

11-Morris County Fair Center
v. Boonton

May 3, 1979

Transcript of Deposition of Alan ~~At~~ Mallach

pg. 145

U1L0008689

MORRIS COUNTY FAIR HOUSING
COUNCIL, MORRIS COUNTY BRANCH OF
THE NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
AND WILEY C. VAN NESS, PUBLIC
ADVOCATE OF THE STATE OF
NEW JERSEY,

ML000868G

Plaintiffs,

v.

DEPOSITION OF:

BOONTON TOWNSHIP, CHATHAM
TOWNSHIP,, CHESTER TOWNSHIP,
DENVERVILLE TOWNSHIP, EAST HANOVER
TOWNSHIP, FLORHAM PARK BOROUGH,
HANOVER TOWNSHIP, HARDING
TOWNSHIP, JEFFERSON TOWNSHIP,
KINNELON BOROUGH, LINCOLN PARK
BOROUGH, MADISON BOROUGH, MENDHAM
BOROUGH, MENDHAM TOWNSHIP,
MONTVILLE TOWNSHIP, MORRIS TOWN-
SHIP, MORRIS PLAINS BOROUGH,
MOUNTAIN LAKES BOROUGH, MOUNT OLIVE
TOWNSHIP, PARSIPPANY-TROY HILLS TOWN-
SHIP, PASSAIC TOWNSHIP, PEQUANNOCK
TOWNSHIP, RANDOLPH TOWNSHIP, RIVERDALE
BOROUGH, ROCKAWAY TOWNSHIP, ROXBURY
TOWNSHIP and WASHINGTON TOWNSHIP,

ALAN MALLACH

Defendants.

Morris Township, New Jersey
Thursday, May 3, 1979

R E:

MARK SCHAFFER, a Certified Shorthand Reporter
and Notary Public of the State of New Jersey, at the

KNARR - RICHARDS, ASSOCIATES

CERTIFIED SHORTHAND REPORTERS
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1 ALAN MALLACH, previously sworn.

2 CONTINUED CROSS-EXAMINATION BY MR. BUZAK:

3 Q Mr. Mallach, we had ended last time
4 speaking about the various income levels of low and
5 moderate income and the various factors which would
6 produce, your term, least-cost housing, or the Court's
7 term least cost housing. I want to start basically
8 where we picked up with a quotation from the Madison
9 case, which I am sure you are very, very familiar with.

10 And it states, and I do not portend to say that
11 this is an exact quotation, but words to the effect,
12 the governing body must adjust its zoning regulations so
13 as to render possible and feasible the least cost housing
14 consistent with minimum standards of health and safety
15 which private industry will undertake in an amount and
16 in amounts sufficient to satisfy the deficit and the
17 hypothesized fair share that was taken from 72 N.J. at
18 512, the Madison case.

19 I am curious with respect to the words private
20 industry. And I ask you whether the standards that you
21 set forth in your report--Do we have this report
22 marked? A Yes, it's been
23 marked.

24 Q --if the standards you set forth in your
25 report are those not only that are minimum standards of

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

1 MORRIS TOWNSHIP MUNICIPAL BUILDING, Morris Township,
2 New Jersey, on Thursday, May 3, 1979, commencing at
3 10:00 A.M.

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

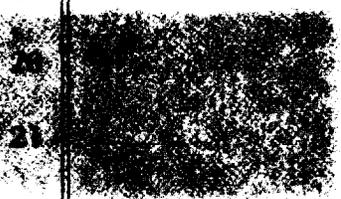
5 THE PUBLIC ADVOCATE
6 BY: PETER A. BUCHSBAUM, ESQ.
Attorneys for the Plaintiffs.

7 MESSRS. EDWARDS & GALLO,
8 For the Defendant Township of
East Hanover,
and

9 MESSRS. VILLORESTI & BUZAK,
10 For the Defendants Randolph, Kinnelon and
Washington Townships,
11 BY: EDWARD J. BUZAK, ESQ.

14 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 CROSS RECROSS

Mr. Mallach
By Mr. Buzak 2 144
By Mr. Buchsbaum 142

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

EXHIBITS DESCRIPTION FOR ID.

DK-1 Lower Income Housing: The Planner's Response 15
DK-2 Townhouses and Condominiums: Residents' Likes and Dislikes 22

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1 health and safety which you allege that they are, but
2 furthermore, are those which private industry will under-
3 take to produce housing?

4 A I believe so. Clearly this has never been given
5 a fair test perhaps because since ordinance provisions
6 have typically been far more restrictive, obviously
7 industry builds to the standards that they can. The
8 belief is in two parts.

9 First off, I do believe that private industry
10 will build at or very near the standards that I am
11 recommending here if the opportunity is provided. Mind
12 you, I'm not saying that all of the units that would be
13 built in such zones would be built to such standards.
14 Indeed, that's part of the rationale for overzoning.
15 But certainly a substantial number would be.

16 And secondly, in any event, it's not within the
17 purview of the municipality to preclude the opportunity
18 to do so.

19 Q Well, okay. I understand that. But are
20 you saying then that in a hypothetical were there no
21 zoning ordinance at all, which is not a position that is
22 totally contrary to your position in some cases--Let me
23 start with that. Is that correct?

24 MR. BUCHSBAUM: Wait a second. Do you
25 understand the question?

1 THE WITNESS: I am not entirely sure what
2 the question is.

3 MR. BUCHSBAUM: Is the question do you
4 believe in zoning or not?

5 MR. BUZAK: I am sorry. Let me start
6 again because I got into two questions.

7 Q One is if I read the depositions correctly,
8 and these are the three days of depositions that were
9 taken by Mr. Burnstein for the Common Defense, I read
10 that conceptually, anyway, you had no problem with not
11 having any zoning ordinance whatsoever and, in effect,
12 having either the market dictate that which is built or
13 in the alternative private covenants to limit to some
14 extent the type of development in a particular area?

15 A I should stress that when I said that one could
16 do without zoning as, for example, the City of Houston
17 does with reasonable success, that that is not the same
18 as one can do without planning controls such as sub-
19 division regulations, reasonable site plan review
20 and so forth. It's arguable also that there are
21 circumstances where zoning is an appropriate technique.

22 I think there are some fundamental, both con-
23 ceptual and practical, problems with zoning as a way of
24 planning for rational development of a community. But it
25 has its uses.

1 Q Can you tell me specifically what are the
2 problems with zoning as a planning tool?

3 A Well, I think the principal problem, of course,
4 is that in its clear form what zoning is is the separation
5 of uses. As I'm sure you are familiar, the original
6 zoning ordinance typically separated the uses in very
7 gross terms, industrial, commercial, residential. Then
8 gradually they became more and more fine in the sense of
9 making fine distinctions, different multi-family versus
10 single-family, large lot single-family versus medium lot
11 single-family and so on and so forth.

12 Now, the key problem is that in the final analysis
13 most serious planners and students of community develop-
14 ment, community life, do not believe that the rigid
15 separation of uses that is inherent in zoning is con-
16 ducive to a community that meets the needs best of its
17 inhabitants. The typical example would be the fact that
18 in a community that has grown up as a result of modern
19 zoning, it is almost invariably necessary for people to
20 use their cars to achieve the most simple shopping
21 purposes. That sort of thing is hardly conducive either
22 to a good quality of life or, for that matter, to energy
23 conservation. And that's just one simple example.

24 And, in fact, the whole concept of P.U.D. has
25 been brought into the planning vocabulary as a way of

1 trying to achieve unzoning within zoning, if you follow.

2 Q If that is a question, yes, I follow.

3 A Yes.

4 Q And I understand what you are saying.

5 However, is it not true, let's take the P.U.D., which
6 would be the mix of residential, commercial, industrial,
7 in effect all types of uses, is it not true that those
8 people, too, to perform the minimum tasks in shopping,
9 food buying, whatever, would still have to use their
10 automobiles?

A Not necessarily.

11 If you look, for example, at areas that were developed
12 in most parts of American cities over suburbs and the
13 like, say during the 1920's which were typically developed
14 without zoning, and you think of, say, the inner suburbs
15 of north Jersey, you very often find a pattern where you
16 might have single-family houses along a street. The
17 corner building might be a commercial building with
18 stores on the first floor and apartments above. You
19 would have apartments interspersed with the single-family
20 houses. You would have houses on different lot widths

21 or sizes.

22 Q Well, I do not mean to interrupt you.

23 When you say the inner suburbs, can you give me some
24 examples I mean in terms of municipalities? I guess in
25 terms of municipalities. Are you talking about, say,

1 Hudson County municipalities, Hudson County, Bergen
2 County municipalities such as Bogota, Maywood, Rochelle
3 Park? A It would in-
4 clude many of those certainly. I guess the ones that
5 were in my mind were typically the ones in southern
6 Bergen County, places like Rutherford, Lyndhurst and
7 the like; also in Essex County. I guess some of the
8 parts--I guess a lot of parts of the Oranges, Maplewood.

