

ML 2

Boonton

12/1980

Supplemental Trial Brief on Behalf
of Chester Twp.

pgs. 63

ML000653B

MORRIS COUNTY FAIR HOUSING
COUNCIL, et al.,

Plaintiffs,

-vs-

BOONTON TOWNSHIP, et al.,

Defendants.

:
:
:
:
:
:

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

Civil Action

SUPPLEMENTAL TRIAL BRIEF ON BEHALF OF CHESTER TOWNSHIP

Alfred L. Ferguson,
Of Counsel and on the Brief

McCarter & English, Esqs.
550 Broad Street
Newark, New Jersey 07102
(201) 622-4444
Attorneys for Defendant,
Chester Township

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT.....	1
A. Chester's Foundation: The Land and the Water.....	1
B. Chester Township's Land Use Planning Process.....	8
1. The Comprehensive Development Plan of 1960.....	8
2. The Comprehensive Plan of 1974.....	9
C. The 1976 Ordinance.....	13
D. The Caputo Litigation.....	14
E. The 1978 Zoning Ordinance: Complying with the Obligations of Mt. Laurel.....	18
I CHESTER TOWNSHIP AS A DEVELOPING MUNICIPALITY.....	19
II CHESTER TOWNSHIP HAS SATISFIED ITS REGIONAL OBLIGATIONS TO ZONE FOR ITS FAIR SHARE OF LEAST COST HOUSING AND ENVIRONMENTAL NEEDS IN A COMPREHENSIVE LAND USE PLAN.....	23
A. Chester Township has Zoned its Land Consistent with its Regional Obligation to Protect the Environment.....	23
1. The 208 Water Quality Management Plan.....	25
2. The Tri-State Regional Planning Commission Findings on Environmental Constraints.....	28
3. The Caputo Decision.....	29
B. Chester Township Has Zoned Its Land Consistent With the State Development Guide Plan, the Tri-State Guide Plan, and the Morris County Master Plan.....	31

- 1. The State Development Guide Plan: Limited Growth for Chester..... 32
- 2. The Tri-State Regional Development Guide Plan: Open-Land Designation for Chester..... 35
- 3. The Morris County Master Plan of Future Land Use..... 37

III THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL BAR RELITIGATION ON ALL ISSUES DETERMINED IN THE CAPUTO LITIGATION..... 40

- A. The Same Rights Have Been Previously Litigated and Conclusively Determined..... 42
- B. Plaintiffs are Collaterally Estopped from Relitigating the Mt. Laurel and Madison issues in this case..... 46
- C. The Doctrine of Virtual Representation Demands that the Caputo Decision be Considered Res Judicata on the Issue of Compliance with Mt. Laurel and Madison..... 52

IV IF NEITHER RES JUDICATA NOR COLLATERAL ESTOPPEL APPLIES, CAPUTO SHOULD BE STARE DECISIS FOR THIS COURT..... 57

- A. Plaintiffs Challenge the Chester Township Zoning Ordinance on the Same Grounds Urged in the Caputo suit..... 59
- B. Public Policy Requires this Court follow Caputo..... 61

CONCLUSION..... 63

PRELIMINARY STATEMENT

A. Chester's Foundation: The Land and the Water.

In the early 1600's the Minisink Indians became the first humans to inhabit Chester Township. Originally nomadic, these native Americans had journeyed inland from the seashore in search of food. They used the forests to hunt and the streams to fish. Later, as permanent settlers, they turned to farming as an additional source of food.

In the early 1700's, two major roadways were opened. The "Landing" or "Brunswick" road ran north-south, and another artery ran east-west. The roads paralleled what are now Routes 206 and 24 respectively. Encouraged by an abundance of fertile soil, swift flowing streams, limestone and iron resources, settlers made their way west toward Chester.

In the latter part of the eighteenth and early nineteenth century, Chester became part of America's nascent industrial revolution. The swift-flowing streams provided ideal locations for water-powered grist and saw mills. The streams also served as sources of power for early charcoal burning forges and furnaces. These forges and furnaces worked the iron ore taken from the mines in the Township. And as Chester and the nation moved further into the nineteenth century, the Township's mining industry flourished. During this entire period, Chester's population grew.

Development was curtailed only with the advent of improved roadways to the north and south. The improvements made Chester less of a merchant center in the network of east-west trade. Merchants that would have once stopped at Chester could now travel greater distances in less time. Chester's development therefore began to switch from burgeoning industrial back to agricultural. When the economic recessions of the 1870's and 1880's caused the iron industry to falter, Chester's transition back to being a primarily agricultural community was complete.

In the early part of this century, the streams provided a foundation for farming. They also made Chester a popular vacation spot. Lacking any transportation network, the Township retained its rural character. Development, as it were, had passed Chester by.*

The lessons of history should not be lost. From the Minisinks to the modern day, the land has defined both the character and the future of Chester Township. Where the Raritan headwaters once provided the necessary energy to fuel factories and mills, they now are the purest sources of water extant in New Jersey. Where the streams and lands of Chester Township once sustained life through agriculture and industry, those same streams and lands now support a ground water system which is necessary to the economic and environmental survival of a drought

* For general history of Chester Township, see Land Use Plan Element, 1978 Update at 2-7.

stricken and pollution wracked state. Over time, only the apparent function of the land has changed. The underlying reality remains as it was - Chester Township's lands and waters are necessary to the economic and biological well-being of New Jersey's citizens.

The Morris County Fair Housing Council and the New Jersey Public Advocate would change all this. Spurred by the single goal of dispersing low and moderate income families throughout this state, they have assigned a housing unit allotment to Chester Township which bears no relationship to that which has determined growth in the past - the land and the water. Unaware of or unwilling to acknowledge the environmental facts which militate against sprawl development, plaintiffs pursue their course under the banner of a case which demands zoning for the general welfare. Unfortunately, it is precisely the general welfare that plaintiffs have ignored.

Chester Township is located in the southern and southwestern part of Morris County, New Jersey. The Township has 28.68 square miles, or 18,355 acres. As of the 1970 census, it had a population of 4,265 for a population density of 148 persons per square mile. This density is significantly lower than that of communities to the east of the Township.

Chester Township completely surrounds Chester Borough. In a pattern common throughout Morris County, the two form a doughnut configuration. The Township forms the outer ring and the Borough forms the hole. For reasons to be made apparent through-

out this brief, most of the development in the "Chesters" has occurred in the Borough Center. The Borough Center contains (or will in the future contain) what developers and planners refer to as the necessary infrastructure for development: sewers, stores, roadways and other service facilities like hospitals and schools. The Borough Center also is formed around the intersection of Routes 206 and 24, the only major arteries of entry or exit to the Chesters. It is not surprising, therefore, that throughout its history, whatever development which has occurred in the Chesters has tended heavily toward the Borough.

The sparse development in general can be traced to a number of factors. The absence of any major transportation network and the presence of better thoroughfares to the north and south contributed significantly to the curtailment of development at the beginning of the century. Today, moreover, neither component of the transportation system has changed. Route 206 is only a two lane arterial road; and Route 24 is primarily a two lane road. As in the past, roadways above and below the Chesters are superior. Major interstate highways 80 and 78 flank Chester to the north and south respectively; and interstate 287 bypasses Chester to the east. None of these highways run through or even close to Chester.

What does traverse Chester is a network of waterways. Three major streams course in a north-south direction through the Township: the Lamington or "Black" river, the Peapack Brook, and the Burnet Brook. These form the headquarters of the North

Branch of the Raritan River. Water drains into these rivers by virtue of the land pattern in Chester itself. The land around the Peapack and the Burnet slopes from north to south and several ridgelines cut across the Township from east to west. These ridgelines delineate the watershed areas which contribute storm water runoff to the three waterways. The land surrounding the Peapack and Burnet Brook is rugged and steeply sloped. The land surrounding the Lamington or "Black" River is flat.

In the 1960's the watershed characteristics of the land in the Chesters became more widely recognized as an irreplaceable environmental asset. To protect the area, citizens from the Chesters and surrounding communities joined together to form the Upper Raritan Watershed Association (hereafter "URWA"). The Upper Raritan Watershed designates the area containing the headwaters of the North Branch of the Raritan in Chester Township and adjacent communities.

The URWA retained the Department of Limnology of the Academy of Natural Sciences to conduct a series of water quality surveys in the late '60s and early '70s. While noting the generally good quality of the waters in the Upper Raritan Watershed, the Academy warned in 1967 that greater attention would have to be paid to "proper land use and waste treatment" to maintain that quality. Water Quality Survey, p. 20 (1967). This warning was given an even more serious slant five years later when the Academy studied the nutrient pollution in the watershed's

streams.* The Academy concluded that many sections of the watershed's streams were either at or near the available assimilative capacity under then present nutrient loadings. Water Quality Survey, p. 30 (1972). To counteract this apparent trend the Academy recommended modification of existent nutrient loadings, and no development which would further increase nutrient input. Today, the concerns voiced in 1967 and 1972 form one part of the foundation of Chester's land use planning effort. The impact of agricultural and urban related nonpoint sources of pollution is being identified. Efforts are being made to preserve existing and potential surface and groundwater supplies. Development is being planned to preclude adverse environmental impact. See infra; see also Draft Upper Raritan 208 Plan, May 1979, at III-4. Cf. Tri-State Regional Development Guide, March, 1978 at 5-6.

