

CA

Chusler

Oct. 18, 1977

Stenographic Transcript
of proceedings

- John Rahes cross exam
- P David Zimmerman direct
~~exam~~ exam

pgs. 132

ML0006848

A-813-78A 150 SEP 1979

no copy

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NO. L-42857-74
A-0813-78

JOSEPH CAPUTO and
ALDO CAPUTO,

FILED
Plaintiffs,

STENOGRAPHIC TRANSCRIPT
OF
PROCEEDINGS
REC'D.
APPELLATE DIVISION

vs.

JAN 14 1980

CHESTER TOWNSHIP,

Stephen Wilson
Defendant. CLERK

FEB 6 1979

Morris County Courthouse
Morristown, New Jersey
Tuesday, October 18, 1977

B E F O R E :

ROBERT MUIR, JR., Assignment Judge, Superior
Court

TRANSCRIPT ORDERED BY:

PHILIP LINDEMAN, II, ESQUIRE

FILED
APPELLATE DIVISION

FEB 6 1979

A P P E A R A N C E S :

MESSRS. HELLRING, LINDEMAN, LANDAU & SIEGAL
BY: PHILIP LINDEMAN, II, ESQUIRE
For the Plaintiffs.

MESSRS. McCARTER & ENGLISH
BY: ALFRED L. FERGUSON, ESQUIRE
For the Defendant.

MESSRS. HILLAS & GOODRUM
BY: JAMES HILLAS, ESQUIRE
For the Defendant.

EARL C. CARLSON, C. S. R.
Official Court Reporter
Morris County Courthouse
Morristown, New Jersey 07960
285-6249

ECM

PENGAD CO., BAYONNE, N.J. 07002 FORM 2046

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>
JOHN RAKOS		2
P. DAVID ZIMMERMAN	90	

E X H I B I T S

<u>IN EVIDENCE</u>		<u>PAGE</u>
P-10	ORDINANCE 76-12	43
P-11	INTERIM ORDER	43
P-12A	COMPREHENSIVE PLAN AND MAPS	48
P-12B		
P-14	'64 ZONING ORDINANCE WITH MAP	48
P-15	1960 MASTER PLAN	49
P-12C	MINUTES	56
P-12D-1	MAPS	57
P-12D-2		
P-13		58

/hl

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: All right.

JOHN RAKOS, previously sworn.

CROSS-EXAMINATION BY MR. FERGUSON: (CONTINUED)

Q Mr. Rakos, yesterday you were talking about the gross and net densities of the present zone under 76-12, the August, 1976, zoning ordinance. I think you had 5.3 acres per unit for gross, and something just under 5 acres per net?

A Per net, yes.

Q And then you said that this was due to the inefficiency of the land due to its physical limitations.

Can you explain what you mean by inefficiency of the land?

A Well, the inefficiency of the land for the purpose of development is due to the particular geometry of the tract. The grades at some places are unsuitable for the most desirable kind of development and the fact that some of the land will be devoted to a water retention basin is always diminishes its deficiency.

Q And the fact that the Peapack Brook bisects the property and that the land immediately adjacent to the Peapack Brook is either water or flood plain, would that also decrease the efficiency?

MR. LINDEMAN: I object, your Honor. There has

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2046

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

been no testimony in this case about any flood plain. Reference as to whether it is or isn't simply is not in the case here. I know of no such testimony.

MR. FERGUSON: Well, there will be.

THE COURT: Wait a minute. Wait a minute. Somebody made a reference. I don't know. Mr. Rakos, the expert, may have made a reference to the flood plain of the brook. Very definitely.

MR. LINDEMAN: Well, it is my recollection --

THE COURT: My recollection is that he made reference to the flood plain of the brook. He talked about what was in the flood plain of the brook.

MR. FERGUSON: The alluvial soil, I believe.

THE COURT: Yes, talking about the soils.

MR. LINDEMAN: I can only say it is not my recollection.

THE COURT: Okay.

MR. FERGUSON: Will you read the question back?

(Last question read by the reporter.)

THE COURT: I will allow it.

Q Go ahead, answer it. I think the Judge indicated.

A I have no knowledge of the danger of flooding on this property. I have not, no preventive measures as a result of anticipated flooding was brought ever to my attention.

Q I understand that. I think you are missing the

1 thrust of the question.

2 The inefficiency of the land is increased as it
3 were because the land which would otherwise be perhaps
4 be developable is bisected by a brook running through it.

5 A Well, the brook itself, of course, does diminish the
6 efficiency of the land. It would be further diminished if
7 certain portions of the tract were subjected to flooding
8 of which I am unaware.

9 In fact, I was advised that there is no anticipated
10 flooding.

11 MR. FERGUSON: Objection as to what the
12 witness was advised by anyone.

13 Q I understand there is, you haven't gotten
14 any input to give us about the flood plain or flooding?

15 A Correct.

16 Q What I am saying is, if there is any, and I'm
17 not saying that there is, that would further decrease it?

18 A If there is, yes.

19 Q You said that the Chester-Gladstone Road
20 was one of the few arterial roads hard-surfaced with
21 access to 206 and Chester Township.

22 Are there any other roads which fit that description?

23 A I think there are. I have, some time ago I have
24 looked at the Master Plan of Chester Township and I have
25 just picked out what few roads there were that could be

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

classified similarly to this road. And I know that that was one of only a few with the same attributes.

In fact, neither one of them have the same kind, namely, the fact that it is within such easy access to Route 206 as well as the railroad station.

THE COURT: Hold it just a second.

Q I don't think I understand. You referred in your answer to neither of them.

A Neither of the other hard-surfaced roads have all of those attributes that Chester-Gladstone Road does in terms of access to Route 206 as well as the railroad station in Peapack.

Q When you say neither, I assume that there are two?

A I don't know how many there are. I have taken a look at the street inventory, street plan of the Master Plan and I evaluated briefly what kind of streets there are.

Q Can you tell us what other roads are arterial and have access to 206?

A I could not name another street by name just rather than 206 and the ones that abut this property. And generally as I have said previously, the examination and evaluation of township-wide characteristics were not in the province of my assignment.

Q All right. Are you aware that the Department of

1 Transportation has announced a tentative plan to relocate the
2 Peapack-Gladstone Station?

3 A No, I know that the Department of Transportation
4 is involved with improvements to that entire line.

5 I don't know what specifically they intend to do with
6 the Peapack-Gladstone Station.

7 Q If the Department of Transportation had plans
8 to relocate the station from the Chester-Gladstone Road
9 to a location just off Route 206, would that change your
10 opinion about the suitability of the Chester-Gladstone Road
11 and this development as to its location?

12 A I would have to know just exactly what, how that will
13 affect access to that new location of the railroad station
14 and it may be, it may be improved or not by its new location.
15 I don't know.

16 Q Yesterday you were testifying about the fact
17 that this development would not be inconsistent with
18 surrounding land use largely because there is no surrounding
19 land use.

20 A There is no, no character, no discernible character
21 of development.

22 Q But --

23 A But there is development in the area.

24 Q But it is sparse?

25 A Yes.

1 Q What there is is single-family residential?

2 A With the exception of --

3 Q The nursing home?

4 A Of the nursing home.

5 Q The character of the land use is ascertainable
6 though?

7 A That's what I was trying to get across, that in terms
8 of determining a character.

9 Q Isn't --

10 A I would rather say there is no character.

11 Q It is largely undeveloped?

12 A It is largely undeveloped.

13 Q The state of being undeveloped is a character of
14 land use, is it not?

15 A No, because it isn't being used, it is vacant land.
16 It is largely -- land use implies that the land is being
17 used for something.

18 Q If land is being used as a watershed to collect
19 water and has no structures built on it at all, is it your
20 opinion that that land is being used or not used as that
21 term is used by professional planners?

22 A Well, I would, I think it is probably, would be
23 termed as not being used. It's vacant land.

24 Q So unless it is being used for a structured
25 purpose it is not being used, or a purpose that must utilize

1 structures built on the land?

2 A In most instances. Maybe with some exceptions that
3 don't come to mind, but I would not say that exclusively.
4 But in most instances the use of land involves some kind
5 of development.

6 Q Are you familiar with the Black River Preserve,
7 publicly-owned land in the northern part of the Township?

8 A No.

9 Q Assume then for this question that the Black
10 River Preserve is a large band of publicly-owned land
11 surrounding both sides of the Black River and is devoted
12 to no use whatsoever except preserving the environment
13 of that area. Is that a land use within the terminology
14 that you as a planner would use?

15 A No. No, I would add to the term development activity.
16 If there is development or activity on a piece of land,
17 I would, I could be, I would be able to determine the use
18 of the land. If there is no activity or development
19 associated with it, I would call the land undeveloped.

20 Q By activity you mean human activity?

21 A Well, farming or recreation.

22 Q But human beings have to be on it as opposed to
23 deer, wild life, just trout and animals?

24 A Yes.

25 Q Yesterday you said that a spray system needs an

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

economic base to pay for the spray system?

A Yes.

Q In reference to this particular project?

A That's correct.

Q Have you made any calculations as to the cost of the spray system that will be installed on this tract to handle 856 units?

A I have not. I was relying on experience, on knowledge about previous projects and I know that several hundred thousands of dollars, it would cost hundreds of thousands of dollars to develop such a system and 51 homes could not possibly justify such a capital outlay.

Q Based on your experience and general knowledge, if you double the number of units, would you have to double the cost of the spray system?

A No, not usually you wouldn't.

Q The incremental cost is much less?

A It is diminishing when you, when you increased the size, the per gallon capacity will diminish. The cost for developing the per gallon capacity will diminish.

Q Is there any limit on what you just said or is there an upper limit as to which that does not hold true? If we have ten million people as the incremental cost going to exceed?

A I would hesitate to answer that question. I am just

1 not an expert in water treatment facilities.

2 Q But as a general rule it would hold true?

3 A As a general rule within the practical limits of
4 what we are talking about, it would hold true.

5 Q Okay. Were you told or do you know what the
6 capacity of that spray system will be?

7 A Only in terms that it would be adequate to handle the
8 demands that would be generated by the development.

9 Q Would it be adequate to handle more than this
10 development?

11 A I don't think that was one contemplated because there
12 is a possibility for doing that, but I don't know.

13 Q Weren't you told that the number of units
14 and the amount of land you're allowed to use for units
15 was decreased to get just the amount of land necessary to
16 adequately fund the spray field?

17 A For this --

18 Q For the project.

19 A As you see, this scheme here, yes, that holds true.

20 Q So, in other words, the number of units is
21 just balanced to the amount of acreage in the spray field?

22 A Correct, on this scheme.

23 Q So if that's true, there is no excess capacity
24 for the spray system?

25 A I don't think there is.

1 Q Are you familiar with the concept of least
2 cost housing as enunciated in the Madison Township case by
3 the Supreme Court?

4 A Yes.

5 Q Wouldn't it be cheaper to build more developments
6 and more units if you could keep the cost of sewer improve-
7 ments as low as possible?

8 A Yes. Generally speaking the lower the associated
9 improvement costs, the lower the per unit, the per dwelling
10 unit cost.

11 Q Wouldn't it be better in terms of keeping the
12 over-all cost of housing down to find a location where you
13 could have one large septic sanitary sewer disposal system,
14 be it spray or package plant or whatever which could service
15 a greater number of units than it would be to have many
16 units with no excess capacity scattered around the Township
17 or the County?

18 A Well, in the abstract, that is probably true. However,
19 inasmuch as this tract had all the attributes that I was
20 referring to yesterday in addition to the fact that the
21 owner of the land is ready, willing and able right now to
22 undertake this development, I think that negates the
23 possibility that the hypothesis that some other place
24 somewhere else, some other piece of property may be equally
25 suitable or perhaps better suitable for this purpose.

1 Q But as a general rule it is true that you could
2 cut down the cost of the housing if you could find a
3 place to build more units and have a bigger treatment
4 system?

5 A If that was the only objective, that would possibly
6 be true.

7 As I said, as a hypothesis, but in addition to the
8 facts that --

9 Q All right.

10 A I am, I'd just like to point out --

11 Q Go ahead.

12 A That an oversized development does also have some
13 liabilities which --

14 Q You're saying that there are certain dis-
15 advantages when you get too big?

16 A That's correct.

17 Q And there are other factors that a planner must
18 consider?

19 A Yes.

20 Q I don't mean to say that there aren't such
21 factors. I am just saying, isolating this one factor.

22 A Correct.

23 Q Then it would be true?

24 A Then it would be true and then I would agree with you.

25 Q Do you have any opinion as to the number of

1 units that it would take to support in Chester Township,
2 a municipally owned, financed and run sewer disposal system?
3 Have you investigated that at all?

4 A I have not investigated that at all.

5 Q Would that generally be within the scope of
6 the investigation of a planner?

7 A Yes, it could be.

8 Q You have to rely on the advice of other experts,
9 but that would be within the scope of your field to inves-
10 tigate it?

11 A Yes, it would be based on experience, advice,
12 consultation with other professionals.

13 Q Now, just yesterday you talked about the fact
14 that the applicant had been a long-time resident and might
15 not abandon the project. And today you just stated that
16 the applicant is ready, willing and able as being an
17 important factor.

18 Would you tell us why you are focusing on the
19 applicant and why that is important?

20 I don't quite understand it.

21 A Well, it is a reasonable assumption that when the
22 developer resides on this piece, on the piece of property
23 he develops, he would have in addition to the pride that
24 he might have in the development, he would not want to
25 live amongst housing units that are undesirable from an

1 aesthetic or other points of view.

2 Q Are you suggesting that then it is an
3 appropriate criteria for this Court or a planning Board
4 or a Zoning Board or whatever authority passes on the
5 appropriateness of a project to look at the character of
6 the applicant as to his desire to live with the aesthetically
7 pleasing, functioning structures?

8 A Yes. Yes, it is very legitimate for the municipality
9 to seek a development that is aesthetically pleasing,
10 that will not depreciate land surrounding any particular
11 piece of land. And it is also reasonable to assume that
12 people would not want to live surrounded by development
13 that would be for any reason undesirable, be it aesthetic
14 or otherwise.

15 Q Could a municipality require that the developer
16 live on the project?

17 A No, I don't think they could require that.

18 Q What investigation of Mr. Caputo's background
19 or resources did you make prior to today?

20 A None.

21 Q None?

22 A Are you talking about financial resources?

23 Q Well, that is the first thing.

24 A Well, I haven't made any investigation other than
25 conversation with him in which he indicated that he wanted

1 to undertake this development himself. And when he
2 instructed me to develop the scheme for the development,
3 he told me that his house will remain just where it is
4 and he will continue to reside in it.

5 Q Is it not financial responsibility, resources
6 an important aspect of the ability of a developer to
7 carry through on a project and see it through to the end?

8 A Very important.

9 Q Did you make any independent investigation of
10 his resources?

11 A No, I have not.

12 Q Did Mr. Caputo tell you about the tract of land
13 he has in Sussex County and the lawsuit that is pending
14 with respect to that property and the proposed development?

15 A Yes, I know about it, yes.

16 Q Are you also engaged to be an expert with respect
17 to that project?

18 A I was only engaged to prepare a development scheme for
19 that parcel of land.

20 Q How big is that development in terms of acres?

21 A I am sorry, I just don't recall now. It was several
22 years ago when we did that.

23 Q Is it bigger, larger than the site in Chester
24 Township?

25 A I think it is slightly smaller.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q How many units?

A I don't recall.

Q Approximately the same number?

A It's over a hundred and under a thousand.

I just don't remember what the number is.

Q Does the -- what County, what Township is that other project in?

A It is in Washington Township, Warren County.

Q Warren County. Is spray disposal proposed on that site?

A Yes.

MR. LINDEMAN: Hold it. I object, your Honor. I did not object initially at this because I really thought it was going to be short. But I think to go into this thing goes far afield and it is irrelevant.

THE COURT: I would agree. Sustain the objection.

MR. FERGUSON: He just stated, the witness has already testified about the applicant's willingness to carry it through and I think one thing that is relevant to that how many projects the applicant has going.

THE COURT: Okay. You made your point. I think you have gone far enough on the point.

1 Q Referring to your first map, P-7. The white
2 is five-acre or over in terms of zoning.

3 A Minimum lot area required.

4 Q Minimum lot area.

5 Does that include the part of Tewksbury Township
6 here that's within the circle?

7 A Yes.

8 Q And it includes Far Hills and Bernardsville
9 and Mendham and Mendham Township in white within the circle?

10 A Correct.

11 Q Okay. The yellow is one to four acres?

12 A Yes. One to up to --

13 Q 4.99?

14 A Yes.

15 Q How, what kind of different zones are included
16 in the one to 4.99? I mean, is it mostly 2, is it 3,
17 is it 4? Do you have any idea in your notes or can you
18 recall?

