ML- Morris County Fair Housing Council vs. Boonton

Dec. 8, 1980

- East Hanover

Trial Brief on Behalf of Defendant, Township of East Hanover in support of dismissal of Plaintiff's Complaint and deny the relief sought

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ML000648B

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 ON BEHALF OF DEFENDANT, TOWNSHIP OF EAST HANOVER

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On the Brief

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STATEMENT OF FACTS

On October 16, 1978, Defendant, Township of East Hanover, (hereinafter referred to as "East Hanover") was served with a Complaint in Lieu of Prerogative Writs filed by the Morris County Fair Housing Council, the Morris County Branch of the National Association for the Advancement of Colored People, and Stanley C. Van Ness, Public Advocate of the State of New Jersey. The civil action was filed in the Superior Court of New Jersey, Law Division, Morris County, carrying Docket No. L-6001-78 P.W. In this Prerogative Writs action, East Hanover was named as a co-defendant with 26 other Morris County municipalities, East Hanover being a municipal corporation of the State of New Jersey, located in Morris County, New Jersey.

In their Complaint, Plaintiffs seek injunctive and declaratory relief by challenging the constitutionality and legality of East Hanover's land use plan and development ordinance and practices. Specifically, Plaintiffs seek an order:

a) declaring the defendants' land use plans and ordinances unconstitutional, illegal and void, insofar as they unlawfully exclude their fair share of the regional need for low and moderate income housing opportunities;

b) enjoining the defendants, their officers, agents and employees, from engaging in any land use policy or practice which is intended to or has the effect of excluding or substantially hindering the provision of

housing opportunities for persons of low and moderate incomes;

c) ordering the defendants to comprehensively review and amend their land use plans and ordinances within such time as determined by the Court to eliminate all exclusionary requirements and to make realistically possible their fair share of the regional need for low and moderate income housing;

d) ordering the defendants to issue building permits for any housing development proposed in developable areas which will be built at minimum standards consistent with the protection of the public health, safety and general welfare until such time as their respective shares of the regional need for housing for low and moderate income persons are met or until such time as the Court has adjudged that the defendants have adopted constitutional and lawful land use plans and ordinances; and

e) granting such other relief as the Court deems is just and equitable.

Upon its receipt of the Complaint, Defendant, East Hanover filed an Answer and Counterclaim on November 22, 1978. East Hanover's Counterclaim emphasizes the patent deficiencies and erroneous and illegal foundation upon which Plaintiff bases its action against the Defendant, East Hanover, in this matter. In its Counterclaim, East Hanover seeks from Plaintiff damages, costs of suit, attorneys fees, and such other relief as the

Court may deem equitable. By order of the Honorable Robert Muir, A.J.S.C., review and disposition of all counterclaims filed in the within matter are not to be considered until the termination of this matter or by further order of the Court.

Thereafter, East Hanover brought Motions for an order severing East Hanover as a party defendant from all other co-defendants and for the Plaintiffs to supply East Hanover with a more definite statement with regard to its justification and contentions in filing the within matter and action against East Hanover. On December 8, 1978, the Honorable Robert Muir, A.J.S.C., after considering the Briefs, Affidavits, and oral argument of counsel, dismissed the severance Motion and ordered a modified procedure by which Plaintiffs were to present to East Hanover a definite statement in regard to the background and institution of the within cause of action. In addition, the Court on its own Motion, in accordance with Rule 4:10-4, ordered on January 19, 1979, a precise procedure establishing dates for discovery and a pretrial conference.

East Hanover reinstated its Motion on March 10, 1979, for an Order of Dismissal of the Plaintiff's cause of action. The Court, in denying East Hanover's Motion for Dismissal, also ordered the Plaintiffs to supply East Hanover with additional information necessary for East Hanover to assess its situation and status in the within cause of action.

The Court's January 19, 1979, Pretrial Discovery Order was amended on June 21, 1979, November, 1979, and on January 14, 1980, revised schedules and procedures for interchange of

interrogatories, completion of depositions of Plaintiff's and Defendants' witnesses, and the establishment of a date for the Pretrial Conference in the matter was also ordered by the Court.

Pretrial Conferences were held in February and March of 1980. Interim motions in the matter were requested by counsel for Plaintiff and Defendant in May, June and October, 1980. Defendant's Motion to stay the lawsuit was also denied by the Court.

Plaintiffs contend in this lawsuit that East Hanover has unlawfully and unconstitutionally misused their delegated municipal authority by creating, by design, a land use plan, ordinance, and development regulations to create a predominantly white, middle and upper class community. Plaintiffs further assert that East Hanover has knowingly and arbitrarily excluded or constrained the construction of housing in its municipality generally affordable to low, moderate and even middle income persons, which as an end result precludes those persons of low and moderate income from securing "needed housing" in East Hanover. Plaintiffs go on to allege that East Hanover has not carried their fair share of the growth and development in Morris County which compounds an "existing housing crisis" and as an end result, unconstitutionally and unlawfully creates an unequal housing opportunity for all citizens, regardless of economic status or race.

East Hanover absolutely and unequivocably denies all allegations asserted by the Plaintiffs against its municipality.

The Township of East Hanover, by way of physical characteristics is approximately 8.3 square miles, which is roughtly 5,376 acres. By physical location, East Hanover is located on the easterly boundary of Morris County. Based upon existing cases regarding the establishment of a municipality's stage of development, East Hanover is a small and almost "fully developed" municipality and not a "developing community of sizeable land area". Furthermore, East Hanover has not created a zoning or land use ordinance situation which has been fiscally zoned, nor has East Hanover overzoned the lands within its boundaries for industrial zoning needs.

Rather, East Hanover refutes Plaintiffs' allegations by relying upon the considerations which were set forth in the 1976 East Hanover Master Plan and the considerations used in the compilation of its zoning and land use Ordinance which was prepared by East Hanover to meet the current conditions and land use characteristics within the boundaries of East Hanover. These considerations specifically included the present and future zoning, planning, employment and housing needs within East Hanover as a "developed" municipality. In establishing these zoning and planning needs, East Hanover took into consideration those areas in the surrounding communities in accordance with N.J.S.A. 40:55D-1 et seq. East Hanover has within its physical boundaries, unique environmental, archeological, soil characteristics, drainage, and overall hydrological characteristics which make it a unique municipality within Morris County mandating that it be dealt with by the Court in this matter on an ad hoc

comprehensive zoning and land use basis. East Hanover strenuously asserts that its present established pattern of land use and zoning is the result of the Township's reasonable implementation of development and planning standards based upon these characteristics.

With regard to its drainage, soils, hydrological problems, and flood characteristics, East Hanover itself is almost totally surrounded by waterways, including the Passaic, Rockaway, and Whippany Rivers and the Black Brook. Two swamps extend into the Township. It is a relatively flat community, having 35.3 percent of its lands in flood hazard areas delineated on the "Flood Hazard Maps" developed by the U.S. Department of Housing and Urban Development. East Hanover, when assessing its zoning and land use characteristics with regard to N.J.S.A. 40:55D-1 et seq., evaluated almost all of the vacant undeveloped lands within its boundaries to be in an environmentally sensitive condition. With these conditions in mind, the Township was following the dictates of N.J.S.A. 40:55D-2(c) and (j). Notwithstanding the above mentioned statutory guidelines, East Hanover with regard to the development of said properties, must comply with New Jersey Department of Environmental Protection and U.S. Environmental Protection Agency mandatory guidelines, rules and regulations dealing with land development within flood sensitive areas. East Hanover contends that the Federal Housing and Urban Development mandatory criteria for flood insurance certification from the Federal Insurance Administration, further restricts high density open and widespread regulated and

unregulated development within its delineated and designated flood areas. Furthermore, in accordance with Environmental Protection Agency rules and regulations, 35.925-13(e) Federal Register Volume 43, No. 118, dated September 27, 1978, any federally funded sewerage projects are specifically conditioned upon the fact that no sanitary sewerage facilities are to be designed or installed for the future development of flood sensitive areas. These rules and regulations were adopted pursuant to Executive Orders 11988 and 11990 of President Carter mandating protection of Flood Plain and wetland properties. East Hanover must also comply with the mandates of its 201 and 208 water quality plans prohibiting further degredation of the water quality within or passing through the Township.

