

ML - Chester Twp

11/15/77

Caputo v. Chester Twp

Transcript of Trial - Vol I

witness:

- Kasler

- Ellis

- Ashmun

+ exhibit list

P 151

ML0006903

no by.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
DOCKET NO. L-42857-74 P.W.

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JOSEPH CAPUTO and
ALDO CAPUTO,

Plaintiffs,

vs.

TOWNSHIP OF CHESTER
and PLANNING BOARD
of TOWNSHIP OF CHESTER,

Defendants.

FILED

JAN 14 1980

STENOGRAPHIC TRANSCRIPT

OF

TRIAL

VOLUME I

Stephen W. Youngs
CLERK

) PLACE:
MORRIS COUNTY COURTHOUSE,
) MORRISTOWN, NEW JERSEY
NOVEMBER 15, 1977

BEFORE: HON. ROBERT MUIR, JR., AJSC

TRANSCRIPT ORDERED BY: PHILIP LINDEMAN, II, ESQ.

APPEARANCES:

MESSRS. AMBROSE & MONICA
BY: PHILIP LINDEMAN, II, ESQ.,
COUNSEL FOR PLAINTIFFS

MESSRS. MC CARTER & ENGLISH
BY: ALFRED L. FERGUSON, ESQ.,
COUNSEL FOR DEFENDANTS

REC'D.
APPELLATE DIVISION
APR 5 1979
AG

Elizabeth M. ...

FILED
APPELLATE DIVISION
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Elizabeth M. ...

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I N D E X

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Bruce Ellis	98	102		
Candice M. Ashmun	105	121		

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1 THE COURT: The posture we were at when
2 we broke was, Mr. Ferguson, you were going to
3 make some motions. So, why don't you proceed
4 with your motions.

5 MR. FERGUSON: The only item of un-
6 finished business, I think, may have been the
7 resolution, not the ordinance, about the mora-
8 torium.

9 THE COURT: Resolution?

10 MR. FERGUSON: Resolution. I'm informed
11 that there was a resolution adopted by the
12 council on November 20, 1972, which stated,
13 quote, "Be it resolved that the Township
14 Council declared a moratorium for actions
15 on actions, or decisions on all major sub-
16 divisions for six months, or until such time
17 as the Planning Board has completed their
18 zoning plan, whichever is the sooner, and the
19 Planning Board be advised of this action by
20 the Council. This resolution to be revised
21 and clarified by the Township Attorney at the
22 regular meeting of the Township Council on
23 December 4, 1972."

24 Now, that, I think, was adopted on
25 November 20, 1972, and Mr. Hillas informs me

1 has been rolled over like treasury.

2 THE COURT: It's a very interesting
3 question, and if it was more germane to this
4 case, I think I would probably write an opinion
5 to go into the reports for it. How can you
6 pass by resolution something that has an af-
7 fect on a document that's an ordinance?

8 There was a case on it that discusses the dif-
9 ference between resolutions and ordinances,
10 and Justice Pashman holds in that case, and
11 I had forgotten the name of it, that you can't
12 do something by resolution that you should do
13 by ordinance. How can you suspend an ordinance
14 by resolution? I question the legal efficacy
15 of the moratorium. I don't know that it's of
16 any moment, except the effect that it had on,
17 unless the Township is going to argue that the
18 reason why they didn't pay attention to Mr.
19 Caputo's position was that there was a mora-
20 torium in effect. Then, you know, it might
21 get--

22 MR. FERGUSON: We did pay attention to
23 him, along with the other requests for zoning
24 change. I think the issue is now moot.

25 MR. LINDEMAN: Just one inquiry about

1 that, your Honor. That date was what, in
2 '72?

3 MR. FERGUSON: I'm advised it's November
4 20, 1972.

5 MR. LINDEMAN: November 20, 1972, and
6 are you stating, counsel, that roll-over as
7 for practical purposes extended to this day,
8 until when?

9 MR. FERGUSON: It's my understanding
10 that most people in the Township thought it
11 was in effect until the disposition of the
12 zoning ordinance in 1976.

13 THE COURT: Okay.

14 MR. FERGUSON: I haven't seen any cer-
15 tified minutes, and I can't represent to the
16 Court that that, in fact, happened.

17 THE COURT: Since I question its legal-
18 ity in any event, I really--. You know, it's
19 like the legislature passing a statute and
20 then passing a resolution amending the statute.
21 I really don't think, if anybody challenged
22 it at some time during the various stages that
23 it was in effect, I think we would have had a
24 great deal of difficulty continuing, but it
25 almost seems like it's moot.

1 MR. LINDEMAN: If your Honor please,
2 it may be moot, but I consider it important
3 in our case, and I do accept counsel's re-
4 presentation of those dates, and as a factual
5 matter, I will concede to the Court that that's
6 admitted as part of the evidential pattern in
7 the case for whatever purpose it may serve.

8 THE COURT: From the standpoint of
9 legal validity, that's all I'm talking about.

10 MR. LINDEMAN: Just one further request,
11 your Honor, I would like to have a copy of
12 that resolution.

13 THE COURT: Let's do this first, let's
14 mark it into evidence as plaintiff's exhibit
15 45.

16 MR. LINDEMAN: Plaintiff's, yes.

17 THE COURT: Yes.

18 MR. FERGUSON: What I read from was a
19 paper that had been typed out by I know not
20 who and given to me. It's not a certified
21 copy.

22 MR. LINDEMAN: I'm satisfied with it.

23 THE COURT: Just mark it for the iden-
24 tifying--. It's not a resolution or anything
25 of that nature, but it's a document to reflect

1 the date the moratorium went into effect.

2 (P-45, document, was received and
3 marked for Identification.)

4 THE COURT: At least in July, August 1st,
5 of '76, by virtue of the M.L.U.L., it be-
6 came illegal.

7 MR. FERGUSON: Well, see, that's what
8 I, I don't think it was rolled over at any
9 time the Land Use Law was in effect because
10 you can't. It's contrary to the specific
11 terms of the Land Use Law.

12 MR. LINDEMAN: Well, may not have been
13 the case, may have been contrary to the Land
14 Use Law.

15 THE COURT: I don't know.

16 MR. FERGUSON: I don't think it was
17 in my representation.

18 THE COURT: He didn't represent it went
19 beyond '76.

20 MR. LINDEMAN: I'll accept it anyway.
21 I'm satisfied it's through the effective date
22 of the Act, August of '76.

23 May I see it again after the Court--

24 THE COURT: Yes, sure.

25 It's suspending the zoning ordinance,

1 and the land-subdivision ordinance by reso-
2 lution.

3 Well, all right now, Mr. Ferguson.

4 MR. FERGUSON: I would, at this time,
5 move to dismiss the complaint of the plaintiff
6 at the close of the plaintiff's case. I recog-
7 nize the standard which must be applied, and
8 that is the plaintiff's testimony must be
9 accepted at its face value, and legitimate
10 inferences therefrom can be drawn. I think
11 it's helpful to break down the issues which this
12 Court has been asked to decide. I must con-
13 fess I found it somewhat difficult to isolate
14 the issues from the rather long complaint,
15 and I don't know that it's all that helpful
16 to look at the relief sought, and try and re-
17 late that back to any causes of action, which
18 I'm asking the Court to dismiss.

19 THE COURT: As I understand the posture
20 of the pretrial, the pretrials that were held,
21 the purpose of the brief was to outline the
22 causes of action, or the relief sought, and
23 that is why I used the brief and those para-
24 graphs "A" through "W".

25 MR. FERGUSON: I have that in front of

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me. I'm prepared to go down that, argue from it.

THE COURT: That's what I did last night or the night before.

MR. FERGUSON: I frankly think that a distinction should be drawn between a cause of action and the relief to be awarded. Many of these paragraphs "A" through "W" all stem from one cause of action, the invalidity, and invalidity of the ordinance under Mount Laurel or Madison Township. Some of the other paragraphs stem from, for instance, the taking issue, confiscation issue. In any event, what we have is four major issues.

Does the ordinance comply with the right asserted and stated under the New Jersey Constitution by the Mount Laurel-Madison Township decision?

Second is, as applied to the plaintiff's property, is the ordinance unreasonable, capricious or arbitrary?

Third is, does the zoning ordinance follow from and implement the master plan in connection or as judged by the Municipal Land Use Law, and the standards in that statute?

1 And, four is, does the ordinance amount
2 to a confiscation or taking of the plaintiff's
3 property without due process of law?

4 Now, I think that covers the major
5 issues in the law suit, and if there are others
6 in the suit, I would ask Mr. Lindeman to tell
7 us. I think the requests for relief follow
8 from those four issues.

9 THE COURT: All right. Go ahead.

10 MR. FERGUSON: Taking them in reverse
11 order, the testimony as to the confiscatory
12 nature or effect of the zoning ordinance, or
13 the taking of the plaintiff's land is totally
14 inadequate to sustain any charge. Mr. Earl
15 testified on the basis of Mr. Rakos' layout,
16 and Mr. Smith's costs, and the effect of his
17 testimony is basically that you can make much
18 more money, make more of a profit if your land
19 is zoned at a higher density. This Court,
20 we all became very much aware that the \$286,000
21 dam in those figures was not a requirement
22 of any of those lay outs, so all those figures
23 have to be adjusted upward by \$286,000. The
24 Court will recall that Mr. Rakos testified
25 that he had not considered clustering or flag-

1 lot layouts, and I believe he testified that
2 he was instructed on the layout by Mr. Smith.
3 However that may have come about that he chose
4 to lay his prospective layouts the way he did,
5 he did not use clustering. He did not use
6 flag-lots. Put a \$286,000 dam. I submit
7 that the testimony does in no way make out
8 a case for a confiscation or a taking of the
9 plaintiff's property without due process
10 of law. It merely shows that the land becomes
11 more valuable as you zone it for higher and
12 higher density, and I don't seriously dispute
13 that proposition.

14 Again in reverse order, the third issue
15 is whether the zoning ordinance follows the
16 requirements of the Municipal Land Use Law,
17 effective August 1, 1976. In some respects,
18 it clearly does not. The nomenclature of the
19 present ordinance has not been brought up to date.
20 The conditional-use and special-exception proce-
21 dures are not totally in compliance with the Land
22 Use Law. The zoning ordinance has to be redraft-
23 ed, certainly from a technical point of view, in
24 order to fully comply. Also, there is no sepa-
25 rate document labeled, quote, "Land Use Element,"

1 close quote, as required by the Land Use Law.
2 I submit, however, that the document in evi-
3 dence has the reference base and master plan,
4 comprehensive plan itself adopted August 14,
5 1974, in effect contained the basic data neces-
6 sary to make a land use element, although the
7 form of the plan is not quite correct. That
8 data has to be taken out, put in a separate
9 document entitled, "Land Use Element," rewritten,
10 brought up to date; if you're going to do it
11 at all, one might as well bring it up to date.
12 Indeed, that's highly appropriate after Mount
13 Laurel and Madison Township called the Land
14 Use Element, and rewrite the master plan at
15 least to that extent. At the same time, it
16 does not contain some of the other separate
17 elements demoninated as such as is encouraged
18 by the Land Use Law, although not made abso-
19 lutely mandatory. The only mandatory one is
20 the Land Use Element. The master plan itself
21 is in evidence, and I submit that the plaintiff
22 has offered no substantial credible evidence
23 at which a judgment can be made that the zoning
24 ordinance deviates from the Land Use Element
25 in any major respect. The testimony of Mr.

1 Zimmerman, in effect, came down to four pro-
2 positions. One is that the limit of 300 units
3 in the MDR Zone is too little. Next is that
4 the limit of 150 units per tract is not neces-
5 sary, and could be a cost generating unit under
6 the Doctrine of Least/^{Cost}Housing in Madison
7 Township. In other words, the 10-bedroom
8 limitation per acre is not necessary, and that
9 the density of 5 per acre is too low in accord-
10 ance with his experience. Now, that is not
11 testimony which throws the whole master plan
12 out. It simply is not. By and large, the
13 zoning ordinance does follow the master plan.
14 It does implement it. It did create three
15 MDR acres close to the borough where the master
16 plan itself states, "Traffic, utilities, soils,
17 land is more suitable for development around
18 the borough." In all respects, nobody has
19 challenged that. There has been no testimony
20 at all challenging the master plan or how the
21 zoning ordinance implements it, except insofar
22 as those four rather technical requirements are
23 involved, and with respect to those four, the
24 Court is aware that the township has re-adopted
25 its own ordinance as an interim ordinance, and,

1 in effect, it is looking again at those re-
2 quirements with a view to adopting them again,
3 modifying them or eliminating them under the
4 Doctrine of Madison Township, which says you
5 have to over-zone for least-cost housing.
6 That's a new doctrine to New Jersey law; new
7 doctrine as far as I know in U. S. law, first
8 announced by the New Jersey Supreme Court in,
9 I believe, late January, early February of
10 this year.

11 Going to the second issue, that is
12 whether the zoning ordinance as applied to the
13 plaintiff's property is arbitrary, capricious
14 or unreasonable, I don't think there has been
15 any evidence to say that it is. The two lay-
16 outs which Mr. Rakos prepared, as to which
17 Mr. Earl and others have testified are simply
18 one possible, or two possible layouts of
19 major subdivision detached single-family
20 housing which are possible on the Caputo
21 tract, there's no testimony that they're
22 the best layout; that they're the layouts
23 which can be built at the least cost. There
24 is no attempt to even investigate whether
25 clustering or the flag-lot provisions would

1 save substantial development costs. Without
2 that kind of testimony, I don't think this
3 Court is in a position to say that the plain-
4 tiff has even made a prima facie case that the
5 ordinance has applied to his land, that it's
6 unreasonable, capricious or arbitrary.

7 Which leaves us to the final issue,
8 and that is whether the ordinance is valid or
9 invalid under the Doctrine of Mount Laurel and
10 Madison Township. It's helpful, I think, to
11 look at the testimony of each of the witnesses
12 that has testified so far. I've commented
13 briefly on the testimony of Mr. Zimmerman,
14 the net effect of which is there are some de-
15 fects in the zoning ordinance, and the Township
16 comes before this Court and states that it
17 knows that is true, "while not conceding the
18 validity of any of Mr. Zimmerman's specific
19 objections, we are in the posture of saying,
20 we have to re-plan; we have to revise, and
21 some of those provisions may be substantial."
22 The second thrust of Mr. Zimmerman's testi-
23 mony was that the Township must address and
24 estimate its regional responsibility for
25 housing, and to this I say, yes, we must. In

1 fact, we did it in the 1974 master plan and
2 reference base, the data is there. Mr. Zimmer-
3 man's criticism was not that the master plan
4 didn't do that, but that the zoning ordinance
5 didn't implement it fully enough, and that
6 leads into his next comment, which is the Town
7 should plan for zoning over a time period;
8 zoning must not be concerned solely with what
9 should be done right now, it should look to
10 the future. I think this is an area in which
11 planners, reasonable planners may reasonably
12 disagree and you could have a staging ordin-
13 ance. You can have an ordinance now which
14 you intend to look at or amend every two or
15 three years, whatever. But, the point is that
16 the master plan has addressed the regional
17 housing need, although not in the detailed
18 terms which all ordinances are investigated
19 under since Mount Laurel, and Madison Township.

20 In point of fact, this master plan an-
21 ticipated Mount Laurel and Madison Township.
22 The discussion is there, the statements are
23 made that the Town has a responsibility, and the
24 master plan takes the position that it should
25 construct what they call, "medium density

1 residential, MDR." I shouldn't say "should
2 construct," takes the position it should make
3 land available for it. The Town has already
4 done this. The zoning ordinance does it to
5 the extent that there are any technical limi-
6 tations in the ordinance which should be re-
7 viewed and perhaps eliminated or amended be-
8 cause of the mandate to zoning for least-cost
9 housing in Madison Township, the Town is doing
10 so right now, has engaged the services of a
11 planner and the planning process is going on.
12 The deadline for the expiration of the interim
13 ordinance is January 18, 1978, and the Town is
14 aware of that deadline, and is striving to
15 meet it.

16 Mr. Zimmerman testified that if you
17 remove the 300 limit and the 150 limit per
18 tract, you have 1,392 units possible on the,
19 in the MDR zones at a five-unit per acre den-
20 sity, and you have 1,048.8 units available at
21 a seven-unit per acre density. This, I submit,
22 is full compliance with what any witness testi-
23 fied is the thrust of Madison Township or Mount
24 Laurel.

25 David Mendelson testified simply that the

1 traffic will be too much for the roads to
2 handle in 1983, no matter what happens, and,
3 therefore, you're going to have to improve the
4 roads and might as well improve them with suf-
5 ficient capacity to allow Mr. Caputo's develop-
6 ment, or another development like it.

7 Mr. Earl testified that there is a mar-
8 ket for condominiums. We don't really quarrel
9 with that. He testified that Mr. Caputo can
10 make, can realize a greater profit with a
11 zoning which gives him more units per acre,
12 but he testified on the basis of Mr. Smith's
13 calculations, which included a \$286,000 dam,
14 which is considered either an amenity or at
15 most part of the storm drainage system, and
16 there are other ways to handle that. The
17 witness said if there weren't, it's not a
18 necessity, it's a luxury.

19 Mr. Rakos' testimony was quite interest-
20 ing. His map of the zoning inventory of the
21 zoning within five miles showed that the zoning
22 in Chester is consistent with the zoning of
23 the other municipalities around them. Ninety
24 per cent, Mr. Zimmerman said, of the zoning
25 within five miles is greater than one-acre lots.

1 He said the lake is basically an amenity for
2 two-to-five-acre layouts. He acknowledged
3 the steep slopes and rugged terrain of the
4 Caputo tract, and much of the township. He
5 did not consider clustering and the flag-lot
6 prospects of the ordinance in his review.
7 He never investigated whether it would be less
8 costly to use those prospects in his layout.
9 He said that the high gross and net acreage
10 figures of the Township, sorry, of his layout,
11 were, quote, "due to the inefficiency of the
12 land, and due to its physical limitations,"
13 which is a direct echo and justification of
14 the statements about the characteristics of
15 much of the land in the township made in the
16 master plan itself. He talked about the ex-
17 cessive grades and the limitations of the land,
18 and he said that the land on the Caputo tract,
19 if my memory is correct, may merit development,
20 but based his opinion on the testimony of others,
21 and not on his own planning expertise and know-
22 ledge. He also said that low density land use is
23 justified for purposes of environmental pro-
24 tection where appropriate. No witnesses testi-
25 fied that any of the statements made in the

1 master plan about the physical limitations of
2 the land are wrong or inappropriate or not
3 proper considerations on which a zoning ordin-
4 ance should be based. That point, I'll just
5 point out the testimony of Gary Salzman, who
6 said that his investigation at the State
7 Geologist's Office at the DEP showed they
8 recommended three to four acres as lot size on
9 the Precambrian Gneiss, and he cited Mr.
10 Dembowski as authority for that. He also testi-
11 fied that the Parker Edneyville soils are not
12 suitable for intense community development,
13 although he did say that was the definition
14 of the Soil Conservation Service, and he
15 didn't necessarily agree with it.

16 Those soils are, according to the book,
17 and to Mr. Salzman's testimony, suitable for water-
18 shed protection. Mr. Rakos also said that the
19 minimum lot size is not dictated by the
20 zoning ordinance so much as it is by the limi-
21 tations of the land, and the main problem in
22 his layout was to avoid septic tank limitations,
23 and that, I submit, proves the reasonableness
24 of the zoning ordinance as it relates to the
25 plaintiff's property. There's no testimony

1 in the record that the requirement for two-
2 and-five-acre zoning on the plaintiff's pro-
3 perty is not justified by the problems of
4 water and septic system construction.

