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Trial Brief of Harding Twp

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

TRIAL BRIEF OF HARDING TOWNSHIP

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I

JUDGMENT SHOULD BE ENTERED IN FAVOR OF HARDING TOWNSHIP BECAUSE PLAINTIFFS FAIL TO MAKE THE NECESSARY ALLEGATION OR PROOF THAT HARDING TOWNSHIP HAS NOT MET ITS "LEAST COST" ZONING OBLIGATION.

The Plaintiffs' Complaint and case are fatally defective in that there is no allegation or proof that Harding Township has failed to meet its constitutional obligation to zone for "least cost" housing in amounts sufficient to satisfy its alleged "fair share" of regional housing needs.

The Plaintiffs have misconstrued the nature of the fair share zoning obligation imposed upon a municipality. They have incorrectly assumed that Harding Township has a fair share obligation to provide "low and moderate income" zoning, i.e. zoning for housing affordable by low and moderate income families. This outmoded, impracticable concept of "low and moderate income" zoning has, however, been supplanted by the more workable duty to enact "least cost" zoning, i.e. zoning to allow the construction of the least costly housing, consistent with minimum health and safety standards, which a private, unsubsidized developer will actually build in light of market conditions.

The Supreme Court has acknowledged the "well-known fact...that private industry will not, in the current and

prospective economy...", construct new housing affordable to significant numbers of "low or moderate" income families. Oakwood at Madison v. Madison Tp., 72 N.J. 481, 510 (1977) (emphasis supplied). The Court has therefore had to come to grips with the hard fact that zoning laws cannot create any substantial number of "low or moderate" income housing units. Id. at 512. Thus, the Supreme Court has held that in order to meet any Mt. Laurel fair share obligation, the only requirement is that:

> "the governing body...adjust its zoning regulations so as to render possible and feasible the 'least cost' housing, consistent with minimum standards of health and safety, which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share. ..."

Id. (emphasis supplied).

Of course, in order to determine the type of such "least cost housing" whose construction will actually be undertaken, reference must be made to the condition of the particular municipality's housing market. "Least cost housing" cannot be defined in a vacuum, without reference to Harding Township's housing and land development market.

In Oakwood at Madison, supra, the Supreme Court recognized the validity of the argument that market conditions render futile any attempts to fulfill the Mt. Laurel

mandate by zoning specifically for housing affordable to "low and moderate" income households. That is, market conditions will preclude such zoning ordinances from actually resulting in the construction of any significant number of "low or moderate" income housing units, because builders simply do not find such development sufficiently profitable. The Court was thus faced with the choice between rejecting the relatively new Mt. Laurel obligation as mere impracticable theory, or of somehow modifying the Mt. Laurel obligation so as to alleviate perceived housing needs by a different zoning strategy. The Court chose the latter course of action in setting forth the "least cost" zoning concept which will effectively serve to increase the supply of housing affordable to all families, particularly those in the lower income groups. Id. at 512.

Indeed, the Supreme Court found that, in view of the infeasibility of constructing unsubsidized low and moderate income housing, the "only acceptable alternative" was to rely upon what it referred to as a "filtering down" process to meet the housing needs of lower income groups. Id. at 512-14. (emph. supplied). In short, it is contemplated that, as families with more than "low or moderate" incomes move into newly constructed "least cost" housing, additional good quality, existing housing will become

available for occupancy by low and moderate income families, thereby serving the purposes of the Mt. Laurel decision.

The Oakwood at Madison court readily acknowledged the "indirect" nature of the filtering process; and, it even cited an article by Alan Mallach, an expert upon whom Plaintiffs rely herein, for its emphasis that the filtering process may take as long as a lifetime to occur. Id. at 514, n. 22, citing inter alia, Mallach, "Do Lawsuits Build Housing? The Implications of Exclusionary Zoning Litigation", 6 Rutgers Camden L.J. 653, 666 (1975). Nevertheless, the court held that zoning for "least cost" housing, coupled with reliance on "filtering", would more effectively accomplish the goals of Mt. Laurel than would the futile exercise of zoning specifically for low and moderate income housing.

The futility of enacting such zoning is further reinforced by the Supreme Court's holding that a municipality has no legal obligation to engage in "affirmative action", such as sponsorship of public housing projects or granting certain tax concessions, for the purpose of fulfilling a Mt. Laurel responsibility. The Court went so far as to note that enabling legislation and perhaps a constitutional amendment would be required just to allow a municipality to give tax concessions. Id. at 546-47. The Supreme Court has thus rejected the concept of compelling municipal subsidization of housing, i.e. it has rejected the

use of the only means of municipal action which might make specific low and moderate income zoning a meaningful exercise in light of "current and prospective" economic conditions. Id. at 510; Urban League v. Mahwah Tp. at pp. 29-30, No. L-17112-71 P.W. (Law Div. 1979) (unpublished opinion), cert. granted, ___ N.J. ___ (1980).

It is therefore abundantly clear that in the portion of the Oakwood at Madison opinion entitled "'Least Cost' versus 'Low and Moderate Income' Housing", Id. at 510-514, the New Jersey Supreme Court determined that (1) "low and moderate income" zoning was an outmoded, unrealistic concept, and that (2) a municipality's "Mt. Laurel" obligation could henceforth be met by the enactment of "zoning regulations so as to render possible and feasible the 'least cost' housing, consistent with minimum health and safety, which private industry will undertake... ." Id. at 512.[1]

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1. This marked shift from "low and moderate" income zoning to "least cost" zoning has not gone unnoticed by commentators. E.g. "A Regional Perspective of the 'General Welfare,'" 14 San Diego L. Rev. 1227, 1236-37 (1977) (recognizing that the Oakwood at Madison opinion "modified the Mount Laurel holding to require that the local legislature make available...'least cost' housing, rather than low income housing. ... [T]he court held that the local legislature must fulfill its obligation to provide for its fair share of the regional need by zoning for the least cost housing that private industry will build." (Footnotes omitted) (emphasis supplied)). See also, "The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning," 74 Mich. L. Rev. 760, 777 (1976) (acknowledging the point that "costs of construction make it impossible for private developers to profit from building and selling dwellings within the financial grasp of low- and moderate-income families...." (footnote omitted)). See generally, "Exclusionary Zoning: the Mount Laurel Doctrine and the Implications of the Madison Township Case," 8 Seton Hall L. Rev. 460, 479-80 (1977).

For purposes of trial, it is very important to see this difference between least cost housing and low or moderate income housing, for the Plaintiffs have alleged only that Harding Township has failed to provide low and moderate income housing, i.e. housing affordable to low and moderate income families. See e.g. the Complaint, ¶¶ 4, 13, 15, 17, 22, 23, 24. Harding Township does not, however, have a legal duty to provide "housing opportunities for low and moderate income persons within... [its] borders," as alleged in paragraph 23 of the Complaint. Even assuming, arguendo, that Harding is found to be a "developing municipality," and setting aside the planning and environmental factors which support its current zoning, it can only be required to provide certain zoning for the least cost housing which a private, unsubsidized developer would actually undertake to build. It is of absolutely no legal import that this least cost housing may not be affordable to low and moderate income groups, for it is the consequent "filtering," rather than the actual construction, which is to ameliorate lower income housing needs. Oakwood at Madison, supra, at 513-14.

Indeed, the Oakwood at Madison Court expressly acknowledged that while the required "zoning for least cost housing...may not provide newly constructed housing for all

in the lower income categories mentioned, it will nevertheless through the 'filtering down' process...tend to augment the total supply of available housing in such manner as will indirectly provide additional and better housing for the insufficiently and inadequately housed of the region's lower income population." Id. at 513-14. (emphasis in original). Yet in spite of this acknowledgment that required least cost zoning is not designed to effect construction of low and moderate income housing, the Plaintiffs launched their Complaint with the allegation that the unconstitutional nature of the defendants' ordinances stems from the constraint of "construction affordable to" low and moderate income families who are "precluded...from securing needed housing in the defendant municipalities... ." Plaintiffs' Complaint, "STATEMENT OF THE CASE," para. 1.

The Plaintiffs' entire Complaint is based on this clearly invalid premise, i.e. that a municipality must meet so called "fair share" obligations by zoning for housing specifically affordable to low and moderate income families, rather than zoning for the least cost housing which an unsubsidized developer will actually construct, in light of market conditions.

This allegation in the Statement of the Case concerning the purported obligation to zone for "low and

moderate income" housing, as opposed to least cost housing, is not an isolated aberration. The Complaint is replete with allegations based upon this unsupportable legal position, e.g.:

1. Para. 2: Plaintiffs seek an Order requiring municipal approval of proposed developments "for needed low and moderate income housing."

2. Para. 3.b.: The NAACP has sought the "actual construction of needed low and moderate income housing."

3. Para. 12: The defendants do not "provide needed housing opportunities for low and moderate income persons."

4. Para. 23: The defendants' ordinances preclude "the provision of housing opportunities for low and moderate income persons within their borders."

5. Para. 24: The defendants have "little, if any land...zoned for residential development affordable to low and moderate income persons."

The Plaintiffs have grossly erred in so framing their case. They have totally ignored the latest Supreme Court holding which sets forth the municipal obligation for "fair share" "least cost" zoning. The only way to determine if a municipality has met the "least cost" zoning obligation of Oakwood at Madison is to: (a) consider economic conditions in housing and land development markets within which the municipality is located; (b) in light of these condi-

tions, determine the least costly housing which an unsubsidized developer would construct in the municipality; and (c) determine if the municipal zoning allows for the development of its "fair share" of such "least cost" housing. If the zoning meets this test, then the municipality must be deemed to have provided the opportunity for the development of the "appropriate variety and choice of housing" referred to in the Mt. Laurel opinion, 67 N.J. 151, 174 (1975). Oakwood at Madison, supra, at 510-514. If the zoning does not meet this test, then the court must reach the further issues of, for example, whether environmental constraints and other planning limitations justify the ordinance.

The Plaintiffs have failed, however, to allege any facts which, if proven, would demonstrate that Harding Township's zoning ordinance does not meet the least cost zoning obligation of Oakwood at Madison. There are no allegations concerning:

(a) the economic conditions in housing and land development markets in which Harding Township is included; or

(b) the least costly housing which a developer would actually construct in Harding Township, in light of these economic conditions.

And, most importantly, there are no allegations concerning:

(c) whether Harding Township's zoning laws would allow for the private development of its "fair share" of this unsubsidized "least cost" housing.

While plaintiffs' expert Allan Mallach has expounded upon his notions of "least cost housing" in his expert reports, his musings are legally irrelevant to the case because he ignores the key questions of:

(a) the economic conditions in housing and land development markets of Harding Township; and of

(b) the least costly housing which a developer would actually construct in Harding in light of these economic condition.

Instead, he defines "least cost" housing as an absolute "no frills" type of housing, notwithstanding that market conditions may give a developer absolutely no incentive to build such housing, regardless of the zoning laws. As such, "no frills" housing is no more the equivalent of "least cost" housing than is "low and moderate income" housing.

In Urban League v. Mahwah, supra, the trial court rejected the contention of Allan Mallach, plaintiffs' instant "expert", that least cost housing could actually be built for only $36,000. per unit. Instead, the court held, as required by Oakwood at Madison, that townhouses costing approximately $100,000 per unit satisfied the "least cost" obligation because that was the least expensive unit buildable and saleable in light of current "astronomical", id. at

45, land and construction costs. In the year and a half which has passed since this March 8, 1979 Mahwah opinion, land and building costs have, of course, only moved upward. Malwach's unrealistic "least cost" contentions are therefore now even more irrelevant and infeasible than ever before.

Plaintiffs have all too clearly attempted to attack residential zoning by engaging in the meaningless exercise of merely examining the words of an ordinance to see if it is "exclusionary" in the Mt. Laurel sense. This exercise is doomed to failure for in order to make such a determination, one must analyze:

> (1) Whether the zoning actually restricts demand, for "[t]he evaluation of the impacts of a zoning ordinace is no simple matter; an ordinance that appears on its face to be very restrictive may only prove to be a reflection of the land-use pattern that would have emerged in an unregulated housing market."[2] Schafer, The Suburbanization of Multifamily Housing, at 100 (1974); and

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2. In this context, Harding Township's expert witness Thomas P. Welsh, M.A.I., will establish that, in the absence of constraints due to zoning, environmental restrictions, and lack of sewerage facilities, the least cost housing which a private developer would actually build in the township is a single family detached dwelling on a 1/2 to 1 acre lot, with 2,500 to 3,000 square feet of space, and selling for between $150,000 and $200,000. It is thus not Harding's zoning, but the marketplace, which precludes the opportunity for the construction of low and moderate income housing in Harding.

(2) Whether the restriction is justified by sound planning principles embodied in the purposes of the MLUL, N.J.S.A. 40:55D-2.

Plaintiffs' failure to make the necessary allegations and proofs on these two central points warrants, as a matter of law, the entry of judgment in favor of the defendant Harding Township.

II

THE MT. LAUREL LINE OF CASES DOES NOT IMPOSE A MUNICIPAL OBLIGATION TO ENACT ZONING WHICH PROVIDES FOR ALL TYPES OF HOUSING.

The Mt. Laurel and Oakwood at Madison "fair share" zoning obligation requires that municipal zoning reasonably accomodate regional planning concerns, (particularly, regional housing needs), in accordance with acceptable planning and zoning practice. Regional housing needs are, however, only one facet of sound planning criteria; they should be reasonably accomodated by a municipality whose planning and zoning should also be consistent with: (1) natural features of the land; (2) existing and proposed development; (3) sound transportation planning; (4) sound utility service planning; (5) sound community service and recreational facility planning; and (6) sound conservation planning for the preservation and utilization of natural resources. N.J.S.A. 40:55D-28(b),- 62(a) (requiring, with stated exception, substantial consistency between master plan and zoning ordinance).

The accomodation of housing needs, see N.J.S.A. 40:55D-28(b)(3), is thus only one isolated purpose of planning and zoning.

In this complex planning scenario, "a competent

planner, as a matter of total professional discretion, [would never]...recommend that each community in a region, no matter how large or small, no matter how blessed with or without certain natural features, no matter what its past and its present makeup, should be an exact (or even approximate) microcosm of the whole..." in any given respect. John M. Payne, "Delegation Doctrine in the Reform of Local Government Law: the Case of Exclusionary Zoning," 29 Rutgers L. Rev. 803, 812-13 (1976). In short, each and every municipality is no more well suited to accomodate all housing types, than each would be to accomodate all types of industrial or commercial development.

This proposition is well 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 Tp. v. Central Bergen Community Health Center, 156 N.J. Super. 388, 413 (Law Div. 1978) (emphasis in original) (dictum).

As the Court stated in Pascack Ass'n v. Washington Tp., 74 N.J. 470, 481 (1977), "it would be a mistake to interpret Mount Laurel as a comprehensive displacement of sound and long established principles concerning judicial

respect for policy decisions in the zoning field. ... 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. ..." The Court thus reaffirmed its earlier statements in Fanale v. Hasbrouck Heights, 26 N.J. 320, 325 (1958), that:

> 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 compatibility with the circumstances of the particular municipality, judged in the light of the standards for zoning set forth in R.S. 40:55-32. [Now N.J.S.A. 40:55D-62, -65, -67]

In Pascack, the Court expressly recognized that the vast diversity among New Jersey's municipalities dictates against the judicial imposition of any particular zoning scheme, and weighs heavily in favor of affording considerable discretion to local legislative bodies enacting zoning laws:

> 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. [74 N.J. at 482.]