Given the existing water table elevation in East Hanover and soil composition characteristics and limitations, high density development on the remaining undeveloped land not in flood hazard areas in the Township in the magnitude and cost ranges proposed by Plaintiffs, is not possible. Rather, these existing water table and soil limitations mandate that the construction of feasible sewerage disposal systems for the suggested high density development to be very costly, thus not only defeating the concept of least cost housing, but also potentially causing irreparable damage to those sensitive lands.

East Hanover asserts that upon a cursory review of the present East Hanover zoning map and planning exhibits, it can be determined that in establishing its existing pattern of zoning and land use, East Hanover has in fact zoned the vacant developable

land within its Township boundaries in the most feasibly prudent manner possible to obtain the goals sought by the Plaintiff in this matter, given East Hanover's physical and environmental constraints. East Hanover contends that environmental factors such as those existing physically within the Township are those environmental factors delineated in existing case law which are lands to be excluded in any type of ratio to determine gross vacant land and acreage suitable for residential housing in a municipality. In accordance with case law and statute, any land identified as environmentally critical, being for example short term flood plains, acquifer out crops, and swamps essential for water resources, are to be excluded from any type of land ratio formula. The environmental situation in East Hanover can be seen as being very substantial and a real factor to be dealt with in any proper planning and implementation of municipal zoning and land use. To not deal with those considerations would constitute a zoning and planning oversight of irreparable magnitude and violation of the Township's charged municipal duty under N.J.S.A. 40:55D-1 et seq. Furthermore, flood sensitive areas and lands experiencing regular high water tables have been directed by the New Jersey State Development Guide Plan to be restricted and subject to severely limited development.

Plaintiff's contentions with regard to the amount of least cost housing which is "possible" and "implementable" within East Hanover is unrealistic and not feasible and arrived at without any physical or real evaluation of actual circumstances existing in East Hanover constituting nothing more than a "raw" mathematical

or statistical calculation. Plaintiffs have alleged quotas and numbers for fair share housing allocations in East Hanover that completely contradict the concepts of sound comprehensive planning and zoning. Plaintiffs alleged quotas further contradict state and federal laws, rules and regulations and case law dealing with fair share, least cost and exclusionary zoning as applicable in East Hanover. Plaintiffs are attempting to have the Court apply least cost and fair share housing allocations to East Hanover based upon studies and reports that formulate numbers and criteria that have been created in an unrealistic theoretical vacuum. The theoretically formulated numbers for East Hanover as alleged cannot be implemented and achieved to carry out Plaintiffs' expressed purposes in the case at hand.

An actual detailed analysis of real facts and circumstances in East Hanover clearly show that with existing state and federal regulations and the use of any sound comprehensive planning and zoning principles, it is not reasonably possible to implement Plaintiffs housing goals given East Hanover's existing pattern of established development, municipal size, land characteristics and restrictions, and Plaintiffs allegations should be dismissed.

POINT I

THE TOWNSHIP OF EAST HANOVER IS A "DEVELOPED" MUNICIPALITY AND HAS NO AFFIRMATIVE DUTY TO SHOULDER THE OBLIGATION OF PROVIDING A DESIGNATED SHARE OF LEAST COST HOUSING OR ZONING PROVISIONS FOR ALL CONCEIVABLE TYPES OF HOUSING WITHIN ITS MUNICIPAL BOUNDARIES.

A review and analysis of the cases in New Jersey which set forth both the precedents and guidelines to be followed by a municipality in providing various types and a wide spectrum of housing stock set forth that if a New Jersey municipality is a "developing" municipality, then that municipality is obligated to provide housing stock of a "least cost" variety in sufficient numbers to accommodate that municipality's particular need vis-a-vis the need of the surrounding municipalities, and the all encompassing term "region". While the obligation of a "developing" municipality is to provide least cost housing, case law precedent provides that if a municipality is one that is determined to be "developed", then it, as a municipality, owes no duty to provide least cost housing as stated above. Nigito v. Borough of Closter, 142 N.J. Super. 1 (App. Div. 1976); Pascack Association Limited v. Mayor and Council of Washington Township, 74 N.J. 470 (1977).

Defendant, Township of East Hanover, submits to the Court that it is a municipality that is "developed" and based on that stage of development, the Township has no obligation or duty to now provide types or values of housing in conflict with and contrary to the types of existing housing and requirements set forth in the existing land use and corresponding zoning ordinance and master plan.

The establishment of the rational and criteria to determine and designate a municipality as one that is "developing" was first set forth by the New Jersey Judiciary in Southern Burlington City N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975). On page 160 of that landmark zoning decision by the New Jersey Supreme Court, the Court concisely set forth six criteria which could serve as indicators with respect to New Jersey municipalities for use in determining whether that municipality was developing. The Court stated:

> "The same question arises with respect to any number of other municipalities of sizeable land area outside the central cities in older built-up suburbs of our north and south Jersey metropolitan areas (and surrounding some of the smaller cities outside those areas as well) which, like Mt. Laurel, have substantially shed rural characteristics and have undergone great population increase since World War II or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth." Mt. Laurel, supra., page 160.

The six Mt. Laurel criteria have been subsequently considered, discussed and analyzed in numerous zoning cases, i.e., Glen View Development Company vs. Franklin Township, 164 N.J. Super. 563 (Law Division 1978) cert. granted _____ N.J. _____(1980); Fobe Associates v. Mayor and Council and Board of Adjustment of Demarest, 74 N.J. 519 (1977); Oakwood at Madison Inc. v. Township of Madison, 72 N.J. 481 (1977).

Upon an analysis and reliance of existing case law with regard to the application of the six Mt. Laurel criteria which establish a developing municipality, the Township of East Hanover is beyond its phase as a "developing municipality".

East Hanover's factual circumstances are akin to the circumstances which existed in the municipalities determined by the Courts to be "developed". See (Pascack Association, supra.; Nigito, supra.; Windmill Estates v. Zoning Board of Totowa, 147 N.J. Super. 65 (Law Div. 1976), reversed in part 158 N.J. Super. 179 (App. Div. 1978).

Through a balancing and weighing of the six Mt. Laurel criteria, the Township of East Hanover closely aligns to the factual land use patterns of the above outlined cases dealing with developed municipalities. The Township of East Hanover does not have sizeable land area. As a municipal corporation, it covers 8.3 square miles and is located on the eastern boundary of Morris County. Its land size is hardly that of Mt. Laurel, 22 square miles, and Madison Township, being 42 square miles (Mt. Laurel, supra., and Oakwood at Madison, supra.). Based upon a gross municipal land mass alone, the Township is more closely akin to the municipal size of the Borough of Totowa, 3.9 square miles, the Borough of Closter, 3.2 square miles, and Washington Township, 3.25 square miles. The Township of East Hanover does not have the physical size in land area to be initially considered developing.

Coupled with the Mt. Laurel criteria dealing with land size, the Township of East Hanover submits to the Court that based upon its overall percentage of land area now developed within its municipal boundaries, the Township is no longer a "developing" municipality. The remaining vacant, undeveloped residentially zoned property within the municipal boundaries

of the Township which can still be developed without danger to the environment equals approximately two percent (2%) of land. with ninety-eight percent (98%) of East Hanover's land defined as "developed".

