

Transcript of Continued Deposition of Alan Mallaeh

pg. 139

ML 0008659

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

ML000865G

MEDIA

MORRIS COUNTY FAIR
HOUSING COUNCIL,

Plaintiff,

vs.

BOONTON TOWNSHIP,
et als,

Defendants. :

CONTINUED
DEPOSITION OF:

ALAN MALLACH

Morris Township, New Jersey
Monday, April 16, 1979

B E F O R E:

MARK SCHAFFER, a Certified Shorthand
Reporter and Notary Public of the State of
New Jersey, at the Morris Township Municipal
Building, 50 Woodland Avenue, Morris Township,
New Jersey, on Monday, April 16, 1979, commenc-
ing at 10:15 o'clock.

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

THE PUBLIC ADVOCATE
BY: CARL C. BISGAIER, ESQ.,
For the Plaintiff Morris County Fair
Housing Council.

KNARR - RICHARDS, ASSOCIATES

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A P P E A R A N C E S (Continued):

1
2 MESSRS. SACHAR, BERNSTEIN, ROTHBERG,
SIKORA & MONGELLO

3 BY: DANIEL S. BERNSTEIN, ESQ.,
4 For the Common Defense Committee and
Chatham and Mendham Township.

5 MESSRS. CLAPP & EISENBERG
6 BY: ROGER S. CLAPP, ESQ.,
For the Defendant Harding Township.

7 MESSRS. SCANGARELLA & FEENEY
8 BY: FRANK SCANGARELLA, ESQ.,
For the Defendant Borough of Lincoln Park.

9 MESSRS. HASKINS, ROBOTOM, HACK, WINTER,
10 PIRO & O'DAY
BY: JAMES J. MC DONALD, ESQ.,
11 For the Defendant Township of Hanover.

12 MESSRS. MC CARTER & ENGLISH
BY: CLAUDIA B. WILKINSON, ESQ.,
13 For the Defendant Chester.

14 ROBERT S. GOLDSMITH, ESQ.,
For the Defendant Rockaway.

15 KARL Z. SOSLAND, ESQ.
16 BY: BERNARD P. BACCHETTA, ESQ.,
For the Defendant Pequannock Township.

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18 MARK SCHAFFER, C.S.R.
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I N D E X T O W I T N E S S E S

WITNESS

DIRECT

Alan Mallach

By Mr. Bernstein

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I N D E X T O E X H I B I T S

EXHIBIT

DESCRIPTION

FOR IDENT.

D-3 Transcript dated March 12, 1977 41

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1 A L A N M A L L A C H , previously sworn.

2 CONTINUED DIRECT EXAMINATION BY MR. BERNSTEIN:

3 Q Mr. Mallach, was it your testimony
4 at our last set of depositions that you do not
5 consider yourself to be expert in sanitary sewers,
6 septic systems, the engineering and the costs of
7 these systems? A Not in any
8 detail, no.

9 Q You do not have any training in
10 this field, any formal training?

11 A That's correct.

12 Q Now, could you tell us what you
13 would define exclusionary zoning as being?

14 A Exclusionary zoning as I understand it
15 under the law as it is in New Jersey is zoning of
16 a municipality which does not provide for least
17 cost housing in a variety of different ways and
18 in an amount that is adequate to meet reasonable
19 fair share goals.

20 Q Now, you have testified in a number
21 of exclusionary zoning cases in New Jersey;
22 correct? A That's correct.

23 Q Would you give us the first
24 exclusionary zoning case that you testified in?

25 A That would be the case of Southern

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Burlington N.A.A.C.P. vs. The Township of Mount Laurel.

Q And could you tell us what the plaintiffs were seeking in that case?

MR. BISGAIER: The complaint speaks for itself in that. He is not an expert in what the complaints are seeking. If you are asking for his testimony--

MR. BERNSTEIN: I am entitled to ask what the plaintiffs were seeking in that case, Mr. Bisgaier, as a prelude to asking what his testimony was in that case. It is a very reasonable question.

MR. BISGAIER: Well, you are entitled to ask him. I doubt that he would be able to tell you.

MR. BERNSTEIN: You doubt that Mr. Mallach, who worked in the Mount Laurel case with the attorneys, who I am sure was in court a number of days, whose name appeared on one of the opinions as having written a brief, you doubt the man that has put this much work in the Mount Laurel case and has cited it in his writings can tell us what the thrust of the case is

1 about?

2 MR. BISGAIER: I know he cannot tell
3 you what the plaintiffs were trying to
4 seek and there are so many inaccuracies
5 in the statement you made as to his involve-
6 ment in that case.

7 Q Do you know what the plaintiffs
8 were seeking, Mr. Mallach, or were you in the
9 dark as to what their motive was for bringing the
10 lawsuit? A Well, I really don't

11 know in any kind of detail what specific relief
12 the plaintiffs were seeking in that case.

13 Q Do you know why the case was
14 brought in a general way? Do you have any idea?

15 A Well, in a general way, I believe the
16 origins of the Mount Laurel case--And this is all
17 second and thirdhand because I had no personal
18 involvement in this aspect--

19 Q You did not speak with any of the
20 attorneys about the case?

21 A Well, I'm saying this second and thirdhand
22 based on conversations with attorneys after the
23 fact.

24 Q Well, Mr. Bisgaier represented the
25 Southern Burlington N.A.A.C.P. which was the lead

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plaintiff in the case; wasn't it?

A Yes.

Q And I am sure you had extensive conversations with Mr. Bisgaier about the case.

A Some.

Q And he presented the case in court?

A Yes.

Q And I assume you were in court on numerous days when the case was tried?

A Two, I believe.

Q And you worked on the brief with Mr. Bisgaier?

A No.

Q Your name appears to be on one of the opinions as having worked on the brief?

A In the Mount Laurel case?

Q Was it the Madison Township case?

A Right.

Q Okay. Do you have any idea what the Mount Laurel case was about other than your involvement?

A As I understand it, and again, as I say, this is from second and third-hand after-the-fact information, the origins of the Mount Laurel case came up as an outgrowth of the activities of the Township of Mount Laurel to try to force the black community in the Springville

1 area out of the township through a combination of
2 restrictive zoning which did not permit them to
3 buy or build houses that they could afford and a
4 process of zealous code enforcement of existing
5 housing.

6 Q And what was your testimony in that
7 case, Mr. Mallach?

8 A My testimony in that case dealt with
9 questions of housing need.

10 Q And could you give us some more
11 facts on what you testified to?

12 A Well--

13 MR. BISGAIER: Before Alan answers,
14 you should know that he participated in
15 two trials.

16 MR. BERNSTEIN: I am talking about
17 the Mount Laurel I.

18 MR. BISGAIER: I am not sure he
19 appreciated that.

20 THE WITNESS: Yes, I did.

21 Q How many years hiatus was there
22 between the trial court hearing in the first Mount
23 Laurel case and the second trial in the Mount
24 Laurel case? I am sure a number of years?

25 A Yes, quite a number.

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Q Okay. What was your testimony specifically on need?

Well, in a nutshell, it covered the areas that were the subject of my study that was published by the State entitled The Housing Crisis in New Jersey and dealt with establishing the general characteristics of housing needs, their extent, and I would guess the urban-suburban difference. Frankly, it was fairly limited testimony and it was as you know a long time ago.

Q Are you telling us that you primarily testified as to the housing need for low and moderate income families in Mount Laurel 1?

A That's correct.

Q And did you give any criteria that you felt would be adequate for minimum lot size and for the density of townhouses and garden apartments in Mount Laurel 1?

A Not as far as I remember, no.

Q The second exclusionary zoning case that you remember testifying in?

A I believe that was the Bedminster case, Allen Dean vs. Bedminster. That would be also the first of the two.

1 Q The first, yes. And could you tell
2 us first what that case was about as you know it?
3 That case was actually two cases. One was
4 a class action suit brought by a group of moderate
5 income households against the exclusionary zoning
6 of the Township seeking greater housing opportu-
7 nities in the township generally. The second was
8 a suit that was filed more or less at the same
9 time by a landowner, the Allen Dean Corporation,
10 seeking relief from the Township's exclusionary
11 zoning practices as they affected their land.

12 Q And I believe the suits were conso-
13 lidated? A They were consolidat-
14 ed eventually, yeah.

15 Q And did you appear on behalf of
16 both groups of plaintiffs?

17 A No, no, I appeared on behalf of the former
18 group, which were known as the Cieswick, which is
19 spelled C-i-e-s-w-i-c-k, plaintiffs.

20 Q And what was the thrust of your
21 testimony in the first Allen Dean case?

22 A It dealt with analysis of housing needs,
23 analysis of the zoning ordinance and its exclusion-
24 ary provisions.

25 Q And with regard to the housing

1 needs, I assume that your testimony was that there
2 was a need for more low and moderate income hous-
3 ing in Bedminster Township; correct?

4 A I would think so.

5 Q And it was your testimony with
6 regard to the zoning ordinance, those provisions
7 of the zoning ordinance which you found to be
8 exclusionary? A Yes.

9 Q Did you talk in that case at all
10 about densities which you suggested were appro-
11 priate for low and moderate income housing?

12 A I believe so.

13 Q Do you remember what those densi-
14 ties were which you recommended?

15 A I believe I was speaking in terms of multi-
16 family housing, townhouses and the like. I
17 believe I was talking in terms of such as ten to
18 15 to the acre.

19 Q How would the distribution be
20 between the townhouses and the gardens?

21 A Well, I don't recall the specifics on that
22 point.

23 Q Was there anything else you
24 testified to in the Allen Dean case other than
25 the analysis of housing needs and your analysis

1 of the exclusionary character provisions in the
2 zoning ordinance? A I don't believe

3
4 Q The next case?

5 A The next case I believe was the Cinnaminson
6 case. I may get the sequence of some of these
7 wrong--

8 Q That is all right.

9 A --if you are going to go through them one
10 by one.

11 Q And the thrust of the Cinnaminson
12 case, Mr. Mallach?

13 A The Cinnaminson case was again in this
14 case an effort by a company seeking to build
15 fairly modest, no-frills townhouses in the
16 Township of Cinnaminson which, at that time, had
17 no land zoned for any form of multi-family housing.

18 Q Do you remember what the density was
19 that the plaintiffs were seeking?

20 A About ten to the acre.

21 Q I assume that you felt that the
22 proposed townhouse project was suitable for low
23 and moderate income families?

24 A Well, this was a--Again, there is a
25 question of definition here. It was certainly

1 suitable for them. It was decent, inexpensive,
2 sound housing. Whether a low and moderate income
3 family by certain definitions would have been
4 able to afford these or any housing other than a
5 direct government subsidy is debatable. They
6 were at least significantly less expensive and
7 more available than other housing in the town.

8 Q Would you clarify this housing as
9 being least cost housing even though the term was
10 not coined when you testified in the Cinnaminson
11 case? A Generally speaking, yes.

12 Q And the thrust of your testimony in
13 this case was?

14 A It covered a large number of things. It
15 included an analysis of the zoning ordinance and
16 its provisions. It included discussion of fair
17 share and region, although only in very limited
18 terms. It was principally devoted to the zoning
19 ordinance and its effects, also some analysis of
20 the housing cost and availability in the township
21 and its immediate vicinity at the time and some
22 discussion of housing needs in the area.

23 Q Was your analysis of the zoning
24 ordinance similar to what took place in both the,
25 first, Allen Dean case and in the present case,

1 that is you pointed to revisions which you found
2 to be exclusionary? A Yes.

3 ~~COTTON~~ Q Do you remember the region that you
4 felt Cinnaminson belonged in?

5 A Well, yes, this was--If memory serves, the
6 case had taken place shortly after the Mount
7 Laurel trial had been decided by the Supreme Court.
8 And it seemed readily apparent to me that
9 Cinnaminson, being almost adjacent to Mount Laurel,
10 was part of the same region that the Supreme Court
11 had delineated for the Mount Laurel case.

12 Q What did you do with regard to your
13 analysis of housing costs in the municipality?

14 A The principal element was an analysis of
15 comparable or usable sales as they're sometimes
16 called.

17 Q How was that valid in analyzing a
18 zoning case? A Well, it was--How was
19 what?

20 Q The comparable sales analysis. I
21 would like you to explain to me how you related
22 that to the zoning of the municipality and also
23 to the relief which your client was seeking?

24 A The key point of the sales analysis was to
25 determine the degree which the need for housing

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of different income groups was or was not being met so that the sales were analyzed by different value ranges and compared to the income distribution of the households in the region.

Q If there were multi-family housing in Cinnaminson, would that have been included in your housing analysis?

A If possible, yes.

Q And do you feel that analyzing housing cost is a valid tool for analyzing the need for dwelling units in a municipality?

A It's one significant input into such an analysis, yes.

Q Did you make such a study in the present case of housing cost?

A No.

Q Do you know if any of the plaintiff's witnesses have?

A I don't know.

Q With regard to housing needs, did you testify in the Cinnaminson case about the need for low and moderate income housing within the municipality?

A I don't remember.

Q Did you testify in general about the need for low and moderate income housing in the region?

A I believe I did.

1 Q The next case that you testified in
2 was?

3 A We missed one intervening
4 case which was not specifically speaking an
5 exclusionary zoning case. This was a housing
6 case.

6 Q Which one is that?

7 A It was the Welfare Rights v. Cahill.

8 Q And the thrust of that case?

9 A That case dealt with the legality of the
10 changes in State Welfare procedures. From up to
11 that point, the State calculated rent as a sepa-
12 rate item in a Welfare budget and obtained a
13 statement from the landlord as to what the rent
14 was and issued a separate check for that amount.
15 And after that, this was the procedure that was
16 being challenged, the State calculated an average
17 rent for a household of given size and type and
18 just added that to the Welfare grant as part of
19 the single total.

20 Q What was your testimony in that case
21 dealing with, Mr. Mallach?

22 A My testimony was based on a detailed
23 analysis of rent levels for Welfare households by
24 county, by household type and size and the like
25 and documented the rather incontrovertible fact

1 that by changing the system, large numbers of
2 households would be very severely burdened
3 economically.

4 Q You would not consider the Welfare
5 Rights case as being an exclusionary zoning case?

6 A No, not at all.

7 Q The next case you testified in?
8 And as we have stated before, since you do not
9 have a list of the cases before you, I can
10 appreciate the fact that you may not be going in
11 order, but that is all right.

12 (A discussion is held off the
13 record.)

14 A Okay. I think the next would probably
15 have been Urban League of Greater New Brunswick
16 vs. Borough of Carteret, et al.

17 Q And the principal thrust of that
18 case was?

19 A The principal thrust was to seek an area-
20 wide fair share plan or housing remedy or some
21 such against all of the municipalities other than
22 the core communities of Middlesex County.

23 Q And your testimony in that case
24 dealt with? A My testimony dealt
25 with two areas. One was the analysis of the

1 provisions of each of the defendant ordinances.

2 Q Showing where they were exclusion-
3 ary?

4 A Yes; and secondly was the
5 presentation of different types of relief that
6 the Court may want to consider in its remedy or
7 its decision.

8 Q Could you tell us in what ways the
9 Urban League of Greater New Brunswick suit was
10 similar to the present case we are involved in,
11 in what ways it was different?

12 MR. BISGAIER: Can you give that
13 question again.

14 (The last question is read.)

15 MR. BISGAIER: Do you mean in its
16 totality or as far as his testimony is
17 concerned?

18 MR. BERNSTEIN: In its totality as
19 far as Mr. Mallach is concerned.

20 MR. BISGAIER: In his personal
21 viewpoint?

22 MR. BERNSTEIN: From his personal
23 viewpoint. I do not see how he can
24 testify from anyone else's viewpoint.

25 A With regard to my role?

Q First let me ask you were you in

1 court as the trial progressed?