In accordance with this reasoning, the Appellate Division has explicitly stated that, "[i]t is now clear that a municipality need not provide for every use within its borders. ..." Swiss Village Assocs. v. Wayne Tp., 162 N.J. Super. 138, 145 (App. Div. 1978). Thus, in reversing the trial court's decision that a municipality violated the zoning enabling legislation by enacting an ordinance that failed to provide for high rise apartment development, the Appellate Division specifically noted that it was a legislative, not a judicial, decision to make the planning judgment as to whether or not high-rise apartments must be accomodated in all municipalities. Even assuming that this form of housing was a "perfectly respectable form of housing accomodation," 162 N.J. Super. at 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 supplied).

One cannot say, as a matter of constitutional law, that every housing type must be provided for in every municipality, for "whether regulation rather than prohibi-

tion [is] the appropriate technique for obtaining a balanced and attractive community is to be left to 'discretionary decision by local legislative bodies.'" Id. at 145 (emphasis supplied).

It is thus a local legislative function, rather than a judicial function, to make the various qualitative, economic and plannings decisions of how best to meet any "least cost" zoning obligation which a municipality may have. In this context, it has been explained by the courts that:

> The validity of high-rise housing projects as a governmental instrumentality utilized to help alleviate the shortage of low and moderate income living quarters is an issue to be debated and decided in a forum other than the courts....It is not for the courts to speculate upon or anticipate the social effects which will result from municipal or legislative action. In short, the social or economic belief of a court cannot be substituted for the judgment of officials who are either elected or appointed to exercise that judgment.

Cervase v. Kawaida Towers, 124 N.J. Super. 547, 569 (Law Div. 1973), aff'd, 129 N.J. Super. 124 (App. Div. 1974) (emphasis supplied).

Indeed, in the post- Mt. Laurel decision of Pascack Ass'n v. Washington 74 N.J. 470, 481, the New Jersey Supreme Court repeated, "as countinuing sound law," the

principle that, even if "'the preponderance of the weight of the expert testimony adduced at trial is at variance with the local legislative judgment, [i]f the latter [local legislative judgment] is at least debatable, it is to be sustained.'" Id., quoting Bow & Arrow Manor v. W. Orange, 63 N.J. 335, 343 (1973). While Harding Township will prove by a clear preponderance of the evidence that the substance of its zoning ordinace is compelled by pertinent environmental, planning and, indeed, "least cost" housing considerations, the Township need not even make this showing to sustain its ordinace's validity. Id. All that need be shown is that its judgment in so zoning the town "is at least debatable," and not "clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [Municipal Land Use Law.]" Id. Harding's proofs will, a fortiori, meet this standard.

In short, the law recognizes that "'there is frequently ... a variety of possible zoning plans, districts, boundaries, and use restrictions, 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 a court would have done it differently...'" Id.

This court should therefore adhere to the well settled principle that no municipality must zone to accomodate all types of development or all types of housing. Compliance with Mt. Laurel and Oakwood does not require the judicial imposition of any particular zoning scheme or housing mix.

The proofs will show that the housing and development mix allowed by Harding's ordinance is, at the very least, representative of the "debatable" local legislative judgment; and is, moreover, compelled by sound planning and environmental constraints. As such, the ordinance must be sustained against plaintiffs' attack. Passack, supra, at 481.

III

HARDING TOWNSHIP'S 3-ACRE ZONING IS A PERMISSIBLE AND REASONABLY NECESSSARY MEASURE FOR THE PREVENTION OF A REAL AND SUBSTANTIAL DANGER OF ENVIRONMENTAL DAMAGE.

The Mt. Laurel decision did not remove environmental considerations from the realm of municipal zoning and planning. The Municipal Land Use Law, whose enactment followed the Mt. Laurel decision has affirmatively sanctioned the use of municipal planning and zoning:

> To promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through improper use of land.

N.J.S.A. 40:55 D-2(j). In both Oakwood at Madison v. Madison, 72 N.J. 481, 544-45 (1977), and So. Burlington County NAACP v. Mt. Laurel, 67 N.J. 151, 186-187 (1975), the Supreme Court recognized that, notwithstanding "fair share" claims, a zoning ordinance is a perfectly appropriate and constitutional exercise of the police power where its enactment was reasonably necessary to protect the public's vital interest in preventing a real and substantial danger of environmental damage.

Moreover, the importance of local zoning as means of protecting regional environmental concerns has been the subject of recent, groundbreaking case law. In SAVE v.

Bothell, 576 P.2d 401 (Wash. Sup. Ct. 1978), the Washington Supreme Court recognized that courts in New York and New Jersey have required zoning to serve regional housing concerns, see Berenson v. New Castle, 38 N.Y.2d 102, 378 N.Y.S.2d 672 (1975); Mt. Laurel, supra. Applying a similar regional conception of the "general welfare," the Court in SAVE held that a municipal zoning ordinance must serve the welfare of the affected region "when the interest at stake is the quality of the environment." 576 P.2d at 406. The Court therefore invalidated a local zoning amendment which was made without adequate consideration of environmental factors such as loss of agricultural lands, air pollution caused by traffic congestion, increased runoff, flood hazards, unstable soil conditions, and the loss of the region's rural character. Id. at 405-07.

In accordance with this sound body of law requiring zoning to protect local and regional environmental interest, Harding Township will prove that its zoning ordinance is a reasonably necessary measure for the protection against real and substantial environmental dangers which would be brought about by high density development such as that proposed by plaintiffs. The Harding Township ecosystem is a highly sensitive, regionally important component of:

1. The Great Swamp National Widlife Refuge, and its watershed; of

2. Morristown National Historic Park (Jockey Hollow); of

3. The high headwaters of the Passaic River; of

4. The federally protected sole source Buried Valley Aquifer recharge zone; and of

5. The wildlife habitats of a large percentage of New Jersey's officially declared "endangered" and "threatened" species.

That Harding Township's current zoning ordinance, largely limiting development to 3-acre residential tracts, is a reasonable means of minimizing environmental harm to these valued natural resources will be proved by the testimony of:

1. Dr. Richard Sullivan, former Commissioner of the New Jersey Department of Environmental Protection;

2. Dr. Kemble Widmer, the State Geologist of New Jersey;

3. Dr. Nancy Updegraff, Technical Director of the Passaic River Coalition, Basking Ridge;

4. Dr. Edmund Stiles, a zoologist and professor of zoology at Rutgers University;

5. Dr. Daniel Okun, a groundwater and aquifer quality specialist;

6. Edward Perry, an Environmental

Planner with the United States Department of the Interior, who is responsible for monitoring proposed wetlands developments in the Great Swamp watershed;

7. Helen Fenske, Special Assistant to the Regional Administrator of the U.S. Environmental Protection Agency (EPA); and

8. Robert Fox, a licensed Professional Engineer intimately familiar with sensitive soil conditions in Harding Township.

In Oakwood at Madison, supra, at 505 n.9, the Court made it very clear that the Mt. Laurel principle should, in no way, operate to bar large lot zoning per se:

> "We have no intent to impugn large lot zoning per se. If a developing municipality adequately provides by zoning for lower income housing it may zone otherwise for large lots to the extent that the owners of property so zoned have no other legitimate grievance therewith. ..."

Even in the Mt. Laurel opinion, the Court explained that its decision was not inconsistent with certain basic zoning principles, i.e.:

> [Developing communities] can [still] have industrial sections, commercial sections and sections for every kind of housing from low cost and multi-family to lots of more than an acre with very

expensive homes.*

67 N.J. at 190-91. In short, there is no legal or logical reason why a developing municipality cannot provide appropriate large lot zoning, where it has elsewhere complied with the Mt. Laurel obligation, or where it has no such obligation by virtue of the need to prevent environmental dangers, Oakwood at Madison, supra, at 544-45.

In recently upholding the constitutional validity of the zoning ordinance of Tiburon, California, allowing only between one and five residences to be built on a five-acre tract, the United States Supreme Court recently acknowledged the efficacy of such zoning in furthering the public welfare by:

> 1. protect[ing] the residents of Tiburon from the ill-effects of urbanization. ...[and]
>
> * * *
>
> 2. assuring careful and orderly development of residential property with provision for open-space areas.

Agins v. Tiburon, 48 U.S.L.W. 4700, 4701 (June 10, 1980).

The Court found that the zoning "substantially advance[d] legitimate governmental goals" articulated by the State of California which "determined that the development

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* It should also be pointed out that, in light of the Oakwood at Madison focus upon least cost housing, rather than low and moderate income housing, 72 N.J. at 510-14, market conditions may, for certain municipalities, produce least cost housing with lot sizes significantly greater than the bare minimum associated with low and moderate income housing.

of local open-space plans will discourage the 'premature and unnecessary conversion of open-space land to urban uses.' Cal. Gov't. Code §65561(b)(West Supp. 1979)." Id. In short, the Supreme Court took no issue with the local legislative finding that this one to five acre zoning promoted the general welfare, for:

> ["It is] in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and the environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." Ordinance No. 124 N.S. §1(c).

Id. at 4701, n.8.

Thus, because large lot zoning promotes many of the purposes of the Municipal Land Use Law which governs zoning, for example:

> a. provision of adequate light, air, and open space, N.J.S.A. 40:55D-2(c);
>
> b. promotion of appropriate population densities for the well-being of people, neighborhoods, regions, and the environment, N.J.S.A. 40:55D-2(e);
>
> c. promotion of a desirable visual environment through creative development techniques, N.J.S.A. 40:55D-2(i);

d. conservation of open space and valuable natural resources, and prevention of urban sprawl and environmental degradation, N.J.S.A. 40:55D-2(j); and

e. promotion of more efficient uses of land by deterring sprawl, N.J.S.A. 40:55D-2(m);

the appropriate use of large lot zoning substantially advances important governmental goals.

Along these lines, the Tri-State Regional Planning Commission has, in connection with its designation of "Open Land" areas, which include Harding Township, formally recommended that:

> The lowest residential densities deemed constitutional should be maintained in open-land areas: three to ten acres per dwelling, more if possible. In any case, local zoning should be encouraged for densities lower than two acres per dwelling. Public works, particularly sewer trunk lines and arterial roads, should not be built on open lands, and interchanges on expressways should be omitted or widely spaced.
>
> Small clusters of development may exist within areas that the plan designates as open lands. Expanding growth around these small clusters is not intended, but new "in-fill" building at current densities is appropriate and often necessary.

Regional Development Guide 1977-2000, Tri-State Regional Planning Commission, at 19 (March, 1978) (emphasis sup-

plied). In further support of such low density zoning, from an environmental/planning standpoint, Tri-State noted that:

> The open-land system with its recommended low density is reinforcing to efficient water supply in the Region's urban areas. Open lands protect existing and potential sources of water supply within and adjacent to the Region's boundaries. Thus they reduce the need for new costlier, distant, water-supply projects.

Id. at 26.

In short, due to the inefficiencies associated with furnishing gas, water, and electric lines; sewage and solid waster disposal; streets, curbs, sidewalks and parks; and mass transportation to residential development at a density of 1/2 to 2 acre minimum lot size, at which densities environmental conservation is also "haphazard;" Tri-State recommends that all new residential development be at either minimum lot sizes of one-half acre or less, or at lot sizes of 'three to ten acres per dwelling, more if possible." Id., at 19, 25-26.

Harding Township's 3-acre zoning is, of course, consistent with these planning guidelines, as well as with the aforesaid cases, in addition to cases such as Fischer v. Bedminster, 11 N.J. 194 (1952) (sustaining 5-acre zoning in

a rural community); Omnia Properties v. Brookhaven, slip op., U.S. District Court, E.D.N.Y., at 16 (Dec. 31, 1979)* (sustaining 2-acre zoning to achieve the "proper governmental purposes" of minimizing population density to perserve land in its undisturbed state so as to maintain the quality of ground waters relied upon for drinking water); County Comrs. v. Miles 228 A.2d 450 (Md. Sup. Ct. 1967) (sustaining 5-acre residential zoning to preserve historical sites, to lessen street congestion, and to promote fire safety and adequate water and sewerage provisions); Gisler v. County of Madera, 38 Cal.App.3d 303, 112 Cal Rptr. 919 (1974) (sustaining 18-acre agricultural zone imposed on land in agricultural use); Davanne Realty v. Montville, Superior Ct. of New Jersey, Law Div., Morris County (Docket No. L-292-74 P.W.) (Jan. 9, 1976, and April 14, 1976), aff'd per curiam, No. L-292-74 P.W. (App. Div. 1979), certif. denied, 81 N.J. 260 (1979) (sustaining 3-acre zoning).

The testimony of Dr. Widmer, the State Geologist, is based on a study and analysis of groundwater yields performed by the New Jersey Geological Survey, Department of Environmental Protection (DEP). The Survey, directed by Dr. Widmer, has developed a method of determining minimum lot size for a number of geologic formations found in New Jersey, based on the use of individual on-site wells and

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* Appeal pending.

well records showing safe sustained groundwater yields. Given the extensive reliance by Harding's citizens on individual on-site wells for their water supply, these official DEP recommendations for minimum lot sizes are particularly appropriate as the starting points of zoning and planning guidelines for the Township, in that they are based only on groundwater quantity yields, and not any other criteria.

There is not only ample legal justification for the proposition that large minimum lot sizes are not impermissible zoning controls, but additionally Dr. Widmer will testify that, according to New Jersey Geological Survey official DEP standards, recommended minimum lot sizes in Harding Township should be as follows:

a. 2 to 3 acres over the Precambrian Crystalline Rock formations, i.e. Hornblende Granite & gneiss, and Hypersthere-Quartz-Andensine Gneiss.

b. 2 acres over the Triassic Basalt Flows and Triassic Border Conglomerate Formations found along Mt. Kemble Ridge.

c. 1 acre over the Triassic Brunswick Formation.

See also "Geology as a Guide to Regional Estimates of the Water Resource," Kemble Widmer, Bureau of Geology and Topography (1968); "Land Oriented Reference Data System,

Bulletin 74, Section on Atlas Sheet 25, "N.J. Geological Survey, DEP, at 23-24 (Revised edition, 1979).

While much of the lands of Harding Township are zoned at a 3-acre residential density which is, of course, a lower density than some of these recommended minima, one must bear in mind that even at a 1-acre density, none of plaintiffs' proposed high density development is feasible. For example, plaintiffs propose a minimum density of approximately 10 units per acre for townhouses and 15 units/acre for garden apartments. See expert reports of Allan Mallach. Moreover, these recommended minima are based only on safely sustainable groundwater yields (i.e. mere quantity of water supply), and do not reflect constraints related to the protection of groundwater quality or any of the other pertinent environmental constraints.