Based upon the above percentage, Plaintiff has erroneously claimed that the Township of East Hanover is a "developing" municipality. To the contrary, it is submitted to the Court that the East Hanover Land Use Plan and existing scheme of residential development is closely akin to that of the scheme of the Borough of Closter, Township of Washington, and the Borough of Demarest which have been determined by New Jersey Courts to be post developing or "developed". Nigito, supra., Pascack, supra., and Fobes, supra. Specifically, Closter comprises 3.2 square miles and is 94 percent developed, Totowa is 3.9 square miles and is 95 percent developed, and Washington Township, having 3.25 square miles is 94.5 percent developed. Like East Hanover, Closter, Washington Township, and Totowa, did not provide in its zoning scheme, provisions for multi-family, high density development. More importantly, those municipalities have been deemed by the Courts to be developed, and thus not obligated to amend or provide in their existing zoning scheme multi-family high density housing.

The Township of East Hanover submits that the Courts in Nigito, supra., Pascack, supra., and Fobes, supra., gave great emphasis and weight to the Mt. Laurel criteria dealing with geographical size of the municipality and the municipality's percentage of remaining vacant land to be developed residentially

These two Mt. Laurel criteria were emphasized in the Nigito case, supra., at pages 7-8, where the Court stated:

> "The ordinance was not invalidated for its failure to make provision for multi-family construction. Nor could it be under the factual complex of this case. Closter is a small, almost fully developed community. The subject parcel, according to the trial judge's own findings is the only remaining land appropriate to garden apartment construction. The town has grown over the years in accordance with its zoning plan, as a community of single-family homes with services adequate for that kind of development. A disinclination to accept the sizeable population increase necessarily attendant upon the erection of 186 garden apartment units cannot be regarded as arbitrary or capricious action on the part of the municipality. Nor do we find anything to the contrary in the Opinion of the Supreme Court in Southern Burlington County N.A.A.C.P. v. Mt. Laurel Township, 67 N.J. 151 (1975), decided after the trial court opinion in this matter. There the Court (at 187) limited its mandate to provide "the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there" to developing communities of sizeable land area. Closter meets neither criteria."

East Hanover submits that it has similar geographical size, 8.3 square miles, with vast amounts of environmentally sensitive lands and similar completed pattern of development for single family residential homes with municipal utilities and amenities commensurate to that pattern of development. These factors make crucial the existing stage of the Township's development, vis-a-vis the percentage of remaining vacant residentially zoned land and clearly make East Hanover's characteristics analogous and parallel to that of the Borough of Closter.

Plaintiff claims and alleges that the Township of East Hanover is and will continue to experience a high degree of population and municipal growth commensurate thereto. By use of the preliminary 1980 census figures with regard to the Township of East Hanover, Plaintiff's allegations are inaccurate. While the Township of East Hanover has in the past experienced population growth, this high rate of population growth has leveled off and will continue to level off since East Hanover has become fully developed. Quite simply, since the remaining vacant residentially zoned land in the Township is di minimus in amount, the future single family residential dwellings to be constructed on that vacant land will not be in numbers which will relate to a marked population increase. East Hanover's situation then is quite distinguishable from that of a typical developing municipality which has substantial amounts of vacant residentially zoned lands and is currently in the stage of municipal development that will be continuing until it reaches its municipal peak. The Court in Pascack Association, supra., remarked on pages 480 to 481 with regard to the Mt. Laurel circumstances where it stated:

> "...; (2) the municipal category subjected to the mandate of the decision was that of the 'developing municipality'. It required the combined circumstances of the economic helplessness of the lower income classes to find adequate housing and the wantoness of foreclosing them therefrom by zoning in municipalities in a state of ongoing development with sizeable areas of remaining vacant developable land that moved this Court to a decision which we frankly acknowledge as 'the advanced view of zoning law as applied to housing laid down by this opinion'."
> 67 N.J. at 192.

Due to its physical location on the eastern boundary of Morris County, East Hanover does lie just outside a central urban city and is itself a built-up suburb community. The Township does not have significantly available mass transportation. The Township does not lie in the path of inevitable future residential, commercial, and industrial demand and growth since it is a developed municipality, well beyond that stage of municipal life. These Mt. Laurel factors when analyzed, given East Hanover's characteristics, indicate that the Township is a developed municipality. The more important of these Mt. Laurel factors which were given strong credence and emphasis by the Courts as outlined above, indicate that its geographical size and stage of development categorize East Hanover as that of a developed municipality.

East Hanover, being a developed municipality, does not have an obligation to further widen its spectrum of municipal zoning to provide multi-family, high density residential housing. As was specifically stated in the case of Pascack Association, supra., the Court held at 481 through 482 that:

> "There is no per se principle in this State mandating zoning for multi-family housing by every municipality regardless of its circumstances with respect to degree or nature of development. This court confronted a cognate problem in Fanale v. Hasbrouck Heights, 26 N.J. 320 (1958). We there reversed a trial court decision invalidating an ordinance prohibiting any further construction of apartment houses in the entire borough. We said (at 325-326):
>
> "It cannot be said that every municipality must provide for every use somewhere within its borders. Duffcon Concrete

> Products, Inc. v. Borough of Cresskill, 1 N.J. 509 (1949); Pierro v. Baxendale, 20 N.J. 17 (1955). Whether a use may be wholly prohibited depends upon its compatability with the circumstances of the particular municipality, judged in light of the standards for zoning set forth in R.S. 40:55-32."

East Hanover submits that it has complied with the designated purposes and criteria of zoning as set forth in the Municipal Land Use Act tempered with the existing environmental conditions and pattern of development within the Township. Its zoning policies were not formulated to be arbitrary or patently unreasonable. The Township's zoning and land use plan take into account all factors and weighs them accordingly, and as was held in the case of Dellawanna Iron and Metal Co. v. Albrecht, 9 N.J. 429 (1952), there is a substantial relation between the Township restraints put upon the use of its land and the public health, safety, morals, and the general good and welfare of the citizenry of the Township by the particulars involved in the exercise of the use zoning process set forth in the statute.

The Township of East Hanover's zoning and land use plan has, in fact, carried out sound and established comprehensive planning principles. These decisions were adopted and set forth as a local zoning policy with regard to the development of the Township of East Hanover. The development of the Township has now all but been accomplished. East Hanover has not undertaken a mode of strong fiscal zoning to the exclusion of residential base zoning. East Hanover has equally split approximately 50% residential/ and 50% non-residential zones. These percentages

can be deceiving and must be considered in light of the extensive amount of flood plain and sensitive wetlands that make up the substantial portion of each category. As Defendant's proofs will show, an evaluation of vacant land in the Township of East Hanover indicates only 145.9 vacant acres of residential/non-residential lands not subjected to flooding or wetland conditions. Of this acreage, 108.1 acres are zoned residential and represent only 4.4 percent of all residential land which again is only two percent (2%) of the entire Township. The remaining 37.8 acres are non-residential land and only 0.7 percent of the entire Township. It will be shown by East Hanover's proofs that its ratables have not unduly generated unmet housing needs. East Hanover directs the Court's attention to Windmill Estates v. Board of Adjustment of Totowa, supra., where the Court made a finding of fiscal zoning. Even though Totowa had the highest ratables in Passaic County, (East Hanover doesn't even come close in comparison), the Court found it was a developed municipality and therefore its municipal growth and development was over and its established municipal zoning characteristics could be maintained. East Hanover maintains that the Court must apply the Totowa, supra., standards in this matter.