19 A No, no. There are numbers required. This is a
20 generalized zoning inventory and in order to minimize the
21 number of categories that I had to deal with, I have
22 created one category out of several zoning requirements.
23 And the yellow depicts any kind of zoning requirement
24 where minimum lot sizes range from one to five acres.

25 Q Is it true that the two and five-acre zoning

1 that presently exists with respect to Mr. Caputo's
2 property is constant with the zoning of similar land in
3 the municipalities immediately adjacent to the southern half
4 of Chester Township?

5 A I don't know what you mean by consistent.

6 Q Well, Washington Township is approximately two
7 to three miles to the west has 1 to 4.99 acre zoning
8 immediately adjacent to the five-acre zoning in --
9 excuse me -- five-acre zoning in Chester Township.

10 A Well, depending on whether that 1 to 2 is one acre
11 or four-acre, it could or could not be consistent.

12 Q Are you telling me that you can't tell from
13 that map whether the zoning on Mr. Caputo's property is
14 consistent with the zoning of the land immediately adjacent
15 to it in other municipalities, immediately adjacent?

16 A I don't know what reference you are talking about
17 consistency.

18 Q Whether the zoning, the zoning is similar.

19 A In terms of lot size?

20 Q In terms of lot size.

21 A Lot area? When you mean that it is generally larger
22 lots, zoning, yes, it is consistent. Is that what -- if
23 that is what you mean.

24 Q That is the thrust of my question, yes.

25 A Yes, that they're all generally large lot

1 requirements around it except for maybe 10 percent of the
2 land within that 50,000 acre area.

3 Q And that includes the Townships of Washington,
4 Tewksbury, Bedminster, Peapack-Gladstone, Far Hills,
5 Bernardsville, Mendham and Mendham Township?

6 A Portions of it. Portions of all those ten
7 municipalities.

8 Q That are shown on your map?

9 A Correct.

10 Q All right. You stated several times that you
11 subscribed to large lot zoning or low density zoning
12 where justified by physical conditions, but that where the
13 physical conditions could be overcome by some other
14 methods because of your zoning philosophy you would change
15 and not have low density zoning.

16 Is that an accurate paraphrase of what you said?

17 A Yes.

18 Q Do you have an opinion about the physical
19 conditions of Chester Township in the southern portion
20 surrounding in a general manner the Caputo property
21 as to whether they require low density zoning?

22 A Well, I can only reflect on the physical conditions
23 as they relate to the site. And as they relate to the site
24 I have found through the studies made primarily by
25 Jaman Engineering that large lot zoning is not justified

1 because the potential adverse environmental impacts
2 can be overcome.

3 Q Largely by the spray field?

4 A By the spray field being one of those things.

5 Q And what are the others?

6 A The water retention facilities.

7 Q And what else?

8 A The clustering of the development and the preservation
9 of vegetation and the, and leaving the area most susceptible
10 to erosion undeveloped.

11 Q Yesterday I asked you if you were aware of
12 whether the pipes had to be buried and I think you told
13 me you didn't know. That's the pipes for the spray field.

14 A No, I don't know just exactly how the spray field
15 is constructed.

16 Q Were you aware that Jaman Engineering Associates
17 has or will say that if necessary, they will construct
18 berms along the steep slopes to prevent surface water
19 rundown to the Peapack Brook?

20 A No, I have no idea. As I say, I am just not
21 familiar with the construction details of the spray
22 field.

23 Q Are you aware that Jaman Engineering proposes
24 to relocate a stream that now runs down to the Peapack
25 Brook and is called an unnamed tributary of the Peapack

1 Brook and is located in the northeast corner of the property?

2 A No, I'm not.

3 Q At one point I heard 6.3 acres for the pond
4 or retention facility and another time I heard 16.3.

5 Am I confused or would you tell me which is correct?

6 A No, you are not confused. The 6.3 acre retention
7 facility was considered for the development plan, for the
8 development scheme that included the detached single-family
9 homes on individual lots.

10 Q Okay.

11 Referring to P-8 and 9, is that what you are referring
12 to?

13 A Yes.

14 Q That is 16.3?

15 A That is 6.3.

16 Q 6.3?

17 A And this scheme includes a pond with 16 acres surface.

18 Q Why the difference?

19 A There is engineering requirements that were just
20 furnished to me by Jaman Engineering.

21 Q Were you told that it was necessary to have an
22 increased acreage because of the clustered townhouse units
23 on the west side of the bank for drainage?

24 A I know there was a reason for it. If you, if you
25 want to know whether the increased runoff is the result of

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2046

1 that, I could not say.

2 There is undoubtedly, if you are referring to the
3 potential runoff?

4 Q I'm not sure what. As far as I know and from
5 all I know is what you have told me.

6 The reason for the pond is to take care of the storm
7 drainage problems and the drainage and storm water runoff?

8 A That was at least one of its functions.

9 Q Yes.

10 Were you told there had to be 16.3 acres or thereabouts?

11 A Yes.

12 Q Just trying to get the reason from increasing
13 it from 6 to 16.

14 A Well, I'm not familiar with all of the reasons.
15 The input for that area, the surface area of the pond in
16 both instances was a Jaman Engineering result of their
17 calculations.

18 Q On P-9, the sketch was that a number of lots
19 plus or minus two or three -- 51?

20 A Well, the number that is shown there is 51. And
21 as I said, I am very confident that is very close to the
22 actual number that would result in a more precise layout.
23 But, you know, it is not inconceivable that it could be
24 slightly off.

25 Q Okay. I just never got the number yesterday.

1 I wanted to make sure the record had it.

2 At your deposition I asked you if you knew what
3 PL 92,500 was or if you had ever read it.

4 I think you answered no?

5 A That's still my answer.

6 Q Is that still your answer?

7 A Yes.

8 THE COURT: What was the number of that PL?

9 MR. FERGUSON: 92,500.

10 Q I would ask you the same question with respect
11 to the fresh water pollution control act amendment of
12 1972.

13 A No, I am not familiar with it.

14 Q What about Section 208, Area-wide planning by
15 the Department of Environmental Protection?

16 A No.

17 Q What about 303, basin planning for the
18 Raritan River Basin?

19 A No.

20 Q Did you have any discussions with Jaman or
21 anyone else with respect to what happened if the treatment
22 plant became inoperative for a short or long period of
23 time?

24 A No, I had no discussion but presumably there is,
25 there are standby facilities there for such an occasion which

1 there usually are and to overcome operational problems.

2 Q Do you know what those standby facilities
3 are here?

4 A No, I don't.

5 Q At your deposition, I believe, you told us
6 that the market over a period of time that the project
7 would take to build or be completed plus the development
8 of the infrastructure would have an effect upon the building
9 of the development and the time within which it would be
10 completed?

11 A You mean the time it takes to construct it?

12 Q And the planning receptivity?

13 A Yes, obviously that would have an effect.

14 Q Well, tell me if you would, how the infra-
15 structure will affect either of those things, the market
16 receptivity or the time it takes to complete the development?

17 A Well, there is, there are certain physical limitations
18 that will limit the speed with which a development such as
19 this can be constructed. Some of the infrastructure of
20 the construction must be completed.

21 Q Excuse me. What do you mean by infrastructure?

22 A Roads, the treatment facility, the water supply and
23 so on.

24 Q You're not, you're talking about the internal
25 development site improvements and utilities?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A Yes.

Q You're not talking about the infrastructure of the social and other services available from outside the site to service the residents of the site?

A No, I was not talking about that.

Q That is not within the scope of your investigation?

A No, it was not.

MR. FERGUSON: May we have just a minute, your Honor?

Q Yesterday I asked you if you could find the date at which, I think, first, the meeting was held and, second, the date you prepared Plan Number 2 for 1,452 units?

A Yes.

Q Could you locate those dates?

A Yes.

Q What were they?

A The meeting date was October 26, 1974, and the second development scheme was prepared in May of 1975.

Q From your review of your file, I take it was last night, could you give us any more information about what happened to Plan Number 2 for 1,452 units?

A Not in addition to what I have already said yesterday.

Q Just one last question.

You have made an assumption that the environmental

PENGAD CO., BAYONNE, N.J. 07002 FORM 2046

1 problems would be taken care of properly, that transporta-
2 tion, access roads and improvements on the roads outside
3 and inside the project would be completed and that all
4 things that had to be done would be done with respect
5 to this project?

6 A To acceptable degrees, yes.

7 Q And you're relying on Mr. Smith, of Jaman
8 Associates, Mr. Mendelson, of Gorman Associates, for traffic?

9 Have I missed anybody?

10 A Primarily those were the two disciplines that I have
11 consulted.

12 MR. FERGUSON: No further questions.

13 MR. LINDEMAN: I have no questions, your Honor.

14 THE COURT: Before you go. Would you flip
15 that up to P-7? Thank you.

16 As I understand what you're saying on P-7,
17 taking the yellow area, that amount of area is zoned
18 one acre to 4.99 acres. But you're not telling me
19 to what degree, i. e., it could be all points,
20 4.99 acres or it could all be 1 acre. Not all of it,
21 but a majority of it could be 4.99 acres or a majority
22 of it could be one acre?

23 THE WITNESS: Well, it could be, but I think at
24 least a great deal of it is one acre.

25 THE COURT: All right. A great deal of it

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

is one acre?

THE WITNESS: I could not say what proportion it is, but a substantial acreage of it is one acre.

THE COURT: Now, you told me yesterday, I believe, that all of the zoning is reflected on the basis of your writing to the Clerk of the Municipality and saying, send me your zoning ordinance?

THE WITNESS: Or telephone or writing.

THE COURT: Okay. Now, it was prepared in May of 1977. Were those zoning ordinances requested at that time?

THE WITNESS: Within weeks of that date.

THE COURT: Within weeks.

You show no multiple family zone or townhouse zone other than the dark red and the purple, is that correct?

THE WITNESS: There is one other zoning, a dark blue zone in Mendham.

THE COURT: That's dark blue? I'm sorry. I thought that was purple.

THE WITNESS: Industrial zone and also permits townhouse development.

MR. FERGUSON: That is a dark blue with brown stripes industrial or townhouse.

THE COURT: Yes.

1 You show no dual two-family zone in any of those
2 municipalities?

3 THE WITNESS: No.

4 THE COURT: And am I correct that you include
5 all of Mendham, when I say Mendham, I mean Mendham
6 Borough as opposed to Mendham Township on that map.

7 THE WITNESS: I believe, as I see it from this
8 distance only a portion of it is included in that
9 five-mile radius.

10 THE COURT: May I see the map of the County
11 in the evidence here? Wait a minute.

12 We had a map of the County yesterday marked
13 in evidence. Here it is. I got it. My fault, sorry.

14 MR. LINDEMAN: P-6, right?

15 THE COURT: Okay. It is hard to tell.
16 Mendham Borough is sort of the missing part of the
17 horseshoe with Mendham Township being the horseshoe.

18 THE WITNESS: Yes.

19 THE COURT: You got one part of the Mendham
20 horseshoe which would be the westerly portion of it.
21 All right.

22 All right, I have no further questions.

23 MR. FERGUSON: One thing, Mr. Rakos.

24 Q Are you aware of the existing townhouse
25 development in Mendham Borough?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A I know there is, yes.

Q Is that shown on your map? Is your map big enough to include it?

A I don't think so.

Q So that would be off your map?

A I'm not sure. It should be on the map if it's in the townhouse zone. It is off if it is developed by methods other than being zoned for that purpose.

Q Or if it is greater than five miles away?

A That's right.

Q Are you aware then of any multi-family projects which are in fact built within this range which are built in a zone which is not zoned for it, but which were approved either because of a pre-existing use or under an old ordinance or a variance?

A No.

Q In your -- withdraw that.

Did you examine each of the ordinances of each town?
Did you get a physical copy of the ordinances?

A Yes, yes.

Q Did any of the ordinances of any township within your circle of five miles have a conditional use provision?

A I don't know.

Q Are you familiar with the conditional use devise?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A Yes.

Q Would it not be possible for a zoning ordinance to provide for multi-family housing or dense land use in a floating zone or by using a conditional use device?

A It would be possible.

Q You did not determine whether any of the ordinances you looked at had such a device in them?

A I cannot answer that question any more because it was some time ago. This map, as you see here, reflects as best as I could the zoning inventory within that five-mile radius. Where there was an uncertainty or there was various ways to interpret the ordinance, I had to choose one way in order to generalize the map sufficiently to give it a general overview of this area. I did that and I just don't know specifically what each one of the zoning ordinances provided for.

This, if you're referring to the fact that this map does not reflect all of the zoning ordinances in all of the details, in all of their details, I must agree with that.

Q But you can't tell us today whether Mendham Borough or Mendham Township has a conditional use provision specifically directed towards multi-family housing?

A Mendham Borough, Mendham Township?

Q Yes.

A No. As I say, I know that Mendham Township has

1 the optional use of townhouses in the industrial zone
2 and that may be a conditional use there. I don't recall
3 any more.

4 Q Did you by any chance prepare a map, a similar
5 map with a radius of 10 miles?
6

7 A No, I did not.

8 Q Did you ever investigate it?

9 A No, I did not.

10 Q Were you ever asked to?

11 A I was not.

12 Q Any other radius than five miles?

13 A No, sir. We had to choose something and while five
14 miles is somewhat of an arbitrary distance, ten miles
15 would also have been arbitrary. It seems like a reasonable
16 radius which is what we have chosen.

17 Q As far as you know, there are no zones in this
18 area for two-family houses?

19 A As far as I know, there aren't any.

20 MR. FERGUSON: That is all, Judge.

21 MR. LINDEMAN: I have nothing further, your Honor.

22 THE COURT: Okay. Step down. Thank you.

23 MR. LINDEMAN: Mr. P. David Zimmerman, please.
24
25

1 P. D A V I D Z I M M E R M A N , sworn.

2 MR. LINDEMAN: Your Honor please, Mr.
3 Zimmerman is a planner who will testify on certain
4 provisions of the present zoning ordinance and the
5 present Master Plan for Chester Township. A comparison
6 of the two.

7 He will comment on a number of housing units
8 that are provided for in the current zoning ordinance
9 which really requires testimony rather than just
10 a factual, a direct reading of the ordinance, it
11 being the position of the plaintiffs that an analysis
12 is required in order to determine generally how many
13 of the various kinds of units may be constructed
14 in certain of the zoning areas.

15 In addition to that, he will comment upon the
16 Master Plan and the zoning ordinance insofar as they
17 follow the criteria of the Mount Laurel and Oakwood
18 of Madison Township as well as the Municipal Land Use
19 Act itself.

20 He will define insofar as it may be necessary
21 the meaning of P. U. D. and cluster zoning or
22 clustered development. And he will testify generally
23 on items related to those matters.

24 MR. FERGUSON: It might help the Court if I
25 stated a fairly fundamental objection at this point.

End Tape
2

1 And that is that since the ordinance before the
2 Court is an interim ordinance adopted pursuant to
3 Section 98, the Municipal Land Use Laws, I concede
4 that it is irrelevant whether that interim ordinance
5 meets the legal requirements which a permanent
6 ordinance must meet. Therefore, the testimony as to
7 how much this ordinance deviates from the standards
8 required of a permanent ordinance is not relevant
9 to the reasonableness of the interim ordinance.
10 And I would make that objection to the kind of
11 questions Mr. Lindeman is about to ask and the kind
12 of responses which were given on depositions and
13 which I anticipate the witness giving today.

14 MR. LINDEMAN: Your Honor please, we, on behalf
15 of the plaintiffs, vigorously deny that position.
16 That is, that is precisely why we are in court and
17 that position which I think Mr. Ferguson correctly
18 reflects of the officers and experts who have served.
19 And I use that word loosely, Chester Township, and
20 I say that for this reason: That this lawsuit
21 originally was commenced at a time when the ordinance
22 preceding 76-12 was in effect and it was invalid,
23 we alleged.

24 The ordinance was amended and it was amended
25 in ways that turned out to be worse than what the

1 1964 ordinance provided. Now, the adoption by
2 ordinance of some kind of a position that this is
3 an interim ordinance under the Municipal Land Use
4 Act does not change the content or character of
5 76-12, nor does it change the pattern of that which
6 happened between the '64 ordinance and '76-12.