9 Q You are saying those communities grew up
10 without zoning? A A great deal
11 of those communities grew up either without zoning or
12 very generalized zoning.

13 Q You are familiar I assume with the new
14 town concept, a place like the older new towns, Green
15 Belt, Maryland, and the newer new towns such as
16 Columbia and Reston? You are familiar with those areas?

17 A Yes.

18 Q Now, do they not on a little bit larger
19 scale produce the same P.U.D. that you are talking about
20 in a zoning ordinance of a particular municipality?

21 A To a large degree, yes. I think the original
22 part of Reston or that part known as Lake Ann Village,
23 which was developed under the original concept for that
24 community, really typifies the kind of model planned
25 development in this regard in terms of intermingling,

1 you know, recreational facilities, commercial facilities,
2 residential facilities around a lakefront.

3 Q What happened to that first section in
4 Reston? Do you know? In terms of its condition at this
5 point in time? A It's superb.

6 Q What happened with the remainder of the
7 development in Reston in terms of the original concept?

8 A Well, that is a very long and very complicated
9 story which--

10 Q I am somewhat familiar with the story. And
11 I do not want you to go into all the details, but maybe
12 I can ask you a specific question. Was the concept
13 changed due among other things to financial considerations?

14 A It was changed almost entirely because of one
15 particular financial issue, namely cash flow, which is
16 the key problem with large-scale planned developments
17 everywhere.

18 Q Okay. Now, this was, though, a much
19 smaller section than the entire planned Reston as it
20 would ultimately be built?

21 A That's correct.

22 Q All right. And yet right at the beginning
23 they had a financial problem?

24 A Well, that's the worst time, the beginning.

25 Q I understand that. I understand that.

1 But is that not going to happen in a P.U.D. in Morris
2 County? A It depends. I
3 think each one is a unique case again. And you have to
4 look at the local situation.

5 Part of the problem with Reston--And, in fact,
6 Reston is very often misunderstood in terms of the
7 financial implications or problems of it. Reston was
8 building vastly further out from what was at the time
9 sort of the perimeter of suburban development in
10 Washington. It had abominable access.

11 In fact, it's ironic. One of the assumptions
12 that the developer Ben Simon made when he did that was
13 that the Dulles Airport Highway, which was going to be
14 built, would be almost right up against his property
15 line, was going to provide access to Washington for his
16 development. And when the F.A.A. decided that there
17 would be no access from intermediate points to Washington
18 on that highway, he was crushed because that meant there
19 would be no even reasonably high-speed access or oppor-
20 tunities for high-speed public transportation into
21 Reston and the inner ring.

22 The second thing Reston had is if you look at the
23 terms of the financing that Simon accepted, it's quite
24 clear that there is no way barring divine intervention
25 that things could have succeeded financially. He

1 accepted ruinous terms in order to get the thing off the
2 ground in the hope that after he demonstrated what a
3 ~~fantastic~~ success it was, his two principal creditors,
4 which were the John Hancock Insurance Company and Gulf
5 Oil, would agree to refinance on more reasonable terms.
6 Needless to say, they didn't. Instead they foreclosed.

7 But the point is there are a lot of extreme
8 situations. Now, if you look at a Morris County community,
9 if you have a site that has good access and particularly
10 given the incredibly strong pent-up housing demand in
11 this area that really cuts a very wide spectrum of the
12 income range, and you can market your units fast enough,
13 you could have a viable P.U.D.

14 Q But don't you have the same problem in
15 terms of financing? You have pointed out that the
16 problem with Reston, the main problem, was the financing,
17 the acceptance of what you termed as abominable terms of
18 this financing. Is that not going to be the same
19 situation here in Morris County?

20 A Not if people think you have a really marketable
21 proposition. The reason Simon got such bad terms is
22 because there was a great deal of skepticism about his
23 marketability. It's just like if you have a sound
24 proposition, you can get a bank loan at reasonable terms
25 If it's not so sound, you can go to a finance company and

1 get worse terms. If it's still less sound than that,
2 you end up going to a loan shark.
3 So, in other words, the more solid the proposition
4 and in particular the faster you will be able to turn
5 over your units, the more likely you are to get reasonable
6 terms. If you can demonstrate, for example, that you
7 could market, say, a 3,000-unit P.U.D. in five years,
8 which is quite possible I think in this area, then you
9 could get more reasonable terms.

10 I'm not suggesting it's going to be a sure thing
11 because the cash flow is going to be a problem in any
12 large-scale development.

13 Q What is the municipality or what can a
14 municipality do to avoid or help the developer avoid the
15 financing problem?

16 A Well, the crux of the financing problem is based
17 on the fact that to build a P.U.D. a developer has to
18 invest a great deal of money in infrastructure before
19 he's begun to make a substantial return in the sale of
20 leases or the rental of apartments. So theoretically if
21 a municipality wanted to encourage P.U.D. development,
22 one thing they could do, it would be on a selective
23 basis, is to underwrite or frontend perhaps some of the
24 infrastructure costs.

25 One possibility might be--And I think exactly how

1 you do this might be tricky, but I suspect it could be
2 worked out--is given the fact that a municipality is
3 in a position to borrow from the tax exempt market for
4 capital costs and a developer is not, whether there
5 would be any possibility of using that financing as a
6 means of getting--paying less interest for the frontend
7 costs of the development.

8 Q So you are advocating that the municipality
9 issue tax exempt bonds and use that money to help
10 finance for the developer or a developer?

11 A I'm not ready to advocate that. I'm suggesting
12 this as an area that could be explored in response to
13 your question.

14 Q Well, okay. It is in response to my
15 question, but it is in response to a problem that you
16 pointed out that exists with respect to the construction
17 of P.U.D.'s.

18 A Yeah, but my
19 feeling is, I guess, it is a problem with regard to the
20 construction of P.U.D.'s, particularly very large-scale
21 developments. I'm not entirely convinced that that is such a
22 municipal policy goal, if you will, that, you know, it's
23 necessary for the municipality to step in. Certainly in
24 terms of the least-cost housing issue, there is at least
25 as much possibility, if not more so, of the units being
provided through a number of more modest developments

1 taking place independently than through a smaller number
2 of large P.U.D.'s.

3 Q All right. So you are saying then that in
4 order to meet the standards of least cost housing and
5 perhaps, in addition, to meet the hypotheticalized fair
6 share, one does not need to zone for or permit within
7 its zoning ordinances P.U.D.'s?

8 A That's correct.

9 Q Getting back to the question of private
10 industry and the demand in the market which private
11 industry is to meet, are you aware of any studies that
12 have been done to determine what that market is, what
13 the demand is, in terms of unit size? Let's take that
14 one first of all. In terms of unit size, that is, what
15 are people looking for in a townhouse, and let's take
16 that one, with respect to size?

17 A Well, there are a lot of studies that have been
18 done. They vary. And, of course, it depends on which
19 markets you are talking about. I notice you have an
20 Urban Land Institute study there.

21 Right. A And the Urban
22 Land Institute certainly does quite a bit of work in this
23 area.

24 Q All right. Now, but do you know from your-
25 self and from the Urban Land Institute or other studies

1 the demand in terms of unit size, let's say, for a town-
2 house? A Well, demand is
3 not an abstract notion. Demand is demand of a certain
4 body of people.

5 Q Fine. A Now, that may
6 not be a least-cost housing market.

7 Q Okay. You are saying then that those who
8 would occupy least-cost housing units do not, in effect,
9 constitute a population that would affect the demand for
10 certain communities? A No, what I'm

11 saying is in an environment where you have a scarcity,
12 let's say where you have limited availability of, say,
13 townhouses, the demand of people at the upper ends of
14 the income range are likely to be more compelling to a
15 developer than those at the lower ends. So, in other
16 words, the demand that may be reflected in the studies
17 would not necessarily be the demand that might exist for
18 least-cost units.

19 Q But do you feel that there is a market
20 demand for least-cost units?

21 A Certainly.

22 Q Okay. Are you familiar with the study made
23 by Mary Brooks entitled Lower Income Housing, the Planner's
24 Response, The American Society of Planning Officials,
25 Monograph, July and August 1972?

1 A I know of it, but I'm not sure I've ever looked
2 at it.

3 Q I am reading from a section. It is Page 5
4 of the Monograph I referred to. I do not know if you
5 want to mark it. You can mark it if you like as P-1 or
6 D-1. A There have been
7 a number of things marked.

8 MR. BUCHSBAUM: Maybe DK-1.

9 (Lower Income Housing: The Planner's
10 Response, marked DK-1 for identification.)

11 Q I am reading from Page 5 of the report that
12 has been marked DK-1, Lower Income Housing: The Planner's
13 Response, by Mary Brooks. Page 5 in the fourth para-
14 graph reads as follows: "Secondly, there are important
15 distinctions between lower income housing and other
16 residential land uses. Most residential subdivisions
17 or communities are built in anticipation of a market for
18 a particular housing type. Lower income families do
19 not characteristically make an economic demand for

20
21 Alternative criteria must be used to further
22 influence the timing and location of lower income
23 housing development. The need is often termed a 'non-
24 effective' or a 'social' need because these families
25 cannot compete economically in the housing market given

1 present subsidy programs."