Dr. Daniel Okun will testify to the significance of the fact that Harding Township lies within the recharge zone of the Buried Valley Aquifer, a "sole source" aquifer designated under federal law, 42 U.S.C. §300h-3(e), the contamination of which would create a significant hazard to public health and safety. While recent public attention has focused upon the need to protect the quality of the aquifer systems underlying the sparsely populated Pine Barrens areas in southern New Jersey, of equal, if not greater, signi-

ficance is the fact that, pursuant to the Safe Drinking Water Act, 42 U.S.C. 200f, 200h-3(e), the Administrator of the Environmental Protection Agency has determined that the Buried Valley and Bedrock Aquifer system underlying the Central Basin of the Passaic River in western Essex and southeastern Morris Counties, New Jersey, is the principal source of drinking water for these counties and that, if the aquifer system were contaminated, it would create a significant hazard to public health. 45 F.R. 30537 (May 8, 1980).

As an officially declared "sole source" aquifer, the Buried Valley Aquifer is the subject of the federal protection set forth in 42 U.S.C. §300h-3(e) concerning the withholding of federal financial assistance for projects in the aquifer recharge zone. In its evaluation of projects which may contaminate the aquifer, the EPA will apply more stringent review criteria to those projects that have a greater potential for contaminating the aquifer, such as those located in the recharge zone, which includes all of Harding Township. 45 F.R. 40537-38 (May 8, 1980).

The significance of this "sole source" designation is exemplified by the fact that there are only seven other such "sole source" aquifers in the United States and its possessions, including Guam. There are no others in New

Jersey.

Because of the high population density of the Burried Valley Aquifer service area, and the well known water supply problems currently being experienced here, it is particularly important to protect this aquifer which is the sole or principal source of drinking water for approximately 600,000 people in western Essex and southeastern Morris Counties. 45 F.R. 30537. Moreover, current water supply treatment practice for public supplies is generally limited to disinfection for drinking purposes, with some plants capable of manganese removal. Id. When aquifers are, however, contaminated, the groundwaters may not be purged for decades or even centuries, as opposed to a river which can cleanse itself of pollutants in hours or days. These facts, coupled with the uncertainties connected with the mapping of recharge zones, make it particularly important to make the Burried Valley Aquifer System and the inter-connected Great Swamp National Wildlife Refuge the subject of a policy of non-degradation concerning water supply. (For further detail of Dr. Okun's findings, please see the pre-trial submission entitled "Okun and Updegraff Findings.")

The Technical Director of the Passaic River Coalition, Dr. Nancy Updegraff, will testify that because

Harding Township is in the high headwaters of the Passaic River, and is in the Great Swamp National Wildlife Refuge watershed, it would be most unwise, from an environmental standpoint, to allow or promote high density housing in the Township. Dr. Updegraff has personally observed silt build-up in at least 10 different points in the Great Brook watershed, intensified by the erosion from upstream development. This observed silt clogs the streams draining into the Great Swamp, causing flooding problems in Harding Township by reducing channel capacity of streams, and degrading water quality in the Great Swamp.

She will testify that there is a system of relatively small brooks in Harding Township, including Primrose Brook, Great Brook, Pine Brook, and the Loantaka Brook, and their tributaries, which drain into the Great Swamp National Wildlife Refuge, and into the Passaic River, thereby making Harding Township, the Great Swamp, and the Passaic River particularly susceptible to the harmful environmental effects of development. It is her opinion that because Harding Township is such a small watershed, run-off and siltation caused by development will markedly (and more significantly than in a larger watershed area) raise water table levels throughout the Township, thereby increasing flooding dangers and sewage pipe inflow and infiltration

problems. She will also point out that because the locations of bedrock fractures through which the aquifer is recharged have not yet been mapped, and are not precisely known, it is particularly important to avoid intensive development in Harding Township, which is a high headwaters, recharge zone community.

Dr. Updegraff will also testify that, due to the presence of federally designated and protected wetlands throughout Harding Township, it would be most unwise, from an environmental standpoint, to allow or promote high density housing in Harding Township. These extensive wetland areas, throughout Harding Township, are subject to the federal protection, designation, and permit requirements set forth in, inter alia, 33 U.S.C. §1344, 33 C.F.R. Part 323.1 et seq., and Executive Order 11990 (May 24, 1977). They serve very important environmental functions by:

a. Controlling floods through their ability to swell and hold water which would otherwise contribute to flooding.

b. Filtering of certain organic and inorganic pollutants before they reach ground waters.

c. Providing a unique ecological habitat for a variety of fish and wildlife.

High density development in Harding Township, such

as that proposed by plaintiffs, is likely to require or result in the infill of its extensive, federally designated and protected wetlands areas, causing a worsening of flood conditions, pollution of groundwaters and surface waters, and destruction of wildlife habitats.

Dr. Updegraff will also show that water quality of the Great Swamp National Wildlife Refuge is very important to groundwater quality because the Great Swamp acts as both a groundwater recharge and discharge source. It is therefore particularly important that Harding Township not contribute to the water quality problems already being experienced in the Great Swamp by allowing ill-advised high density development. Indeed, in its most recent, Summer 1978 Water Quality Study, the U.S. Fish and Wildlife Service found dissolved oxygen levels, temperature fluctuations, ammonium nitrogen levels, phosphate levels, nitrite levels, and chlorine levels above the applicable N.J. DEP minimum standards for Class FW-II waters in the streams flowing into the Great Swamp.

Dr. Updegraff will testify that, as a high headwaters community, all of whose lands are included in the Passaic River headwaters or Great Swamp watershed, Harding Township should not have <u>any</u> high density development. It is her expert opinion that:

1. High density development in such a headwaters community is much more likely than low density development, currently allowed by Harding's zoning, to result in runoff problems, point source and non-point source pollution, downstream flooding, and flooding in Harding Township.

2. As a high headwaters community, Harding Township has a heavy responsibility to prevent water system degradation, more likely to result from high density than low density development, which is carried to downstream locales.

3. In order to protect downstream locales from flooding and water degradation, a high headwaters community cannot safely sustain the same high density development that a downstream community can.

(For further detail concerning Dr. Updegraff's findings, please see the pre-trial submissions entitled "Okun and Updegraff Findings" and "Proposed Findings for Dr. Nancy Updegraff, Ph.D.").

As an Environmental Planner and Fish and Wildlife Biologist with the U.S. Department of the Interior, Fish and Wildlife Service, Mr. Ed Perry's responsibilities include the review of development proposed in the Great Swamp watershed that would require §404 and §402 permits under the Clean Water Act of 1977. He has personally walked

the Great Brook where it enters the Great Swamp National Wildlife Refuge (Great Swamp), and has observed fish and wildlife habitat degradation on and adjacent to the Great Swamp Refuge. This degradation is primarily the result of uncontrolled development in the watershed surrounding the refuge.

Current development patterns in the Great Swamp watershed, of which Harding Township is a vital part, are, according to Mr. Perry, causing environmentally harmful and unnaturally high levels of upland erosion and stream sedimentation in the waters flowing into the Refuge.

The observed high sedimentation levels are also artificially speeding up the Great Swamp's aging process by converting aquatic habitat into a dry, upland area at a greatly accelerated rate. Erosion caused by construction in the Great Swamp watershed introduces sediment into the streams draining into the Great Swamp, thereby filling in the aquatic habitat. Development runoff scours stream banks, which increases sedimentation, resulting in further in-fill of the Great Swamp aquatic habitat. Furthermore, in the event that new development depends upon the Woodland Avenue Sewage Treatment plant to treat runoff or sewage, the effluent is deposited into Loantaka Brook which drains into the Great Swamp. This, in turn, increases

nutrient levels, which creates unusually dense aquatic plant life and algae, which, when they decompose, cause the unnatural, rapid in-fill of the Great Swamp aquatic habitat.

The discharge of this nutrient enriched effluent stimulates the production of oxygen-consuming microorganisms that break down aquatic plants, and stimulates growth of algae which, when they die, are broken down by additional oxygen-consuming microorganisms. Since fish and other aquatic organisms depend on dissolved oxygen for survival, the resultant lowered dissolved oxygen levels caused by this process described above severely stresses the aquatic habitat and results in a less diverse fishery and a lower value resource.

Thus, if new development relied upon existing treatment levels in the Woodland Avenue sewage treatment plant for treating runoff or sewage, the additional effluent would further degrade fish and wildlife habitat on the Great Swamp Refuge by introducing additional nutrients and sediment. This would permanently and seriously alter the basic purpose and function of the Refuge.

Given observed sedimentation levels in the Great Swamp and high levels of nitrates and phosphates found in waters flowing into the Refuge which are inextricably linked

to development, and given current sewage treatment plant capabilities and runoff problems, it is Mr. Perry's professional opinion that a complete building moratorium in the Great Swamp watershed in Harding Township is warranted in order to protect the Great Swamp habitat.

The character of the Great Swamp National Wildlife Refuge would be permanently and adversely changed by allowing development to proceed unabated, under current conditions, in the Great Swamp watershed, causing its conversion to a dry, upland area.

The aquatic habitat degradation resulting from unabated development in the Great Swamp watershed would be particularly detrimental to waterfowl, racoons, otters, shore birds, such as egrets and herons, bald eagles and other fish and wildlife species dependent on a healthy, non-degraded aquatic habitat for their existence. Also, by way of example of the detrimental impacts of such development, the large fresh-water mussel population is likely to be depleted to the detriment of the otters and muskrats which feed on them.

While the municipal imposition of the building moratorium proposed by Mr. Perry is not a currently feasible, legal alternative, plaintiffs' blind, arthmetical advocacy of 2,014 high density units as Harding's "fair

share" is most inconsistent with this overriding environmental need to restrict development in the Township. (For additional detail of Mr. Perry's Findings, please see "Findings of Mr. Edward Perry.")

Dr. Edmund Stiles, a prominent Rutgers University zoologist and ecologist has based his analysis upon (1) a review of the current ecological theory which is pertinent to the situation in Harding Township, (2) inventory of existing plant and animal communities in the Township, and (3) his ecological analysis of the probable effects of an increase in human population density on the plant and animal communities in general and on selected sensitive species in particular. It is his professional and expert opinion that significant negative impacts on the ecosystem, of which Harding Township is part, would be generated by increases in Harding's human population density above that allowed by current zoning.

His analysis has disclosed that the Harding Township landscape is a series of wildlife habitat patches and corridors of movement or recolonization between these patches. The habitat patches which are most important for retaining the quality of wildlife, e.g. those species which are found in later successional situations, and under conditions of minimal habitat perturbation, are the later

successional forests and wetlands. Two major patches of protected habitat occur in Harding Township, the Great Swamp National Wildlife Refuge and the Morristown National Historical Park.

The integrity of the numbers and kinds of species which exist in these large patches is dependent upon minimal impact from the peripheral private areas. The expected persistence of sensitive species within these habitats is influenced by the relationship with other habitat patches in the patterned landscape and corridors of similar habitat connecting the patches. The larger patches act as colonizing sources which maintain higher species diversity in smaller patches through continued immigration, and the smaller patches may act as temporary refuges for species which can recolonize the major patches if extinction would occur.

The wildlife corridors, which serve vital recolonization and movement functions, are, as Dr. Stiles will testify, found along the major streams in the Township (Pine Brook and Primrose Brook) which flow from the Jockey Hollow area to the Great Swamp habitat. Through the use of aerial photographic maps which graphically show the extensive habitat patches and corridors network in the Township, Dr. Stiles will illustrate his opinion that

significant high density residential development in Harding would adversely affect the ability of these corridors to serve their natural functions as recolonization and movement areas, which are very important to the long-range survival of Harding Township wildlife.

Dr. Stiles will also testify to the unique and regionally significant nature of the Harding Township wildlife population which must be protected from adverse effects of high density human presence and development in the Great Swamp watershed and Jockey Hollow woodlands.

Pursuant to the "Endangered and Non-Game Species Conservation Act," N.J.S.A. 23:2A-1, et seq., the Department of Environmental Protection has promulgated a list of "endangered species" in New Jersey, N.J.A.C. 7:25-11.1, defined as those "whose prospects of survival or recruitment are in jeopardy or are likely within the foreseeable future to become so due to any of the following factors: (1) the destruction, drastic modification, or severe curtailment of its habitat, or (2) its over-utilization for scientific, commercial or sporting purposes, or (3) the effect on it of disease, pollution, or predation, or (4) other natural or manmade factors affecting its prospects of survival or recruitment within the Stae, or (5) any combination of the foregoing factors. The term shall also be deemed to include

any species or subspecies of wildlife appearing on any Federal endangered species list..." N.J.S.A. 23: 2A-3. Dr. Stiles' wildlife inventory indicates that the following "endangered species" are found in Harding Township's wildlife habitats:

(1) Bog Turtle

(2) Blue-spotted Salamander

(3) Coopers Hawk

(4) Bald Eagle

(5) Peregrine Falcon

(6) Osprey.

N.J.A.C. 7:25-11.1; N.J.D.E.P. "Endangered Species" listing. Of the six "endangered" bird species in New Jersey, four are found in the Harding Township habitat; and of the two "endangered" reptile species in New Jersey, 1 is found in the Harding habitat. Id.

The N.J.D.E.P. has also designated 28 "threatened" species in New Jersey, defined as "a species that may become endangered if conditions surrounding it begin to or continue to deteriorate." N.J.D.E.P. "Threatened Species" listing. Of these 28 "threatened" species, Dr. Stiles has discovered that 14 are found in the Harding habitat:

(1) Wood Turtle

(2) Long-tailed Salamander

(3) Pied-Billed Grebe

(4) Great Blue Heron

(5) Red Shouldered Hawk

(6) Barred Owl

(7) Red-headed Woodpecker

(8) Cliff Swallow

(9) Short-billed Marsh Wren

(10) Bobolink

(11) Savannah Sparrow

(12) Henslow's Sparrow

(13) Vesper Sparrow.

(14) Northern Harrier (formerly called "Marsh Hawk")

Id.

The N.J.D.E.P. has additionally designated 31 "declining" species, defined as those which have "exhibited a continued decline in population numbers over the years." N.J.D.E.P., "Endangered and Nongame Species Project, "Endangered, Threatened, Peripheral, Declining, Undetermined, and Extirpated Wildlife Species in New Jersey," (Official List).

Of these 28 "declining species," Dr. Stiles has concluded that the following 17 are found in Harding's

wildlife habitat:

(1) Eastern Hognose Snake

(2) Marbled Salamander

(3) Four-Toed Salamander

(4) Northern Red Salamander

(5) Yellow Crowned Night Heron

(6) Least Bittern

(7) American Bittern

(8) Whip-poor-will

(9) White-eyed Vireo

(10) Warbling Vireo

(11) Golden-Winged-Warbler

(12) Yellow-Breasted Chat

(13) Least Flycather

(14) Horned Lark

(15) Purple Martin

(16) Hooded Warbler

(17) Eastern Meadowlark

Id.

In short, Dr. Stiles has concluded that there is a clear connection between the viability of Harding's unique wildlife habitat and the fact that the Township is located in a relatively isolated drainage basin in the upper drainage area of the Passaic River. The isolated

nature of the basin and the presence of large public use areas creates* an ecosystem which is of great value to the large areas of human population which have access to the area. The unique characteristics of this drainage basin and the continued accessibility of so many interesting and unusual species of organisms will be significantly altered by an increase in human population density above that allowed by the existing zoning. Significant negative impacts on the ecosystem would be generated by such increases, so that the existing low density zoning should be retained. (For additional detail of Dr. Stiles' findings, see "Finding for Edmund W. Stiles, Ph.D.")