7 In short, we have nothing else really to present
8 to the Court but the contents of '64 and 76-12 as
9 well as the Master Plan of Chester Township.

10 Moreover, if the position of Mr. Ferguson is
11 what I think it is, then it is tantamount to saying
12 that there is no ordinance at all that is worthy of
13 any discussion because everything is invalid. And if
14 that is the case, I am prepared now, of course,
15 to stipulate that fact. That everything about
16 76-12 and its adoption as an interim ordinance is
17 invalid and that the Township did not follow the
18 direction and precepts of Mount Laurel and Oakwood
19 at Madison Township and that they have failed to
20 abide by the Municipal Land Use Act in all respects.

21 If that is the case, I am prepared to stop
22 right now and merely to continue with some of our
23 experts who will give further testimony about the
24 premises in question.

25 I don't think that's what the position is.

1 But it is impossible for us to assume that there is
2 no ordinance that we are attacking.

3 THE COURT: This is part of the enigma that I
4 was confronted with by your Motion to bring this
5 case on for trial earlier than I had originally
6 scheduled it under the timing that I had given the
7 Township of Chester to make corrections that were
8 originally referred to back in May.

9 MR. LINDEMAN: May I interrupt the Court for a
10 moment on that very point?

11 THE COURT: Yes.

12 MR. LINDEMAN: Of course, there isn't anybody
13 who can testify to this. But I think it would be
14 interesting, it would be useful to the Court to
15 find out perhaps from Mr. Ferguson whether or not
16 the Master Plan has been adopted as of this date,
17 which is the direction of the Court as of last May.

18 My recollection is that the original time
19 schedule was that the Master Plan would be adopted
20 by about October 15th and the zoning ordinance would
21 be available, I think, by November 15th.

22 Now, I am not asking Mr. Ferguson to answer that
23 because he doesn't have to. But --

24 MR. FERGUSON: I'll be glad to inasmuch as
25 I can.

1 It was never ordered by the Court because those
2 conditions were contained in an Order which was
3 not consented to by Mr. Lindeman.

4 THE COURT: It was never signed. That's not
5 my recollection.

6 MR. FERGUSON: Never signed. In the interim,
7 what happened was that the Township of Chester,
8 of course, hired Mr. Cappola to do all the work which
9 we said we were going to do. The work was going on.
10 The State of New Jersey Cap Law prevented the
11 municipal adoption of the budget with the monies
12 in it necessary to pay Mr. Cappola, or I should say
13 prevented an ordinance appropriating the money to
14 pay him. An emergency appropriation measure had to
15 be sent to Trenton which approval was, which was
16 finally obtained in early September.

17 Prior to that time, in late August, this Court
18 ordered the trial to commence on October 11th with
19 all the problems and with no deadline other than
20 the January deadline. We did not specifically
21 urge the Township to go on an expedited schedule.

22 The progress as of this date is that most of
23 the work based on data and studies for the Master Plan
24 are approximately 80 to 85 percent complete. There
25 are meetings scheduled. I don't know the dates of

1 them because they were being scheduled last week.
2 We are continuing to plan and project the adoption
3 of an ordinance prior to the expiration of the
4 one-year period of the interim Order.

5 The Township is planning independently of this
6 trial, but with the general knowledge that they have
7 to get something done by the end of the year.

8 MR. LINDEMAN: Your Honor, I would respectfully
9 submit that it's no excuse that they have not
10 finished their Master Plan by October 15th because the
11 Court did not so order it. I also submit --

12 THE COURT: Well, wait a minute. I don't
13 want to get into a semantic discussion. It just
14 seems to me, if I didn't order it, are you expecting
15 them to have gone -- it is no excuse for them not to
16 have sat back on their laurels because I didn't order
17 it?

18 MR. LINDEMAN: Yes.

19 THE COURT: With the proposition that the
20 Cap Law prevented them?

21 Well, let's do it this way. We can discuss
22 this for a long time. My position is going to have
23 to be that it will be, if it is treated as an
24 interim Order under the Municipal Land Use Act of 1975,
25 then I will have to interpret the scope and nature of

1 my jurisdiction over an interim zoning Order.

2 This is part of the enigma that was confronting
3 me when I put the case back on the trial list.

4 It will have to proceed that way. The attack will be
5 on the interim zoning ordinance.

6 Nothing says that the interim zoning ordinance
7 under the Municipal Land Use Act cannot be attacked.

8 MR. FERGUSON: Indeed, I don't want to take that
9 position.

10 THE COURT: Okay.

11 MR. FERGUSON: My objection is making it
12 before we get into the specific questioning.

13 THE COURT: Okay.

14 MR. FERGUSON: But my objection is, will be to
15 the phrasing of the questions and the tests which this
16 witness will be asked to apply because he is going
17 to them as he should, as if he were attacking the
18 regular ordinance right from the Land Use Law.

19 THE COURT: It will have to set in that frame-
20 work for my determination as an interim zoning
21 ordinance. That's all I can do at this point.

22 Go ahead.

23

24

25

1 DIRECT EXAMINATION BY MR. LINDEMAN:

2 Q Mr. Zimmerman, tell us, please, your formal
3 education.

4 A I have an undergraduate degree from Rutgers University
5 where I majored in Planning. I obtained my degree in
6 1961. I have a Master's Degree in City Planning from the
7 University of Pennsylvania, which I obtained in 1973.
8 Since that time, I have taken additional course work at the
9 University of Denver, the University of Akron, Rutgers Law
10 School, and Livingston College.

11 Currently I am enrolled in the Ph. D. Planning Program
12 at Livingston College, which is a branch of Rutgers
13 University.

14 Q Tell us what your present profession is and
15 whether or not you hold any licenses or anything of that
16 kind.

17 A I am a licensed professional planner in the State of
18 New Jersey. I am a practicing city planner. I have a
19 planning consulting firm which has an office located in
20 Morristown, New Jersey. In that capacity, I offer planning
21 services to municipalities, private parties, citizens' groups,
22 private developers.

23 In addition to my work as a professional planner,
24 I am a part-time instructor at Rutgers University at
25 the Newark Campus in the Urban Studies Department and I have

1 been so employed for approximately the last five years.
2 I would estimate that I have approximately fourteen years
3 planning experience in a variety of situations.

4 The last four, four-and-a-half have been as a
5 privately employed planning consultant. Prior to that,
6 I was employed by the City of Jersey City. I was employed
7 by the Morris County Planning Board. The City of Phila-
8 delphia, the State of New York. I worked abroad in
9 Planning and I have worked for various planning consulting
10 firms.

11 At the present time, I am the consultant planner
12 to Vernon Township and Andover Township.

13 Q Are you a member of any professional organiza-
14 tions?

15 A I am an Associate Member of the American Institute of
16 Planners, member of the American Society of Planning
17 Officials, member of the New Jersey Society of Planning
18 Officials, New Jersey Federation of Planning Officials.

19 Q In the capacity of performing the various,
20 performing for the various clients you have just mentioned
21 have you ever had occasion to consult about or to assist
22 in the presentation of a Master Plan?

23 A Yes, I have.

24 Q And how about zoning ordinances?

25 A Likewise.

1 Q Can you tell us what kind of services you
2 have performed for private developers, if any?

3 A I have over the years performed a variety of planning
4 services on the behest of various planning, various developers
5 involving representation before Planning Boards, other
6 municipal bodies in preparation of site plans, the analysis
7 of property as to feasible development.

8 Q Are you familiar with the existence of the
9 Municipal Land Use Act of the State of New Jersey adopted
10 and known as the Municipal Land Use Law adopted in
11 1975?

12 A I am familiar with that Statute.

13 Q And are you familiar with some of the criteria
14 or the criteria that have been set forth in the case
15 generically known as Mount Laurel?

16 A Yes, I am.

17 Q Oakwood at Madison Township?

18 A Yes, I am.

19 Q And have you examined certain of the, or have
20 you examined the Master Plan for Chester Township?

21 A Yes, I have.

22 Q And the 76-12 Zoning Ordinance, that is to say,
23 that the ordinance that was adopted in 1976?

24 A Yes, I have.

25 MR. LINDEMAN: I have no further questions on

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

qualifications.

CROSS-EXAMINATION BY MR. FERGUSON:

Q Do you have your Ph. D. yet?

A No, I do not.

Q How long have you been engaged in the Ph.D. program?

A Four years.

MR. FERGUSON: I have no questions.

MR. LINDEMAN: Now, at this time, if your Honor please, I would like to offer into evidence because I think it has already been agreed upon anyway, the zoning ordinance in question. I think that they have not strangely actually been offered.

If your Honor please, I offer 76-12.

There are two amendments, October 4th and October 19th, that I have at the moment. I will offer them later. I think it is fair to say that they are not material amendments that will affect the litigation, but I will produce them later.

THE COURT: Is that the zoning map with it?

MR. LINDEMAN: Yes.

THE COURT: Okay.

MR. FERGUSON: Well --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. LINDEMAN: I am sorry, your Honor. I got it. Your Honor, I offer as the next plaintiff's exhibit Ordinance 76-12 together with two amendments and then I will offer the interim ordinance as a separate exhibit.

THE COURT: Okay. Staple them together. P-10 in evidence.

(The document referred to was marked P-10 in evidence.)

MR. FERGUSON: If we furnished the Court with a large copy of the zoning map revised as of 10/20/86?

THE COURT: I have not seen it.

MR. FERGUSON: It is attached to our brief, I believe.

THE COURT: That is the large copy?

MR. FERGUSON: Yes.

THE COURT: Okay. My law clerk has your brief right now.

MR. FERGUSON: We can get some more.

THE COURT: Let me get it from the brief.

MR. LINDEMAN: May I offer this in the meantime?

THE COURT: Yes.

MR. LINDEMAN: The interim Order.

THE COURT: P-11 in evidence.

(The document referred to was marked P-11 in evidence.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. LINDEMAN: Next, your Honor, the comprehensive plan for Chester Township dated, well, adopted August 14, 1974.

MR. FERGUSON: There is some slight change between the map contained in the ordinance and the map revised as of October 20, 1976. I am not quite sure.

THE COURT: You want to attach that to P-10 in evidence?

MR. LINDEMAN: This was from your brief?

MR. FERGUSON: Yes.

MR. LINDEMAN: You accept, I take it you accept it with that representation?

MR. FERGUSON: Sure.

MR. LINDEMAN: I am satisfied to leave it with your Honor.

THE COURT: All right. Leave it, then, as P-10. We will have a second map, large zoning map that is corrected to the 20th of October, 1976.

MR. LINDEMAN: Will that be 10B or A?

THE COURT: Just mark it all part of P-10.

P-10 will be the next one in evidence, the comprehensive plan.

MR. LINDEMAN: Your Honor please, I have a Morris County Master Plan, Land Use Element which was

1 marked P-12 for identification at the pretrial
2 discovery and is the only copy I have and it is
3 marked. I am satisfied to offer it if counsel is
4 willing to accept it, or if he has another copy of it.

5 MR. FERGUSON: I am sorry. I simply don't
6 have one that is unmarked and I think the witness
7 has one that is marked as well.

8 THE COURT: The Planning Board is now up on
9 Hanover Avenue, so we can't walk up and get one.

10 MR. FERGUSON: Only if I have a half an hour
11 to mark it up myself. I don't really think it is
12 proper to give you with different colors of felt-type
13 pens.

14 MR. LINDEMAN: I can see that, your Honor.

15 THE COURT: It would have a tendency to
16 emphasize something that might not properly be done.
17 So let's do this. We will agree that P-13 will be
18 marked in evidence and I'll check the Morris County
19 Law Library to see if we got a copy of it because
20 there is a requirement that all zoning ordinances
21 and Master Plans be filed in the Law Library. So
22 we may have a copy of it.

23 MR. LINDEMAN: Or perhaps I can get one later
24 and exchange it.

25 THE COURT: I think I can arrange for it.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. FERGUSON: What is P-12?

THE COURT: P-12 is the comprehensive plan for Chester Township.

MR. FERGUSON: Oh.

THE COURT: It has not been marked yet.

MR. LINDEMAN: We have a problem on that, your Honor.

THE COURT: Hold it just a second.

All right, let's go back to P-12.

MR. LINDEMAN: Your Honor please, on the comprehensive plan I have a dilemma. I just simply cannot explain. The document that I have for the comprehensive plan of Chester is dated February, 1974. Mr. Ferguson showed me that copy that bears the date of August, 1974. He tells me that mine is a preliminary document. I just don't know. It is the only copy in the file.

THE COURT: It is unusual, not unusual in the annals of municipal work.

MR. FERGUSON: As far as I am concerned, this is it. It is dated on it and that's the one I have been told is the proper one.

THE COURT: Mr. Hillas is going to be the one most familiar with it. He is the attorney for the Planning Board.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. LINDEMAN: Do you know about that?

MR. HILLAS: This was adopted, in fact, that's my partner's handwriting on the front page. He wrote that on the day that it was adopted.

MR. FERGUSON: This is right. This is my only copy. I am happy to let the Court and the witness and Mr. Lindeman use it. But I will have to get another one someplace.

THE WITNESS: I would.

MR. HILLAS: I can provide one.

MR. FERGUSON: I would like a discussion off the record.

MR. LINDEMAN: May I ask to let the witness look at half a moment, your Honor?

THE COURT: P-12, then, will be --

MR. LINDEMAN: The comprehensive plan with the reference based --

Does your Honor want one then as an exhibit?

THE COURT: Yes, I want it to be understood that if there are not any maps included in those documents. I want reference, I want the maps to be included because my knowledge of the Master Plan indicates there are an awful lot of maps that come with a Master Plan.

MR. FERGUSON: Very well.

End of
Tape 3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Are there maps in there?

MR. LINDEMAN: There are some, yes.

THE COURT: All right. P-12, two parts to it.

MR. LINDEMAN: Yes, the comprehensive plan with the text and reference base are separate documents.

THE COURT: P-12A and B and C we can mark the maps.

(The documents referred to were marked P-12A, P-12B, in evidence.)

THE COURT: Let me just look at this, if you would, please, for just a moment.

MR. LINDEMAN: May we offer another exhibit?

THE COURT: Yes, sure.

MR. LINDEMAN: For the record, the so-called '64 zoning ordinance with the map.

THE COURT: All right, it will be P-14.

(The document referred to was marked P-14 in evidence.)

MR. LINDEMAN: The next one, your Honor, is the comprehensive development plan for Chester Township previously marked in the pretrial discovery as defendant's exhibit DC-3, which I assume is now ignored.

MR. FERGUSON: Off the record?

(Discussion had off the record.)

1 THE COURT: P-15 for the record is the 1950
2 Master Plan for the Township of Chester.

3 (The document referred to was marked P-15
4 in evidence.)

5 MR. LINDEMAN: Oh, yes. It is not '50.

6 MR. FERGUSON: Yes, sorry, wrong one.

7 MR. LINDEMAN: That should be 1960, your Honor.

8 THE COURT: 1960?

9 MR. LINDEMAN: Right.

10 MR. FERGUSON: I also suggest getting a copy
11 of the Somerset County Master Plan and I will take the
12 position that Chester Township being on the border
13 is just as relevant. I know what the Somerset County
14 Master Plan is as the Morris County.

15 MR. LINDEMAN: I don't have any intention of
16 offering that.

17 THE COURT: If you want to, Mr. Ferguson, you
18 can get it.

19 Let's do this. I think the Grand Jury is
20 coming in at eleven. Obviously, Mr. Hillas is going
21 to be more than a few minutes. Let's go ten minutes
22 after. By that time, I will have gotten rid of the
23 Grand Jury.

24 MR. LINDEMAN: Can we leave this here?

25 THE COURT: Yes, you can leave everything.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

right there.

(A short recess was taken.)

THE COURT: Okay.

Q Mr. Zimmerman, you made a study of the Chester Township Master, comprehensive Master Plan prepared by Canteub & Fleissig, dated August of 1974, which is P-15 in evidence?

A That's correct.

Q And in your -- did you make any analysis of that plan?

A Yes, I did.

Q And in so doing, what criteria, if any, which are relevant in this case, did you employ?

A Well, there were several criteria I employed in the analysis of Chester Township's comprehensive Master Plan. First was whether the Master Plan conformed to the requirements in the Municipal Land Use Act of 1975. Second criteria was whether the Master Plan conformed to the principles enunciated in the recent court decisions relative to planning and zoning, Mount Laurel and the Madison Township case.