2 My point, Mr. Mallach, is that if Madison was
3 involved with the provision of least-cost housing which
4 private industry will undertake, is it not true that
5 if we use that standard in assuming that I have properly
6 interpreted and read from Madison, isn't that true,
7 that private industry, since there is not the market
8 demand, economic market demand by lower income people,
9 will not build that type of housing?

10 A There is a definitional question here. As I
11 read what you quoted--

12 Q Okay. And I recognize that, you know, I
13 am quoting from a Monograph that is approximately 67
14 pages long--

A Right.

15 Q --and from one paragraph of it.

16 A Right.

17 Q So I recognize that.

18 A Right. But what I assume Mary Brooks is referring
19 to is essentially subsidized housing. And in particular
20 housing built under the Federal subsidy programs which,
21 as we discussed I believe at the last deposition,
22 certainly is oriented towards a population generally
23 earning less than that who could afford any kind of
24 housing without subsidy.

25 Now, clearly the private industry is not going

1 to build in the absence of subsidies housing for low
2 income or I suspect lower income, in Mary's phrase,
3 people. I think the least-cost demand is somewhere
4 between the admittedly non-effective demand of low
5 income people for housing and the clearly effective de-
6 mand of upper income people for housing.

7 Q Okay. And let me stick with that for a
8 second. In terms of the quality of the units that are
9 going to be built, the Madison case, Justice Conford or
10 presiding or acting Justice Conford was very, very clear
11 that he did not want his ruling in Madison to be
12 interpreted to mean that low quality housing, housing
13 which would as he termed it I believe create slums in
14 the suburbs, would be built. That was not his intention.

15 The lower income people do not affect the demand.
16 The higher people at the other end of the scale, the
17 highest income people, clearly affect the demand; that
18 if you are going to have housing built in between, that
19 it is going to have to be housing in terms of cost that
20 does not meet the quality standards that the higher one

21 is going to meet? A Quality not
22 in the literal sense. I mean a house that would be built
23 in my judgment or as I read the least cost language of
24 Madison would not be less sound in terms of traditional
25 standards of quality than a more expensive house. It

1 would have a roof that does not leak. It would have
2 solid wall materials. It would have indoor plumbing,
3 hot and cold running water, level floors, windows that
4 open and shut. In other words, in terms of all of those
5 standards it would be good quality housing. The
6 difference--

7 Q Now-- A Sorry.

8 Q Go ahead. A The difference
9 would be in the standards of space, land consumption
10 and the like that are dealt with in my report as well as
11 in the court decisions.

12 Q When you speak in terms of the fact that
13 the unit under your concept that will be built at least
14 cost will vary only so to speak in size or amenities
15 as you I believe point out, that in effect you will have
16 windows that open and you will have level floors and
17 such, is that not, again in order to come up to the
18 standard of least cost housing, the condition of that
19 dwelling when it is new?

20 Yes.

21 Q And not when it is five years old?

22 A Well, the condition of a dwelling when it's five
23 years old is a function in part of its condition when
24 new and a function in part of its maintenance over the
25 five-year period.

1 Q Which gets to the next point. Are you
2 familiar with any studies that have been done concerning
3 the condition of low and moderate income housing? Let's
4 stick with low income housing for the time being which
5 was built new-- A All houses are
6 built new.

7 Q At some point in time that is true. Let
8 me rephrase that then.

9 Low income housing that was built specifically
10 for that purpose, either subsidized or unsubsidized
11 units, either in an inner city or in the suburbs, are
12 you familiar with any studies that have shown the
13 condition of such dwellings from the beginning and then
14 let's say five years later and then the results of that
15 study?

16 MR. BUCHSBAUM: I am just not clear on
17 something. Are you asking now about least cost
18 housing or subsidized housing? Because your
19 questions as to the new unit and the five-year-
20 old unit have been with respect to least cost
21 housing.

22 MR. BUZAK: Okay. Right now since least
23 cost housing is a fairly new concept, I suppose I
24 am speaking about low income housing or what was
25 understood to be low income housing that had been

1 built previously specifically for low income
2 housing, i.e., low income housing developments.
3 Okay? Either in Newark, outside of the inner
4 cities, in other states perhaps. My point is the
5 condition of what has been termed, for lack of
6 a better phrase, I call it a low income unit,
7 after a period of time.

8 A I'm not familiar with any studies that have been
9 done specifically on that point. I'm familiar with a
10 lot of I guess information generally around that issue.

11 Q Okay. And what does that information show?

12 A The information shows that the range of variation
13 is literally enormous; well, that over a time many such
14 developments continue to be attractive, sound, livable
15 communities and some do not.

16 Q Are you familiar with any studies that
17 show, in fact, as compared to lower density-type housing
18 that the condition of the units over--and I take a five-
19 year period as just a number--are, in fact, worse,
20 substantially worse than of a lower density unit which
21 is not directed to lower income families?

22 A Not as a general case. I think there is one
23 specific point on that where there is some evidence that
24 there are particular problems associated with high-rise,
25 very large scale, and here we're talking about typically

1 of 100 families per acre or more, developments that have
2 been constructed for large families or have been
3 occupied by large families with children where you do
4 have evidence that there are problems of maintenance,
5 safety, living conditions and the like. With that
6 exception I'm not familiar with any such studies.

7 Q Okay. Would you know why a high-rise with
8 density of 100 units to an acre or typically as you
9 stated would result in any different use of that unit
10 than if that same unit were put on five units to an acre
11 in terms of condition?

12 A Well, the problems are not with the individual
13 dwelling units in those buildings. In fact, typically
14 the individual dwelling units in public housing projects,
15 even including massive high-rise developments in such
16 places as New York City and the like, are well maintained
17 by their occupants.

18 Q I do not mean to interrupt you in the
19 middle of what you are saying, but do you have any
20 statistical or empirical evidence or whatever to confirm
21 what you have just said concerning the individual unit
22 condition of lower income housing?

23 A I believe there have been studies, studies that
24 have dealt with problems in what you might call public
25 or intermediate spaces in these developments, have

1 characterized or contrasted those problems with basic
2 soundness of the individual dwelling units themselves.
3 I believe there is material in Newman's book entitled
4 Defensible Space on this point.

5 Q Are you familiar with any studies that
6 have been done in conjunction with urban renewal projects,
7 solely urban residential, urban renewal or combined
8 commercial and industry, urban renewal projects that
9 were built in terms of the housing that was built and
10 the condition of that housing after a period of time?

11 A I'm not familiar with any offhand.

12 Q Getting back for another moment to the
13 demand, you had pointed out earlier that I have had or
14 had a study from the Urban Land Institute entitled
15 Townhouses and Condominiums: Residents' Likes and
16 Dislikes.

17 MR. BUZAK: I would like to have that
18 marked.

19 (Townhouses and Condominiums: Residents'
20 Likes and Dislikes marked DK-2 for identification.)

21 Mr. Mallach, I refer now to DK-2, which
22 is the study Townhouses and Condominiums: Residents'
23 Likes and Dislikes by Dr. Carl Norcross. Well, are you
24 familiar with the study at all?

25 A I'm aware of it. I believe I've looked at it,

1 but I'm not familiar with its findings at present.

2 Q Okay. Very briefly it was an opinion poll
3 done by Dr. Norcross which was initially sent out in
4 1977 on a questionnaire basis to those owners of town-
5 houses and condominiums. And first in terms of demand,
6 you have stated that a minimum of ten units per acre I
7 believe is to you absolute? I am not sure if the term
8 is minimum or maximum now, but to you it is the lowest
9 density that could be supported to reflect high density,
10 if that makes any sense? It is the lowest density that
11 you would accept in terms of providing least cost
12 housing perhaps is a better way to express it?

13 A Yes.

14 Q Okay. Now, in terms of the study, and I
15 am referring now to Page 38, and it is the third para-
16 graph, it reads as follows: "An official who does visit
17 completed projects is City Planner Richard Quivey of
18 San Diego. He says, 'I would like to see townhouse
19 densities held to six or seven-dwelling units per acre,
20 and that is definitely crowded, with six or seven
21 units and enough distances between buildings be maintained.
22 At one project density is 12 and that is too high. It
23 would be turned down now.'" That is the end of the quote
24 from Richard Quivey.

25 The paragraph continues "President Harold Starkey,

1 Jr. of San Diego's First Federal Savings and Loan agrees."

2 This is from Mr. Starkey. "'Densities should be lower,
3 especially on some low-priced developments around here.'"

4 The study of Dr. Norcross goes on in that same
5 section, this is Page 38, to indicate that in his
6 opinion density is a basic factor in long-term value
7 and that owners attempting to resell their units that
8 have been 12 or more to the acre have a difficult time
9 doing so.