Plaintiff further requests that the Court force East Hanover to amend its policies having the Court go against the fundamentals and legal precepts with regard to judicial respect for local policy decisions in the zoning field. In the case of Bow and Arrow Manor v. Town of West Orange, 63 N.J. 335 (1973) at 343 states:

> "It is fundamental that zoning is a municipal legislative function, beyond the perview 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 the fundamental principals of zoning or the statute. N.J.S.A. 40:55-31,32. It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently or because the preponderous of the weight of the expert testimony adduced at trial is at variance with the local legislative judgment. If the latter is at least debatable it is to be sustained. Kozesnik v. Montgomery Twp., 24 N.J. 154, 167 (1957); Vickers v. Tp. Com. of Gloucester Tp., 37 N.J. 232, 242 (1962), cert. den. and app. dism., 371 U.S. 233, 83 S. Ct. 326, 9 L. Ed. 2d 495 (1963)." (emphasis added)

As was recognized further in the case of Fobe Associates, supra., there would be several detrimental effects which would far outweigh the good from a judicial requirement that a municipality which is "developed" further alter its existing pattern of development to provide multi-family high density zones. The proposition that each municipality is not suited to accomodate all housing types is supported by and consistent with the rule that "even where Mt. Laurel is implicated..., a municipality in carrying out the constitutionally and legislatively vested (zoning) power is not compelled to provide for every use within its boundaries...". Washington Township v. Central Bergen Community Health Center, 156 N.J. Super. 388, 413 (Law Div. 1978) (emphasis in original) (dictum). The Court has, from its early

statements through its holding in Fanale v. Hasbrouck Heights, supra., on through Pascack, supra., expressly recognized the diversity which exists among New Jersey municipalities and rules against the judicial imposition of any particular zoning scheme and does lean heavily in favor of granting local legislative bodies the discretion necessary in enacting sound zoning laws. Pascack, supra., states at page 482:

> "It is obvious that among the 567 municipalities in the State, there is an infinite variety of circumstances and conditions....There must necessarily be corresponding breadth in the legitimate range of discretionary decision by local legislative bodies as to regulation and restriction of uses by zoning."

The New Jersey Appellate Division ruled in part through Swiss Village Associates v. Wayne Township, 162 N.J. Super. 138, (App. Div. 1978) that a municipality did not have to provide for every zoning use within its municipal borders. The Court in Swiss Village, supra., also remarked on the necessity for judicial absention in light of the legislature discretion by stating that it was for the legislature and not the judiciary to make these judgments. At page 145 the Court noted that:

> "The judgment of the trial judge in regard to the "acceptability" of high rise apartments, without more, must give way to the judgment of those elected to make that decision and into whose hands the legislature has placed the power...id. (emphasis added)."

The Court in Segal Construction Co. v. Zoning Board of Adjustment, 134 N.J. Super. 421 (App. Div. 1975) concluded that the Borough of Wenonah, a municipality of 660 acres with 109 acres of land yet to be developed was not a municipality of

"sizeable land area" under Mt. Laurel precepts. Even though the Borough had roughly 16 percent of overall municipal land developable, the Court found that intense multi-family construction at that stage of its municipal life was outweighed by the overall effects that type of construction would have on the municipality. The Court stated at page 424 to 425:

> "Requiring multi-family use of this sizeable parcel of developable land within this tiny borough would thus subject Wenonah to a judicially created explosive growth phenomenon for which it may be ill equipped to deal... Wenonah's contribution to the housing needs of Gloucester County must perforce be a minor one because of its limited size, but requiring Wenonah to make this minor contribution may well prove catastrophic to its way of life. This is what the trial judge meant when he noted that Wenonah could not be regarded as the last hope for Gloucester County. On balance, the minor contribution of Wenonah to the housing needs, if there be any, of Gloucester County, as against the major impact on Wenonah resulting from this contribution, removes any constitutional or statutory compulsion upon this borough to provide this alternative mode of housing."

East Hanover will prove that given its stage of municipal development and municipal characteristics, amenities and infrastructure, it is ill-equipped to now deal with and provide multi-family, high density housing within its municipal boundaries. As in Segal, supra., East Hanover's contribution to housing needs in Morris County or any delineated "region" is minor. To force East Hanover to make this minor contribution will be shown to be imprudent and possibly cause irreparable injury to the Township. Therefore, on a balancing test, the major impacts caused the Township from a forced contribution outweighs the

need for East Hanover to now make its contribution.

Since the Township of East Hanover is a developed municipality, the Township requests that the Court apply the case law as outlined above which establishes that a developed municipality must not be mandated to supply multi-family high density housing which might have a devastating effect upon the established pattern of development which now exists in the Township. Both case law and the precepts of sound comprehensive planning and zoning dictate that a municipality can withstand zoning alterations if it has both the geographical size and is at a stage of municipal development not close to its peak, at a "developing" stage. East Hanover has neither capacities and is thus "developed" under existing case law.

POINT II

THE TOWNSHIP OF EAST HANOVER HAS FORMULATED AND CARRIED OUT A LOCAL ZONING AND LAND USE PLAN IN ACCORDANCE WITH THE MANDATES OF STATE STATUTE WHILE STILL PROTECTING THE ENVIRONMENTALLY SENSITIVE LANDS WITHIN THE TOWNSHIP'S MUNICIPAL BORDERS.

The Township of East Hanover from a zoning and planning policy sense, is statutorily charged with the local responsibility of formulating a plan of development for the Township giving consideration to factors and indicators which must be taken into account if the ultimate zoning plan is to be a sound one. The Township has in the past and presently complies with that responsibility. Currently, the Municipal Land Use Law, Laws of 1975, Chapter 291, N.J.S.A. 40:55D-1 et seq., provide the controlling guidance. The very purpose of the Municipal Land Use Act sets forth the various indicators which must be accounted for in a sound framework of municipal zoning. N.J.S.A. 40:55D-2 more specifically provides in part that as a primary purpose a municipality must strive "to promote the conservation of open space and variable natural resources and to prevent urban sprawl and degradation of the environment through improper use of land." (emphasis added). The overall purpose of the Municipal Land Use Law is the comprehensive and uniform development of land within the State of New Jersey through municipal local action in the manner which will promote the overall public health, safety, morals, and general welfare of the citizens of New Jersey.

Plaintiff, in this litigation, requests that the Court entirely abandon all the standards of established statute and case law, sound planning, and basic common sense by demanding that the Court order East Hanover to now provide various high density zoning within its Township boundaries. The Public Advocate's proposition is not only abstract and unrealistic, but constitutes a real threat to the citizens of the Township of East Hanover, a threat that is clearly contra to the purpose of the Municipal Land Use Law. The Township was charged in the preparation of its municipal master plan with the responsibilities of preparing an overall land use plan element which considers the topography, soil conditions, water supplies, drainage, flood plain areas, marshes, and woodlands of the Township (N.J.S.A. 40:55D-28(b)). The Township's zoning plan was enacted under N.J.S.A. 40:55D-62 with those considerations in mind. If the Court adopts Plaintiff's position, then the considerations set forth in the Municipal Land Use Act need not be used by any municipality in the State of New Jersey. The Township submits that the devastating effect that will occur based on the unregulated and nonuniform development of land within the State of New Jersey is monumental and tragic.

The Township of East Hanover's 1975 Municipal Master Plan fully recognized the environmental and planning constraints which exist as a land use characteristic within the boundaries of the Township. The environmental constraints are a result of the Township's physical location. The Township is almost totally surrounded by waterways, including the Passaic River, Rockaway

River, and the Whippany River and the Black Brook. Two swamps extend into the Township. These geographical and environmental factors have resulted in extensive flood sensitive areas that are adjacent to its rivers and swamps. Plaintiff's allegations and demands would support a proposition that East Hanover disregard all law, both State and Federal, to allow and promote high density development in environmentally sensitive areas within the Township. Plaintiff's allegations have never specified nor do they recognize the limitations and the Township's obligation to provide various types of high density housing zoning within its boundaries. Plaintiffs have thoroughly disregarded the incompatability of high density development in land areas subject to regular flooding and designated wetlands. Plaintiff refuses to recognize the real environmental constraints within the Township and the devastating impact on East Hanover if these contraints are ignored.