The Black River flows through Chester Township's western side. The land around the river is considerably flatter than that found in eastern Chester and is known as the Black River basin. The land is subject to continual wetness. Given its low level and naturally wet condition, the land is most appropriately

* Nutrient pollution is pollution caused by excessive amounts of nitrogen, phosphorous and their compounds in waterways. These chemicals serve as food for algae. Excessive algae make water unpotable and eventually lead to eutrophication. Nutrients result from the decomposition of both vegetable matter and human and animal wastes. The secondary treatment of sewage does not greatly reduce the quantity or concentration of nutrients in the effluent. A stream with good water quality represents a delicate balance of biochemical forces. A stream's ability to absorb or "digest" nutrients is called assimilative capacity. (See testimony of Dr. Ruth Patrick, Caputo v. Chester Twp., No. L-42857-74 P.W. (Superior Court, Law Div. at 13T 26-19 to 34-25), whose testimony was explicitly adopted by Judge Muir.

used as a flood plain or conservation area. Reflecting this fact, most of the land along the Black River in Chester Township is publicly owned. See Chester Twp. Land Use Plan Element, 1978 Update, at Plate 34.

B. Chester Township's Land Use Planning Process.

1. The Comprehensive Development Plan of 1960.

In the Comprehensive Development Plan of 1960, the Township planners and the Planning Board first set out the planning philosophy of the Township: to encourage development of growth first within the Borough and then in the area of the Township immediately surrounding Chester Borough, but within a reasonable service distance from the Borough and its service facilities. The Comprehensive Development Plan stated:

"FOCUS NEW GROWTH

a. New Borough-Township growth should be encouraged to concentrate where facilities and services are presently available. Since the Borough is more highly developed than the Township, and retail, governmental and school facilities already exist there, future medium density residential development should be encouraged there first. The future commercial development of the two communities should also be concentrated in this area within the framework of the existing shopping district. By focusing new growth within and immediately surrounding the Borough, the most orderly and thus economical development pattern (for both communities) is obtained. The Borough shopping area's development as a shopping center for the entire region is also stimulated.

b. The next lowest density residential development should be planned for the area immediately surrounding Chester Borough, but still within a reasonable (one mile) service distance from school facilities. Residential land development in this area should be maintained at a slower rate of growth, at least until development in Chester Borough has filled in to the point where the expansion of mutually used facilities is most economical."

The Comprehensive Development Plan of 1960 addressed the

problem of preserving the Watershed in sensitive areas:

"a. The following general areas should remain as nearly as possible in their present undeveloped state:

1. Black River Basin

Land bordering the Black River is extremely low and subject to continual wetness. This land is not desirable land for development purposes and should be protected as a floodplain or conservation area. Uses appropriate for land areas such as this include agriculture, horticulture, public parks, playgrounds and wildlife preserves. This area has considerable potential as county park land, and is shown on the Morris County Park Plan for that purpose.

2. Areas of Extremely Rugged Terrain

A great deal of the Township land area is extremely rugged, which would preclude intense development. Most of the land is wooded and should be preserved, as nearly as possible, in its present state of development for purposes of watershed conservation. The means by which this is implemented will depend primarily on the active encouragement and support of those landowners involved. This is explained more fully below."

Most of the land along the Black River in Chester Township is now in public ownership.

2. The Comprehensive Plan of 1974.

On August 14, 1974, the Planning Board adopted a Comprehensive Plan prepared for the Township by its consultant, Candeub, Fleissig and Associates. This comprehensive planning document, and its reference base of February 1974, were prepared and adopted after a lengthy process of meetings, hearings, discussion, debate and revisions.

The Comprehensive Plan first notes, at Page 1, that the Regional Plan Association, the Tri-State Transportation Commission, the Morris County Master Plan Future Land Use Element, all recognized regional planning agencies, agree that Chester Township will be excluded from the most intensive development in the urban corridors to the north and south because of its location.

The Comprehensive Plan notes, on page 2, that Chester Township should not, at the present time, assume any major regional employment areas and communication corridors. The Plan noted that the Township's

"most significant responsibility is to provide regional open space and to help meet the increasing regional demand for water supply and flood control."

The report summarized the environmental constraints on high density development because of the sensitivity of the land:

"The general soil characteristics are not favorable for extensive development. Large areas contain severe limitations for development due to high erosion potentials, intermittent flooding, shallow depth to bedrock, poor drainage and poor acceptability of the septic tank form of wastewater treatment.

On the other hand, the natural features provide high quality environment for open spaces and low density residential development. The sensitivity of the natural features and resources must be considered in planning the community."

The Comprehensive Plan notes that there is no public sewerage collection or disposal system in the Township; that there

are no public water distribution facilities except for a minor area along the Old Chester-Gladstone Road; and that there are no public transportation facilities at all. (Plan p. 4.)

The Plan had five general objectives, which, in addition to the usual planning objectives, included the following:

"To preserve the present open space character of Chester Township by protecting and maintaining significant environmental features including woods, streams, ravines and hilltops.

Protect and enhance the Township's important natural resources including ground and surface waters, open space, vegetation, soils and wildlife to service both local and regional residents.

Monitor the use of the Township's regionally valuable natural resources to avoid the depletion of those resources and to protect the Township and the related parts of the region from erosion, flooding and pollution." Comprehensive Plan, p. 6.

The Plan also had among its functional objectives the following:

"Relate the size, density, type and design of new development to the specific environmental capabilities of each area in terms of water runoff, soil capacity, ground cover, slopes and the ability to preserve an acceptable pollution level." Comprehensive Plan, p. 7.

The Comprehensive Plan addressed the housing needs (pages 5, 10), although not specifically in the terms used later in the Mt. Laurel decision. A future need of 650 multi-family units was projected (the Plan used the term "rental units", p. 10). The Plan provided for multi-family housing in a "medium density

residential" area, at Page 12:

"Certain areas adjacent to the South of the Borough are recommended for possible medium density residential use, with gross density of more than one dwelling unit per two acres. The reasons for this are:

-- Provide a wider range of dwelling types, possibly including townhouses and apartments.

-- Increase the possibility of providing adequate utilities in this central location.

The areas for medium density residential use were selected because of positive development factors such as adequate traffic access, compatible development patterns, and less sensitive natural resources. However, public or private utilities including proper water and sewerage systems are mandatory for the medium density residential use. The development of these areas should be monitored publicly in order to provide needed facilities and utilities in an orderly manner."

Jude Muir in his Caputo decision upheld the conclusions of the 1974 Plan: to allow for a cluster of higher density residential development around the Borough, while preserving the Watershed by very low density zoning.

C. The 1976 Ordinance.

After adopting the Comprehensive Plan of 1974, the Planning Board of Chester Township and the Governing Body held public hearings and adopted Ordinance 76-12. That zoning ordinance was based upon the Comprehensive Plan, and was adopted in October of 1976. On January 18, 1977, however, the Township adopted the entire zoning plan as an interim zoning ordinance pursuant to N.J.S.A. 40:55D-90. The move from permanent to interim was prompted by the State's adoption of the Municipal Land Use Law, N.J.S.A. 40:55-1, et seq., and the New Jersey Supreme Court's decision in Oakwood at Madison v. Township of Madison, 72 N.J. 481 (1977).

D. The Caputo Litigation.

Prior to adoption of the 1976 Zoning Ordinance, two developers brought suit against Chester Township alleging failure of the Township to fulfill the demands of So. Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151 (1975) (hereafter "Mt. Laurel"). In July, 1975, plaintiffs, Joseph and Aldo Caputo, alleged that defendant's then operative 1964 Zoning Ordinance was "arbitrary, capricious and [violative of] the general welfare of the citizens of New Jersey." Complaint at 9, Caputo v. Township of Chester, et al., No. L-42857-74 P.W. (Morris County Court, filed October 4, 1976). The basis for this claim was defendant's alleged failure "to make realistically possible . . . a variety and choice of housing." Id. at 3. That failure, in turn, was ascribed to particular provisions in the zoning ordinance and alleged failures at the planning level. These included large lot zoning of 1, 2, 3 and 5 acres in specific zones, and failure to provide "dwellings of condominium, townhouse or apartment classifications." Id. at 3-4, 11.

On December 13, 1976, the Caputos filed an Amended Complaint. This complaint repeated the allegations of the initial complaint and attacked the then recently passed 1976 Zoning Ordinance. The Caputos alleged that the ordinance was "arbitrary, capricious and unreasonable in whole . . .," and they specifically alleged that the configuration of R-1, R-2 and R-5 zone designations were exclusionary in nature. Amended Complaint at 20. According to the Complaint, the new ordinance provided even

fewer possibilities for construction of multi-unit dwellings. Id. at 10-11. Contending that Chester's environmental justifications were merely "smoke screens," (Id. at 21), the Caputos alleged that more land had been made part of the five acre zone, and less had been included in the two and one acre zones. Id. at 11. Moreover, only single family units of specified size were allowed in both the two and five acre zones. The R-M zone which did permit multi-family dwellings was alleged to be unlawfully limited to 150 units on any one parcel and 300 units in the zone as a whole. Id. at 21.