5 The Court has seen the property of Mr.
6 Caputo. The two-acre zoning is on the west,
7 to the west of the Peapack Brook, where the
8 land is more suited for development, the soils
9 are much better for septic system use on the
10 west side of the brook, and it's zoned two
11 acres. On the east side of the brook, the
12 soils are marked by excessive radient by
13 bedrock close to the surface, at least in
14 comparison with the land to the west--thick
15 dense vegetation, very steep slopes, soils
16 and land which is not suitable for intense
17 development. That is zoned five-acre zoning,
18 and the master plan makes clear the reason why.
19 I'm referring now to page 11 and 12 of the
20 master plan, which gives the criteria which
21 has been used for rural, residential, has been
22 given to areas which are constrained by steep
23 slopes, flooding, high water table, shallow
24 depth to bedrock for soil conditions which are
25 generally less suitable for development.

1 Limited access to major roads and difficulty
2 in providing public utilities, were also con-
3 sidered, as well as environmental features
4 such as hilltops, woods and streams. Density
5 of five acres per dwelling unit provides the
6 preservation of the wooded character and cor-
7 responds to the number of acres needed for
8 septic tank development in these types of
9 soil. That's the reason that in the master
10 plan; the plaintiff has offered no testimony
11 contrary to it.

12 The plan goes on to say, to point out
13 those changes between the '64 ordinance and
14 the '76 ordinance with respect to rural,
15 residential zoning, three major areas along
16 Burnett Brook with tributaries, a watershed
17 area, then along, this is the second category
18 specifically relating to the area in which
19 Mr. Caputo's property is located, along Pea-
20 pack Brook with tributaries, and the areas
21 east of the same. That goes on to low density
22 residential with respect to areas with less
23 severe natural constraints for development.
24 Once again, in those areas, the density of
25 two acres per dwelling unit will be adequate

1 for development with septic tanks. The limit-
2 ing factors are the limitations of the soils
3 and the land itself, and I submit that there
4 has been no testimony contrary to those state-
5 ments in the master plan.

6 There is discussion in the master plan
7 about the location of the MDR zones, which should
8 be closer to the borough because of better
9 road access to both Routes 206 and 24 and 510.
10 Whatever community facilities there are in the
11 Chester Borough and Township area are located
12 close to the borough center. It is more prob-
13 able that utilities will be constructed to
14 service an MDR zone closer to the borough
15 than out away from the borough where there is
16 no possibility of any other facility using a
17 utility, and I think this is a key point. The
18 master plan assumes that you have to solve the
19 utility problem before you can build any den-
20 ser housing, denser than the two-and five-acre
21 residential development permitted, and that
22 testimony was echoed by Mr. Zimmerman when he
23 testified to the effect that, yes, you can
24 certainly have small-lot zones, but that as-
25 sumes that you have solved the utility and the

1 sewer problem. The fact of the matter is you
2 can't until you have it. If you haven't got
3 it, it doesn't make any sense to zone for it.
4 There's no evidence by any witnesses, anything
5 so far, that the master plan or the zoning or-
6 dinance is inconsistent with the plans put
7 forth by the various regional planning bodies.
8 The Court had occasion to hear various parts
9 of the Morris County master plan read to it,
10 some parts which I insisted go along with it
11 for purposes of balance and to explain what
12 went before. The Morris County master plan,
13 Somerset County master plan, the planning docu-
14 ments by the Regional Planning Association,
15 Tri-State, indeed, regional planning documents
16 by the State itself, I have reference to the
17 State development guide, which is not in
18 evidence I concede, but the point is it is
19 not in evidence. There is nothing which any
20 witness has pointed to to say, "You're being
21 inconsistent with what the regional planners
22 are saying you ought to do with your township."
23 We're trying to do with our township what the
24 regional planners have said is appropriate.
25 The limitations of the land prevent us from

1 doing any more at this time, but that by itself
2 is not enough to render the ordinance or the
3 plan invalid, and I must say that Lee Hobaugh,
4 one statement I really understood was Chester
5 Township is a very sparsely developed community.
6 I think that's very, very significant. The
7 town does not have a sewer system, does not have
8 a public water distribution system. Why not?
9 Because there as yet has been no ordinance
10 for it. It's a very sparsely developed commun-
11 ity. I think in the 1970 census it had a
12 little over 4,000 residents. That is not very
13 many people for 28 square miles. It's mostly
14 rural. It is changing its characteristics
15 from rural, agricultural, to rural, developed.
16 It's in the pathway of some development.

17 The town has tried to meet its respon-
18 sibility to take care of the development, but
19 it can't zone and plan, and make available the
20 kinds of utility systems which will make avail-
21 able overnight development, just simply can't
22 do it. I don't think the plaintiff has made
23 out a case that the ordinance is--. Let me
24 phrase it another way.

25 I don't think the plaintiff has made out

1 a case that the town has not made a good-
2 faith effort to provide for its fair share of
3 all housing types. The limitations of the
4 land itself, which are stated in the master
5 plan, and which are unchallenged by any witness
6 who has testified at this trial, show that
7 you can't have small-lot zoning, simply is
8 not appropriate. There's no place in the
9 township you can put it. The only testimony
10 is that the MDR zone may not be big enough in
11 terms of over-zoning for least-cost housing;
12 that the technical limitation of 300 one hund-
13 red fifty per tract, ten bedroom limitation, and
14 density of five units per acre, perhaps should
15 be adjusted in some way to take care of the
16 mandate for over-zoning of least-cost housing.
17 We concede those areas should be examined.
18 I'm not conceding that any or one of them are
19 invalid per se. I'm saying with the mandate
20 of Madison Township, we acknowledged our res-
21 sponsibility to look at them, re-evaluate them.
22 That is being done. I think the plaintiff's
23 proofs fall far short of saying that the town-
24 ship has not done all that it reasonably could
25 to meet its fair share obligations.

1 MR. LINDEMAN: If your Honor please,
2 I must state that what I'm about to say is not
3 intended in any respect to be smart alecky or
4 unduly contemptuous, but I have made a tactical
5 decision, perhaps because of my understanding
6 of the case thus far, not to respond to that
7 statement because it is so clearly a matter of law and
8 fact that the position is one which cannot be
9 sustained. So, I will not take the time of
10 the Court to respond to it. I just would
11 point out, perhaps, two or more factual cir-
12 cumstances which I think just should be borne
13 in mind.

14 First, that Mr. Hobough testified at
15 least that the number of units of least-cost
16 housing constituting a fair share for the
17 Township of Chester is at least 200 if not more
18 than that, which is provided for.

19 Secondly, that on August 2nd, 1976, the
20 municipality, in a closed-session meeting,
21 testified that probably based upon advice
22 from their planner, that limitation of 300
23 units should be increased to 500 units. This
24 having taken place ten days before the ordin-
25 ance itself was actually adopted, it does not

1 become fully effective with all its amend-
2 ments until sometime in October or early
3 November, 1976, but, nevertheless, that's what
4 happened then.

5 Now, this goes at least somewhat, per-
6 haps extensively, and to the core of the good
7 faith of the municipality. Passing all of that,
8 however, that is at least a prima facie case
9 on the bedrock, I think that's a good word
10 for this case as to where we stand. The muni-
11 cipality, under law, under Mount Laurel and
12 Oakwood at Madison Township, must go forward,
13 and I cite also the argument that I made very
14 early in this case, that under the direction
15 of Justice Hall, the Court in Mount Laurel,
16 once a prima facie case is made, it's the ob-
17 ligation of the municipality, defendant muni-
18 cipality, to go forward to justify, bear the
19 burden, or at least bear the burden of going
20 forward with the evidence to justify the
21 position which it has taken. So, I will say
22 no more. I think that even on the issue of the
23 confiscatory nature of the ordinance as it
24 applies to the defendants, the plaintiff's
25 property, that it is nevertheless the burden

1 of the municipality to go forward to justify
2 that which it has done, which it did in an
3 obviously retaliatory manner to the actions
4 which the plaintiffs have demonstrated before
5 them up through the time of the adoption of
6 the ordinance.

7 THE COURT: All right. The defendant
8 Township of Chester moves to dismiss the plain-
9 tiff's complaint on essentially four grounds.
10 One, non-compliance with the Mount Laurel and
11 Oakwood decisions, specifically Burlington
12 County N.A.A.C.P. vs. Township of Mount Laurel
13 in 67 N.J. 151, (1975 case), and Oakwood of
14 Madison, Inc. vs. The Township of Madison.
15 I don't have the book and page, but it's a 1977
16 decision.

17 Second is that the defendant has failed
18 to show that as it applies to the plaintiff's
19 property, the ordinance is unreasonable, arbi-
20 trary, capricious.

21 Third is the zoning ordinance does not,
22 strike that. Challenge to the zoning ordinance.
23 Let's start again.

24 The motion to dismiss is based on four
25 grounds. I should start out by saying initially

1 that we're dealing with an interim zoning
2 ordinance under N.J.S.A. 40:55 (D)-90. Now,
3 the challenges to the, or the motion to dis-
4 miss, are based in four areas, those areas
5 where the plaintiff asserts, one, that the
6 ordinance does not comply with Mount Laurel
7 and Oakwood, specifically the cases that I
8 just cited. Two, that the property, plaintiff's
9 property, as the ordinance applies to it, or
10 the ordinance applies to the plaintiff's pro-
11 perty, is unreasonable, arbitrary and capri-
12 cious. The third, challenge to the ordinance
13 for failure to comply with the Municipal Land
14 Use Law of 1975, and the fourth, confiscation
15 of the property without due process.

16 I'm going to deal essentially, first,
17 with the Mount Laurel and Oakwood contentions
18 and the non-compliance with the Municipal Land
19 Use Law. The one challenge here, the one
20 basis for the plaintiff's challenge is that the
21 zoning ordinance does not comply with the
22 master plan as required by the provisions of
23 N.J.S.A. 40:55(D)-62, and I'm referring to
24 plaintiff's brief, pages 9 and 10 specifically,
25 and I'm going to read them. "To set aside the

1 ordinance on the grounds that the same has
2 not been adopted in accordance with N.J.S.A.
3 40:55(D)-28, et seq." Next paragraph, "That
4 the comprehensive plan of August, 1974, does
5 not meet the requirements of the Municipal
6 Land Use Law of 1975 with the consequence
7 that the zoning ordinance under attack, 76-12,
8 is not lawfully enacted in accordance there-
9 with." Next paragraph, "Said ordinance is
10 procedurally defective in that even if the
11 1974 comprehensive plan meets the requirements
12 of the Municipal Land Use Law of 1975, such
13 ordinance is inconsistent with the land use
14 element of that plan with no reason for such
15 inconsistency set forth in accordance with
16 N.J.S.A. 40:55(D)-62." The last item deals
17 with, "that the development procedures and
18 fees imposed by said ordinance are burdensome,
19 excessive, and unlawful, including site plan
20 and environmental procedures and fees." Now,
21 the ordinance under attack here is ordinance
22 76-12.

23 It was adopted prior to the adoption
24 of the Municipal Land Use Law, on January 3rd,
25 1977. That ordinance was adopted as an interim

1 ordinance pursuant to N.J.S.A. 40:55(D)-90.
2 I believe it's subsection (B). Yes, subsec-
3 tion (B). That statute provides, in part, "A
4 municipality may adopt a reasonable interim
5 zoning ordinance not related to the land use
6 element of the master plan without special
7 vote as required pursuant to subsection 49
8 of this Act pending the adoption of a new or
9 substantially revised master plan, or new or
10 substantially revised development regulations.
11 Such interim zoning ordinance shall not be
12 valid for a period longer than one year, un-
13 less extended by ordinance for a period no
14 longer than an additional year for good cause
15"

16 Now, it should be noted that the Muni-
17 cipal Land Use Law was a law, Chapter 291, of
18 the Laws of 1975, and it became effective
19 August 1st, 1976. One of the intentions, as I
20 read the 40:55(B)-90, is to permit a munici-
21 pality to utilize its present zoning ordinance
22 while studying and preparing a new master plan
23 that is going to comport with the requirements
24 of the Municipal Land Use ordinance. It per-
25 mits the old ordinance to be operable, and not

1 be, in my opinion, the subject of judicial
2 invalidation for non-compliance with the
3 provisions of the Municipal Land Use Law that
4 requires certain conformity as between the mas-
5 ter plan and the zoning ordinance. In this
6 instance, since we are dealing with an interim
7 zoning ordinance, and since I'm satisfied that
8 it clearly was the legislative intent to per-
9 mit the municipality to adopt an existing
10 ordinance as an interim zoning ordinance to
11 permit modifications of the master plan, an
12 interim ordinance should not be subject to at-
13 tack for non-compliance with the provisions
14 of the Municipal Land Use Law, and I think
15 it's clear that that was the legislative
16 intent when you deal with the question of
17 moratorium, and in this statute, moratoriums,
18 the statute prohibits the development--strike
19 that. The statute provides in subsection A),
20 40:55(D)-90, "The prohibition of development
21 in order to prepare a master plan, development
22 regulation is prohibited." So, that what the
23 legislature is saying is municipalities are
24 required to comply with the Municipal Land
25 Use Law. We recognize that it's going to take

1 them time to do so, so that during an interim
2 period there may be adoption of the existing
3 ordinance, and they're not, the municipality
4 is not going to be required to comply with
5 those sections of the ordinance, of the statute
6 rather, specifically 40:55(D)-62, and other
7 sections of the statute.

8 Now, I'm satisfied that insofar as those
9 challenges that I read, with the exception of
10 that with respect to fees, that the challenge
11 is premature, and that the motion should be
12 granted with respect to those statements that
13 assert non-compliance with the Municipal Land
14 Use Law.

15 Now, I think I would be less than res-
16 ponsible if I weren't, did not comment upon the
17 status of this case as it has developed. At
18 one point during this proceeding, counsel for
19 the plaintiff, former counsel for the plaintiff,
20 suggested a conference and suggested that in
21 light of a letter from Mr. Ferguson, the attor-
22 ney for the township, to the Township Committee
23 that this matter should not go to trial pend-
24 ing a time when the township should have an
25 opportunity to make certain changes as suggested

1 by Mr. Ferguson in the zoning ordinance. The
2 suggestions were conferred upon, and at one
3 point it was generally agreed that the best
4 thing would be to set up a schedule that the
5 township would meet so that there would be
6 compliance with, not only the Municipal Land
7 Use Law, but also the, at least the recommen-
8 dations of Mr. Ferguson in his letter to the
9 Township Committee. However, at a posture
10 between a conference with me in my chambers
11 and the setting of the form of the order to
12 cover what I will call a remand for lack of
13 a better phrase, the plaintiff took a different
14 posture. The plaintiff insisted on going
15 forward with the case, and this Court was not
16 in a position to compel the plaintiff to await
17 the outcome of the new township master plan,
18 and zoning ordinances, as had been originally
19 suggested. I did not feel that I was in a
20 position to force the suggestion upon the
21 plaintiff when the plaintiff had a change of
22 heart. Accordingly, in balancing the consider-
23 ations, I set an early date for trial, and the
24 township, of course, did not have a chance to
25 adopt its master plan, new master plan and

1 zoning ordinance so that the result is that
2 the challenge here as to the interim zoning
3 ordinance, and I have to honestly say that the
4 challenge on the basis of failure to comply
5 with the Municipal Land Use Law, therefore, is
6 premature. It has to be. The statute in my
7 opinion is quite clear as to its intent. It
8 was to give the municipality an opportunity to
9 comply with the Municipal Land Use Law. The
10 plaintiff has chosen to challenge prior to the
11 passage of the interim period which would be
12 whatever the date of publication of the interim
13 zoning ordinance was after it was finally
14 adopted on January--

15 MR. FERGUSON: I think it's the 18th.

16 THE COURT: 3rd, I think, the final
17 hearing. Whatever the date was--. Wait a
18 minute. The ordinance was finally adopted
19 January 3rd, 1977, so the year runs from the
20 time that the last publication of the ordin-
21 ance occurred, whenever that was. So at least
22 the township has until January of 1978 in which
23 to comply with the Municipal Land Use Law,
24 and while I'm not too sure of what the statute
25 means when it says, "for good cause shown,"

1 or, "for good cause," if there's a year's
2 extension permitted, who determines whether
3 good cause exists? That's not of moment for
4 me insofar as I'm concerned. Therefore, as to
5 that portion of the plaintiff's challenge to
6 the ordinance, 76-12, as it was adopted as
7 an interim ordinance in January of 1977, the
8 motion of the plaintiff, the defendant is
9 granted, and I specifically refer to the
10 three aspects of relief sought that I quoted
11 from the plaintiff's brief.

12 Now, there was one further aspect that
13 I'm going to consider the motion related to,
14 and that is with respect to the procedures and
15 fees. There was no proof whatsoever with
16 respect to the reasonableness of the fees,
17 whether they were burdensome, excessive, un-
18 lawful, et cetera. Even giving the most favor-
19 able inference to the plaintiff's case, I can
20 find nothing that supports evidence to show that
21 the fees are excessive and unlawful, and
22 accordingly as to that aspect of the relief
23 sought, I am also going to dismiss the complaint,
24 of course, and the dismissal is with prejudice.

25 Now, turning to the compliance with the

1 Mount Laurel and Oakwood decisions, I have
2 had the occasion to review the legislative
3 history of the Municipal Land Use Law, and
4 particularly hearings presided over by Senator
5 Morton Greenberg of Essex County, who I under-
6 stand was one of the sponsors of the legis-
7 lation, and at the legislative hearings, Senator
8 Greenberg makes a statement that the Municipal
9 Land Use Law was not in response to Mount
10 Laurel, that it was drafted a long time before
11 Mount Laurel. I, therefore, conclude that
12 whether an ordinance is an interim zoning or-
13 dinance or whether it's a finally adopted
14 ordinance under the Municipal Land Use Law, it
15 is subject to attack in a judicial forum for
16 non-compliance with Mount Laurel, and the
17 subsequent Oakwood at Madison vs. Madison
18 Township case.

19 Now, with respect to that, I'm satis-
20 fied that the defendant's motion should be
21 denied; giving the framework of every favorable
22 inference to the proofs, the testimony of Mr.
23 Zimmerman, the testimony of Mr. Hobauch indi-
24 cates to me that there are sufficient proofs,
25 and I'm not going to enumerate them because I

1 don't think it's necessary, but there are
2 sufficient proofs to require the defendant to
3 go forward and defend the interim zoning or-
4 dinance as it existed under ordinance 76-12.

5 I make no determination on the burden
6 of proof shift that is referred to in Mount
7 Laurel. I don't find it necessary, and I,
8 therefore, make no determination on that.
9 That is for, as I deem it, the conclusion of
10 the case insofar as the burdens of proofs, not
11 the burden of coming forward.

12 Now, with respect to whether or not
13 there is a confiscation of plaintiff's property
14 without due process, I candidly must indicate
15 that I think the proofs are less than sub-
16 stantial. However, being mindful of Justice
17 Hall's statement in Morris County Land Improve-
18 ment Co. vs. The Township of Parsippany-Troy
19 Hills, 40 N.J. 539, at 557 (1963), where
20 Justice Hall quotes from Kozsesnik vs. Mont-
21 gomery Township, 24 N.J. 154 (1957), quote
22 "that a restraint against all uses confisca-
23 tory and beyond the police power and statutory
24 authorizations is too apparent to require
25 discussion." That's the end of the quote.