2 A In the Urban League case?

3 Q Yes, sir.

4 A It was certainly a lot of days. Whether
5 it was most or not, I wouldn't know.

6 Q And you actually conferred with
7 plaintiff's counsel in regard to this case?

8 A Dealing with the individual cases against
9 the individual municipalities, yes.

10 Q And you even suggested some modes
11 of settlement for a number of communities with
12 regard to the discussions between plaintiff's
13 counsel, defense counsel and the Court?

14 A Well, as you probably remember having sat
15 through probably many more days of that case than
16 I did even, Judge Furman did, in essence,
17 recommend that a settlement be entered into
18 regarding certain towns, at which time it became
19 necessary for the plaintiff to recommend exactly
20 what they saw as being the grounds for such a
21 settlement. And I advised plaintiff's counsel as
22 to my judgments on what those grounds should be.

23 Q Now, can you tell us, to get back
24 to my principal question, areas in which you feel
25 that case was similar to the present one and the

1 areas which you feel it was different from the
2 present one? A That's a difficult
3 question, sir. Bear with me.

4 Q Okay. I will ask an easier question.
5 Could you contrast your study that you made in
6 the Urban League case with the studies that you
7 are making in the Public Advocate lawsuit?

8 A Yes, and I think that probably suggests
9 one significant difference between the two. It
10 is that in this case a fairly serious effort, and
11 I believe it's embodied in part at least of my
12 testimony, has been to ground the analyses of the
13 ordinances and presumably what happened subse-
14 quently in a consistent definition of least cost
15 for the purposes of the analysis. And in some
16 ways this was something that was made possible
17 by the Madison decision, which had not come down
18 at the time of the Urban League case.

19 Q Also in the present case you really
20 ~~have not~~ spoken of different types of relief
21 ~~which~~ the Court might grant to the plaintiffs;
22 have you? A That's true, too.

23 Q Also in this case, you have made
24 studies on overzoning for least cost housing
25 which you did not present in any more than a

1 sketchy way in the Urban League lawsuit?

2 A Well, that's an example of something that
3 has been clearly established by the Madison
4 decision.

5 Q The next case which you testified
6 in? A I guess that would probably

7 be a case entitled Lorenc, L o r e n c, vs. The
8 Township of Bernards.

9 Q And the principal thrust that the
10 plaintiffs were seeking in that case was?

11 A They were seeking a ruling on the validity
12 of P.R.N. zoning provisions in the Township zon-
13 ing ordinance.

14 Q And your testimony dealt with what,
15 Mr. Mallach?

16 A My testimony dealt exclusively with a
17 commentary on a kind of floating zone provision
18 that the Township had just adopted to their
19 ordinance.

20 Q Was that the Planned Residential
21 Neighborhood provision, which allowed low density
22 multi-family housing which was to be surrounded
23 by one-family housing which the Town argued would
24 provide the low and moderate income housing fair
25 share for Bernards Township?

1 A Something along those lines, yes.

2 Q And can you tell us in a general
3 way what your opinion was regarding the validity
4 of the P.R.N. zone?

5 A Well, I should distinguish. The P.R.N.
6 zone was a mapped zone. The thing that you are
7 describing and that I focused on was a floating
8 zone and--

9 Q I think that was the P.R.N.

10 A No, it was called B.R.C., the B.R.C. Option
11 or Balanced Residential Community Option.

12 Q Okay. You are right.

13 A The P.R.N. zone itself, in the absence of
14 the option, it was an extremely low density use.
15 My opinion of the B.R.C. Option was that it would
16 not achieve the ostensible goal of providing low
17 and moderate income housing.

18 Q Did you testify at all on the
19 validity of the P.R.N. zone?

20 A No.

21 Q Did you have an opinion on the
22 validity of the P.R.N. zone?

23 A Yes.

24 Q What was your opinion?

25 A Well, it was certainly not low and moderate

1 or conducive to least cost housing.

2 Q In your opinion, what would have
3 been a reasonable density for the P.R.N. multi-
4 family zone in Bernards Township?

5 A Well, this raises a number of--This is
6 another complicated question which unfortunately
7 requires a complicated answer. A P.R.N. or--A
8 P.R.N. is a kind of planned unit development
9 under the Land Use Law. And a planned unit
10 development can serve a number of purposes.

11 My feeling as I reflected in my report is
12 that if a municipality is seeking to use planned
13 unit development in one of its manifestations as
14 a vehicle for achieving least cost housing, it
15 should be possible to build housing, least cost
16 housing, in that P.R.D. or P.R.N. under condi-
17 tions that are no more strenuous than those that
18 would be required if the housing is being built
19 in a regular garden apartment or townhouse or
20 high-rise or whatever zone. So that the density
21 of a P.R.N. or P.R.D. that was designed as a least
22 cost vehicle would be simply the composite of the
23 densities of the different housing types that
24 would be provided.

25 On the other hand, as I believe I also

1 said, it is perfectly legitimate for a municipi-
2 pality to use P.R.D. or P.R.N. as a vehicle for
3 other planning goals without any pretense that
4 this is a contribution toward least cost obliga-
5 tion. In that situation, the densities would
6 clearly not have to be as high.

7 On the other hand, even there they would
8 have to be high enough so that it made some kind
9 of a logical sense in terms of the economics of
10 development and open space preservation and so on.

11 In the case of Bernards, the densities in
12 these P.R.N.'s were something like one and one-
13 and-a-half to the acre. And this is clearly too
14 low for a P.R.N. or P.R.D., period, whether least
15 cost or not because it just does not work.

16 Q What density do you believe would
17 have been valid in the P.R.N. zone in Bernards
18 Township? A Okay. Again, as I
19 say, if the P.R.N. zone was clearly understood
20 not to be providing least cost housing and not to
21 be contributing towards whatever Bernards Town-
22 ship's fair share goal might be, then a reasonable
23 density could be, oh, say in the area of four to
24 six, seven units to the acre.

25 Q And are there any reasons why you

1 would expect a relatively low density in the
2 Bernards Township P.R.N. zone while you might not
3 expect a low density in some other P.R.N. zones?

4 A Not really, the point of--Well, assuming
5 the purpose of the P.R.N. zones was the same in
6 each case, there would be no reason to expect a
7 different density.

8 Q Well, weren't there certain ecolo-
9 gical problems in the Bernards Township P.R.N.
10 zone that might not be there in other P.R.N. zones?

11 A Well, the whole purpose in some ways of a--
12 or I shouldn't say the whole purpose, but a
13 significant purpose of P.R.N. as it is used by
14 townships is to have a vehicle to make it worth-
15 while on everybody's part to not build in certain
16 areas by concentrating in other areas. It's a
17 clustering certainly central to the P.R.N. concept.

18 So in the Bernards P.R.N. zone, if memory
19 serves, a substantial part of the tract was in
20 floodplain or certainly very lowlying areas with
21 high water tables, surface water, whatever, which
22 was certainly not buildable. So it would logical-
23 ly follow that anybody developing in the P.R.N.
24 zone would leave that ~~area~~ unbuilt and would
25 concentrate his units in the area that was not

1 subject to flooding.

2 But to a greater or lesser degree, this is
3 true in most cases where P.R.N. is enacted. A
4 large area, whether it's a flood or stream valley
5 or steep slope or what have you, is left open and
6 the units are clustered on the balance of the site.

7 Q Are you saying that the fact that
8 there were environmental constraints on the
9 Bernards Township P.R.N. zone property would not
10 restrict the density which you would consider
11 reasonable for that zone?

12 MR. BISGAIER: Are you asking if
13 there is a relationship between the ecolo-
14 gical factors and density controls per se
15 or are you dealing specifically with that
16 site?

17 MR. BERNSTEIN: I am asking
18 specifically about Bernards Township.

19 A I believe--Well, there are a lot of ques-
20 tions about suitability of that site for P.R.N.
21 development generally.

22 Q Okay. Answer that. I am interest-
23 ed.

24 A Well, in terms of--And
25 clearly a P.R.N. again, although the goal is
clustering and the provisions of higher densities

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1 on part of the site for nondevelopment and open
 2 space on the balance, if you go to a site where
 3 80 or 90 percent of the land is unbuildable,
 4 it's somewhat silly to expect a developer to come
 5 in and build on ten percent of the land in most
 6 cases. There are exceptions, but that is
 7 generally the case.

8 Also if you have a P.R.N. and as I think
 9 the Courts commented in Madison, you put the
 10 P.R.N. somewhere out in the middle of nowhere
 11 and try to use it as a means by which the town
 12 gets a great deal of free or low-cost infra-
 13 structure extension, then that also is not
 14 particularly sound.

15 Q Well, where would you put multi-
 16 family dwelling units and small lot zoning in
 17 relation to infrastructure--

18 A Well--

19 Q --in order to create low and moder-
 20 ate income housing? A Well, assuming

21 the municipality had a reasonable infra-
 22 structure base, the best sites would be those
 23 that are in a position to hook up to infrastruc-
 24 ture without any significant extensions.

25 Q And I assume you are talking about

1 water and sewers primarily when you talk about
2 infrastructure? A Water and sewer
3 and a reasonable amount of existing road frontage.

4 Q I presume you would prefer the road
5 frontage to be on a road which could take the
6 traffic that would be in good repair and would not
7 be unduly narrow? A That's correct.

8 Q Let's assume a municipality does
9 not have any sites which meet these tests. Then
10 where would you suggest putting the low and
11 moderate income housing, if at all?

12 A Well, I think first most municipalities
13 have some kind of a road network that provides
14 for reasonable access. It may not be as good as
15 one might hope, but there are usually certain
16 parts of the road system that are better than
17 others. So certainly access either directly onto
18 or within close proximity to the better elements
19 of the road system would be a desirable factor.

20 ERAS
21 there is no public system either there or reason-
22 COTTON
23 ably available to be brought to the site, then I
24 think the principal criteria would be land that
25 is developable for higher density uses with a
minimum of unusual costs; in other words, no

1 extreme slopes, no significant surface water or
2 high water tables, things like that; and prefer-
3 ably sites which are amenable to the construction
4 of small or medium scale package treatment
5 facilities, which again, without wanting to--to
6 pretend to more expertise than I have, I under-
7 stand would either be for the most part a matter
8 of having soil suitable for groundwater discharge
9 or access to a stream capable of handling that
10 kind of discharge. As to which would be appro-
11 priate and so on would be obviously an engineer-
12 ing judgment.

13 Q And what you just described are
14 sites in municipalities lacking public sewers or
15 public water which you feel would be most appro-
16 priate for least cost housing; correct?

17 A Yes.

18 Q Now, in discussing the Lorenc case,
19 you discussed a concept that I would like to ask
20 you about. You mentioned that a zone can be
21 reasonable, but not provide for least cost housing.
22 And I wonder if you could expound on that point?

23 A Reasonable for other purposes. Meeting
24 housing needs is one goal of the zoning and
25 planning process. I believe it is an extremely

1 important goal. Others may differ. However, it
2 is not the only goal.

3 I think the Supreme Court has recognized
4 that if a municipality amply provides for least
5 cost housing within its boundaries, I think the
6 term amply is important, that it may pursue other
7 goals in other parts of the municipality.

8 Q You mention that providing housing
9 needs presumably for low and moderate income
10 persons is one goal for zoning. I wonder if you
11 could discuss what are other goals which you see
12 a municipality should take into account when
13 adopting a zoning ordinance.

14 A Well, one other goal is to provide ade-
15 quate amounts of land for nonresidential uses
16 that can reasonably be anticipated to take place
17 in the community. An additional goal, which is a
18 goal of planning really, which to some degree
19 zoning can help effectuate, is the goal of pro-
20 ~~controlling~~ environmentally sensitive areas and
21 providing open space in the community.

22 Another planning goal which can be
23 accomplished in the context of zoning again to a
24 limited degree is the provision--the balancing of
25 the growth of the community's housing and

1 population with the nature of its transportation
2 network and its community facilities.

3 Q When you say transportation network,
4 I assume you refer to roads?

5 A Roads principally, but to the degree that
6 a municipality has another transportation system
7 such as a reasonably serious railroad system,
8 that can be taken into consideration.

9 Q And when you talk about community
10 facilities, you are speaking of?

11 A Well, a sewer and water system as well as
12 in the overall planning context, and this is
13 really not a zoning matter so much as a planning
14 matter, it's the ongoing provision of things like
15 schools and public services in proportion to
16 growth.

17 I mean one doesn't hopefully control
18 growth in order to reduce the demand for those
19 facilities. But one does monitor on an ongoing
20 basis growth and capital programs and the like.

21 Q Are there any other goals of zoning
22 which you can think of, zoning or planning, at
23 the present time which would be important for a
24 community to take into account?

25 A Well, let's see. We have gone through

1 meeting housing needs, providing resources for
2 industrial and commercial development, transporta-
3 tion, community facilities, open space, environ-
4 mental protection. I think an additional goal is
5 to have some kind of consistency among munici-
6 palities with overall regional needs.

7 Q Explain that to me, Mr. Mallach.

8 A Well, a lot of the features that I just
9 mentioned are not exclusive to a single munici-
10 pality. And in each case, the outcomes would
11 certainly be better if there is a measure of
12 coordination in terms of--For example, in the
13 area of housing needs, certainly the whole fair
14 share concept is one way of trying to encourage
15 an overall regional approach towards meeting
16 housing needs.

17 In the case of environmental features, for
18 example, many significant environmental features
19 extend across municipal boundaries. And a
20 coordinated approach in terms of preservation,
21 protection or whatever is certainly desirable.

22 Many public services are provided by
23 regional or at least multi-municipal bodies. So
24 in all cases, there is a reasonable justification
25 for some kind of regional thinking.

1 Q When you speak about a regional
2 approach, is it your belief that low and moderate
3 and least cost housing should be placed in Morris
4 County where it is most appropriate or is it your
5 feeling that each municipality should provide its
6 fair share in the zoning ordinance regardless of
7 whether or not some municipalities are better
8 suited to low and moderate income housing?

9 A I think the Supreme Court in Mount Laurel
10 answered that one fairly unequivocally. As long
11 as local zoning is the way in which the people
12 of New Jersey seek to control the great majority
13 of their land uses and development, the responsi-
14 bilities as well as the powers must reside at the
15 local level.

16 Q So it is your testimony that each
17 developing community must provide its fair share
18 of low and moderate income housing, even if it
19 would be more appropriate in some municipalities
20 than others?

21 MR. BISGAIER: Doesn't the fair
22 share plan take care of the appropriate-
23 ness of it? What are you getting at?

24 A Well, I don't want it inferred that I
25 wouldn't have answered the same way if Carl hadn't

1 said what he said, but the fact is that part of
2 the whole point of fair share as distinct from,
3 say, equal share or equal distribution-type of
4 approaches is that it takes into account the
5 significant appropriateness considerations.
6 Obviously no plan can take into account every
7 single matter that somebody can come up with, but
8 it does deal significantly with this issue.

9 Q So what you are saying is fair share
10 means that you would put more of the least cost
11 housing where it is more appropriate?

12 A Yes.

13 Q And you have already outlined in
14 your testimony before what factors or some of the
15 factors that you felt were appropriate for least
16 cost housing; correct? A Yes.

17 Q Now, you touched on another concept
18 that interested me in talking about zoning that
19 is reasonable and zoning that provides for least
20 cost housing. I would be interested in your
21 opinion as to what reasonable densities might be
22 for townhouses in Morris County; not for town-
23 houses that would provide least cost housing, but
24 townhouses that might be reasonable in a zoning
25 context. A I think there are

1 two things here. Townhouses qua townhouses are
2 one and the same thing. I would suggest that if
3 a municipality zones townhouses at least cost
4 standards, it remains within the purview of a
5 developer if he is choosing to build expensive
6 houses for a significantly more affluent market
7 to build them at lower density than the zoning
8 may permit. This is done. In fact, this is
9 explicitly recognized by the Supreme Court as
10 part of its rationale for calling for overzoning.
11 I don't really see any particular rationale on
12 the part of a municipality for zoning for lower
13 density townhouses rather than townhouses at a
14 least cost standard.