Thirdly, I compared the Master Plan with the zoning ordinance to ascertain the conformance between those two documents.

Q Now, you did apply them, or at least compared

1 the zoning ordinance with the Master Plan?

2 A That's correct.

3 Q Did you study that Master Plan?

4 A That zoning ordinance being P-10 in evidence?

5 MR. LINDEMAN: I think it would be appropriate
6 if we had some of those documents before the witness,
7 your Honor.

8 May I do that?

9 THE COURT: Yes.

10 Q Now, inviting your attention to Page 6 of the
11 Master Plan and the general objectives enunciated in it,
12 what, if any, comment do you have with respect to that
13 based upon those criteria that you mentioned before?

14 MR. FERGUSON: Excuse me one minute. I have a
15 problem. Off the record.

16 (Discussion had off the record.)

17 THE COURT: Let's match page 6, that document,
18 Mr. Lindeman. The document that Mr. Zimmerman has,
19 if they match, then you got a point of reference.
20 I think that is what we are going to have to do
21 until the Township Clerk gets here.

22 Is that the same?

23 MR. FERGUSON: The first five paragraphs
24 are, the second three are not.

25 THE COURT: Off the record.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(A short recess was taken.)

Q Mr. Zimmerman, on the comprehensive plan of Chester Township, did you examine the regional context appearing at Page 1 of the document?

A Yes, I did.

Q And then going to the top of Page 2 where it says, "From the foregoing, it is apparent that Chester Township should not assume any major regional responsibility for housing and urbanization due to the relatively remote location as related to major regional and employment areas and communication corridors."

What, if anything, have you found about any undertaking of responsibility for any regional housing, much less major regional housing, major regional responsibility?

A My analysis --

MR. FERGUSON: Objection, unless either from the Master Plan or the question to the witness gets a definition of region. I am not sure it is in the question or adopted by reference.

MR. LINDEMAN: Well, in the context of the report itself I asked the witness if he had read the regional context section on Page 1. He said that he had. And now on the top of Page 2 it refers to the municipalities not adopting major regional responsibility. So I think that the definition is either in

1 the document itself or else it is so vague to be
2 meaningless. And I am sure the municipality doesn't
3 take that position.

4 MR. FERGUSON: If it is not in the document,
5 let's identify it. If it is so vague to be meaning-
6 less, let's not ask it.

7 THE COURT: I think a fair question is to ask
8 him what he determines to be the region as the
9 plan recognizes it. That will help, be helpful to
10 me too.

11 Q Can you answer that, Mr. Zimmerman?

12 A Well --

13 Q What is the region as the plan assumes it to be?

14 A Well, the region as the plan discusses it, in my
15 opinion, is not specifically quantified. I was not able to
16 ascertain from my perusal of the plan whether the region
17 was the area within five miles, fifteen miles, forty miles
18 or the northern New Jersey area.

19 I would interpret, however, the region as those
20 housing needs which develop outside the municipal borders
21 or outside the borders of Chester Township themselves.

22 And --

23 MR. FERGUSON: I still object, your Honor,
24 if this is in response to Mr. Lindeman's question
25 because the regional plan association seems to have

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

been identified as the originator of one definition of region which is the "intermediate ring" and I think when the plan talks about region, it is probably referring to that.

Now, if the witness is going to use another definition, let's have it clearly stated what he is doing.

MR. LINDEMAN: May I ask that the witness consider Mr. Ferguson's comment and also the second paragraph of the second large paragraph, the regional context and perhaps expand on that?

THE COURT: Off the record. The Township Clerk is here with the documents, so let's get those marked.

(Discussion had off the record.)

THE COURT: Let the record show that Mr. Lindeman indicates he is satisfied the comprehensive plan for Chester Township is a document that indicates it is prepared by the Chester Township Planning Board, the Consultant, Candeub & Fleissig & Associates, dated August, 1974, and is 19 pages long.

THE CLERK: 21.

THE COURT: 21 pages long?

MR. FERGUSON: 21.

THE COURT: I only have nineteen. All right,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

the last few pages are maps.

MR. FERGUSON: Do we substitute this for P-13?

THE COURT: I don't want to take her copy. If we got one that is a satisfactory substitute, let's just keep them.

MR. FERGUSON: How many pages do you have, Mr. Zimmerman?

THE COURT: How many pages in yours?

THE WITNESS: The last page is Page 20 which is a general plan map.

MR. FERGUSON: This one that has got 21.

THE COURT: Well, all right. We will do this. We will mark the one that the Clerk brought and we will impose upon you, Mr. Ferguson, the responsibility of returning it to her.

MR. FERGUSON: I will accept it.

THE COURT: That can then be P-12A.

(The document referred to was marked P-12A in evidence.)

MR. LINDEMAN: We have two certified copies of the zoning ordinance.

MR. FERGUSON: Wait a minute.

MR. LINDEMAN: Pursuant to which the comprehensive plan was adopted and the Court requested a copy of that.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Okay. Those are the Minutes?

MR. LINDEMAN: Those are copies of it.

THE COURT: Okay. Let the record show that the Minutes of the Planning Board of August 14, 1974, reflect that a Motion was made by William Conover, Jr., seconded by Scott Parks, that the comprehensive plan as it appears in the Xerox copy, twenty-one pages, dated August, 1974, and attached hereto be adopted and it was adopted by a roll call vote.

All right, I will keep the copy. Let's mark that P-12C, the Minutes.

(The document referred to was marked P-12C in evidence.)

MR. FERGUSON: May I suggest, your Honor, that we mark as P-12D a map entitled "General Plan, Chester Township, Morris County, New Jersey, Candeb, Fleissig & Associates, 1973, which I believe is attached to the Master Plan on Page 20?

MR. LINDEMAN: If your Honor please, I would object only because I think it has a tendency to crowd up the record. But other than that, it is all right with me.

THE COURT: Well, from the standpoint of larger graphics, if they're going to be referred to,

1 in looking at the map on Page 20 that I have attached
2 to the copy that I am using, it's a photostatic copy
3 and somewhat undiscernible.

4 MR. LINDEMAN: All right.

5 THE COURT: From that standpoint, if we are
6 going to use it, I think it will be helpful, so let's
7 mark it P-12D, will be the maps annexed to the
8 Master Plan.

9 MR. LINDEMAN: Maps, is that plural?

10 MR. FERGUSON: Maps.

11 THE COURT: Yes.

12 MR. FERGUSON: The second one would be
13 P-12D-2, which is the illustrative zoning map
14 attached as Page 21 of the Master Plan.

15 (The documents referred to were marked P-12D-1
16 and P-12D-2 in evidence.)

17 MR. FERGUSON: Can I have two minutes just to
18 talk to Mrs. Dews?

19 I assume nobody wants anything further from
20 Mrs. Dews?

21 MR. LINDEMAN: No, thank you, very much,
22 Mrs. Dews.

23 (The noon recess was taken.)
24
25

A F T E R N O O N S E S S I O N

1
2
3
4
5 THE COURT: That can be marked P-13.

6 (The document referred to was marked P-13
7 in evidence.)

8 THE COURT: Okay. As I recall it, and you can
9 refresh my recollection if I am incorrect.

10 MR. LINDEMAN: I am going to rephrase it, if
11 I may, your Honor.

12 THE COURT: Okay.

13 MR. LINDEMAN: The question.

14 Q Mr. Zimmerman, we were noting at the conclusion
15 of the testimony this morning that at the top of Page 2
16 a reference is made to the requirement, non-requirement
17 on the part of Chester to assume the major regional
18 responsibility for housing.

19 Is there any indication at any place of the compre-
20 hensive plan as you have been able to determine it whereby
21 the planners provide for any responsibility, major or
22 minor, for regional housing?

23 MR. FERGUSON: Objection, and once again, unless
24 we define the term regional and also what we mean
25 by responsibility.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Let's, I take it from the form of the question that he is saying regardless of what the region is, is there --

MR. LINDEMAN: I can even put it a little differently than that, your Honor.

Q Regardless of what the region is, is there any undertaking to provide for housing in any area outside of the confines of the municipality of Chester Township?

MR. FERGUSON: I submit that's objectionable because the Master Plan of Chester can only deal with Chester.

As I understood the question, it provides for housing outside the limits of Chester.

THE COURT: Outside the consideration of Chester Township's boundary?

MR. LINDEMAN: Yes, right. That's what I mean, provide for housing within Chester for the requirements of any people outside of the municipal limits of Chester Township.

MR. FERGUSON: I object. That's almost too amorphous to object to.

THE COURT: All right.

MR. FERGUSON: Therefore, objectionable on that ground.

THE COURT: All right.

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2046

1 Q Can you find any such provision in the Master
2 Plan, Mr. Zimmerman?

3 A There are several sections in the comprehensive plan
4 for Chester Township which, in my opinion, enunciate the
5 goals and objectives toward housing. And these goals and
6 objectives relate very succinctly towards Chester Township
7 providing that type of housing which is needed by the
8 occupants of Chester Township exclusive of the needs that
9 may be generated outside the borders of the Township.

10 Q Can you cite us some of those places, please?

11 A Yes, the first mention of housing for Chester Township
12 is found on Page 2 of the comprehensive plan for Chester
13 Township. And I quote from the top of the page.

14 "From the foregoing it is apparent that Chester
15 Township should not assume any major regional responsibility
16 for housing in urbanization due to the relatively remote
17 location as related to major regional employment areas
18 and communication corridors."

19 I would identify that as the first area of the
20 comprehensive plan which addresses itself to housing and
21 the first area within which the regional responsibility,
22 however that is defined, is not assumed to fall within the
23 Chester Township purview.

24 The second area is found on Page 6 under the heading
25 A, General Objectives.

1 "One provides for facilities such as housing and
2 commercial services to meet the needs of Township residents.
3 They should be provided within the framework of environmental
4 goals."

5 Here again, I think, there is consistency within the
6 comprehensive plan in that the provision of housing is
7 directed to meet the needs of Township residents.

8 On Page 10, I would like to draw attention to the
9 section subtitle D, Housing. And in that area, again I
10 feel it is my opinion that the housing needs enunciated
11 relate to needs generated within the Township by residents
12 and activities within the Township borders.

13 And I quote:

14 "The single-family home market is obviously good in
15 Chester Township as demonstrated by the rapid increase
16 in the number of houses during the '60's. However, the
17 rental section of the housing market is very small. The
18 question is, how much of the regional up and down local
19 needs for rental and moderate income housing can possibly
20 be met in Chester Township. The over-all regional demand
21 for apartments and houses in the moderate cost bracket cannot
22 conveniently be met in Chester Township due to the high
23 cost of land and the long distances from major employment
24 centers in combination with the lack of public trans-
25 portation facilities. The major local needs --"

1 Q Well, excuse me, Mr. Zimmerman. Rather than
2 just reading on the balance of that. Can you tell us
3 --

4 MR. FERGUSON: Excuse me. If the witness
5 thinks it is important in answer to Mr. Lindeman's
6 question to read the third paragraph, I think he
7 should do so.

8 MR. LINDEMAN: Well, I am satisfied to have
9 it. I don't know.

10 MR. FERGUSON: The witness may not be.

11 THE COURT: You're answering the question,
12 Mr. Zimmerman?

13 THE WITNESS: I was prepared to read the third
14 paragraph.

15 THE COURT: All right?

16 MR. LINDEMAN: All right.

17 A "The major local needs include provisions for
18 services of elderly residents and young families who want
19 reasonably priced dwellings with less site size and
20 floor space to maintain. The proposed office areas will
21 to a large extent draw employees from the existing or
22 potential labor pool in the surrounding areas and as a
23 result, there will not be a significant increase in the
24 demand for moderately priced dwellings in Chester Township.
25 A future need of about 650 rental units is estimated."

1 I think at this point it would be useful, in my
2 opinion, to put these three quotations from the Master Plan
3 together and I would be competent to draw a conclusion
4 that one, Chester Township identifies its goals and
5 objectives in the housing area as solely falling within the
6 needs of providing for housing for the residents within
7 Chester Township.

8 I would also like to point out that while the
9 municipality anticipates that there will be the development
10 of proposed office areas in the municipality, it does
11 not feel that the employees should be housed within the
12 municipality or that there should be housing for phase
13 employees in the municipality and makes the assumption
14 that the existing or potential labor pool for the office
15 areas in Chester Township will come from the surrounding
16 communities. That is, Chester Township will zone areas
17 for office use. They will be developed for that purpose,
18 yet the labor pool will be housed outside the Township.

19 Therefore, the conclusion of these statements are
20 that moderately priced dwellings do not have to be
21 provided for within the borders of Chester Township.

22 Q Mr. Zimmerman, is there any place in the
23 Master Plan that you may recall that justifies or explains
24 the 650 figure in that housing section which is the last
25 one that you read?

End of
Tape 4

1 A I was not able to ascertain what the computations,
2 assumptions or the genesis of that figure was in my review
3 of the comprehensive plan.

4 Q Now, in the section that we are referring to on
5 Page 10, have you been able to find anything in the Master
6 Plan that relates to rental units? Is there another place
7 that refers to rental units? I call your attention parti-
8 cularly to, or the bottom of 16, top of Page 17.

9 A On Pages 15 and 16 of the Master Plan, there is a
10 description of the amount of area in the municipality
11 that is proposed to be zoned in particular residential
12 districts. In the middle of, I guess, Page 16, there is
13 a subsection which deals with the medium density residential.
14 In this section the Master Plan states that the medium
15 density residential area includes 2.6 persons per dwelling
16 unit and a maximum of four to five dwelling units per acre.

17 I would interpret this as being the effort on the
18 part of the municipality to provide for other than single-
19 family type dwellings.

20 Q Now, do you know what the zoning ordinance
21 provides, that is to say, the 76-12 ordinance, the one
22 that is currently in effect with respect to this kind of
23 dwelling, multiple family dwelling?

24 A The zoning ordinance has designated approximately
25 275 acres which have been, fall in the MR District -- I'm

1 sorry -- RM District. Under that category, there are
2 certain zoning regulations and restrictions dealing with the
3 types of housing units and density bedroom counts and
4 other factors pertinent to the development in the RM
5 District.

6 Q And how many units per acre can be accommodated
7 then in the RM District?

8 A The RM District sets a requirement of five dwelling
9 units per acre as a maximum.

10 It also designates that no area greater than 150 acres
11 would be developed at any one time and also sets forth
12 a requirement that the density maximum is 10 bedrooms per
13 acre.

14 Q Excuse me, Mr. Zimmerman. You referred to 150
15 acres at one time. Did you mean, is that what you meant?

16 THE COURT: I read the zoning ordinance 150
17 per site.

18 MR. LINDEMAN: 150 --

19 THE COURT: Per site.

20 MR. LINDEMAN: Yes.

21 THE COURT: The sites are limited to 10 acre
22 sites.

23 THE WITNESS: I am sorry. 150 units be located
24 on one site and 300 units be the maximum that the
25 town will consider in the RM Zone.

1 Q Now, you were referring to the five units per
2 acre and 10 bedrooms per acre.

3 What opinion, if any, do you have as to the feasibility
4 of those limitations for low income people?

5 A In my opinion, they're --

6 MR. FERGUSON: Which limit, totally unfeasible?
7 Which limitations are we talking about?

8 MR. LINDEMAN: First, now I am talking about
9 five units per acre and a 10 bedroom limitation.

10 MR. FERGUSON: Well, separately or together or
11 what? I don't think the question is clear.

12 MR. LINDEMAN: I will take them separately.

13 Q Let's take five units per acre first, Mr.
14 Zimmerman.

15 A There has been over the years a density figure
16 associated with different types of housing. For example,
17 single-family homes in Chester Township range from one unit
18 per acre to one unit on five acres.

19 In other communities, the range may be one unit
20 on one acre to four units on one acre or quarter-acre
21 zoning.

22 The next type of housing which would be single-family
23 attached or townhouses built upon the single-family
24 density and we would have a range of, say, four to six
25 units per acre or maybe four to eight units per acre for

1 townhouse type units.

2 The next highest type of housing in terms of density
3 would be garden apartment type density in a suburban
4 community. This ranges from ten to fifteen units per acre.
5 So that when you talk about five, when the zoning ordinance
6 passes a requirement a maximum of five dwelling units per
7 acre, they're saying with, in my opinion, a great deal
8 of specificity. What type of housing units can be built
9 on that tract of land.