As noted above, the Township, in January of 1977, adopted the zoning ordinance as an interim ordinance. And in a letter from counsel on April 11, 1977, Chester Township, in effect, outlined the problems in its ordinance. This made the Caputo claim largely unnecessary.

The letter advised revision of the Chester Township Zoning Ordinance. It suggested that the 300 unit limit on multi-family units be revised upward. It suggested review of the 150 units/parcel limit to insure that "developers are not prevented from realizing economies of scale in the construction of least cost housing." It recommended increased density per acre in areas zoned for apartments. It flatly stated that the 10 bedroom/acre limitation was invalid, and it advised re-examination of the minimum square foot requirements contained in the building code. It also advised either reconsideration of the prohibition on mobile homes, or barring that, a clear statement of reasons for

prohibiting those units. Finally, in response to Chester's large lot zoning, the letter instructed the Township to make provision for small lot housing, if it could be accommodated by on-site septic or public sewage collection.

Given both these instructions, and the Township's explicit intention to revise its zoning ordinance, Judge Muir thought it unnecessary to proceed with litigation. Caputo v. Chester Township, supra, at 5. The Caputos disagreed and pushed forward with their trial.

Judge Muir issued an extensive Opinion outlining the Township's Mt. Laurel obligation. He criticized the lack of provision for small lot zoning and the minimum floor area requirements. Id. at 76. He criticized the cluster zone's acreage limits as unduly costly. Id. at 77. The "medium density or multi-family zone" was deemed "extremely restrictive," and its bedroom limit was ordered removed. Id. at 78, 105. The limitation of 150 units/parcel in the R-M zone was evidence of the zone's restrictive character. Id. at 78-79. Such restrictions were held to "provide no incentive to the builder." Five acre zones were held invalid; small acre zoning was ordered insofar as it was reasonable. Id. at 104. As a guide to determining reasonability, the Court noted that the Township's two acre zone flanking Route 206 in and around Chester Borough could not be justified as an environmental necessity. Id. at 90-92. However, three acre zoning in and around watershed areas was upheld by the extensive environmental evidence presented. Id. at 95. The Caputo's demand for a multi-

family zone on their tract was rejected as environmentally unsounds. Id. at 101.*

* This case is now on appeal before the New Jersey Supreme Court. The grounds for appeal are, however, extremely limited. Plaintiffs appealed Judge Muir's refusal to order rezoning of their tract. Defendants cross-appealed to have Judge Muir's prohibition of five acre zoning overturned. See Notice of Appeal and Notice of Cross-Appeal, Caputo v. Chester Township, No. A-813-78 (Superior Court of New Jersey, App. Div.). All other grounds for cross-appeal in defendant's motion were later abandoned. See Brief of Defendants-Respondents and Cross-Appellants, Caputo v. Township of Chester, et al., No. A-813-78 (Superior Court of New Jersey, App. Div. 1979). On the issue of five acre zoning, this part of Judge Muir's judgment was stayed by Order of the Appellate Division dated April 3, 1979 (J. Conford), who stated: "it is not likely that such prohibition will be sustained on this appeal." See Order of Appellate Division, Caputo v. Chester Twp., No. A-813-78 (Superior Court, App. Div., filed April 2, 1979).

E. The 1978 Zoning Ordinance: Complying with the Obligations of Mt. Laurel.

Chester Township has revised both its Comprehensive Land Use Plan and its Zoning Ordinance. With the exception of five acre zoning, the revisions are responsive to all the guidelines outlined by Judge Muir in Caputo v. Chester Township, supra. The limit of 300 multi-family units has been eliminated; the capacity of the multi-family zone is now over 1200 units; the limit of 150 units of multi-family housing per area designated R-M has been eliminated; the bedroom limitation has been eliminated; two acre zoning around Chester Borough near Route 206 has been changed. Now the area is zoned for special residential category (SRC).^{*} Finally, provision for small lot housing has been made through the use of an A/T zone allowing units on lots of 5000 sq. ft. Not even plaintiff's experts in this case advocate smaller lot size.

These revisions finally compelled acceptance by the Caputos of Chester's zoning ordinance. See Order filed June 20, 1979, Caputo v. Township of Chester, et al., No. L-42857-74 P.W. (Morris County, Superior Court, Law Division). They believe, as we always have, that Chester Township's ordinance comports fully with the dictates of Mt. Laurel and Madison.

* SRC is sometimes referred to as "Granny Flats." Used extensively in California, it allows an additional rental unit to be built as part of a single-family detached house. The rental unit uses the same septic system as the bigger unit, and the rental income will allow the units to be built by persons of lower income who would otherwise be unable to afford the price.

I
CHESTER TOWNSHIP AS A
DEVELOPING MUNICIPALITY

In its Brief filed in the Appellate Division (and subsequently the Supreme Court) in the Caputo litigation, Chester Township conceded that it was a "developing municipality," as that term was used in Mt. Laurel and as it has been defined in other New Jersey cases.*

The concession was limited however, and we repeat here the statement which was made by Chester Township on the appeal:

"Prior to and at the trial Chester maintained it was not a developing municipality. Chester contended it was not developing yet, but would most likely become so fairly shortly. In any event, the Township had acted as if it were a developing community and itself planned for multi-family housing (1974 Master Plan) prior to any court imposed obligations.

In the Caputo trial plaintiffs presented no evidence as to the quantum of the fair share obligation for least cost housing, and Judge Muir made no such finding. The extent of this obligation will be determined in other litigation, most notably that instituted by the Public Advocate against 27 Morris County municipalities, including Chester Township, now pending before Judge Muir (Morris County Fair Housing Council v. Boonton, Docket No. 6001-78 P.W.).

* To the extent that the remedy obligation of developing municipalities may be extended by the Supreme Court to mandate inclusionary devices, Chester reserves the right to resist that obligation and any extension thereof by the Public Advocate.

We believe that the magnitude of the fair share obligation depends, at least in part, on just how "developing" a municipality really is. It would be absurd to make this problem come down to an all or nothing choice. There are clearly degrees and shades of gray. These issues will be decided in other cases.

For the purposes of this proceeding, therefore, and while reserving its day in court as to the quantum and extent of the fair share obligation, Chester Township agrees that it is a developing municipality, as found by Judge Muir." Chester Township Appellate Division Brief, p. 6.

Chester Township maintains that the extent of its obligation to zone for housing is dependent upon the particular planning facts relevant to its land use problems. This is in stark contrast to the position of the Public Advocate, which disregards all planning factors when determining the housing obligation of each municipality. The quantum of fair share obligation, if any, must be determined by a full and complete consideration of all land use planning facts, not just the mechanistic and formulaic fair share model of the plaintiffs.

In the six consolidated zoning cases argued before the Supreme Court, plaintiffs and all defendants appeared to agree that the distinction between "developing" and "non-developing" municipalities is not justified and in fact is counterproductive. The plaintiffs in those cases (including the Public Advocate) contended that the only reason for bringing exclusionary lawsuits at all was to mandate construction of affordable housing. The plaintiffs then argued that this duty follows from the

"inalienable constitutional rights" of New Jersey citizens. The position of plaintiffs before the Supreme Court was that the constitutional right which justified such relief was the right to a housing unit without reference to income. Since no case has heretofore established such a right, the defendant municipalities contended that no affirmative duty to compel affordable housing exists.

But even if such a duty does exist, even the defendants argued that it makes sense to apply it to all communities, and not just to "developing" communities. There is no reason to limit any such duty to developing municipalities; if it is good land use planning to make a developing municipality undertake these affirmative obligations, it is good land use planning to impose the same obligation on all municipalities.

The result of eliminating the developing/non-developing distinction, if implemented by the Supreme Court, may be dramatic. Much of the "fair share allocation" of the Eastern part of the plaintiffs' eight county region will be satisfied in place by the obligation of the municipalities which had heretofore been considered "developed." The methodology which allocates urban housing need to ex-urban areas will fall of its own weight, as it should.

In the case of Chester Township, it is obvious that the very best location for multi-family development is in Chester Borough, the center of all social and commercial activity. Under

the plaintiffs' theory, the Borough has no "fair share" because it is not "developing." Yet it has vacant land, close to shopping, etc. Such a result is absurd.

Chester Township believes that every community, as a matter of sound land use planning, should attempt to balance jobs and housing, not only in the community itself, but throughout the region. This is no more, and no less, than what is required by generally accepted land use planning, and the constitutional dimension of the Mt. Laurel rule is not needed to impose it. Indeed, it is now imposed explicitly by the Municipal Land Use Law itself. That balance will be determined by the traditional planning factors of location, geology, transportation, population, employment, and existing and proposed infrastructure. Accordingly, the developing/non-developing distinction is of little use in deciding these planning questions, and has now become irrelevant in exclusionary zoning cases.