15 Q Well, I believe in one of your
16 reports, you indicated that townhouses at a
17 density of 12 dwelling units per acre were the
18 minimum density which you felt met least cost
19 standards. Isn't that right?

20 Let me check that.

21 Q Fine. A It's not my
22 recollection.

23 (A discussion is held off the
24 record.)

25 A Yes, my report says that less than ten to

1 the acre would not be considered justifiable in
2 least cost terms. I should point out that one
3 could develop a perfectly livable townhouse
4 community of 12 to the acre.

5 Q No, I understand that. Your
6 report indicates ten dwelling units for town-
7 houses and 15 dwelling units for garden apart-
8 ments are the minimum densities which would be
9 acceptable to you for least cost housing; correct?

10 A That's correct.

11 Q Now, I am asking you as one who
12 purports to be a housing expert, what would you
13 consider reasonable densities for townhouses for
14 middle income persons and garden apartments for
15 middle income persons? And I am talking about
16 dwelling units which were not specifically design-
17 ed for low and moderate income persons.

18 MR. BISGAIER: I really want to
19 know specifically what you are asking now.
20 You are asking for is there a reasonable
21 standard for middle income people in
22 terms of density controls for townhouses?

23 MR. BERNSTEIN: And garden apart-
24 ments.

25 MR. BISGAIER: By 50 or 100 to the

1 acre? In Georgetown? In Philadelphia?

2 MR. BERNSTEIN: I am talking about
3 Morris County developing communities. I
4 am not talking about Georgetown and
5 Philadelphia and New York City.

6 A There is a lot planning communities can
7 learn from Georgetown and Philadelphia. I
8 believe that's a function of the marketplace.

9 Q I am asking for your analysis of
10 the zoning ordinance. Would a zoning ordinance
11 be unreasonable if it provided a density of four
12 to six townhouses to the acre?

13 A Well, there's an issue here. Now,
14 theoretically one can read Madison and Mount
15 Laurel as saying--

16 MR. BISGAIER: He is not asking
17 for your legal opinion. If he is asking
18 for that, I object to it and will not let
19 you answer it. He is asking for a plan-
20 ning opinion as to the reasonableness of
21 zoning four to six to the acre.

22 A To the best of my knowledge, there are no,
23 quote, "reasonableness standards," unquote, that
24 can be rationally grounded in that range.

25 Q How about higher density, six to

1 eight townhouses? Could there be any rationale
2 for that? Or is it your testimony that townhouse
3 zoning must have a zoning of at least ten units
4 to the acre in order to be reasonable?

5 A See, the point is and the thrust of some
6 of my arguments in my report is that once you
7 have defined what units and site plans and lay-
8 outs and so on should be doing and you say that
9 you need so much space to provide for the house
10 and for these appurtenances that go with the
11 house, then clearly somebody can say in my
12 personal judgment there ought to be more open
13 space around it or houses ought to be bigger or
14 there should be a wider buffer between the houses
15 and whatever is next door to it or these houses
16 should be set back further from the street, et
17 cetera, et cetera, et cetera.

18 Each of these, of course, then triggers
19 additional space requirements which works to
20 lower the density. The point is there are no
21 standards with which I am familiar which say so-
22 and-so, although not least cost, is nonetheless
23 reasonable while such-and-such, although also not
24 least cost, is not.

25 Now, in certain cases, market considerations

1 will dictate the density may not go below a
2 certain point. Equally so, a developer who is
3 going after a particular high income market may
4 decide that in order to attract that market and
5 sell his townhouses at the price he is seeking,
6 he has to provide such-and-such space, which
7 dictates that the density not exceed such a point.

8 But these are economic considerations
9 affecting the developer which I believe by and
10 large the market can deal with. There are no
11 planning standards of reasonableness in that area
12 that I am familiar with.

13 Q Is it your testimony that zoning
14 would be unreasonable in a developing community
15 in New Jersey today if it had a townhouse zone
16 with a density of less than ten units to the
17 acre or a garden apartment zone with a density of
18 less than 15 developing units to the acre?

19 A While simultaneously another part of the
20 municipality providing ample zoning for least cost
21 housing?

22 Q We will take that assumption first.

23 A Okay. It's my understanding--This is a
24 legal rather than a planning issue.

25 Q This is a housing issue and you are

1 discussing, Mr. Mallach, what you consider to be
2 reasonable densities. You hold yourself out as
3 an expert on densities and square footage. And
4 I want to know the answer to the question based
5 on your expertise.

6 MR. BISGAIER: As a planner, not
7 your interpretation of the--

8 MR. BERNSTEIN: As a housing
9 consultant, please.

10 MR. BISGAIER: Not your interpreta-
11 tion as to what the Courts would say is
12 reasonable from the point of view of
13 confiscation.

14 A As a planner or housing consultant or
15 whatever, there is no abstract rationally ground-
16 ed standard that I am familiar with and that I
17 have seen for distinguishing on grounds of rea-
18 sonableness let's say in townhouses between four
19 units versus five versus six versus three versus
20 seven. The same is true for other housing types.

21 Q So you would say based on your
22 expertise that any zoning ordinance in a New
23 Jersey developing community which provided for
24 townhouses at a density of less than ten dwelling
25 units per acre or garden apartments at a density

1 of less than 15 dwelling units per acre was
2 unreasonable regardless of the justification.
3 Isn't that right?

4 A Well, when you regardless of the justifi-
5 cation, I mean I cannot think of any justifica-
6 tion that would make such a density reasonable
7 in the definition of reasonable as being ground-
8 ed in reasonable or rational principles.

9 Q Have you ever seen justification in
10 all your experience as a housing consultant,
11 have you ever seen a justification in a develop-
12 ing community, for a density in a zoning ordin-
13 ance of less than ten for townhouses or less than
14 15 for garden apartments?

15 A No.

16 Q So that in analyzing zoning
17 ordinances, if you saw less than ten dwelling
18 units per acre for townhouses and less than 15
19 dwelling units per acre for garden apartments,
20 you would say that this was an unreasonable
21 standard; correct?

22 (A discussion is held off the
23 record.)

24 (The last question is read.)

25 Q Do you remember the question?

1 A In the sense that I've used the term
2 unreasonable and defined it just before, yes.

3 Q And you have never found a zoning
4 ordinance which did not meet the standards of at
5 least ten dwelling units per acre for townhouses
6 and at least 15 dwelling units per acre for
7 garden apartments to be reasonable? That is
8 correct; isn't it? A Yes.

9 Q Now, we had discussed a number of
10 cases where you testified. And I believe the
11 last case that you had discussed was the Lorenc
12 case. Can you tell us what was the next case
13 where you testified, Mr. Mallach?

14 A I believe it would have been the case of
15 Round Valley, Inc. vs. The Township of Clinton.

16 Q And can you give us a synopsis of
17 what the plaintiffs were seeking in that case?

18 A The plaintiffs were seeking a ruling that
19 the Town's zoning was invalid generally and
20 invalid specifically with regard to their holdings.

21 Q And can you tell us what the thrust
22 of your testimony was?

23 A My testimony in that case was extremely
24 limited. It was to discuss the issue of region
25 as it affected Clinton Township and to discuss

1 fair share factors affecting Clinton Township
2 generally, but not to present a specific fair
3 share formula or number to the Court.

4 **HEMILC** Q With regard to the fair share
5 factors, what factors did you testify in that
6 case should be taken into account with regard to
7 Clinton Township?

8 A Well, the key factor as I stated was the
9 question of region. And the key issue here was
10 whether Clinton Township could be legitimately
11 considered an extension of the overall north-
12 eastern and north central New Jersey suburban or
13 suburbanizing area.

14 MR. BERNSTEIN: I ask if you can
15 mark that for identification.

16 (Transcript dated March 21, 1977
17 marked for identification as D-3.)

18 Q Mr. Mallach, I would ask if you
19 would look at this deposition and see if you can
20 identify it as containing the testimony which
21 you gave in the Round Valley case.

22 (A discussion is held off the
23 record.)

24 Q You recognize D-3 as containing
25 the testimony which you gave at the depositions

1 in the Round Valley case?

2 A Yes, sir.

3 Q Now, according to the depositions,

4 there was a study on region which was prepared

5 by a Mr. Akahoshi? A Akahoshi, yes.

6 Q And Mr. Akahoshi's region for
7 Clinton Township, and I am showing you Page 89
8 of the transcript, included Union, Essex,
9 Somerset, Morris and Hunterdon Counties; correct?

10 A That is correct.

11 Q And you felt that that was a
12 reasonable approach to region for Clinton
13 Township; wasn't it?

14 A I believe that the thrust of either my
15 testimony or certainly my feeling was that
16 although the most appropriate region would be
17 wider, that this was, and I believe I referred
18 to it as, a minimum region for Clinton Township.

19 Q But you felt that the minimum
20 region was a reasonable one?

21 A Not the best, but it had some rational
22 basis, yes.

23 Q You preferred what region? I
24 believe that the transcript speaks about the
25 northeastern region.

1 A Yes, my position is, and I believe has
2 been, that there is really no hard and fast line
3 that one can draw within the overall northeastern
4 New Jersey region.

5 Q Well, what was the region that you
6 preferred for Clinton Township? You have spoken
7 of the northeastern region. What would that
8 include? A I think Clinton
9 Township is in a difficult position when you
10 talk about counties because Clinton Township and
11 a couple of other--some other parts of Hunterdon
12 County in the northeastern part of the county
13 are clearly linked to a northeastern region that
14 would include the entirety of Bergen, Passaic,
15 Hudson, Essex, Morris, Union, Somerset and
16 Middlesex. Other parts of Hunterdon County are
17 not necessarily so because it is arguable that
18 the influence of the core as it is moved outward
19 so far has not been affecting all parts of
20 Hunterdon County equally.

21 Q Is the reason that Clinton Township
22 is linked with these other counties because of
23 the fact that Clinton Township is located on I-78?

24 A That helps.

25 Q What other factors would there be

1 other than the fact that it is on a major inter-
2 state route? A Well, the simple
3 greater geographic proximity of Clinton,
4 Readington and a couple of other townships are
5 the townships that are closest to the northeas-
6 tern core generally as regards Hunterdon County
7 as a whole.

8 Q Well, if municipalities do not
9 always follow county boundaries with regard to
10 region, is it possible that some of the munici-
11 palities in Morris County would be in different
12 regions from other municipalities in Morris
13 County? A Extremely unlikely,
14 the basic region is this overall region emanating
15 out of the northeastern core. The only issue is
16 how far beyond it goes.

17 I mean, the point in the Clinton case that
18 we argued and that the Court accepted was that
19 here, whether or not Hunterdon County in its
20 entirety has been suburbanized into this north-
21 eastern region, clearly parts of it have been or
22 are in the process of so becoming. Now, it's
23 equally possible that parts of Sussex and Warren
24 Counties as well as parts of Ocean County have
25 also been suburbanized into the northeastern

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region.

So I think there's really in my mind, without having done a detailed study of this admittedly, no question that Morris County in its entirety is part of the region. The question is only whether the region has effectively spilled beyond Morris into Warren or Sussex.

Q Now, in the Round Valley case, you approved of the minimum region which included Union, Essex, Somerset, Morris and Hunterdon Counties; correct?

A Approved with qualifications, that it is a minimum region. It is not the most logical region.

Q Now, my question is if this minimum region included Morris County, could not one fashion a minimum region in this case which would include the same five counties, Union, Essex, Somerset, Morris and Hunterdon Counties which may not be the best region as you see it, but would be an acceptable region?

A Well, it all seems highly speculative. To paraphrase Jimmy Carter, why not the best? I mean if there is a region--

Q I am not asking for the best.

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1 MR. BISGAIER: Let him answer the
2 question. Will you answer the question?

3 THE WITNESS: It is an important
4 point. If there is a region that is
5 better than an alternative, one should
6 use the best region. Now, I have not done
7 a specific study of Morris County to see
8 whether there is any minimum region that
9 would be, although less acceptable, still
10 would have some rational basis for it.

11 Q Well, my problem is you accepted
12 Mr. Akahoshi's region of Union, Essex, Somerset,
13 Morris and Hunterdon Counties as being an accept-
14 able region for the Clinton Township case. My
15 question is how can you reject the same region
16 for Morris County when you said it was acceptable
17 in other litigation?

18 A I haven't rejected it. I simply stated
19 that I have no position on it, that it does not
20 necessarily follow.

21 Q Is it your testimony that you have
22 done no studies on what region Morris County
23 should be included in?

24 A That's correct.

25 Q Have you discussed what region

1 Morris County should be included in with any of
2 the witnesses in the present lawsuit?

3 A Certainly not in detail, perhaps casually.

4 Q And can you tell us who you spoke
5 with about region?

6 A I might have spoken with Mary Brooks about
7 it.

8 Q And can you tell us what your dis-
9 cussion was with her with regard to region?

10 A That I couldn't tell you. If it was a
11 discussion, it was a casual one and it was
12 certainly not a detailed one.

13 Q Do you remember what she said to
14 you? A No.

15 Q So that in the Round Valley case,
16 you are stating that you testified about princi-
17 pally region and to a lesser extent fair share?

18 A That's correct.

19 Q And I assume your conclusion was
20 ~~that~~ Clinton Township had an inadequate amount
21 of land zoned for low and moderate income housing?

22 A I did not attempt to reach such a conclu-
23 sion.

24 Q You did not analyze the zoning
25 ordinance in that case? A No.

1 Q The next case you testified in?

2 A That would presumably have been the second
3 Mount Laurel case.

4 Q And what was that case about?

5 A That case was a hearing on whether the
6 proposed fair share plan and rezoning that Mount
7 Laurel had undertaken after the Supreme Court
8 decision were in compliance with that decision.

9 Q And your testimony was what?

10 A My testimony dealt principally with fair
11 share.

12 Q As it related to Mount Laurel?

13 A That's correct.

14 Q And was it your testimony that the
15 rezoning was inadequate to satisfy Mount Laurel's
16 fair share? A Yes.

17 Q Is there anything else you can tell
18 us about--

19 MR. BISGAIER: Let me have that
20 question again.

21 THE WITNESS: Let me qualify it.

22 MR. BISGAIER: Can you give the
23 question again before he answers it.

24 (The last question and answer are
25 read.)

1 A The qualification--

2 Q Go ahead.

3 A The qualification would be that I did not
4 explicitly analyze or testify on the zoning
5 ordinance. The zoning ordinance was keyed to a
6 proposed fair share presented by the Township
7 which I found to be inadequate.

8 Q You did not do a separate study,
9 but you testified that the Town's study was
10 inadequate?

11 A No, I did a separate
12 study on fair share, not on the zoning.

13 Q I see. And you took the Town's
14 figures as to what its rezoning would create in
15 terms of housing?

16 (A discussion is held off the
17 record.)

18 Q Where was the fair share formula
19 which you questioned, Mr. Mallach?

20 A It was embodied in the amendatory ordinance
21 adopted by the Township.

22 Q And what studies did you make?

23 A I analyzed their fair share analysis
24 study to determine how they had gone about doing
25 it and to reach some conclusions as to the
legitimacy or reasonableness of their procedures.

1 And I did my own study of the fair share.

2 Q And based on this, you found that
3 the municipality was not providing enough low
4 and moderate income housing?

5 A Well, that assuming the zoning ordinance
6 did not provide for more than their proposed
7 fair share number, which I think was a reasonable
8 assumption, that the municipality was not provid-
9 ing for the amount of low and moderate income
10 housing that they should.

11 Q And the next case that you testi-
12 fied in? A That would be the

13 Home Builders case or Home Builders League of
14 South Jersey vs. The Township of Berlin, et als.

15 Q That case was an attack on minimum
16 square foot standards for one-family residential
17 homes? A It was minimum square
18 foot standards for all forms of housing.

19 Q And I believe that your reports
20 embodied what you consider to be reasonable
21 square foot requirements for townhouses and
22 garden apartments; correct?

23 A Do you mean my reports in this case?

24 Q In this case.

25 A Yes.

1 Q And I believe that you accept the
2 H.U.D. standards as being reasonable standards
3 for multi-family dwelling units?