10 And I think they're talking about townhouse type
11 units in the middle density range.

12 I know of no situation in New Jersey under which
13 garden apartments have been built at this low density.
14 If in fact garden apartments were built at this low
15 density, then the costs associated with these units would
16 make them very expensive and put them out of the range of
17 low and moderate income families.

18 Q What does the limitation of ten bedrooms per
19 acre add to that viewpoint?

20 A The ten-bedrooms per acre similarly constrict the
21 flexibility of the types of units in terms of bedrooms
22 that are placed upon the site.

23 For example, if it was desirable, or the developer
24 wanted to build a variety of bedroom types, one-bedroom,
25 two-bedrooms and three-bedroom type units, the ten-bedroom

1 maximum would, as I said before, seriously constrict his
2 flexibility. And if he were to put in two, three-bedroom
3 units, he would have used up 60 percent of his bedroom
4 allotment and he would only be able to put in, say, two
5 more two-bedroom units for a total of four units.

6 So if he was disposed towards putting in two and
7 three-bedroom type units, which I would submit are the
8 types of units that are needed when we talk about low,
9 moderate or median income type housing, it would be difficult
10 for him to even approach the five dwelling unit limit
11 that's in the ordinance and that the bottom line really
12 is that the ten-bedrooms in a serious restriction upon what
13 is needed in terms of housing.

14 Q Is there any statement in the comprehensive
15 plan to your knowledge regarding the substandard housing
16 in the municipality and recommendations as to its
17 improvement?

18 MR. FERGUSON: Objection, unless we get a
19 definition of substandard.

20 MR. LINDEMAN: Well, let me, and before the
21 Court rules on that objection, perhaps I can ask
22 another question, your Honor, which may shed some
23 light on that question which is otherwise pending.

24 Q Is there any provision, to your knowledge,
25 in the Statute, that is to say, the Municipal Land Use Law

1 that relates to the improvement of housing within a
2 municipality?

3 A It is my information that the housing element of the
4 State Statute specifically has a clause which requires
5 that the substandard housing be addressed within that
6 element.

7 Q I refer you to 40:55-40, 55D-28 of the
8 Municipal Land Use Law and particularly section B3 in
9 that section of the Statute. Is that the section you are
10 referring to?

11 A That's correct.

12 Q And that's very short. Would you read that
13 to the Court, please?

14 A "A housing plan element, including but not limited
15 to residential standards and proposals for the construction
16 and improvement of housing."

17 Q Is there any such provision in the Master Plan
18 which refers to the improvement of the housing?

19 A Well, I would not only say that there is no section
20 in the Master Plan that deals with the improvement of
21 housing, but I would be, I would say that there is no
22 housing plan or housing plan element in the Master Plan
23 at all.

24 Q Are there any other elements that are lacking
25 in the Plan which are otherwise required by the Statute?

1 A Well, I have to admit that I focused my attention
2 in the analysis of the comprehensive plan upon the land
3 use element and upon the housing plan element.

4 MR. LINDEMAN: All right. If your Honor please,
5 I will withdraw that question having to do with
6 the substandard housing and just limit it to the
7 word improvement the witness has just testified to.

8 Q Would you explain, please, if you can, Mr.
9 Zimmerman, the meaning of PUD in terms of what we are
10 talking about?

11 A PUD stands for Planned Unit Development.

12 Q And what does that mean?

13 A In the context that it's used in planning and
14 implemented in zoning ordinances, it is a, it is a develop-
15 ment of land which would embody mixed types of land use.

16 For example, let's say there are two zoning proposals
17 to district areas for one particular type of use, R-1
18 would be single-family type use on one acre. The PUD would,
19 first of all, allow for a mixed or variety of housing
20 types within the PUD District. There may be provision
21 for single-family detached housing, single-family attached
22 housing, apartment patio housing, a variety of housing
23 would be provided. And that variety would be spelled out
24 in the requirement of the zoning ordinance.

25 In addition, the PUD would also allow for commercial

1 or industrial development. And again, the zoning ordinance
2 would define to what extent or what limits that type of
3 development would take place.

4 Most PUD ordinances are aimed at development of
5 larger tracts of land. And it's the theory that the
6 development of these larger tracts of land with flexibility
7 and the variety of land uses is preferable to the stereotype
8 or it is preferable to older, more traditional development
9 that might create a Levittown type housing development
10 or sprawl-type development.

11 Q Mr. Zimmerman, with regard to the Master Plan
12 and the map, the zoning map for Chester, how many dwelling
13 units does the plan call for in the PUD section?

14 A Initially, the Master Plan was drafted and there was
15 a specific designation for PUD areas. The housing density
16 at that point was 2.3 units per acre.

17 In addition, there were approximately 1,009 acres
18 outlined in the general plan for future development in this
19 PUD type manner.

20 Q And how many units, therefore, would that
21 allow for?

22 A That would allow for approximately 2,320.7 units.

23 Q And how many units in the apartment area?
24 I think we referred to that a moment ago.

25 A There were 650 units designated for apartment rentals

1 in the comprehensive plan.

2 Q Therefore, the combination of apartment rentals
3 and PUD rentals equals what?

4 A Well, that is somewhat of a question as to whether the
5 apartments would be contained within the PUD or would be
6 separate. If they were contained within the PUD, we would
7 still be dealing with 2,320.7 units.

8 If they were in addition to the units designated for
9 the PUD area, then we would be talking about an aggregate
10 of 2,970.7 units which would be apartment units, multiple
11 family units and any other units that would be placed in
12 the PUD area.

13 Q Now, Mr. Zimmerman, does the zoning ordinance
14 which is P-10 in evidence, provide or allow for either
15 2,320.7 units or 2,970.7 units?

16 A No, it does not. As I indicated earlier, the
17 RM District, which is the only district in the municipality
18 which would provide or have the potential of providing
19 for multiple family type units has a limit of 300 dwelling
20 units. So that while the Master Plan provided either
21 2,300 multiple family units or 2,900 multiple family units,
22 those figures are certainly not translated in the zoning
23 ordinance which only provide for 300 multiple family units.

24 Q There are, as you testified before, I think,
25 approximately 250 acres in the RM Zone over-all, is that

1 correct?

2 A 278.4 acres.

3 Q And that would permit construction of how many
4 dwelling units?

5 A That would permit the construction of the approximately
6 1,392 dwelling units, if that acreage was developed at a
7 density of 5 units per acre.

8 Q And that is what in relation to that which the
9 comprehensive plan proposes?

10 A Well, again this is significantly less than what
11 the comprehensive plan calls for. It is approximately
12 50 percent of what the Master Plan calls for in terms of
13 total units.

14 Q Now, you have examined, have you not, the
15 1976 Zoning Ordinance, P-10 in evidence, relative to the
16 '64 ordinance which is P-14 in evidence?

17 A Yes, I did.

18 Q Were there -- tell us first what kind of
19 residential zones are provided for in both ordinances?
20 Taking first the '64.

21 A Yes. The basic difference between the residential
22 categories and the original zoning as compared to the
23 new zoning ordinance is that the new zoning ordinance adds
24 the RM District, which is the multi-family district.
25 Both ordinances have an R-5 District which is single-family

1 on five-acres and the R-2 District which is single-family
2 on two acres and the R-1 District which is single-family
3 on one acre.

4 And then as I said, the '76 ordinance has the
5 multi-family addition.

6 Q Now, is there any change in the allocation
7 of acreage in the various R Districts from 1964 to the
8 1976 ordinance?

9 A Yes, there is.

10 Q Would you tell us, please, what, if any, change
11 in acreage there were in the R-5 Zone in 1964 to 1976?

12 A The amount of acres in the R-5 District has been
13 significantly increased in the new zoning ordinance.

14 Q In what amount?

15 A Previously there were approximately 4,200 acres of
16 the municipality in the R-5 District, whereas, in the
17 new zoning ordinance there are 5,640 acres in the R-5
18 District or an increase of approximately 33 percent.

19 Q And how about the R-2 Zone?

20 A Now the R-2 Zone, there is a decrease in the number
21 of acres that lie within the R-2 Zone. It goes from 8,400
22 acres in the old zoning to 6,700 acres in the new zoning,
23 or a decrease of about 20 percent.

24 Q And the R-1?

25 A In the R-1 Zone, the acres we are dealing with is

1 very small. In the early zoning ordinance, or the old
2 zoning ordinance, there were 227 acres in the R-1 and that's
3 been cut approximately in half to 111 acres in the R-1
4 Zone.

5 Q Now, have those acres that are remaining
6 to the R-1, can you tell us anything about the extent of
7 building already on them?

8 A My analysis of the R-1 Zone indicated that almost
9 all of the acres in the R-1 Zone are developed and have
10 existing residences and other structures upon them so that
11 there is virtually no vacant developable land in the
12 R-1 Zone in Chester Township.

13 Q What conclusion, if any, do you draw from the
14 fact that the R-5 acre was increased by 4 percent with
15 regard -- and the conclusion I am referring to, would
16 have with regard to the amount of housing can be constructed?

17 A Well, what has happened --

18 MR. FERGUSON: Excuse me. I am sorry. Could
19 I have that read back?

20 (Last question read by the reporter.)

21 MR. LINDEMAN: Let me rephrase it.

22 Q What conclusions, if any, have you drawn
23 respecting the amount of housing that can be constructed
24 arising out of the increase of the R-5 Zone by 34 percent
25 increase in these two zoning ordinances?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. FERGUSON: Now, is that the amount of housing constructed throughout the Township in all zones or limited to the RM, or R-5?

THE COURT: I take it it is limited to the R-5.

MR. LINDEMAN: Yes.

THE COURT: He is asking what is the number of houses that can be built on the additional number of acres that is reflected in between '64 and '76 ordinance, or the 34 percent increase or the 1,448 acres.

MR. FERGUSON: If you take away from the R-5 and add to the R-2 and the RM, of course it tends to balance out. If this goes --

THE COURT: He is only asking with respect to that zone.

MR. FERGUSON: Okay.

MR. LINDEMAN: I think that would be cross-examination anyway. I was not asking specifically for the number of houses precisely, your Honor. I was really asking just what conclusion he draws from that because I don't know that an exact computation has been made by the witness.

Q Well, can you answer the question?

A Yes. Based upon the figures I cited earlier,

1 I would conclude that what Chester Township has done is
2 first of all to increase the amount of acres located within
3 the R-5 Zone and this would be the most, this would result
4 in the erection of the most expensive type of house in
5 Chester Township.

6 And as I mentioned earlier, a significant number of
7 acres have been put into the R-5 Zone which hitherto
8 didn't exist. However, because we are dealing with
9 5-acre zoning, only a small amount of new housing would
10 result. Approximately 245 additional housing units would
11 result in the R-5 Zone.

12 Q Now, Mr. Zimmerman --

13 MR. FERGUSON: All right. Go ahead.

14 Q Have you formed an opinion as to whether or
15 not the present zoning ordinance, that is, 76-12 will
16 translate itself into more or fewer dwelling units than
17 was provided for under the '64 Zoning Ordinance?

18 A Actually comparing the development potential of the
19 two zoning ordinances, the new zoning ordinance provides
20 for less housing units than would be the case under the
21 old zoning ordinance.

22 Q Can you do that by count in the various
23 zones?

24 A Yes, I have already done that calculation.

25 Q And what is it?

End of
Tape 5

1 A And under the old zoning ordinance the maximum
2 number of dwelling units amounts to 4,492.

3 And under the new zoning ordinance the maximum number
4 is 4, 298.

5 So there is approximately a difference of 200 dwelling
6 units that have been removed under the new zoning ordinance.

7 Q Can you break that down in the, as to the
8 present zoning ordinance?

9 A Yes. In the R-5 District, there would be 958 dwelling
10 units. In the R-2 District --

11 MR. FERGUSON: Is this the old or new ordinance?

12 THE WITNESS: The new zoning ordinance.

13 MR. FERGUSON: Okay. R-5 is what?

14 THE WITNESS: 958.

15 In the R-2 Zone District there would be
16 2,846. In the R-1 Zone District there would be
17 95 units. In the RT Zone District there would be
18 99 units and in the RM District there would be
19 300 units. So those figures add up to 4,298.
20 There may be some rounding in that calculation.

21 Q Similarly as to the '64 Act or zoning ordinance
22 rather --

23 A That's correct.

24 Q Would you tell us about the '64 breakdown?

25 A Okay. In the R-5 Zoning Ordinance -- I'm sorry --

1 in the old zoning ordinance, the R-3 District provided
2 for a maximum number of 716 dwelling units. The R-2
3 District provided for a maximum of 3,584 dwelling units.
4 The R-1 District provided for 193 dwelling units for a
5 total of 4,492 dwelling units under the old zoning ordinance.

6 Q Now, is there any provision in the present
7 zoning ordinance for houses on small lots, that is to say,
8 lots of less than one acre?

9 A No, there is not. The smallest single-family lot
10 district is the R-1, one-acre district which I have already
11 indicated is substantially fully developed.

12 Q How far is the Township of Chester from Newark,
13 New Jersey?

14 A From the --

15 THE COURT: As the crow flies or as the car
16 drives?

17 MR. LINDEMAN: I think I better ask the witness,
18 your Honor. I don't know how he has computed it.

19 THE COURT: Okay.

20 A As the crow flies.

21 THE COURT: As the crow flies. Okay.

22 A The center of Chester Borough to the center of
23 Newark, Broad and Market Street, is slightly less than
24 twenty-eight miles.

25 Q All right. Now, you said at the early part of

1 this examination that you are familiar with the Mount Laurel
2 and Oakwood at Madison Township. Can you tell us what the
3 criteria for developing municipalities are as enunciated
4 in the, in those cases?

5 And as you do it, please tell us for each particular
6 criteria your opinion as to whether or not the Township of
7 Chester either meets or fails to meet the criteria?

8 MR. FERGUSON: I object for the record, your
9 Honor. It is really a legal conclusion that the
10 witness is testifying to and you can take judicial
11 notice of it.

12 THE COURT: An expert can help me with facts
13 and areas of expertise. Now you're getting into
14 the law which technically should be the Court's
15 expertise. Whether it is or not is the basis perhaps
16 is subject to debate. But aren't you asking me,
17 aren't you asking him to give me my conclusions
18 on Mount Laurel's outlook?

19 MR. LINDEMAN: I think, your Honor, in this
20 area this is the kind of thing that really calls for
21 a legal conclusion.

22 At the very outset of this proceeding, this
23 trial, there was a discussion as to whether or not
24 Chester Township was a developing municipality.
25 And, of course, it is the Court's conclusion that is

1 the final and only real one upon which we will
2 ultimately rely.

3 THE COURT: An expert is supposed to help me.

4 MR. LINDEMAN: Yes, the expert is supposed to
5 help you.

6 Now, I think as the witness will tell us what
7 the criteria are which, of course, the Court already
8 knows which way, but, of course, we have to put it
9 in the record. But as he tells us what the criteria
10 are, he would give his expert opinion as to the
11 aspects which the Township either does or doesn't
12 meet them.

13 MR. FERGUSON: I have no objection to the
14 witness giving a criteria and then judging whatever
15 he wants from that criteria or making any comment
16 upon it.

17 I do object to the apparent assumption that is
18 the criteria contained in Mount Laurel.

19 MR. LINDEMAN: Well, he may be wrong. I will
20 concede that. I think he will not be, but he will
21 state at least what his view is as to the existence
22 of those criteria and then state factually and from
23 his expertise whether or not the Township meets
24 them.

25 THE COURT: I think, it smacks a little bit of

1 a lawyer telling me whether a zoning ordinance is
2 valid or not. And I don't see why an expert has
3 that, any greater expertise in that area when you're
4 applying it to case law.

5 MR. LINDEMAN: Let me cite this example,
6 if I may, your Honor.

7 It is in the form of an offer of proof and I
8 am going to refer to a certain, one criterion, if the
9 Court will permit me to do it in the presence of the
10 witness. I am thinking of the one that speaks of the
11 municipality shedding its rural aspects.

12 Now, there I think while the Court does make
13 the determination as to whether those criteria have
14 been met, there is no fixed or legal standard so far
15 as I know that can determine whether or not a
16 municipality has shed that rural quality, or aspect.
17 There I think you need the opinion of somebody who
18 is a planner. Somebody who knows about the development
19 of real estate because we are talking where the fact
20 that farms may have existed at one time and may not
21 exist now. And that the municipality is taking on
22 certain characteristics which are relevant from an
23 expert's point of view.