II
CHESTER TOWNSHIP HAS SATISFIED ITS
REGIONAL OBLIGATIONS TO ZONE FOR
ITS FAIR SHARE OF LEAST COST
HOUSING AND ENVIRONMENTAL NEEDS
IN A COMPREHENSIVE LAND USE PLAN

A. Chester Township has Zoned its Land Consistent With Its
Regional Obligation to Protect the Environment.

The courts and the legislature have indicated that both housing development and environmental protection are necessary goals; where these goals conflict with each other, they must be balanced.

The legislature, through passage of the Municipal Land Use Law, has expressed an intent to promote sensible development that simultaneously protects the valuable natural resources of the State. The purpose of the act is, inter alia

e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;

j. 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. 40:55D-2.

The state can achieve both these goals if development is methodical rather than hasty, and comprehensive rather than myopic. Obviously, any one acre of land may not be equally suitable for growth and for conservation. However, the Municipal Land Use Law does not require every parcel in the state to meet every need of general welfare. Where land has natural constraints upon it for

development, or positive and significant environmental attributes, the land is properly used only to promote conservation and to prevent degradation. While the result is to preclude development on that land, the well-being of citizens of the state is still promoted.

The Supreme Court, in its exclusionary zoning decisions, has recognized that environmental constraints may preclude development where their impact is "substantial and very real."

So. Burlington Cty. NAACP v. Towp. of Mt. Laurel, 67 N.J. 151, 187 (1975); Oakwood at Madison, Inc. v. Twp. of Madison, 72 N.J. 481, 545 (1977). See also, N.J. Builders Assoc. v. Dept. of Environmental Protection, 169 N.J. Super. 76 (App. Div. 1979).

In N.J. Builders Assoc., plaintiff Town of Hammonton challenged the validity of the state's designation of the Pine Barrons as a "critical area" on the ground, inter alia, that such a designation prevents the municipality from fulfilling its Mt. Laurel obligation to provide housing. The court rejected this contention stating:

[T]he very fact that the Supreme Court has not invalidated statutes and regulations which control and limit development in the Hackensack Meadowlands, N.J.S.A. 13:17-1, the Wetlands, N.J.S.A. 13:9A-1, and the Coastal Area Zone, N.J.S.A. 13:19-1, suggests that the preservation of water quality and the natural environment must be balanced against the dictates of Mt. Laurel. 169 N.J. Super. at 95.

In Chester Township there are substantial and very real constraints that mitigate against the kind of excessive development the plaintiffs advocate.

1. The 208 Water Quality Management Plan.

The Department of Environmental Protection has, pursuant to the State Water Quality Planning Act, N.J.S.A. 58:11A-5, prepared a Water Quality Management Plan for the Upper Raritan Basin (hereinafter cited as 208 Plan).^{*} Approved by the Governor on March 12, 1980, and the EPA Regional Administration on April 16, 1980, the 208 Plan has legal effect insofar as DEP may not "grant any permit which is in conflict with an approved areawide plan." N.J.S.A. 58:11A-10. As the issuance of a permit for sewerage treatment plants has a direct impact on development, the 208 Plan must be reviewed by courts reviewing a municipality's development plans.

The Upper Raritan 208 Plan has designated Chester Township as an area of important headwaters where development should occur only under stringent standards. Chester Township is in the North Branch of the Raritan Basin. The southern part of Morris County is divided between the North and South Branch

* The "208 Plan" is required as one stage of implementation of the Federal Water Pollution Control Act Amendments of 1972. (33 U.S.C. §1288). This section of the act requires that the State Environmental Protection Agency take an inventory of existing conditions, establish detailed water quality goals and create the governmental management structure needed to implement the program. The 208 Plan is the middle stage in a macro-to micro analysis of water quality goals and water treatment needs: the "303(e) Plan" sets major objectives for each river basin, and the "201 Plan" analyzes feasibility and desirability of individual sewage collection and treatment plants.

drainage basins. Although less than half of Morris County drains into the Raritan Basin, the region is important in that it contains all headwaters of the basin. 208 Plan, May 1979 (Draft), at 1-6. Much of the North and South Branch sub-basins contain trout production and trout maintenance streams. This indicates high water quality throughout much of the planning area. 208 Plan, May 1979 (Draft), at III-4 Figure III-2. Furthermore, the North Branch Raritan River Segment is a major source of potable water supply that will be subject to more intensive development in the next 20 years. Advanced water treatment will therefore be required for dischargers above the proposed confluence reservoir. 208 Plan, May 1979 (Draft), at III-78.

The high quality of the waters in the Upper Raritan Basin and their use as a supply of potable water for a large segment of that state justifies the Plan's objective for the area: protection, preservation, nondegradation. More specifically, the Plan sets forth these objectives:

- Establishment of a water quality management system in which water quality considerations are incorporated within local government decision making processes and ongoing programs.

- Preservation of existing and potential potable surface and groundwater supplies.

- To identify the relative water quality impacts of agricultural and urban related non-point sources of pollution. 208 Plan, May 1979 (Draft) at I-16.

The policy of preservation of valuable headwaters and nondegradation has, and is understood by DEP to have, consequences for future settlement patterns. Concentrated development near existing infrastructures is mandated by the Plan to counter the recent trends toward sprawl and dispersal. Exurban areas without present sewerage infrastructure, like Chester Township, "should remain relatively low [in total population]. . . . Instead, county population growth should be channeled to other more suitable locations within each county." 208 Plan, May 1979 (Draft), at IV-14, (emphasis added).

Significantly, DEP has recognized that a local loss of potentially developable land to a state policy of headwater preservation is not a net loss regionally:

In addition to protecting high quality waters this policy may help protect farms, woodlands and other undeveloped lands. Clean streams are generally found in undeveloped areas; the antidegradation policy will increase the costs of developing these areas. Conversely, this policy, by raising the cost of development in unsewered areas, will tend to encourage development in sewerred areas. Thus, it would encourage more compact growth and development. . . . Owners of property in [unsewered] areas may incur some economic loss in that the value of their land may not be as high as would be if there were no antidegradation policy. Owners of land within sewerred areas may benefit since the displaced demand from antidegradation areas may increase the value of their land. Since there is more than sufficient land in the State to accommodate projected development, this policy will not affect the total amount of development, but rather its location. Consequently, no overall loss of jobs may be expected. Indi-

vidual landowners, however, may gain or lose economically, depending upon the location of their property. These gains and losses may be expected to offset each other. 208 Plan, July 1979 (addendum) at 76-77 (emphasis added).

Chester Township is an unsewered area where the state policy of environmental protection, when balanced against the state policy of appropriate population concentrations, must prevail.

2. The Tri-State Regional Planning Commission Findings on Environmental Constraints.

This judgment that the regional role for Chester Township is principally as a water quality/water supply preservation area is shared by the Tri-State Regional Planning Commission.* When that regional agency analyzed land characteristics of the Tri-State region in preparation for their comprehensive guide plan, they made the following findings with respect to Chester Township:**

* The Tri-State Regional Planning Commission was set up by the states of New Jersey, Connecticut and New York (N.J.S.A. 32:22B-1) to act as an official comprehensive planning agency for the region. (N.J.S.A. 32:22B-2). It is to prepare plans for the development of land, housing, transportation and other public facilities, and is to act as liaison to encourage coordination between governmental and private planning entities. (N.J.S.A. 32:22B-6). All projects for which federal assistance is sought must be consistent with the comprehensive planning of the Commission. (See United States Bureau of the Budget Circular No. A-95 July 24, 1969.) Review by the Planning Commission of federal applications includes review of county plans which must be compatible with Tri-State plans and must be cross-accepted by the constituent agencies.

** The methodology and mapping of the land characteristics is explained in Tri-State's Interim Technical Reports: "Water Supply Watersheds as an Environmental Constraint," September, 1977; "Reformation of Headwater Areas in the Tri-State Region," September 1977; and "Soil Suitability as an Environmental Constraint," August 1977.

- (i) Chester Township is a headwater area;
- (ii) Chester Township has 33-66% of its soil per square mile suitable as cropland or orchards;
- (iii) Chester Township's soil per square mile is from 33 to more than 66% unsuitable for urban densities by reason of slope, excessive rockiness, thin soil cover, poorly drained soil and/or flooding; and
- (iv) Chester Township is a reservoir feeder area within a watershed used for public water supply.

See, Tri-State Regional Planning Commission, Regional Development Guide 1977-2000, March 1978, at 16.

3. The Caputo Decision.

Testimony presented during the trial of Caputo v. Chester, supra, and adopted by the court, supports this recognition that Chester Township's development should only occur after careful consideration of its impact on the watershed.