4 A Yes.

5 Q Is there any standard that you can
6 give us for one-family detached homes that you
7 as a housing consultant believe would be a rea-
8 sonable standard for the municipalities in Morris
9 County?

10 MR. BISGAIER: The least cost
11 standard or reasonable standard?

12 MR. BERNSTEIN: Let's see if there
13 is a difference.

14 Q First, let's hit a reasonable
15 standard. A There is no intrinsic
16 difference between one-family and multi-family
17 housing in terms of minimum square foot require-
18 ments.

19 Q So that you feel the H.U.D.
20 standards should apply to one-family homes?

21 A They do. The H.U.D. standards apply to
22 all housing with which H.U.D. is involved of
23 whatever type. They make no distinction between
24 housing types.

25 Q Well, would you argue that a

1 standard that imposed a minimum of 800 square
2 foot for a one-family home was an unreasonable
3 standard in a community in Morris County?

4 A As an abstract standard, yes. Eight
5 hundred square feet for a single-family home
6 with a certain number of bedrooms might not be.

7 Q Okay. As an abstract, if you were
8 to see a zoning ordinance which required one-
9 family homes to have 600 square feet without any
10 other criteria, would you say that that would be
11 an unreasonable standard for a detached one-
12 family home?

13 A Although technically
14 it would also be subject to the same criticism
15 from a practical standpoint, it could probably
16 be lived with.

17 Q Where would the cutoff point be if
18 a municipality wanted to keep a square foot
19 standard for one-family homes for all new
20 construction? Where would you say would be the
21 point where it would be reasonable to create a
22 minimum?

23 A Well, as Judge Talbott
24 put it in her decision, the test of a floor area
25 standard is whether it's occupancy-based. Now,
from a practical standpoint, people are unlikely,
say, to build a single-family home today that has

1 fewer than two bedrooms in it. From a theoretical
2 standpoint, they could, of course.

3 And what a developer chooses to build in
4 the marketplace again in the final analysis is
5 not necessarily the province of the zoning
6 ordinance. The standards--A perfectly reasonable
7 standard which would apply to both multi and
8 single-family units would be for the H.U.D.
9 minimum property standards or their equivalents
10 to apply relative to the number of bedrooms that
11 were being provided in the unit.

12 For example, if somebody wanted to build
13 an efficiency unit, then it would meet one
14 standard. If they wanted to build a one-bedroom
15 unit, it would meet another and so forth.

16 Again it comes back to the question, you
17 keep using the term reasonable. If you are talk-
18 ing about a standard that is rationally grounded,
19 a single standard for single-family homes is not
20 rationally grounded.

21 Now, it's quite possible that you could
22 adopt, say, a 600-square foot standard for single-
23 family homes and the practical consequences
24 would not be significantly different than if you
25 adopted a much more reasonable in the literal

1 sense, set of standards. But the fact remains
2 it would not be a reasonable standard.

3 Q Now, you are suggesting that mini-
4 mum square foot standards should be keyed into
5 the number of bedrooms in a dwelling unit;
6 correct? A Yes.

7 Q Are you also suggesting that
8 density should be keyed into the number of bed-
9 rooms? And by that I mean would it be reason-
10 able to permit 15 dwelling units per acre for
11 garden apartments or ten dwelling units per acre
12 for townhouses if each of these units was to
13 have four bedrooms?

14 A That would be not inherently unreasonable.

15 Q Would it not be more reasonable to
16 permit higher densities if each of the garden
17 apartments was merely to have one-bedroom units
18 and if each of the townhouses was merely to have
19 also one-bedroom units?

20 A A two-edged sword here and it's a compli-
21 cated issue which the Supreme Court again tried
22 to grapple with in Madison. I mean there are
23 planning considerations that argue that the
24 standard of density should be related to the
25 people using a piece of ground as distinct from

1 the number of units. There are others that would
2 argue that units qua units are a more appropriate
3 standard.

4 The other side of the issue is that at
5 the same time as you can make these arguments,
6 as the Court in Madison recognized, in the
7 interest of meeting housing needs, you don't
8 want to create a situation where you have, in
9 effect, penalized a developer or builder who
10 wants to build larger units because there is
11 abundant evidence that--especially within
12 moderate price ranges and especially within
13 moderate price rental ranges, that the unmet
14 demand becomes particularly serious with the
15 larger units. In other words, the vacancy rates
16 get tighter. The cost inflation gets higher and
17 so on. So the standard in this regard has to
18 balance these factors.

19 My concern is that even given certain
20 planning grounds for zoning, if you will, den-
21 sity by people, the danger of creating penalties
22 for building larger units is so great that from
23 a practical standpoint I would argue against it.

24 Q So you would argue that there
25 should be one standard for multi-family dwelling

1 units, that is one density, regardless of whether
2 or not the units were one, two, three, four or
3 five-bedroom units; correct?

4 A I think so.

5 Q Now, with regard to one-family
6 homes, would the same considerations apply and
7 should there be one standard for dwelling units
8 regardless of the number of bedrooms?

9 A I believe so.

10 Q And your last answer was based on
11 a density-per-acre figure; correct?

12 A Yes.

13 Q You would believe that the square
14 foot minimum standards should be based on bed-
15 rooms; correct? A Yes.

16 Q Now, the next case that you
17 testified in was what?

18 A That would be the second Bedminster case.

19 Q The thrust of that case dealt with

20 what? A It was similar to the second

21 Laurel case. The case had been tried,
22 appealed and the Supreme Court had finally refus-
23 ed to grant cert and the Township had come up
24 with a proposed amendatory ordinance. And it was
25 a hearing to determine whether the amendatory

1 ordinance complied with the Court decision.

2 Q And your testimony was what, Mr.
3 Mallach? A That it did not.

4 Q What studies did you make, Mr.
5 Mallach, for this second Bedminster case?

6 A I analyzed the fair share for Bedminster
7 Township. And I analyzed the provisions of the
8 zoning ordinance regarding their provision of
9 the fair share of least cost housing.

10 Q And did you find that the zoning
11 ordinance provided insufficient land zoned for
12 low and moderate income housing?

13 A Yes.

14 Q Did you study region in the second
15 Bedminster case? A Yes, I did.

16 Q What did you recommend as the
17 region for Bedminster Township?

18 A That the region for Bedminster Township
19 be defined effectively as the eight-county region
20 that the Department of Community Affairs uses in
21 **HEMISK** allocation study.

22 Q Now, are there any other cases
23 where you had testified, Mr. Mallach, other than
24 those that we have discussed today?

25 A Besides Bedminster?

1 Q Yes, sir.

2 A I have testified in the Mahwah case,
3 which is Essex County Urban League vs. Township
4 of Mahwah.

5 Q And what was the thrust of that
6 case?

7 A The thrust of that case was
8 to present existing statistical evidence on
9 housing costs and trends in Mahwah, fair share
10 and the like, and to analyze the Mahwah zoning
11 ordinance.

12 Q The plaintiffs were seeking to
13 have the Mahwah ordinance as being invalid, as
14 being exclusionary. Is that correct?

15 A That's correct.

16 Q Now, you said you studied housing
17 costs?

18 A That's correct.

19 Q Was this a study which went into
20 the existing housing cost in the municipality?

21 A Yes.

22 Q And with regard to fair share, did
23 you make an analysis?

24 A No.

25 Q Did you analyze the zoning ordinance?

26 A Yes.

27 Q And I assume you found provisions
28 that were exclusionary?

1 A That's correct.

2 Q Now, are there any other cases
3 that you testified in other than these that you
4 have described today?

5 A That I have testified in? Not to my
6 recollection.

7 Q Mr. Mallach, isn't it true that in
8 each of these cases, you testified against a
9 municipality? A Yes.

10 Q And in each of these cases, it was
11 your opinion that the municipality zoning
12 ordinance was exclusionary?

13 A Yes.

14 Q And I believe you were prepared to
15 testify in the Randolph Township case. Is that
16 true? A Yes.

17 Q And you were prepared to testify
18 that the Randolph Township zoning ordinance was
19 exclusionary? A I believe so.

20 Q Have you ever testified on behalf
21 of a municipality? A No.

22 Q Have you ever testified that a
23 municipal zoning ordinance--

24 MR. BISGAIER: Hold on for a second.

25 (A discussion is held off the

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record.)

Q --is not exclusionary?

A No.

Q Have you ever found the zoning ordinance of a developing municipality in New Jersey to be totally nonexclusionary?

A That's somewhat redundant. I rarely get a chance to look--seek out a zoning ordinance to look at them unless they're involved in litigation. And they are not likely to be involved in litigation unless they are exclusionary.

Q How many zoning ordinances have you reviewed, Mr. Mallach?

MR. BISGAIER: Why don't you answer the question.

A The answer is not to my knowledge, I guess.

Q Right.

How many zoning ordinances have you reviewed

ed for the municipalities in the State of New Jersey?

A Somewheres between

and a hundred.

Q Can you tell us if any of these zoning ordinances were nonexclusionary?

A I believe if memory serves that from a practical standpoint, the Dunellen zoning

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1 ordinance was not exclusionary.

2 Q But didn't you testify against
3 Dunellen that there were some provisions in its
4 ordinance that were improper?

5 A They were minor provisions, yes.

6 Q You were prepared to testify on
7 behalf of Dunellen; weren't you?

8 A On behalf of Dunellen?

9 Q Against Dunellen?

10 A Yes.

11 Q But what you are saying is the
12 exclusionary provisions in the Dunellen ordinance
13 were minor? A Yes.

14 Q That is because it is such a small
15 town and because it is all built up and because
16 it is inhabited by four people (sic); right?

17 A No, that certainly helps, but the fact
18 is in terms of significant features such as
19 density, the absence of significant restrictions
20 such as bedrooms and the like, the flexibility
21 with regard to housing types and such insignifi-
22 cant amounts of vacant land that it may have
23 remaining, the ordinance on balance is not
24 exclusionary.

25 Q Yet a lawsuit was brought against

1 that municipality as one of the defendants in
2 the Urban League vs. Carteret; correct?

3 A That's correct.

4 Q Did you recommend to plaintiff's
5 attorneys that Dunellen be dropped from the suit?

6 A I never had anything to do with the choice
7 of municipalities in the suit.

8 Q Did you ever recommend to the
9 Urban League's counsel that this is one town that
10 should be involved in the law suit?

11 A I don't recall.

12 Q Are there any other towns other
13 than Dunellen that you would consider as non-
14 exclusionary that you have reviewed?

15 A None come to mind.

16 Q Dunellen is what would be consider-
17 ed a developed community; correct?

18 MR. BISGAIER: That is a legal
19 question.

20 MR. BERNSTEIN: As a housing
21 consultant he can answer that.

22 MR. BISGAIER: No, he cannot. It
23 is a legal question.

24 Q Okay. Let me ask you this, Mr.
25 Mallach: Are you competent to tell us what a

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developed community is and what a developing community is or do you feel that those definitions are outside the purview of your expertise?

A They work at two levels. Inasmuch as those terms are terms of art adopted by the Supreme Court in a series of cases, I can try to interpret those, the use of the Supreme Court-- the use of those terms by the Supreme Court, sorry, as best I can. If I try to look at those terms from the standpoint of, say, more general housing and planning criteria, I might arrive at very different conclusions.

Q Based on what you understand the law to be, would you consider Dunellen to be a developed community? And was it, in fact, a developed community when the Urban League of Greater New Brunswick vs. Carteret, et als was pending?

MR. BISGAIER: You are asking for a legal conclusion.

MR. BERNSTEIN: I am asking for his opinion based on his understanding of the law.

MR. BISGAIER: That is a legal conclusion.

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MR. BERNSTEIN: Mr. Bisgaier, are you stating to us that Mr. Mallach will give no legal conclusions at the trial? Because I would submit to you that the whole concept of exclusionary zoning is not one that is plucked out of the air, but it is one that is defined by the cases. This man could not testify if he was not basing it on legal considerations.

MR. BISGAIER: He will testify to no legal conclusions at the trial.

MR. BERNSTEIN: He cannot testify in that event.

MR. BISGATER:: Judge Muir will be the judge of that.

MR. BERNSTEIN: I find it amazing that you are objecting to my asking him an opinion where one would assume a modicum of knowledge of the law in these areas because I know of no planners or housing consultants who testify about zoning ordinances who do not take the law into account.

MR. BISGAIER: Well, you can ask what the basis of that would be. I would

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1 be interested in seeing what Alan thinks
2 about what Washington, Demarest and
3 Madison and Mount Laurel for that matter
4 means with regard to developing municipi-
5 pality. But unless there is a legal
6 standard, I will not know what he means.

7 Q Mr. Mallach, what is your analysis
8 of what the Courts mean when they use the term
9 developed community?

10 A I thought we had gone over this in some
11 detail last week. But my analysis, and it's not
12 really an analysis, my reading if you will, of
13 Washington and Demarest, which are really the
14 only Supreme Court cases that I know of where
15 developed community has been a subject by Supreme
16 Court decision, is that a specific fact pattern
17 applies to Washington and Demarest. And this
18 has to do, one, with the fact that they are both
19 a very small size and, two, with the fact that
20 land for future development in both towns is in
21 extremely short supply and represents tiny, shall
22 we say one percent, two percent or so shares of
23 the acreage of these municipalities.

24 Q Using this standard, wouldn't you
25 agree that Dunellen was a developed community at

1 the time that the Urban League lawsuit was brought?

2 MR. BISGAIER: I object to that
3 question. You can ask him if he thinks
4 it was small like Demarest. You can ask
5 him if he thinks it had minimal amount of
6 land available. But it is a legal con-
7 clusion for a judge to determine whether
8 or not that township was developed or not.

9 MR. BERNSTEIN: Well, I would like
10 to hear Mr. Mallach's opinion. Are you
11 going to ask him not to answer?

12 MR. BISGAIER: No, he can answer.
13 The objections have been reserved. I am
14 telling you my objection in case that
15 should be read into the record later on.

16 A The standards had certainly not been set
17 at the time the Urban League case had been tried.

18 Q I did not ask you that.

19 A Now, if it had been, I wouldn't want to
20 say with certainty, but I would say there is a
21 reasonable likelihood that Dunellen's fact pat-
22 tern would have been close enough to that of
23 Washington and Demarest for the same to apply.

24 Q So that the one zoning ordinance
25 that you stated today that you had analyzed and

1 found to be nonexclusionary was for a developed
2 rather than a developing community; correct?

3 A For a community that most probably would
4 have been considered a developed community if
5 Washington and Demarest had been decided at that
6 time.

7 (The luncheon recess is taken.)

8 Q Mr. Mallach--

9 A Yes.

10 Q --I believe that in the documents
11 you produced for the defendant municipalities,
12 you indicated the various ways in which you claim
13 the zoning ordinances of the defendant munici-
14 palities violate the principles of least cost
15 housing as you understand them. Is that correct?

16 A Yes.

17 Q Now, what I would like to know, and
18 I ask you to refer to the studies you prepared,
19 are all of the ways in which the defendant
20 municipalities have violated the principles of
21 least cost housing with regard to multi-family
22 dwellings, each of the provisions in the ordi-
23 nances that they have employed to stifle least
24 cost housing?

25 A I can't give you the specific provisions

1 for every specific municipality except going
2 town-by-town. I can give you the types of
3 provisions that apply.

4 Q I am not interested in what sec-
5 tion of what municipal ordinance is in issue
6 because that is not my job. What I am interest-
7 ed in is the various tools in the zoning ordi-
8 nance which you as a housing authority found to
9 be obnoxious or improper. You may refer to your
10 notes. I would be just as happy if you did.

11 A I think there are a number of such provi-
12 sions. The first, of course, and the most
13 straightforward is simply not to provide for
14 multi-family housing in an ordinance.

15 Q Is it your position, Mr. Mallach,
16 that each of the defendant municipalities has an
17 obligation to provide some multi-family housing?