Mr. Robert Fox, a licensed Professional Engineer (P.E.) of the State of New Jersey, and Harding's Township Engineer, will testify that in light of (1) high water tables; (2) shallow depth to bedrock; (3) poorly percolating and clayey soils; (4) floodways and floodplains; (5) the sensitivity of the Great Swamp to sedimentation build-up and water quality degradation; (6) well-water pollution in the Township; and in light of (7) the attendant

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* Approximately 40% of the Township's 13,200 acres lie within Great Swamp National Wildlife Refuge and the woodlands of Morristown National Historic Park (Jockey Hollow). Another 17% is farmland, assessed under the Farmland Assessment Act.

problems in disposing of sewage, it would be ill-advised to increase the density of Harding Township's current 3-acre zoning.

It is Mr. Fox's professional opinion that the current zoning is reasonable in light of existing conditions. (For additional detail of Mr. Fox's findings, see annexed "Fox Findings.")

Helen Fenske, the Special Assistant to the U.S. EPA's Regional Administrator, will testify to the national, regional, and local significance of the Great Swamp National Wildlife Refuge, including part of the National Wilderness Preservation System, 16 U.S.C. §1131-32, i.e., an:

> area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature with imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, edu-

cational, scenic, or historical value.

16 U.S.C. §1131(c).

She will testify to the ramifications of Federal policy and law which impact on management of Great Swamp Basin lands in Harding Township, including:

a. Endangered Species Act and the Fish and Wildlife Coordination Act.

b. Flood Plains - Executive Order 11988.

c. Wetlands - Executive Order 11990.

d. National Wilderness Act of 1964.

e. Clean Water Act of 1972 and 1977.

f. President's Urban Policy - June, 1978.

Her testimony will highlight the fact that the Great Swamp Basin's natural system presently fulfills several social, environmental, public health and safety needs. These relate to the Basin's functions as:

a. an irreplaceable natural flood control facility;

b. a headwater water supply and quality resource vital to downstream Passaic River communities and industries;

c. an important mitigating influence in the increasing degradation of air, water and quality of life in the New York/New Jersey Metro-

politan Region.

d. a recreational and educational resource for the New York/New Jersey Metropolitan Region.

These invaluable functions and the investment of millions of public dollars could be lost if inappropriate land use should occur within the Basin leading to severe water quality and quantity problems. The resulting social, financial and environmental consequences could amount to the commitment of millions more public dollars in remedial actions, such as downstream disaster flood relief and structural flood control facilities.

She will conclude that protection of these resources cannot be achieved through forced allocations for density development, such as those proposed by plaintiffs, which do not recognize variables in land formations and water systems.

Mrs. Fenske will attest to the fact that, as a headwater community within the Great Swamp Basin, Harding has the awesome capacity of imposing costly and irreversible flooding and pollution impacts on communities and industries on the main stem of the Passaic River if it does not manage wisely and knowledgeably its many privately owned lands within the Basin. Such sound land use management is not attainable throught the plaintiffs' arithmetical approach to

this case, ignoring variables in land formations and water systems. (For additional detail, see "Findings of Helen Finske").

Mrs. Joan Geraghty, the Harding Township Sanitary Inspector for the Board of Health for the past 13-1/2 years, is responsible for inter alia, inspection of the installation of all water wells and septic systems; issuance of permits authorizing the installation of septic systems; participation in Board of Health consideration of applications for special permits to install septic systems; investigations of complaints regarding sewage-related problems. She will testify to well water contamination and problems relating to septic system siting in the Township, based upon records maintained by her in connection with her responsibilities as Sanitary Inspector and upon observations made by her in the field.

Her factual observations furnish, in part, the basis of the conclusions made by the expert witnesses who will testify on environmental matters. The well water contamination in the New Vernon section of the Township and the difficulties involved in siting septic systems are symptomatic features of an area not suited for plaintiffs' proposed high density development. (For additional detail, see "Proposed Factual Findings of Joan Geraghty.")

Dr. Richard Sullivan, former Commissioner of the New New Jersey Department of Environmental Protection, will attest to the conclusion that unless the use of land in Harding Township is strictly regulated, the Great Swamp cannot survive. He will testify that the 3-acre minimum lot size requirement at least assures an appropriately low density which, with other land use controls, can protect the natural character of the Swamp wilderness, and can prevent the environmental harms that follow from inappropriate high density development, such as that proposed by plaintiffs. These harms include:

> a. Excessive water supply demands will be made on low yield aquifer which cannot meet high density water requirements. Id.
>
> b. Pollution of ground and surface water can occur because of the low capacity of the soils and hydrology to receive waste. Id.
>
> c. Increased run-off of rainwater will cause stream pollution by transported sediment and debris, and by residual chemicals, affecting downstream uses. The run-off will also increase flooding by draining more water at a higher rate of flow, and by diminishing stream flow capacity through sedimentation.
>
> The run-off will decrease the replenishment of the ground water aquifer. Id.

It is thus Dr. Sullivan's opinion that while

3-acre zoning in Harding Township may not be the complete solution to protecting the environmental integrity of the Great Swamp watershed, the interior wetlands, and the aquifer, it is an appropriate part of the answer to the problem, so blithely ignored by plaintiffs' arithmetic allocation manipulations. (For additional detail, see "Findings of Sullivan.")

In light of the foregoing environmental considerations which underpin Harding Township's zoning ordinance which, in turn, protects the public from real and substantial environmental danger, it is respectfully submitted that the zoning ordinance is a consitutional exercise of the police power, and not violative of Mt. Laurel and Oakwood principles.

IV

HARDING TOWNSHIP'S ZONING ORDINANCE IS A REASONABLE AND CONSTITUTIONAL IMPLEMENTATION OF SOUND REGIONAL AND LOCAL PLANNING CONSIDERATIONS.

As set forth in the Trial Brief joined in by several of the defendants, Mt. Laurel and Madison affirmed the duty of a municipality to base its zoning decisions on comprehensive planning considerations, now set forth in the Municipal Land Use Law, N.J.S.A 40:55D-1, et seq. While Mt. Laurel and Madison contributed to the law of zoning by including regional housing needs as a component of the general welfare to be served by local zoning, these opinions do not, in any way, excuse a municipality from basing its zoning law on the entire range of factors contributing to the public health, safety, and general welfare, including land characteristics; population densities; development and redevelopment of housing; traffic and circulation; water, sewage, waste disposal and related utilities; community facilities including schools, hospitals, libraries, firehouses, etc.; recreation and public space; and conservation of agricultural lands, environmentally sensitive lands, and wildlife. N.J.S.A. 40:55D-28(b). See e.g., Points I, IV of Trial Brief joined in by several defendants.

In accordance with this well-established body of

law requiring municipal zoning decisions to be based on a qualitative comprehensive planning approach, Harding Township will prove through documentary evidence, and the testimony of witnesses which may include the following persons, that its zoning ordinance is a reasonable and constitutional implementation of such planning:

1. Dr. Brian Berry, Director of the Center for Urban Studies, and Chairman of the Geography Department, Harvard University.

2. Thomas Thomas, a licensed professional planner.

3. Dr. Willaim Murtaugh, the Director of the Historic Preservation Program at the Graduate School of Architecture and Planning, Columbia University.

4. Ms. Constance Greiff, Director of Heritage Studies, Princeton, N.J., a consulting firm specializing in the identification and preservation of historical, architectural and cultural resources.

5. Henry Ney, a licensed professional engineer specializing in traffic engineering.

6. Charles Agle, a licensed professional planner.

7. Jerome Rose, Professor of Urban Planning, Rutgers University.

The detailed findings of these witnesses, and various, relevant independent evidence sources, are set

forth in a point-by-point fashion in the submissions of findings for these witnesses, which were prepared in accordance with the Pretrial Order.

Dr. Berry will testify to the effect that the plaintiffs' proposed dispersal of development in an equi-partitioned manner among Harding Township and the other defendant municipalities represents the most inefficient pattern of land use. This widely dispersed, sprawling, non-specialized development has been demonstrated to result in more costly public services, more deteriorated urban environments, greater consumption of agricultural land by urban uses, and higher energy costs, than the more concentrated alternatives proposed by the Tri-State Regional Planning Commission, the New Jersey Department of Community Affairs in its 1980 State Development Guide Plan, by Harding Township in its Comprehensive Master Plan, and by Morris County in its Future Land Use Element of the County Master Plan.

Indeed, most of Harding Township has been designated a "Conservation Area" by the State in the most recent Development Guide Plan. As such, Harding Township is an area where the protection of "[o]pen space is . . . necessary to protect important natural resources from the effects of development and to provide opportunities for a variety of recreational and leisure-time activities. . . ."

State Development Guide Plan (revised draft), New Jersey Department of Community Affairs, at 65 (1980).

As a Conservation Area, Harding Township has met the following criteria:

> a. Low density development with little or no public water supply or sewerage services;
>
> b. Large blocks of existing publicly-owned open space with room for further expansion as future needs dictate;
>
> c. Major areas of environmentally-sensitive land within or adjacent to existing public holdings;
>
> d. Limited accessibility from population and employment centers by major highways and commuter rail facilities.

Id., at 66. That Harding Township's low density zoning is consistent with these State open space and conservation goals, is perhaps best shown by the position of the Morris County Planning Board that, "[l]ow density zoning is the least costly governmental action to perserve openness in the form of private open space." Morris County Master Plan: Future Land Use Element, at 13 (1975).

Tom Thomas, a licensed professional planner, has reviewed the array of pertinent planning considerations which underlie Harding's zoning ordinance and has concluded that it is, indeed, a most reasonable implementation of

comprehensive planning principles, including principles concerning regional housing needs. From the standpoint of sound professional planning, his conclusions are that:

A. Harding Township is a unique national and regional resource.

B. The present pattern of low density development within the Township results from recognition of the sensitive environmental characteristics and physical development constraints within Harding Township.

C. The low density of development as planned and zoned within Harding Township is consistent with the Morris County Master Plan, the New Jersey Department of Community Affairs State Development Guide Plan, the Tri-State Regional Planning Commission Land Use & Housing Plan, the U.S. Environmental Protection Agency Guidelines on public facilities in rural areas, the New Jersey Department of Environmental Protection Guidelines for Development within sensitive & critical environmental areas, the New Jersey Department of Agricultural goals and objectives for protecting, preserving existing farmlands, and National goals and policies pertaining to protection of sensitive environmental areas.

D. The Public Advocate's position that the Township of Harding Housing Region consists of eight (8) counties is not realistic or valid.

E. Designation of this large geographical area, which includes several densely developed urban communities, results in a distortion in the allocation of potential low and moderate income housing units for the Township.

F. The regional analysis has not taken into consideration the extent of sensitive environmental features, the lack of infrastructure, and the importance of low density development in preserving critical national wildlife and historical features within Harding Township.

G. The eight (8) county housing region allocations also do not reflect or consider realistic commutation distances for potential low and moderate income residents within the Township or the proximity of low and moderate income employment opportunities within the Township or the Township commutation area.

H. The planning and zoning program for Harding Township has been based upon realistic and in-depth analyses of sensitive environmental features within the Township, development constraints, the lack of infrastructure existing or planned within the Township, and the historical character and pattern of development which complement the Great Swamp National Wildlife Refuge and the Morristown Historical Park areas.

I. The zoning regulations for Harding Township are reasonable and have been based upon realistic and well documented planning studies.

J. Major revisions in the Zoning Ordinance to permit or encourage high density development would be contrary to good planning principles and county, state, regional and federal planning policies.

K. Encouraging high density development within Harding Township, whether for low and moderate income housing or for

high income housing or commercial or industrial development, would result in extensive and expansion of unwarranted and unnecessary suburban sprawl and extensive secondary impacts on the Harding Township environment.

L. Such development would only result in the destruction of precious open space and sensitive environmental features within the Township which have been recognized for preservation and protection at virtually all levels of government.

M. Therefore, from the standpoint of sound professional planning, and in light of the foregoing, as well as the following factors most particularly, Harding Township's zoning ordinance is a most reasonable, valid implementation of sound planning principles, and should not be changed to permit higher density housing proposed by plaintiffs, particularly in light of:

1. Groundwater and surface water contamination problems;

2. Harding's location in the sole source Buried Valley Aquifer recharge zone;

3. The location of extensive, federally protected wetlands in the Township;

4. Flooding potential in the Township;

5. Harding's location in the high headwaters of the Passaic River;

6. Harding's location in the Great Swamp National Wildlife Refuge;

7. Sedimentation, water contamination, and streamflow problems in the

streams draining Harding Township into the Great Swamp;

8. Well water contamination problems in the Township;

9. Poor percolation of Township soils;

10. Technical, environmental, economical, and policy problems connected with expanding sewerage facilities into the Township;

11. The location of extensive wildlife habitats; threatened, endangered, and declining species; and wildlife movement and colonization areas in Harding's stream corridors and woodlands;

12. Agricultural lands and public open spaces accounting for close to 60% of the Township's lands;

13. Well water yields from the types of geologic formations underlying the Township;

14. The health and environmental hazards posed by non-point source pollution in Harding Township;

15. The value to New Jersey and the nation in preserving the natural integrity of the Great Swamp National Wildlife Refuge;

16. The economic infeasibility of privately producing "low or moderate" income housing in Harding Township, regardless of the zoning;

17. The significant historical character of the community;

18. The Township's rural road system's

inability to serve the traffic generated by plaintiffs' proposed development;

19. Harding's location outside designated growth corridors and paths of development; and in light of

20. Plaintiffs' simplistic "allocation" aproach to zoning being based on obsolete, inaccurate data, and outmoded, unsound planning principles.

Henry Ney, a licensed professional engineer specializing in traffic engineering, will testify that the current zoning ordinance of Harding Township is perfectly consistent with the existing rural roadway system which could safely accomodate the full development allowed by the present zoning ordinance, but which could not so accomodate the development proposed by the plaintiffs or the Department of Community Affairs' Allocation Report in the amount of 2,014 or 931 "low and moderate income" housing units, respectively. The necessary expansion of the roadway system to accomodate this development would cost well over $4,000,000.00, and would be completely inconsistent with the New Jersey Department of Transportation's Surface Passenger Transportation Element if the Master Transportation Plan, and may be restrained by the State DOT's Driveway Permit Application Review Process if construction is proposed on Route 202.

In light of the New Jersey Supreme Court's recognition that the preservation of community character is still a valid zoning consideration, Homebuilders League v. Berlin, 81 N.J. 127, 144-45 (1979), the zoning ordinance's relationship to the preservation of Harding's historical character is a pertinent consideration in evaluating the reasonableness of the ordinance. Constance Greiff, Director of the Heritage Foundation, has performed a detailed inventory of the component features of Harding's historical character, i.e. its buildings, roads and circulations patterns, topography, spatial relationships, and its villages or nodes.