N.J.S.A. 58:16A-55 is the New Jersey Statute regulating development within flood sensitive areas within the State. President Carter, by recently issuing Executive Order No. 11990 entitled "Protection of Wetlands" and Executive Order No. 11988 entitled "Floodplain Management", promulgated the federal government's policy for mandatory protection of these lands. Both fully recognize the habitat values of wetlands above and beyond the stated need set forth through flood control measures. Wetland preservation from despoliation or incursions by development is a critical necessity and concern. Plaintiff, however, would have the Court direct that East Hanover abandon all these

concerns and require that the Township utilize flood sensitive lands and wetlands now vacant but residentially zoned for incomprehensible high density, multi-family zoning and development, which "it" claims is needed within the Township. The devastating effect of having a Court order the Township to develop its flood sensitive and wetland properties in a manner consistent with Plaintiff's allegations would cause irreparable injury not only to East Hanover, but to the entire region.

Further development of environmentally sensitive lands (wetlands and floodplain) in East Hanover is curtailed by Environmental Protection Agency rules and regulations 35.925-13(d) and (e) found in Federal Register Volume 43, No. 118, dated September 27, 1978. These regulations deal with the prohibition of construction and availability of sanitary sewer collection facilities in environmental sensitive lands. Since the Township is currently constructing a federally funded municipal sewer project, the Township's compliance with these rules is mandatory. The rules provide:

> "(d) The collection system conforms with any approved WQM plan, other environmental laws in accordance with §35.925-14, Executive Orders on Wetlands and Floodplains and Agency policy on wetlands and agricultural lands; and
>
> (e) The system would not provide capacity for new habitations or other establishments to be located on environmentally sensitive land such as wetlands, floodplains or prime agricultural lands. Appropriate and effective grant conditions. (e.g., restricting sewer hook-up) should be used where necessary to protect these resources from new development."

Therefore, environmentally sensitive lands in East Hanover absolutely cannot be afforded municipal sewer collection - an

essential and critical cost effective utility necessary for multi-family, high density development. While East Hanover has recognized and complied with these federal regulations, Plaintiff has not acknowledged their existence nor their impact and effect upon development of these sensitive lands in the Township.

Within the municipal boundaries of the Township, there are approximately 809.4 acres of vacant residentially zoned land. That vacant residentially zoned land accounts for approximately 15.1 percent of the Township of East Hanover. Of this amount, approximately 460.1 acres lie in the flood hazard area (floodway and 100 year flood fringe) and therefore, are subject to the mandates of N.J.S.A. 58:16(A)-1 et seq. The intent of flood hazard area and flood control legislation is to totally minimize if not completely proclude most all active development in the sensitive areas which abound in the Township of East Hanover.

Beyond the flood sensitive and wetland characteristics, East Hanover has an additional approximately 241.2 acres of residentially zoned vacant land which has very high seasonable water tables (0 to 1/2 feet of the surface). The severe limitations to community development in terms of construction and especially high density construction where there is existing high water tables of this degree are prohibited by any reasonable land use planning. Such areas should ideally be left undeveloped in any municipality and if developed, housing densities should be low. The cost, both financial and environmentally in constructing in these areas, strongly precludes any attempt at

high density development and makes "least cost" absolutely impossible.

East Hanover's flood hazard, wetland, and high water table areas leave approximately 108.1 acres of vacant land which might be suitable for any residential residential development, assuming as will be explained hereafter, that there are no other extenuating impediments to such development. This gross acreage of land represents only approximately 2 percent of the total Township area.

Mt. Laurel, supra., established that a municipality must take into account environmental characteristics, factors, and problems. The Supreme Court ruled in Mt. Laurel, however, that notwithstanding the environmental and ecological factors within Mt. Laurel, there were considerable portions of the Township still available for residential development. The Court at page 186 through 187 stated:

> "This is not to say that land use regulations should not take due account of ecological environmental factors or problems. Quite the contrary. Their importance, at least being recognized, should always be considered. Generally only a relatively small portion of a developing municipality will be involved, for, to have a valid effect, the danger and impact must be substantial and very real (the construction of every building or the improve ment of every lot has some environmental impact) - not simply a make way to support exclusionary housing measures or preclude the growth - and the regulation adopted must only be that reasonably necessary for public protection of a vital interest."

Further, it was pointed out in Oakwood at Madison, supra., at page 546:

> "In concluding this point, however, we find no basis in the record for determining that, in any view of the environmental proofs, Defendant does not have sufficient vacant developable land free from disabling ecological considerations to enable it to create the zoning opportunity for its fair share of the region's least cost housing."

The foregoing East Hanover site specific information clearly reveals that East Hanover, given its municipal size and vacant land, does not have any great amount of non-environmentally sensitive vacant land as was the case in Mt. Laurel, supra., and Oakwood at Madison, supra.

The critical need to consider and preclude from municipal development, environmentally sensitive lands, which include flood hazard, wetlands, or lands with high water tables, has been instilled and reiterated as a primary guideline in the Revised State Development Guide Plan, N.J. Department of Community Affairs, Division of Planning, May 1980. The plan fully recognized the need to systematically protect "critical environmental features" by emphasizing on pp. 87-88:

> "In addition to these large resource areas of statewide significance, there are critical environmental features of lesser size which should also be protected throughout the State. In most cases such natural features have not been mapped in the Guide Plan because of the scale and/or inadequate data. The conservation of critical environmental areas and the regulation of development are a concern of the Department of Environmental Protection as well as many municipalities and counties. Such planning should incorporate, where appropriate, guidelines such as the following:
>
> Restrict development in floodways in accordance with the State Floodplains Act of 1972, so as to minimize destruction of property by flooding.

> Maintain buffers along the banks of streams, rivers, and lakes to avoid accelerated sedimentation from bank erosion.
>
> Strictly control development in areas of high ground water table, so as to reduce the possibility of groundwater pollution.
>
> Carefully control development in principal acquifer recharge zones to reduce the potential for contamination of the potable water supply.
>
> Carefully control development in headwater areas to minimize the risk of degrading downstream reaches.
>
> Restrict development and other activities which would affect the ecological balance of freshwater or tidal wetlands."

This strong policy statement and guidelines comport with the emphasized need which exists in East Hanover. Plaintiff refuses to acknowledge the overall proportion and existence of the vacant sensitive lands in East Hanover, but more importantly, Plaintiff totally disregards the sensible, sound dictates of planning set forth in the State Development Guide Plan and case law with regard to non-development of these lands.

Mt. Laurel, supra., Oakwood at Madison, supra., and the State Development Guide Plan, stand for the proposition that environmentally sensitive lands are automatically eliminated from any municipal formula for residential land development. East Hanover respectfully requests the Court apply these principles with regard to East Hanover, and in doing so, protect East Hanover's flood sensitive and wetland areas from any intense high density development. To provide otherwise would be a disaster to the Township, and in fact the region, and contrary to all State and Federal laws and regulations, the

Municipal Land Use Act, and any desirable land use planning. The Court should not allow Plaintiff to disregard these principles and further destroy the environment, not only in the Township of East Hanover, but in its surrounding communities whose environments are impacted by these lands. The matter is not an isolated one but is a group fear and one which is very real. East Hanover has demonstrated that its environmental and ecological conditions show that its land is not environmentally suited to the degree of density and type of development proposed by Plaintiff, and as held in Oakwood at Madison, supra., Mt. Laurel, supra., and promulgated by the State Development Guide Plan, and any mandate otherwise would be contrary to these precedents.