18 A Yes.

19 Q You have not analyzed the amount
20 of multi-family housing that any of the
21 defendant municipalities should provide; have
22 you? A No.

23 Q Do you know who made that study on
24 behalf of the plaintiffs?

25 A I don't know if a specific study on that

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point is being made. Certainly the fair share study deals with a closely related matter.

Q Very well. The second item under multi-family housing which you feel violates the least cost principles would be?

A Low densities.

Q And explain what you mean by low densities. A Densities significantly lower than those indicated in my report as being consistent with recent cost housing standards.

Q Well, here is the problem I have with that, Mr. Mallach. Are you saying that you have no objection to densities that are lower than ten units per acre for townhouses and 15 units per acre for garden apartments as long as they are not significantly lower? In other words, where do you make the cutoff point? Where would you say that the ordinance is reasonable or unreasonable?

C Well, the figures of ten and 15 to the acre respectively that I cited in my report are certainly very conservative figures. They are not by any stretch of the imagination the highest densities at which housing of the types

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1 specified can be built while still consistent
2 with health and safety.

3 For example, there are townhouse develop-
4 ments, apartment developments in various parts
5 of the country that have densities of 15, 20,
6 25, 30 or more to the acre. So these are not to
7 be construed as maximums. If anything, say half
8 of this is reasonable.

9 If I say ten to the acre and have estab-
10 lished that as a very modest requirement, that
11 perhaps if you are talking about something that
12 comes out to nine or nine-and-a-half, that that
13 would be considered a variation, that would not
14 be significant in its impact, but certainly no
15 greater deviation than that.

16 Q I understand. With regard to
17 garden apartments, since you have just spoken
18 about townhouses, what would be the deviation
19 which you feel would not be substantial with
20 ~~continued~~ to densities?

21 Again, a negligible deviation, shall we
22 say 14. I'm not trying to suggest that these are
23 hard and fast mathematical formulae.

24 Q Are you suggesting that these
25 minimum densities would be the same for each of

1 the defendant municipalities in this lawsuit?

2 A I cannot imagine circumstances under which
3 an appreciably lower density would be comparably
4 least cost. In other words, least cost is least
5 cost. There are circumstances I could imagine
6 where one would argue that a higher density than
7 this would be not only appropriate but necessary
8 in order to provide least cost housing. If, for
9 example, you had exceptionally high land cost or
10 some such feature.

11 Q Since you have given us the mini-
12 mums that you feel are acceptable, what maximums
13 do you feel would be acceptable with regard to
14 first townhouses and secondly garden apartments?

15 A I think that's difficult to say. I think
16 it's a question of site planning and a lot of
17 other factors. I think there are abundant
18 examples in planning and architectural literature
19 of apartments that do not require elevators,
20 housing developments that do not require eleva-
21 tors being constructed with densities of over 30
22 units to the acre.

23 I have no, you know, philosophical
24 objection to anything like that. I live in an
25 area where everyone has their own yard. There

1 are not elevators. The living conditions are
2 certainly ample for health, safety and welfare.
3 And the density is well over 20 to the acre.
4 So the maximums can be a function of the sensi-
5 tive design and site planning of a unit.

6 Q Well, you have given us the mini-
7 mum standards. Can't you give us comparable
8 figures for what you believe would be maximum
9 standards that would be reasonable for townhouses
10 and garden apartments as a general rule or can't
11 you make that general rule?

12 A The highest density at which a townhouse
13 or walkup apartment development can be built and
14 remain consistent with health and safety?

15 Q That is right, correct.

16 A I think my point was really that with
17 sensitive planning and design, the densities can
18 be increased considerably. I am familiar with
19 certain attractive, livable developments that are
20 up to 20 to 25 units per acre for townhouses, 30
21 to 40 units per acre for garden apartments.

22 For all I know, somebody could come up
23 with a plausible scheme that would be higher.
24 Again, it's not a hard and fast mathematical
25 process. It's a matter of how you approach a

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site.

Q Now, I believe you testified that you lived in what you considered an attractive garden apartment. I assume it is.

A No, it's a townhouse.

Q A townhouse. What density is the townhouse where you are living?

A The townhouses are--As I say, the density for the area in which I live is approximately 20-- between 20 and 25 units to the acre.

Q And you find it appropriate?

A I personally certainly do. And as far as I can tell, the family that lives next door to me that has five children also finds it appropriate.

Q And from a professional basis, you see no problem with it? A No.

Q And you live in Philadelphia. Is that correct? A That's correct.

Q And where do you live in Philadelphia? A It's an area known as Fairmount.

Q Now, you believe that a density that is appropriate for Philadelphia would also be appropriate for the developing communities in Morris County? A Quite possibly.

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1 Q Would you say that the density of
2 your apartments would be appropriate for any of
3 the defendants in this particular lawsuit?

4 A They are townhouses, not apartments.

5 Q Okay. Townhouses. Can you give
6 the names of any municipalities who are defen-
7 dants in this lawsuit where you believe such
8 densities would be appropriate?

9 A I haven't done a study of that. That
10 would--It's not a matter of municipalities.
11 It's a matter of sites. It's a matter of areas
12 within municipalities. As I say, it is quite
13 possible that there are areas that the density
14 would be appropriate in all of the municipalities.

15 Q But you have not made that study?

16 A No.

17 Q So I assume that it is your testi-
18 mony that what you regard as the highest densi-
19 ties that you are aware of for townhouses and
20 garden apartments would be equally appropriate
21 for Philadelphia and for the developing communi-
22 ties in Morris County? A Yes.

23 Q Now, can you tell us, Mr. Mallach,
24 the difference in costs on a per unit basis
25 between constructing a townhouse development at

1 six units to the acre and constructing a town-
2 house development at ten units to the acre?
3 What is the ratio between the per unit cost for
4 each of these units?

5 A The actual dollar difference would be a
6 function of the specific site and the specific
7 plan. There would be savings that could be
8 obtained with regard to land costs and with
9 regard to site improvement or infrastructure
10 costs. The prices would vary from development
11 to development.

12 Q I appreciate that. But can you
13 give us a percentage or can you give us a dollar
14 figure? Because I am interested specifically in
15 the relationship between density and costs. And
16 I would like to know if you can give us any
17 information other than a generalized statement
18 about land costs.

19 A I'd say there would be savings in land and
20 infrastructure costs and they would vary from
21 site to site. I can't give you a dollar figure.

22 Q And you cannot give us a percentage
23 figure of the savings; can you?

24 A Precisely.

25 Q And you cannot give us a cost for

1 the marginal increase in costs as the density
2 decreases? A That's correct.

3 Q And I assume you could not give us
4 these figures for either townhouses, garden
5 apartments or one-family homes?

6 A That's correct.

7 Q Now, what I am concerned about, Mr.
8 Mallach, is why you pick the figure of ten dwell-
9 ing units per acre for townhouses and 15 dwelling
10 units per acre for garden apartments when you
11 could not relate this to cost development.

12 A Well, I can and this goes to the crux of
13 the issue. The point is least cost from a hous-
14 ing standpoint is not that it costs X dollars
15 less than something else, but that it costs less
16 than something else. The ten-to-acre figure for
17 townhouses, for example, was not chosen as a
18 figure where I'm saying this is the absolutely
19 most efficient use of the land that is possible.
20 What I have said is that at ten to the acre, it
21 is possible without difficulty to develop housing
22 that meets all of the standards and criteria of
23 which I am aware dictating the density of a hous-
24 ing development. And that it is a figure also
25 in my judgment that is still low enough so that it

1 would not drastically offend, shall we say,
2 suburban sensibilities.

3 The point is having arrived at that
4 figure on the basis of an analysis of what a
5 housing site has to do in terms of providing
6 space for units, yards, parking, setbacks and
7 the like, it becomes immaterial whether it is
8 less expensive than a six-to-the-acre apartment
9 by a hundred dollars a unit, a thousand dollars
10 a unit or \$10,000 a unit. The fact that it is
11 less expensive means that it is least cost,
12 while the other is not least cost.

13 Q What you are saying is that the
14 amount of the decrease in cost is not relevant?
15 The only thing that is relevant is the fact of
16 that increased density in your opinion leads to
17 some decreased cost. Is that your testimony?

18 A That's correct.

19 Q Now, you talked about criterion for
20 setting up the minimum of ten dwellings to an
21 acre for townhouses. I would like to know what
22 criterion you used as a housing consultant in
23 determining that ten units to the acre was the
24 minimum that you found acceptable?

25 A Okay. A unit--A site, rather, not a unit,

1 has to be able to do a number of things. It
2 has to be able to provide room for the units
3 themselves. It has to provide enough space if
4 you are talking about townhouses for each family
5 to have a small private yard in the back, enough
6 space for there to be a modest setback from the
7 street or sidewalk to the front, adequate space
8 for parking of cars, turnaround space and an
9 access road or strip, driveway, rather, from the
10 public street, certain modest buffers, setbacks
11 on the side, and ideally perhaps a small, common
12 open space for passive recreation activities
13 such as a small child playing or sitting area,
14 very small.

15 Q Any other factors?

16 A No.

17 Q Now, how do we get from all of
18 these factors, Mr. Mallach, to the concept of
19 ten units per acre being the minimum which is
20 acceptable?

21 A Well, from a practical standpoint, you see what these spaces require.
22 Now, for example, in the example I cite, I am
23 talking in terms of an 18-foot-wide unit, private
24 yards--

25 MR. BISGAIER: Excuse me one

1 second. Why don't we have this document
2 identified. Then we can refer to it by
3 page numbers.

4 MR. BERNSTEIN: I ask you to mark
5 the Mallach study dated March 12, 1979 as
6 D-4.

7 (Mallach Study dated March 12, 1979
8 marked D-4 for identification.)

9 A In this report, Page 5, I present the
10 analysis for townhouse units. In essence, what
11 I show is that if you provide ten townhouses and
12 their attendant parking, but leaving aside access
13 to that parking for the time being, but includ-
14 ing the houses, their private yards and their
15 parking requirements, you use approximately half
16 an acre for every ten units.

17 Now, assuming modest standards for buffers,
18 driveways, turnaround space and the like and a
19 20 percent of the site set aside for open space
20 activity, it becomes a relatively straightfor-
21 ward matter to put those ten units on one acre
22 of ground or by extension 50 units on five acres
23 and so on.

24 Q Now, you assumed each unit would
25 average 1200 square feet; correct?

1 A That's correct.

2 Q And did you assume any space for
3 each family for a yard? A Yes.

4 Q That is a criterion you just spoke
5 of. How much space was that for each family?

6 A Okay. Specifically we are talking about
7 a unit where the house itself has a total blue-
8 print of 18-by-34 and sits on a yard that is 18-
9 by-100. And assuming we have a 25-foot setback,
10 that would provide a yard that would be 18-by-41.

11 Q That is for each home?

12 A For each home, yes.

13 Q Now, you talked about modest set-
14 backs. What were the setbacks that you had
15 estimated? That is the front--

16 A Twenty, 25 feet.

17 Q What was it, 20 or 25 feet or
18 aren't you sure? A It makes no
19 difference for the example. If you have a 26-
20 foot setback, then the yard is 40. If you have
21 a 25-foot setback, then the yard is 41.

22 Q That would be the front?

23 A Yes.

24 Q And that would be the rear setback?

25 A Well, the yard represents the setback.

1 In practice, there is no need for any more than
2 curbing between the rear property line and the
3 parking area or the common open space as the
4 case may be.

5 In other words, you do not have setbacks
6 as such behind the individual property lines.
7 You either have open space or parking.

8 Q You mean you hypothesized that
9 there would be parking spaces in back of the
10 individual townhouse units?

11 A Behind the yard, that no--In theory you
12 could say that the rear setback then becomes 41
13 feet because that's the distance from the end of
14 the house to the property line.

15 Q Well, did you provide any grassed
16 area in the back of each unit? That is what I
17 would like to know for this example.

18 A You could if you wanted to. And you need
19 not if you don't want to. The point is under
20 this example, approximately 20 percent of the
21 site, leaving aside perimeter space, is avail-
22 able for open space.

23 Now, if a developer wanted to provide that
24 as a strip between the units, the private yards
25 and the parking areas, he could. If not, he

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wouldn't.

My personal preference would be to have the parking right abut the private yards and thereby provide the grass area in a more usable dimension rather than a strip elsewhere on the site.

Q Now, you talked about the parking of cars. You assumed I guess a 10-by-18 stall?

A No, the total--

Q Each stall I am interested in first.

A Each stall would be 10-by-20.

Q And you assumed that there would be a requirement of 1.8 parking stalls per unit?

A That's correct.

Q Did you provide for any visitor parking?

A Yes, my assumption is that in a least cost development of this sort, you would have a substantial number of households that would have one car and that probably the average number of cars per household resident of the development would be in the area of 1.5 or 1.6.

Q Would you assume that as one went to areas where there was no public transportation, that the number of apartments or the number of

1 households having two or more cars would increase?

2 A The number of households having two or
3 more cars is principally a function of their
4 economic status, not the availability of public
5 transportation.

6 Q You are saying that if you built
7 least cost housing in an area that was not served
8 by public transportation, that you would have the
9 same number of vehicles per dwelling unit that
10 you would have in an area that was served by
11 public transportation having the same socio-
12 economic group of tenants?

13 A Yes.

14 Q You do not know any empirical
15 studies on that point; do you?

16 A There is a certain amount of census data
17 on this point. The complete absence of car
18 ownership correlates with, well, sort of urban-
19 suburban distinctions fairly strongly. That is
20 also principally a socioeconomic phenomenon.
21 The one versus two-family (sic) households does
22 not, to the best of my knowledge. One versus
23 two-car households.

24 Q You do not know of any studies you
25 can point to that show that public transportation

1 has no factor in the number of vehicles that a
2 family owns, the availability of public transpor-
3 tation? A No.

4 Q Now, I can see that you provided
5 in your example 1.8 parking stalls of 10-by-18--
6 A 10-by-20.

7 Q 10-by-20? Okay--for each dwelling
8 unit. What I am interested in is how much drive-
9 way space and turnaround space did you provide
10 in this hypothetical?

11 A That's a function of the site plan. Now,
12 you can't--You can design a hypothetical site
13 plan for a hypothetical site.

14 Now, for example, if you have an area that
15 contains a group of 10-by-20 parking spaces, you
16 have a parking lot. And let us say that it is a
17 parking lot that simply has perimeter parking,
18 does not have internal parking within the parking
19 area. For each parking stall, you will require
20 roughly comparable amount of space within the lot
21 for turnarounds and movement.

22 In other words, if you have a space that's
23 20 feet deep, each 20-foot-deep space will have
24 20 feet of turnaround space roughly behind it for
25 the cars to be able to come in, turn around,

1 maneuver and the like. In addition, that's a
2 relatively straightforward factor if you have a
3 simple lot.

4 Q If you could stop there. Do you
5 know what any of the traffic engineering studies
6 suggest as the typical module for parking stalls,
7 space in the center and parking modules for either
8 90-degree parking or angle parking? Can you give
9 us any of those statistics or cite any of the
10 source material which traffic engineers draw on
11 in establishing standards?

12 A I don't have the numbers in front of me.
13 I have reference works that I consult on this
14 point.

15 Q Could you give us which reference
16 books you consulted in setting up your hypotheti-
17 cal parking for this hypothetical ten-unit
18 apartment? A The principal ones

19 were--I think it's called Planning and Design
20 Criteria. And it's by DeChiara and Koppleman.

21 There is also a--

22 Q Who was that published by?

23 A One of the major trade publishers. I
24 forget whom.

25 Q And? A And there's a

1 manual on site plan review. That's published by
2 the New Jersey Department of Community Affairs.

3 Q Is that by Moskowitz and Lyndbloom?

4 A It may be. They have done something.
5 This may be the one that they did. I forget.

6 Q Neither of these are studies or
7 traffic studies; are they? They are planning
8 studies? A They are planning

9 studies that are cross-referenced to a variety
10 of traffic studies. The first book I referred to,
11 every reference is cross-referenced to it,
12 specific technical studies.