10 Now, again recognizing, Mr. Mallach, that I am
11 pulling this out of one page of a again lengthy report
12 and as a result of a poll, is that not contrary to what
13 you are setting forth in your own report in terms of
14 densities? Let's take that one.

15 MR. BUCHSBAUM: Just before you answer the
16 question, is Mr. Quivey's expertise qualifications
17 set forth anywhere or President Starkey's?

18 MR. BUZAK: No, only in terms of I believe
19 Quivey is a city planner and Starkey is the
20 president of a savings and loan association.

21 MR. BUCHSBAUM: So we know nothing more
22 about their qualifications than stated here?

23 MR. BUZAK: No, I do not know any more
24 about them and I do not think it is stated any-
25 where in there.

1 Q My question then is is not in general the
2 items that I have just read concerning densities and
3 financing of units or projects contrary to what you
4 have submitted in your own report?

5 A Well, I think that two are approaching the
6 question of density from very drastically different per-
7 spectives and so the results clearly are different, yes.

8 Q Okay. But aren't those perspectives one of
9 private industry looking at the question and the other
10 one in terms of either public subsidy or need for
11 housing?

12 A Private industry
13 reflects a very wide spectrum in itself. I mean cer-
14 tainly the concerns of private industry vary widely.
15 The concerns of the Urban Land Institute typically
16 represent what is the most profitable, most attractive
17 development for the highest income market available.
18 Certainly if you are trying to build for a higher income
19 market, you may build for lower densities and build non-
20 least cost housing.

21 I think a point that's made later on in the report
22 in the study, DK-2 is important, namely, quote "Although
23 density means number of units per acre, the density
24 figure itself is only one of a dozen factors that in-
25 fluence the sense of density." I think that's also im-
portant to bear in mind.

1 Q Okay. A But the fact is
2 that the higher density is required in order to keep a
3 variety of costs down and enable the units to be least
4 cost.

5 Q Okay. But we have been unable to segregate
6 either by percentage or dollars the amount by which a
7 higher density keeps costs down?

8 A That's correct.

9 Q Now, two things: One is is it your
10 position then that the Urban Land Institute is prejudiced
11 or biased or directed to middle and higher income-type
12 housing and development?

13 A Well, prejudiced and biased is certainly I think
14 an excessive formulation. I think their interests lie
15 principally in that direction.

16 Q So you are saying then that the statements
17 regarding density as set forth in this report that I
18 have read are not applicable at all to the development
19 of housing for a low and moderate income person?

20 A I think that's quite possible. Without having
21 read the report in its entirety I couldn't say certainly,
22 but I believe that is quite possible.

23 Q Do you know of any studies that have been
24 done either by the Urban Land Institute or others re-
25 garding the demand of lower or moderate income persons

1 for housing and their likes and dislikes in terms of
2 high density or lower densities?

3 A I think there's a fair amount of work on lower
4 income housing needs or preferences. I think you have
5 studies such as the Newman study I referred to pre-
6 viously. There is a great deal of study embodied in a
7 volume entitled Planning and Design Workbook for
8 Community Participation or something to that effect
9 published by Princeton University some years ago.

10 Q Do you know what those studies conclude
11 in terms of the demand or the likes or dislikes of low
12 and moderate income persons in terms of housing?

13 A The conclusions in general are that with the
14 exception of extreme situations such as the high-rise
15 that I discussed earlier, the density is not so much the
16 issue as what one might call the configuration of the
17 units, the manner in which they're laid out on the site,
18 the manner in which they relate to each other and
19 matters of that sort.

20 So that density is not really a concern of
21 It is how the units are constructed in terms of
22 configuration? A Laid out.

23 Q Laid out, all right.

24 A Laid out would be more appropriate.

25 Q All right. Now, in terms of laying out,

1 are they concerned about the fact that every single unit
2 in, let's say, a townhouse development or an apartment
3 house development has the same facade on it in terms
4 of configuration of the unit?

5 A I doubt that that would be an issue. I'm not--

6 Q But you do not know that in terms of a
7 report?

A That's correct.

8 Q How about in terms of what you termed
9 zig-zag of a unit back and forth so that you do not
10 have the flat front facade? Do you know if that is a
11 concern of theirs?

12 MR. BUCHSBAUM: In the report or generally?

13 MR. BUZAK: In the reports that Mr.

14 Mallach has cited indicating that the concern of
15 this population is not that a unit has a certain
16 density or development a certain density, but
17 configuration of that development.

18 A To my knowledge that is not involved.

19 Q What does configuration involve in terms
20 of layout?

A Configuration

21 might include, for example, whether individual units
22 have private space for the unit, private outdoor space
23 for the household. It might include whether when small
24 children are playing outdoors they can be seen from the
25 windows of the dwelling unit. It might include whether

1 children can play without the danger of being run over
2 by cars, things of this sort, practical matters.

3 Q But it would not include things like zig-
4 zag as you termed it, that is, moving the frontages back
5 and forth? A That's correct.

6 Q And it would not include things like the
7 look-alike provisions as you termed them in terms of
8 zoning ordinances? A That's correct.
9 That's a standard term, not mine.

10 Q Okay. I am sorry. And I just want to
11 get this clear. And I do not mean to harp on it. Is
12 that what the report says in terms of configuration or
13 is that what you are defining configuration as?

14 A These are the kinds of things as I just described
15 them in terms of children play, visual surveillance,
16 private spaces and the like that are dealt with in these
17 reports.

18 Q In terms of you had mentioned earlier, too,
19 sense of density as opposed to actual density, would
20 that include the amount of open space that is
21 available on a particular site?

22 A It would be more directed towards the manner in
23 which that open space is laid out or used in its relation-
24 ship to the buildings. In other words, the amount of
25 open space pure and simple is probably a function of the

1 density. The way that open space is used, where it is
2 relative to the buildings, how it's landscaped or laid
3 out is what would make the sense of open space vary or--
4 I'm sorry, the sense of density vary while the actual
5 density in mathematical terms might not.

6 Q But you do admit that it is also related
7 to the amount of open space that is there?

8 A Yes.

9 Q The obvious being if there is no open
10 space, there is no way that you can configure it--

11 A Well, there's always open space.

12 Q Okay. Also in terms of sense of density
13 and use of open space, is there not a concern regarding
14 recreational areas or availability of recreational areas
15 for the children as you mentioned?

16 A The concern on a housing site I'd say that
17 typically would have a modest number of units would be
18 for recreation for the very small children. Typically
19 recreation for older children would take place in parks,
20 playgrounds, school yards and the like.

21 Q In terms of recreational facilities for,
22 as you term it, younger children, what would that be?
23 Would that be swings and sandboxes and sliding ponds and
24 wading pools? A Things of that
25 sort would be possible. It could be just a small tot

1 lot, things of a fairly modest nature.

2 Q Would they have to be within sight distance
3 of the units so that the people in the units can look
4 at their children out there playing in the tot lots or
5 playground within the-- A That's desirable,
6 yes.

7 Q And it is also I assume desirable to have
8 just natural open space in terms of trees and grass
9 which was there before the site was built and remains
10 there after the development is built on the site?

11 A That's one of those things that is certainly
12 nice, but again on each individual housing site--and
13 we're not dealing here with necessarily P.U.D.'s of
14 hundreds or thousands of acres, but with more modest
15 developments--it's certainly not a central theme of
16 each individual housing site.

17 Q But are you saying then that that does not
18 have an effect in terms of the sense of density that
19 persons in the unit have?

20 A It would have an effect on that presumably, yes.

21 Q So if the concern of the population that
22 we are talking about is not how many units are on an
23 acre, but the sense of, in effect, how much they are
24 confined or how dense it actually is in terms of their
25 senses as opposed to number of units, isn't that a main

1 or a significant consideration, to make them feel that
2 or have them sense that the density is not as great as,
3 let's say, you point out in your report?

4 A I'm not sure this is not entirely a very large
5 and round about red herring. This notion of being con-
6 fined is really I think a very subjective kind of thing.
7 And I don't think that the evidence, a couple of docu-
8 ments in the report marked DK-2 notwithstanding, is
9 particularly strong that people feel confined at densities
10 of the sorts that I'm discussing in my report, par-
11 ticularly if you look at urban environments, which is
12 where most people have come from at one time or another.
13 You find that typical densities are far higher.

14 You find, for example, in--As I may have discussed
15 somewhat previously in the neighborhood I live in
16 Philadelphia you have typical residential densities,
17 townhouses of 20 to 25 to the acre. The sense of being
18 confined in my judgment is not at all present. The
19 combination of small private spaces which are used for
20 gardening and other activities on the one hand and the
21 presence of public park land on the other within
22 reasonable distance all make it a very attractive and
23 livable area.

24 So I don't know that there is a real problem with--
25 if you are developing a development of, say, ten, 12, 15

1 units to the acre, whether you are thereby creating some
2 kind of a problem which has to be somehow mitigated
3 through measures to create a lower perceived density.