The Court found that the Township had met its burden on its affirmative environmental defense "in the areas with slopes of greater than 15% and within reasonable distances of the streams of the Upper Raritan River Watershed of the need to protect those streams against pollution from non-point sources that is directly caused by development." Slip Opinion at 94. The Court also found on the basis of the testimony of Dr. Ruth Patrick, "a woman of impressive and unchallenged qualifications in the field of liminology and related areas," Slip Opinion, at 52, that the

streams in Chester Township which form the Upper Raritan Watershed have already undergone some significant degradation due to population growth and will continue to do so unless steps are taken now. See Slip Opinion, at 52-55. The Court went on to state:

Dr. Patrick indicated maintaining open spaces most desirable if water supplies are to be protected, but acknowledged all spaces cannot be kept open since the demand of increasing population for a place to live must be met. She indicated if the development is to take place three acre lots are required to meet septic tank disposal needs in the areas of streams. She suggested the streams in the area are not sufficient in size to handle sewage treatment disposal plants which provides secondary treatment, the most common form of sewage treatment in public systems at present. Slip Opinion, at 55.

* * *

The State Department of Environmental Protection, the Tri-State Regional Planning Commission and Judge Muir have all found therefore, that Chester Township should not be developed intensively, but rather should be preserved as an important water supply area. Such a balanced approach to land use has been implemented in the Zoning Ordinance of Chester Township in accordance with both Mt. Laurel and the Municipal Land Use Law.

B. Chester Township Has Zoned Its Land Consistent With the State Development Guide Plan, the Tri-State Guide Plan, and the Morris County Master Plan.

The Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., enumerates several purposes that the legislature intended to implement through passage of the Act. These include:

e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;

f. To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies.
N.J.S.A. 40:55D-2.

These purposes both guide and restrict Chester Township.

"Appropriate population densities" and "appropriate and efficient expenditure of public funds" suggest that careful consideration must be given to whether any single municipality is the proper location for high density development, from the perspective of the general welfare of the region, or whether it is better developed with some other public need in view.

No single municipality can expect to have the optimum panoramic view on the needs of the state and the region. All municipalities have a natural tendency to zone myopically. In order to counter that tendency, the Municipal Land Use Law mandates that all municipal master plans incorporate county and regional planning considerations. It provides:

The master plan shall include a specific policy statement indicating the relationship of the proposed development of the municipality as developed in the master plan to (1) the master plans of contiguous municipalities, (2) the master plan of the county in which the municipality is located and (3) any comprehensive guide plan pursuant to section 15 of P.L. 1963, c. 47 (C.13:1B-15.52. N.J.S.A. 40:55D-28(d)).

1. The State Development Guide Plan: Limited Growth for Chester.

The State Development Guide Plan, Revised Draft, May 1980 (hereinafter SDGP), prepared by the Department of Community Affairs, is such a comprehensive guide plan, (see SDGP, at preface), and was considered by Chester Township during its master plan process. The SDGP is highly relevant to this litigation because it implements one of the explicit purposes of the Municipal Land Use Law, that is to coordinate public funding with land use policies. N.J.S.A. 40:55D-2(f). The SDGP sets forth its function thus:

Although the plan may have some indirect impact on social, economic and psychological goals, it is essentially an advocacy plan for the preservation and efficient use of the State's physical resources. It functions by recommending where growth-inducing investments should and should not be made so that these resources are used efficiently to achieve fundamental state-wide goals. SDGP, at ii.

The SDGP will have a substantial impact on development in Chester Township because it recommends that growth-inducing investments should not be made in the Township.

Specifically, the SDGP has designated Chester Township as a "limited growth" area from among its categories of "growth", "limited growth," "conservation," and "agricultural." SDGP, at 129, map XXI. This designation was based upon a balancing by the agency of ten planning factors touching on both infrastructure and environment. Specifically, five of the factors were considered indicative of where growth should occur (sewerage, public water supplies, highway and rail facilities, intensive employment concentrations and development concentrations); five were considered indicative of where growth should not or could not occur (agricultural soils, public open space, steep slopes, wetlands, and water supply resources). SDGP, at 28. The designation of Chester Township, therefore, was the considered judgment of the state agency arrived at on the basis of a comprehensive planning review of the needs of the state. The SDGP summarized its findings with respect to "limited growth" areas:

Except for the older centers, most of the development in Limited Growth Areas has occurred at very low densities. To some extent, development has been curbed by natural features such as steep slopes which interfere with easy access and increased construction costs. Mostly, however, these areas have only scattered, low density development because other portions of the State are more accessible to markets and population centers. SDGP at 72.

The SDGP has further reconciled these planning considerations with other state policies such as energy conservation, urban revitalization, and population accommodation. Through the

selective use of growth inducing investments, the SDGP anticipates channelling state funds away from limited growth areas in order to avoid an "energy - inefficient pattern of scattered development." SDGP at 72. In addition, this policy of discouraging significant growth in areas like Chester Township means that needed funds will be freed up for "growth" in urban areas while valuable land in the ex-urban areas is reserved for the future.

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

Under such a comprehensive plan, Chester Township plays an important role as a land bank for future generations. This role has been approved by the DCA with the knowledge that there exists sufficient vacant developable land in the "growth" areas of the state to satisfy the current and the immediate future housing needs of the state.

In its master plan process, Chester Township attempted to coordinate its plan with this comprehensive guide plan. In so doing, Chester Township realized one of the goals of the Municipal Land Use Law, to coordinate public funds and development with

sound land use policies. See N.J.S.A. 40:55D-2(f).

2. The Tri-State Regional Development Guide Plan:
Open-Land Designation for Chester.

Chester Township has not only zoned in accordance with comprehensive planning imperatives on the state level, but has also sought to coordinate its ordinance with regional and county plans. The Tri-State Regional Planning Commission has prepared a comprehensive land use plan for the metropolitan region that considers the same professionally—accepted planning factors as the SDGP. The resulting plan incorporates the goals of urban revitalization, environmental protection, and the coordination of "the location of homes and work places with public utilities, facilities, services and public transportation in order to conserve energy and promote social equity." Tri-State Regional Planning Commission, Regional Development Guide, 1977-2000, March 1978 (hereinafter RDG), at frontpiece. The RDG thus balances regional housing needs with employment, infrastructure and environment.

To implement this balanced approach to the region, the plan places Chester Township in an area with an "open lands" designation. Tri-State describes "open lands" as follows:

Critical lands are inventoried vacant lands where environmental characteristics make it desirable either to prevent development or provide special safeguards if development must occur. . . . Usually, a predominance (70 percent) of critical lands within a given square mile indicates a candidacy for open land designation. . . Other concerns used to derive these designations included:

the present predominance of vacant land; the absence of streets, water and sewer lines, schools and other urban services; and the finding that the remaining developable lands are amply sufficient to accommodate the planned and balanced growth of jobs and housing in the Region and in each subregion for the foreseeable future. RDG, at 15, 17.

Development on land designated as "open" should occur only at "very low densities for incidental residential or nonresidential uses." RDG, at 17. Strict regulation of such uses is mandated to prevent degradation of the natural environment. The Planning Commission concludes:

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. . . . RDG, at 19. (emphasis added).

The RDG designation of "open land" for Chester is consistent with the state's "limited growth" designation. It confirms the SDGP and the planning principles on which it is based because Tri-State considered the same planning factors to arrive at the same result.

Chester Township has zoned in accordance with Tri-State recommendations by placing most of its acreage in 3 or 5 acre zones. Because some growth is appropriate and expected, the Township has provided for increased densities in areas proximate to available or planned infrastructure so that development which

does occur is cost and energy efficient. See RDG, at 19. These areas center around Chester Borough.

3. The Morris County Master Plan of Future Land Use.

The zoning ordinance is also consistent with the land use recommendations of the Morris County Planning Board. In the County Master Plan there is an analysis of factors present in the region of the Chester Township and Chester Borough that push toward development and factors that militate against development. For example, pressure for development was seen as severe, but the area is noted as one of the County's "most important watersheds." See Morris County Master Plan, Future Land Use Element, April 1975, at 73. The Board balanced the various factors and concluded that: "Whatever is done here must be done slowly, carefully, and with consideration for every possible consequence." Id. In justifying this section of its comprehensive plan for the county, the Board also noted:

While large lot zoning predominates in the area, there are sound planning considerations to back up this policy. The area covers the headwaters of three major branches of the Raritan River system, which is used extensively for water supply for a major portion of the State; it is the only part of the County in which there can be any hope of preserving farming as an economic activity over any sizeable area; and it is the least well-served area of the County in terms of transportation facilities. As a complement to its predominantly large-lot zoning, the area has also been notable for its disinclination actively to solicit

industry, although with its generally low population density, there seemed little need to provide a significant number of employment opportunities. Future Land Use Element, at 73-74.

Once again, sound and balanced planning approach of the Morris County Planning Board resulted in a considered judgment that future development in Chester Township should be slow and must protect the watershed and its environmental assets. Chester Township, in its 1978 Land Use Plan, agreed with this decision and planned accordingly. However, this has not led Chester Township to close its doors on development altogether. The municipality agreed, and continues to agree, with the Morris County Planning Board that the question has always been what kind of development should occur, and not whether any development should occur. See Future Land Use Element, at 74; see also, Chester Township, Land Use Element Update, November 1978, at 12. Accordingly, Chester has made adequate provision for cluster development of high densities permitting least cost housing.