POINT III

EAST HANOVER'S EXISTING MUNICIPAL DEVELOPMENT HAS BEEN FORMULATED IN ACCORDANCE WITH ESTABLISHED COMPREHENSIVE LAND USE PLANNING AND N.J.S.A. 40:55D-1 *et seq.*, AND PLAINTIFF'S BURDEN SET FORTH BY A SINGLE FACETED ATTACK AGAINST EAST HANOVER'S ORDINANCES IS NOT SUSTAINABLE.

In the preceding point, it has been set forth that the formulation of East Hanover's municipal land use plan element was concerned with providing the Township with zoning provisions that would comport with the Township's needs and established planning measures given the Township's local environmental and ecological conditions.

The very essence of Plaintiff's allegations against the Township of East Hanover clearly indicate that by a single thrusting claim of exclusionary zoning tactics with regard to housing, the Plaintiff disregarded and ignored the plethora of planning considerations in the local land use element of the Master Planning and Zoning regulations and dealt solely with one element - zoning for multi-family high density housing. The Court must not fall prey to Plaintiff's allegations since they are totally contrary to the Municipal Land Use Law and established case law.

East Hanover's formulation of a Land Use Plan has already been portrayed as dealing heavily with the protection of environmental and ecological concerns which exist within the Township. These environmental and ecological concerns, while being critical factors in formulating East Hanover's zoning policy, are only a part of the consideration. Contrary to Plaintiff's

incomprehensive singular approach to municipal zoning which is an approach that is inconsistent with sound comprehensive planning, East Hanover, through local legislation, assessed its municipality and formulated a continuing land use plan commensurate to its already established mode of development to continue through the twilight stages of its municipal development.

East Hanover's tactic in formulating a continuing comprehensive plan of development within the municipality was difficult, and took into account both its geographic size and its stage of development. East Hanover's formulation of its zoning policy was enacted pursuant to New Jersey Constitution Article IV, Section 6, Clause 12, and was a zoning and development ordinance adopted only after East Hanover's Planning Board had adopted a "Land Use Element" portion of the local Master Plan. East Hanover's Zoning Ordinance effectuates and is substantially consistent with that land use element of the East Hanover Master Plan in accordance with N.J.S.A. 40:55D-62

East Hanover's land use element portion of its Master Plan includes on a local level determination the given population and density and overall remaining development intensity within the Township in accordance with N.J.S.A. 40:55D-28(c). East Hanover's land use plan which determined the standards of population and overall development intensity, calls for an analysis on the local level of the existing and proposed location, extent, and intensity of various types of development, including: (1) residential; (2) commercial; (3) industrial; (4) agricultural; (5) recreational; and (6) other private and public forms of development. N.J.S.A. 40:55D-28(b).

As has been discussed, East Hanover's formulation of a land use element regarding population and development standards was made after consideration of (1) natural conditions, including but not necessarily limited to: (a) topography; (b) soil condition; (c) water supply; (d) drainage; (e) flood plain areas; (f) marshes; and (g) woodlands. N.J.S.A. 40:55D-28(b) to (d).

Therefore, the Master Plan element dealing with development standards within the Township is a policy statement taking into account primarily the relevant planning concerns including housing needs based on East Hanover's stage of development, and its relationship to the Master Plans of contiguous municipalities. East Hanover asserts that given its stage of municipal development as a total municipal entity, the Township is a "developed" municipality, and has to concern itself with maintaining its existing pattern of development, and its relationship to the overall comprehensive guide plans outside its municipal boundaries. East Hanover submits that at the "developed" stage as a municipality, it cannot now adopt a different regional perspective than previously existed as a large developing municipality has the ability to do.

East Hanover carried out its task of formulating a municipal master plan in accordance with N.J.S.A. 40:55D-1 et seq. by considering the interrelationship of comprehensive land use and planning factors. A grouping of some of the factors to be considered are "the availability of other lands for similar development; (2) market demands for given land uses; (3) needs for public facilities, e.g., transportation, sewers, water

supply; (4) availability of public funds to provide needed government services; and (5) patterns of population movements." Norman Williams, 1 American Land Planning Law, Section 1.08, pages 15 to 16 (1974).

A further dissertation on the complexities of land use planning which the Township of East Hanover considered and complied with is fully set forth in the Municipal Land Use Law under Section 40:55D-2. This section of the Municipal Land Use Law fully acknowledges that a municipality must take into account the interrelationships and complexities of all facets of municipal planning and zoning in order to formulate one consistent and centralized Master Plan. The particulars specified by the Municipal Land Use Law for consideration in formulating an overall municipal master plan indicate the plethora of factors involved for consideration and decision under N.J.S.A. 40:55D-2(a) through (m). Beyond the environmental and ecological conditions within the Township considered under N.J.S.A. 40:55D-2, East Hanover has determined that the Township had reached a point of growth and development with established land values, established traffic and circulation patterns, and municipal elements and facilities in place which must be maintained and which preclude drastic alteration through intensified development.

The preclusion of drastic zoning and development alteration at this stage of East Hanover's development is in comport with case law. The cases of Nigito, supra., Pascack Association, supra., Fobes, supra., and Segal, supra., all stand for the proposition that a developed municipality must not be held or

required to drastically alter its land use planning after its growth as a municipality has reasonably ceased. Given East Hanover's considerations and obligations set forth in N.J.S.A. 40:55D-2, its formulated Master Plan and related municipal zoning policy is not unreasonable nor arbitrary and capricious. As has been cited and again must be emphasized to the Court, the case of Pascack Association, supra., at 483, held that "beyond the judicial strictures against arbitrariness or patent unreasonableness, it is merely required that there be a substantial relation between the restraints put upon the use of the lands and the public health, safety, morals or the general good and welfare in one or more of the particulars involved in the exercise of the use-zoning process specified in the statute". Delawanna Iron and Metal Co. v. Albrecht, 9 N.J. 424, 429 (1952) (emphasis in opinion).

It is submitted to the Court that the Plaintiff's tactic in this lawsuit totally distorts the statutory intent, requirements, factors and realities which East Hanover underwent in reviewing and finalizing its Master Plan. If the Court adopts Plaintiff's approach to planning, only one matter will be considered on a municipal zoning scheme, and that is housing. All other factors required by statute and federal law and authorized by the State Constitution dealing with municipal zoning and planning are to be set aside under Plaintiff's theory. The above matrix of planning factors and their interrelationships which East Hanover has had to deal with are not even acknowledged by Plaintiff. It is strenuously submitted to the Court that not only is Plaintiff's

tactic in this lawsuit a distortion of well settled principles of planning, but Plaintiff's tactics totally constrain the attempts of a municipality to make rational local zoning decisions based on that matrix of local considerations. Plaintiff's tactic in focusing upon the single facet of housing, without a major consideration of the other factors involved in planning, completely stalls any attempt to formulate rational planning decisions. By shifting to a result oriented single faceted mode of planning formulated in a vacuum, with primary emphasis upon one facet through the elimination of all others, is not a determination of "exclusionary", rather it is the irrational and illogical ruination of a developed municipality's historical formulation of land use.