4 Q All right. But you do not know that in
5 terms of what the demand is? And I use demand in a
6 very generic sense, recognizing that earlier we talked
7 about the fact that there is no demand as such for these
8 units, market demand.

9 A No, that's not what I said. The area in which
10 there is no market demand and which market demand can be
11 considered non-effective demand is by definition that
12 area within the income range where people require sub-
13 sidies to be housed. In other words, if he cannot be
14 housed without subsidies, then by definition your demand
15 is not effective in market terms.

16 However, when we are talking about a population
17 that can be housed without the subsidies through the
18 construction of least cost housing, this is demand. It
19 is potential market demand. It is demand that may not
20 be met because as long as the opportunities for private
21 to construct townhouses are rendered artificially
22 low by virtue of the scarcity of suitably zoned land,
23 this demand will not be met because the land that is
24 zoned for townhouses will be priced up. It will be as
25 is the case in I believe every community in Morris

1 County that I've studied saddled with restrictive zoning
2 provisions and will in any case, even if it were not,
3 given the scarcity would probably be developed for more
4 expensive housing because it's more profitable.

5 But the demand exists there. It's just being
6 artificially constrained.

7 Q Well, you are also assuming that the con-
8 struction of least cost housing and the cost of that
9 least cost housing would, in effect, supply the needs
10 or meet the needs of the, let's call them, upper, moder-
11 ate income persons?

12 A Yes.

13 Q But that is a function of the cost?

14 A That's correct.

15 Q But if I understand correctly, we have not
16 been able to come up with the effect on cost of the
17 varied as you term them exclusionary and as others term
18 them exclusionary items in the zoning ordinance?

19 A Not in dollar terms, that's correct.

20 So it would be \$10 or it could be \$10,000?

21 I do not know what it is?

22 MR. BUCHSBAUM: Is that a correct
23 rendering of the testimony?

24 THE WITNESS: No, I believe the testimony
25 strongly indicated that the costs were quite

1 substantial and that even though the exact
2 dollar cost could not be pinned down without a
3 specific study for a site, certainly the costs
4 that were being affected by zoning restrictions
5 were certainly much closer to the higher end of
6 the range than to the lower one.

7 Q But you do not want to give me a number?
8 You are willing to say it is not \$10 and you are willing
9 to say maybe it is as high as \$10,000, but you are not
10 willing to tell me that it is \$50 or \$75 or \$100 or \$200?
11 Mr. Mallach, my concern, I voiced it at the last
12 deposition, is that this entire concept, and I think this
13 was pointed out to some extent in Madison, that the
14 entire concept is not going to result in the construction
15 of housing which is affordable by anyone other than the
16 middle or upper middle income people and, of course,
17 going higher than that. And that has been generally
18 accepted, but explained away by saying, well, we have
19 filters and we have filtering and we have change of
20 ~~landship~~ and that will produce the housing that is
21 ~~needed~~ for the population that we are looking for.

22 Now, is that it? Is that the way that the demands,
23 and I use that in a general sense, now, the demands of
24 the population that we are looking at are going to be
25 met? A I think there

1 are two ways. By providing the opportunity for least
2 cost housing you are doing potentially three things.
3 First, you are providing housing opportunities for
4 populations whose needs are not being met under present
5 zoning restrictions, even though those populations are
6 certainly not low income populations and for the most
7 part, although they will be to some degree, will not be
8 principally moderate income populations. It will be a
9 mix of, say, moderate and middle income people. That's
10 one.

11 Second is, of course, that filtering will take
12 place. And I believe we discussed this extensively.
13 And my conclusion is that although filtering is cer-
14 tainly imperfect, it is not entirely a matter of ex-
15 plaining away, but there is some substance to it.

16 Thirdly, of course, is that to the degree that
17 subsidies are available for construction of low and
18 moderate income housing, zoning for least cost housing
19 should make it possible to use those subsidies to their
20 fullest extent.

21 Q Are you familiar with any applications that
22 have come before any of the four towns that I am repre-
23 senting here today, that is, Kinnelon, Randolph Township,
24 Washington Township and East Hanover, any applications
25 that have come before them in terms of requesting

1 permission to construct housing that would be constructed
2 through subsidies or that would have subsidies available
3 in terms of purchasing, you know, or in terms of renting?

4 A No.

5 Q Why do you think that that would change
6 if the zoning were any different?

7 A Because if there were zoning in a municipality
8 that made it possible to apply for and obtain subsidy
9 funds for a development proposal without the need to go
10 through a zoning variance or zoning amendment process at
11 the local level, this would certainly facilitate and in-
12 crease the likelihood of development of subsidized
13 housing. I'm sure you will acknowledge that whether you
14 argue it's a modest hurdle or a massive one, the need
15 to go through the zoning change process is a significant
16 factor.

17 Q Well, is it really no different than going
18 through the site plan process, assuming that the use that
19 you were intending to employ was a permitted use and the
20 configuration of the development was such that there was
21 no need for a variance, bulk or use?

22 A The process of going for a zoning change or a
23 variance is significantly different than the process of
24 going through a site plan review.

25 MR. BUCHSBAUM: I just want to note for

1 the record we went over this a little bit at the
2 last deposition. It seems to me this line of
3 questioning is essentially an argument with the
4 Supreme Court's opinion in Madison. And I suppose
5 at the time of trial we will be making the
6 appropriate response if these questions are asked.
7 But it seems to me the thrust of these questions
8 is more towards the Supreme Court opinion than
9 the implementation of it.

10 Q Mr. Mallach, do you favor the concept of
11 rent skewing to make certain to some extent anyway that
12 units are either rented or sold to low or moderate in-
13 come persons or persons of that income?

14 A Yes.

15 Q And do you think that that is a permitted
16 zoning provision in accordance with the enabling legis-
17 lation, the Municipal Land Use Act?

18 A Well, I see no reason why it should not be. I'm
19 aware of the rather, how to characterize it, ambiguous
20 language in the Madison decision on that point.

21 Q You are referring to the language wherein
22 the Supreme Court did not seem to initially like the
23 concept of rent skewing and then went on to say we are
24 not totally foreclosing municipalities, we are encourag-
25 ing municipalities to work on that?

1 A What is the question?

2 Q The question is do you feel that under the
3 present enabling legislation of the Municipal Land Use
4 Act a municipality can adopt a zoning ordinance which
5 would require rent skewing?

6 MR. BUCHSBAUM: I just state for the
7 record I view this kind of questioning of detailed
8 interpretation as fundamentally different than
9 Mr. Mallach's application in his report of the
10 general principals with respect to least cost
11 housing as enunciated in Madison. But if you can
12 answer the question, fine, we will
13 reserve any objections for trial as we have been
14 doing all along.

15 A I'm not familiar with any language in the Munici-
16 pal Land Use Act that would preclude this approach. And
17 since the Court in the Madison case left it up in the
18 air, it's clearly not illegal.

19 Q In your view obviously as a housing con-
20 sultant and not as a lawyer. I recognize that.

21 A Well, to the degree that I can interpret what
22 the Court said in Madison.

23 Q Okay. A They're not
24 saying it's illegal. On the other hand, they're not
25 saying it's explicitly legal either.

1 MR. BUCHSBAUM: Are you asking him to give
2 his opinion in terms as a lawyer?

3 MR. BUZAK: No, in terms of a housing
4 expert and in terms of the municipal ordinance
5 that can be made to encourage low and moderate
6 income housing. I am asking a housing expert,
7 not a lawyer.

8 MR. BUCHSBAUM: But the thrust of the
9 question seemed to be is this legal under Madison,
10 which is a legal question, not an expertise and
11 factual question.

12 MR. BUZAK: Okay. I think that legality
13 is involved in terms of when Mr. Mallach as a
14 housing consultant looks through our zoning
15 ordinance and says that these provisions are
16 contrary to those as enunciated in the Madison
17 case and the Mount Laurel case. And, you know,
18 I know if he has the ability or the expertise to
19 say that, and he certainly is saying it, I would
20 think that he would also have the expertise to
21 say whether we can do certain things that were
22 indicated as methods to promote low and moderate
23 income housing in the Madison case. So I am not
24 asking him to do anything more in terms of scope
25 than he has done already.

1 Q In terms of your view of the Municipal
2 Land Use Law then you find nothing that precludes it or
3 nothing that specifically permits it?

4 A That's correct.

5 Q Okay.

6 (A recess is taken.)

7 Q Mr. Mallach, on Page 2, and I mention it
8 as Page 2, it is in parenthesis on your report, you talk
9 about some of the standards in zoning ordinances which
10 are not conducive to least cost housing. And you
11 mention that you advocate an absense of cost generating
12 provisions or exactions, modest and occupancy based for
13 areas and modest lot size and densities and related
14 frontages, et cetera. And then you go down on that same
15 page to enumerate some cost generating features. And
16 the first item is basements instead of a slab.

17 Can you tell us in terms of the thousand square
18 foot unit that you talk about later on the difference in
19 cost between building that unit with a basement and on a

20 A I can't give
21 an exact figure, but I believe it would be anything
22 from two to \$5,000, somewheres in that range.