*

*

*

As mandated by the Municipal Land Use Law and in compliance with Mt. Laurel, Chester Township's plans for future development are in line with the State Development Guide and the Morris County Master Plan. It has applied and satisfied the "numberless fair share" approach (See Maxi-Trial Brief for

Defendants, pt. II). Chester Township has therefore presumptively satisfied its regional obligation.

The plaintiffs' allocation model ignores Chester Township's status as an area of "Open Lands" (Tri-State); a "low growth" community (State Development Guide Plan); and area of "slow growth" (Morris County Master Plan). The plaintiffs treat an acre of land in Chester Township in exactly the same manner as an acre of land in Newark or Hudson County. The plaintiffs' model is designed to achieve a pre-determined result: geographic dispersing of housing need; it totally ignores the reality of the land and its location, and it must be rejected.

III
THE DOCTRINES OF RES JUDICATA AND
COLLATERAL ESTOPPEL BAR RELITIGATION ON ALL ISSUES DETERMINED IN
THE CAPUTO LITIGATION.

The issue of Chester Township's compliance with the Mt. Laurel and Madison planning imperatives has already been litigated based on a thorough record and a full hearing. Judge Muir issued Specific Findings of Fact and Conclusions of Law. With the exception of his per se ban on five acre zoning (which was stayed by the Appellate Division), all such findings and conclusions bind the Court in this case.

The following are among the specific findings of fact and conclusions of law made by Judge Muir:

1. "Chester Township has no transportation facilities within its boundaries . . . [and] the Chester area is the least well served area in terms of transportation facilities in the County. . . . [Chester Township] is not strategically located for purposes of transportation that would be required of low income groups. It has no bus lines. The available trainstation require automobiles to be reached. Additionally, the railroad lines are expensive . . . It is not the type of transportation required by lower income groups and thus the area is too remove[d] in that sense." Slip Opinion at 9, 81.

2. Based on inter alia, population projections and future employment availability, Chester must be characterized as a low-growth municipality. Id. at 9-12.

3. "Chester Township has no public water system and no sanitary sewerage system." Id. at 40.

4. "The Town is obliged to protect both its underground water supply, i.e. aquifers, and the headwaters of the North Branch of the Raritan River." Id. at 67. "The choice of what kind of development reflects the concern [which] need be given for the protection of water supplies." Id. at 68.

5. "There is potential for adverse affect from development on the Peapack Brook. There are circumstances which dictate against rezoning. . . I find that the municipality has sustained its burden with respect to at least three acre zoning within a reasonable distance of the Peapack Brook." Id. at 101.

6. "The rationale behind locating multiple family housing in the environs of [Chester] Borough is justified." Id.

7. ". . . overriding here . . . is the right of the municipality to select the area for zoning for multiple family dwellings provided there is a reasonable basis therefor. And in that status this Court will not intervene and order rezoning of the property." Id. at 102.

Each of these findings and conclusions binds the parties in this case.

A. The Same Rights Have Been Previously Litigated and Conclusively Determined.

Nine days after Judge Muir's decision and well over one year after Chester Township had commenced revision of its zoning ordinance to comply with Mt. Laurel and Madison, plaintiffs in this case brought suit against the Township. The general grounds for their complaint are virtually identical to those of the Caputos. They allege failure to comply with the demand of Mt. Laurel. Complaint at 7, 11. Specifically, they allege that Chester Township excludes multi-family housing through, inter alia, low density levels, high minimum square footage requirements, minimum floor areas, bedroom restrictions, and large lot sizes. Id. at 11-12. These are the same attacks that were advanced by the Caputos See ante. The very deficiencies attacked in the instant case have already been remedied. The issues the Public Advocate and the Morris County Fair Housing Council would decide here have already been determined. Full compliance with the principles of Mt. Laurel and Madison has been sought and attained. This is the meaning both of Caputo and Chester's 1978 Revised Zoning Ordinance.

Sound principles of judicial economy and procedural fairness demand an end to litigation at some point. The most auspicious point occurs when a case in controversy moots itself through final determination. To further tax both society's resources and a litigant's right to final determination is to

undermine the structure of legitimacy necessary to the maintenance of our system of justice itself.

This is the purpose behind the principles of collateral estoppel and res judicata.

". . . a right, question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit . . . [T]he right, question or facts once so determined must . . . be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

New Jersey Highway Authority v. Renner, 18 N.J. 485, 494 (1955), citing Southern Pacific R.R. Co. v. United States, 168 U.S. 1, 48 (1887). So compelling is the need to insure finality that the parties are concluded

"not only as to every matter which was offered and received to sustain or defeat the claim or demand but as to any other admissible matter which might have been offered for that purpose.

Hudson Transit Corp. v. Antonucci, 137 N.J.L. 704, 707 (E.&A. 1948), quoting Paterson v. Baker, 51 N.J.Eq. 49, 53 (Ch. 1893).

A determination of whether a matter was actually put in issue and determined is based upon a review of the entire record of the case. Robinson Shore Development Co. v. Gallagher, 26 N.J. 59 (1958). And in the case sub judice, such a review reveals conclusively that the Caputo case, the record of which is summarized in the Preliminary Statement, involved a cause of action for violation of Mt. Laurel and Madison obligations.

In the instant case, the allegations are virtually identical with the claims made in Caputo. Plaintiffs accuse Chester Township of "exclud[ing] or severely restrict[ing] the development of multi-family housing." Complaint at 11. Where such development is permitted "density levels . . . minimum square footage requirement, [and] bedroom restrictions preclude the construction of low and moderate income housing . . ." Id. The Caputos made the same accusation. See Amended Complaint at 15, Caputo v. Chester Twp., supra. Plaintiffs accuse Chester Township of zoning to exclude "low and moderate single-family housing by requiring large lot sizes and excessive minimum floor areas and lot frontages." Complaint at 11. Again, the Caputos made the same accusation. See Amended Complaint at 15, 20, Caputo v. Chester Twp., supra.

As outlined in detail above, Judge Muir responded fully to the Caputo's complaint. The record that existed there is the same as will be developed here, and even the parties are virtually the same. Chester Township is, of course, defendant in both suits. More importantly, the Public Advocate appeared as an amicus plaintiff in the appeal of the Caputo suit, and is now one of the plaintiffs in this suit.

Everyone agrees on what has and will be decided. In their Appellate Brief, the Caputos described their Amended Complaint as an effort to show that the 1976 Zoning Ordinance violated Mt. Laurel and Madison. Brief for Plaintiffs-Appellants,

Joseph Caputo and Aldo Caputo at 2, Caputo v. Township of Chester. No. A-813-78 (Superior Court, App. Div. 1979). In their Complaint, the Morris County Fair Housing Council and the Public Advocate ask that the Township be ordered to comply with Mt. Laurel. Complaint at 7. In his opinion, Judge Muir described the Caputo case as a challenge to Chester Township's Zoning Ordinance on Mt. Laurel grounds. Slip Opinion at 2. He said the "predominate issue" in the case was whether the [zoning] ordinance realistically permits the opportunity to provide a fair and reasonable share of the region's need for housing . . . i.e., whether [the ordinance] is not exclusionary." Id. at 70. Chester, for its part, has revised its zoning and defends it as fully compatible with the demands of Mt. Laurel and Madison.

This case will be yet another attempt to assess Chester Township's compliance with Mt. Laurel. As such, it will involve relitigation of issues previously decided based on facts previously heard by parties who, in effect, previously appeared. There comes a time to make an end of litigation. That time is now.

B. Plaintiffs are Collaterally Estopped from Relitigating the Mt. Laurel and Madison issues in this case.

The Morris County Fair Housing Council and the Public Advocate are foreclosed from relitigating the findings of fact and conclusions of law in this new action by New Jersey's current expansive doctrine of collateral estoppel. The expanded doctrine bars relitigation not only by the original parties to the action but also by any parties similarly situated. State v. Gonzalez, 75 N.J. 181 (1977); Brunetti v. Borough of New Milford, 68 N.J. 576 (1975); New Jersey Manufacturers Ins. Co. v. Brower, 161 N.J. Super. 293 (App. Div. 1978); Desmond v. Kramer, 96 N.J. Super. 96 (Cty. Ct. 1967).

The parameters of the expanded doctrine were most recently outlined by the New Jersey Supreme Court in State v. Gonzalez, supra. There, both defendants in a criminal case had brought motions to suppress evidence obtained in an allegedly illegal search. The co-defendant's motion was heard first and granted; Gonzalez' motion was denied. Following conviction, Gonzalez appealed. He argued that the doctrine of collateral estoppel should have applied to suppress the fruits of the search of his person.

The Supreme Court held that collateral estoppel did apply. In so doing, it outlined the requirements of a new more broadly based doctrine. It abandoned the old rule of mutuality or strict identity of interest in favor of a more "flexible approach closely tied to the practicalities of certain types of

litigation and to the details of the prior adjudication. . . "
Id. at 191.