The Court should not allow Plaintiff to subvert the precepts of Mt. Laurel which call for adherence to rational planning on the local level. East Hanover has formulated its land use in accordance with N.J.S.A. 40:55D-1 and is carried forth through its Master Plan and the embodied criterion factors of the Municipal Land Use Law. Plaintiffs seek to remove East Hanover's planning principles out of the context of its objectives. For example, Plaintiffs have formulated an argument with regard to East Hanover's failure to provide zoned land comporting to Plaintiff's alleged standards for high density purposes. Plaintiffs fail to recognize or acknowledge that land values in the Township of East Hanover, which run approximately $25,000 to $30,000 per quarter acre (10,000 square feet), when placed in Plaintiff's housing tactic, do not comport to Plaintiff's standards for

development in a least cost sense. East Hanover has not created the existing market and economy demands and constraints which are factors in this lawsuit. Market and economy factors are a product and consideration which must be realistically dealt with as East Hanover is bound to do, but which Plaintiff has not acknowledged. The realities and results of free market economic factors as to land costs and housing costs have been somehow attributed by Plaintiff as generated by East Hanover. This proposition is distorted and without foundation. Rather than address these issues, Plaintiff has maintained a sterile and assertive position that notwithstanding any of the plethora of planning factors and economic factors which East Hanover has considered, given its status as a developed community, it is still claimed as being exclusionary in its zoning.

While Plaintiff's allegations portray a limited aspect of planning through its single faceted housing argument, the Court should not fall prey to this focus and must consider this matter under the precepts of Mt. Laurel, supra., which understood and considered the overall multi-faceted purposes of zoning considerations and have been abundantly addressed and explained herein through N.J.S.A. 40:55D-2, 28, and 62. As was reiterated in Mt. Laurel, supra., and Oakwood, supra., the judiciary lacks the planning expertise to judge zoning validity by placing its subjective value judgments upon the different zoning purposes under the Municipal Land Use Law. The judiciary should defer and not portray its judgments for local land use over that of the decisions made by the municipality weighing its site specific

factors. In that manner all factors will be kept in their proper perspective having been weighed according to local land use planning and expertise. Furthermore, deference will properly be given to local planning considerations on a particular site specific basis.

As emphasized in Point I, the Courts must refrain from substituting its conceptions over those of the municipality:

> "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 Kozesnik, both cited above. In short, it is limited to the assessment of a claim that the restrictions of the ordinance are patently arbitrary or unreasonable or violative of the statute, not that they do not match the plaintiff's or the court's conception of the requirements of the general welfare, whether within the town or the region." Pascack Association, supra., at 485 (emphasis added).

East Hanover submits that its zoning and land use is not patently arbitrary, unreasonable, or violative of the statute, but that its local zoning policy was implemented in accord with statutory and legislative purpose.

It is abundantly clear and is hereby submitted to the Court that the underlying purposes of the Municipal Land Use Law are in fact proper legislative purposes. Therefore, this court should not respond to Plaintiff's allegations and claims with regard to East Hanover's exclusionary zoning by looking specifically to housing only, but as to whether, on a balancing test,

the subject zoning is reasonable in light of all the municipal land use purposes, N.J.S.A. 40:55D-2,-28. East Hanover is confident that the Court will find and determine as did the legislature, that contra to Plaintiff's illogical tactics, sound, safe planning and zoning cannot be had by placing residential development concerns above all other relevant planning concerns. That the Court may disagree with such an approach to planning and zoning is not justification for holding, as a matter of state constititutional law, that a different approach be implemented in order to better meet low income housing needs.

The Public Advocate's tactic in this lawsuit against the Township has been used in the past in other lawsuits against municipalities. That tactic of broad, across the board exclusionary zoning allegations, based on supposed housing need contra to state statute, has been critically dealt with by the Courts when the claim is made against a developed municipality. The Court in Pascack Association, supra., particularly rejected the Public Advocate's analysis of the application of Mt. Laurel and state statute to all municipalities, by firmly emphasizing at pages 486-487:

> "There are allusions in the briefs to approving references in our cases to zoning for an appropriate variety and choice of housing, see, e.g., Mount Laurel, 67 N.J. at 174, 179, 187, and corollary arguments that such references support the thesis that all municipalities must zone for housing for all categories of the population, middle and upper classes as well as low and moderate income. A moment's reflection will suffice to confirm the fact that such references contemplate fairly sizeable developing, not fully developed municipalities--particularly

> small ones...to one like the subject municipality, homogeneously and completely developed as a middle-upper income, moderate to low density, single-family community. 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 through-going redevelopment of blighted areas." (emphasis added)

As in Pascack, supra., this Court must also reject the Public Advocate's allegations and broad brush implications and inferences set forth regarding state mandated zoning legislation and responsibility for all municipalities. East Hanover relies on the precepts of Pascack, supra., that the Public Advocate's arguments herein against the Township must also be rejected and dismissed.

Zoning legislation must not be narrowly and inaccurately viewed and construed as a means of broad mandated low-income housing needs. Plaintiff's allegations in this regard should not be allowed to withstand judicial scrutiny, and based upon same, East Hanover Township must not be adjudged to have fostered exclusionary zoning tactics herein.

POINT IV

PLAINTIFF'S ALLEGED ALLOCATION OF MULTI-FAMILY HIGH DENSITY HOUSING UNITS AS ALLOCATED TO THE TOWNSHIP OF EAST HANOVER IS UNREALISTIC, IMPRACTICABLE, AND BASED UPON PLAINTIFF'S DEFICIENT SINGLE FACETED HOUSING FACTOR APPROACH TO ZONING AND PLANNING.

Plaintiff's main thrust and reliance with regard to multi-family high density housing to be allocated to the Township of East Hanover is based upon the New Jersey Department of Community Affairs Housing Allocation Report. That document was formulated in 1977 and revised and supplemented in 1979. Part of the "housing allocation plan" sets forth numbers of multi-family high density housing units which the report argues are a given municipality's share of overall housing need which all municipalities in the State of New Jersey must supply.

Specifically with regard to the Township of East Hanover, the housing allocation plan which is being relied upon by the Plaintiff and the numbers specified therein call for the Township of East Hanover to provide 1713 units of varying degrees of density which will satisfy the "need" which the plan alleges is real and must be met by the Township.

The merits and the propriety of the state housing allocation plan have been submitted to the Court in the Brief submitted by all municipalities on the common issues in the within lawsuit. East Hanover hereby adopts by reference the areas briefed with regard to the merits and propriety of the housing allocation plan.

Plaintiff's "allocation" number of 1713 assigned East Hanover must be put in perspective so that the Court can be exposed to the sheer disparity of housing need which is claimed by Plaintiff. East Hanover, a municipality roughly 8.3 square miles in size, is allocated 1713 units by Plaintiff and has been assessed with 1,262 vacant acres of land while Newark is assessed as having 0 acres of vacant developable land. Defendant submits Plaintiff's adoption of this rationale and result is absurd given the realities of the existing land use status of Newark and East Hanover is inherently prejudiced by Plaintiff's tactics herein.

Plaintiff's reliance upon the State housing allocation plan by alleging that East Hanover must provide 1713 multi-family high density units is not feasible nor is it implementable within the Township of East Hanover. Plaintiff's failure to consider the site specific restraints within the Township not only from a planning sense, but from the facets of ecological, environmental and related limitations to the East Hanover infrastructure indicates that Plaintiff's approach in this lawsuit is shallow, erroneous, unfounded, and therefore, should be dismissed.

Plaintiff's housing allocation number with regard to East Hanover does not take into account that East Hanover is a "developed" municipality under the precepts of the Nigito, supra., Pascack Association, supra., Fobe, supra, and Windmill Estates, supra. Beyond Plaintiff's failure to recognize East Hanover's developed status, Plaintiff has failed, ignored and refused to address any of the other limiting factors which currently and will in the future exist within the Township.