23 Q Okay. Now, does the ordinance of the
24 Borough of Kinnelon require basements?

25 (A discussion is held off the record.)

1 A The answer is not to my knowledge at this point.

2 Q Okay. And how about Washington Township?

3 A Not as far as I know.

4 Q Okay. And Randolph Township?

5 A Not as far as I know.

6 Q And East Hanover?

7 A East Hanover effectively does by virtue of
8 establishing cubic content requirements for the units
9 that could not be met without basements being provided.

10 Q Mr. Mallach, why do you say that that
11 number of cubic feet cannot be constructed without a
12 basement? Why can't it be done on a slab?

13 A Well, it depends. Theoretically it could be
14 constructed without a basement, but let's say you wanted
15 to build a one-story ranch house in the R-10 zone and
16 typically you had eight-foot ceilings. If you built
17 that unit on a slab, it would have to have a floor area
18 on the ground floor of something in the area of 2200
19 square feet.

20 Now, that is possible, but the point is if you
21 were building what would basically be a modest unit,
22 somewhere in the area of a thousand, 1100, 1200 square
23 feet, a modest ranch unit in that zone, it would have to
24 have a basement in order to achieve the cubic content.

25 In other words, the unit either has to be extremely

1 large on the ground or have a basement.

2 Q In terms of cubic content, does that in-
3 clude anything above the first floor, that is, the
4 attic space?

A I believe it
5 only includes floors that are at some minimum level. I
6 do not believe it includes the attic space, but I'm not
7 absolutely certain on that point.

8 Q Okay. The next item that you mention in
9 your report on Page 2 is excessive parking requirements.
10 Now, in terms of the Borough of Kinnelon are there ex-
11 cessive or are there what you term excessive parking
12 requirements in its ordinance?

A I should mention first that the excessive parking
14 requirements are principally relevant to multi-family
15 provisions rather than single-family provisions because--
16 Since single-family houses generally have driveways, it
17 is not usually the same type of issue. However, with
18 regard to Kinnelon the ordinance does require that the
19 units have garages, which is one of the excessive parking
20 requirements that I made reference to.

21 Q That is in reference to a single-family
22 dwelling?

A Yes, they do
23 not permit multi-family dwellings in Kinnelon.

24 Q Okay. In terms of Washington Township,
25 does it have an excessive parking requirement?

1 A Yes.

2 Q And what is that excessive parking require-

3 ment? A In all zones in

4 which any form of housing other than conventional single-

5 family housing is permitted two parking spaces per unit

6 is required.

7 Q Okay. You had figured, if I am not mis-

8 taken, 1.8 parking spaces per unit?

9 A For typical townhouse developments, less for

10 typical garden apartment developments.

11 Q Okay. Now, on what data is your minimum

12 based? A I should mention

13 that was gone into very extensively in the Common Defense

14 deposition. In a nutshell, it was based on an examina-

15 tion of the typical bedroom mix of such units, on the

16 car-owning characteristics of the households of a

17 typical size and economic level that would be anticipated

18 for least cost housing with certain bedroom mixes.

19 Q In terms of townhouses you had set forth

20 A Yes.

21 Q Do you feel that because there is two-

22 tenths of a parking space difference per parking space

23 or per unit I guess, that is a factor which precludes or

24 encourages the preclusion of least cost housing?

25 MR. BUCHSBAUM: That is three-tenths?

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THE WITNESS: No, 1.8 to two.

MR. BUCHSBAUM: I am sorry.

(A discussion is held off the record.)

Q Do you remember the question?

A Yes.

Q Okay. A Any requirement

that increases costs will obviously discourage the provision of least cost housing to some degree.

Q Okay. Do you admit, however, that a de

minimis difference in terms of standard that you have

proclaimed and a standard that is in, let's say, the

Washington Township ordinance in regard to townhouse

parking in practicality and in reality has no real

effect on the construction of a least cost townhouse in

Washington Township let's say?

A The problem with the de minimis argument is, of

course, in a typical exclusionary ordinance such as that

in Washington Township, to take an example at random,

the number of separate provisions increasing costs is

substantially greater than any single one provision. So

the cumulative effect of all of these minor pro-

visions can be far from being de minimis.

Now, in the case of parking, the actual cost of

the extra two-tenths of a space per unit may not be

great. The actual cost of all other provisions in that

1 same price range may add up to quite a bit.

2 So that when looking at the ordinance, if you say
3 that such and such provision is de minimis, so let's
4 leave it be and then you go to each one of them, by the
5 time you have let them add up, you have quite a serious
6 cumulative effect. So as a result you can't really take
7 a de minimis argument on an exclusionary zoning provision.

8 Q Let's take Washington Township again. Are
9 you saying that the provisions in its zoning ordinance
10 to the extent that they are exclusionary, each item as
11 you point out is de minimis?

12 A Oh, no, not necessarily with regard to that
13 ordinance. But you could, say, find a hypothetical
14 ordinance which had a large number of provisions, each
15 one of which would be no less de minimis than the
16 difference in parking spaces difference.

17 Q Okay. But that does not exist in Washington
18 Township? A It may. I did

19 not mean my answer to be construed as saying that that
20 was the case.

21 MR. BUCHSBAUM: Are we talking about large
22 developments now where this thing might add up a
23 lot or small developments of, let's say, ten
24 units?

25 MR. BUZAK: In my estimation I am talking

1 about one unit as a standard. I think Mr.
2 Mallach's position is that if there are 20 dif-
3 ferent items that are exclusionary and they each
4 add \$10 to the cost of a unit that is \$400, one
5 of them might be considered de minimis. However,
6 each of them separately might be considered
7 de minimis. And if you permit all of them, you
8 are permitting an increase of \$200 in cost.

9 Q Is that correct, Mr. Mallach?

10 A Yes.

11 MR. BUZAK: Whereas, if you viewed them
12 all together, whereas each one all together is
13 de minimis, the total one is not and produces
14 something which is not least cost housing.

15 Q And what I am trying to get at is the fact
16 that if there are provisions in the zoning ordinances
17 of the towns that I represent for the purposes of this
18 deposition which are not de minimis, that is, however
19 we define that standard, that certain items, for example,
20 parking spaces per unit difference, might be
21 considered de minimis and not precluding least cost
22 housing?

23 A You mean, in
24 other words, let's say an ordinance, a hypothetical
25 ordinance, had half a dozen provisions that were blatantly
cost generating and then there was this one which

1 arguably was of significantly less drastic impact, that
2 if you took away the half a dozen ambiguous ones, would
3 it not then be de minimis?

4 That is correct. Or that if there were
5 no other restrictive ordinances other than this .2
6 difference with townhouses?

7 A I find this terribly abstract.

8 Q Unfortunately I find much of this terribly
9 abstract. A That, too.

10 Q But you are not going to sit there and
11 say that were the hypothetical that I just gave the case
12 where the only provision that did not conform to your
13 provisions was a fact that the parking spaces in the
14 particular ordinance exceeded your standard by .2 per
15 unit would constitute an exclusionary or invalid zoning
16 provision? A It is certainly

17 an excessive zoning provision. Clearly under those
18 circumstances the municipality could cleanse its or-
19 dinance with a minimum of impact, however.

20 (A discussion is held off the record.)

21 Q Let me go back to parking. I did not
22 finish the other two towns. In terms of the parking
23 requirements, Mr. Mallach, you mentioned that Washington
24 Township's was two per unit for anything other than
25 single-family units and expressed the opinion that that

1 was improper inasmuch as yours was 1.8 for a townhouse
2 and I believe it was 1.5 for an apartment unit?

3 A Yes.

4 Q Okay. In terms of the Township of
5 Randolph, does its parking requirements constitute a
6 cost-generating factor?

7 A Yes.

8 Q And why is that?

9 A The townhouse zone requires not only that there
10 be two parking spaces per unit, but that one parking
11 space per unit be in a garage. The garden apartment
12 zone, which has an extremely stringent bedroom require-
13 ment more or less dictating that 90 percent or more of
14 the unit be one-bedroom or efficiency apartments, re-
15 quires two parking spaces per unit, which is clearly
16 excessive.

17 Q I am sorry. How many?

18 A Two. Particularly given that bedroom configuration.

19 Q In terms of East Hanover, is there an
20 excessive parking requirement?

21 A Again since East Hanover does not permit multi-
22 family housing, the issue does not arise.

23 Q Okay. In terms of the parking requirements,
24 Mr. Mallach, and I recognize that you went into this in
25 some detail in the Common Defense depositions, but given

1 the transportation routes available to a township like
2 Washington or Randolph, would that not have an effect
3 on the number of parking spaces per unit?

4 A Not really.

5 Q Why? A In a nutshell,
6 the theme was that the number of cars a family owns is
7 dictated principally by the size of the family and by
8 their economic level and that--Well, in a suburban area
9 we would assume that the greater majority of families
10 in this least cost housing apartment, townhouse, the
11 like, would own one car. Many of them would not own
12 two cars.