13 Q Now, you have stated that the turn-
14 around in your estimation is roughly equal to
15 the size of the parking stall?

16 A Yes.

17 Q So that if you required 3600 square
18 feet for parking stalls, you would require an
19 additional 3600 square feet for turnaround area;
20 correct? A Precisely, that is

21 one of the things that is included in the remain-
22 ing 50-percent use of the site.

23 Q Now, there is a figure on your
24 tabulation of 18,000 square feet. And I would
25 like to know what that comprises.

1 A That comprises in this case ten 18-by-100
2 lots.

3 Q What is the significance of the
4 ten 18-by-100 lots? Is this the open space for
5 each? A No, if you have a ten--Each
6 townhouse sits on an 18-by-100 lot. Ten of them
7 sit on ten 18-by-100 lots.

8 Q I see. Now, this is the amount of
9 land that would be used presumably exclusively
10 by each townhouse owner?

11 A That would be the sum total of private
12 lot area.

13 Q Now, have you given any additional
14 space for turnarounds and access driveways?

15 A That's built into the remaining 50 percent
16 or shall we say 30 percent less green space of
17 the site.

18 Q Well, what I am interested in, we
19 have the turnaround space that you have given us.

20 Can you give us any figures on how much of this
21 hypothetical plan would be taken up by access
22 driveways? A That would be diffi-

23 cult to say because that varies very significantly
24 from development to development. Depending on
25 the site, the nature of the road network around

1 it, the size of the development you would have--
2 For example, if you have one road, access road,
3 from the public road to the parking area with
4 two-way traffic on it, which you might do if it
5 was a small enough development, you would have
6 something that would be in the order of 25 to 30
7 feet wide and could be anything, could be only a
8 few hundred feet long.

9 Q Could you give us a general rule?

10 Can you give us what you assumed when making the
11 study that we have before us that is marked D-4?
12 Are you saying that each site varies?

13 A I'm saying two things: One, that each
14 site varies; second, that under a variety of
15 plausible different sites, the amount of space
16 that would be taken up by access roads between
17 the public road and the parking area would be
18 easily accommodated within the amount of land
19 available.

20 Q Now, you talked about modest

21 buffers on the sides. Would you give us the
22 figures that you would consider appropriate for
23 these modest buffers?

24 A I think the principal purpose of buffers
25 is to protect the adjacent uses from noxious

1 effects, so that there is no intrinsic need for
2 buffering between townhouses and single-family
3 houses as such. There is nothing inherently
4 noxious about a townhouse unit or about the end
5 of a townhouse row.

6 So that let us say hypothetically you had
7 an access road going along one side of the town-
8 house site. The amount of buffering that you
9 would need between the access road and the adja-
10 cent lots would depend on--would depend, of
11 course, first on the use of the adjacent lots.
12 If you had, say, houses coming virtually up to
13 the lot line adjacently, you might want to have
14 as many as 20 or 25 feet between--

15 Q Would that be your maximum side
16 yard? A I could not imagine any
17 circumstances unless there was a need to protect
18 the townhouses from a noxious use that pre-exists
19 adjacent to them, in which case it would not
20 have made any sense to zone that area for least
21 cost housing. But as far as protecting adjacent
22 uses from the effects of townhouses, I can
23 imagine nothing where you would need more than
24 25 feet. And under most circumstances, ten feet
25 would probably be adequate. Under some

1 circumstances, you could even have five or six
2 feet and put up an attractive wood fence.

3 Q You feel that the ten-foot figure
4 would be adequate to protect adjacent one-family
5 homes in the defendant communities in this law-
6 suit? A In most settings, yes.

7 MR. BISGAIER: From what?

8 Q Now, you have talked about common
9 open space. What percentage of the tract would
10 you recommend for common open space?

11 A I would think that 20 percent would be an
12 upper limit.

13 Q Now, is there any place where you
14 have diagrammatically shown how you would be
15 getting ten units to the acre on your hypothetical
16 plan while keeping all the criteria that you have
17 recommended? A No.

18 Q Now, let me understand, Mr. Mallach.
19 This is the most stringent set of standards that
20 you feel would be reasonable, what you have just
21 discussed with your hypothetical; correct?

22 A I believe least stringent.

23 Q Thank you. This is the least
24 stringent? A Yes.

25 Q You feel that more modest standards

1 would also be reasonable?

2 A Yes.

3 Q Now, let's assume we had a municipi-
4 ~~ality~~ ~~that~~ ~~wanted~~ ~~to~~ ~~actively~~ ~~encourage~~ ~~least~~
5 cost housing. You could take any of the defen-
6 dant municipalities. What standards would you
7 suggest that would be the least stringent and
8 still meet the health, safety and welfare stan-
9 dards with regard to townhouses? These are the
10 most stringent standards. What are the least
11 stringent standards?

12 A Other way around. These are the least
13 stringent. You want the most stringent?

14 Q I want the standards that are most
15 permissive. A I guess it is which
16 direction you are coming from.

17 Q Fine. I want the most permissive
18 since these are the least permissive that you
19 would approve of. I want the most permissive
20 with regard to townhouse zoning.

21 A Okay. Within the density of ten to the
22 acre, there is ample room for such things as 25-
23 foot setbacks, side setbacks as well as front
24 setbacks. There is ample room for 20 percent
25 open space as well as hundred-foot-deep lots and

1 18-foot-wide units.

2 All of those are adjustable. Unit size,
3 for example, unit width, for example, could
4 easily be reduced to 15 or 16 feet.

5 Q Would that be the minimum width
6 that you would recommend?

7 A Well, I live in a house that's 14 feet
8 wide and it is certainly ample.

9 Q You live there alone; don't you?

10 A No.

11 Q Okay. A But as I men-
12 tioned, most of the people in the neighborhood
13 who live in identical houses have families with
14 children. There are two children to my right,
15 five children to my left.

16 Q What size unit is the one with the
17 five children in square feet?

18 A Twelve hundred.

19 Q You feel that is adequate?

20 A Well, they seem to manage.

21 Q I asked if you as a housing con-
22 sultant feel it is adequate?

23 A Well, there is nothing inherently incon-
24 sistent with health and safety to put that number
25 of people in a 1200-square-foot unit. The unit

1 has three bedrooms, which means that the parents
2 have a bedroom, the male children have a bedroom
3 and the female children have a bedroom.

4 Q You have no problems with this as
5 a housing consultant? A None.

6 Q Fine. Now, what is the minimum
7 width that you could put in the zoning ordinance
8 for least cost townhouses? Is 15 or 16 feet what
9 you would be advocating or the 14 feet that you
10 live with? A I think 14 feet is
11 acceptable.

12 Q Fine. Now, can you tell us with
13 regard to parking spaces?

14 A I would not want to reduce the number of
15 parking spaces.

16 Q 1.8 would be your figure?

17 A For suburban townhouses where the typical
18 occupant is likely to be a family rather than a
19 single individual.

20 Q Are there any instances where you
21 would increase the number of parking spaces

22 above 1.8? A I think you might
23 want to consider it in a situation where the
24 development was made up predominantly of larger
25 units likely to house large families and

1 potentially containing substantial numbers of
2 teen-age children in the development.

3 Q When you say larger units, what
4 type of square footage are you talking about?

5 A Well, I was talking about like the four-
6 bedroom, where there was a significant mix of
7 four-bedroom units. That might be 13, 1400
8 square feet conceivably.

9 Q And what number of parking stalls
10 would you want to put in this unit for a four-
11 bedroom?

12 A Again, I have not
13 done a specific study and I would not mention
14 a specific amount. I'm just saying that under
15 such circumstances, looking at a specific develop-
16 ment, you might want to increase it. I haven't
17 done an analysis.

18 Q Now, we have talked about the size
19 of the room units. I assume you are talking
20 about a three-bedroom townhouse at the 1200-
21 square-foot level?

22 A More than ample.

23 Q Do you find that that is not
24 consistent with least cost housing, 1200 square
25 foot for a three-bedroom unit?

A I think one could build a smaller unit

1 as I believe I stated earlier. I am certainly
2 not suggesting that that be set as a minimum.
3 ~~ERAS~~ The point is for the purposes of the hypotheti-
4 ~~COTTON~~ in order to make sure that the land alloca-
5 tion was adequate, I used a hypothetical that
6 was larger than a minimum.

7 Q Is that reasonable? Would it be
8 reasonable for the Town to require 1200 square
9 foot for a three-bedroom unit or would you find
10 it unreasonable? A I would find
11 it unreasonable.

12 MR. BISGAIER: Could I have that
13 again, the question and answer?

14 (A discussion is held off the
15 record.)

16 Q Now, in making the minimum stan-
17 dards with a townhouse development, what size
18 units would you use for your three-bedroom units?

19 A I've already suggested that the minimum
20 required would be--

21 Q Are these the H.U.D. standards?

22 A --would be somewhere in the area of 800
23 to 900 square feet.

24 Q Okay. A Now, well--

25 Q Now, could you cut down on the

1 size of the yard for each family and still have
2 a reasonable townhouse project?

3 A Yes.

4 Q Could you cut out all the yard
5 area for the individual units?

6 A In theory you could. In practice the
7 yard is part of the justification for developing
8 townhouses as a housing type. So that I would
9 not advise cutting out the yard.

10 Q Well, how could we reduce it or
11 how far could we reduce the yard and still have
12 what you would consider to be a reasonable
13 development? A Well, the question

14 is--Again, you see the point of all these things
15 is not to play with numbers, but is to look at
16 what a yard or a house or whatever is supposed
17 to do. Now, the purpose of a yard, townhouse
18 yard--

19 Q Well, rather than get into the
20 purpose--

21 MR. BISGAIER: Let him finish and
22 then you can rephrase the question more
23 specifically.

24 MR. BERNSTEIN: The problem, Mr.
25 Bisgaier, is that neither I nor you or Mr.

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COTTON

Mallach want to be here for eternity. I asked a specific question. I wanted to know what was the minimum size yard that he felt was reasonable. I did not ask for a philosophical explanation.

MR. BISGAIER: All right. Let me hear the question again and let him read back the partial answer.

(The last question and answer are read.)

MR. BISGAIER: You do not want him to continue with that answer?

MR. BERNSTEIN: I want the numbers.

MR. BISGAIER: Fine.

MR. BERNSTEIN: I understand his answer. I would like the number if he can give it.

THE WITNESS: Again, there is no hard and fast number, but certainly if you had the unit on, say, a 14-by-90 lot, that would reduce your lot size by, say, 12 to 15 feet.

Q Now, we talked about with regard to the most stringent standards previously the setback of 20 to 25 feet. That was your maximum

1 standards for townhouses. What would be your
2 minimum standards for a front setback that you
3 felt would be reasonable?

4 A Again, with all of these, a lot of it
5 depends on the specific siting and the location
6 and all of the other things that I have gone
7 into, but I am sure there are circumstances
8 under which ten to 15 front setbacks would be
9 adequate.

10 Q Would you say in most cases, ten-
11 to-15-foot front setbacks would be adequate?

12 A Yes, I think there are many townhouse
13 developments where the units front directly onto
14 the sidewalk.

15 Q You have no problem with townhouses
16 fronting on sidewalks?

17 A No.

18 Q You feel that would be appropriate
19 for suburban Morris County communities?

20 A In the right places, yes.

21 Q You have done no study, though, to
22 determine where these sites should be?

23 A No.

24 Q I assume that the turnaround would
25 be the same whether you were establishing the

1 most stringent standard for townhouses or the
2 most lenient standards for townhouses?

3 A Unless, of course, one wanted to require
4 as a condition of occupancy that the household
5 own only subcompact cars.

6 Q Would you think that would be a
7 reasonable condition?

8 A No.

9 Q So you would keep the turnaround
10 dimensions the same? A Yes.

11 Q You had testified previously that
12 under the most stringent standards, a five-to-
13 six-foot side yard might be adequate and the
14 maximum would be 20 to 25 feet. So I assume if
15 you were giving minimum standards for townhouses,
16 the side yard would be five feet?

17 A Or shall we say ten feet as it would--
18 with a rule as a possibility of reducing to five
19 or six feet.

20 Q You would find the five-to-ten-
21 foot side yards to be reasonable for the defen-
22 dant municipalities in this lawsuit?

23 A Yes.

24 Q Now, with regard to common open
25 space, you testified that the maximum requirement

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that you felt was reasonable was 20 percent.
What would you perceive to be the minimum require-
ment for common open space?

A Zero.

Q You feel that it would be reason-
able for a townhouse development in the defendant
municipalities?

A Actually the
responsibility for providing open space for the
use of the citizens is properly a municipal
responsibility through the establishment of a
park and recreation system. And the provision
of private--of open space for recreational pur-
poses by a developer represents a concession
relative to whose obligation it actually is
rather than an obligation.

Q So that your answer is that you
believe it would be reasonable for a zoning
ordinance in any of the defendant municipalities
to require no common open space for a townhouse
development; correct?

A That's correct.

Q And given all of these minimum
criteria, what do you perceive to be the maximum
density that you would allow to be placed in the
zoning ordinance for the defendant municipalities

1 for townhouses? A I haven't
2 calculated the number. It would presumably be
3 over 15.

4 Q Can you give us an estimate as to
5 what the maximum figure would be? If I can re-
6 fresh your recollection, you testified a few
7 moments ago to a density I believe of 20 to 25
8 units to the acre for townhouses. Would you
9 feel that that would be a reasonable maximum
10 density? A That would not pro-

11 vide as much parking as one unfortunately would
12 need in a suburban area, so that the densities
13 in this case would probably be between 15 and 18.

14 Q You would perceive them to be the
15 maximum densities for townhouses?

16 A Somewheres in that area, yes.

17 Q Now, had you--

18 A Well, I should qualify that.

19 Q Fine. A One thing,
20 that would be the maximum density for a suburban
21 townhouse development assuming that each unit
22 were a separate two-story, one-family unit and
23 that you could increase the density quite substan-
24 tially and be providing an additional housing
25 type that would be very desirable by making a

1 reasonable number of those units into three-story
2 duplex units where one story becomes a rental
3 apartment and the other two stories are the
4 habitation of the owner-occupant.

5 Q You are suggesting that these
6 would be in some way condominiumized with each
7 townhouse being owned by a tenant who would
8 sublease or lease a portion of his unit?

9 A No, townhouses--The townhouses would
10 conceivably be straight fee simple ownership.
11 The person would buy a two-family unit. That
12 family would then rent the rental unit to a
13 second individual or smaller family and thereby
14 recoup a certain percentage of their housing
15 cost thereby. It is a very attractive housing
16 type that's been in use all over the country.

17 Q The tenants on the third floor, of
18 course, would have to walk up one and two flights
19 of stairs? A Two in most cases.

20 Q Now, do you know if any of the
21 housing types that you have described exist in
22 any developing community in Morris County?

23 A I really don't know.

24 Q Do you know if any of these hous-
25 ing types exist in any of the communities in the

1 eight-county Department of Community Affairs
2 region where Morris County fits?

3 MR. BISGAIER: What type of hous-
4 ing are you talking about?

5 MR. BERNSTEIN: What he has just
6 described, the very desirable type of
7 townhouses.

8 A Two-family houses.

9 Q You are talking about the town-
10 houses with the--

11 MR. BISGAIER: Two-family houses.

12 A This is probably the most common housing
13 type that is being built or has been built during
14 the last decade by private market developers in
15 Hudson County.

16 Q These are two-family townhouses?

17 A Yes.

18 Q In Hudson County?

19 A Yes.

20 Q Can you give us any specific project
21 that you are aware of in Hudson County?

22 A They are usually not projects. They are
23 usually in-fill housing. They are developed in
24 clumps anywhere from a single house to a few
25 hundred.

1 I don't know the name of the project.
2 There is quite an extensive development of this
3 type in the downtown area as it is called by
4 Henderson Street. They dot the side streets of
5 Union City. There are quite a number on the
6 west side of Bayonne. There are probably many
7 more, but those come readily to mind.