24 I think it is not limited solely to a conclusion
25 to be drawn from facts that would be adduced at a

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

trial. That's only one.

THE COURT: The factual basis for not meeting the criteria or not meeting the Statutory dictates is one thing. But for him to tell me, I think for him to tell me whether it meets Mount Laurel and Oakwood from an opinion standpoint, which is as I understand your question, is what you're asking him. You're asking him what criteria for developments

--

MR. LINDEMAN: Developing municipalities.

THE COURT: Developing municipalities, what they are as enunciated in the Mount Laurel and Oakwood cases. And your opinion on each criteria, whether Chester Township meets or fails to meet the criteria.

MR. LINDEMAN: Well, all right. I see the Court's problem with it.

THE COURT: You see the problem I have with it? This is the holding of the case.

MR. LINDEMAN: Right.

THE COURT: Okay? And you're talking about two cases which I read just as you read and I am to construe those cases.

Now, you're asking him not to construe them and say what the criteria are, but to say whether in

1 his opinion which has to be my opinion. And I don't
2 see how that opinion -- I think it impinges upon
3 my responsibilities, seriously.

4 MR. LINDEMAN: I think if I were to perhaps
5 supplement the question a little bit by asking what
6 he bases his determination on that perhaps may
7 satisfy the Court.

8 I do think, however, that it is necessary that
9 this kind of testimony be before the Court or else
10 lacking it, I think we will have the spectacle of
11 Mr. Ferguson and I arguing before the Court that this
12 one particular criteria has or has not been met.
13 And it is such a subjective thing that I think the
14 Court can be greatly aided by a witness such as this.

15 THE COURT: You know, factually we have a fine
16 line here which I think you're crossing over or
17 a line that you're crossing over on that I'm not
18 clear on and maybe we are not -- well, if you're
19 asking him to tell me what the facts are that give
20 rise to his opinion, fine.

21 MR. LINDEMAN: Yes, I think I better do it
22 that way.

23 THE COURT: Okay. If you're asking him to take
24 the criteria from the case and tell me whether in his
25 opinion they meet the criteria without the intervening

1 facts, I have no way of evaluating this witness,
2 which I may do for the purposes of giving weight to
3 his testimony. You're precluding me from making any
4 basis, adequate determination as a trier of the facts.
5

6 MR. LINDEMAN: I think your Honor is right and
7 I agree with that merely for him to say yes or no
8 would not, would be of no help at all to the Court.

9 Now, I think it should be his factual statement
10 and then perhaps his conclusion. I will ask him
11 a conclusion as to whether or not --

12 THE COURT: That doesn't bother me as long as
13 I get the factual -- you understand what I am saying,
14 Mr. Ferguson?

15 MR. FERGUSON: Yes.

16 THE COURT: In that framework, do you have any
17 objection?

18 MR. FERGUSON: No, as long as it is clear
19 that he is stating facts which he observed or got
20 from someplace and tells us the source.

21 THE COURT: Okay.

22 MR. FERGUSON: And what his testimony is about.

23 THE COURT: So that question is what criteria
24 are there for developing municipalities as enunciated
25 in those cases and what facts that he concludes
Chester Township has not, I take it, met those

1 criteria?

2
3 MR. LINDEMAN: Either met or not met, whatever
4 the case may be.

5 THE COURT: All right. Okay.

6 Maybe you ought to re-state the question, though,
7 just so it is clear.

8 MR. LINDEMAN: All right.

9 Q Mr. Zimmerman, taking each one of the criteria
10 respecting the development, developing municipalities as
11 these criteria are defined in the Mount Laurel and Oakwood
12 at Madison Township, tell us, please, what facts, if any,
13 you have to determine whether or not the township has met
14 or has failed to meet them.

15 A The first criteria that I would utilize is the
16 criteria of size. That is, Mount Laurel Township is
17 twenty-two square miles. Madison Township is thirty-eight
18 square miles. Chester Township is 28.9 square miles.
19 There we are not dealing with a small municipality, but
20 really we are dealing with a municipality that does have
21 a significant size. And interestingly enough, this case
22 falls between Mount Laurel and Madison Township.

23 The second criteria that I would employ is the
24 determination as to whether we are dealing with an older
25 suburb or a central city. An older suburb might be
Netcong or Morristown. A central city would be Newark and

1 Elizabeth. I think it's clear and easy to indicate that
2 Chester Township is not an older suburb, nor is it a central
3 city, therefore, it would be considered a developing
4 municipality in that regard.

5 The third criteria that I would utilize is growth
6 since World War II. And specifically, in the decade from
7 1960 to 1970, the population has risen from 2,107 to 4,265
8 for a percentage increase of 102.4 percent.

9 That is, in the last decade, the population has
10 doubled.

11 I would add that the Morris County Planning Board
12 has made an estimate of the current population for the
13 township and it has indicated that the population of the
14 township has continued to increase and its estimate for
15 1974, for example, was approximately 5,000. I am sorry,
16 more exactly, the population estimate for January 1, 1975,
17 for Chester Township was 4,939.

18 The population has been growing since World War II
19 and certainly in the last decade has grown significantly
20 and is continuing to grow.

21 A fourth criteria is the determination as to whether
22 there is developable area in the municipality. In the
23 case of older built-up suburbs or center cities, there isn't
24 much vacant land for new residential or new housing
25 construction. That certainly is not the case with Chester

1 Township. There are significant amounts of land that are
2 vacant and developable for residential purposes.

3 A fifth characteristic is whether the community is
4 shedding its rural characteristics.

5 I would submit that only a minimum or portion of
6 the total acreage in Chester Township is utilized for
7 agricultural purposes.

8 According to the existing land use tabulation found
9 in the comprehensive plan, approximately 20 percent of the
10 municipality is utilized agriculturally. My own observation
11 is that this land is that much of it that lies within the
12 estate-type development as opposed to active, primary
13 agricultural pursuits which are found in the more western
14 or southern counties of New Jersey.

15 So I would submit that the rural character as using
16 agricultural land as a criteria is to some degree on the
17 wane in Chester Township.

18 The sixth criteria is whether the municipality is
19 in the wave or in the path of future growth. Earlier we
20 discussed the definition of the region and there was a
21 pronouncement in the Master Plan or comprehensive plan
22 that Chester Township lies within the intermediate ring
23 which has been drawn around the Newark-New York center.
24 This intermediate ring is that area which is experiencing
25 the greatest amount of growth, both in the present and will

1 continue to experience growth in the future.

2 All population estimates for Chester Township and
3 the surrounding communities indicate that these communities
4 including Chester Township, will continue to experience
5 growth in the future.

6 And certainly the establishment of highway networks
7 in the area, specifically Route 287, Route 78, Route 80
8 and the continued utilization of Route 24 and 206 in
9 my mind indicate that Chester Township will continue to
10 grow and certainly is in the path of growth as it emanates
11 from the more built-up areas of the suburbs and rural areas.

12 The last criteria is a little harder to define.
13 It deals with the concepts of whether the community is
14 a municipality in the sense of having a municipal government
15 structure.

16 For example, there are some municipalities in
17 New Jersey -- I did some work for Millstone Township in
18 Monmouth County which didn't have a Borough Hall. They had
19 a part-time policeman. The Clerk ran the activity out of
20 her home, volunteer fire department. There was no
21 municipal government structure as is the case with Chester
22 Township and the case with other communities in New Jersey.

23 Q Mr. Zimmerman, are you saying that Chester
24 Township is similar to Millstone?

25 A No. I am saying Chester Township does have a municipal

1 structure. It does have a police department. It does
2 have a City Hall or Township Hall within which are found
3 municipal employees dealing with the day-to-day functions
4 of municipal activities.

5 I think putting, I, as a planner and as an expert
6 in planning-zoning matters, would conclude utilizing these
7 seven criteria that Chester Township is a developing
8 municipality and I would rely upon the facts enunciated
9 in this regard.

10 MR. LINDEMAN: If your Honor please, I ask the
11 indulgence of the Court to permit me to request of the
12 court reporter that he prepare a copy of that answer
13 for me? If that can be done?

14 THE COURT: Subject to his physical limitations,
15 yes.

16 MR. LINDEMAN: Whatever they may be. I don't
17 need it tomorrow.

18 That concludes my examination.

19 (A short recess was taken.)

20
21 CROSS-EXAMINATION BY MR. FERGUSON:

22 Q When you say that the Master Plan does not
23 assume responsibility for, do you mean housing for residents
24 outside the region or the community, not the region outside
25 the boundary of Chester Township. Would you tell us

1 what you would do if you were re-writing the Master Plan
2 and how you think the Master Plan ought to assume a
3 responsibility? How does it do it?

4 MR. LINDEMAN: Your Honor please, with all the
5 alternatives, I object because this goes beyond the
6 scope of the direct examination, even insofar as
7 this person is an expert is concerned. I haven't
8 examined the witness on it. I think his answer might
9 be interesting. I would be curious to hear it myself,
10 but I think it is really beyond the --

11 THE COURT: How is it relevant to this testimony?

12 MR. FERGUSON: Well, the implication is that
13 the town should address in the Master Plan a regional
14 responsibility for residents that live outside its
15 own borders.

16 I am asking this witness how he can conceive
17 that responsibility, what options are open to this
18 town? If he says there are no options open to it,
19 then we are through. There have to be some options
20 open to it. There has to be some alternatives
21 which this witness thinks are feasible.

22 THE COURT: Well, Mr. Lindeman, since a
23 question that occurred to me when, during the time
24 that he was testifying, I'm going to give
25 him that opportunity. I think there is some

1 relevancy to it so I will allow it.

2 A I think --

3 MR. LINDEMAN: Your Honor please, while the
4 witness is even thinking, I detect two questions.
5 I am not sure which one counsel is asking. I think
6 he asked what it would be required to do with regard
7 to residents outside of the confines of Chester and
8 also what the options available to the township may be.
9 I think the two questions are slightly different.
10 At least, different in some degree. I am not sure
11 which one the witness is supposed to be answering.

12 THE COURT: Well, what I put down is what would
13 he do to re-write and how it ought to assume its
14 obligation.

15 Now, the two ideas would seem synonymous.
16 But yet the precise way of expressing them might be
17 different. Do you follow what I mean?

18 In other words, I am going to put it down in
19 writing than the way I would indicate that the obliga-
20 tion could be assumed. It is a fair, it is a fair
21 objection.

22 Q First, how would you address the problem of
23 regional responsibility in Chester Township? This is for
24 housing for persons outside of its borders?

25 A I think there are several approaches that I would

1 recommend. The first approach deals with what I think was
2 a major part of my direct testimony in that I indicated
3 there was a serious gap between what the comprehensive
4 plan called for in terms of housing units and what was
5 translated into the zoning ordinance in terms of numbers of
6 housing units.

7
8 So the first approach I would make, or the first
9 recommendation I would make is to adjust, modify, re-do
10 the zoning ordinance to conform to the Master Plan or
11 comprehensive plan.

12 As I indicated, the zoning ordinance is sufficiently
13 lacking.

14 The second --

15 Q Oh, go ahead.

16 A The second part of my recommendation would be to
17 re-examine the goals and objectives relative to housing
18 in the Master Plan. Granted the Master Plan or comprehensive
19 plan provided for housing in the zoning ordinance, but even
20 those numbers, in my opinion, are not adequate to meet the
21 needs.

22 Specifically the housing objectives in the Master
23 Plan and the numbers generated from those objectives
24 pertain exclusively to the internal needs. The people who
25 would be working, or the people who would be moving out of
their big, single-family homes and desiring smaller units

End of
Tape 6

1
2 or younger people living in Chester Township who want to
3 establish their own household, but still remain in Chester
4 Township.

5 Could I? I am almost finished, Mr. Ferguson.

6 Q Okay.

7 A I think the Master Plan did set forth the significant
8 acreage, amount of acreage for office and research activities.
9 I think there are only 800 acres and when a plan, in my
10 opinion, when a plan is comprehensive it means that it
11 all fits together.

12 It means that you're providing for an economic base
13 or a tax base in designating areas for office and research.

14 In my opinion, you also have to provide for the
15 housing for those employees. You can't slough it off
16 on to other municipalities, or say that the potential
17 labor base is found in other municipalities.

18 We will have a ratable and we won't have the housing.
19 So I think first just the zoning to meet the comprehensive
20 plan.

21 Second, I would adjust the goals and objectives of
22 the comprehensive plan to include more than just provide
23 for housing for the internal needs. And specifically,
24 I would recommend that the, they provide housing for the
25 office, the potential office and research type activities.

 And thirdly, I would make a determination as to what

1 is the regional needs. As I understand the series of
2 expertise being put before this Court, there will be
3 discussion as to what the regional need is and the fair
4 share in those items are. I did not delve into those
5 figures, but those figures will be presented and the
6 factor in that, in the deliberation on these issues.

7
8 Q In effect, you would really do two things.
9 You would make the zoning ordinance, bring it into more
10 compliance with the Master Plan in terms of the number of
11 units talked about in the Master Plan versus the number
12 implemented in this current zoning ordinance?

13 A That's correct.

14 Q Plus you would, in effect, reeplan?

15 A I think there have, there are adjustments, modifica-
16 tions that have to be made to the Master Plan.

17 Q And you would go through the process set forth
18 in the Municipal Land Use Law, Article 3, about the
19 Master Plan and specifically you testified about the
20 housing element, the land use element, and you would go
21 through all those nine or eight areas and come up with a
22 comprehensive Master Plan that fits together?

23 A That's correct.

24 I might also add, Mr. Ferguson, that early in my
25 testimony I indicated that the Statutory requirements
for a Master Plan, and particularly the housing element of

1 the Master Plan have to be met. But I also indicated
2 that there are enunciations, or pronouncements or principles
3 that have emanated from the Mount Laurel and Oakwood at
4 Madison case which also bears on the issue.

5 I don't think there is anything about fair share
6 in the Statute that comes from Mount Laurel. That comment
7 from Mount Laurel and Madison Township and whatever else
8 the Court may decide from those cases as being applicable
9 to all municipalities ultimately, indeed ultimately
10 to Chester Township. Particularly developing municipalities.

11 Q Have you reviewed those elements of the
12 comprehensive plan of August of 1974 relating to the
13 topography, soils above and below ground, water resources,
14 environmental input and data and statements contained in the
15 Master Plan?

16 A No, I have not.

17 Q That was not within the scope of your engagement?

18 A That's correct.

19 Q Is your opinion that you have expressed today
20 about meeting the need, the regional need, whatever that
21 region may be and the people who reside outside the
22 township in terms of housing, has that opinion been
23 expressed in any way in contemplation or in recognition
24 or taking account of the specific geological, topographic
25 soil, water supply, drainage, flood plain, marsh and wood-

1 land conditions relevant to Chester Township as a whole?

2 A I am not sure I quite understand the question.

3 Q When you say that the town must plan and meet
4 its responsibility, that responsibility must be implemented,
5 must it not, taking account of those factors I named,
6 the topography, soil, water supply, drainage, flood plain,
7 marshes, woodlands?

8 A I would agree with you. I would also state that
9 the plans for the town relative to housing should also
10 consider utilities which are part of the plan, which is
11 one plan element in the comprehensive plan.

12 Q That was my next question. As to utilities,
13 it must take into account also water supply and distribution
14 facilities?

15 A That's correct.

16 Q Are there any water supply and distribution
17 facilities in Chester Township?

18 MR. LINDEMAN: I object, you are getting beyond
19 the scope of this witness.

20 THE COURT: I will sustain the objection.

21 MR. FERGUSON: All right.

22 Q And in the same category would be drainage
23 and flood control facilities, sewage and waste treatment
24 and solid waste disposal, utilities?

25 A I am willing to submit that as well as all of the other

1 elements enunciated in the Statute have to be complied with
2 and be part and parcel of the comprehensive plan.

3 Q And part of a comprehensive plan also,
4 is it not, a conservation plan element?

5 A That's correct.

6 Q Relating to natural resources, open space,
7 water, forests, soil, marshes, wetlands, harbors, rivers
8 and other water, fisheries, wild life and other natural
9 resources?

10 A That's correct.

11 Q That is read right out of the municipal land
12 use Law Section 28B-8?

13 A That's correct.

14 Q Have you made any review of Mr. Caputo's
15 site in terms of its appropriateness for high density use
16 as opposed to other areas within the municipality?