13 The absense of public transportation would un-
14 doubtedly, say, at a minimum crimp the style as it were
15 of many such families. But their car ownership in the
16 final analysis would be dictated by their economic
17 condition. And they would make adjustments to the ab-
18 sence of public transportation.

19 Q But doesn't it have an effect as to how
20 one's place of employment, one's place of
21 shopping, where one does his shopping?

22 A Certainly it has an effect. And this is why I
23 say the families would obviously have to make adjustments.

24 Q Do you think it would be a proper provision
25 in a zoning ordinance to limit the number of automobiles

1 that a family could own in that particular complex?

2 A No.

3 Q Wouldn't that have the effect of making
4 certain that the parking requirements or parking
5 standards that you have set forth or that any ordinance
6 sets forth are, in fact, adequate for the purpose of
7 the unit? A It would

8 certainly have that effect, but I think the cost in
9 terms of arbitrary restriction on people's lives would
10 be far greater.

11 Q However, if your theory in terms of auto-
12 mobile ownership and use is incorrect, with all due
13 respect, would that not have an effect on the complex,
14 and I say complex in terms of a townhouse complex or an
15 apartment complex, sense of density I guess is the word
16 that you used earlier?

17 A You used.

18 Q No, you used first because I wrote it down
19 when you used it.

20 MR. BUCHSBAUM: It came from that report.

21 THE WITNESS: It came from the townhouse
22 report, yes.

23 Q No, no, it came from the report that you
24 say exists--I do not mean that--

25 MR. BUCHSBAUM: It came from the last

1 paragraph of that report.

2 MR. BUZAK: Okay. You are right. You are
3 right. I am sorry.

4 Q If your theory were wrong and, in fact,
5 that were true, that it was not a function of economic
6 condition, it was a function of transportation or largely
7 a result of transportation routes, wouldn't it have an
8 effect on the sense of density that the people would have
9 in that particular unit?

10 A It may.

11 Q But you feel that that is not significant
12 enough to control or limit by municipal zoning ordinance?

13 A Obviously in the planning process and in the
14 framing of standards one makes the best judgments one
15 can or hopefully one does so and develops on that basis.
16 I think to protect yourself by infringing on--subse-
17 quently on the occupants I think is unreasonable.

18 Q The next item that you mentioned is re-
19 quirements for more open space that bears a reasonable
20 relationship to the needs of the occupants. Can you tell
21 me whether or not that has anything to do with those
22 municipalities that do not permit multi-family use?

23 A No, this is characteristic of multi-family housing.
24 To the best of my knowledge, well, with very rare ex-
25 ceptions ordinance provisions governing single-family

1 subdivision development rarely, if ever, mandate open
2 space.

3 Q In terms of then Washington Township's
4 zoning ordinance, is its open space requirement, if any,
5 improper under your standards?

6 A Yes.

7 Q And why is that?

8 A Because they require a wide variety of open
9 space features that bear no relationship to basic needs
10 of the occupants.

11 Q Can you tell me what they are?

12 A Okay. For example, they require an extensive
13 buffer zone around the development that has to be left
14 open.

15 Q What is that extensive buffer zone?

16 A It's ten percent of the width of the tract at each
17 point up to 75 feet. They require land to be set aside
18 as open space and parenthetically they require that the
19 gross density of the development be reduced for slope
20 areas, areas in floodways and areas subject to easements,
21 even though these could be used for the open space.
22 They then require that expensive and extensive recrea-
23 tional facilities be constructed in the development, in-
24 cluding tennis courts and swimming pools.

25 Q Are those the only items that you find to

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1 be exclusionary with regard to open space, and I would
2 assume things like the swimming pool and the recreational
3 facilities not necessarily related to open space other
4 than the fact that you have to have some space to put
5 it in? A Well, it's part

6 of the whole. Open space requirements can be excessive
7 both in terms of the amount of space and what they
8 require to be done with or not done with the space. So
9 they both fit under the same overall category.

10 Q All right. I will handle that under the
11 next item, which is exaction, I suppose. With regard to
12 Randolph Township and the open space requirements, can
13 you tell me if those are improper under your standards?

14 A Under the townhouse zone a minimum of 30 percent
15 of the tract must be dedicated for open space, which is
16 in my judgment excessive. There are no specific open
17 space requirements that I've noted under the garden
18 apartment zone.

19 Q So, therefore, they would not have ob-
20 viously an excessive open space requirement for the
21 apartments? A That's correct.

22 Q Okay. A Though one
23 could argue that if you will note on my exhibit with
24 regard to Randolph Township under the garden apartments
25 there is Point K on my note which does provide very

1 broad discretion to the Planning Board to engage in what
2 ~~one~~ could construe as establishing open space require-
3 ~~ments~~ independently of the ordinance language.

4 Q Okay. However there is nothing that you
5 are aware of in the history of the working of this
6 ordinance where that has been so. Is that correct?

7 A That's correct.

8 Q Now, you say that the 30 percent require-
9 ment of open space for the townhouse zone is excessive.
10 What is in your opinion the amount that should be
11 dedicated to open space?

12 A As I have suggested, townhouses because they
13 contain private open spaces for the individual dwelling
14 units need not provide significant communal open space.
15 I've suggested that it is legitimate to have no open
16 space requirement with a townhouse zone and certainly
17 that in no case as more than, say, something in the
18 area of 20 percent.

19 Q So you are saying that in your concept of
20 ~~townhouse~~ development which by nature of being a town-
21 ~~house~~ development has what you would consider private
22 open space, that there need not be any general open
23 space within that development?

24 A That's correct, just as is the case with single-
25 family subdivisions.

1 Q Now, in terms of cost provisions, can you
2 tell us the increased cost for requiring 30 percent of
3 the tract to be open space?

4 A The requirement of the amount of open space is
5 very closely related to the density requirement. It
6 means that there will be additional land required for
7 the development that will have to be bought, that is,
8 not necessarily for the use of the residents and on
9 which the taxes that are paid will be calculated.

10 Q But you cannot give me a dollar number,
11 percentage--

A No.

12 Q --in terms of the development?

13 A Well, you could--I can't give you a dollar number,
14 but if you figure that it would add ten percent, say,
15 perhaps to the acquisition cost and another ten percent--
16 not ten percent, but add some substantial amount to the--
17 Well, strike that, not ten percent of the total cost, but
18 ten percent perhaps of the land portion of the property
19 taxes on the development.

20 Q And how do you derive that figure?

21 A Well, if you need ten percent more land than you
22 would otherwise and if the land--the entire area on
23 which the development sits has given land value per acre
24 as distinct from the value of the improvements on it,
25 then it would be increased by ten percent.

1 Q Is there a valid planning consideration
2 in terms of open space and townhouses?

3 A With the exception of the desirability of pro-
4 viding small open spaces for sitting purposes and per-
5 haps for small child play such as small tot lots and
6 the like, I'm not aware of any.

7 MR. BUCHSBAUM: You are talking about
8 legal planning consideration as opposed to the
9 kind of design items an architect might consider?

10 MR. BUZAK: Well, you know, I guess there
11 is no, as far as I know, any legal planning
12 standards. I guess it is the latter, the--

13 THE WITNESS: Site design.

14 MR. BUZAK: --design that an architect
15 would take into account.

16 Q Your answer is that to your knowledge there
17 is no such planning concept that--

18 A With particular applicability to townhouses, yes.

19 Q Mr. Mallach, isn't your theory very simple,
20 not mean that in a derogatory sense at all,
21 is simply that any piece of land within a
22 municipality be zoned in such a way that it would permit
23 the highest density of development consistent with
24 health and safety standards at the absolute least cost?

25 A Well, some land should be so zoned, certainly

1 not everything. I think a municipality should have some
2 kind of overall planning which would identify areas that
3 are more suitable for this higher density housing than
4 other areas. I would require areas set aside for open
5 space and recreation purposes as well as environmental
6 reasons and a variety of other criteria, but within that
7 there should be provision, yes, for housing that can be
8 built at least cost standards.

9 Q And when you say least cost, you mean
10 absolute least cost? A No, these are
11 not absolute least cost standards. They are what I've
12 characterized I believe as modest standards generally
13 consistent with least cost and also consistent with
14 suburban development characteristics generally.

15 Q Okay. My point I guess is more general.
16 And that is that there should not be in this particular
17 area or areas of a municipality, there should not be
18 given consideration to planning concepts in terms of,
19 let's say, open space for townhouses, but instead the
20 attention should be at least what you consider the
21 standards for least cost and perhaps even more
22 stringent in terms of higher densities or less open
23 space than you have provided?

24 MR. BUCHSBAUM: That does not seem to be
25 a fair characterization of what he said, but if

1 you feel you can answer--

2 A Well, I have to answer it by going back to the
3 question for planning concepts for townhouses. As I
4 say, I believe within a community as a whole it is
5 certainly a good thing to have open space. And there
6 are certain planning concepts along those lines. With
7 specific regard to townhouses with the very limited
8 exceptions that I mentioned, I do not believe that there
9 is a sound planning concept for open space, particularly
10 with regard to townhouses.