1 "The same result ordinarily follows where the
2 ordinance so restricts the use that the land
3 cannot practically be utilized, be utilized
4 for any reasonable purpose or when," and this
5 later phrase is underlined for emphasis,"when
6 the only permitted uses are those to which the
7 property is not adapted, or which are econo-
8 mically infeasible." That's the end of the
9 quote from the decision.

10 Now, giving every favorable inference
11 to the testimony of Mr. Earl, recognizing
12 that Mr. Earl relies upon layouts made by Mr.
13 Rakos and that those layouts, maybe I should
14 say, even recognizing that his testimony re-
15 lies on the layouts by Mr. Rakos, and that
16 those layouts do not include potential flag-
17 lot development, cluster development, and
18 includes the pond or retention basin, which
19 I'm satisfied Mr. Caputo would like to have
20 there for aesthetic and sale reasons, as well
21 as any other, I think there is enough of a
22 favorable inference for the plaintiff to get
23 by the motion to dismiss as they relate to the
24 need for the pond. Mr. Earl's testimony, as
25 I recall it on the motion, was that he indicated

1 under the present two-and five-acre zoning
2 that there would be a market value produced
3 of 1.8 million dollars, and concluded after
4 deducting construction and improvement costs,
5 other factors relating to overhead, that there
6 would be a minus value for the sale of parcels
7 of land. Giving the most favorable inferences
8 to that testimony, it seems to me that the
9 language of Justice Hall, where he states or
10 refers to "economically infeasible," there is
11 sufficient proof to get by the motion.

12 Now, that as I see it leaves the ques-
13 tion of the application of the ordinance to the
14 plaintiff's property, and whether the plain-
15 tiff has shown that the ordinance is unreason-
16 able, arbitrary and capricious as it applies
17 to that property. Again, all I'm going to do
18 is comment this way: I think the proofs are
19 somewhat thin. However, no matter how thin
20 they are at this stage, I think they are
21 sufficient to, with the favorable inferences
22 that are required, to get by a motion to dis-
23 miss. The question of the location of the
24 property and the effect that the ordinance has
25 on that property, again centering around Mr.

1 Earl's testimony, taking into mind the topo-
2 graphical conditions of the property that may
3 or may not ultimately be a turning point for
4 that contention, I think there is sufficient
5 evidence here for the plaintiff to survive
6 the motion to dismiss. So, to recap, the
7 challenge to the ordinance for non-compliance
8 with the Municipal Land Use Law requirement
9 is dismissed with prejudice, as is the challenge
10 to the excessive fees, and in all other respects
11 the challenges to the ordinance remain viable
12 claims, and the defendant is now left to its
13 proofs.

14 All right. Now, are you--

15 MR. FERGUSON: We have a witness. I
16 would request five minutes to talk to him.

17 THE COURT: You can, if you want. Okay.

18 (RECESS OBSERVED.)

19 MR. FERGUSON: Your Honor, one matter
20 which perhaps we ought to comment on is Mr.
21 Lindeman's letter to the Court of November 10
22 clarifying Mr. Caputo's testimony about what
23 the prices of his condominiums might be.

24 THE COURT: In what respect? You know,
25 what he said is what's in the record.

1 MR. FERGUSON: I don't conceive, I
2 think this goes a little bit further, and frank-
3 ly it's a fairly, it's something I'm concerned
4 about because--

5 THE COURT: That's not evidence.

6 MR. FERGUSON: Okay.

7 MR. LINDEMAN: Your Honor, with regard
8 to your Honor's review of certain of the back-
9 ground of this case in its remarks prior to
10 its determination on the defendant's motions,
11 I would like to make this observation or
12 comment, if I may. The Court stated that it
13 was its recollection that prior to the letter
14 of counsel for the defendant on April 28,
15 1977, or just after that, that a meeting was
16 called among counsel, and the Court, and that
17 a determination had been made that the case be
18 adjourned, but that the plaintiffs later had
19 a change of heart. I'm reminded that as set
20 forth in Mr. Joseph Caputo's affidavit, prior
21 skirmish in this action, he made it very clear
22 he never really had a change of heart, that he
23 had not agreed in the first place. So, it was
24 just a change of heart, part of it--

25 THE COURT: There was a change of heart

1 that I have to attribute to the plaintiffs
2 because they were represented by counsel.

3 MR. LINDEMAN: In that respect, yes.

4 THE COURT: I assume counsel is repre-
5 senting the client, and from my standpoint, it
6 was a change of heart. I have to consider it
7 as that. I think it would be unfair to charac-
8 terize it in any other way.

9 MR. LINDEMAN: I understand your Honor's

10 --

11 THE COURT: Otherwise, we could have
12 tried it back on May 19th.

13 MR. LINDEMAN: It was just the affi-
14 davit of Mr. Caputo did take a somewhat dif-
15 ferent position, and I didn't want the record
16 to show anything other than that. The Court,
17 of course, is correct.

18 THE COURT: Okay.

19 MR. FERGUSON: Mr. Kasler.

20 M A L C O L M K A S L E R, sworn.

21 DIRECT EXAMINATION BY MR. FERGUSON:

22 MR. FERGUSON: May it please the Court,
23 we are calling Mr. Kasler as an expert witness.
24 He is a planner. He has prepared a fair-share
25 housing study, and will testify as to the

1 regions he selected for his study, and the
2 computations he made as to Chester's share of
3 the housing need. Mr. Kasler was employed by
4 the planning firm of Candueb-Fleissig in 1974,
5 and was at that time assigned to work on the
6 Chester comprehensive plan which was adopted
7 in August of 1974, with particular reference to
8 the housing aspect of it, and he will testify
9 and give his opinion about whether the master
10 plan and zoning ordinance meet the housing
11 need as set forth in the master plan, and his
12 fair-share housing study prepared for this
13 litigation.

14 Q Mr. Kasler, where do you reside?

15 A I reside at 6 Oak Street, Harrington Park, New Jersey.

16 Q Where is your office?

17 A My office is located 39 Hudson Street, in Hackensack,
18 New Jersey.

19 Q What is your profession?

20 A I'm a community planning consultant.

21 Q Do you hold any professional licenses from
22 the State of New Jersey? A Yes, I am

23 licensed as a professional planner; my license number is 835.

24 Q Would you give us your educational background?

25 A I attended Rutgers University, in 1961 received the

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1 dual degrees of Bachelor of Science, Bachelor of Arts, in
2 City Planning Engineering. I subsequently attended New York
3 University and received my Master's degree in Urban Planning
4 in 1967.

5 Q Will you tell us what professional organi-
6 zations you are a member of? A Yes. I am a full
7 member of the American Institute of Planners, American
8 Society of Planning Officials, New Jersey Association of
9 Consulting Planners, which I'm vice-president, New Jersey
10 Federation of Planning Officials, the Urban Land Institute.

11 Q Have you served on any professional bodies
12 or legislative committees, that kind of endeavor?

13 A Yes, I served on the legislative committee of the
14 American Institute of Planners and also served as--

15 Q Were you chairman of that committee?

16 A Yes, I was chairman for one year.

17 Q What year was that?

18 A I believe either 1972 or 1973.

19 Q What-- Please go ahead.

20 A I also served as one of the eight original drafting
21 members of the Municipal Land Use Law on behalf of the
22 American Institute of Planners and the New Jersey League of
23 Municipalities.

24 Q Will you tell us what that committee was, who
25 it was comprised of, not by name, but profession or occupation?

1 A The committee serves at the pleasure of the League
2 of Municipalities and consists of, I believe, six attorneys,
3 an architect and a planner. That particular committee was
4 empowered to redraft what was earlier legislation, original
5 bill being 14-22 and then ES 803, and ultimately which led
6 to the Municipal Land Use Law. I was appointed to that
7 particular committee after ES 803 died in the committee in
8 the legislature, and was seated as a member of the American
9 Institute of Planners.

10 Q What was your function on that committee?

11 A As the other members, to help in assisting the
12 drafting of legislation, hopefully seeing it adopted by the
13 legislature.

14 Q That it, you have reference to the Municipal
15 Land Use Law about which there was argument and colloquy
16 between Court and counsel this morning?

17 A Yes, sir.

18 Q Mr. Kasler, are you the author of any articles
19 or publications?

20 A Yes, in particular I wrote
21 several articles on the Municipal Land Use Law which ap-
22 peared in the publication, "League of Municipalities,"
23 specifically an article entitled, "Proposed Land Use Law:
24 How It Affects Your Community," dated 1974, and another
25 article entitled, "Municipal Land Use Law," March of 1976.

Q Mr. Kasler, do you currently represent any

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1 present firm represents them? A Yes, sir.

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1 municipalities in New Jersey? A Yes, sir.

2 Our firm represents the Borough of Fort Lee, Township of
3 Mahwah, the Borough of Park Ridge, and the Borough of Mendham,
4 in various planning programs.

5 Q Have you, in your professional experience, had
6 occasion to work on and prepare master plans and zoning or-
7 dinances? A Yes, sir.

8 Q Will you give us a sample of some that you
9 have worked on or prepared? A My professional
10 experience began in 1961, and from that period on, until the
11 present time, I have either assisted or directed in the
12 preparation of planning programs, including master plans and
13 zoning ordinances. Specifically in Morris County, I assisted
14 in the preparation of master plans in Chester Township, in
15 Morris Township, Borough of Kinnelon, and other municipalities;
16 particularly in Bergen County, Mahwah Township, Borough of
17 Fort Lee, the Borough of--, I should say Township of Kearny,
18 Borough of North Arlington; Union County, Springfield Town-
19 ship; in Monmouth County, Keyport, Bcrough of Oceanport.
20 I'm sure there are others I just can't recall at the moment.

21 Q Have you represented private developers as
22 well? A Yes, sir.

23 Q Will you tell us about your prior employment

1 THE COURT: Let's not spend a lot of
2 time on it. Can you answer the question?

3 THE WITNESS: It was probably right
4 after the decision was rendered, the early part
5 of this year.

6 Q Would you say you have not reread it prior to
7 your coming, immediately prior to your coming to this Court
8 today? A That's correct.

9 Q Now, are there any texts that you know of that
10 deal with the issue raised in Mount Laurel and Oakwood on the
11 subject, on the issue of fair-share housing?

12 A I would believe that that is a correct statement,
13 there are no real texts per se, but that it has really evolv-
14 ed through Court decisions.

15 Q And, the subject of least-cost housing has, it
16 is referred to at least in the Oakwood case, are there any
17 articles or texts that have been written on that that you
18 know of? A There have been articles written

19 on various aspects of the whole Mount Laurel, Madison ex-
20 tension thereof. I have read several articles, but I don't
21 think there's a particular text on that, that particular
22 aspect.

23 Q Do you recall if any of the articles, well,
24 particularly the subject of fair-share and least-cost --

25 A I have read texts. Again, I can't provide who they

1 were written by, but I have read various articles on it,
2 yes.

3 Q It's fair to say that there's certain written
4 authorities on those two subjects at this time; is that
5 correct?

A Again, as it has extended through
6 the Courts, I think there's a direction the Courts are in-
7 dicating, which in part is being based upon various segments
8 which are being consolidated.

9 Q On the subject of regions to which reference
10 must be made in testimony, such as your's on fair-share and
11 least-cost housing, are there any texts that deal with that
12 subject?

A There have been various sources
13 that have been cited in both the cases that I earlier men-
14 tioned.

15 Q In the cases? A In the
16 cases, and which in part, again, rest upon other documen-
17 tation. Again, there's no single authority that I know of
18 that could say in fact that there is one region or one
19 methodology.

20 Q So that insofar as your testimony is concerned
21 as an expert on the subject of fair-share and least-cost
22 housing that that which you will have worked up will have
23 been your own construction, it will have been as a result
24 of your own views as to what a proper region is and what a
25 proper fair-share would be, sorry, what fair-share would be,

1 what least-cost housing means; is that fair to say?

2 A No, I don't believe that's fair to say. I have
3 relied upon other sources, and as I say, the documentation
4 in the cases themselves. In my testimony today, it will not
5 indicate one region, but a series of regions.

6 Q I'm talking about how one arrives at what a
7 region is.

8 MR. FERGUSON: Your Honor--

9 MR. LINDEMAN: I was wondering if there
10 were any texts on the subject.

11 MR. FERGUSON: I think this is far
12 enough, is more like cross-examination.

13 THE COURT: It's more properly the
14 subject of --

15 MR. LINDEMAN: If your Honor please,
16 I don't mean to belabor the point, but as I
17 understand it, the witness is called not to
18 testify on any planning subject overall, but
19 rather it's limited to the concept of fair-
20 share, least-cost housing. That's what I
21 thought I heard counsel say. On that subject,
22 I was curious to know while there may have
23 been many texts and articles that the witness
24 may have written and read on the subject,
25 generally, of planning, that's not what his

1 testimony is going to be about. It's going
2 to be a phase of planning.

3 THE COURT: But, what do his qualifi-
4 cations have to do with what articles, to the
5 particularity that you have asked him, have
6 been written?

7 MR. LINDEMAN: I'm curious to know what
8 the witness knows about fair-share housing and
9 least-cost housing, as it has been defined in
10 the two cases that we have mentioned. That
11 was really the only purpose. I think I have
12 gone through that. I won't pursue it any
13 further.

14 THE COURT: Anything further?

15 MR. LINDEMAN: No, sir.

16 THE COURT: All right.

17 MR. FERGUSON: Your Honor, I ask at this
18 time the two documents be marked; one, "Chester
19 Township Fair-Share Housing Study, dated
20 May, 1977, Malcolm Kasler & Associates," and
21 the other a map with an overlay, entitled,
22 "Definition of Housing Regions, Malcolm Kasler
23 & Associates."

24 THE COURT: All right. D-19 will be the
25 Chester Township Fair Housing Study, for iden-

1 tification. D-20 will be the definition of
2 the housing region map, for identification.

3 (D-19, report, and D-20, map, were
4 received and marked for Identification.)

5 MR. HILLAS: That's fair-share housing.

6 MR. FERGUSON: Do you have any objec-
7 tion to the Judge following from the document
8 before I move it into Evidence?

9 MR. LINDEMAN: Is that dated May, '77,
10 the same as you gave us before?

11 MR. FERGUSON: Yes.

12 MR. LINDEMAN: I have no objection.

13 MR. FERGUSON: Do you have one?

14 BY MR. FERGUSON:

15 Q Mr. Kasler, at my request and for the purpose
16 of this litigation, did you prepare document D-19 for Identi-
17 fication? A Yes, sir, I did.

18 Q Will you tell us what it is?

19 A This is an analysis of a series of regions within which
20 Chester Township is located, and goes through an analytic
21 procedure as to what Chester's fair-share housing would be
22 by virtue of various regions and various criteria in deter-
23 mining, in determining the allocation aspect of the fair-
24 share housing. It results in a series of 16 different housing
25 allocations as a result of the four regions under various

1 independent variables, sorry, 12 different housing allocation
2 numbers. The key variables in that study are population,
3 employment and vacant land, and when you apply it to each one
4 of the regions, each region then results in three different
5 numerical numbers, and taking four different regions would
6 result in 12 numerical numbers as to what Chester's fair-
7 share housing would be.

8 Q Now, would you outline for us briefly, to the
9 extent you have not already done so, your methodology and the
10 sources of information which you utilized?

11 MR. LINDEMAN: Will you go slowly,

12 please?

13 A Methodology is based on the fact that Chester is
14 a part of a larger region; therefore, must assume a fair-
15 share or proportionate share of the housing needs of the
16 entire region. The region, and the description of the regions,
17 I will describe in a moment. Succinctly, it assumes that
18 there are really three key variables associated with the
19 determination of allocation, the first of which is employ-
20 ment, second of which is population, and the third of which is
21 vacant land. In my judgment, employment is probably the key,
22 most important variable in determining allocation, because it
23 is the reason why housing is needed in a particular general
24 region. I will describe later various weighting factors that
25 I utilized. Secondly, population is a factor in determining

1 Community Affairs, and that was the Department of Conserva-
2 tion and Economic Development, and in the early 1960's that
3 particular department prepared a variety of studies concern-
4 ing the State of New Jersey dealing with regions, dealing with
5 shopping centers, economic centers, dealing with areas of
6 forestry, and various other aspects of the State, but one
7 of the earlier studies that was prepared at that point in
8 time dealt with the establishment of regions and in that
9 particular study there were various classes of regions that
10 were identified. The first class of region was the State
11 as a whole. The second class was really breaking out the
12 northerly and southerly parts of the State, separate sub-
13 regions. The third class or region which is really akin to
14 some of the types of housing analysis, regionally, which is
15 pertinent today, establishes what was then known as Class 3
16 regions, and those regions were determined by a number of
17 factors, including telephone calls as to how far they were
18 made, newspaper circulation, various social and economic
19 criteria of which there may have been 12, 13 particular
20 parameters. As a result of that, the study concluded that
21 there were various Class 3 regions. In particular in Morris
22 County, it basically consisted of most of Morris County as
23 described by the orange area indicated on the map, but it
24 did include a small section of Sussex County, including Ho-
25 patcong, Byrum and Stanhope, and included several communities

1 in Somerset County, including Bedminster, Bernards Township,
2 Far Hills, Peapack-Gladstone, and Bernardsville, but it also
3 excluded the Borough of Kinnelon, Butler, Riverdale, Pequannock,
4 and Lincoln Park, in the northern section of the county.
5 This, then, was the determination of a Class 3 region. As
6 I'll indicate shortly, this is very similar to Morris County
7 as an overall region. They also defined sub-regions within
8 those regions. That is, Class 4 regions, and this was the
9 smallest entity that was identified in the report. That
10 group of communities were identified as Class 4, were really
11 communities that had a great deal of common interest. That
12 is, they may have sent children from one high school to the
13 other in sending-receiving relationships. There may have been
14 important social ties between people residing in one com-
15 munity, and going to church in another community, so it
16 really represented a larger, a larger definition of what
17 a municipality is, but really constituted what an extended
18 community might be considered, and the Class 4 region in
19 which Chester was identified included both Chester Borough
20 and Chester Township, Mendham Borough, and Mendham Township,
21 Harding Township, Passaic, Morris Township, Morristown,
22 Morris Plains, Hanover, East Hanover and Parsippany. Total
23 of 12 municipalities. So, as a result of the particular
24 study that was done in the early 1960's, we identified in
25 particular two regions which we want to re-evaluate as a

1 part of our fair-share housing study. A third region which
2 was, as I indicated earlier, similar to the Class 3 region
3 was the County of Morris as a whole. In the Madison case,
4 in the Holmdel case, and several other cases, the County
5 has been accepted as a housing region by the Courts, parti-
6 cularly in the Madison case, and I believe somewhat reluct-
7 antly, but the basic theory being that a majority of the
8 people who reside in the county also worked in the county,
9 and since employment is a significant aspect of the housing
10 determination that we're trying to seek, therefore, the
11 county itself is a proper region on which to consider. So,
12 the black area identified on this map identifies the whole
13 of Morris County as being a region. As the Court will note,
14 it is somewhat different than the Class 3 region in that the
15 three towns in Sussex County, and the five towns in Somer-
16 set County are excluded, but the northerly communities of
17 Morris County are included, and I failed to note earlier
18 Washington Township is included. It was excluded as one of
19 the Class 3 towns in the earlier study.

