow & Arrow v. Town of West Orange, 63 N.J. 335,343 (1973), is worth repeating as continuing sound law:

"It is fundamental that zoning is a municipal legislative function, beyond the purview of interference by the courts unless an ordinance is seen in whole or in application to any particular property to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute. N.J.S.A. 40:55-31, 32. It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts,

boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgement. 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 judgement. If the latter is at least debatable it is to be sustained."

The 25 municipalities which will take part as defendants in this trial are all distinct entities with distinct zoning ordinances, distinct infrastructure facilities, distinct patterns of supply and demand, distinct housing stock and distinct environmental concerns. While there are numerous highly interesting and provocative issues which may be said to be common to all of the individual lawsuits which are to be tried here, this Court must, in the final analysis, judge of the reasonableness of each municipality's zoning ordinance in the specific context of the constellation of planning factors which legitimately bear upon zoning decisions in the municipality in question.

As much as it may behoove Plaintiff to meet its burdens of proof using generalized evidence unrelated to the specific factual contexts of individual municipalities, such as unqualified least cost design parameters, such evidence cannot support a prima facie case in a suit against a particular municipality. As argued in the defendant's brief on common issues, the concept of least cost must take into consideration numerous factors beyond initial construction cost. These factors vary from municipality to municipality.



Design standards which are feasible and rational in one topographical and social setting cannot be so in all settings. Rockaway Township is not a municipality blessed with an abundance of "good" land in large, uninterrupted parcels. As previously indicated in this trial brief, a myriad of planning factors both environmental and social are relevant to proper development regulation in Rockaway Township. Plaintiff cannot be permitted to ignore this fact in presenting its proofs.

Plaintiff's burden of showing Rockaway Township's zoning ordinance to be unreasonable, arbitrary or capricious in accordance with well-settled standards is unchanged. This cannot be accomplished without comprehensive evidence of competent expert planners concerning the substance of the Rockaway Township zoning ordinance in relationship to the Township's topography, environmental concerns, transportation facilities, infrastructure needs, the actual uses already in existence and long-range local, regional and state goals for land use.


POINT VII

THE PLAINTIFFS AND THE PUBLIC ADVOCATE SHOULD BE
REQUIRED TO PAY THE DEFENDANTS' LEGAL AND OTHER
REASONABLE EXPENSES OF THIS LITIGATION.

This suit was commenced by plaintiffs prior to adoption on May 31, 1979 of Rockaway Township's amended zoning ordinance pursuant to its 1977 Master Plan. This ordinance represents sound comprehensive planning including planning for the Township's constitutional obligations under Mt. Laurel and subsequent decisions.

The Public Advocate did not evaluate Rockaway Township's comprehensive planning in good faith but rather adhered blindly and without justification to a patently inadequate, outdated and misleading housing allocation report and theories of remedy not sanctioned by statute or case law as a basis for the instant suit. Thus acting, the Public Advocate was reckless in naming Rockaway Township as a defendant and under the "bad faith" exception to the American Rule, should be charged with the Township's counsel fee and reasonable expenses of litigation.

Moreover, this case involved different and competing public interests. It was for just such matters that the legislature expressly empowered the Public Advocate to choose to represent one such interest and thereafter provide for payment of expenses of representation of the remaining inconsistent public interest. N.J.S.A. 52:27F-31. The Public Advocate should be ordered to provide for the expenses he has imposed upon



the defendant municipalities by the position he has taken in
this litigation.

CONCLUSION

For the foregoing reasons, defendant, Township of Rockaway, respectfully requests that the Complaint against it be dismissed.

Respectfully submitted,

WILEY, MALEHORN AND SIROTA
Attorneys for Defendant,
Township of Rockaway

By: _____


Fredric J. Sirota

Dated: December 5, 1980