17 MR. LINDEMAN: If your Honor please, unless
18 counsel is willing to take the witness as his own
19 and to accept the answer as his own, I would object
20 to the question because there wasn't, that was no
21 part whatever of his --

22 THE COURT: Let him answer the question, then
23 if he says yes, then we will go somewhere else.

24 MR. LINDEMAN: Okay.

25 THE COURT: We will deal with the next question.

1 If he says no, then it is over.

2 Did you?

3 THE WITNESS: Well, would you repeat the
4 question?

5 (Last question read by the reporter.)

6 THE COURT: Yes or no. Did you review the
7 Caputo site for high density use against other areas
8 in the municipality?

9 THE WITNESS: From a, from a planning point of
10 view, I was aware of what was being proposed and I
11 was aware of the supportive reports by other experts
12 relative to the development of that property other than
13 what it was zoned or --

14 MR. FERGUSON: I don't think that really
15 answered the question.

16 Q Did you examine the, or were you made aware
17 of expert reports or any, or data with respect to other
18 sites, and specifically those areas up near the border of
19 Chester Borough around where the MR Zones are in the
20 present ordinance?

21 A I am not aware of expert reports or if they exist.
22 I haven't read them.

23 Q Okay. Did you make any investigation of other
24 potential sites, such as the MR Zones?

25 A No, I did not.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q To compare them with Mr. Caputo's site?

A No, I did not.

MR. FERGUSON: I think it might help if we had a short recess just to let me go over a few notes.

I don't think we will go beyond today, Mr. Zimmerman.

THE COURT: Okay. In light of the fact that in part I have been keeping him waiting, I would like to get through with him today. All right, what do you need, ten minutes?

MR. FERGUSON: That would be fine. If the Court has any questions, perhaps you want to ask?

THE COURT: I have nothing to ask at this point. Let's take ten minutes. You can step down.

(A short recess was taken.)

THE COURT: Okay, Mr. Ferguson.

Q When you say that the comprehensive plan provided only for residents in terms of housing, you include in your definition of residents future residents?

And isn't that -- my next question is -- isn't a fair reading of what the Master Plan is saying?

A As far as, well, the Master Plan provides for both current and future residents. The Master Plan, however, does not provide, in my opinion, the type of housing that is needed for future residents in the way it provides for

1 housing for future residents for single-family type
2 houses or housing on two acres or one acre or five acres.

3 Q Your point is that it should have a greater
4 variety of housing and specifically other types of multi-
5 family units?

6 A And other types of multiple family, correct. And a
7 variety of housing should be provided in the township.

8 Q You said that Chester Township does not have
9 any small lot zoning that is less than an acre?

10 A That's correct.

11 Q Have you made any independent study to enable
12 you to determine if in fact there are places where small
13 lot zoning under an acre per lot is appropriate, given all
14 the factors that a planner must evaluate in making that
15 determination?

16 A My opinion is that there are areas that are appropriate
17 for smaller type houses and smaller lots in Chester Township
18 consistent with the land use development concepts that
19 have been identified by Chester or consistent with the
20 plan before the Court presented by the Caputo property.

21 Q I don't understand that answer. You are going
22 to have to explain it to me.

23 A Well, on the one hand, I am saying that there is
24 nothing so unique about Chester Township which would
25 preclude it in any way, shape or form from providing in its

1 zoning ordinance for small lot type houses and small size
2 type houses.

3 Now, the alternatives from a planning point of view
4 are where in the municipality this should go. How much
5 and there are two alternatives suggested which are not
6 multi exclusive.

7 Q We are talking about small lot zoning?

8 A That's correct.

9 Q Now, what isn't a requirement of small lot
10 zoning?

11 To get at it another way, utility systems to support
12 it and specifically water and sewers?

13 A That may be or may not be a requirement. For example,
14 there is a plan before the Court that would provide on-site
15 treatment and on-site utility systems, if the municipality
16 were disposed to go ahead and provide water and sewage
17 facilities within the municipality itself, then small lots
18 could be addressed.

19 In addition, there is no place in the Master Plan
20 which entertains this as a viable concept. So the issue
21 isn't even raised in the Master Plan as a possibility.

22 Q The Master Plan, does it not reflect the
23 fact that there are no sewers or utilities presently
24 existing in Chester Township?

25 A Well, I would suggest that if that is the case,

1 and I don't disagree with you, that it is not, it is a very
2 limited outlook for a Master Plan.

3 A Master Plan is a projection for the future and
4 should consider as enunciated in the Statute the provision
5 for utilities.

6 Q Okay. When we factor in the concept of time
7 in the planning decisions, tell us as a professional planner
8 what time span you would like to see as a general rule
9 in Master Plans?

10 A I think the general rule has been that a concept
11 be developed for twenty years in the future and that that
12 general concept be translated into a shorter range program.

13 Say for the next five years and a land use element
14 be produced consistent with that five-year short-range
15 future which would tie into the zoning ordinance.

16 Q Now, are you saying that the land use element
17 is short range for five years?

18 A That's correct.

19 Q Or could you have a land use element that is
20 co-extensive with the Master Plan, but which has units
21 indicated in it?

22 In other words, a five-year stage, a ten-year stage,
23 a fifteen-year stage, et cetera?

24 A That's a possibility.

25 Q So you could have both?

1 A That's a possibility.

2 Q You could do it either way and still be within
3 -- if I were an accountant, say the generally accepted
4 accounting principles, but why don't we say generally
5 accepted planning principles?

6 A That's correct.

7 Q What is the time plan for a zoning ordinance?
8 In other words, what is the time frame? What are we talking
9 about? What kind of a range? Short, long, medium?

10 A Well, that's an impossible question to answer in
11 general terms.

12 Every zoning ordinance relates to a particular
13 municipality. It certainly is applicable as we all know,
14 to the present.

15 Q You are familiar with Article 3 of the
16 Municipal Land Use Law.

17 You are also familiar with Article 8 of the Municipal
18 Land Use Law, the Master Plan, and zoning, respectively.
19 Under those -- withdraw that.

20 Within the framework of those two articles, what would
21 you as a planner say is the -- by the parameters of
22 a time frame that you as a planner would use to design a
23 zoning ordinance?

24 MR. LINDEMAN: I object. I think it is virtually
25 impossible for anybody, including the drafter of

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

the Act to know what Article 3 or Article 8 is off the top of his head.

MR. FERGUSON: I hand the witness Article 3 and Article 8.

MR. LINDEMAN: Which is that?

THE COURT: Article 3 of the Planning provision. Article 3 is the Master Plan and Article 8 is the zoning.

MR. LINDEMAN: I mean of the Statute.

MR. FERGUSON: The zoning ordinance.

MR. LINDEMAN: Follow the same numbers down.

MR. FERGUSON: I don't know.

MR. LINDEMAN: 55D-28? Is that it?

MR. FERGUSON: Article 8 is Section 62.

Article 3 is Section 28.

A I perused very quickly these two Articles.

Q Yes.

A And I have since forgotten the question, if you don't mind.

MR. LINDEMAN: Can you find it, Mr. Reporter?

(Last question read by the reporter.)

MR. LINDEMAN: Your Honor, I object again. Your Honor, forgive me, because you may miss the question again. But --

THE COURT: I think we are getting very

1 theoretical, Mr. Ferguson.

2 MR. LINDEMAN: Awful theoretical and awfully
3 vague.

4 MR. FERGUSON: I am just trying to ascertain
5 the period of time within which we are confined here,
6 both from a planning point of view and from a
7 zoning point of view. And perhaps I can just ask the
8 witness his opinion of whether a zoning ordinance
9 should, in the ordinance itself, have a phased growth
10 plan or whether that should be confined to the
11 Master Plan and the ordinance should only reflect
12 what should be done in the near future.

13 MR. LINDEMAN: I object to that, too.

14 THE COURT: That is the whole problem.

15 MR. FERGUSON: That's right.

16 THE COURT: You know, that is the whole problem
17 the State has, the County has, you know. If we
18 could phase the growth and control the growth, we
19 would be in good shape and he probably would be out of
20 a job and so would all of us.

21 THE WITNESS: Not necessarily.

22 THE COURT: You know, I don't understand what
23 you mean by that question and I think it is unfair
24 to ask him.

25 He said before it is impossible to talk in terms

1 of long-range or short-range.

2 Are you saying how long should a zoning
3 ordinance be good for or how long should a Master Plan
4 provide? How should a Master Plan provide for the
5 phasing of growth or the growth phases?

6 MR. FERGUSON: Perhaps I can ask those two
7 questions of the witness.

8 THE COURT: Well, if you are talking about
9 how long a zoning ordinance is good for, I can
10 only speculate as to what his answer is going to
11 be and I can tell you pretty close what his answer
12 is going to be. All right.

13 How long do you think a zoning ordinance
14 -- maybe the other way you should ask it.

15 How often should you review a zoning ordinance?

16 THE WITNESS: Well --

17 Q Keeping in mind that the Master Plan must be
18 updated every six years as required by law.

19 A That's correct. As I read the two articles in the
20 Statute, there is not, as I read them, specific reference
21 to a Master Plan should be aimed toward twenty years
22 in the future and ten years. And likewise, there is
23 no specific time parameter placed around the zoning
24 ordinance. The zoning ordinance is the law literally and
25 figuratively of the land and it should purport to indicate

1 what the most appropriate uses for that land is at this
2 moment of time.

3 Now, a zoning ordinance could exist as a valid
4 zoning ordinance for a year or for ten years and that it
5 really depends upon the community that we are dealing with.
6 And, for example, if we were dealing with a developing
7 community, then I would suggest that the zoning ordinance
8 be reviewed periodically.

9 And that if we are dealing with a non-developing
10 community, agriculturally based, not experiencing growth,
11 et cetera, then the zoning ordinance is going to exist
12 without change for a longer period of time.

13 Q As required in effect?

14 A That's correct.

15 Q The RM Zone has 278.4 acres, I believe you said.

16 From this using a 5-unit per acre density, you
17 calculated 1,392 units leaving aside the limitations which
18 you made reference to about 300 and 157?

19 A That's correct.

20 Q If you had a density of 7 units per acre --
21 would you check my mathematics -- that you could have
22 1,948.8 units?

23 A 1,948.8?

24 Q That's basically the formula you used. And
25 I am correct in using the same one?

End of
Tape 7

1 A That's correct.

2 Q Now, when you testified as to your calculations
3 about the difference between the '64 ordinance and the
4 '76 ordinance and the number of acres -- strike that.

5 In the number of units in the residential zone and
6 you compared them, would you tell us what assumptions you
7 used in making those calculations in terms of roadways,
8 the acreage which could not be built on because it would
9 have to be taken up by roads, et cetera?

10 A I assumed that 15 percent of the acreage would be
11 utilized for right of way systems.

12 Q Is this true for the RM Zone?

13 A No. The RM Zone has a limit expressed in the
14 zoning ordinance of 300 units.

15 Q So that you did not subtract 15 percent from
16 the RM Zone?

17 A That's correct.

18 Q Only from the single-family residential zones
19 of R-5, R-2, R-1, and H-2?

20 A That's correct.

21 Q You said the flight of the crow between Chester
22 Township and Newark is 28 miles. Do you know what that is
23 by road, and if so, which roads?

24 A I don't know what it is by road in miles. I would
25 indicate that in time door-to-door travel it is about fifty

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

minutes.

Q Five zero?

A Five zero by automobile and about an hour by train.

Q First by automobile, over what roads?

A Well, there are several routes that can be taken.

Route 24 into Morristown connecting with 287 north to

Route 80 to 280 into Newark, or connecting up with Route

206 south to Route 287 north to Route 80 and then on to

Route 206 or 202 or going on 206 to connect with Route 78,

78 west on to Route 22 and Route 22 into Newark.

Q What time of day does that 50-minute estimate hold true for?

A That is for the peak hours' journey to work. Journey from work.

Q During peak hours?

A Yes.

Q Does that include peak hours through Morristown?

A Yes.

Q Does it include peak hours on Route 280 going into Newark through Harrison?

A Yes, it does.

Q Have you ever driven that yourself?

A Many times I drive, take that route twice a week into Newark.

Q Where do you get off?

1 A I don't get off Route 280 and Orange Street.

2 Q That Orange Street is not the exit going into
3 downtown Newark.

4 A I realize that. It takes you another ten minutes
5 to get to downtown Newark.

6 Q Two more. There is one going into Newark and
7 one going across the river into Harrison.

8 A This would be the last exit into Newark which I
9 think is Orange Street.

10 Q Where do you live?

11 A I live in Randolph Township.

12 Q Which is above Chester Township?

13 A That's correct.

14 Q So how do you go?

15 A I work my way over to West Hanover Avenue to
16 Ridgedale Avenue in Morris Plains.

17 Take Ridgedale Avenue north to Route 10. I get on
18 Route 287 at Route 10. 287 intersecting north connects up
19 with Route 80 and into 280. This is when I teach in
20 Newark. It takes me thirty-five minutes door-to-door.

21 Q You got a good route. Don't tell anybody else.

22 So how did you get this 30 minutes? Did you
23 drive into the middle of Chester?

24 A I have taken that route. I have been involved, well,
25 suffice to say, I have traveled that distance for not only

1 the purpose of preparing myself for this testimony, but
2 other development proposals in Chester Township which required
3 that knowledge.

4 Q Where do you take your start of your journey from?

5 A I am starting my journey from the Caputo tract.

6 Q You're not starting from the center of Chester?

7 A No.

8 Q Where is the center of Chester?

9 A North of the Caputo tract.

10 Q What is it called?

11 A Chester Borough.

12 Q What is in Chester Borough?

13 A I don't know what you mean. Is there land uses or
14 population or --

15 Q Describe it for us.

16 A Streets?

17 Q The land uses and character of Chester Borough.

18 A Chester Borough contains the commercial land uses
19 that are found in the Chester area. There are essentially
20 two major neighborhood shopping centers in Chester Borough.
21 There is strip commercial along Route 24. There is
22 scattered commercial along 206 and there is a variety of
23 land uses found in Chester Borough.

24 Q Characterize for us briefly, if you would,
25 the residential land use of Chester Borough?

1 A I really haven't analyzed the types of residences
2 found in Chester Borough.

3 Q You said that as far as you were concerned
4 Chester Township was a municipality in terms of having
5 a functioning government and not a part-time government.

6 Is that an accurate paraphrase?

7 A No, I don't think so. What I was alluding to and
8 the examples were to the point in that there is a municipal
9 building, there is a police department. There are municipal
10 employees who work there who are there during the day
11 when you want to go there to pick up zoning ordinances or
12 the comprehensive plan or check tax maps or pay your tax
13 bill or other activities that one would presume takes
14 place in the municipal building, whereas, there are
15 municipalities in New Jersey which don't have those
16 activities or functions.

17 Q Do you know how many municipal employees there
18 are?

19 A No, I do not.

20 Q Do you know how many of them wear more than
21 two municipal hats?

22 A No, I do not.

23 Q Do you know how many of them are a part-time
24 municipal employee and work at another job someplace else?

25 A No, I do not.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q What is your definition of a developable area in your four criteria which you testified about?

A An area that is vacant or unencumbered and suitable for development, such as vacant land. Unfortunately, we tend to consider agricultural land as in that category. The Caputo property certainly would fall in that category as opposed to land that is already built upon for houses or parks or other uses.

Q Why do you say unfortunately about agricultural land?

A Well, it is my own perhaps editorializing --

Q I'm very interested in --

A -- regarding the value of agricultural land, feel that the only purpose is as a reservoir for future residential development.

Q What do you think, how do you think we should regard agricultural land aside from a reservoir for future development?

MR. LINDEMAN: I object, if the intent of that question is asking for the witness' personal preference.

THE COURT: I think we are getting a little far afield.

MR. FERGUSON: Well, he testified there is, 20 percent of the land is in agricultural use according to the records of the Township. And although

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

some of that was in a state-type agricultural use.

THE COURT: A use predominantly estate-type, isn't that correct?

THE WITNESS: That's correct.

Q So no hard agricultural use?

A I am not of that opinion.

Q Okay. You never know.

Is any, are there any hard agricultural uses in Chester Township? Is land under active cultivation by a farmer for a profit?

A There may be some. From my knowledge of Chester Township, I'm not aware of any.

Q What about the fruit orchards?

A Many of those, well, of the fruit orchards that I am aware of, they are part-time activities on the part of the owner. The owner maintains it as an orchard, but his real livelihood is found elsewhere.

Q Are you excluding from your opinion all agricultural uses that might be, that you might classify as part time?