This flexible approach consisted both of a broad test to determine whether collateral estoppel would apply and specific caveats to guard against abuse of an admittedly more liberal doctrine. Under the broad test, collateral estoppel precludes relitigation of issues already determined if (1) the interests represented by the prior parties are sufficiently identical to those in the subsequent action, (2) the prior contest has been fully and fairly litigated, and (3) the judicial fora in which the actions are litigated are similar. Moreover, collateral estoppel can be asserted by or applied against a party regardless of whether that party had been a party of record in the prior action. See e.g., New Jersey Manufacturers Insurance Co. v. Brower, 161 N.J. Super. 293, 298-99 (App. Div. 1978). The identity of the parties is virtually irrelevant. The nature of the issues, and the incentives operating to insure or defeat a vigorous litigation of those issues are the critical factors. Cf. Restatement (Second) of Judgments §68.1 (Tent. Draft No. 4, 1977).

To clarify this broad test, the Gonzalez court contrasted cases in which the conditions for estoppel had and had not been met. In Desmond v. Kramer, 96 N.J. Super. 96 (Cty. Ct. 1967) a plaintiff claimant asserted an estoppel against a defendant bus carrier on the issue of the carrier's liability. The court held for the plaintiff. As the analysis in Gonzalez had

explained, "the issues had been vigorously contested, ultimately being confirmed on appeal." Gonzalez, supra, 75 N.J. at 191. In Reardon v. Allen, 88 N.J. Super. 560 (Law Div. 1965), however, the conditions for estoppel had not been met. In the earlier case, negligence had been found but the claim had been limited to property damage. To have given that finding effect in the later personal injury case would have raised the stakes in the earlier litigation ex post facto. The incentive in each case differed such that the vigor of the prior contest on issues relevant to the later personal injury case could not be assured.

Here, the three major considerations identified by the Gonzalez court bar relitigation of Mt. Laurel and Madison issues. Both plaintiffs here and in Caputo isolate the same alleged defects in the Chester Township Zoning Ordinance. The same court will have heard both cases. Finally, and even more importantly, the vigor of the prior suit cannot be doubted. If anything, the financial reward sought by the Caputo builder plaintiffs gave them even greater incentive to have the court fully litigate their claims against Chester Township. Whatever hopes and aspirations drive the Public Advocate and the Fair Housing Council, one cannot doubt the tangible rewards sought by the Caputos. They had every reason to assert a vigorous challenge to the Chester Township Zoning Ordinance. The conditions for application of the doctrine of collateral estoppel have been fulfilled. None of the caveats barring that application are relevant here.*

* The caveats to application are identified in the Restatement (Second) of Judgments, §88 (Tent. Draft No. 2, 1975), and were

The first condition guards against giving preclusive effect where the determination and the remedy were limited (typically, by statute) to the prior case. Since neither the remedy nor the adjudication of Mt. Laurel and Madison issues was so limited in Caputo, this caveat does not apply. The second condition is equally non-applicable here since the courts and procedural rules governing each trial are virtually identical.

The third condition is designed to guard against parties who could have joined in a prior action, did not do so, and yet wish to claim the preclusive benefit of that earlier decision in a subsequent case. See §88 Comment E. Chester is not such a party.

The fourth condition does not apply here since no other judgment exist inconsistent with the determination in Caputo.

incorporated by footnote in Gonzalez, 75 N.J. at 190, n.5. The Restatement suggests not applying the doctrine in cases where:

- "(1) Treating the issue as conclusively determined would be incompatible with applicable scheme of administering the remedies in the actions involved;
- (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue's being differently determined;
- (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
- (4) The determination relied on as preclusive was itself inconsistent itself with another determination of the same issue;
- (5) The Prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or was based on a compromise verdict

The fifth condition is also not applicable. As the Comment again makes clear, that condition guards against giving preclusive effect to determinations that are products of negotiation and compromise, rather than of adjudication. See Id. Comment G. This condition might limit the preclusive effect of a tort determination, but it does not apply here. The sixth condition is also designed to preclude injustice in tort cases and does not apply here. See Id., Comment H.

Finally, there are no other circumstances which justify restraining Caputo's preclusive effect. The Caputo's spent thousands of dollars, had access to witnesses (expert and otherwise) and fully litigated the Mt. Laurel and Madison obligations of Chester Township.

We recognize our duty to guard against "the potential adverse impact on the public interest or the interests of persons not themselves parties in the initial action." Restatement §68.1e(i). While there may be instances in which those interests compel relitigation of certain issues previously determined, such instances are rare. See Id. Comment at 39. This case does not represent an exception to the general rule.

or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interest of another party thereto;

(7) Other circumstances make it appropriate that the party be permitted to relitigate the issue.

The issues of compliance with Mt. Laurel and Madison have been fully and fairly litigated. The burden on the Township has been and continues to be substantial. The compelling interest now is to put an end to litigation of a matter conclusively determined.

*

*

*

In summary, Chester Township is bound by Judge Muir's prior determination of the invalidity of its ordinance and its status as a developing municipality. The plaintiffs in Caputo litigated those issues in the public interest to a final determination. The Public Advocate, also litigating on behalf of the public interest, is similarly bound by the prior determination. Chester Township has complied with the prior judgment, and all issues determined before should not be relitigated.

C. The Doctrine of Virtual Representation Demands that the Caputo Decision be Considered Res Judicata on the Issue of Compliance with Mt. Laurel and Madison.

Under either an analogy to taxpayer plaintiffs or the explicit rule of virtual representation, 4:26-1, the Caputo plaintiffs litigated their suit as representatives of the public interest. Because they served as virtual representatives and because they meet the specific tests for applying the law of res judicata to suits brought by such representatives, Caputo must be viewed as dispositive of the Mt. Laurel and Madison issues in this case.

The doctrine of virtual representation was first applied to public interest litigation in 1961. In the case of In re Petition of Gardiner, 67 N.J. Super (App. Div. 1961) a taxpayer brought suit against Jersey City alleging municipal non-compliance with state law. The defendants' motion for summary judgment was granted and no appeal was taken. When a second taxpayer attacked the same item on identical grounds, the prior decision was held to be res judicata since the same subject matter had already been fully litigated. As the Court wrote:

The general rule is that in the absence of fraud or collusion a judgment for or against a government body in such an action is binding and conclusive on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest.

In Re Petition of Gardiner, 67 N.J. Super. at 448.*

* In adopting the rule, New Jersey was echoing the sentiments of other jurisdictions. See, e.g., Smith v. City of Los Angeles,

The rationale for this rule was also outlined by the Court. Faced with the prospect of mass uncertainty and the expenditure of substantial public funds, the Court emphasized that

Strong considerations of public policy dictate that after a bona fide and well contested litigation by a taxpayer of a specific question asserted to affect the validity of municipal action in respect of an important and well-known public enterprise, the judgment entered should conclude all other taxpayers, . . .

Id. at 449. Thus, if a taxpayer is suing, in effect, in the public interest, that same interest dictates an end to litigation once the "public" issues have been litigated.

Challenges to municipal zoning ordinances exhibit the same essential characteristics of taxpayer actions. In a taxpayer action, litigants are permitted to attack local enactments which apply to all other citizens in that district. No proof of special injury is required. Van Itallie v. Franklin Lakes, 28 N.J. 258, 276 (1958). Similarly, in a Mt. Laurel suit the entire zoning ordinance is subject to review. While the interests of the individual litigant[s] bringing the suit no doubt insure that "sufficient stake and real adverseness" necessary for standing,

190 Cal. App. 2d. 112, 11 Cal. Rptr. 898 (Ct. App. 1961); Johnson v. City of Alma, 222 Ga. 272, 149 S.E.2d. 66 (1966); Greenberg v. City of Chicago, 256 Ill. 213, 99 N.E. 1039 (Sup. Ct. 1912); VanZandt v. Braxton, 149 Miss. 461, 115 So. 557 (1928); Siercle v. Reynolds, 4845 S.W.2d. 675 (Mo. Ct. App. 1972); Murphy v. Erie County, 34, App. Div. 295, 310 N.Y.S.2d. 959 (1970). See 74 Am.Jur.2d. 562. In fact, virtual representation as a bar to relitigation of judgments in taxpayer suits is the generally accepted legal doctrine. See 74 Am.Jur. 2d. 562.

Crescent Park Tenants Association v. Realty Eq. Corp. of N.Y., 58 N.J. 98 (1971), neither the scope of the claim nor the nature of the remedy is limited to those particular interests. The inherently broad-based nature of the initial complaint demands an equally broad-based res judicata effect.

As persuasive as the analogy to the taxpayer action is, no New Jersey Court has reached the specific question of whether virtual representation bars relitigation of Mt. Laurel issues. Nevertheless, the New Jersey Civil Practice Rules provide strong evidence that Mt. Laurel-like cases are among those cases demanding application of the rule. In the Comment to the virtual representation rule, 4:26-1, the cases cited involving public interest issues include challenges to actions by municipalities. Among those cases is Urban League of Essex County v. Twp. of Mahwah, 147 N.J. Super. (App. Div. 1977), a suit in which an association representing disadvantaged citizens and municipal employees was found to have standing to challenge the township's zoning ordinance on Mt. Laurel grounds.