Based upon Ms. Greiff's inventory, Dr. William Murtaugh, the Director of the Historic Preservation Program at Columbia University's Graduate School of Architecture and Planning, will testify that Harding Township could not sustain the additional development proposed by the plaintiffs and still maintain its historically valuable character. This threat to the community's historical character has nothing to do with the socio-economic levels of the occupants of housing, rather it is a function of the amount and density of the housing units proposed by plaintiffs.

The plaintiffs have, unfortunately, ignored these pertinent planning considerations set forth above in determining the reasonableness of Harding Township's zoning

ordinance. Its reasonableness, in light of Mt. Laurel, cannot be determined by resort to the simplistic allocations, based on obsolete data, contained within the DCA Allocation Report. Zoning is a function of the host of qualitative planning considerations set forth above, and not of the arbitrary, arithmetical dispersion of housing advocated by the plaintiffs.

V

THE ALLEGED 8-COUNTY REGION IS NOT AN APPROPRIATE HOUSING REGION FOR HARDING TOWNSHIP DEFINED IN ACCORDANCE WITH THE CONTROLLING LEGAL STANDARD.

A. PLAINTIFFS HAVE FAILED TO ALLEGE FACTS WHICH, IF TRUE, WOULD SHOW THAT THE ALLEGED 8-COUNTY HOUSING REGION IS THE APPROPRIATE HOUSING REGION FOR HARDING TOWNSHIP.

The Complaint does not properly allege the composition of Harding Township's housing region for purposes of an "exclusionary zoning" action. In their April 11, 1979 More Definite Statement of the Complaint made pursuant to Court order, the Plaintiffs allege that the housing region for Harding Township is the same as that for the twenty-six (26) other disparate Defendant municipalities. More specifically, Plaintiffs have asserted that each and every Defendant's region is made up of the eight (8) northeastern New Jersey counties of Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Somerset, and Union.

The importance of a proper and reasonable allegation concerning region cannot, of course, be overstated. It is the allegation of region which will ultimately determine the answer to the question of whether a municipality has met its "fair share" obligation under the Oakwood at Madison and Mt.

Laurel opinions. "In resolving a claim of exclusionary zoning..., the court's determination of what the applicable housing region shall be is of considerable moment, obviously, since each municipality's responsibility must be measured in terms of the housing needs and resources of the region whose needs must be met." Urban League v. Carteret, 170 N.J. Super. 461, 471 (App. Div. 1979), cert. granted, ____ N.J. ____ (Jan. 10, 1980) (argued October 20-22, 1980).

Therefore, allegation and proof of a region which, on its face, fails to meet the applicable legal standard for the determination of region, must result in judgment in favor of Harding Township. To call upon Harding Township to defend a case with such an obvious infirmity can only greatly prejudice the Township, and result in the inefficient and wasteful utilization of judicial resources and public funds.

In Oakwood at Madison, supra, at 537, the Supreme Court stated that it agreed, "in broad principle," with Judge Furman's conception of a municipality's housing region as "'the area from which, in view of available employment and transportation, the population of the township would be drawn, absent invalidly exclusionary zoning.' 128 N.J. Super. at 441." (Emphasis added). In addition to the employment and transportation factors referred to by the

trial court, the Supreme Court indicated that in determining the area from which a municipality would draw its residents, one should also consider "proximity to and convenience of shopping, schools and other amenities. . . ." Id. at 54-541. The court did, however, acknowledge the primacy of employment and transportation cosiderations. See, Id. at 540.

In short, the court determined that a municipality's housing "region" should be the functional equivalent to the "concept of the relevant housing market area" for the municipality. Id.. at 541. The housing region for a municipality is the area from which its population would substantially be drawn, in the absence of so-called exclusionary zoning. Id. at 538-40. Urban League, supra, at 473.

Thus, at the very least, in order to state a claim upon which relief can be granted and to prove a prima facie, case plaintiff's must allege and prove that the whole of the proffered 8-county region is the area from within which Harding Township's population would substantially be drawn in the absence of exclusionary zoning. However, the Complaint, Plaintiffs' More Definite Statement of the Complaint, any materials incorporated by reference therein, and plaintiffs' experts' reports, all fail to make any assertion that Harding Township's population would substantially be

drawn from the the whole of the alleged 8-county region in the absence of any exclusionary zoning (assuming that such zoning exists).

Even after furnishing their More Definite Statement as required by order of this Court, the Plaintiffs have failed to allege this most basic of facts which must be asserted in order to state a claim, and which must be proven in order to prevail. Various rationales and factual criteria for the selection of this region have been set forth in the pleadings and documents incorporated therein by reference. The availability of vacant land; the availability of data; the politically integrated nature of counties and their ability to effect fair share plans; the mere fact of relatively high housing needs in Passaic, Bergen, Essex, Union and Hudson counties, coupled with the mere fact of relative availability of land in Morris, Middlesex, and Somerset counties; and certain inter-county commutation data which contained no municipal break-downs, (and for which no date was even supplied), are factors which were allegedly given consideration in the choice of "region." Plaintiffs More Definite Statement at 3; N.J. Dept. of Community Affiars' (DCA) report, Housing Allocation Regions, at 3, 22-27 (1976) (incorporated by reference into the More Definite Statement).

Nowhere is the allegation made, however, that the region was chosen and alleged because it meets the applicable legal definition, i.e., that it is the area from which Harding Township would substantially draw for its population in the absence of any "exclusionary zoning." Oakwood at Madison, supra at 537-41.

It is not surprising that the Plaintiffs are unwilling to make this allegation, or attempt to prove this fact, for the DCA report selecting the 8-county region was drafted prior to the January, 1977 Oakwood at Madison decision which announced these controlling legal principles. It is, thus, rather disingenuous for the Plaintiffs to claim that the "region" concept is a planning matter as constrained by the Mt. Laurel and Oakwood at Madison opinions, More Definite Statement of the Complaint, at 2, for the region was decided upon before promulgation of, and without any consideration of the controlling principles set forth in the Oakwood at Madison opinion.*

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* The defendant Harding Township is fully aware of the fact that the Oakwood at Madison Court acknowledged existence of the DCA region, 72 N.J. at 531, n.37, 535, n.42. The Court refrained, however, from offering any opinion as to the merits of the "region", noting only that the DCA report had not been finalized. Id. at 532, n.37. The 8-county region referred to was not changed in later DCA reports drafted after the Oakwood at Madison opinion.

Indeed, as previously testified to by Richard Ginman, the DCA's Director of the Division of State and Regional Planning which delineated this region in its Allocation Report, the 8-county region was determined by "drawing a region from contiguous counties until land was calculated as sufficiently available" to meet the perceived housing "needs" of Essex, Hudson, and Union Counties. Round Valley v. Clinton, Superior Court of New Jersey, Law Div. Hunterdon County (January 31, 1978 slip op.), at 39-40 certif. granted, __N.J.__(1980)(argued October 20-22, 1980). In this regard it should be noted that:

1. The highly inaccurate vacant land figures used by the DCA, Trial Brief on Certain Issues Common to all Defendants, at 50-51, render invalid this regional determination, which resultantly included an unnecessarially large area.

2. This "region" was drawn without regard as to whether it is, in fact, the area from within which its western municipalities would draw for their populations, Oakwood at Madison, supra at 537, so that on its face, this "region" is legally irrelevant to the Mt. Laurel and Oakwood concerns of the Morris County municipalities, all of which are contained within the western portion of this "region". A review of Housing Allocation Regions, supra, shows that virtualy no consideration was given to the question of where the towns in the western part of this region would substantially draw for their population in determining this "region".

Similarly, a very obvious defect of the DCA's regional analysis is the ineffectual attempt to use the same "housing region" for all municipalities in the 8-county "region", while totally ignoring the fact that towns like Harding Township, which are relatively close to the border of the region, substantially draw for their populations from areas outside the 8-county region, i.e., from a different region.

B. THE ALLEGATION OF REGION IS LEGALLY INSUFFICIENT BY VIRTUE OF ITS BEING BASED UPON POLITICAL SUBDIVISIONS, RATHER THAN UPON THE CONTROLLING LEGAL DEFINITION WHICH MUST SET THE PARAMETERS OF A HOUSING REGION.

The selection of county-based regions, like the DCA's housing region, was expressly condemned in Urban League v. Carteret, supra, at 472-474. In that case, the court noted that there is no inherent relationship between a county's borders and the Oakwood at Madison definition of "region" as the area from which a municipality would substantially draw its population in the absence of exclusionary zoning. The Urban League court therefore concluded that "the concept of a county 'per se' as the appropriate housing region is not 'realistic.'" Id. at 473. Instead, the Appellate Division decided that a trial court should focus upon the definition of "region" set forth in Oakwood at Madison, supra, at 539, 543. 170 N.J. Super. at 173.

In discussing the employment and transportation factors underlying the Oakwood at Madison definition of "region," the Urban League court concluded that:

> "Obviously, the mere physical boundaries of the State's political subdivisions in no way respond to these criteria. ..."

170 N.J. Super. at 473-74. The court, thus, found that Middlesex County could not appropriately serve as a housing

region for purposes of an exclusionary zoning action. Id. at 475.

While the Urban League court was concerned with the under-inclusive nature of the region caused by the failure to follow the Oakwood at Madison definition of "region," the court's reasoning applies equally well to the instant 8-county region which is both under- and over-inclusive. That is, the court expressed blanket, legal condemnation of "regions" chosen on the basis of "the mere physical boundaries of the State's political subdivisions," 170 N.J. Super. at 474, rather than according to whether the "region" is "'the area from which, in view of available employment and transportation, the population of the Township would be drawn, absent invalidly exclusionary zoning.'" Id. at 473, quoting Oakwood at Madison, supra, at 537.

Thus, by combining what are, in effect, eight invalidly defined regions (i.e., eight individual counties which do not meet the Urban League and Oakwood at Madison "region" definition), the Plaintiffs have succeeded only in alleging a region whose composition does not, as a matter of law, meet the controlling Oakwood at Madison standard. By relying upon county boundaries instead of tailoring the "region" to include only the area from which, in view of available employment and transportation, the population of

Harding Township would substantially be drawn in the absence of exclusionary zoning, the Plaintiffs have failed, as a matter of law, to properly allege a housing region for Harding Township.

The DCA's blind adherence to county borders in defining "regions" is well demonstrated by the fact that all of its 12 defined regions are based on county lines; and 10 of these "regions" are composed of only 1 county. An example of the lack of consideration given to significant border interaction between different county-based regions may be found in Richard Ginman's testimony in Round Valley, supra, at 39-40, wherein he stated that the DCA "never analyzed the relationship between [the region of] Hunterdon [County] and other counties."

Similarly, Allan Mallach, plaintiffs' instant "expert", testified in Round Valley, supra, that the adherence to county boundaries was an "arbitrary" standard set by the DCA in defining "region". It is his opinion that the DCA:

> felt locked into the requirement that they could not cut across county boundaries in setting their regions. I think this is an arbitrary requirement they set for themselves.

Testimony of Allan Mallach, July 14, 1977 Transcript, Vol. III at 27.

Moreover, Mallach was specifically critical of the DCA's 8-county Northeastern New Jersey region. In this regard, he noted that, "they've oversimplified regional considerations to the point where they no longer are logical; specifically the Northeastern New Jersey region does not conform to their description of it in terms of housing market and journey-to-work considerations." Id. at 26-27.

That the Plaintiffs have sued approximately two-thirds of the thirty-nine Morris County municipalities does not, in any way, relieve them of the obligation to properly allege Harding Township's housing region in accordance with Oakwood at Madison standards. The Urban League court expressly decided that the number of defendants in a case should have no bearing upon a municipality's housing region:

> "Not overlooked is the fact that in Oakwood at Madison, the court was dealing with but a single municipality, whereas here virtually all the municipalities in the county have been joined as defendants. We cannot conceive, however, in what way the appropriateness of a geographical area by which to determine low and moderate-income regional housing needs is related to the number of municipalities in the projected area which have been made parties defendant."

170 N.J. Super. at 474. Thus, regardless of the number of parties defendant, the Plaintiffs, in order to state a

cognizable claim, must allege and prove that the profferred housing region is the area from which Harding Township would substantially draw for its population, absent invalidly exclusionary zoning.

Because the allegation and proof of a legally appropriate region will ultimately determine whether Harding Township's "fair share" obligation is met, 170 N.J. Super. at 471, and since the failure to prove a properly defined region must result in judgment for Harding Township, id. at 477, there can be no doubt that the allegation of an appropriate region is an essential element of the Plaintiffs' case.

Thus, as a result of the legal insufficiency of the allegation concerning region, the Complaint fails to measure up to the requirement that it "must do more than just give notice of a claim. It must state the essentials of a cause of action. ..." Schantz v. Rachlin, 101 N.J. Super. 334, 344 (Ch. Div. 1968), aff'd, 104 N.J. Super. 154 (App. Div. 1969). For while simplification of pleadings is to be encouraged, simplification is not to come "at the sacrifice of stating the elements of a claim. ..." Melone v. J.C.P.&L. Co., 18 N.J. 163, 174 (1955). Accord, Gruccio v. Baxter, 135 N.J. Super. 290 (Law Div. 1975). Just as the legal insufficiency of these allegations warrants dismissal of the Complaint, the legal of insufficiency of plaintiffs' proofs on this issue warrants entry of judgment in favor of Harding Township.

THE REVISED STATEWIDE HOUSING ALLOCATION REPORT FOR NEW JERSEY, N.J. DEPARTMENT OF COMMUNITY AFFAIRS, DIVISION OF STATE AND REGIONAL PLANNING (MAY 1978), IS IRRELEVANT TO AN EXCLUSIONARY ZONING CLAIM.

As a result of the substantive problems set forth below, the Allocation Report is logically and legally irrelevant to a claim of "exclusionary zoning" under Mt. Laurel.

1. As indicated on the title page of the document, the Allocation Report was issued only "For Public Review and Comment".

a. No Hearings. In contrast with the series of public hearings recently held in connection with the 1980 draft of the State Development Guide Plan, no hearings were ever held on the Allocation Report. There was thus inadequate opportunity for municipalities to have input into the Report in order to set forth particular, local municipal factors which would show the inadequacy of the DCA allocation numbers.

b. No Formal Approval. The Allocation Report was never formally approved or implemented by any legislative or executive agency.

2. The 1980 State Development Guide Plan Was Not Considered.

a. The May, 1978, Allocation Report has never been updated or re-evaluated in light of the February,

1980 draft of the State Development Guide Plan, released in August, 1980. It would be inconsistent with the State Development Guide Plan's emphasis on corridor development and conservation goals to adopt the Allocation Report, with its sprawl development ramifications.

b. Moreover, while the State Development Guide Plan must, by statute, be considered in the preparation of a municipal master plan, N.J.S.A. 40:55D-28(d), the Allocation Report is not mentioned in the Municipal Land Use Law. As such, the Allocation Report should be subordinated to the State Development Guide Plan and the policies expressed therein.