A I am looking at agricultural land --

Q Let me --

A -- in which the occupant receives his sole income, or sole or primary income from the cultivation of agricultural products. There may be some. There's

1 Park's Fruit Stand is one. There are a couple of small
2 fruit stands.

3 Q You would agree with me that it is not the
4 same as Gloucester County where they have acres and miles
5 of tomatoes?

6 A That's correct.

7 Q That's really what you're saying?

8 A That's correct.

9 Q In your definition of developable area,
10 you indicated if it was vacant it was suitable for
11 development?

12 A I don't think so.

13 Q Well, that's what I heard.

14 THE COURT: He said if it is vacant unencumbered
15 and suitable for development.

16 Q So there was an in between?

17 A That's correct.

18 Q What is the definition of suitable for
19 development?

20 A Well, suitable for development would go to one,
21 the use, and two, other factors such as environmental
22 factors, the lay of the land, items of that nature.

23 Q Including soil topography, drainage, slope?

24 A That's correct.

25 Q As the top of a mountain might not be suitable

1 for development although it will be forever vacant?

2 A There might be topography or terrain restraints
3 on the developability of the property.

4 Q Mr. Zimmerman, do you have a population figure
5 for 1950 in Chester Township?

6 A In 1950, the population of both Chester Township
7 and Chester Borough was 2,051. Unfortunately, the figures
8 contained in this book combine both the Township and the
9 Borough.

10 Q And what's that figure for 1950?

11 A 2,051.

12 Q What is the figure for Chester?

13 A I would estimate if we wanted to hone in on the
14 township that the borough and the township at that time
15 might have broken out 50-50. So half of that would be
16 the borough and half of that would be the township.

17 Q What are the figures for 1960?

18 A The 1960 population of the township was 2,107.

19 Q Yes. What were the figures for the borough?
20 What were the combined figures?

21 MR. LINDEMAN: May I interpose an objection
22 at this point? I don't want to educate the witness
23 on this, but unless this is the burden of the inquiry
24 as to test the witness' memory, I think it might be
25 fair to --

1 THE COURT: Obviously not.that. He is
2 allowed to look in the census books.

3 MR. FERGUSON: My next question is to edify
4 what books he is taking it from.

5 MR. LINDEMAN: These figures have been stipulated
6 in the proceeding.

7 MR. FERGUSON: Not for the Borough they haven't.

8 MR. LINDEMAN: I didn't think the Borough,
9 frankly, was relevant.

10 MR. FERGUSON: I do.

11 MR. LINDEMAN: Well, I object on the basis
12 --

13 THE COURT: I will allow it because we are
14 talking about regional concepts.

15 A The population in 1960 for Chester Borough was
16 1,074.

17 Q In 1970?

18 A 1970 was 1,299. Chester Borough.

19 Q Is 1950 the only year they combined the two
20 of them?

21 A No, they combined them in all preceding years,
22 1930, '40, from there.

23 Q But in '60 and '70 they broke them out?

24 A The figures are broken out for the Township and the
25 Borough.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q How did the census treat them?

A When?

Q In 1950 first together.

A Well, the information I have is compiled and published by the County Planning Board and that information lumps the Borough and the Township together.

There may be, I am sure there is a way to determine in fact what the population of the township and the borough were in 1940, '30, or whatever you are interested in. I just don't have those figures in front of me.

Q Why does the County Planning Board lump the township and the borough together, do you know?

A That was the way the census published the figures at that time.

Q Have they since been published so you can break each one out?

A That's correct. In 1960, they broke it out.

Q Did you make any study of Chester Borough to see if the Borough provided any housing or met its responsibility with respect to residents living outside its borders?

A No, I did not.

Q What is the source of your information for the population of the Borough and the Township?

Is that the United States Census data?

1 A That's correct.

2 Q I infer from your comments, and you correct me
3 if I am wrong, that you did not make any study as to
4 where utility systems could best be located in Chester
5 Township to serve the needs of the Township for the next
6 five, ten, fifteen, twenty years?

7 A That's correct. I certainly did not do that.

8 MR. FERGUSON: I have no further questions,
9 your Honor.

10 MR. LINDEMAN: I have no questions.

11 THE COURT: Okay. Step down, Mr. Zimmerman.
12 Thank you.

13 THE WITNESS: Thank you.

14 THE COURT: All right.

15 MR. LINDEMAN: Your Honor please, I would like
16 to present something to the Court which I think is a
17 legal proposition of some importance, or at least
18 it strikes me as being important.

19 In the decision of Mount Laurel at Page 42
20 of the Court's slip opinion that I have, the Court
21 first makes some observations about the nature of
22 Mount Laurel Township in respect of its developing
23 aspects and comes to the conclusion apparently that
24 it is a developing municipality.

25 Then at Page 42, it says, "That without further

1 elaboration on this point our opinion, that is,
2 Mount Laurel's zoning ordinance is presumptively
3 contrary to the general welfare and outside the
4 intended scope of the zoning power in the text
5 mentioned, a facial showing of invalid is thus
6 established shifting to the municipality the burden
7 of establishing valid superseding reasons for its
8 action and non-action.'

9 Now, we take the position, your Honor, that
10 with Mr. Zimmerman's testimony as well as with the
11 facts and figures contained in the stipulation
12 already admitted into evidence, that that alone
13 constituted a prima facie case that an ordinance of
14 the Township of Chester is invalid.

15 And at this point, while it may come as somewhat
16 of a shock and surprise, I think that under the
17 mandate of Mount Laurel the burden has shifted from
18 us to the Township and it is now the Township's
19 burden to go forward to show that their ordinance
20 is in fact valid.

21 MR. FERGUSON: I ask --

22 THE COURT: Hold it just a second.

23 There is a difference between, as I understand
24 it, the burden of proof and the burden of coming
25 forward with evidence.

1 MR. LINDEMAN: I agree, your Honor.

2 I agree and I think, I do think the language is
3 somewhat confusing, but what the Court has said
4 is that the burden has shifted to the municipality
5 to show valid superseding reasons for its action or
6 non-action.

7 I think what it is saying is that that's
8 the burden of proving. It doesn't use those words.

9 THE COURT: You have two facets to your position
10 that seem to me to be inherent to your burden of
11 proof. One that you suggested you have already made.
12 The other is that requirement that I directed the
13 Township of Chester zone your client's property
14 as you deem it should be or as he deems it should be
15 zoned.

16 Now, that facet is referred to in Oakwood
17 and I know of no similar proviso in the Oakwood case.
18 And you could point it out to me if I am wrong, which
19 shifts the burden to the Township of Chester to
20 prove that the property is not suitable for the
21 proposed use.

22 So it would seem to me that you have further
23 aspects of proof at this point. If you want to rely
24 on the language of Mount Laurel, that is your perfect
25 right to do so. I will not concur, or deny that

1 conclusion at this point.

2 You tell me when you're ready to rest and then
3 I will see what the Township wants to do.

4 MR. LINDEMAN: It goes without saying, your
5 Honor, I would not take that risk in a case of this
6 kind.

7 THE COURT: Right.

8 MR. LINDEMAN: But I do think that the Supreme
9 Court has said what I maintain it to have said.
10 And I think I read the Court's determination even
11 without regard to this other question of the suitability
12 of the plaintiff's land for the purpose that we seek.
13 But I would ask only that and the balance of the
14 case that the Court bear this edict or dictum,
15 whatever it may be from the Mount Laurel in mind.

16 I will not concede the rest of the case
17 simply because I think it is too treacherous to do
18 that.

19 THE COURT: I am not saying that I disagree
20 with you. Don't misunderstand me. If you thought
21 that all I am saying is added this point there are
22 many facets and I picked out two of them to this case
23 that have to be dealt with.

24 When you have deemed the time to rest with the
25 many facets of the case, and I think tomorrow is

1 a good time to get back to the relief sought in
2 the brief and the answers to those questions because
3 there are facets there that while you alluded to
4 a shifting of the burden of proof, I am not too
5 sure there is a shifting of the burden of proof,
6 i. e., the reasonableness of the fees in the
7 ordinance because they have a severability clause
8 in the ordinance. You got to tell me about that.
9 These are things that at this point it doesn't
10 surprise me that you raised the question after hearing
11 from Mr. Zimmerman. But if you're raising it to
12 suggest that now Mr. Ferguson has got to present
13 proof, then it does surprise me in light of what
14 you're asking for in your brief.

15 MR. LINDEMAN: Right. I think that even in
16 Oakwood at Madison Township where the Court does say,
17 I think it is at Page 94, of the slip opinion, that
18 in a, well, start at about maybe two, perhaps that
19 certain relief should be given to the plaintiff and
20 they're speaking of the private plans.

21 THE COURT: That is the last few pages of the
22 opinion.

23 MR. LINDEMAN: Yes, your Honor. Just before the
24 section entitled, Remedy and Remand.

25 I don't think the Court there is really, or has

End of
Tape 8

1 made any distinction between the requirements on
2 behalf of the plaintiff. The plaintiff personally
3 and the over-all proofs that have to be presented
4 on the issue of invalidity. I think it is a fair
5 reading of Oakwood that because the plaintiff bore
6 the burden of bringing the action and going to all
7 this trouble and being treated as it was, it is
8 entitled to some separate relief.

9 THE COURT: You do conclude that that's the
10 conclusion that the Trial Court should draw in every
11 case where a real, where there is a challenge to a
12 zoning ordinance on the Mount Laurel Oakwood basis?

13 MR. LINDEMAN: I would go as far to say that
14 would be the situation in every case. I don't think
15 there is any question but they exist in this one.
16 Each fact, each case has to be determined on its own
17 facts. But what I'm simply saying now is that the
18 statement of relief to be granted as it is announced
19 in Oakwood at Madison Township, I think is not,
20 I think does not subsume that the plaintiff has
21 produced evidence that, to show that his evidence to
22 the property is suitable.

23 I am simply, the Court is saying that it should
24 have the relief that it seeks and that is after it
25 seeks, and this is after having gone through all of the

1 other testimony and having made, drawing conclusions
2 as to the conditions of the Mount Laurel ordinance,
3 it found that it was invalid. And then it said,
4 not Mount Laurel, I mean Oakwood at Madison Township
5 ordinance, it found it was invalid and found the
6 plaintiff, it should be entitled to relief that they
7 seek.

8 I'm not prepared at this time to produce our
9 engineering expert as of this time simply because
10 of the nature of things. His schedule and ours and,
11 but even so, I think that I should not be required
12 to do so. However --

13 THE COURT: Look, that it is unusual if you're
14 making a Motion. You have the burden. You prove
15 all of the facts that you feel are necessary and
16 provide me with all of the opinions that you feel are
17 necessary until you meet that burden. If you want to
18 rest before me and say, all right, now, Judge, if
19 you decide whether that burden has been met at this
20 point, I can do that. But what I am saying to you
21 is this: That in light of all of the relief that
22 you ask for in the brief that has been filed with me,
23 and which we have gone over and tried to get
24 clarification on, there are aspects that go well
25 beyond the scope of the language of Mount Laurel and

1 go well beyond the scope of the language of Oakwood.

2 Let us take a for instance, and I will refer
3 to it specifically so that there is no question,
4 on Page 10 that the development procedures and fees
5 imposed by said ordinance are burdensome, excessive
6 and unlawful, including site plan and environmental
7 procedures and fees.

8 Now, I know of nothing in either of those two
9 principal cases that have generated all of the zoning
10 ordinance litigation referring to that. I know of
11 no case and, perhaps, and I don't recall the brief
12 showing me any case that shifts the burden of proof
13 on those two aspects. So we are still confronted
14 by the presumption of reasonableness, or the presumption
15 of validity that the municipality was able to ride
16 the crest prior to Mount Laurel, no longer hasn't
17 if certain facts are shown. But that's one of the
18 aspects that I don't see any change. And I read the
19 two new cases --

20 MR. LINDEMAN: Pascack and Demarest.

21 THE COURT: Pascack and Demarest, which are
22 different entirely on their facts as far as the type
23 of municipality is concerned, but let's say bolstering
24 the premise of the old law and the old presumptions.
25 And that is a debatable argument. If it is debatable

1 as between experts is not for the Court to select
2 which of the better two exists.

3 There the presumption, it seems to me, continues
4 to prevail and opponents to the ordinance cannot
5 prevail. But, so you got other facets to this case
6 that are going to have to be brought forward in the
7 proofs. If you don't want to bring your engineering
8 expert, that is perfectly your right. But you're
9 asking me to order the defendant to cooperate with
10 and subject -- strike that, it is the wrong one --
11 a re-zoning of plaintiff's property.

12 MR. LINDEMAN: Yes, I stand by that, your
13 Honor.

14 THE COURT: Okay. I know you stand by it.
15 But what I'm saying isn't that. I don't think it is
16 an automatic relief no matter how you read Oakwood.
17 It is the end of the case.

18 I have spent many hours trying to analyze
19 just what it is that Judge Conford means there as a
20 guideline to the Trial Court. Whether I think, and I
21 think it has to relate specifically to the facts of
22 each case. But if you're asking for a re-zoning of the
23 plaintiff's property, then I think I have got to
24 consider what the Court said in the Pascack and
25 Demarest cases about treating specific property and the

1 debatable aspects of treating one piece of property
2 as opposed to all.

3 The ordinance may be invalid, but that does
4 not necessarily, as I read the cases, indicate that
5 you're entitled to have a specific piece of property
6 re-zoned.

7 MR. LINDEMAN: Your Honor, I think the way this
8 works is this: Perhaps I'm reading something into
9 it as well. But I think it works this way, invoking
10 that section of Justice Hall's opinion in Mount Laurel,
11 we are taking the position that we have made a
12 prima facie case of a certain part of this proceeding.
13 That does not necessarily call for a determination
14 by the Court that the Statute, that the ordinance is
15 invalid in all respects because I just don't think
16 that's what Justice Hall meant. What I think he did
17 mean was that you have now done your job, Mr. Plaintiff,
18 and it is now the obligation of the defendant to go
19 forward and show that his ordinance is in fact
20 reasonable. It would be when that's done and we will
21 bring in rebuttal testimony, if it should be called
22 for, that the Court would make its determination as
23 to this additional relief that we are seeking.

24 THE COURT: I don't see how this differs,
25 let's say, from, let's say a Will contest case where

1 you're trying to upset the Will for undue influence
2 you show the association or the relationship of
3 trust and reliance by the maker of the Will upon
4 the party who is the beneficiary and the defendant
5 in the lawsuit and where it talks about the shifting
6 of the burden of proof.

7
8 As I still understand it, the plaintiff still
9 must come forward and establish all of the facts to
10 justify, and the burden of proof of coming forward,
11 not the burden of proof, the burden of coming forward
12 is still there. But the burden of proving by the
13 evidence is another factor to be assessed by the
14 Trier of the Facts when he has the evidence before
15 him. And what I think Justice Hall was saying, I'm
16 not, you know, I'm not suggesting that I know inside
17 his head, but what I think he was suggesting was that
18 there is a shift. That there is a presumptive pre-
19 sumption of validity in this type of situation.

20 The Mount Laurel type situation no longer
21 exists. The defenant can no longer sit back, if these
22 facts are shown and say, well, we have got a presumption
23 of validity and rest on that presumption, or bring in
24 an expert and say from the expert's standpoint, well,
25 I disagree, I disagree, I disagree.

They got an affirmative burden of proof. I don't

1 think, I don't know that he is talking about the
2 burden of producing the evidence. I think he is
3 talking, I think, the evidence there was to overcome
4 the presumption that is rampant in the cases and
5 was utilized by municipalities time and time again,
6 saying, okay, we have got the presumption. It wasn't
7 overcome and the Court sustained the presumption,
8 the burden not being met against.

9
10 But look, I guess it boils down to this,
11 Mr. Lindeman. It is your case to try. It is my
12 case to decide. When you have decided to rest,
13 you let me know.

14 MR. LINDEMAN: It isn't going to be tomorrow.

15 THE COURT: Okay.

16 MR. LINDEMAN: Thank you, your Honor.

17 THE COURT: Now, do you have an expert?

18 Do you have somebody for tomorrow morning?

19 MR. LINDEMAN: Yes, I do, your Honor.

20 MR. FERGUSON: Who?

21 MR. LINDEMAN: Clifford Earl, if he is back.
22
23
24
25

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, EARL C. CARLSON, a Certified Shorthand
Reporter and Notary Public of the State of New Jersey,
certify that the foregoing is a true and accurate
transcript of my stenographic notes.

Earl C. Carlson

2-4-1917