20 This constituted the third region that we explored.
21 The last region is the region which was at least in theory
22 identified in Mount Laurel. That is the so-called "journey-
23 to-work" region, which is identified as an overlay with a
24 pattern of little "X's" on top of it. In Mount Laurel, the
25 determination of the region was really based upon the "journey-

1 to-work," how far it takes a worker to go to a particular
2 location within a reasonable time period, and within that
3 framework you could, therefore, assume that he, a worker
4 was willing to travel that distance, he would likely reside
5 in that same region. The Mount Laurel region, however, was
6 restricted only to two counties. It was, as even Justice
7 Hall admitted later, a mistake to place the center of that
8 region in the Town of Camden as opposed to the Town of Mount
9 Laurel, which was the subject town under consideration, but
10 it did stop somewhat artificially at the two counties that
11 were involved, although it might have been possible to travel
12 beyond those counties or at least it's not clear from the
13 records that the counties were actually the limits.

14 We selected, therefore, as a center of the universe
15 Chester Township, indicated by the star, and located within
16 this overall region all of the major roadways that service
17 the region, particularly in Chester Township, Route 206 and
18 Route 24, and nearby roads, including Route 46, Interstate 80,
19 Interstate 287, and so on. The purpose of the highway allo-
20 cation was to basically determine how far somebody residing
21 in Chester could ultimately extend within a reasonable time
22 period. In order to do this, we recognize that some of the
23 roads would operate at greater efficiency and speed because
24 of their particular design and circumstances. And, other
25 roads, because of greater congestion or lesser design capabili-

1 ties would not allow as quick a time period to travel. We
2 selected as a basis for determining maximum speeds, the speed
3 limit of 55 miles an hour on the Interstates, which is the
4 maximum speed limit permitted in the State of New Jersey.
5 We assume that all limited-access roadways would allow a
6 driver to travel from point A to point B at that average
7 speed, assuming that there would be no congestion, parti-
8 cularly on those roads. We assume lesser speeds on State
9 roads, and on U. S. highways, particularly local roads such
10 as Route 24, although it's a State road, is heavily con-
11 gested, is basically a two-lane road for most of its entirety,
12 and is, in fact, occupied by many, many traffic lights and
13 other signals, so that the travel speed on Route 24 would
14 not be as great as Interstate Route 287, and we assume the
15 speed limit of 30 miles per hour on the average for that
16 type of a road, and for a road such as Route 46, or Route 22
17 or 206, which is more limited access, although they do con-
18 tain traffic signals, and such, we assume the speed limit
19 of 40 miles to the hour. As a result of those parameters,
20 which are generally accepted criteria, we also assume an aver-
21 age travel time of 40 to 45 minutes as being the outward
22 extension of what an average individual would travel from home
23 to work. That's not to say that an individual would not
24 travel an hour, hour and a half, or in fact if he would,
25 in fact, even accept 45 minutes as a travel time, but we ac-

1 cepted that as being a general premise, one of which is
2 accepted in, I think, in general parlance among planning
3 professionals, and, in fact, was in fact utilized by Mr.
4 Hobough in his earlier studies.

5 As a result of those criteria, a region then is des-
6 cribed which centers upon Chester and extends into at least
7 five, does extend, I'm sorry, into five counties. It extends
8 into Morris County, portions of Hunterdon County, portions of
9 Somerset County, portions of Sussex County, and portions of
10 Warren County. There are small areas where we believe even
11 touch upon Essex County and Bergen County, but because of the
12 very minor nature of those extensions, we precluded those
13 particular areas. For example, a very small section of
14 Livingston may, in fact, be within that 45-mile-an-hour limit,
15 but from a county point of view, and other points of view, it's
16 really a very, very small aspect of the total region. Never-
17 theless, this general description, then, would define what the
18 housing region would be for Chester Township on the basis of
19 a Mount Laurel-type of analysis.

20 Q Did you, after ascertaining the--withdraw that.
21 Do you have an opinion as to the most appropriate region to
22 use for purposes of a housing study?

23 A It's my opinion that the three regions, the Class 3
24 region identified in the Conservation-Economic Development
25 study, the region defined by Morris County and the five-county

1 region are all valid regions under the Supreme Court-type of
2 test, Supreme Court speaks to two of those regions, and the
3 Class 3 region is very similar, in fact, to the county, and
4 I believe would be as viable a region as of the county in
5 and of itself.

6 Q How about the Class 4 region?

7 A I think the Class 4 region is probably too small a
8 region to be embraced by the Supreme Court definition, but
9 in the point of view of the fair-share housing study, it's
10 too small to entertain in this type of study at this point.

11 Q Did you then ascertain the existing housing
12 need in the regions, and if so, I ask you to tell us what you
13 did and how you did it.

14 A The, there were
15 various studies that we utilized which I believe I should
16 have answered directly, and I failed to do so, which were
17 utilized in the study itself. The studies include specific
18 data compiled by the New Jersey Department of Labor and
19 Industry specifically relating to population estimates for
20 the State of New Jersey, dated July 1, 1975, number of
21 residential permits issued for the years 1970 through 1975.

22 MR. LINDEMAN: Excuse me. Is that from
23 that same study? Is that what you mean, or
24 was that a different study?

25 THE WITNESS: This is specific data
that we utilized in our particular study.

1 Q What is the source of the number of residential
2 permits? A All three that I'm going to iden-
3 tify is the Department of Labor and Industry, Division of
4 Planning and Research. And, the third source is "Covered
5 Employment Trends in New Jersey, 1975," by geographical areas
6 of the State. In addition to those sources, we used studies
7 prepared by the New Jersey Department of Community Affairs
8 entitled, "Analysis of Low and Moderate Income Housing Need
9 in New Jersey." Another study prepared by the same source,
10 only entitled, "Statewide Housing Allocation Plan for New
11 Jersey: A Preliminary Draft of Public Discussion," dated
12 November, 1976, and finally, a study prepared by Franklin J.
13 James, and James W. Hughes, entitled, "Modeling State Growth,"
14 New Jersey, 1980," which was prepared for the Center for
15 Urban Policy Research at Rutgers University. These were,
16 I believe the main sources that we utilized in the particular
17 study, which then served as the basis for the overall program
18 that we will describe.

19 Q I believe my, the next area would be, did you
20 ascertain existing housing needs in the region?

21 A Yes. In order to do the study, we first had to deter-
22 mine what the existing housing need was, and then to deter-
23 mine what the projected housing need would be, and as part
24 of the analysis, the methodology that we used, we tried to
25 eliminate houses which have already been built. I'll describe

1 that in a minute, so that we would ultimately wind up with
2 a figure that would represent housing need which still has
3 not been met. The existing housing need essentially rested
4 upon the study, analysis of low and moderate-income housing
5 need in New Jersey. That study, which was prepared in 1973,
6 was actually based upon 1970 census data. So, as an initial
7 basis for determining need, we listed by region each region
8 and municipality, the existing housing needs for specific
9 municipalities.

10 Q Are those numbers listed in the middle of

11 page 2 of your report?

A Those numbers

12 specifically are listed on page 2, which represent the sum-
13 mary of the regions that we identified, and the specific
14 data is presented in the rear of the report. If anybody is
15 interested, they can research each and every municipality.

16 For the five-county region, that is the largest region, a
17 total of 27,625 housing units were identified as being need-
18 ed as of 1974, low and moderate-income housing needs.

19 Morris County totaled 15,209. The Class 3 region, which I
20 earlier indicated is similar to the Morris County region,
21 totaled 13,010 units; and, the last region which represents
22 the twelve towns was 4,829 units.

23 Q What was the next step in your analysis?

24 A The next step in the analysis was really to find
25 out what had happened in the particular regions since 1970,

1 because the regions themselves showed a specific need as
2 of the census period. We attempted, then, to upgrade housing
3 which had been built, which might qualify as least-cost
4 housing. We're going to be shifting a little bit because the
5 interpretation by the Courts had shifted as to low income
6 and moderate income, which really was the language of Mount
7 Laurel, to least-cost housing, which was the language of
8 Madison, but we assumed for the purpose of upgrading this
9 information that any housing that was built in the classi-
10 fication known as multiple-family housing would qualify,
11 could be considered as least-cost housing, at least to give
12 us a parameter as to what had taken place in the ensuing
13 seven years since the census had been taken. We then, there-
14 fore, relied upon the number of building permits issued and
15 reported by the Department of Labor and Industry for the
16 period 1970 through 1977, which at the time of this report
17 was the latest information available, and as a result of that
18 we, therefore, totaled the amount of housing units which had
19 been built, as I indicated, as multiple-family housing, which
20 is indicated on the top of page 3 in those five, four regions
21 again. The five-county region had a total of a little over
22 9,500 permits issued for multiple-family housing in the five-
23 year period. Morris County had 5,583; Class 3 region, 5,572;
24 and the region 4, 361. We note in the report that it does not,
25 the so-called least-cost housing does not necessarily include

1 all of the least-cost housing which might have been built,
2 such as some small lots which might have been developed for
3 residential purposes and other forms of least-cost housing
4 which might not have been reported, but--

5 Q What about mobile homes?

6 A Would not include mobile homes either. There is no
7 source that I am familiar with that could report that infor-
8 mation, unless one goes to the county to determine in each
9 and every municipality how many small lots had been issued
10 or subdivided in an ensuing period or how many permits had
11 been issued for small lots, which would have been an extra-
12 ordinarily difficult, if not impossible, task, and we believe
13 this would at least represent a reasonable ballpark figure
14 of what has been built in a region, but it is, tends to be a
15 conservative figure. So, once we then established what the
16 existing housing need was as of 1970 and then made certain
17 adjustments as to what had taken place since that period of
18 time through 1975, we still had to define what the future
19 housing need was in the region, and--

20 Q How did you ascertain that?

21 A We based that particularly on the study that I earlier
22 indicated, "Modeling State Growth in New Jersey-1980."
23 This particular source was a study prepared by an independent
24 agency, that is, Rutgers University, or under the aegis of
25 two individuals who are in the employ of Rutgers University.

1 It was based, it's a study that projected various housing
2 needs throughout the State of New Jersey, not just sections
3 of it, was a study based upon projects of employment as the
4 key variable for determining the housing. That is, once new
5 jobs and job shifts were allocated to various parts of the
6 State, then determination of various housing needs followed.
7 It was done so in a consistent manner, that is, it was done
8 uniformly for every county in the State and methodology would
9 not differ from county to county or from region to region.

10 MR. LINDEMAN: One moment, please, Mr.
11 Kasler. I rise to object, your Honor, to any
12 testimony on whatever figures may have been
13 extracted from the "Modeling State Growth"
14 report, and I say candidly at the outset, the
15 purpose of my objection is essentially the same
16 as that raised by Mr. Goodrum to Mr. Hobaugh
17 because of testimony on the RPA figures. I
18 would request that some kind of inquiry be
19 permitted as to the method that the author
20 has used to ascertain whatever figures they
21 published. I frankly know nothing about it,
22 but in any event the objection is the same
23 objection.

24 Q Mr. Kasler, would you describe for the Court
25 the basis of the employment and population figures contained

1 in "Modeling State Growth?"

2 A I could probably go through a three-hour dissertation
3 basically by reading a substantial amount of methodology that's
4 contained herein. It was based, as I understand it, on various
5 projections prepared by the authors based upon statistical
6 data of the census on Department of Community Affairs, which
7 also participated in the study, and other aspects of recog-
8 nized sources, and it is an accepted document for the purpose
9 of this type of litigation.

10 Q Now, when you say "it's an accepted document,"
11 are you referring to the book, "Modeling State Growth?"

12 A Yes, sir.

13 Q Is that book a document accepted for planning
14 purposes by professional planners in estimating future employ-
15 ment, future housing, and future planning and development
16 in the region which that document covers?

17 A I can only speak to myself, because I know, I don't
18 know of others who may or may not have used it, but I have
19 used it in other similar types of cases, and it has been
20 accepted as such.

21 Q Are you satisfied as a professional planner with
22 the sources of the population and employment information
23 contained in that book, as recited in the book, and in the
24 description of its methodology? A Yes, sir.

25 In fact, I believe that the estimate may be a little bit on

1 the high side, and I have so advised you of that, but never-
2 theless, I accept the methodology and the results of the par-
3 ticular study because I think it's as I indicated earlier,
4 is based upon accepted sources of information and documenta-
5 tion as being done uniformly.

6 Q Now, would you go and continue with--. I think
7 you were in the middle of a description as to employment and
8 population as set forth in "Modeling State Growth," and how
9 you treated that in your report.

10 MR. LINDEMAN: May I pursue that in-
11 quiry, if your Honor please?

12 THE COURT: Surely.

13 MR. LINDEMAN: Briefly.

14 BY MR. LINDEMAN:

15 Q First, Mr. Kasler, are you going to require
16 this volume during your testimony should you be permitted to
17 go forward on it? A I'm not going to use that
18 per se, no.

19 Q You state that this volume is one which you
20 have confidence in, or you have used, you don't know how
21 many others have used it, but that it has been accepted in
22 certain circumstances, I'm not sure what. Will you tell us,
23 please, what you know about the acceptance of the volume?

24 A This particular study has been utilized by myself in
25 a case of Mahwah vs. Suburban Action Institute, and as far as

1 I know, was being accepted by the Courts. That case never
2 came to trial. It's used in a--

3 MR. LINDEMAN: Sorry. Just one moment
4 please, Mr. Kasler.

5 Q Did you testify in a court proceeding then?

6 A The case was dismissed before I gave testimony on it.

7 Q Okay. Next. What else?

8 A It was utilized in the matter of Camelot vs. The Board
9 of Adjustment of Berkeley Heights, which recently was con-
10 cluded, which I did testify, and which was accepted by that
11 Board.

12 Q What Board was that? A Board
13 of Adjustment in Berkeley Heights.

14 Q Were the figures that appear in this book
15 used in the course of your testimony?

16 A Procedure and methodology in that matter was identi-
17 cal to the procedure and methodology in this matter.

18 Q I'm not just referring to that. I'm referring
19 to the data that's contained in it, for the purpose of mak-
20 ing projections? A Same data. It's different
21 for Berkeley Heights than it is for Chester, but, yes, the
22 data in that document was utilized.

23 Q So, when you refer to procedure and methodology,
24 you mean the actual facts and figures contained in there as
25 well; is that right? A Yes, sir.

1 Q Now, so far as the numbers that are contained
2 in this text, do you know what the source of them is?

3 A I indicated earlier that they are based upon what is
4 probably a model. I would suspect it was probably a computer
5 of some sort in which much of this information and data was
6 placed, but the base material upon which it all rests, not
7 the projections but the base data itself, is census informa-
8 tion, covered employment, similar types of information.

9 Q What do you mean by "covered employment?"

10 A Employment data reported by the State of New Jersey
11 which Mr. Hobaugh had testified to.

12 MR. LINDEMAN: Well, if your Honor please,
13 I make the same objection again without repeat-
14 ing entirely that Mr. Goodrum made to Mr.
15 Hobaugh's testimony on the use of figures for
16 his projections based upon the 1970 census and
17 RPA study to which he referred.

18 THE COURT: You'll have to refresh my
19 recollection a little better than that.

20 MR. LINDEMAN: I'm sorry. Your Honor,
21 Mr. Goodrum, as I recall, well, the objection--

22 THE COURT: RPA, talking about the one
23 that's in Evidence or--

24 THE WITNESS: The Regional Planning
25 Association.

1 MR. LINDEMAN: Yes, your Honor. The
2 objection was after a very long colloquy, as
3 I recall it, that we really had no way that we
4 could test the figures that are contained in
5 the report itself, that they are taken in turn
6 from other sources. The 1970 census, we
7 accept. The other sources we know nothing
8 about. That constitutes some form of double
9 hearsay so that the reliability of the document,
10 and, therefore, the testimony, is somewhat in
11 question. Now, Mr. Hobaugh's testimony was
12 accepted, but I just think that it is import-
13 ant that I make the same objection to this
14 testimony that was made at that time.

15 MR. FERGUSON: I suppose it would be
16 appropriate for me to use the same argument.
17 The Court did accept the testimony of Mr.
18 Hobaugh. I think there's an additional reason
19 why this book is more acceptable, if that's
20 the right word, and that is it is produced by
21 the Rutgers University Urban Planning Institute,
22 the sources are the census data and the covered
23 employment trends along with the other data
24 set forth in the book; the RPA document was
25 1973, and there was no proof that that RPA

1 document was still held out by the RPA as
2 the projections for which they were being
3 operated, i. e. some proof in 1977. But, I
4 don't think it makes all that much difference.
5 Mr. Hobaugh's testimony was accepted. I think
6 it goes to the weight of the testimony, and not
7 to its admissibility.

8 THE COURT: This RPA is in Evidence,
9 and I think it's in Mr. Hobaugh's testimony.
10 I'm trying to remember specifically what the
11 difficulty was. As I recall it, it dealt with
12 some of the projections started in 1973, some
13 of the information that we didn't know the basis
14 for it. But, I don't recall it specifically.
15 It doesn't come back to mind.

16 MR. LINDEMAN: I think it had to do
17 particularly with P-30 in Evidence.

18 MR. FERGUSON: I think the problem was
19 Mr. Hobaugh couldn't tell us what they were
20 basing the projections on. This study, of
21 course, the data basis is set forth with great
22 particularity. It's right here. Mr. Lindeman,
23 of course, is free to cross-examine and do with
24 it whatever he wants.

25 THE COURT: Just a minute. Let me look

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at my notes. Mr. Hobaugh testified utilizing Port Authority data, and the RPA data, population projections, job projections. Refresh my recollection, Mr. Lindeman. What are you saying with respect to the RPA that he was not allowed to testify to?

MR. LINDEMAN: He was allowed, your Honor.

THE COURT: He was allowed?

MR. LINDEMAN: He was.

THE COURT: What's your objection?

MR. LINDEMAN: The objection is it's some form of double hearsay not to have the preparers of the texts themselves, figures, and we have no way of testing whether the data contained in--

THE COURT: Wait a minute. I thought what you were saying he was not allowed. If he was allowed, why can't Mr. Kasler be allowed?

MR. LINDEMAN: I have to be fair, your Honor. I make the objection--

THE COURT: Sorry, I misunderstood you. I thought you were telling me Mr. Hobaugh was not allowed to testify, and I couldn't remember anything on that.

1 MR. LINDEMAN: Sorry, your Honor.

2 I didn't mean to give that impression.

3 THE COURT: Let it never be said that
4 justice has an uneven hand, if that's what I'm
5 administering. The ruling will be the same.
6 He will be permitted to testify.

7 MR. LINDEMAN: May I keep this, Mr.
8 Kasler?

9 THE WITNESS: I may have to resort to
10 that.

11 MR. LINDEMAN: All right.

12 BY MR. FERGUSON:

13 Q I think, Mr. Kasler, we were getting to the
14 future need in housing. A That's correct.

15 Q Will you tell us how you approached that
16 question, what you did, and what your results were?

17 A As I indicated, the study makes projections as to
18 regions of the State of New Jersey as to what their housing
19 is estimated to be by the year 1980, based upon employment
20 projections for those same areas. The regions projected in
21 the study were not identical to the regions that we were
22 dealing with. For example, I believe Morris County was in-
23 cluded with several other counties as to their, as to an over-
24 all projection. I believe there were three or four counties
25 grouped together with Morris County, so in order to determine

1 what proportion Morris County would be of this projected
2 area, we had to determine a proportionate relationship between
3 those specific numbers. We--

4 Q Did you do that? A We did
5 that on the basis of knowing what the population currently
6 in the specific region or sub-region was relative to the
7 projection region identified in the 1980 New Jersey study, and
8 on the basis of that proportionate development, we allocated,
9 then that number of housing units were being projected to
10 each one of our four regions.