East Hanover is clearly limited and most likely precluded by its municipal lack of capacity to supply certain necessary municipal amenities and services to areas and locations within its boundaries to meet the demands of the Plaintiffs. The Township is currently constructing a municipal sewer collector system, funded in part by the United States Environmental Protection Agency and the New Jersey Department of Environmental Protection. As has been submitted herein, East Hanover has been mandated by both the federal government and the New Jersey DEP that it cannot and will not allow the construction or extention of its sanitary sewer facilities to environmentally sensitive areas and wetlands as delineated by the federal waste water treatment facilities rules and regulations 35.935-13. These federal and state rules and regulations were and are an implementation of presidential Executive Order No. 11990 and 11988. Furthermore, the rules and regulations are in furtherance of the promulgations of the Federal Clean Water Act, 33 U.S.C. 1251 et seq., and The Solid Waste Disposal Act, 42 U.S.C. 6901 et seq. Therefore, neither the federal government nor the State DEP will allow any attempt to extend its sewerage facilities to any environmentally sensitive areas. Without the availability of a central municipal sewerage facility, any type of multi-family high density housing will then have to use some other mode of sewage disposal which will also have to comply with the mandates of the New Jersey State DEP, and the federal rules and regulations with regard to wetlands and environmentally sensitive areas, since all remaining vacant lands within East Hanover

are extremely environmentally sensitive and fall under these governmental regulations. In addition, it is submitted that notwithstanding outright development prohibition the excessive costs in any development of multi-family high density units under existing governmental constraints in these environmentally sensitive lands, which will have to be adhered to, negate any type of "least cost" housing in these areas. A Court mandated zoning change will only result in higher density housing of a type purchased by the same socio-economic group already prevalent in East Hanover.

Plaintiff further fails to recognize East Hanover's land sensitivity with regard to drainage and the recharging of needed acquifers now located in the Township. The Township of East Hanover lies above the underground glacial lake known as the Brunswick Formation, which is the primary source of East Hanover's private water system and a main source of water supply to many surrounding communities. It is submitted to the Court that there is a recognizable and clear danger to the recharging capacity of the Township to this underground lake which serves as a regional water supply if high density development of the magnitude demanded by Plaintiff is to be implemented. Furthermore, the Municipal Land Use Law, Oakwood at Madison, supra., and Mt. Laurel, supra., specifically call for a municipality to protect its acquifer recharge areas within the municipality. Plaintiff's failure to consider this aspect and analyze the site specific information of the Township is an erroneous and misguided attempt to apply the Municipal Land Use Law and case

law precedent to East Hanover and its capacity to provide multi-family high density housing within its boundaries.

As has been indicated, Plaintiff fails to give real consideration to East Hanover's true capacity to support multi-family high density housing, nor to its physical constraints given the surrounding waterways which border the Township. The Passaic River, the Whippany River, and Rockaway River form a wedge around two-thirds of the Township and with its low lying topography is at the mercy of ever-increasing flooding due to increased upstream drainage discharge into these waterways. We submit that additional development of the magnitude called for by Plaintiffs will only aggravate an already critically severe existing municipal problem. Plaintiff has also failed to address how the Township of East Hanover will comply with the Federal Clean Water Act and the standards of the East Hanover 201 and 208 study which mandates no further degradation of the existing municipal water quality.

Plaintiff's alleged allocation of 1713 housing units for East Hanover in multi-family high density housing has again been only statistically, and we must state not realistically analyzed given the remaining vacant residentially zoned lands in the Township which are not environmentally sensitive. Simply put, Plaintiff's housing numbers cannot be met by the Township.

It is also submitted that due to the established and existing development of commercial, industrial properties in the Township of East Hanover, all remaining lands zoned non-residential are also in small pockets surrounded by already

existing commercial/industrial development. Any comprehensive planning standards state that rezoning these small scattered non-residential areas should not be resorted to.

As has previously been discussed, the Township has approximately 108 small scattered acres of vacant residentially zoned properties that are not flood prone, sensitive, or have very wet conditions. Assuming arguendo and using the criteria set forth by Plaintiff's expert, Alan Mallach, which is to zone twice the land needed to meet the established housing goal, all the remaining Township land, which from a comprehensive planning standpoint is available for residential development would have to be zoned at 32 units per acre in order to meet the East Hanover allocation of 1713 units which is zoning twice the land needed to meet that goal! Furthermore, Mary Brooks, another of Plaintiff's "experts", has indicated that East Hanover's allocation share should be 3,690 units! While Plaintiff's experts seem to contradict themselves, it is submitted to the Court that one expert, Mary Brooks, further compounds the other already unrealistic and impracticable housing allocation which has been designated for the Township by Alan Mallach through application of the Housing Allocation Plan.

Further assume arguendo that it is determined that there is additional vacant land considered suitable for residential development and which is not located in the flood hazard sensitive areas or not subject to wetland conditions. By way of example, assume the Township has additional vacant acreage that totals 50% more vacant residential lands in East Hanover or approximately

a total of 150 vacant acres of land rather than 108 acres. Even increasing the vacant land mass by 50 percent, and given a unit density of 7 units per acre, only 1021 units could be provided in the Township. This 1,021 units is only 60 percent of the New Jersey D.C.A. allocation for the Township of the 1,713 least cost units, and only 27 percent of the Mary Brooks' allocation of 3,690 units for the Township. Furthermore, if all 145.9 acres of residential/non-residential vacant land is devoted to some form of multi-family use to comply with the DCA allocation of 1713, density of units will be 11.7 units per acre! If only the 108 vacant residentially zoned land is used, density of units would have to be 15.9 units per acre. These minimum densities are not only contra to sound planning, but they exceed the minimum densities which Alan Mallach, Plaintiff's expert, relies upon. Not only is the density of units not feasible but neither are the total numbers allocated.

East Hanover submits to the Court that Plaintiffs have failed to individually and realistically analyze East Hanover's zoning and planning policies of the Township with regard to their actual ability to provide least cost housing as alleged. Rather, Plaintiff alleges exclusionary zoning when the Township of East Hanover, through local zoning policy has comprehensively planned its community, and is now a developed community under that zoning policy. Plaintiff would arbitrarily have East Hanover destroy its existing aesthetics and developed nature rather than deal with and analyze the Township in a comprehensive planning sense as East Hanover itself has done. Plaintiff

relies upon the faulty premise of a single faceted housing argument to justify its allegations of exclusionary zoning.

It is, therefore, submitted that the Court should not mandate that East Hanover irreparably injure its planned developed municipality character in light of Plaintiff's obvious arbitrary and capricious allegations. Any action taken with regard to East Hanover should be done in light of existing case law, statutes, and federal and state rules and regulations. These considerations demand that East Hanover not participate in multi-family, high density needs whether they be under State Housing Allocation, or the mode of "numberless fair share" using the "In fill" strategy of the State Development Guide Plan. The Court should, therefore, dismiss Plaintiff's cause of action against the Township.

CONCLUSION

Based upon the foregoing, the Township of East Hanover submits to the Court that under the precedent of existing case law, it is a "developed" municipality. The Defendant, Township of East Hanover, submits that it has comprehensively planned and zoned its "developed" municipality under the guidelines of the Municipal Land Use Law and existing case law, taking into consideration the Township's established environmentally sensitive flood and wetland condition, its existing municipal amenities, and its capacity to expand its infrastructure. It is submitted that Plaintiff's single faceted attack of multi-family high density housing needs with regard to the Township of East Hanover is not in accord with good comprehensive planning, statutory law, and existing case law. Plaintiff's allegations fail to recognize East Hanover's site specific land use and zoning characteristics. Plaintiff's broad brush housing allocation number they want to impose on East Hanover is unrealistic, impracticable, and would be disastrous and irreparably injure the Township if implemented. Therefore, it is respectfully demanded that the Court dismiss Plaintiff's Complaint and deny the relief sought.

Respectfully submitted,

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By: _____
W. CARY EDWARDS, JR.