3. The Report does not Delineate Relevant Regions.

a. Ignores Oakwood Criteria. The Report uses "housing regions" as determined in Housing Allocation Regions (DCA report, 1976), and selected prior to the Supreme Court's opinion in Oakwood at Madison, in which it announced the definition of region as the area from which a town would substantially draw for its population in the absence of exclusionary zoning, and in light of available employment, transportation, shopping, schools, and other amenities. 72 N.J. at 539-41. Indeed, ten of the Report's twelve regions are composed only of single counties, Allocation Report at 11, notwithstanding that the Supreme Court

and the Appellate Division have uniformly condemned inflexible adherence to county boundaries in determining a housing region. Oakwood v. Madison, supra, at 537; Mt. Laurel, supra at 189-90; Urban League v. Carteret, 170 N.J. Super. 461, 471 (App. Div. 1979), cert. granted, ___ N.J. ____ (Jan. 10, 1980).

b. Blind Adherence to County Borders. The DCA's blind adherence to county boundaries is well demonstrated by Richard Ginman's testimony in Round Valley to the effect that in determining that Hunterdon County should be a region unto itself, the DCA "never analyzed the relationship between Hunterdon and other counties". Round Valley v. Clinton, at 39-40 (Jan. 31, 1978 slip opinion) (Superior Court, Law Division, Hunterdon County), certif. granted, ___ N.J. ___ (1980) (argued October 20-22, 1980).

c. Improper Focus on Essex, Hudson, and Union Counties. As Richard Ginman testified in Round Valley v. Clinton, supra at 39-40, the 8-county region was determined by "drawing a region from contiguous counties until land was calculated as sufficiently available" to meet Essex, Hudson and Union Counties' so called "needs." In this regard, it should be noted that:

(I.) The highly inaccurate vacant land figures used by the DCA, infra, render invalid this regional

determination, which resultantly included an unnecessarily large area.

(II). This "region" was drawn without regard as to whether it is, in fact, the area from within which its western municipalities would draw for their populations, Oakwood at Madison, supra at 537, so that on its face, this "region" is legally irrelevant to the Mt. Laurel and Oakwood concerns of the Morris County municipalities, all of which are contained within the western portion of this "region". A review of Housing Allocation Regions, supra, shows that virtually no consideration was given to the question of where the towns in the western part of this region would substantially draw for their population in determining this "region".

d. Fringe Municipalities. A very obvious defect of the regional analysis is the ineffectual attempt to use the same "housing region" for large groups of municipalities, while totally ignoring the fact that towns on the border of one of these "regions" will substantially draw for its population from another "region".

4. The Report Focuses on Low and Moderate Income, not Least Cost, Housing.

The Report attempts to allocate only the housing needs of low and moderate income families. This is, of

course, understandable since it was prepared in light of the Mt. Laurel duty to zone for housing specifically affordable to low and moderate income families. The Report ignores subsequent modification of this duty to now require zoning only for the least cost housing which a private developer would actually build in light of market conditions. Oakwood at Madison, supra, at 510-14.

That this Report deals only with low and moderate income persons' housing needs must, unfortunately, render its allocation figures legally irrelevant to any claim of exclusionary zoning, except in the rare case where it could be shown that, in light of (extremely depressed) market conditions, "least cost housing" will be affordable to low and moderate income families. Since the duty to zone for least cost housing does not entail the duty to zone for housing specifically affordable to low and moderate income families, 72 N.J. at 512-14, DCA's allocation of low and moderate income housing has no relevance to an excusionary zoning claim.[1]

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1. The relationship between least cost housing and low and moderate income housing depends upon the filtering process, 72 N.J. at 512-14, whose effect is not sufficiently direct or quantifiable to allow least cost housing to serve as a proxy for low and moderate income housing. See generally 72 N.J. at 514, n.22.

5. The Report Relies Upon Inaccurate, Inflated Population Figures. The Housing Allocation Report's housing need is calculated to the year 1990, and is composed of two components: (1) present need, i.e. need existing in 1970, and (2) prospective need to 1990 based upon population projections.

Problems with the population projections may be illustrated with this example. In the eight-county "region," as much as 60 to 85% of some towns' allocations are due to projected prospective need, while the remaining 40 to 15% are due to present need. Allocation Report at A-27, 28. The prospective need is, of course, based upon a projected population increase for this region from 1970-90. However, the 1980 U.S. Census estimates show that the region's population has actually declined by 289,803, or 6.3%, since 1970, so that the allocation for towns in this region is highly overstated. If one plugs 1980 Census figures into the Report, instead of the 1990 projections, Harding's allocation drops from 931 to under 100.

6. The Report does not Accurately Assess "Present Need."

a. Failure to Account for Housing Rehabilitation and Additional Low and Moderate Income Housing Built After 1970. The Allocation Report measures present 1970 needs based on the sum of three figures: (1) "overcrowded units" (i.e., more than 1.01 persons per room), (2) "dilapidated units" (i.e., requiring at least "extensive repair"), both of which are taken from the 1970 Census, and (3) "needed vacant units" (5% for rentals, 1.5% for owner-occupied). Allocation Report, at 6. No attempt was made, however, to update these 1970 figures to take account of housing rehabilitation projects and the private construction of low and moderate income housing since 1970.

b. Unneeded Vacancies. The DCA's "needed vacant units" calculation is no longer valid in light of the large population decreases in northeastern New Jersey since 1970. As noted above, U.S. Census figure show that the 8 county region's population decreased from 4,598,050 in 1970 to 4,308,247 in 1980, for a decrease of 6.3% or 289,803.

c. Dilapidated Units. The "Dilapidated Units" component of 1970 housing need was so unreliable that it was dropped from the 1980 U.S. Census. As Dr. Brian

Berry will testify, the determination of a "dilapidated" unit was so subjective that the Bureau of the Census decided that it was not a useful or reliable measure.

d. No Zoning Change Needed. No zoning change is needed to repair the so-called "dilapidated units", so that this component of "need has no relationship to zoning invalidity.

7. The Report Uses a Simplistic, Arbitrary and Mechanical Allocation Method. In order to allocate perceived, prospective housing needs, the DCA relied upon four principal variables. For each of these variables, the DCA calculated a municipality's allocation, based upon its share of the region's total sum for this variable. The four variables used were:

1. vacant developable land;
2. employment growth from 1969 to 1976;
3. non-residential tax ratable growth from 1968 to 1975; and
4. 1970 personal income.

Thus, for example, if a municipality has ten percent of the region's total personal income, then it would have an allocation of ten percent of the prospective housing need pursuant to that variable, and so on for each variable. Under this method, a municipality will have four different housing allocations, each based upon a different variable. The next step, of course, was to arrive somehow at a single

allocation figure for the municipality. Instead of closely examining the qualitative features of the municipality and the surrounding region, the DCA simply averaged the four different allocation figures in order to arrive at an initial single allocation for the town.

In order to grasp the misleading nature of this average, one need only examine two of the figures averaged in order to arrive at the Harding allocation. Harding's allocation was only 22 units based on the employment growth variable, and 1,904 based on an inflated vacant land measure for the Township. By averaging these and other figures, one ultimately arrives at an unrealistically high allocation of 931 units which does not take proper account of the minimal employment in the Township which, according to DCA, generates need for only 22 units by the year 1990.

Even if one makes the very questionable assumption that this allocation method is not patently arbitrary and irrational, it is very clear that the municipal zoning legislation, which is entitled to a presumption of validity in the face of a constitutional attack, e.g., N.J. Const., Art. IV, §7, ¶ 11, Taxpayers Ass'n v. Weymouth Tp., 71 N.J. 249, 263-64 (1976), should not be measured according to whether or not it complies with this merely arithmetic allocation process. See Allocation Report at 15-17.

8. The Report Relies Upon Inaccurate Vacant Developable Land Figures. Accurate vacant, developable land figures for urban areas go to the heart of the ultimate allocation numbers, for the less vacant developable land that is attributed to urban centers where the DCA has found the greatest low and moderate income housing needs, the greater will be the housing allocations to rural and suburban municipalities in the same region. See Allocation Report, at 14-20.

The Report's figures are, however, based upon what appear to be gross undercounts of vacant, developable land such as:

Municipality	Vacant, Developable Land
Newark	Zero
Paterson	Zero
New Brunswick	Zero
Jersey City	Zero
All of Hudson County	Zero

Allocation Report, at A-22, A-24, A-25, A-30.

Those concerned with urban revitalization, as well as those simply driving through these cities would surely be shocked to hear that these areas have absolutely no vacant, developable land. Indeed, in Hudson County, the Planning Board has found 6,925 acres of vacant land, where the DCA found none (although the Hudson County Master Plan does not use the DCA vacant, developable land definition, so that some of the vacant acres in Hudson County may not be "vacant

and developable" under the DCA definition which excludes from developable land, wet-lands, qualified farm land and public lands, and lands with a slope greater than 12%). Hudson County Master Plan, at 50 (1974).

The DCA's vacant land figures grossly distort the allocations, and fail to serve urban revitalization efforts by causing the estimated housing needs of the urban areas to be unnecessarily allocated outward in a sprawling development pattern, due to the highly inaccurate factual premise that these urban areas lack the land needed for redevelopment.

9. The Report is in Conflict with Urban Revitalization Goals. The DCA's method of allocating 1970 (present) "housing need" is blatantly inconsistent with urban revitalization goals. This method utilizes a so-called "equal proportion method" in which one first calculates estimated 1970 housing needs as a percentage of the region's total 1970 housing stock, and then allocates to each municipality an amount of "needed" housing units equal to that same percentage of its own housing stock. Allocation Report, at 15. By thus automatically assuming that any discrepancy in the percentage of "needed" urban and rural or suburban units must be equalized by allocation (away from the city), rather than focusing upon needs of bringing people back into the city and rehabilitating the housing there, the DCA Allocation Report unfortunately contributes

to the sprawl development patterns which lead to the decline and abandonment of New Jersey's cities.

While Allocation Report proponents may argue that urban sprawl is discouraged through the designation of towns with "deferred allocations", careful examination of the Allocation Report shows all too clearly that the designation of only 23 such towns in distant, outlying areas, will do little, if anything, to control such sprawl patterns where control is needed most. Allocation Report, App. B.

10. The Problem With Later Administrative Changes. The inappropriateness of making zoning validity hinge on the Allocation Reports figures is clearly demonstrated by this scenario: If a Court determines that a zoning ordinance is unconstitutional due to a conflict with the Housing Allocation Report, and the Allocation Report is changed on the day after this judicial decision so that this conflict is eliminated, it may then very well follow that this adjudication of the ordinance's constitutionality is per se or presumptively vacated due to the bureaucratic change in the Allocation Report's numbers. Constitutional law should have a much firmer base.

11. Unintended Use of Report.

In the Attorney General's letter brief, at 5, filed with the New Jersey Supreme Court in the six consolidated exclusion-

ary zoning cases, it was candidly admitted that the DCA does not intend to hold public hearings on the Allocation Report, under NJSA 52:14 B-1 et seq., because it "is not presently intended to have the binding force and effect of law. . ." If a Court were to make the Allocation Report the touchstone of zoning validity, and thereby give it "a legally binding nature", "not contemplated" by the DCA, id., it would be using the Report for a use clearly not intended by its authors.

12. The Report Ignores Pertinent Local Planning Factors. The housing allocation figures do not consider pertinent local planning conditions such as:

a. sewerage availability;

b. water supply availability;

c. groundwater yields from geologic formations, and official DEP minimum lot size recommendations;

d. wildlife habitats;

e. headwaters location;

f. soil and septic conditons.

13. Constitutional Presumption. Article IV, Section 7, Paragraph 11 of the New Jersey Constitution requires that a zoning ordinance "be liberally construed in favor of the municipality. ..." Place v. Board of Adjustment of Saddle River, 42 NJ 324, 328 (1964). This constitu-

tionally required principle would certainly be violated by holding a zoning ordinance to be "presumptively" invalid due merely to an inconsistency with the error-laden, subjective Allocation Report.

In light of the foregoing, the Allocation Report is not relevant to the assessment of the reasonableness of a municipality's zoning ordinance, or of its compliance with Mt. Laurel and Oakwood. In no event, should such reasonableness or compliance be made to hinge upon consistency with the Allocation Report.

VII

HARDING TOWNSHIP IS NOT A "DEVELOPING MUNICIPALITY" SUBJECT TO THE MOUNT LAUREL DOCTRINE.

In Southern Burlington County NAACP v. Mount Laurel, 67 N.J. 151 (1975) the New Jersey Supreme Court held the Mount Laurel Township zoning ordinance invalid because the municipality failed to provide for its share of the housing needs of the region of which it was a part. The court stated expressly that the newly established standard for validity of municipal zoning ordinances is not confined to Mount Laurel Township, but applies also to other "developing municipalities like Mount Laurel." The Supreme Court has made it clear that Mt. Laurel does not apply to developed municipalities, Pascack Ass'n v. Township of Washington, 74 N.J. 470 (1977), Fobe Associates v. Demarest, 74 N.J. 519 (1977), or to rural municipalities, Mt. Laurel, supra, at 160; Glenview Development Co. v. Franklin Tp., 164 N.J. Super. 563, 565 (Law Div. 1978), certif. granted, ____ N.J. ___ (1980) (argued October 20, 1980).

Thus, when a zoning ordinance is challenged, it is necessary for a court in New Jersey to determine whether the municipality, whose ordinance is challenged, is a "developing municipality like Mount Laurel." Franklin Tp.,

supra, at 565-66. If the municipality in question may be characterized as a "developing municipality like Mount Laurel" then it must provide for its share of the housing needs of the region. On the other hand, if the municipality is not a "developing municipality like Mount Laurel" then it does not have to provide for regional housing needs.

The New Jersey Supreme Court anticipated that a litigable issue would arise with respect to many of the 567 municipalities in the state whether a given municipality is, or is not, a "developing municipality like Mount Laurel." To resolve this issue the Supreme Court prescribed the characteristics of such a municipality as follows:

> As already intimated, the issue here is not confined to Mount Laurel. The same question arises with respect to any number of other municipalities [1] of sizable land area [2] outside the central cities and 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 Mount Laurel, [3] have substantially shed rural characteristics and [4] have undergone great population increase since World War II, or are now in the process of doing so, but [5] still are not completely developed and [6] remain in the path of inevitable future residential, commercial and industrial damand and growth. Most such municipalities, with but relatively insignificant variation in details, present generally comparable physical situations, courses of municipal policies,

> practices, enactments and results and human, governmental and legal problems arising therefrom. It is in the context of communities now of this type or which become so in the future, rather than with central cities or older built-up suburbs or areas still rural and likely to continue to be for some time yet, that we deal with the question raised. (emphasis and numbers in brackets added) 67 N.J. at 160.

In this paragraph the court established six criteria to determine whether a municipality is a "developing municipality like Mount Laurel" and provided two general guidelines to be used in evaluating the evidence. The six criteria are:

1. Does the municipality have sizeable land area?

2. Is the location of the municipality outside the central cities and older built-up suburbs of the North and South Jersey metropolitan areas?

3. Has the municipality shed its rural characteristics?

4. Has the municipality undergone great population increase since World War II?

5. Is the municipality still not completely developed?

6. Is the municipality in the path of inevitable future growth?

Id.; Franklin Tp., supra, at 567-68.

The two general guidelines to be used in eval-

uating the evidence are:

1. An explicit judicial instruction to include those municipalities that differ from Mount Laurel Township "with but relatively insignificant variation in details." 67 N.J. at 160.