11 Q Did you make those projections?

12 A Yes, on the basis of that allocation, of that pro-
13 portionate development as indicated on page 5, a 1980 pro-
14 jected multiple-family housing need was determined for the
15 five-county region, Morris County region, Class 4 region,
16 Class 3 region. For the five-county regions, the number was
17 21,436 units; for Morris County, it was 13,399; for the Class
18 3 region, 13,010; and for the Class 4 region, 4,829. I must
19 note for the Court that the projections being offered in this
20 particular study were for multiple-family housing and, again,
21 we translated multiple-family housing, being at least one
22 form of least-cost housing, perhaps a substantial component
23 of it, would not necessarily be addressed to small lots; one-
24 family housing which obviously would not constitute multiple
25 housing, or mobile home housing, which doesn't constitute

1 multiple housing. We felt it was a reasonable parameter for
2 determining what future housing needs were needed, being
3 projected now for the regions. So, in summation, when one
4 takes the existing housing need which is indicated on page 5
5 in the first column, and add the projected housing need for,
6 up to 1980, one then has a total number of housing units
7 projected for 1980; that is, existing plus projected, and
8 for the five-county region, it was 49,061 housing units;
9 for Morris County, it was 28,608 units; for the Class 3
10 region, 28,060; and for the Class 4 region, 10,165 units,
11 subtracting out the amount of multiple-family housing that had
12 been built at least from 1970 to 1975, leaves a residual 1980
13 housing need of 39,526 units for the five-county region;
14 23,025 housing units for Morris County; 22,488 units for the
15 Class 3 region; 9,804 for the Class 4 region. That's not to
16 say that that will be the absolute number because, obviously,
17 between 1975 and 1980, some additional housing will likely
18 be built, but at least, again, it will define roughly what
19 the housing needs are anticipated by the year 1980.

20 Q Would you tell us why you believe the year
21 1980 is an appropriate one to use for the purpose of your

22 study? A As a practical matter, the study only
23 ended with the year 1980, but, again, it's a target year,
24 approximately six years since the adoption of the original
25 master plan which was done in 1974, and if one reads the Land

1 Use Act, it requires a continual review and update every
2 six years on the part of municipalities to insure that the
3 plans and the ordinances implementing those plans are current
4 and relevant, so that this would at least allow the township
5 the ability to know that on the basis of what we started to
6 do in 1974 that this is roughly what the target year should
7 be by virtue of those plans. That's not to say that 1980
8 is ideal in the circumstances because of the fact that we're
9 approaching 1980 already, but within a reasonable time period
10 I think it represents a reasonable basis for the future. In
11 other words, a 1980 target period would probably be beyond
12 the scope of any kind of housing analysis as to what is
13 realistically happening in the State, and 1980, 1982, would
14 probably represent a good horizon period from which to work
15 from.

16 Q You indicated briefly that you thought the
17 employment population projections contained in the book,
18 "Modeling State Growth," might be a little high. Will you
19 tell us what you meant by that?

20 A The difficulty with using census information that goes
21 back to 1970 is obviously, it becomes out of date within a
22 few years. That would likely be true in a number of instances
23 of other sources such as RPA and Port Authority, which was
24 based on census material and other sources. But by using,--

25 THE WITNESS: Sorry, could she read it

1 back? I lost my train of thought.

2 (REPORTER COMPLIES.)

3 THE WITNESS: Thank you.

4 A The material published by the State of New Jersey
5 under covered employment is perhaps one of the most accurate
6 measures of actual number of jobs being held in a geographic
7 area. It is reported by employers to the Department of Labor
8 and Industry periodically, and covers almost all classes of
9 employment. There are some exceptions, and in some instances,
10 particularly where there's State employment, which is not
11 under covered employment aspects, it might not be applicable,
12 but under most circumstances, it is a very realistic measure
13 of how much employment is in a municipality or geographic
14 area. So, therefore, if we have a projection on employment
15 in particular for an intervening year between census years,
16 this is one measure of determining how close that projection
17 actually comes, and we, in fact,--

18 Q Did you make that analysis and comparison?

19 A We made some analysis earlier as to the projections
20 in the James and Hughes publication, and determined that
21 approximately, that the projections appeared to be about seven
22 or eight per cent overstated as to employment for the most
23 recent year that we had, which was 1975.

24 Q Can you tell the Court why you believe the
25 projections, in fact, did come in high? What had happened

1 to make reality turn out less than the projection?

2 A The economy, both in the State and in the country as
3 a whole, has been in a recession. It has been more parti-
4 cularly acute in New Jersey than it has been for the country
5 as a whole, and there has been either a complete halt in the
6 amount in new job formations or actual decline in the number
7 of jobs in the State which has really taken hold in the last
8 two to three years. The 1973 study by Hughes and James, which
9 essentially was based upon earlier data of '70, '71, and so
10 on, didn't anticipate this as did many other sources, and as
11 a result we have had two recessions, and substantial unemploy-
12 ment in the State right now, and, therefore, what Hughes and
13 James are probably saying is probably still realistic, but
14 instead of it being on target for 1980, it might be on target
15 for 1980, '82, something of that magnitude.

16 Q Had there been any change in the patterns of
17 population growth or population migration that have occurred
18 since the census data of 1970, and which the James study is
19 based on?

20 A There continues to be development
21 in Morris County. In other words, continues to be growth
22 and development in the region. What has taken place is that
23 the rate of growth has declined substantially. That, again,
24 is measured in '74 and '75, in particular major recessions
25 in the home building industry, had nothing to do with zoning,
had nothing to do with many other areas basically related to

1 the overall economy. There is some evidence that at least
2 this part of the State is starting to increase again in terms
3 of development patterns, but it certainly has not reached the
4 proportions that existed in the early 1970's.

5 Q Now, once you calculated the housing needs,
6 what did you do next?

A Well, we then had
7 a basis of an overall need for the region. The next question
8 really dealt with how do you allocate it to the community or
9 the individual municipality involved? And, it was on the
10 basis of the three parameters that I had earlier described
11 that we determined a proportionate or a fair-share module.

12 Q Will you explain what you mean by that?

A The reason why most communities exist is because there
14 are jobs there. That is, historically people live in a place
15 because it's close to where they work. In the 17th and 18th
16 centuries, many times you worked and lived in the same house.
17 As transportation patterns changed, the work and home pattern
18 also started to adjust, and today we live in a society that
19 is highly mobile, but nevertheless is still related to the
20 location of the house for most forms of livelihood. There-
21 fore, employment, we felt, was probably the most significant
22 criteria upon which to base an allocation formula. We recog-
23 nize, however, that other factors are also important in that
24 determination, and ultimately the allocation will really weigh
25 heavily on how much weight you put to each criteria, but we

1 do provide an input for numbers of people residing in a
2 community. Obviously, if you have a town of 10,000 people,
3 the need, all other things being equal, the need would be
4 greater in a town of 10,000 than 1,000, so that population
5 was considered.

6 Lastly, the amount of vacant land. Obviously, a
7 community in which there's very little vacant land, although
8 there might be a need in that municipality, may not be able
9 to provide it, whereas in certain communities where there is
10 more vacant land, at least the propensity to build some hous-
11 ing would exist there as well. We took the three criteria.
12 We summed up the amount of employment for the region by muni-
13 cipality. We summed up the amount of population in each
14 municipality, and we summed up the amount of vacant land.
15 In the case of population, we utilized population estimates
16 for the State of New Jersey, which is published by the New
17 Jersey Department of Labor and Industry, dated December 15th
18 of 1975. We utilized that source because it represents the
19 official State estimate. It is the procedure that is utilized
20 in those estimates, uniformly applied across the State, and,
21 again, they're recognized sources for that type of estimate.
22 That's not to say that they are any more accurate or less
23 accurate than perhaps the County Planning Agency or other
24 sources, but at least for the sake of uniformity because we're
25 crossing county lines, we say that the source was identical.

1 We utilize covered employment in the same fashion that it
2 was being reported by Labor and Industry, and is a recognized
3 source of actual information. Lastly, we used vacant land
4 data prepared by the Department of Community Affairs in the
5 year 1976 study which is the only known source that I know of
6 that describes vacant land throughout the entire State.

7 Q What is the definition of vacant land in that
8 study, if you can recall?

9 A I don't know that I can recall. I'm not sure that
10 it's specifically identified. But, I will check.

11 MR. FERGUSON: Withdraw the question.

12 It's not important.

13 THE WITNESS: So that from the point
14 of view of those specific characteristics, we
15 then determine what proportion Chester was
16 of the regions that she was specifically
17 associated with.

18 Q Are those figures contained at Table 2 and
19 page 6?

20 A Yes, they are. Specifically on
21 the basis of employment, Chester constitutes .28 per cent
22 of the five-county region as to employment. That is less
23 than one per cent. That's almost three tenths of a per cent.
24 When it's related to the Morris County region, it constitutes
25 slightly less than one-half per cent, .467 per cent. When
related to the Class 3 region, almost the identical number,

1 .46, and when related to the twelve towns, or the Class 4
2 region, less than one per cent, again .938. The numbers in
3 the second column constitute, if you use just employment as
4 the basis of the region, what would Chester's fair share be?
5 On the basis of .28 per cent of employment of the five-county
6 region, that would translate into 111 housing units. That is
7 .28 times the 39,000 and some-odd housing units.

8 Q Is that multiple-family housing units?

9 A That would constitute what I would define as least-
10 cost housing.

11 Q In your study that-- A Basic-
12 ally translated from multiple-family housing. The number of
13 housing units for Morris County would be 108. The number of
14 housing units for the Class 3 region would be 105, and the
15 number of housing units for the four-town, twelve town region
16 would be 92, which I would note are relatively close numbers
17 when you speak of a range of figures for housing purposes.
18 That is to say, it is almost implicit in that the region
19 doesn't matter, no matter what the region is on the basis of
20 employment, you could say reasonably 100 to 110 housing units
21 would be a need. When one goes through the same analysis for
22 population, the numbers increase somewhat. For the five-
23 county region, Chester's proportionate share is .675 per cent;
24 Morris County, 1.11 per cent; part of the Class 4 region, 3.1
25 per cent; Class 3 region is also 1.1 per cent. When trans-

1 lating those figures into housing units just on the basis
2 of population for the five-county region, you get 267 units;
3 for the Morris County region, 257 units; for the Class 3 region,
4 255 units; and for the Class 4 region, 304 units.

5 MR. LINDEMAN: One moment, Mr. Kasler.
6 Your Honor, I anticipate this document will be
7 offered into Evidence, and I dare say, while
8 I may make some minor objection, it will be
9 admitted for what it says. I wonder if we
10 might not spare the record as to these and
11 many, many other figures to which the witness
12 will refer, that we just refer to them.

13 THE COURT: It's not in Evidence yet.

14 MR. FERGUSON: Well, why don't I move
15 that into Evidence, and perhaps that can--
16 that can save a little time.

17 THE COURT: All right. Then it can be
18 moved into Evidence. It will be D-19 in
19 Evidence.

20 (D-19, report, was received and marked
21 into Evidence.)

22 MR. FERGUSON: I assume that goes for
23 the map also.

24 MR. LINDEMAN: I have no objection.

25 THE COURT: All right. The map, too.

1 D-20 in Evidence.

2 (D-20, map, was received and marked
3 into Evidence.)

4 Q Mr. Kasler, without going through each and every
5 number of your table on page 6, do you have a comment about
6 the number of housing units, when determined on the popu-
7 lation basis? A Yes. For the three regions that
8 I indicated earlier, I believe still to be valid there's a
9 range between 255 and 267. If you base it on the twelve-
10 town region, it's 304, but, again, reasonably close numbers
11 in terms of irrespective of the region itself.

12 Q I would ask you the same question with respect
13 to the analysis using vacant land only.

14 A Vacant land only gives a much larger number of units.

15 Q Will you tell us why?

16 A Because the township does have a substantial amount
17 of undeveloped land still as part of the overall regions.
18 In fact, the Supreme Court, in the Madison case, speaks to
19 the fact that under allocation types of formula, there has to
20 be some type of consideration to vacant land. The numbers
21 herein apply, 1,087 at one extreme to over 1,800 for the
22 twelve-town region at the opposite extreme. One excludes
23 that there's still a reasonable relationship among the three
24 regions as to the number.

25 Q Except for the Class 3 region--strike that.

1 Except for the Class 4 region, the twelve towns, is it your
2 conclusion that the definition of the region for the purpose
3 of making a housing analysis is largely irrelevant?

4 A Yes, sir.

5 Q Now, did you make an allocation formula to
6 determine what you think Chester Township's share of the
7 housing need should be?

8 A I didn't make a
9 formula per se, but I assumed that really the amount of
10 housing ultimately required for Chester would really be
11 determined or weighed upon how much emphasis you put on each
12 one of these three factors. So, I took a broad parameter of
13 weighting factors. That is, "A", "B", "C", and "D" would
14 represent different sets of circumstances. For example,
15 under "A" I would assume whatever formula was utilized that
16 employment would be given 80 per cent of the total weight,
17 and population would be given 10 per cent, and vacant land
18 would be given 10 per cent. This obviously would be some-
19 thing that would be weighed heavily, employment, which may
20 be valid, may not be valid. That's the thing that's being
21 tested, I believe, before the Court. A second set of cir-
22 cumstances wouldn't weigh that heavily upon employment. It
23 would give only 60 per cent to employment, say 30 per cent
24 to population, and only 10 per cent to vacant land. A third
25 condition would be to give even less weight to employment,
50 per cent, and weigh 25 per cent equally to employment

1 and vacant land, and under the last set of circumstances,
2 say that employment, population and vacant land are equally
3 weighted. That is one third to each one of those three
4 factors, and as a result of that multiplying out, what were
5 the housing numbers indicated previously, one could come up
6 with what would then amount of a fair-share housing allo-
7 cation.

8 Q Did you apply those four sets of circumstances
9 to your calculations earlier and arrive at a set of figures
10 under each set of circumstances? A Yes, sir.

11 MR. LINDEMAN: If your Honor please,
12 before the witness actually testifies to that,
13 may I have a brief voir dire on the Table 3,
14 Chester Township's allocation formula?

15 MR. FERGUSON: I do think that's in the
16 nature of cross-examination.

17 MR. LINDEMAN: The purpose of my objec-
18 tion is that it seems to me that the testimony
19 is really irrelevant, based upon what I would
20 expect to extract on the voir dire. I would
21 object to his testifying as to what these
22 figures will be.

23 THE COURT: Why don't we keep it in an
24 orderly fashion. Let's deal with it on cross-
25 examination.

1 MR. LINDEMAN: All right. I'm sorry.

2 Q Did you calculate what Chester Township's
3 share would be under each of the sets of circumstances you
4 described?

A Yes, sir, I did.

5 Q Are they shown on Table 4 and page 8?

6 A Yes, sir. They are.

7 Q Now, Mr. Kasler, do you have an opinion as to
8 which of the sets of circumstances, "A", "B", "C", or "D"
9 about which you testified, is the single most appropriate set
10 of circumstances to use when analysing what Chester Township's
11 share of that regional housing need should be?

12 A In my opinion, either "A" or "B" would constitute
13 a reasonable basis for fair-share housing allocation.

14 Q What about "C" and "D"?

15 A "C" really prescribes a substantial amount of weight-
16 ing to vacant land, and only indicates that perhaps a half of
17 the total weighting would be due to employment. I personally
18 believe employment is a most significant factor than that,
19 and "D" for the same reason, it even dilutes employment even
20 further, and prescribes even more weight to vacant land per
21 se. "A" and "B" say somewhere between 60 and 80 per cent of
22 the reason why housing is needed in a particular location is
23 due to employment, and in my judgment that is proper and
24 reasonable, and that whether you weight population as to 10
25 per cent or 30 per cent, really isn't that significant. The

1 vacant land aspect is not a reason for housing, but a result
2 of that. You must have it to build, but not necessarily have
3 it. For example, land in the middle of Texas, although vacant,
4 may be 50 miles from Houston, might have absolutely no demand
5 need because there is no need for it. The fact that it exists
6 doesn't speak to the fact there's a housing need in that
7 general location. The same could be held here that there is
8 some relationship to vacant land, but it is not a significant
9 one.

10 Q Have you reached any conclusion with respect
11 to whether zoning ordinance 76-12 with a limitation of 300
12 multi-family housing units has satisfied or attempts to meet
13 or satisfy the regional share of housing need which you have
14 calculated for Chester Township?

15 MR. LINDEMAN: I object, your Honor. I
16 think that really is not an expert province,
17 but it's rather the province of the Court.

18 THE COURT: Isn't that an ultimate con-
19 clusion?

20 MR. FERGUSON: Your Honor, it's a con-
21 clusion which this planner is competent to
22 make. It is part of the ultimate conclusion,
23 but I think the very nature of expert testimony
24 is that it can give the Court aid in making
25 that ultimate conclusion. He's done the cal-

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ulation. He's now comparing it with the zoning ordinance of 76-12, and giving you his opinion as to whether that, where that zoning ordinance fits into the regional housing need, and that after all is what this case is all about, and the Holmdel case tells us that the Court should have the benefit of the planner's testimony on that issue.

THE COURT: The Holmdel case?

MR. FERGUSON: Yes. That was where the Appellate Division really didn't criticize the trial court, Judge Lane in Monmouth County, didn't criticize him, but it did indicate it wished it had had more exploration of the ultimate issues by the planners. Out of a total transcript of many hundreds of pages, there were six pages by one planner, twelve pages by another.

MR. LINDEMAN: I'll withdraw the objection. It's not important enough.

THE COURT: I was just going to say I'll spend more time ruling on it--

MR. LINDEMAN: Sorry.

THE COURT: All right. Go ahead.

A Within the general scope of the ordinance, I believe

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1 that the number 300 to be a reasonable number. On the basis
2 of my analysis under the hypothesis of "A" or "B" relative to
3 the three regions, the five-county region, Morris County
4 region, Class 3 region, all indicate a housing need of less
5 than 300 housing units.

6 Q As of what time does that speak in your opin-
7 ion? A This analysis is projected to the

8 year 1980. So, it would include existing need, plus some
9 future need.

10 Q You are familiar with the master plan of
11 Chester Township? A Yes, sir.

12 Q Document P-12(A) in Evidence. Do you have a
13 copy of it? A I probably do.

14 Q Mr. Kasler, from the master plan were you able
15 to determine what the master plan projected as a, as the
16 township's share of a housing need? A I
17 think it should be understood that I participated in the master
18 plan to some extent, particularly relative to the housing
19 issue. There will be others who will speak before the Court
20 who also participated in the development of the master plan,
21 but as a firm and individually we were keenly aware of the
22 housing issues that were taking place during that era of the
23 early 1970's. This plan attempted to address the issues of
24 housing and environment, and to establish a compatible re-
25 lationship between the two; that is, that housing was an

1 important fundamental factor to the master plan as were the
2 environmental aspects of it, as well, and the two could live
3 simultaneously with one another if properly done. The master
4 plan speaks to the, to a number of projected housing units
5 being anticipated during the life of the master plan at that
6 point in time.

7 Q What is that number, and on what page of the
8 master plan do you find it? A That number appears
9 on page 10, under the caption heading, "Housing," and it is
10 indicated as the very last sentence under "Housing," and it
11 states, and I quote, "A future housing need of about 650
12 rental units is estimated," unquote.

13 Q Would you tell us what the term "rental units,"
14 as used in that master plan includes?

15 MR. LINDEMAN: I object, your Honor.
16 I don't think that the witness is qualified,
17 competent or qualified to testify as to what
18 that includes unless there is some actual
19 definition in it, in the document itself, the
20 witness would have to be testifying to the
21 thought processes of the people who adopted it,
22 and I think he is not really qualified on that
23 point.