The Comment reinforces what the case law on taxpayer actions had made clear. A liberal notion of standing demands an equally liberal notion of res judicata effect. To find that a litigant is capable of raising issues inherently germane to the public interest demands a later finding that those public interest issues have been adequately and therefore conclusively determined.

The Caputo builder plaintiffs challenged Chester Township's ordinance on Mt. Laurel grounds. They attacked the entire zoning ordinance, not merely that portion applicable to them. In so doing, they set up a cause of action based not on harm to the individual interests of the plaintiff per se. Rather, their cause alleged harm to the general public welfare, a harm born of the ordinance's alleged failure to comply with the general welfare mandates of Mt. Laurel and Madison.

As virtual representatives, the Caputos satisfied the requirements necessary for a finding of res judicata. First, both the Caputos and plaintiffs here have sufficiently similar interests with respect to the issues which would be barred. Second, the parties in both cases are trying to effect the same result.

We spoke of sufficiency of interest earlier. See ante. The incentives which operated in the Caputo litigation insured an adequate representation of the Mt. Laurel issues. The plaintiff builders would have reaped substantial financial reward had they "won" their lawsuit. Those potential rewards provided the occasion for a complete trial on all issues relevant to compliance with Mt. Laurel. Judge Muir's comprehensive decision only reflects the comprehensive nature of the litigation itself.

It is equally clear that all plaintiffs in these cases desire the same outcome. They want the Township to eliminate all unnecessary cost exactions from their zoning ordinances and they desire increased numbers of low and moderate housing units in Chester Township. To get these results, all plaintiffs must

offer similar proofs by attacking permitted unit numbers, densities and locations.

On the issues of compliance with Mt. Laurel and Madison, all plaintiffs have the same interests and desire the same outcomes. Important public interests are served by applying the doctrine of virtual representation; the relitigation of Mt. Laurel and Madison issues in this case should be barred.

IV
IF NEITHER RES JUDICATA NOR
COLLATERAL ESTOPPEL APPLIES,
CAPUTO SHOULD BE STARE
DECISIS FOR THIS COURT.

Even if the above arguments are rejected, we would argue in the alternative that Judge Muir's decision in Caputo be accorded compelling precedential value in this case. As analyzed in detail above, the Township has more than complied with Judge Muir's extensive guidelines. Indeed, a revised zoning ordinance and an updated Land Use Element has enabled the Township to exceed the demands of Mt. Laurel and Madison. Thus, to undermine, ignore or abandon the Caputo decision would be contrary both to the best interests of the public and the litigants in this case.

Stare decisis speaks to these interests. Unlike the doctrines of either res judicata or collateral estoppel, stare decisis is not an argument which can be advanced before evidence is heard. Rather, it is a tool used by the judge to facilitate decision making once the testimony and evidence in a case has been presented. As a tool, it helps to conserve judicial energy, foster consistency in the law, and invite reliance on legal opinion. Operating as the branch of government which, as Hamilton accurately observed, possesses "neither force nor will,"* stare decisis is absolutely essential to the continual persuasiveness and legitimacy of judicial opinion.

* Federalist No. 78 (C. Rossiter, ed. 1961)

In New Jersey, the old Court of Errors and Appeals long ago reminded the bar of the central place of stare decisis in the American judicial system. Quoting respected authority the Court observed:

As was said by Chancellor Kent, in discussing the doctrine of stare decisis, when a decision upon a point of law has been made upon solemn argument, and upon mature deliberation, the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions by it. When a rule has once been deliberately adopted and declared it ought never to be disturbed by the same court, except for very urgent reasons and upon a clear manifestation of error.

Hudson County Freeholders, v. The Jersey City, Hoboken and Paterson St. R. Co., 85 N.J.L. 179, (E.&A. 1913) quoting 1 Kent Com. 475 (1889).

The stare decisis effect of Caputo extends beyond the original parties to that case and affects all parties who challenge the zoning laws of Chester Township on similar grounds. Since plaintiffs in this case issue the same challenge on the same grounds argued by the Caputos, they are bound by the precedent of Caputo.

A. Plaintiffs Challenge the Chester Township Zoning Ordinance on the Same Grounds Urged in the Caputo suit.

The contours of the doctrine of stare decisis were shaped long ago. If the same, or substantially the same, questions are involved in a later case, a prior decision has stare decisis effect. 1 Kent Com. 473 (1889), Konrad v. Anheuser-Busch, Inc., 48 N.J. Super. 386, 388 (Law. Div. 1958), Black, Law of Judicial Precedent, 37 (1912). That effect is based on the similarity of facts, arguments and issues in the two cases. Privity or identify of parties is irrelevant. Street v. Smith, 5 N.J. Misc. 5 (Sup. Ct. 1926)

Both the irrelevance of party identity and the strength of stare decisis has been emphasized by New Jersey's Courts. In Crossley v. Brisco, 117 N.J.L. 474 (E.&A. 1937), the plaintiff had sued three corporate officers, seeking to hold them personally liable for the breach of a lease agreement. Two of the officers had been sued before, Crossley v. Binns, 115 N.J.L. 160 (E.&A. 1935), and had been found not liable. The Court held the earlier suit stare decisis on the question of the third officer's liability.

"In seeking again to hold the individual defendants liable on the agreement it would appear as though appellants are attempting to re-argue a point which is already res judicata as to two of the defendants here. . . One had not been sued in the previous suit and consequently was not a party thereto. His interest, however, is similar to that of the individuals who were parties and if not protected by the doctrine of res judicata he does come within the doctrine of stare decisis." 117 N.J.L. at 475-476.

A more general outline of the relevance of stare decisis was provided in the later case of N.J. Home Builder's Assoc. v. Div. of Civil Rights, 81 N.J. Super. 243 (Ch. 1963). There, plaintiff sued for a declaratory judgment that the Law Against Discrimination was an invidious and discriminatory exercise of legislative power. One of plaintiff's specific claims was that the law violated the 14th Amendment's Equal Protection Clause. The Court disposed of the claim merely by reference to prior decisional law.

"The Levitt v. Division Against Discrimination, 31 N.J. 514 (1960), appeal dismissed for lack of a federal question, 363 U.S. 418 (1960); and Jones v. Haridor Realty Corp., 37 N.J. 384 (1962) are dispositive of any challenge to the Law Against Discrimination on the basis of a violation of Fourteenth Amendment rights, as the law applies to publicly-assisted housing. The mere fact that the complainant in the instant case is a builder and real estate broker, rather than a housing developer, is not a basis for further challenge on the same grounds raised in the prior two cases." 81 N.J. Super. at 256.

The Court then proceeded to deal with the remaining claims which Levitt and Jones had not encompassed. On the 14th Amendment issue, however, those cases were stare decisis.

Caputo decided the issues and arguments challenging Chester Township's zoning scheme on Mt. Laurel and Madison grounds and is stare decisis as to the claims made in this present case.

B. Public Policy Requires this Court follow Caputo.

The history of the law is the history of man's struggle to limit discretionary authority and arbitrary rulings. The success of that struggle depends upon there being consistency in the law, not confusion. To foster that consistency is to foster that respect for the law from which legitimacy is borne. As Professor Cox has explained

Court decrees draw no authority from the participation of the people. Their power to commend consent depends upon more than habit or even the deserved prestige of the justices. It comes, to an important degree, from the continuing force of the rule of law - from the belief that the major influence in judicial decisions is not fate but principles which bind the judges as well as the litigants and which apply consistently among all men today, and also yesterday and tomorrow. I cannot prove these points, but they are the faith to which we lawyers are dedicated. A. Cox, The Warren Court: Constitutional Decision As an Instrument of Reform (1968), pp. 48-49.

In the mundane day-to-day world, and even in the repetition of cases and disputes that is our legal world, we tend to lose sight of the benefits accrued by the broad principles we espouse. Unless members of society feel they can rely on a judicial decision, they will flood the courts with suits on similar matters. If we allow the lawsuit to become a devalued march to the Courthouse, a market wherein one may purchase his "law result" if he is only willing to pay the price of waiting in line, then we will lose precisely what has been gained -- a method

of peaceful dispute resolution whose outcomes are followed by almost all.

These policy goals of stare decisis - consistency and respect for law, deterrence of excessive litigation and certainty and stability of legal relations - can be achieved by according to Caputo v. Chester the respect of precedent that it deserves. If this court disregards the precedent of Caputo, how many more times will defendant be sued? How many more times will a court be urged to scrap Chester's entire zoning structure? How many more times will New Jersey's courts be burdened with extensive litigation involving days of testimony which has all been heard before, supporting issues and arguments which have all been urged before?

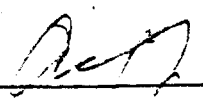
Caputo, as stare decisis, gives the developers, residents and leaders of Chester Township, as well as those who would move to Chester, something upon which they can rely. This Court ought not frustrate that reliance. Public policy requires as much and should demand no less.

CONCLUSION

For the foregoing reasons, the plaintiffs' Complaint as against Chester Township should be dismissed.

Respectfully submitted,
McCarter & English, Esqs.
Attorneys for Defendant,
Chester Township

By: _____


Alfred L. Ferguson
A Member of the Firm

DATED: December / , 1980