8 Q Do you know of any developing
9 community in New Jersey that has either permitted
10 this type of housing unit or anywhere it has been
11 built? A You mean exclusionary
12 municipalities; don't you?

13 Q Only by your standards, Mr. Mallach.
14 And that only presupposes the 60 to 100 zoning
15 ordinances you have read. There may be one tucked
16 away somewhere that even you would consider
17 as properly zoned. Do you know any--

18 A Believe me, I hope, like the Grail.

19 Q Do you know of any developing
20 community that has permitted this type of housing?
21 I take it by the silence that you cannot think
22 of any developing municipalities?

23 A There may be, but none come readily to
24 mind.

25 Q Now, your testimony is, Mr. Mallach,

1 that these minimum standards would be appropriate
2 for all? When I speak of minimum standards, I
3 ~~am~~ talking about the least restrictive standards
4 ~~that~~ you have just testified to. These would be
5 appropriate for sites in each of the defendant
6 municipalities? A Yes.

7 Q And, in fact, you would stick by
8 these minimum standards whether you were in a
9 suburban or a rural or even a developed city
10 such a Philadelphia, New York, Camden, if we are
11 talking about the same type of housing? What is
12 appropriate in a rural area or suburban area is
13 equally appropriate in an urban area and vice
14 versa? A Yes.

15 Q Now, would you concede, Mr. Mallach,
16 that your hypothetical presupposes a piece of
17 property that has no serious environmental
18 constraints? And if that property had environ-
19 mental constraints, you would assume that the
20 density of ten townhouse units per acre and the
21 lot coverage which you previously spoke of might
22 not be appropriate because of constraints on
23 development? A No, I believe the
24 standard of ten to the acre and the related
25 standards that I cited have enough flexibility

1 that they can be adapted to sites that contain
2 moderate environmental constraints. If you have
3 a site that contains extreme environmental
4 constraints, it's debatable whether it's an
5 appropriate site to zone for housing of this
6 nature.

7 Q When you talk about moderate
8 environmental constraints, are you thinking of
9 slopes of any particular dimensions or of any
10 depth of groundwater statistics?

11 A If you had, for example, parts of the site
12 which had moderate slopes or parts of the site
13 that had high surface water or things of that
14 sort, if you had an entire site with steep slopes
15 or an entire site with standing surface water,
16 then obviously you would have to look at the
17 appropriateness of the zoning.

18 Q Now, with regard to garden apart-
19 ments, I see the figures you give, you estimate
20 250 square feet for the typical unit?

21 A That's correct.

22 Q And how much of this unit of the
23 garden apartment project would be taken up by
24 halls and laundry rooms and basements and the
25 like?

A An addition of ten percent,

1 at the same levels as the residential units.

2 Q And how about basement?

3 Basement doesn't take up any more space.

4 Q That is true. Now, how many bed-
5 rooms were you hypothecating in this garden
6 apartment would have 1.5 parking stalls?

7 A A mix of one, two and probably some three-
8 bedroom units.

9 Q What mix would you find as a hous-
10 ing consultant would be appropriate for the
11 defendant municipalities in this lawsuit?

12 A I don't think mix is something that is
13 appropriate to regulate in a zoning ordinance.
14 I think it's a function of the marketplace.

15 Q What would you anticipate develop-
16 ers would be constructing if there were no zoning
17 constraints on the number of bedrooms that could
18 be placed in a garden apartment unit?

19 A Well, clearly it would be a function of
20 a market study in each case. I think the typical
21 mix might have roughly comparable amounts of one
22 and two-bedroom units and a smaller number of
23 three-bedroom units. So it might be 40, 40 and
24 20, for example; 30, 50 and 20; 40, 50 and 10;
25 something in that general area.

1 Q I should have asked you the same
2 question for townhouses absent zoning restric-
3 tions. What do you think the marketplace would
4 provide as far as the mix of townhouse units in
5 the defendant municipalities?

6 A Principally, three's, a smaller number of
7 two's and probably a still smaller number of
8 four's.

9 Q Now, with regard to this garden
10 apartment project, what would you recommend for
11 the front setbacks, side yard setbacks and the
12 rear setbacks?

13 A Again, the example was predicated on the
14 assumption that you would have 25 feet in each
15 case.

16 Q Twenty-five feet for all setbacks?

17 A Yeah, perimeter setbacks, whether on
18 streets, on sidewalks or on side yards.

19 Q And did you anticipate any buffer-
20 ing? And when I talk about buffering, I mean
21 trees, green area, shrubbery, separating the
22 garden apartment from adjacent users on the side
23 yards or rear yards.

24 A I think it would be a function of the
25 adjacent use.

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1 Q Assuming the adjacent use were one-
2 family homes, do you as a housing consultant see
3 the need for any buffering to separate a garden
4 apartment unit in any of the defendant munici-
5 palities from adjacent one-family homes?

6 A To protect the garden apartment unit from
7 the one-family homes?

8 Q No, to protect the one-family homes
9 from the garden apartment unit.

10 A What would it be doing to them?

11 Q Well, one of the advantages that
12 we as attorneys get is that we get to ask the
13 questions. But I am asking, Mr. Mallach, as a
14 housing consultant, would you see the need for
15 any of the defendant municipalities to require
16 garden apartments to have treed and screened and
17 landscaped buffering from adjacent one-family
18 homes or do you see no need?

19 A I think--

20 MR. BISGAIER: You are using the
21 term need from the point of view of
22 necessity, using that as a term of art?

23 Q Reasonableness, is there a need from
24 your vantage point as a housing consultant to
25 require garden apartments to have a buffer from

1 adjacent one-family homes?

2 A I think if the physical proximity of the
3 adjacent one-family homes to their lot line or
4 the apartment lot line were fairly close, it
5 would be desirable to have substantial buffering,
6 more substantial buffering. If they were some
7 distance from the lot line, then it would be less
8 important.

9 Q Assuming adjacent homes were ten
10 feet from the property line and ten feet from the
11 garden apartment property, would you anticipate
12 the requirement of any buffering between a garden
13 apartment and a one-family home?

14 A I would recommend some form of planting or
15 screening, yes.

16 Q And how big an area would you have
17 this buffering in? Would this be five feet, ten
18 feet, 20 feet, 100 feet? How big a buffer?

19 A The planting?

20 Q Yes, sir.

21 A Ten to 20 feet.

22 Q That would be ten to 20 feet of
23 plantings; correct? A Yes.

24 Q Let's assume the home were 30 feet
25 away from the property line. Would you anticipate

1 or would you require any buffering between the
2 garden apartment and the adjoining one-family
3 home which was 30 feet away?

4 A There I think it would be variable. It
5 would depend on the nature of the terrain and
6 the relationship of the actual buildings and the
7 like.

8 Q Let's assume it was a flat terrain.

9 A How much planting was there on the side
10 that has the single-family house?

11 Q Sparse.

12 A Sparse. I think some form of screening
13 might be appropriate, not an elaborate planting.

14 Q How much of a width?

15 A It could be just an opaque fence of some
16 reasonably attractive sort.

17 Q You feel that would be sufficient?

18 A Most probably.

19 Q And how about if the home was 50
20 feet away from the property line? Would you
21 require any buffering in the form of landscaping
22 or fencing or trees or bushes?

23 A Well, you always need fencing because you
24 don't want the kids living in the single-family
25 homes coming in and breaking into the apartments,

1 but nothing elaborate.

2 Q So you are saying you would only
3 have the fence for the protection of the tenants
4 of the apartment; correct?

5 A Well, more seriously--

6 Q You were serious about the last
7 answer; weren't you?

8 A Semi-serious. I think fencing between
9 apartments and single-family homes is principally
10 in most cases a psychological matter. The single-
11 family home occupants, if they have a private
12 yard, usually expect to see something dividing
13 their yard from that that belongs to the apart-
14 ments so there will be no problem of trespassing,
15 inadvertent or otherwise. So that even if there's
16 no physiological (sic) reason for fencing, it
17 usually is appropriate.

18 Q What you are saying is once you get
19 a one-family home at least 50 feet from the
20 apartment project, all that's required is a fence?

21 A I would be inclined in practice not to
22 require the fence unless the residents to the
23 adjacent properties seemed to think it was
24 important because in practice, you can have a
25 nice continuous green area going from the units

1 that is not broken. It would be more attractive
2 than having a fence go down the middle.

3 Q So you are saying once it is 50
4 feet from the property line, you would prefer
5 nothing in terms of landscaping separating the
6 two properties? A Something in
7 that order. You are trying to make exact ratios
8 as 50 feet. You have this at 25. You have that.
9 That is not applicable. All this planning and
10 housing stuff is not a mathematical exercise.

11 Q Aren't your figures exact exercises
12 as an example, Mr. Mallach, when you tell us that
13 we must have ten townhouse units to the acre or
14 our ordinance is exclusionary? Is this a rough
15 guide that can vary or is this the absolute mini-
16 mum, ten dwelling units per acre for townhouses?

17 A As I believe I indicated, that was a figure
18 that was significantly lower than absolute mini-
19 mum or the absolute highest density or anything
20 of this sort. It is a figure that provides
21 tremendous room for flexibility, for different
22 site layout, for different site conditions within
23 individual types.

24 The actual units could turn out to be 11,
25 12, 14, 15, whatever units to the acre. I'm

1 saying there is a point and it's not a hard and
2 fast point. The point could be 11. The point
3 could be 12. Heaven knows exactly where the point
4 is.

5 Q Could it be six?

6 A No.

7 Q Could it be eight?

8 A Probably not.

9 Q You are not sure? Is it possible?

10 A I personally do not see how it could
11 possibly be eight. I think ten is as low as that
12 point could reasonably be. The point could be
13 higher than ten. I don't see how it could be
14 significantly lower than ten. It could be 9.9.
15 It could be 9.6.

16 Q You are just as hard and fast for
17 the 15 units for garden apartments?

18 A It's not a matter of being hard and fast.
19 It's a question of stretching something to the
20 lowest sense in terms of this makes sense for
21 least cost housing.

22 If this is a bargaining process, perhaps
23 I should have started out by saying townhouse
24 units should be 20 and bring it down to 15.

25 Q I understand that. Getting back to

1 the buffering, I want to know as a housing
2 consultant if you would require if you had single-
3 family homes 50 feet away from the apartment
4 project that the developer be required to provide
5 any form of buffering and what would you provide
6 in your zoning or site plan ordinance if you were
7 consulted or have you no opinion on it?

8 A I would first provide as I believe I
9 stated for 25-foot setbacks for the buildings.
10 And I would not make any hard and fast buffering
11 requirements. But I believe if you have a town
12 where you have an inclusionary zoning ordinance
13 and you have a reasonable planning process to
14 follow, I believe that these are issues that
15 could legitimately be reviewed at the site plan
16 review stage.

17 Q How about if you have one of the
18 typical communities which we have in Morris County
19 which you might not classify as inclusionary?

20 What requirement would you recommend for the
21 buffering of multi-family units in these communi-
22 ties?

23 A I would not under those
24 circumstances recommend any buffering require-
25 ment in the ordinance.

Q I assume that you would not require

1 any buffering for townhouses either?

2 A That's correct.

3 Q Even if they were adjacent to one-
4 family homes? A That's correct.

5 (A recess is taken.)

6 Q Now, we have not talked about
7 standards for least cost housing for one-family
8 homes. A That's correct.

9 Q And I wonder if you can give us the
10 standards that you feel are reasonable for one-
11 family residential lots?

12 A Okay. Again, the purpose of the standard
13 is to minimize the lot area and frontage require-
14 ments while providing the basic needs that the
15 lot has to perform. Those are to have space for
16 a house, to have space for a driveway, capable of
17 holding two cars, not necessarily side by side
18 but back to front, and to have a modest yard again
19 for such activities as sitting, infant play,
20 gardening and the like. All of these can be met
21 on a lot that is 50-by-100 with a 50-foot frontage.

22 Q Could you conceive of any impediments
23 to the development of this sized lot in any of
24 the defendant municipalities?

25 A Well, obviously some sites by virtue of

1 their characteristics would be more suitable for
2 this kind of development than others.

3 Q Give me the standards.

4 A Well, one is that development of single-
5 family houses on these small lots is more suit-
6 able for land with rolling or moderate slopes or
7 no slope at all than steep slopes.

8 Q Why is that?

9 A Because, first, the development of a single-
10 family subdivision typically requires more in the
11 way of site preparation, less earth movement and
12 the like than development of multi-family housing,
13 especially when it's a single-family subdivision
14 of relatively high density.

15 Q Are there any other factors that
16 would tend to indicate that land would or would
17 not be suitable for these 50-by-100-foot lots?

18 A Well, I mean again as I mentioned before,
19 you have to have either existing or nearby sewer
20 and water or reasonable feasibility of providing
21 on-site sewer and water. This density generally
22 speaking would not be do-able with private,
23 individual septic tanks and wells. You might be
24 able to do it with individual wells if you had a
25 central sewer or something, but certainly you

1 would have to have some infrastructure possibilities

2 Q As a housing consultant, could you
3 give us any rules for the size of a lot where
4 there are no public sewers and water?

5 A Oh, it varies incredibly depending on the
6 soil type.

7 Q What are the parameters?

8 A Anything from quarter of an acre or smaller
9 lots up to two or three-acre lots. I believe two-
10 acre lots, perhaps three under some circumstances.

11 Q Any other factors that would indi-
12 cate areas that were suitable for these small
13 lots of 50-by-100 feet other than what you have
14 just spoken of?

15 A Again, as with
16 all other kinds of development, certain areas are
17 better than others. It's a relative term.

18 Like, for example, clearly if you're try-
19 ing to build least cost housing, whether single-
20 family or not, you try to build housing that
21 ~~won't~~ require major work or major problems in
22 terms of something like drainage, for example.
23 Again, that doesn't mean it can't be done, but
24 certainly it would be preferable not to have those
25 problems to begin with.

25 Q Any other criterion that you can

1 think of that would indicate areas where these
2 lots would be suitable?

3 A No.

4 Q Now, I digressed from my initial
5 thrust of questions, which had to do with provi-
6 sions in all the zoning ordinances for multi-
7 family development that in your opinion were
8 exclusionary and did not permit least cost
9 construction. You spoke of two criteria, one
10 where there is no multi-family development per-
11 mitted and secondly excessive densities--excuse
12 me, where there were low densities, where suffi-
13 cient density wasn't provided in your opinion.

14 Now, can you tell me the other areas of
15 all the zoning ordinances where you feel the
16 terms as applied to multi-family housing is
17 exclusionary or not least cost?

18 A Okay. Another one is excessive floor area
19 requirements, which I believe I touched upon.

20 Q And by excessive floor area, you
21 mean floor area requirements which exceed the
22 H.U.D. standards?

A That's correct.

23 Q Do you regard the H.U.D. standards
24 as the maximum acceptable standards or the mini-
25 mum acceptable standards for square footage?

1 That is, could you go smaller than the H.U.D.
2 standards and still have a reasonable development
3 or is this the smallest that you would want to
4 see rooms in a multi-family development?

5 A I don't doubt that you could go smaller
6 than the H.U.D. standards and, indeed, in many
7 societies and cultures, people live in far small-
8 er housing relative to the family sizes.

9 Q I am talking about the United States.

10 (A discussion is held off the
11 record.)

12 A The reason I mention this, the reason I
13 mention this is not having any interest to turn
14 everybody into some other culture, but to express
15 the distinction that there are standards that
16 deal with health and safety and there are stan-
17 dards that deal with what are referred to as
18 cultural artifacts, in other words, preferences
19 that are by no means related to health and safety.

20 Q What is the H.U.D. standard? Is
21 ~~that~~ a health and safety standard or is that some-
22 thing that is societally directed?