24 MR. FERGUSON: Well, Mr.--. Let me
25 examine the witness further, your Honor.

1 Q Mr. Kasler, were you responsible for any par-
2 ticular portions of this master plan?

3 A I physically did not write the master plan, so that
4 I can't ascribe any one sentence or paragraph in the report
5 to something which I personally penned.

6 Q Did you prepare the base data and give the
7 Planning Board who wrote the master plan the data on which
8 they placed the master plan? A That's not
9 to say there were others in the firm who, in fact, wrote the
10 plan, one being Mr. Tory Hultgren, H-u-l-t-g-r-e-n, and I
11 believe he will testify at a subsequent date.

12 Q Let me ask you, do you know of your own know-
13 ledge what the term, "650 rental units," as used on page 10
14 refers to? If so, first tell us what your knowledge is.

15 A Discussions that we had with the Board were primarily
16 being directed to apartment-type housing, but that did not
17 preclude the possibility of other forms of housing being used,
18 and I would view the expression, "rental housing," to be a
19 broad unit representing either apartment rentals or even
20 perhaps townhouse type of multiple-family housing, which might
21 be rented or sold because there were various discussions with
22 the Board during that period of time as to possible zoning
23 to implement this as to how it would be accomplished, and we
24 did not just discuss apartments in a very narrow limitation
25 that this would suggest.

1 Q Rental apartment? A Just rental
2 apartments. It was not the sole area that was being dis-
3 cussed. It was a broader avenue of discussion, including
4 townhouses, comparable types of higher density housing. I
5 think that would probably be a fairer statement as to what the
6 projection was being directed to.

7 Q Do you have an opinion, withdraw that. Have
8 you examined the difference in the number 650 and the differ-
9 ence in the 300 limitation in total multi-family housing
10 units in the zoning ordinance, and can you give us an explana-
11 tion of the relationship between the figure 300 and the
12 figure 650?

 A Certainly. The master plan is
13 a policy document for the municipality. As such, it defines
14 various factors of known information, community goals, and
15 ultimately future plans and policies that the plans are based
16 upon. In the implementation of this document, it is not
17 necessarily so that one implements every aspect of the master
18 plan at one time. Rather, it is within the realm of the
19 master plan that segments of the plan can be adopted initially
20 and other aspects implemented at a later date. This is analo-
21 gous to something that is known as phase growth planning, or
22 time phase planning. That is to say, that the master plan,
23 until the new Land Use Law, had really a longer duration in
24 terms of its overall comprehensiveness and policy aspects,
25 and to zone everything recommended in the master plan immedi-

1 ately would probably be foolhardy and silly because it
2 probably could not all be accomplished once it was implement-
3 ed so that the plan, the zoning ordinance to the extent that
4 it is establishing a number of units is implementing the
5 master plan in a stage which is a logical progression, and
6 that is to say in three, four, five years were the 300 units
7 or allocations built, then the community would have the re-
8 sponsibility to reassess their position relative to the next
9 five or six years, which is a concept that is now embodied
10 in the Municipal Land Use Law, and the towns must review
11 their plans every six years. So, it's totally consistent.

12 MR. LINDEMAN: Pardon me. Miss Di-
13 Benedetto, mark that answer please.

14 THE COURT: The ordinance is consistent
15 with the master plan?

16 MR. FERGUSON: Limited by my question
17 which was the 300 limitation, and the 650
18 projection over the life of the master plan,
19 I think is what the witness was referring to.

20 THE COURT: I understand the frame-
21 work of the question.

22 MR. FERGUSON: Your Honor, I think I
23 have a few more questions on other areas. It
24 probably would be an appropriate time to break
25 for lunch.

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THE COURT: Fine.

MR. LINDEMAN: Off the record about scheduling for a moment, if I may. May we?

THE COURT: Today we go to four o'clock.

MR. LINDEMAN: That was my question. I wondered if I could have quarter to four today.

THE COURT: I don't have any problem with a quarter to four. All right. Fine.

(LUNCHEON RECESS IS OBSERVED.)

MR. FERGUSON: At this point, your Honor, I would interrupt Mr. Kasler to go with two others. We sent two people to get some maps, and they will be back in five minutes, and I will be ready for the other--

THE COURT: Okay.

MR. FERGUSON: Mr. Bruce Ellis.

B R U C E E L L I S, sworn.

DIRECT EXAMINATION BY MR. FERGUSON:

Q Mr. Ellis, where do you reside?

A Gladstone--

MR. FERGUSON: You have to talk louder so the Court and the reporter can hear you.

A 57 Mendham Road, Gladstone, New Jersey.

Q What is your occupation?

1 A I'm an aquatic biologist.

2 Q Do you have a degree? A Yes.

3 Q From where? A Rutgers.

4 Q What year? A '73.

5 Q In what field? A Agricultural
6 Science.

7 Q What is that degree, a B.A.?

8 A B. S.

9 Q By whom are you employed?

10 A Jason M. Cortell & Associates.

11 MR. FERGUSON: I should interrupt and
12 state that the purpose of this witness is to
13 mark for identification and qualify a docu-
14 ment, a water quality sampling study performed
15 by Jason M. Cortell & Associates, which will
16 be the basis of another witness' testimony.

17 THE COURT: Okay.

18 Q Mr. Ellis, in what capacity are you employed
19 by Jason M. Cortell & Associates? A An aquatic
20 biologist.

21 Q At my request, did you bring with you today a
22 document? A Yes, sir.

23 Q Will you refer to that document and tell us
24 what it is? A It's a water quality study of,
25 initiated for Richard Goodenough. He's a consultant in

1 Pottersville, and he was contracted by Peapack-Gladstone.

2 Q That's the town of Peapack-Gladstone?

3 A The borough.

4 Q Will you tell us what the document is and
5 what it contains?

6 MR. FERGUSON: I'll state for the
7 record the title of it is, "Water Quality and
8 Aquatic Biology Report:" Peapack Brook and
9 Its Tributaries. Peapack-Gladstone, New Jersey.
10 Dated January, 1977."

11 Q Will you tell us what the report is and briefly
12 what it contains? A This report, it's a water
13 quality study for five sampling stations in the Peapack Brook,
14 and its tributaries. Sampling was for chemical parameters as
15 well as biological.

16 Q And, will you briefly tell the Court what
17 water sampling entails, and what procedures in general were
18 used to get the data to prepare that report?

19 A The chemical parameters were collected in the stream
20 and they were, the general chemistry was collected in a gallon
21 jug and the bacteriological work was collected in a sterile
22 plastic bottle.

23 Q And, were the samples analyzed by your firm?

24 A Yes.

25 Q Will you tell us, did your firm use any standard

Ellis-direct

1.101

1 methodology or sampling requirements in the trade or indus-
2 try to collect and analyze the samples?

3 A The samples were analyzed using "Standard Methods
4 for Waste, for Water and Waste Water Examination."

5 Q And, is that a publication?

6 A Yes.

7 Q Is it referred to in the bibliography attached
8 to that report? A Yes.

9 Q Who are the authors?

10 A Tavis, and it's published by the American Public Health
11 Association.

12 Q Were those samples and the evaluations thereof
13 made by your firm pursuant to your engagement by Mr. Goodenough
14 for the Borough of Peapack-Gladstone? A Yes.

15 Q Will you give us the time frame, when did the
16 sampling commence and when did it end?

17 A The sampling was on three dates, October, excuse me.
18 April, September, November, '76.

19 Q And, were the, withdraw that. Does that
20 report reflect the results of your sampling and your firm's
21 evaluation of those samplings? A Yes.

22 MR. FERGUSON: I'd like to mark this
23 for Identification. I will at the appropriate
24 time move its introduction into Evidence.

25 THE COURT: It will be marked D-21

1 for Identification.

2 (D-21, report, was received and marked
3 for Identification.)

4 CROSS-EXAMINATION BY MR. LINDEMAN:

5 Q Mr. Ellis, what was your participation in the
6 preparation of D-21 for Identification?

7 A I collected the micro-invertebrates and the water for
8 analysis. I also was involved with the interpretation of
9 the data.

10 Q The interpretation of the data?

11 A Yes.

12 Q Are there conclusions that are drawn in this
13 report?

14 A Conclusions just based on
15 stream conditions at that time.

16 Q Could you tell us where those conclusions are?

17 A In the summary of page 5.

18 Q And, you say they're based upon the extreme
19 conditions at the time; is that what you said?

20 A The data and evaluation of data were based on the
21 collection at the time it was emptied.

22 MR. FERGUSON: I think the word was
23 stream, and not extreme.

24 MR. LINDEMAN: I'm sorry.

25 THE COURT: Off the record. I thought
you said extreme, but I thought maybe I didn't

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hear the right word.

MR. LINDEMAN: Through the Court, may I ask a question of counsel? Is this a report of which we have a copy?

MR. FERGUSON: No.

MR. LINDEMAN: Did we ask for it? I'm not sure where we're going on this.

MR. FERGUSON: I'll state what this is going to be. Mr. Lloyd, in the report, final draft of, final version of which I gave to Mr. Lindeman, but whose deposition was taken about a year and a half ago, has done some work to update water quality studies done in 1967 through 1972. This report of the Cortell firm will, along with these reports which I hold in my hand, some seven in number, form the basis of the testimony of Mr. Lloyd as to the quality of the water in the Peapack Brook over a fairly long period of time from 1967 through 1976. Mr. Lloyd is not going to necessarily rely on the conclusions or summary stated in the Cortell report, but he has reached his own conclusions as I understand it, based upon the data which is reflected in the report.

BY MR. LINDEMAN:

1 Q Mr. Ellis, is it correct that the data which is
2 contained in D-21 speaks only of those periods of, April,
3 November and December of 1976? A Yes.

4 Q And, is it also correct that whatever condi-
5 tions are reported here can vary either greatly or at least in
6 some respects between those periods and now; is that so?

7 A Yes, it can vary.

8 Q Is there anything in the report that you can
9 tell me that talks about what bears upon, what factors there
10 are that bear upon a change in conditions?

11 A Yes, there is some mention to natural factors, and in-
12 fluences such as urbanization.

13 Q Pardon me? A Urbanization in-
14 fluences.

15 Q This document was not prepared under your
16 custody or your direction, was it? A I helped
17 write that report.

18 Q It was done also with Mr.--. Is it Mr. Cortell
19 himself? A I was under the supervision of
20 Mr. Charles Gilbert.

21 THE COURT: You can step down, Mr.

22 Ellis. Thank you.

23 MR. FERGUSON: Thank you, Mr. Ellis.

24 MR. LINDEMAN: Where shall I put it?

25 I guess you can take it.

C A N D I C E M. A S H M U N,

sworn.

DIRECT EXAMINATION BY MR. FERGUSON:

Q Mrs. Ashmun, where do you reside?

A Larger Crossroad, Bedminster.

Q Are you employed? A Yes.

Q By whom? A The Association of
New Jersey Environmental Commission.

Q And, where is that office?

A 300 Mendham Road, Mendham, New Jersey.

Q Are you affiliated with the Upper Raritan
Watershed Association? A Yes, I'm the direc-
tor of the resource center.

Q How long have you been the director of the re-
source center? A Four years.

Q And-- A Also, I'm a trustee.

Q I was going to ask you what other affiliations
you have with that organization? A Yes. I'm
trustee and vice president.

Q How long have you been a trustee and vice
president? A I have been vice president for
six years, trustee for nine.

THE COURT: What's the name of the or-
ganization?

THE WITNESS: Upper Raritan Watershed
Association.

1 Q Will you tell the Court what the Upper Raritan
2 Watershed Association is, and what it does?

3 MR. LINDEMAN: Excuse me. Is the witness
4 going to be qualified as an expert? Let me
5 withdraw it. Frankly, I'm curious to know. I'll
6 withdraw it.

7 THE COURT: What is she being offered
8 for?

9 MR. FERGUSON: Excuse me. I neglected
10 to tell the Court. She is being offered to
11 identify the nine documents I have in my hands
12 prepared by the Upper Raritan Watershed Asso-
13 ciation, or under their contract with the
14 Academy of Natural Sciences of Philadelphia,
15 with particular respect to the water quality of
16 the streams in the Upper Raritan watershed
17 area, which includes the Chester, includes
18 the Peapack Brook and the Caputo property,
19 which is the subject of this litigation.

20 Your Honor, for the purpose of the
21 record, we have pre-marked these exhibits
22 DW-1 through 9, and if you want to use different
23 numbers--

24 THE COURT: Go ahead. Continue. You
25 asked her what the association does.

1 Q Will you tell us what it does, what it is?

2 A The Upper Raritan Watershed Association is a private
3 non-profit organization that qualifies under the I.R.S. 5013
4 (C) section, and it's chartered to provide educational and
5 research and support to the 14 communities that form the
6 watershed area of the Upper Raritan River, which includes
7 the Lamington River. The principal tributaries would be the
8 Lamington River, Peapack Brook, Middle Brook, and a lot
9 of other smaller ones. The Watershed Association's principal
10 interest is in preserving the quality of water for future
11 water supply in the watershed. The water from the north
12 branch flows into the Raritan and confluences with the
13 south branch. At north branch, there is the future State
14 reservoir for potable water supply. We have worked very
15 closely with the Academy of Natural Sciences since 1965 in
16 an effort to, first of all, create a baseline of information
17 on the resources of the watershed area, and then to relate
18 that to how it affects water quality over time. We did the
19 first natural resource inventory actually, done in the
20 State. Now, they're being done at a municipal level, but it
21 was the first to be done, it was done just about the same
22 time as the Stoney Brook-Millstone watershed did their's, re-
23 source inventory indicating the capability of the land to
24 accept septic systems, capability, erodable soils and so on,
25 and one of the things that we became extremely interested in

1 was how land use affects water quality, and in that con-
2 nection, the Watershed Association contracted originally in
3 1965 to have water quality work done, testing much as Mr.
4 Ellis described, in the watershed area, and that's where we
5 started. We have been doing that since on a regular basis.

6 Q With whom was your contract in 1965?

7 A Ruth Patrick Academy. I guess it was, the contract
8 was the Academy of Natural Sciences.

9 Q Where is the Academy of Natural Sciences lo-
10 cated? A Philadelphia.

11 Q You mentioned the name of Ruth Patrick. Will
12 you tell the Court who she is? A Dr. Patrick
13 is considered the leading limnologist in the world, and at
14 the time I believe she was the head of the Limnology Depart-
15 ment of the academy.

16 Q Did she leave that position and take another?

17 A She's now the, whatever the chief officer of the
18 academy is.

19 Q What was her role in the work done for the
20 association by the Academy of Natural Sciences?

21 A In the original study, since it was a new thing,
22 something that she was working on, she actually came up
23 and did the sampling, did the work in the field herself.
24 Subsequently, we had follow-up by a number of her graduate
25 students, but always under her direction.

1 Q I call your attention to a stack of docu-
2 ments in front of you. Would you tell us what those docu-
3 ments are?

4 THE COURT: Can we mark them conse-
5 cutively, D-21, 22--. How many are there?

6 MR. FERGUSON: Nine. D-21, 22, through
7 D-30 for Identification.

8 Q Referring to document D-24 for Identification,
9 will you tell us what that is? A This is the
10 natural resource inventory done under contract for the
11 Watershed Association by the Academy of Natural Sciences in
12 Philadelphia, in 19--. It was completed in 1969.

13 Q As an exhibit or supplement to the natural
14 resources inventory, I ask you whether these maps have any
15 bearing, or if they are exhibits? A Yes. They
16 relate to this. These are, refer, this book refers to those
17 maps.

18 Q And, are those maps part of that exhibit?

19 A Yes, they are.

20 MR. FERGUSON: For the purpose of the
21 record, I would think it appropriate just to
22 mark these D-24 A, B, C, et cetera, on there.

23 THE COURT: What is the title of that?

24 THE WITNESS: This is the Natural Resource
25 Inventory of the Upper Raritan Watershed.

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THE COURT: All right. However many maps there are, starting with D-24 A, mark them alphabetically.

MR. LINDEMAN: Can we take a moment. I would like to make a comment about this, if I may. I don't know where we're going. I really don't know whether I should or should not have any objection to it, but I did hear the witness say that this document and the maps that relate to it were prepared for the Upper Raritan Watershed Association.

THE COURT: All she's doing is identifying them.

MR. LINDEMAN: Sorry, your Honor. Yes, but what of it?

THE COURT: I don't know, but I can't make anything of it until they're offered into Evidence. I think he's got the right to have them marked, identified to be used by some other witness; the only other alternative is make her come back with that witness. This is a perfectly acceptable way of doing it, putting them out for identification.

MR. LINDEMAN: I do agree with that, your Honor, but it might just be that unless,

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it might be that I don't object to this.
Frankly, I don't know what the witness, what
the purpose is being served by the witness
identifying them.

THE COURT: As I understand it, they're
going to be used by some witness in the future
to refer to the Upper Raritan River Watershed,
Upper Raritan Watershed. They're going to be
relavant to one of the witnesses who's going to
testify and he's going to refer to them.
This is a way of getting them marked before-
hand. The only acceptable way of doing it;
although perhaps it's a little anticipatory,
it's acceptable.

MR. FERGUSON: It is, your Honor.
Frankly, it's trying to juggle schedules of
who can be at what places at one time.

THE COURT: I'm not debating with it.
D-24 A through K for Identification.

MR. FERGUSON: Shall I read them out
for the record?

THE COURT: For the record.

MR. FERGUSON: D-24 A, --perhaps Mrs.
Ashmun--

THE WITNESS: This is land use in 1961.

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D-24 L, marked for Identification.

MR. FERGUSON: D-24 L is--

THE WITNESS: That's a print of the
U.S.G.S. topographic map.

MR. FERGUSON: D-24 B?

THE WITNESS: Is the geology map.

MR. FERGUSON: D-24 C?

THE WITNESS: Ground water resources.

MR. FERGUSON: D-24 D?

THE WITNESS: Streams and rivers.

MR. FERGUSON: D-24 E?

THE WITNESS: Slopes.

MR. FERGUSON: D-24 F?

THE WITNESS: Natural features.

MR. FERGUSON: D-24 G?

THE WITNESS: K factor.

BY MR. FERGUSON:

Q Will you tell the Court what the K factor is?

A Yes. It relates to erodability, and it's a complicated factor used in construction to determine the capability of the land sustaining in construction.

MR. FERGUSON: D-24 H?

THE WITNESS: Direct reading of the
erodability of the soils as derived by the
Soil Conservation Service.

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MR. FERGUSON: D-24 I?

THE WITNESS: Soil limitations for light buildings with cellars, which is an interpretation, again, of the Soil Conservation Service.

MR. FERGUSON: D-24 J?

THE WITNESS: Soil limitations for septic tanks as defined by the Soil Conservation Service.

MR. FERGUSON: D-24 K?

THE WITNESS: It's a combination of the last two combined soil limitations in building.

(D-22, 23 and 24, reports; D-24 A through L, maps; D-25 through 30, reports, were received and marked for Identification.)

Q Now, going back to Exhibit D-22, would you identify that for us? A It's the water quality survey, Upper Raritan Watershed, done for the Upper Raritan Watershed Association, August and November of 1967, by the Academy of Natural Sciences of Philadelphia.

Q Did you have any participation in the preparation of that document? A Only to enjoy working with Ruth Patrick.

Q Did you work with her in the field?

1 A I was present. I did not do any of the sample
2 gathering in that case.

3 Q Referring to D-23 for Identification.

4 A Water Quality Studies of the Upper Raritan Watershed
5 for the Upper Raritan Watershed Association, May, 1968,
6 October, 1969, done by the Academy of Natural Sciences of
7 Philadelphia.