2. An explicit judicial instruction to exclude municipalities that are "central cities or older built-up suburbs or areas still rural and likely to continue to be for some time yet." Id.

The second general guideline set forth above makes it clear that the New Jersey Supreme Court has created three categories of municipalities:

1. Developing municipalities like Mount Laurel.

2. Developed municipalities, such as central cities or older built-up suburbs like Washington Township, Bergen County and Borough of Demarest.

3. Undeveloped municipalities that are still rural and likely to continue to be for some time yet.

While the Mt. Laurel doctrine applies only to "developing municipalities" in the initial category, 67 N.J. at 160, Harding Township falls within the latter category of undeveloped municipalities which are rural and likely to remain so for some time yet, so that it is beyond the reach

of the Mt. Laurel opinion, 67 N.J. at 160; Franklin Tp., supra, at 576. From the various evidence sources set forth in our Pretrial Submissions, including that entitled "Findings of Jerome Rose," this court should find that, based on a judgment evaluating and balancing the six "developing municipality" criteria, Franklin Tp., supra, at 571, Harding Township is not a "developing community" subject to Mt. Laurel, and that, in light of the pertinent planning circumstances, its zoning is a reasonable and constitutional exercise of the zoning power delegated to municipalities under the Constitution, N.J. Const., Art. IV, §6, ¶2, and the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq.

DUE TO PLAINTIFFS' FAILURE TO OBTAIN THE SUPPORTING TESTIMONY OF A PROFESSIONAL PLANNER WHO IS LICENSED UNDER NEW JERSEY LAW, THEY CANNOT MEET THEIR BURDEN OF PROOF.

Plaintiffs do not offer any witness who is qualified to engage in the practice of professional planning in New Jersey. While their witnesses do not hesitate to critize the master plan-based zoning ordinances of the defendant municipalities, none of the plaintiffs' witneses have the necessary licensing qualifications to prepare a municipal master plan on their own. Although the plaintiffs are overtly trying to have their witness' notions of "fair share" and "least cost" housing supplant Harding Township's master plan and zoning ordinance, none of these witnesses have the professional qualifications to legally prepare a municipal master plan outside the courtroom.

Plaintiffs should not be allowed to have their witnesses attempt to perform, in the courtroom, a planning function which they could only illegally attempt to perform outside the courtroom.

1. Statutory Requirements.

Analysis of the interface between (1) zoning and master plan requirements, and (2) professional planning and licensing requirements will inevitably lead to the conclu-

sion that, in order to prevail in "exclusionary zoning" litigation, a plaintiff must have the supporting testimony of a New Jersey-licensed professional planner. See N.J.S.A. 45:14A-2(c).

Under the zoning enabling legislation enacted pursuant to the Constitution, N.J. Const., Art. IV, §6, ¶2, a zoning ordinance is to be adopted only after the local planning board has adopted a "land use element" of the master plan. The zoning ordinance is, in turn, required to "effectuate" or be "substantially consistent" with the land use element of the master plan. N.J.S.A 40:55D-62.[1]

The master plan's land use element is to include recommended standards of population density and overall development intensity for the municipality. N.J.S.A. 40:55D-28(c). These recommended standards should be specifically reflected in the land use plan's study of the existing and proposed location, extent, and intensity of various types of development, including:

1. residential;

2. commercial;

---

1. To the extent that a permanent zoning ordinance is inconsistent with the master plan, it must be approved by an affirmative vote of the full authorized membership of the municipal governing body which must record its reasons for so acting in its minutes. N.J.S.A 40:55D-62(a).

3. industrial;

4. agricultural;

5. recreational; and

6. other private and public forms of development.

N.J.S.A. 40:55D-28(b).

These population and development standards are to be formulated and proposed in light of:

1. natural conditions, including, but not necessarily limited to:

   (a) topography;

   (b) soil conditions;

   (c) water supply;

   (d) drainage;

   (e) flood plain areas;

   (f) marshes; and

   (g) woodlands; and in light of

2. the other master plan elements, including:

   (a) the Housing Plan element;

   (b) the Circulation Plan element;

   (c) the Utiity Service Plan element;

   (d) the Community Facilities Plan element;

   (e) the Recreation Plan element; and

   (f) the Conservation Plan element.

N.J.S.A. 40:55D-28(a), (b)(2), (b)(3)-(8).

Moreover, as a master plan element proposing development, N.J.S.A. 40:55D-28(b)(2), the land use plan element is to be the subject of a policy statement indicating (1) its relationship to the master plans of contiguous municiplaities and of the county where the municipality is located, and indicating (2) its relationship to any comprehensive guide plan prepared pursuant to N.J.S.A. 13: 1B-15.52. N.J.S.A. 40:55D-28(d).

A zoning ordinance thus represents the implementation of a master plan's land use element whose preparation entails the consideration of a complex matrix of relevant planning criteria. The Legislature has recognized the difficulty of planning problems and the need for their competent, professional resolution in order to provide a sound basis for plan-based zoning law.

The Legislature thus passed the Professional Planners Licensing Act, N.J.S.A. 45:14A-1, et seq. (hereafter, the Act), to protect the public from harms occasioned by inadequately planned development:

> In order to safeguard life, health, and property, and promote the public welfare, any person practicing or offering to practice professional planning in this State shall hereafter be required to submit evidence that he is qualified so to practice and shall be licensed as hereafter provided....

N.J.S.A. 45:14A-1.

In upholding the constitutionality of this legislation, the Supreme Court expressly acknowledged the importance of the protection of the public interests underlying the Legislature's action requiring the licensing of professional planners.

> The public interest and welfare are substantially involved in the creation of sound master plans for the orderly development and redevelopment of land areas in municipalities, counties, regions and the State, as well as in the effectuation of such plans in an orderly physical and financially feasible manner. Expenditures of large sums of public money frequently are required over considerable periods of time in pursuing the planned ends, and the welfare, tranquility and ordered living of the citizen are promoted by the achievement of those ends.
>
> * * *
>
> [The relevant legislative background] suggest[s] the view that the Legislature felt the current need in the field of community planning was for regulation of those persons who wished to engage in the practice [of planning] but who had not demonstrated to any agency that they had sufficient qualifications to do so.

N.J. Chapter, Am. Institute of Planners (AIP) v. N.J. State Bd. of Prof. Planners, 48 N.J. 581, 600, 610 (1967) (emphasis supplied).

The Act requires, of course, that all those who

practice professional planning in New Jersey be licensed by the Division of Professional Boards of the Department of Law and Public Safety. N.J.S.A. 45:14A-1,-4. The unlicensed practice of professional planning is subject to a fine of up to $200 for the first offense, and up to $500 for subsequent offenses. N.J.S.A. 45:14A-16.

The statute defines the "practice of professional planning", for which licensing is required, as:

> [1] the administration, advising, consultation or performance of professional work in the development of master plans in accordance with the provisions of chapters 27 and 55 of Title 40 [N.J.S.A. 40:27-1 et seq., (county master plans); 40:55D-1 et seq., (municipal master plans)] ...; and
>
> [2] other professional planning services related thereto intended primarily to guide governmental policy for the assurance of the orderly and co-ordinated development of municipal, county, regional, and metropolitan land areas, and the State or portions thereof....

N.J.S.A. 45:14A-2(c).

Moreover, the obtaining of a license to engage in professional planning activity related to master plan development is no mere formality. The Act sets forth strict licensing conditions and requirements concerning:

(a) license applications, N.J.S.A. 45:14A-8;

(b) moral character, N.J.S.A. 45:14A-9;

(c) citizenship, id.;

(d) educational requirements, id.;

(e) professional experience, id.;

(f) a written examination covering:

(1) History of urban, rural, and regional planning.

(2) Fundamental theories, research methods and common basic standards in professional planning.

(3) Administrative and legal problems, instruments and methods.

(4) Current planning design and techniques.

(5) History, principles and requirements of planning and zoning procedures in the State of New Jersey. Id.;

(g) issuance of "planner-in-training" certificates, N.J.S.A. 45:14A-10, 13;

(h) payment of license fees, N.J.S.A. 45:14A-14;

(i) creation of an examination board in the Division of Professional Boards of the Dept. of Law and Public Safety, N.J.S.A. 45:14A-4, -7;

(j) revocation or suspension of licenses for fraud or incompetence, N.J.S.A. 45:14A-15;

(k) violations for unlicensed practice, N.J.S.A. 45: 14A-16; and concerning

(l) the hiring of professional planners by government bodies, N.J.S.A. 45:14A-17.

It is therefore apparent that, given the public importance and technical complexity of the planning and zoning relationship, e.g., N.J.S.A. 40:55D-28, -62, the

Legislature has decided that only licensed professional planners should be permitted to engage in the development of master plans which serve as the basis of zoning laws. N.J.S.A. 40:55D-28, -62; N.J.S.A. 45:14A-1, et seq.

2. "Exclusionary Zoning" Litigation Expert Witnesses.

In this "exclusionary zoning" litigation, plaintiffs are attempting to prove that Harding's zoning ordinance, by virtue of its failure to accomodate "least cost" housing needs, is not a reasonable implementation of planning, so that it is unconstitutional by virtue of the failure to promote the regional, general welfare. See, Oakwood at Madison, supra, at 495, 510-14; Mt. Laurel, supra, at 174-78. See generally, N.J.S.A. 40:55D-62 (concerning zoning ordinance and master plan compatibility). In order to prevail, plaintiff must therefore prove either that:

> (a) the master plan, with which the zoning is consistent, does not reasonably accomodate the "least cost" housing needs of the region; or that
>
> (b) although the master plan does reasonably accomodate regional "least cost" housing needs, the zoning ordinance is defective for its failure to implement this aspect of the master plan.

In either event, it is clear that, through the necessary analysis of the zoning and planning interface, the

plaintiffs' case undeniably falls within the statutorily defined "practice of professional planning", for it is clearly "intended primarily to guide governmental policy for the assurance of the orderly and co-ordinated development of municipal, county, regional, and metropolitan land areas... ." N.J.S.A. 45:14A-2(c). In "exclusionary zoning" litigation, the plaintiff is thus attempting to supplant the municipality's master plan, and its implementing zoning ordinance, with planning and zoning changes which it must proffer.

It is clear that if the plaintiff, or its witnesses, in a non-litigation context, offered planning services to the municipality, on which zoning would be based, then the plaintiff or its witnesses would have to be licensed in order to perform these services for the development of master plans. N.J.S.A. 45:14A-1, -2(c). In this litigation, plaintiffs are simply attempting to substitute their witnesses' planning and zoning judgment for that of the municipality's master planner, and are attempting to have the court serve in the role of the local planning board and governing body. Assuming that the plaintiff is successful, the end result will be a new zoning ordinance and a master plan which reasonably accomodates regional "least cost" housing needs.

Through the process of litigation, the plaintiff should not be allowed to skirt the licensing and professional qualifications required of all those who engage in the practice of professional planning by advising, consulting, and performing other services to develop master plans or guide orderly development of the State or portions thereof. N.J.S.A. 45:14A-2(c). Plaintiffs' witnesses should not be allowed to formulate a municipal master plan inside the courtroom, for it would violate New Jersey law for them to perform this planning function for a New Jersey municipality outside the courtroom. If plaintiffs or their witnesses lack the professional qualifications to advise, consult, and perform other services to develop master plans in a non-litigation setting, then they should also be proscribed from performing these services in the courtroom.

The litigation process should encourage, rather than frustrate, the legislative goals of having municipal zoning implement sound planning principles. One of the means that the Legislature has mandated to accomplish this goal is to allow only licensed, professional planners to engage in the master planning upon which zoning should be based. In order to promote the sound planning and zoning which so-called "exclusionary zoning" litigation will

hopefully produce, the Courts should not ignore this Legislative licensing and professional qualification requirement.

While a trial court may, in its discretion, require certain planning experience and qualifications above and beyond the minimum licensing requirements, see N.J.S.A. 45:14A-11 (providing for the professional planning licensing of professional engineers, land surveyors, or registered architects, without specific planning experience), a professional planning license must be the minimum qualification to engage in the master planning analysis involved in "exclusionary zoning" litigation where the expert's aid is enlisted "to guide governmental policy for the assurance of the orderly and co-ordinated development of *** the State or portions thereof." N.J.S.A. 45:14A-2(c).

In making this argument, we do not mean to imply that every witness who testifies on behalf of plaintiffs attacking a zoning ordinance as "exclusionary" must be a licensed, professional planner. The argument does not preclude a trial court from hearing the testimony of other expert witnesses (e.g., ecologists, traffic engineers, economists and real estate appraisers, etc.) and other fact witnesses who are able to supply information relevant to determining the validity of zoning. However, at least one of the plaintiffs' witnesses must be a licensed, pro-

fessional planner who is able to draw upon the testimony of other expert and fact witnesses, see N.J.S.A. 45:14A-9, 40:55D-28, and give a credible, professional opinion on the overall validity of the zoning as an implementation of sound planning principles.

Without such expert testimony, by a qualified, licensed professional planner, plaintiffs are unable to fulfill their burden of proving that the zoning ordinance is not a reasonable implementation of the sound planning required by statute, N.J.S.A. 40:55D-28, e.g. that it does not reasonably accomodate regional housing needs.

IX

THIS COURT SHOULD FIND THAT THE INSTANT, NON-PARTICULARIZED ATTACK UPON HARDING'S ZONING IS A NON-JUSTICIABLE CONTROVERSY CALLING FOR AN UNWARRANTED JUDICIAL FORAY INTO THE POLICY-MAKING PROCESS UNDERLYING PLANNING AND ZONING LEGISLATION.

The extent of judicial intrusion upon the legislative zoning power is directly related to the very general nature of many exclusionary zoning lawsuits. By minimizing the "private interest" components of standing requirements, Home Builders League v. Berlin Township, 81 N.J. 127, 132 (1979), and by failing to consider whether there exist satisfactory criteria for the judicial resolution of certain exclusionary zoning claims, compare Commonwealth v. Bucks County, 302 A.2d 897, 8 Pa. Commnw. 295 (1973)(per curiam), cert. denied 414 U.S. 1130 (1974), aff'g 22 Bucks Co. L. Rep. 179 (1972), the New Jersey courts have, notwithstanding protestation to the contrary, e.g. Pascack Association v. Washington Township, 74 N.J. 470, 481 (1977), put themselves in the position of second-guessing virtually every land use planning decision which a municipality may make.

In Bucks County, supra, the court was faced with a lawsuit brought by the plaintiffs against 54 local municipalities in Bucks County, as well as against the County itself

and its planning commission and housing authority. It was alleged that the defendants had enacted unconstitutional zoning ordinances which excluded low and moderate income housing throughout the County.

The plaintiffs were twelve individuals who claimed to be representatives of resident and non-resident lower income persons, including black and non-English speaking minorities who desired to reside within Bucks County. The plaintiffs alleged, of course, that they were precluded from obtaining housing in Bucks County by virtue of the zoning ordinances under attack. The Commonwealth of Pennsylvania was also a plaintiff, as were two corporations allegedly desirous of developing low and moderate income housing in Bucks County, although they owned no land in the county for that purpose.