23 A It's both. H.U.D.--And it's important.
24 H.U.D. did not arrive at flat unit sizes because
25 there is no such thing as a unit size that is in

1 itself clearly linked to health and safety. What
2 H.U.D. has done is gone through all the different
3 components of what go into a unit and try to
4 determine what are reasonable standards starting
5 out with the premise that certain things are
6 desirable from a cultural standpoint such as
7 separate bedrooms, separate dining area and so on
8 and has for each one said what is necessary to do
9 whatever function that does. And you derive the
10 unit sizes by constructing a layout that meets
11 all the specific functional standards.

12 Q Well, my question was, though, in
13 your opinion are the H.U.D. standards minimum
14 standards that you would not want to go under in
15 setting up a room size or are they the maximum
16 size units that you would permit in a zoning
17 ordinance? A I would have to

18 answer that slightly different than yes or no.
19 They are--I cannot conceive of any health and
20 safety justification for imposing more stringent
21 standards than the H.U.D. standards. At the same
22 time, I can live with the H.U.D. standards, but
23 it is certainly possible to construct smaller
24 units that may well be adequate from a health and
25 safety standpoint. The H.U.D. standards are

1 time-trying in that regard.

2 Q Would you regard the H.F.A. stand-
3 ards as exclusionary?

4 A If I saw the H.F.A. standards in a zoning
5 ordinance, I would consider them exclusionary.

6 Q What other provisions in any of
7 the defendant municipalities' zoning ordinances
8 would you consider exclusionary? You can look
9 through your documentation.

10 MR. BISGAIER: I do not know who
11 this might benefit, but the record might
12 reflect that he was never asked to do an
13 exhaustive study of your zoning ordinance
14 and come up with every least cost signifi-
15 cant feature.

16 MR. BERNSTEIN: I will be happy if
17 Mr. Mallach says that these are the only
18 ones, but I would like to know which are
19 the ones generally--

20 MR. BISGAIER: I am not being argu-
21 mentative. For your benefit, that was
22 never meant to be an exclusive list.

23 THE WITNESS: An exhaustive list.

24 MR. BISGAIER: Exhaustive list.

25 MR. BERNSTEIN: I would like to

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state for the record, Mr. Bisgaier, that we expect your witness and indeed the Public Advocate to state all areas where it believes our clauses are exclusionary. And we would hope that we have been provided through Mr. Mallach's study and through his depositions with the areas that we will have to defend ourselves on.

MR. BISGAIER: Right.

MR. BERNSTEIN: I would trust that there will not be others sprung on us.

MR. BISGAIER: That is a different question.

MR. BERNSTEIN: Yes.

MR. BISGAIER: Those are the areas in which you will be asked to defend yourself. And they are not intended to be an exhaustive list of exclusionary features.

MR. BERNSTEIN: Fine. I am happy you did not go further.

MR. BISGAIER: So am I.

THE WITNESS: Additional features?

Q Yes, sir, I would like each of the features that you found to be exclusionary in one or more of our ordinances as it pertains to

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1 multi-family houses. Let me ask you specifically,
2 the zig-zag provision.

3 A Yes.

4 Q Would you explain for the record
5 what that is? A The zig-zag

6 provision is a provision which requires variation
7 in setback within each structure. This increases
8 the floor area, the wall area and thus the
9 construction cost of the unit. And there is no
10 relation to health and safety.

11 Q Can you give us any numbers for the
12 cost of zig-zag ordinances or the increasing costs
13 for multi-family units which is required because
14 of this zig-zag ordinance which is found in many
15 ordinances? A I have not done a
16 specific study on that point.

17 Q Can you give us any estimate as to
18 the increased cost per unit on account of the zig-
19 zag? A No.

20 Q Is there any benefit of any sort to
21 derived from this zig-zag provision?

22 A I believe the zig-zag provision is put in-
23 to ordinances on the basis of the specious
24 aesthetic theory similar to that used as a justi-
25 fication for no look-alike requirements in

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1 single-family subdivisions.

2 Q Well, you would reject this propo-
3 sition that the zig-zag, in fact, makes apart-
4 ments look more attractive by not giving them all
5 the same setback? A Yes.

6 Q Talking about the anti-look-alike
7 provisions for one-family homes, you feel that
8 these are exclusionary tools as well?

9 A Well, the anti-look-alike provision in
10 single-family homes can be exclusionary if it is
11 imposed on a single-family-zoned district which
12 is otherwise inclusionary. I mean if you have a
13 one-acre zone with minimum house size of 1500
14 square feet and so on and so forth, it's academic.
15 But if you had a single-family zone meeting
16 inclusionary or least cost standards and then
17 imposed a no-look-alike provision on such a zone,
18 its effect would be exclusionary.

19 Q Well, isn't there an aesthetic
20 reason for the anti-look-alike provision? You
21 have different facades in the homes. You do not
22 have a development of 100 homes with the same
23 exterior facade. Isn't that a legitimate purpose
24 in zoning? A I said there is cer-
25 tainly an aesthetic theory underlying it. I

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1 would characterize it as a pretension rather than
2 a reason. And I don't see any relation to health
3 or safety in it.

4 Q Well, forgetting health and safety,
5 as a housing consultant, wouldn't you see a more
6 aesthetic job if you had 100 houses with at least
7 four or three different exterior elevations than
8 if you had 100 homes all of the same type and
9 design, each having the identical plan? Wouldn't
10 you see this as being aesthetically unattractive
11 for the residents?

12 A Not necessarily, I think the fundamental
13 problem here is that people are trying to impose
14 a specious aesthetic judgment which is based on
15 their own design illiteracy. The thing that makes
16 a house attractive or an apartment attractive is
17 the design of that house or that apartment.

18 It is not, you know, an arbitrary rule
19 saying that one facade has to zig and the other
20 facade has to zag or you have to have a setback of
21 six feet for every 30 feet of frontage or any of
22 that sort of thing. These neither make the units
23 more or less attractive. They just make them
24 different.

25 Different is neither better nor worse.

1 Whether it turns out better is a function of
2 design. Some of the most horrendous developments,
3 subdivisions, townhouses, whatever, that I've
4 seen are built under rigorous zig-zag, no-look-
5 alike variation and the like ordinance provisions
6 because they are badly designed. That's the whole
7 point of this.

8 So all these ordinances are doing is impos-
9 ing costs on the basis of a specious aesthetic
10 theory. It's similar to having an ordinance
11 which said every house should have a marble
12 reproduction of an ancient Greek statue 30 feet
13 back from the sidewalk in the center of the front
14 yard.

15 Q As a housing consultant, you see no
16 problem with having 100-lot subdivisions, each
17 with the same exterior elevation and design?

18 A No problem.

19 Q Now, you cannot tell us what the
20 cost would be of an anti-look-alike provision,
21 that is, the increased cost per lot in a residen-
22 tial subdivision as a result of the existence of
23 these ordinances? A No.

24 Q Now, I believe another provision in
25 the ordinances that you found to be exclusionary

1 was the fact that in some of the ordinances you
2 found excessive parking requirements; correct?

3 A That's correct.

4 Q Where do you draw the line, Mr.
5 Mallach, on something that is or is not excessive
6 as far as parking goes?

7 A Well, since one has to draw the line some-
8 wheres, I have recommended that it be drawn for
9 garden apartments at 1.5 and for townhouses at
10 1.8 parking spaces per unit.

11 Q Can you cite to us any studies
12 which you have done which would justify these
13 numbers? A No.

14 Q Can you tell us of any studies that
15 were done by anyone who would justify these num-
16 bers? A It is my recollection that
17 these numbers are consistent with the standards
18 recommended in the sources I cited earlier.

19 Q So that those two sources are the
20 ~~only~~ sources you know of that recommend and have
21 ~~done~~ studies on these particular subjects?

22 A Offhand, yes.

23 Q Will you supply to Mr. Bisgaier the
24 name of the authorities of the Department of
25 Community Affairs publication to which you alluded

1 to? A Yes.

2 Q You would concede that there is a
3 body of opinion that holds that two parking
4 spaces per multi-family dwelling unit is required
5 in order to provide parking for inhabitants and
6 their guests? A Well, there

7 obviously is because it appears in many ordinances.

8 Q Have you ever read any reports or
9 studies that have recommended two parking spaces
10 per unit? A Not offhand.

11 Q Now, you feel that the minimum lot
12 size for multi-family units in some of the
13 defendant municipalities is excessively small;
14 correct?

15 MR. BISGAIER: What is that question
16 again?

17 MR. BERNSTEIN: Excessively large,
18 excuse me.

19 MR. BISGAIER: Can you read back
20 the question.

21 (The last question is read.)

22 A Question: For the development as a whole?

23 Q Yes.

24 MR. BISGAIER: I am sorry. The
25 tract size you mean? Is that what you are

1 talking about?

2 MR. BERNSTEIN: Tract size.

3 MR. BISGAIER: All right. Excuse
4 me.

5 A It may be. This varies. Lot or tract
6 size rather is a factor where it affects the
7 ready availability of land for development.

8 Q Well, assuming there were no prob-
9 lems in supplying multi-family lands, assuming a
10 town had met its fair share burden. What then
11 would you recommend as the minimum lot size for
12 townhouses and the minimum lot size for garden
13 apartments?

14 MR. BISGAIER: This is on a non-
15 least cost basis? The question is assum-
16 ing they have met their fair share? I am
17 sorry. I am confused.

18 Q Okay. Assuming we have a municipa-
19 lity that has sufficient least cost multi-family
20 units in your opinion and the town is not using
21 this minimum lot size to limit the number of
22 potential multi-family units. What size would
23 you recommend for townhouses and for garden
24 apartments? A I don't see that there

25 is any need for a minimum tract requirement if you

1 have set down requirements for the units. And I
2 think if those requirements can be met on a tract
3 of one acre or five acres, it's immaterial.

4 Q Well, how about if you had 100-by-
5 100-foot lots, which is a quarter of an acre.
6 Could one construct a garden apartment unit
7 having four units and still be reasonable as you
8 see it as a housing consultant? Can we go down
9 that low?

10 A Well, these are what
11 some people call quadraplex units. And they are
12 allowed as separate entities. If somebody can
13 design a site plan and a unit that meets all the
14 separate requirements on a site that size, I
15 don't see what's wrong with it.

16 Q Well, you are testifying then that
17 as a housing consultant, you recommend no minimum
18 lot size. Is that right?

19 A I would think so.

20 Q As a practical matter, what would
21 you expect a minimum lot size for a townhouse
22 project and a garden apartment project to be
23 before the marketplace would accept it as a poten-
24 tial site?

25 A I think that would
depend on the site characteristics. For example,
if you have--If you have a relatively more

1 built-up part of the town, more centrally located,
2 I think very small tracts of an acre or less are
3 perfectly acceptable from a market and demand
4 point of view. If you are talking about more
5 outlying parts of the community, I think most
6 developers would prefer to build larger develop-
7 ments and might seek tracts as a rule of, oh,
8 five, six or more acres.

9 Q Would you find a municipality that
10 required a five-acre minimum lot size for a multi-
11 family development on outlying tracts to be
12 exclusionary?

13 MR. BISGAIER: That question has
14 essentially been answered by saying he
15 sees no basis for the requirement at all.

16 MR. BERNSTEIN: Well, we talked
17 about the practical forces at play.

18 A Again, this comes up in so many things.
19 The practical forces of the marketplace are best
20 left to the marketplace.

21 Q Without any zoning interferences?

22 A Where there is no health or safety justifi-
23 cation.

24 Q Is it your belief, Mr. Mallach, as
25 a housing consultant that the only rational basis

1 for the zoning is health and safety and that
2 zoning should not control criteria which are not
3 related to health and safety?

4 A Well, I am very much aware that there is
5 a third element in the trilogy as it affects
6 zoning overall known as the general welfare.
7 This seems frequently to be interpreted as the
8 particular welfare rather than the general welfare.
9 And so I am often at a loss as to quite what to
10 make of it.

11 Q Well, I am looking at it from your
12 vantage, Mr. Mallach, not that of the Court. Is
13 it your opinion and has it consistently been your
14 opinion that the only rational basis for zoning
15 is in protecting the health and safety?

16 A And general welfare.

17 Q Oh, you admit the general welfare
18 does play a role? A I just said it
19 did.

20 Q From your vantage point? I am not
21 talking about from a legal standpoint. I am
22 looking at it from your standpoint as a housing
23 consultant. Do you concede that the general
24 welfare plays any role in the implementation of
25 zoning? A Yes.

1 Q And do you now concede that
2 aesthetics plays a role in the general welfare?

3 A I have difficulty with aesthetics,
4 aesthetics in zoning, from a practical standpoint.
5 I think certainly in theory it is in the interest
6 of the general public that things be more beauti-
7 ful than not. I think from a practical standpoint,
8 there is disagreement about aesthetics and even
9 beyond the disagreement, about aesthetics, there is
10 very real question about whether zoning tools to
11 date bear a meaningful relation to aesthetics.

12 In other words, it's one thing to say that
13 beauty is in the general welfare. It's another
14 thing to say that an ordinance provision that
15 purports to deal with aesthetics, but objectively
16 does nothing of the sort, is justifiable under the
17 same grounds.

18 Q Is it your testimony then, Mr.
19 Mallach, that you see no rational basis for zoning
20 ~~to~~ accomplish aesthetic goals?

21 A I see no successful efforts at least in
22 the typical suburban developing municipality zon-
23 ing ordinances. I'm not averse to carefully con-
24 ceived attempts towards that end.

25 Q You know of no zoning provisions

1 that, in fact, promote aesthetics; do you?

2 A Well, I think in some central cities--

3 Q I am talking about in developing
4 communities. I am not interested in central
5 cities since they are not defendants here today.

6 A I know of no provisions offhand in any of
7 the developing municipalities that I've studied
8 that do so.

9 Q And you know of no valid aesthetic
10 provisions in any of the defendant municipalities?

11 A No.

12 Q Well, if the general welfare does
13 not mean aesthetics and it does not mean health
14 and safety, what does the general welfare mean
15 to you as a housing consultant?

16 A I believe I stated earlier that I find
17 that very difficult to answer. That has always
18 struck me as being a very nebulous term. It is
19 very hard to pin down in practice.

20 Q So aren't you really saying that
21 the only justification for zoning that you
22 consider rational is either health or safety?

23 A Not necessarily; you might take something
24 like zoning for commercial and industrial use, to
25 take one example. This is tangentially perhaps

1 related to health and safety, but I suspect it has
2 more to do with the general welfare.

3 Q Let me paraphrase it. You know of
4 no justification for residential zoning restric-
5 tions other than health and safety?

6 A Offhand, I can't think of any.

7 Q And you know of no valid aesthetic
8 controls on residential zoning that you are pre-
9 sently aware of? A In suburban

10 or among the defendant communities?

11 Q Among the defendant communities.

12 A That's correct.

13 MR. BISGAIER: Just to have some
14 precision on that question, I am not sure
15 what you meant. We can leave it if you
16 like and go off the record. Are you say-
17 ing he found none in the ordinances or
18 could think of none that could be put into
19 the ordinances?

20 MR. BERNSTEIN: All right.

21 Q You found none in any of the defen-
22 dant municipalities, any aesthetic controls on
23 residential development which you found to be
24 reasonable or rational?

25 A That's correct.

(The witness is excused.)

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LAW DIVISION - MORRIS COUNTY
DOCKET NO. L-6001-78 P.W.

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MORRIS COUNTY FAIR
HOUSING COUNCIL,

Plaintiff,

vs.

BOONTON TOWNSHIP, et als,

Defendants.

CERTIFICATION

I, MARK SCHAFFER, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, certify the foregoing to be a true and accurate transcript of the deposition of ALAN MALLACH who was first duly sworn by me at the place and on the date hereinbefore set forth.

I further certify that I am neither attorney nor counsel for, nor related to or employed by, any of the parties to the action in which this deposition was taken, and further that I am not a relative or an employee or any attorney or counsel employed in this case, nor am I financially interested in the action.

Mark Schaffer
A Notary Public of the State of New Jersey

Dated: 4/19/79