8 Q Once again, pursuant to the contract between
9 the Academy and the Association, did you do any work on this?

10 A No, I just learned.

11 Q Exhibit D-24, the natural resources inventory?

12 A Yes, this is the same inventory. Another copy.

13 Q Will you briefly tell us in your own words
14 what that document is? A Well, this is the
15 resource inventory. It's a written report on what those
16 maps say in terms of the water resources, in terms of the
17 aquafiers of the watershed, the geology, and the possible
18 impact of different actions on the soils and on the water--

19 Q Do you know Mr. Tom Lloyd?

20 A Yes, I do.

21 Q Did he have anything to do with the natural
22 resource inventory? A Yes, he did the bulk of
23 the work on the resource inventory.

24 Q Under whose direction? A Under
25 Ruth Patrick's direction.

1 Q Who is Mr. Lloyd, for the record?

2 A I don't know what his present--

3 MR. FERGUSON: I'll withdraw the ques-
4 tion.

5 THE WITNESS: Yes.

6 Q D-25 for Identification is a copy of what
7 document?

8 A This is a copy of the Upper
9 Raritan Watershed Water Quality Survey, done in 1972, by the
Academy of Natural Sciences.

10 Q Did you have any participation with respect to
11 that survey?

12 A Not in the field. I worked in
13 terms of existing land use, information, because much of
it is in Bedminster Township.

14 Q D-26 for Identification? A This
15 is the Water Quality Survey done by the Upper Raritan
16 Watershed Association on the north branch of the Raritan
17 River. You want me to describe it?

18 Q Yes, if you would. A This is a
19 study that was undertaken on the limited number of stations
20 to determine the seasonal variations in water quality and the
21 variation in water quality from the upper part of the river
22 down to the Ravine Lake.

23 Q Who did that study? A I did this
24 study.

25 Q Under whose direction or under whose guidance?

1 A Under the guidance of Ruth Patrick and the Phila-
2 delphia Academy.

3 Q Will you tell me what guidance Dr. Patrick
4 or the academy gave you? A The academy
5 established the methodology which we followed, and then
6 helped us with the interpretation of results.

7 Q Who gathered the samples or whatever raw data
8 was necessary? A I did.

9 Q Did you have any assistance?
10 A On this study, I did the work myself.

11 Q And, to whom did you show your raw data once
12 you had gathered it? A To the academy
13 personnel, and to Peter Larson, who was at that time the
14 director of the Watershed Association.

15 Q As to the interpretation of the data, who did
16 the interpretation? A The interpretation
17 was done with a combination of Mr. Larson and the academy,
18 and I provided the input as to the loadings that could have
19 come from various land uses upstream, for instance.

20 Q Did you supervise the interpretation of the
21 data in accordance with the standards given to you by the
22 academy? A I did not draw any conclusions.
23 I provided the raw data. They drew the conclusions, the
24 academy.

25 Q Who is "they," the academy?

1 A The academy and Mr. Larson.

2 Q Specifically on this report, can you tell me
3 who at the academy worked on it or drew conclusions?

4 A I think Tom Walton played a part in that. I'm not
5 positive about that. Because, it was Ruth's, Dr. Patrick's
6 graduate students that were involved in the determination
7 of loading factors.

8 Q Dr. Patrick? A Dr. Patrick.

9 Q I show you document D-27, and ask you the same
10 set of questions, what it is, who worked on it, et cetera?

11 A The sub-watershed study, water quality data for the
12 Upper Raritan Watershed Association, Spring of '75--

13 Q Why don't we do them all at once.

14 A Spring of '75--

15 Q Exhibit D-28. A Summer of
16 '75.

17 Q Exhibit D--

18 MR. LINDEMAN: Wait, wait. Spring, '75,
19 28 is the Summer of '75?

20 MR. FERGUSON: Correct. 29 would be
21 Fall, Winter, '75, '76. 30 is Summer, '76.

22 Q With respect to those exhibits, 27, 28, 29 and
23 30, will you tell us who worked on them, under what super-
24 vision, under what guidance? A This study
25 was undertaken by the Watershed Association under the

1 supervision of the Academy of Natural Sciences. It was done
2 in order to update the previous data, resource inventory.
3 It was done as a part of a general sub-watershed. By sub-
4 watershed, we took the watershed itself and broke it down
5 into the tributary watersheds to make it easier to deal with.
6 There were 40 stations. There were really five sub-watersheds
7 involved. We did a chemical sampling and a biological sam-
8 pling each season, which meant that we took, we used what
9 is known as artificial substrates, which are described in
10 the document, which are artificial rocks put in the stream,
11 micro-invertebrates get on it, and you take them out and
12 count them and census the,--by that, you get a biological
13 analysis of the state of the water. We put those in and
14 you leave them, left them for 30 days, which meant we did
15 a chemical grab sample at the beginning, put the substrate
16 in the water, did a chemical sampling at the end when we took
17 the substrate out, and then counted the bugs as we say.
18 The reason for doing that was because the chemical sampling
19 can vary from practically instant to instant, but the popu-
20 lation of micro-invertebrates in the stream are indicators
21 of long-term stream quality. We followed a methodology
22 that developed at the Academy.

23 Q Under whom? A Under Dr. Patrick,
24 to determine, and produce raw data. These reports do not
25 contain interpretive data. They are, they contain the

1 original raw data, and are subject to interpretation by, who-
2 ever.

3 Q Is there any interpretation in those last four
4 reports at all? A No.

5 Q Do they contain the raw data which you, under
6 the supervision or guidelines of the Academy, collected,
7 assembled, and put into those reports?

8 A Yes, they do. I checked these particular ones against
9 our file. I had helping me at the time, I did much of the
10 field work myself, also had a graduate of the Connecticut
11 College in Environmental Sciences, who assisted, and--

12 Q Was that person working under your supervision
13 and control? A Yes, directly, yes, and Mr.
14 Ellis assisted us with the identification of the micro-
15 invertebrates.

16 Q Mr. Ellis, who just testified?

17 A Yes.

18 Q Has this data been submitted to anyone at the
19 Academy of Natural Sciences? A Yes, they
20 have, all of them.

21 Q To whom, specifically? A To
22 Dr. Patrick, and to Tom Lloyd, when he was at the Academy,
23 and Tom Walton.

24 Q At my request did you submit copies of these
25 reports and specifically the last five, to Mr. Lloyd, Thomas

1 Lloyd, for the purpose of whatever studies he might be doing
2 in this litigation? A Yes, that and the other
3 information from this update.

4 Q What other information are you referring to?

5 A These maps constitute the update on information on the
6 inventory information for this one, Peapack sub-watershed.

7 Q Who prepared these maps? A These
8 maps were prepared by Mr. Perry Boynton, B-o-y-n-t-o-n.

9 Q Who is he? A He's an employee
10 of the resource center of the Watershed, planner by train-
11 ing. These were designed to provide, to provide us with any
12 changes in land use that had taken place from those maps at
13 that time to this time, and because we had baseline water
14 quality data at that time, and we have new water quality
15 data that goes with these, and we could ascertain, Tom Lloyd
16 or anyone who wanted to interpret, then interpret what the
17 land impact had been on water quality, so the other changes--
18 you only take the things that change.

19 MR. FERGUSON: Can we have these three
20 maps marked please? D-31, 32, and 33, for
21 Identification.

22 (D-31, 32, and 33, maps, were received
23 and marked for Identification.)

24 Q D-31 doesn't have-- A D-31 is a
25 soils map derived from the soils survey of Somerset County

1 Soil Conservation Service, and the soils survey of the Morris
2 County Soil Conservation Service.

3 Q D-32 is entitled, "Peapack Brook Sub-Watershed
4 Land Use Map," and D-33 is entitled, "Legend," but you better
5 tell us what it is. A This map indicates the
6 infrastructure, that is, and the geology of the sub-watershed.
7 They're the sewerage lines, water lines, wells, sewerage
8 treatment plants, water tasting stations the relate to sub-
9 water study, major public open spaces, fault lines, and
10 surface water affluents.

11 THE COURT: Can I see that, please?

12 (COURT OBSERVES.)

13 MR. FERGUSON: That's all the questions
14 I have of this witness on these documents,
15 your Honor. At the appropriate time I intend
16 to move them into Evidence, and let them be
17 used by another witness. Cross-examine.

18 CROSS-EXAMINATION BY MR. LINDEMAN:

19 MR. LINDEMAN: I commence this examin-
20 ation with a comment that I am vastly confused
21 by the apparent direction which the case is
22 going in. I recall nothing in the case that
23 has anything to do with a defense on the part
24 of the defendant that the Township is not
25 appropriate for development beyond whatever

1 is provided in the present zoning ordinance
2 because of any environmental or ecological
3 problem, and unless the evidence is being of-
4 ferred to prove that, I submit it seems to me
5 we have been wasting our time. I would cer-
6 tainly object on the ground that that's not an
7 issue in the case, and I don't know what other
8 purpose this material can serve. But, if it's
9 just a question of marking it for Identifica-
10 tion, I guess we do have to go through some of
11 this.

12 Q Mrs. Ashmun, Miss Ashmun? A Mrs.

13 Q Tell us, please, by what entities the Water-
14 shed Association is supported? A Private.

15 Q Well, what do you mean by "private?"

16 A Private subscription memberships.

17 Q You mean property owners around the area
18 would-- A All through the watershed,
19 just residents. Don't have to be a property owner.

20 Q Anybody? A Some of the
21 studies have been funded by grants from private foundations,
22 but the bulk of the organization's funding comes from mem-
23 bership.

24 Q Will you tell us who the foundation, what the
25 foundations are? A They're private. One

1 of them was funded by a member of the Watershed Association
2 who chose to stay anonymous. Do whatever you want with it
3 in that case. Doesn't have anything to do with--

4 MR. LINDEMAN: It's for the Court to
5 decide, Mrs. Ashmun.

6 THE WITNESS: I don't want to say it
7 unless you want me to.

8 THE COURT: Is there any need for me to
9 know that?

10 MR. LINDEMAN: I don't know whether
11 there is. The lady is a very respectable and
12 distinguished lady apparently, but whether this
13 association has an axe to grind of some kind,
14 I don't know. I just don't know.

15 THE COURT: Should we ask if Mr. Caputo
16 is a contributor?

17 MR. LINDEMAN: We can ask him. I
18 would doubt it.

19 THE COURT: Unless there's some speci-
20 fic reason for it, it would seem to me that, you
21 know, there's something specific you have in
22 mind that you know of, I think exploration into
23 their contributors, other than the fact that
24 they're generally a non-profit organization
25 with certain objectives, I don't think it's

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going to be relevant.

MR. LINDEMAN: I won't press that particular question, but I would be interested to know what the identity of the directors and the contributors is. Would you furnish that to us, please?

MR. FERGUSON: Do you have annual reports, Mrs. Ashmun?

THE WITNESS: Yes, sir.

MR. FERGUSON: We can make those available. I should point out, Mr. Larson's deposition was taken extensively in this litigation, and Mr. Ambrose did, in fact, ask a lot of that kind of questions. It's all there.

THE COURT: Why don't you look at Mr. Larson's deposition and see if there's anything in there. Maybe he answers much of what you would want from her.

MR. LINDEMAN: I'm satisfied with the representation if it's not in our records some place, that it will be furnished to us. I don't need to pursue that, that line.

Q Mrs. Ashmun, do you have any technical background?

A Yes. I'm a physicist by training, and I worked in the research lab for many years.

1 Q Research lab of what?

2 A Industrial research.

3 Q How long have you been connected with the

4 Watershed Association? A As a trustee,

5 about nine years.

6 Q As a--. I take it you're now an employee; is

7 that correct? A I'm a director of the

8 resource center. That's correct. I work part time--

9 Q When you-- A --In that capacity.

10 Q When you furnished input to certain of the

11 documents, particularly I think it was D-26, do you know

12 how long you had been with the Association at that time?

13 A Yes, as an employee?

14 Q Yes. A About six months, and then

15 I went, it was the two years I was there that I was doing

16 this work.

17 Q Two years after that that--

18 A During that period, yes.

19 Q What did that input involve?

20 A My input to the watershed.

21 Q To that particular report which was--

22 A To these reports? I did the field work on these,

23 and the lab work.

24 Q What was involved in doing the field work?

25 A Picking up samples, putting in substrates, taking

1 out substrates.

2 Q Is that not--. Is that the kind of work that
3 requires training in a particular field?

4 A I had, as I testified to, I had worked with Ruth
5 Patrick in the field for a long time during all these other
6 studies. I did not participate in the data gathering for
7 those studies, but I was with her and the kind of training
8 that I had previously for lab work was more than adequate for
9 doing this work.

10 Q Were you a paid employee at that time?

11 A I was a paid employee at that time.

12 Q When you finished the input?

13 A Yes, sir.

14 Q You say that the training that you had was

15 more than adequate. A What I mean is that the,
16 the work that we do for this kind of data gathering is
17 ordinarily done by technicians, and is not all that compli-
18 cated. The chemicals, for example, that we use in order to
19 maintain consistency of result are pre-measured chemicals
20 and we have a spectrophotometer, Bausch and Lomb, with which
21 I am familiar because of work I had done previously. So, I
22 did not have any difficulty in following the methodology
23 that was laid out for us by the Academy, and also is in the
24 standards for water quality samples.

25 Q Is it not correct, though, that except as to

1 the input that you actually furnished for some of these
2 reports, that you really don't know how it is that the
3 Academy of Natural Sciences prepared the various documents
4 that were prepared for the association? A I
5 know how they did all their field work. I was there.

6 Q For all of the field work that was done for
7 all of the reports-- A Not literally
8 every sample, but I was a spectator at most of their field
9 work, when they're in the field in the watershed area.

10 Q Does that relate to all of the reports that
11 you have-- A Yes, all the way back to the
12 beginning.

13 Q But, you did not participate in actually
14 furnishing the data-- A No, not for those
15 reports. Just for these.

16 Q When you say, "these"--

17 A "These" are the sub-watershed study reports I testi-
18 fied that I did the data gathering for.

19 Q So, except as to those, you were present when
20 data was collected, but you did not actually present it to
21 the Academy, nor did you have anything really to do with the
22 preparation of the documents, nor did anyone else at the
23 Watershed Association? A Except I was a
24 trustee of the Watershed Association, and they were working
25 under contract to the Watershed Association at that time. I

1 was a party to writing the contract.

2 MR. LINDEMAN: Your Honor, the position
3 that I take so far as the Identification is
4 concerned, except as to those documents that
5 Mrs. Ashmun contributed to in the performance
6 of work, she has really done little more than
7 to read off what the documents are.

8 THE COURT: Identified them, and how
9 they came into existence as far as the Upper
10 Raritan Watershed Association is concerned.

11 MR. LINDEMAN: Right.

12 MR. FERGUSON: We anticipate Mr. Lloyd
13 testifying November 29, and Dr. Patrick testi-
14 fying on November 30th, and they will qualify
15 those documents that Mr. Lindeman refers to.

16 THE COURT: Thank you, Mrs. Ashmun.

17 MR. FERGUSON: I should, perhaps, state
18 for the record that the purpose that these
19 will be introduced for. We do, indeed, have
20 a defense to the charge that large-lot zoning
21 is exclusionary per se, and is always against
22 the general welfare, as partially testified to
23 by Mr. Hobough that the defense has articulated
24 several times over in the pleadings and in the
25 pretrail order.

1 MR. FERGUSON: Mr. Kasler.

2 Could I have a minute to clear the floor,
3 Judge?

4 THE COURT: For the record, all of
5 those exhibits marked for Identification
6 will be the responsibility of Mr. Ferguson.

7 M A L C O L M K A S L E R, recalled.

8 CONTINUED DIRECT EXAMINATION BY MR. FERGUSON:

9 Q Mr. Kasler, you briefly told us about your
10 engagement when you were with Candueb-Fleissig to work
11 for Chester Township. Would you briefly, again, give us a
12 description of what you did with respect to the comprehensive
13 plan of 1974, when you were with Candueb-Fleissig?

14 A Excuse me. The contract, I believe, was entered into
15 by my firm and the Township; I believe occurred in 1972. As
16 the regional director for New Jersey, work product of all
17 planning programs, basically, was under my direction,
18 control, although I might not necessarily be involved in
19 each case. In this particular situation, my responsibility
20 was primarily to oversee the aspect of housing as a com-
21 ponent of the master plan, although I wasn't directly involved
22 with the detailed work of precisely how the master plan was
23 to be formulated. I did attend some of the meetings of the
24 Planning Board with Mr. Hultgren, who was the project planner
25 for the assignment.

1 Q Was he also employed by Candueb-Fleissig?

2 A Yes, he was. The discussions that we had with the
3 Planning Board essentially evolved around the premise that
4 we recognized the Township to be a community with many
5 environmental constraints, and limitations. Nevertheless,
6 because of the number of, growing number of litigated matters
7 relating to housing, we felt housing was an important com-
8 ponent to the master plan, and, in fact, should be a policy
9 matter as well as environmental aspects. We believe the
10 Board accepted the premise, and we had a number of discussions
11 as to how this might be accommodated. in view of the number
12 of limitations that the Township had by way of environmental
13 factors, utilities, and so on. Specifically, it was our
14 opinion, my opinion that specific areas should be considered
15 in the community, should be selected on the basis of their
16 uniqueness for possible multiple-family housing sites if,
17 in fact, that could be accomplished and that that, the
18 basis for selection of those particular locations and sites
19 would be based upon a number of criteria, including property
20 size, accessibility to major roadways, relationship to shop-
21 ping and other community services, other community facilities
22 and functions such as school, libraries, relationship to work
23 patterns, soil and other environmental factors. The ultimate
24 decision to locate the so-called MDR areas were really based
25 upon those criteria, although I did not specifically sit

1 with the Board each and every meeting, or ultimately conclude
2 those particular sites were the only sites, but on the basis
3 of my general overview of the material that was presented to
4 me, I concurred with that general finding that there were, in
5 fact, specific locational, geographic, geologic factors which
6 were most suitable and appropriate for housing in those
7 particular locations.

8 Q Now, you say those "particular locations." To
9 what locations are you referring? A The master
10 plan identifies, I believe, three to four areas for higher
11 density housing.

12 Q Will you look at the illustrative zoning map
13 attached to the master plan, I believe page 21, and point out--
14 I'll ask you, can you identify those areas to which you re-
15 fer? A Actually, the map that I'm referring to
16 is page 20, which is the general plan upon which that illus-
17 trative plan was based.

18 MR. FERGUSON: Does the Court's copy
19 have page--

20 THE COURT: I have to get it.

21 (COURT DEPARTS FROM BENCH.)

22 (COURT RETURNS TO BENCH.)

23 Q Showing you--

24 THE WITNESS: I have 21. I have another
25 copy.

1 Q Look at your copy of the master plan, and
2 referring to pages 20 and 21, will you tell us what those
3 maps are on pages 20 and 21, 21 first?

4 A Page 20 is the general plan of the Chester Township
5 master plan which is a, you know, policy land use document
6 as to future land use patterns in the community, and among
7 other things it indicates what I would consider three general
8 areas which are identified for possible medium-density
9 residential use. The first such area is located on the most
10 easterly side of Chester Borough in Chester Township on the
11 northerly side of Route 24. Second such area is identified
12 essentially south of Chester Borough along Route 206, along
13 both sides of Route 206, just south, again, as I indicated,
14 of Chester Borough; and, a third area is located further to
15 the, on the westerly and southerly side of Chester Borough
16 between Route 206 and Route 24.