Although the Pennsylvania courts were pioneers in upholding claims of exclusionary zoning, e.g. National Land and Investment Company v. Easttown Township Board of Adjustment, 215 A.2d 597 (1965), Girsh Appeal 263 A.2d 395 (1970), the Bucks County court refrained from becoming involved in the massive rezoning which it would ultimately be asked to supervise.

In reaching its determination as to whether or not the controversy before it was a justiciable controversy

suitable for judicial resolution, the Bucks County court relied heavily upon the relevant criteria set forth in the United States Supreme Court decision in Baker v. Carr, 369 U.S. 186 (1962), in which the Court undertook the review of legislative reapportionment decisions.

In Baker v. Carr, supra, the Supreme Court set forth two "dominant considerations" which affected the determination of whether a question was indeed a non-justiciable issue, i.e.:

> 1. The appropriateness under our system of government of attributing finality to the action of the political department, and
>
> 2. The lack of satisfactory criteria for a judicial determination.

369 U.S. at 210, quoting Coleman v. Miller, 307 U.S. 433, 454-55 (1939).

In deciding whether separation of powers principles would properly render a question to be non-justiciable under these "dominant considerations," the Court articulated certain specific factors to be examined:

> 1. Whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> 2. Whether there is a lack of judicially discoverable and manageable standards for resolving the issue;

3. Whether the Court could decide the issue without an initial policy determination of the kind clearly for non-judicial discretion;

4. Whether the court's undertaking independent resolution of the issue would be inconsistent with the respect due to coordinate branches of government;

5. Whether there is an unusual need for unquestioning adherence to a political decision already made; or

6. Whether there is a potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

In so framing its discussion with reference to Baker v. Carr, supra, the Bucks County court noted that existing exclusionary zoning case law does not "confer any omniscience upon the judiciary in the planning and zoning fields...," 302 A.2d at 904, nor is there any requirement for the "elimination of expertly advised and informed local legistative discretion in precribing the extent, location, terms and conditions, and the many other relevant factors which go into a practical and workable application of the planning and zoning function as related to any and all particular categories of uses or occupancies, including housing." Id. Thus, in light of the overly general attack

upon the ordinances, without reference to their application to any particular proposed project, id. at 900-903, and in light of the fact that, "the zoning power is one of the tools of government which, in order to be effective, must not be subjected to judicial interference unless clearly necessary", id. at 904, quoting National Land and Investment Company, supra, at 606, the Bucks County court held that:

> [T]he within action, unlike that of Baker v. Carr, inherently and necessarily would involve the attempted answers to questions of a political and nonjusticiable nature which answers would be beyond the competence of the Court to formulate, direct and administer. In order to meet and resolve the problems posed by plaintiffs in their presently hypothetical, far-ranging and totally unparticularized context, the Court itself, directly, or indirectly through the requested mandates to and oversight of the County planning commission and the governing bodies of the fifty-four separate municipalities, would be required to assume the awesome task of becoming a superplanning agency, with no expertise in the field; and as such the Court would be required to make immediate and basic "initial policy determinations of a kind clearly for nonjudicial discretion", and to carry out this tremendous responsibility with an entire "lack of judicially discoverable and manageable standards for resolving it," in the language of the Baker v. Carr opinion, supra. This responsibility we do not believe we are required to assume, and we therefore decline to do so. [at 904-05].

The instant case is no more particularized, and no

less hypothetical and far-ranging than was the controversy in Bucks County, supra. This case involves twenty-five municipalilties sued on an equally grand sociological or social planning basis as the fifty-four involved in Bucks County. The plaintiffs, who are not associated with any specific property interest or planned project, see "The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning," 74 Mich. L. Rev. 760, 779 (1976), have, in effect, asked the courts to make the same far-reaching planning and policy judgments concerning, inter alia:

1. The weight to be given to environmental concerns in zoning;

2. The problems associated with sprawl development patterns which have plagued New Jersey;

3. The wisdom of planning for high density development in areas distant from mass transportation facilities;

4. The types of consequent costs which a municipality may consider in enacting zoning laws; and

5. Where, within the municipality, it is reasonable to zone for the types of developments which the plaintiffs advocate.

It is clear, however, that, in the language of Baker v. Carr, supra, at 218, the consideration of these issues and the resolution of this generalized attack upon the zoning ordinance must inevitably require:

1. Judicial oversight of the zoning

process which is delegated by our Constitution, N.J. Const. Art. IV, §6, ¶2, to municipal legislative bodies, i.e. which is the subject of "a textually demonstrable constitutional commitment... to a coordinate political department"; would require

2. The court's acknowledgement of "a lack of judicially discoverable and manageable standards for resolving" the claims before it see e.g. Oakwood at Madison v. Madison Township, 72 N.J. 481, 533-36 (1977); would require

3. The realization of "the impossibility of deciding [the issues] without an initial policy determination of a kind clearly for non-judicial discretion," e.g. policy determinations concerning the weight to be given to enviornmental concerns, John M. Payne, "Delegation Doctrine v. Reform of Local Government Law: A Case of Exclusionary Zoning," 29 Rutgers L. Rev. 803, 811-12, Save a Valuable Environment v. Bothell, 576 P.2d 401 (Wash. 1978)(holding that a municipality has the duty to consider the regional needs for environmental protection in enacting its zoning laws), the wisdom of different ways to ameliorate housing needs, and the realistic opportunity to concentrate the use of limited state financial resources in the aid of decaying urban center; and would entail

4. The courts' expressed or implied "lack of respect due coordinate branches of government [i.e. municipal legistive bodies]," for so many of the planning and zoning decisions which the court must be called upon to resolve are certainly subject to

> alternative, reasonable solutions by these legislative bodies.

By holding controversies such as the instant one to be non-justiciable, this court would appropriately adhere to the overriding principles which must govern judicial behavior, i.e. that:

> In a democratic society the choices between alternative policies are to be made by elected representatives in the Legislature, subject [to constitutional restraints]...to protect the rights of individuals or groups. It is the function of the court to protect the rights of individuals and groups within the constitutional framework and to apply and develop the law, but not to substitute the court's judgment as to what is better policy. A court is not a super legislature....choices between alternative policies are to be made by elected representatives in the Legislature

Bonnet v. State, 141 N.J. Super. 177, 196 (Law Div. 1976), aff'd 155 N.J. Super. 520 (App. Div. 1978) (emphasis supplied).

It is important to give full weight to the fact that judicially directed "rezoning forecloses municipal policy-making in so many areas principally because land-use planning often entails choices among competing, mutually exclusive uses. ...Judicial rezoning may indeed challenge a municipality's parochialism, but it can also interfere in a legitimate political debate over how the limited supply of

land in a metropolitan area should be regulated. ...[T]he possibility of several 'legitimate' perspectives on a zoning question suggest that conflict among these views should be resolved in a forum more democratic than a courtroom." 74 Mich. L. Rev., supra, at 777 (footnotes omitted).

In order to best serve these principles, Harding Township submits that an exclusionary zoning case should be held to be non-justiciable unless brought by the developer or prospective residents of a proposed housing project barred by a zoning ordinance. If the plaintiffs could show both that the zoning ordinance failed to comply with Mt. Laurel and Oakwood at Madison, and that it would be arbitrary and capricious for the municipality not to zone the given site to allow the proposed development, then, and only then, would there be the requisite compelling need for the Court to intervene in the legislative zoning process.

By thus utilizing the justiciability doctrine to limit the unhappy prospect of judicial rezoning, the courts would not have to cut back upon the liberal standing already granted, such as that given to the Public Advocate in Home Builders League of South Jersey v. Berlin Township, supra. The Public Advocate would still have standing to represent the interests of lower income persons, but could do so only in connection with a specific proposed

project. Where an appropriate housing project was proposed by the owner of land within a municipality, and where it was in the interest of lower income persons to bring an exclusionary zoning claim in order to facilitate development of the project, the Public Advocate could, instead of individual lower income persons, file a Mt. Laurel suit because he does have independent standing under the Home Builders' decision. Under the discussed justiciability doctrine, the Public Advocate would thus not lose his standing to sue to represent the interest of lower income families.

The purpose of the justiciability doctrine is not to limit standing. Rather, it is hoped that this Court could effectively use this doctrine to avoid the position of having to make planning and policy judgments in connection with generalized exclusionary zoning claims which require the courts to repeatedly second guess the discretionary legislative decisions made by the municipal governing body.

THE DEFENDANT HARDING TOWNSHIP SHOULD BE AWARDED PUNITIVE DAMAGES AND COSTS OF SUIT, INCLUDING ATTORNEYS' FEES, FOR PLAINTIFFS' BAD FAITH AND/OR WANTON DISREGARD OF THE PERTINENT FACTS, IN BRINGING THE INSTANT ACTION.

In its counterclaim, the defendant Harding Township seeks, inter alia, costs of suit and attorneys' fees incurred by it in defending against plaintiffs' allegations.

Both by statute, N.J.S.A. 2A:15-59, and by court rule, R.4:42-8(a), the court, in its discretion, is empowered to award costs. Assessing costs "[is] said to be in nature of incidental damages allowed to indemnify the successful party against the expense of vindicating a right invaded by an adverse party." In re Caruso, 18 N.J. 26, 38 (1955). Costs which may be granted by the court are provided by statute. N.J.S.A. 22A:2-8.

This defendant recognizes that attorneys fees are generally not considered a "cost" of suit and that New Jersey follows the so-called "American rule": to wit, "'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Van Horn v. City of Trenton, 80 N.J. 528, 538 (1979), citing Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). It is submitted, however, that in cases such as the present one, where a party asserts a claim in bad faith

and in complete disregard of the facts, the court should assess attorneys' fees in favor of the party against whom such claims are asserted, notwithstanding this general rule.

Both courts and commentators have spoken favorably concerning an award of attorneys' fees to the victim of a lawsuit brought in bad faith. See, The Penwag Property Co., Inc. v. Landau, 76 N.J. 595 (1978) (Pashman, J. concurring); Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162 (1960); 89 N.J.L.J. 308 (1966). The apparent reason for not allowing the assessment of attorneys' fees against a party who has filed suit in wanton disregard of the facts, is the difficulty in confining attorneys' fees awards to such situations, see, Sunset Beach Amusement Corp. v. Belk, supra, at 167. In this regard, it has recently been noted that:

> [O]ur courts should have the discretionary power to award attorney's fees to a prevailing defendant in certain defined classes of litigation upon a finding that the plaintiff's action was instituted vexatiously and in bad faith ... Any danger that an undesirable chillling effect as described above would result from the fact that such a rule would be applied with the benefit of hindsight, ... could be minimized by a requirement, that in such case, the losing party's improper purpose be clearly and convincingly established. Such a rule would simultaneously prevent abuse of plaintiffs with arguably meritorious but unsuccessful claims,

> while ensuring that those who act in capricious disregard of the interests of justice by using the courts as a tool for harassment will not be able to indirectly accomplish their goal. Such persons should not be permitted to visit the potentially ruinous costs of litigation on an innocent party.

The Penwag Property Co., Inc. v. Landau, supra at 600 (Pashman, J. concurring).

Furthermore, and as noted by Mr. Justice Pashman in Landau, supra, other jurisdictions which follow the "American rule" allow attorneys' fees to be awarded to a party which is the victim of a suit brought in bad faith. Id. See also, Alyeska Pipeline Service Co. v. Wilderness Society, supra, at 258-259 ("a court may assess attorneys' fees ... when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons...'" (citations omitted)); and Hall v. Cole, 412 U.S. 1, 5 (1973) ("it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly or for oppressive reasons'" (citations omitted)).

In this case, it is submitted, plaintiffs have acted with a wanton disregard of the facts, in bad faith, vexatiously and oppressively in bring a suit that has cost Harding Township hundreds of thousands of dollars to defend.

This unfortunate expenditure of public moneys could have been avoided had plaintiffs made minimum effort to have initially apprised themselves of the facts necessary to make the determination upon which their complaint is based, i.e. to determine the reasonableness of Harding's zoning ordinance. Under the circumstances, it is both proper and equitable that the plaintiffs reimburse Harding Township for the expenses which they have wantonly and unreasonably caused Harding to incur.

In addition to costs and attorneys' fees, defendant Harding Township seeks punitive damages against plaintiffs. Although actual malice must be shown before a court may award punitive damages, see, DiGiovanni v. Pessel, 55 N.J. 188 (1970), at 191, "malice, in law, means nothing more than the intentional doing of a wrongful act to the injury of another, without just cause or excuse." Wendelken v. Stone, 88 N.J.L. 267, 269 (E. & A. 1913). Accord, DiGiovanni v. Pessel, supra at 191; and Sandler v. Lawn-A-Mat Chem. & Equip. Corp. 141 N.J. Super. 436, 448 (App. Div. 1976).

The rationale for awarding punitive damages is two-fold: "punishment to the offender for aggravated misconduct and to deter such conduct in the future." Leimgruber v. Claridge Associates, Ltd., 73 N.J. 450, 454 (1977).

Whether or not to award punitive damages rests in the sole discretion of the trier of fact; and, in exercising that discretion, the trier of fact

> should take into consideration all of the circumstances surrounding the particular occurrence including the nature of the wrongdoing, the extent of harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of damages.

Id. at 456.

In making its determination concerning the correctness of awarding punitive damages to Harding, it is urged that the court consider the literal unbridled discretion of plaintiff in choosing interests to represent. By statute, the Public Advocate is permitted to exercise his "sole discretion to represent or refrain from representing the public interest in any proceeding." N.J.S.A. 52:27 E-31. Thus, it has been held that the propriety of the Public Advocate's decision to institute suit is properly limited to a review of the complaint filed and affidavit submitted by the Public Advocate and to uphold the decision unless it appears from such a review that the decision was "irrational, arbitrary or capricious." Bor. Morris Plains v. Dept. of Public Advocate, 169 N.J. Super. 403, 411 (App. Div. 1979). In commentary on this sole discretion conferred

on the Public Advocate, it has been noted that "[a]lthough the decisions about the nature and extent of PIA [Public Interest Advocacy, a division in the Department of Public Advocate] representation are controlled by prudential limitations, the sole discretion standard poses a problem of accountability." (Footnote omitted). Note, "the Department of Public Advocate: Public Interest Representation and Administrative Oversight," 30 Rut. L. Rev. 386, 418 (1977).

With this case the court will be given the opportunity to advance the accountability of the Public Advocate. It is submitted that by assessing punitive damages against the plainitffs the court will serve to make the Public Advocate more accountable to the public in the future, i.e., deter it from bringing suits before apprising itself of all relevant facts, and punish it for its wanton and reckless disregard of the rights of this defendant.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that judgment be entered in favor of the defendant Harding Township.

Respectfully submitted,

SHANLEY & FISHER

By Arthur R. Schmauder
ARTHUR R. SCHMAUDER

Dated: December 5, 1980

STATE OF NEW JERSEY)
) SS: AFFIDAVIT OF MAILING
COUNTY OF ESSEX)

I, ANNETTE COVERT, of full age, being duly sworn, says:

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2. On December 5, 1980, I forwarded one copy of the Trial Brief of Harding Township, by regular mail to:

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ANNETTE COVERT

Sworn and Subscribed to
before me this 5th day
of December, 1980.

NOTARY PUBLIC OF NEW JERSEY
My Commission Expires November 8, 1981