17 Q Are you looking at page 20 or 21?

18 A This, I believe, is, this is page 20, the general
19 plan.

20 Q By what on the map can you tell that those
21 three areas are indicating-- Will you tell us why you say
22 that?

23 A There is a dotted pattern of a very
24 concise nature which is identified in the legend as possible
25 medium-density residential use.

Q Now, will you tell us the criteria that you

1 and the Planning Board used, if you know, when that plan
2 was drawn, criteria for possible siting of MDR?

3 A The original, prior to the formulation of the plan,
4 we had suggested a number of criteria for use by the Planning
5 Board, and as a basis for our own technical determination as
6 to certain areas for higher-density housing use. Those
7 criteria were, one, proximity to commercial areas, either
8 existing or anticipated to be developed; two, proximity to
9 existing or proposed community facilities, and services,
10 particularly schools, library facilities, police and fire
11 protection. Most importantly, schools. --

12 MR. LINDEMAN: Your Honor, sorry.

13 A --Third, the availability of utilities, specifically
14 water supply and sewerage treatment of a centralized nature,
15 either of a public or of a private nature, either existing
16 or proposed. Four, the suitability of the land itself for
17 certain types of higher density and development, including
18 underlying geology, soil conditions, topography, and the
19 like. Five, the size of the land area itself. As a general
20 criteria, we had suggested areas of 100 acres or more for
21 consideration, because one of the theories that were being
22 developed at that point in time was possible use of a sewerage
23 treatment type known as spray irrigation, which by its very
24 nature requires a large land area, and if a development were
25 to take place, we were anticipating a possible area of 30 to

1 40 acres just for those purposes, combined with that another
2 open space, we felt that a reasonable size area for develop-
3 ment would have to, as a minimum, have approximately 100
4 acres. We also considered accessibility to major roadways
5 insofar as many of the roads in Chester Township are of a rural,
6 and in many instances, sub-standard nature for higher-density
7 development. We felt it appropriate the respective area or
8 areas have accessibility to major highway facilities which
9 could accommodate the increased traffic. So that on the
10 basis of those criteria, we then determined where the most
11 appropriate locations for higher-density housing might,
12 might be considered.

13 MR. LINDEMAN: If your Honor please,
14 on the basis of the qualification of the wit-
15 ness, and the representation of the Court as
16 to what the purpose of the testimony was going
17 to be, I move that that answer and this line
18 of questioning be stricken, that which went
19 into the Candueb-Fleissig report, which is
20 illuminating, is beyond the scope of this wit-
21 ness' function as I understand it, if the Court
22 intended that he be bound--

23 THE COURT: It's not what the Court
24 intends that the witness testify. Let me make
25 that clear right away.

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MR. FERGUSON: I thought I articulated the witness would testify to his involvement in the preparation of the 1974 master plan. If I didn't, I was in error.

THE COURT: I did not intend--. What I was trying to do was get an idea of where a witness fit into the situation so I could get a preliminary, well, he did make--. My notes indicate he made a reference to working on the Chester Township Planning, for the master plan, the housing aspect. I have it, "i" and "p", which means intended purpose. That maybe a paraphrase by me. So, I'll allow it.

MR. FERGUSON: I also intend to ask the witness if he has an opinion about whether the Caputo site fits into the criteria he has just enunciated, which perhaps he--

THE COURT: I'm not going to bind you too strictly to it.

MR. FERGUSON: All right. Is there a pending question? I believe Mr.--

THE COURT: No, there's no pending question.

Q Mr. Kasler, I believe you just articulated the six criteria which had been used in determining the locations

1 for possible medium-density residential zoning. Please
2 take each one of those criteria, and tell us in what respect
3 these, or how these areas you told us about were judged
4 under those criteria, either separately or together, whichever
5 is more convenient for you? A I'll try
6 and do it one by one. I may overlook one, and you may have
7 to fill me in. But, as to the aspect of major, accessibility
8 to improved highways, Route 24 and Route 206 are the two
9 major thoroughfares that extend through Chester Township, and
10 by any stretch of the imagination probably the most fluid,
11 if I can use that verbiage to describe the method of traffic
12 flowing in the community. They are regional highways of
13 one extent or another. All three areas that I described
14 as being indicated in the master plan are related to those
15 specific thoroughfares, Route 24 or Route 206.

16 Item two, the relationship to community shopping,
17 Chester Township is the out of perimeter of the proverbial
18 hole in the donut. The Borough of Chester is the center of
19 activity in the Township relative to commercial activity.
20 There is very little commercial development in the community,
21 and, in fact, Chester Township relies to a great degree
22 upon its normal convenience shopping in the Borough itself.
23 There must be shopping in other communities as well, but
24 there is a high correlation between the resident population
25 of the Township and the shopping patterns of those residents.

1 This is comparable in nature to Morristown and Morris Town-
2 ship, wherein there is virtually no commercial development
3 in Morris Township, and the residents of Morris Township
4 rely upon the center of shopping in Morristown. The proximity
5 of the three areas recommended for medium-density residential
6 use all about the Borough, Borough of Chester, and, therefore,
7 there's a high correlation between the proximity of those
8 sites and the shopping, thereby minimizing traffic movements
9 and other movements. It's then really a regional concept
10 of expanding development from the Borough outward, which is
11 a recognized pattern of planning. This, again, is comparable
12 in Morristown and Morris Township, and in many of the
13 borough-township relationships in this area, and this part
14 of the State.

15 Third, the qualitative aspects of the sites themselves
16 were based upon studies of the environment by Mr. Hultgren
17 and others relative to the acceptability of septic tanks,
18 the geologic substrata, and other factors which also led to
19 the selection of these sites for potential higher density
20 housing. That is not to say there might be other areas in
21 the community that might also fit that criteria, but certain-
22 ly these areas did, in fact, meet those criteria.

23 Fourth, and related to that, was the aspect of the avail-
24 ability of water and sewerage utilities. While we did not
25 know if a comprehensive water or sewerage system were to be

1 developed or could be developed for the total township
2 because of its relative size. It was a likely thought that
3 eventually there would be some kind of a sewer system de-
4 veloped in the borough, and that any development of a
5 centralized system could most easily and appropriately be
6 developed in areas immediately abutting it in the township,
7 and if there were some form of regional development to take
8 place, obviously the cost could be deferred both to the
9 township and the borough, if that did, in fact, take place.
10 Absent a centralized sewer system in particular, we felt
11 there was still the possibility, if the ground and land
12 characteristics permitted, of on-site sewerage development.
13 That is, that which I described earlier as spray irrigation
14 or some other comparable means. The reason why locations
15 in and near water streams were not considered was because
16 of the downstream, possible downstream effects of possible
17 pollution.

18 THE COURT: Go ahead.

19 (OUTSIDE NOISES.)

20 THE COURT: You went to available water
21 and sewerage utilities.

22 A Again, the, these maps do not indicate it, the areas
23 generally under consideration as evidenced by the tax maps
24 were all very large land areas which were capable, if developed,
25 to accommodate spray irrigation, at least as to size, and at

1 least some preliminary findings as to geologic conditions.
2 Nevertheless, any final or specific determination would
3 have to weigh on an application actually being submitted.

4 THE COURT: Could I ask you one ques-
5 tion? On page 21 of the comprehensive plan,
6 there is an area shown MDR, and it seems to me
7 that there is under, in that area some kind of
8 street layout for subdivision.

9 THE WITNESS: That's correct.

10 THE COURT: What is that?

11 THE WITNESS: I believe there was at
12 one time a subdivision that had been filed
13 that had never been developed.

14 THE COURT: Okay.

15 THE WITNESS: The land is vacant. It
16 is still at least in one or two major parcels
17 that could be developed. I think I raised
18 the same question when I first saw it, your
19 Honor.

20 THE COURT: Okay.

21 A The other criteria that I have listed is community
22 facilities, and, again, relative both to the township and
23 to the borough, any location in the center of the township
24 would obviously have the least or the most beneficial effect
25 to the residents of the township as opposed to a facility

1 which might be located in the most extreme northern corner,
2 which geographically might be totally inaccessible to the
3 southwestern corner of the township. The configuration of
4 the community is such that the majority of the community
5 facilities and services will, in fact, occur or should
6 occur in that general facility. The township, in fact,
7 shares some of its school facilities with the borough, and
8 they are, in fact, located in the borough so that the center
9 of the township, which is exempted by the borough, is the
10 area of very likely high activity in terms of community
11 services. So, once again, there is a gravitational aspect
12 which comes back to areas in the township immediately
13 abutting the borough, which reinforced again the concept
14 that was originally espoused for other reasons. I think I
15 have covered all of them. I may have left one out. But,
16 there was a constant reinforcement of the same basis, most
17 appropriate locations for higher-density housing was, in
18 fact, immediately adjacent to the borough, particularly to
19 the south and to the east.

20 Q I think you may have left out water supply,
21 central water supply. A Well, the same
22 would hold true as to sewerage development as it would for
23 water supply; possibility that in the event water, centralized
24 water facilities were not to take place, that there was, in
25 fact, sufficient well capacity to particularly serve these

1 areas. Again, the specifics as to the factors, environmental
2 factors, were reviewed by others in detail. I, in fact, had
3 some participation in those factors, but did not have an
4 in depth knowledge of that, and others will testify to that
5 effect.

6 Q To whom are you referring to for the record?

7 A Specifically, Mr. Hultgren.

8 Q Now, did the master plan establish standards
9 for the MDR development, and have you testified about those,
10 or are there others which you have not testified about?

11 A Specifically, on page 21, the master plan indicated
12 a map which was indicated as being the illustrative zoning
13 map. In effect, what was being proposed was a, what we
14 believe to be a hypothetical zoning map carrying out the
15 master plan. It was made a part of the record that this
16 did not mean that this in fact would be the zoning ordinance,
17 zoning map, but that the translation of the plan itself as a
18 policy document into law could, in fact, take this format as
19 one of a number of formats, and, specifically, we did not be-
20 lieve that that, all of the areas identified in the general
21 plan on page 20 for possibly, which was indicated as possible
22 medium density residential use in fact needed to be imple-
23 mented by way of the zoning ordinance in total, which is what
24 I spoke to earlier as to the staging aspect, and it was our
25 belief that the area in the central part of the township

1 that is abutting Route 206 to south of the Borough of
2 Chester was probably, from all of the criteria that we had
3 established, the best of the alternatives, if a singular
4 area were to be zoned, and, therefore, we had suggested that
5 a singular zone encompassing approximately 260 some-odd
6 acres should be zoned for higher-density residential use.

7 THE COURT: One single zone?

8 THE WITNESS: One single zone.

9 Q Do you know if that recommendation was follow-
10 ed in fact? A Ordinance 76-12, in fact, went

11 beyond that and actually established three separate higher-
12 density residential zones. It embraced not only the illus-
13 trative MDR zone, but two other zones as well, pretty much
14 consistent with what the overall general plan was. In terms
15 of overall area, it wasn't quite as extensive, but the three
16 sites generally coincided with those areas identified in
17 the master plan.

18 THE COURT: Do you know what the size
19 of the three areas were?

20 THE WITNESS: In totality, no, sir.

21 THE COURT: Okay.

22 A Part of the dilemma that we faced in 1973, essentially,
23 was trying to develop a plan with a view towards implemen-
24 tation, and, very frankly, our density considerations for
25 this MDR zone was somewhat less than actually was imple-

1 mented in 76-12. We were discussing with the Planning
2 Board the possibility of an overall density of about two
3 and a half units to the acre. Subsequent to that, under the
4 advice of another consultant, the ordinance 76-12 was
5 established at five units to the acre.

6 Q What was the reason for your recommendation
7 of less than five, or approximately two and a half?

8 A Well, we very frankly were in an area of, I think,
9 somewhat uncertainty. The municipality at that point in
10 time essentially was a community of two-acre and five-acre
11 zoning. There was some areas that were zoned for one acre,
12 but overwhelmingly this was a community of large-lot zoning.
13 We did not, frankly, know (A) what was acceptable to the
14 community on the basis of this type of housing, but (B) we
15 had had the experience of working with a large tract of land
16 for a private developer with a municipality that already had
17 zoned the site for two units to the acre with a variety of
18 housing types, and because of our knowledge of the infra-
19 structures and the costs associated with that in an envi-
20 ronment, physical environment, which was probably more
21 difficult than this general area that we were considering,
22 we thought that economically it could be developed within
23 reasonable price ranges. That was, again, in the early
24 1970's. So, on the basis of our experience privately with a
25 client, and in an area geographically not that far away,

1 environmentally probably of a similar character, we assumed
2 as a minimal threshold the two and a half, two, two and a
3 half actually would have been an appropriate density that
4 could have been built and still be consistent with the types
5 of litigation that was just beginning to be established.

6 Q Would you explain what you mean by "consistent
7 with the types of litigation" which were then coming in?

8 Did you have any discussion with the Planning Board about
9 litigation?

10 A Not specifically in Chester, but
11 we had professionally had been employed in a number of
12 municipalities, particularly Mahwah Township, in which the
13 United Auto Workers filed a suit, either in 1970, 1971,
14 alleging exclusionary zoning on the basis of large lots, had
15 also been involved in Mahwah Township with the Suburban
16 Action Institute, filed an action not only Mahwah, but
17 adjoining municipalities, and in other communities as well,
18 alleging the same type of conditions so that we were
19 certainly aware of the type of Court action that either was
20 pending or was, perhaps, in trial already. We were also
21 aware of the very, frankly, the very unknown solutions that
22 were to come down technically with Mount Laurel and Madison
23 Township, which at that time, at that point, had not, in
24 fact, been heard by the Supreme Court. So, I think it could
25 be stated very succinctly that we were groping for solutions
before precise sources had been identified. There were none.

1 There were no ground rules, and it's still a very murky
2 area in my judgment today, but it's an area I think that
3 has been more finely focused as a result of the two Supreme
4 Court cases, and a number of other cases that, actually
5 three Supreme Court cases, and others that have gone to the
6 Appellate Division.

7 Q Mr. Kasler, at my request, have you reviewed
8 ordinance 76-12? A Yes, sir, I did.

9 Q At my request, did you inform me, advise me
10 of limitations which you felt existed in that ordinance,
11 and with particular reference to the mandate of Madison
12 Township to zone for least-cost housing?

13 A Yes, sir, I did.

14 Q Did you give me various items which you con-
15 sidered ought to be the subject of further exploration of
16 planning by the Planning Board? A Yes, sir.

17 Q Specifically, did you give me an opinion with
18 respect to the 300-unit limitation on the total number of
19 multi-family units?

20 MR. LINDEMAN: I object, your Honor, not
21 just because the question is leading, but to
22 this whole line of inquiry as to what the witness
23 may have advised counsel, particularly with
24 regard to the infirmities of the act. Unless
25 there's going to be a complete recapitulation

1 right now, but I think it's inappropriate, and
2 improper that the witness disclose what he may
3 have given of his, given as his opinion of the
4 improprieties in the 76-12 ordinance.

5 THE COURT: Well, if the defendant is
6 telling me what's wrong with the ordinance,
7 what changes should be made, why is that in-
8 appropriate? It's a concession, it would seem
9 to me, that--. I'm not, I don't necessarily
10 have to agree with it any more than I neces-
11 sarily have to agree with the conclusions of
12 your experts, but has not your expert already
13 told me what's wrong with the ordinance about
14 the 300 units per acre? Maybe a little differ-
15 ent than the way that question was just asked,
16 and is sought to be answered, but if normally--
17 it's a little refreshing to be candid with you.
18 Normally, zoning ordinances are, maybe not
19 after Mount Laurel, but pre-Mount Laurel, they
20 were infallible. They no longer are. I don't
21 have any problem with allowing the--

22 MR. LINDEMAN: It's just such a shocking
23 kind of testimony, really too kind.
24 It's almost as though the very document that
25 we're attacking is--

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THE COURT: Maybe they're agreeing with you. Maybe they're agreeing with you.

MR. LINDEMAN: I dare say they are.

THE COURT: It's refreshing.

MR. FERGUSON: We stand before the Court having put Mr. Lindeman, Mr. Caputo, the Court, and indeed the world on notice the zoning ordinance expires January 18, 1978, because after that date it's not going to comply with with Land Use Law, and why doesn't it comply with the Land Use Law? All kinds of little things. We also have represented to this Court that there are other areas we want to examine, and in light of the obligations put on all municipalities to zone for least-cost housing first enunciated in January of this year, I have taken the position that the township has handled it as well as it possibly can be, and that's why I'm asking this witness the question.

THE COURT: Very candidly, I was waiting with some anticipation on how the letter that Mr. Ambrose originally forwarded to me, that Mr. Ferguson sent to the township committee, was going to be handled. I assume that's the

1 way it's going to be handled. I think it's
2 appropriate.

3 How long is it going to take? I told
4 the Grand Jury 3:30.

5 (DISCUSSION OFF THE RECORD.)

6 THE COURT: Let the record show I in-
7 terrupted the question, and we'll continue that
8 question the next time we meet. There is one
9 other question Mr. Ferguson wants to ask.

10 Q Mr. Kasler, using the criteria you indicated
11 were used in the master plan for the siting of the potential
12 MDR zones, do you have an opinion as to the subject site, Mr.
13 Caputo's property, as a possible location for meeting density
14 and residential use?

15 MR. LINDEMAN: We may not get to this
16 so fast, because I object. Certain of the
17 criteria that were referred to by the witness
18 include environmental circumstances. There
19 has been no testimony that there is any
20 environmental information technically about
21 the Caputo tract, nor that there was any parti-
22 cular study that was made by the witness of the
23 tract.

24 THE COURT: Let's find out if he has an
25 opinion.

1 Q Do you have an opinion? A Yes,
2 sir.

3 Q Will you tell us--

4 MR. LINDEMAN: I object to the opinion.

5 THE COURT: Now, why do you object to
6 the opinion?

7 MR. LINDEMAN: I object to the opinion
8 because the criteria includes such things as
9 sewer, well community facilities, the avail-
10 ability of water and sewers which is a factual
11 thing, but number three was the qualitative
12 aspects of the area which, of course, he says
13 somebody else testified about, or knows about,
14 namely Mr. Tory Hultgren, but this witness
15 doesn't. He doesn't know about our tract,
16 really doesn't know.

17 THE COURT: About the geological, soil
18 conditions?

19 MR. LINDEMAN: Yes.

20 THE COURT: Let's stop with the question.
21 Maybe a little more foundation could be--

22 MR. FERGUSON: I would anticipate the
23 witness would tell us his opinion, exactly why
24 he has it, and articulate those areas on which
25 he's basing his opinion, and those areas which

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he's basing his opinion on the testimony or opinion of others, if, in fact, that is the case, and those areas which he's not basing his opinion on at all.

THE COURT: Okay. To deal with Mr. Lindeman's objection, maybe you could explore the six criteria a little more and find out whether he's relating to all six or whether he's relating to five, six. But, we'll do that the next time we meet.

MR. FERGUSON: I'll rephrase my question and ask Mr. Kasler to remember it very well.

THE COURT: I think it would be fair to ask him the question again when we meet again. As I now see it, it's going to be the 29th and 30th of November.

MR. FERGUSON: Correct.

MR. LINDEMAN: Is that Monday and Tuesday?

MR. FERGUSON: Tuesday and Wednesday.
Off the record.

(DISCUSSION OFF THE RECORD.)

(WHEREUPON PROCEEDING WAS ADJOURNED.)

PENGAD CO., BAYONNE, N.J. 07002 FORM 2045