11 Q Well, I am talking about in terms of
12 development. I'm not talking about in terms of the
13 general municipality. But the point is if I am a planner
14 and I sit down and I say I want to conform to what Mr.
15 Mallach envisions is the proper way to zone a portion
16 of the municipality that I represent and, therefore, I am
17 going to take this particular site and zone it; and my
18 theory in zoning it and setting forth the requirements
19 should be, if I understand your theory correctly, that
20 I should get the highest density consistent with health
21 and safety standards at the absolute least cost that I
22 can do it at? A Again not abso-

23 lute, but--

24 Q Okay. At the least cost that I can do it
25 at? A Okay.

1 Q Which would be definition or by theory
2 eliminate any item that does not have to do with health
3 and safety. Is that correct?

4 A Yes.

5 Q Which would eliminate really any aesthetic
6 provision. Is that correct?

7 A I have a fundamental problem with the use of
8 aesthetics in a positive sense to provide provisions
9 of the sort that have been characterized as aesthetic. I
10 do not characterize them as aesthetic.

11 Q Okay. You can characterize what you think
12 of as aesthetics in terms of my question. You should
13 not give considerations to aesthetic factors in order to
14 produce an environment that is conducive to least cost
15 housing?

16 A You should not
17 impose ordinance provisions which are cost generating
18 on the basis of a, I would argue, spurious aesthetic
19 theory. I believe I stated previously that if a
20 municipality is engaging in good-faith efforts to bring
21 about least cost housing, in the context of that I have
22 no objection to aesthetic criteria being used as part of
23 the site plan design review process.

24 Q But that does not create--You were finished?
25 I did not know if you were. But you started to say--

A No, I'm finished.

1 Q But ~~does~~ that not then conflict with your
2 theory of least cost housing because that is not a health
3 standard nor a safety standard?

4 A No, because an attractive development or aesthetic
5 standards need not increase the cost of the unit. A
6 sensitive design, a sensitive site plan, intelligent
7 selection of materials and so on is not necessarily cost
8 generating.

9 Q But the zoning ordinance could not
10 guaranty that; could it? A That's correct.

11 Q So you are depending upon the developer
12 of that site to be sensitive to the items you ~~have~~ just
13 mentioned, the aesthetics, the use and choice of
14 materials? A Working in
15 conjunction with the--actually the Planning Board and the
16 municipality's professional advisors.

17 Q Okay. A The zoning
18 ordinances that contain spurious aesthetic provisions do
19 not guaranty or even actually encourage aesthetic, more
20 attractive developments.

21 Q Well, we all recognize that aesthetics is
22 in the eye of the beholder I believe?

23 MR. BUCHSBAUM: Wait a second.

24 MR. BUZAK: Go right ahead.

25 (A discussion is held off the record.)

1 Q Mr. Mallach, in terms of my perhaps
2 simplification of your theory, if I wanted to zone a
3 piece of property for least cost housing I would zone it
4 in such a way that it would permit the highest density
5 for area, frontages, et cetera, bulk requirements con-
6 sistent with minimum health and safety standards and
7 that is it and leave the rest out because any other
8 thing that I would add would by its nature increase the
9 cost or the developer is not going to do it in the first
10 place?

A Well, I think
11 there are two qualifications to that. First, again it's
12 an important distinction, I am not talking about here
13 the absolute highest density. I am talking about
14 reasonably high densities consistent with least cost
15 standards. They're by no means the highest densities
16 that could be. The answer--

17 Q But you would not have any objection to
18 having, if I were the planning consultant, to having a
19 much higher density as you propose is the minimum highest

A I think higher
20 densities would be acceptable.

21
22 Q Fine. But you feel that my concept is an
23 oversimplification of your theory?

24 MR. BUCHSBAUM: Wait a second. Your con-
25 cept as you stated it was simply the Supreme

1 Court language, not Mr. Mallach's theory.

2 MR. BUZAK: Well, I am not so sure about
3 that.

4 MR. BUCHSBAUM: The least cost housing
5 consistent with minimum standards of health and
6 safety that private industry will undertake.
7 That is the language.

8 MR. BUZAK: I was saying if I were a
9 planner, is that all I take into account.

10 Q Is it that simple?

11 A In terms of the overall planning for the community
12 as a whole, obviously there are a lot of other factors.
13 In terms of specific provisions of zoning ordinances
14 for those sites that are zoned for townhouses, apart-
15 ments, whatever, that is correct. That is all that
16 would be in them.

17 Q Okay. Should there be any consideration
18 given to environmental factors?

19 A Certainly, again as we went into in great length,
20 environmental characteristics of the site have sub-
21 stantial bearing on its suitability for different types
22 of housing. And I believe it is incumbent upon a planner
23 for a community when seeking the areas that he is going
24 to designate for high density housing to find out sites
25 that are of those available the more suitable from an

1 environmental as well as other criteria.

2 Q So in terms of choosing the site, environ-
3 mental factors ought to be considered?

4 A That's correct.

5 Q But in terms of requirements, once the
6 site to be zoned is chosen, they should not?

7 A Well, clearly there are environmental factors
8 governing the development of sites regardless of the
9 type of housing or for that matter non-residential use
10 that you are proposing. Clearly there should be adequate
11 means of disposing the sewerage. There should be an
12 adequate water supply. There should be adequate pro-
13 vision for runoff and drainage on the site.

14 Q I do not mean to interrupt you, but I
15 guess I am. Sorry. A Yes.

16 Q Those would be valid requirements that you
17 feel could be put on a particular site and still be
18 zoned for least cost housing?

19 A Certainly, they're not customarily part of the
20 zoning ordinance so much as they're a part of the site
21 plan or subdivision process, but they are, certainly.

22 Q And if some of those factors or considera-
23 tion of some of those factors increases the cost of
24 housing because of the, for example, different type of
25 infrastructure as you have termed it for the purposes of

1 your report is needed, that is acceptable?

2 A Certainly kinds of infrastructure improvements
3 ~~may be~~ needed for reasons of health and safety,
4 essentially just like certain environmental protections
5 may be needed for those purposes.

6 Q Do you have any problem with a conditional
7 use for, let's say, a townhouse unit or a townhouse
8 development which would as its condition set forth
9 standards like adequate water supply and sanitary sewerage
10 disposal?

11 A There are two
12 questions sort of interwoven in there. Let me see if I
13 can answer them.

14 I certainly have no problems with making the
15 provision of adequate means of water supply and sanitary
16 sewerage disposal conditions for approval of multi-
17 family housing. As to whether this should be framed as
18 a conditional use in the sense of the land use law and
19 so on is a somewhat different matter.

20 Q Okay. Let's stick with the first one.
21 ~~In terms~~ of having the requirement that there be adequate
22 ~~provision~~ for water and sanitary sewerage facilities as
23 a condition, not necessarily as a conditional use in the
24 proper sense, but as a condition to the development of
25 a least cost housing site, you do not have a problem with
that?

A No, to my

1 understanding that is a condition more or less explicitly
2 of any kind of housing development.

3 Q Now, in terms of what is considered adequate
4 or inadequate, would you feel that a requirement that the
5 sanitary sewer system be a public system be a proper
6 condition? A Yes.

7 Q Would it be improper to require that the
8 water system be a public system?

9 A Yes.

10 Q And is that an absolute kind of statement
11 in terms of the amount, no matter what the situation
12 happens to be, that it should not be required to be a
13 public sanitary sewer or public water system?

14 A I think the case where that could be made a re-
15 quirement would be the case where you had more or less
16 complete coverage of the community by ample--by pre-
17 existing, ample public water and sewer systems or where
18 such was contemplated to take place so soon that it
19 would not hinder development and where there was as a
20 result a particular reason not to want to have a
21 mutually competing, either in the economic or physical
22 sense, system.

23 Q Do you have any problem in terms of a
24 public water or sanitary sewer supply system to impose
25 the costs of getting to the existing public sanitary

1 sewer or water system on the developer assuming that the
2 imposition is in accordance with the requirements of the
3 Land Use Act for offtract improvements?

4 A That's another question that has to be answered
5 with a maybe. Certainly in principal, no problem. In
6 practice that would be modified by the fact that it
7 would depend on the proximity.

8 And as you recall, Madison in very strong language
9 said that you don't locate a site here and then tack on
10 the cost or for that matter even a substantial pro rata
11 cost of the extension. To the degree feasible, as I
12 believe I stated earlier, where there is a public sewer
13 and water system, a criterion for locating sites for
14 high density housing should be close proximity to the
15 system so that the costs of extension are modest.

16 Q So that the developer of that site ought
17 to be treated differently, let's say, from the developer
18 of one acre, single-family dwellings in terms of the
19 location of that zone and its proximity to the sanitary
20 sewer and water system?

21 A Well, it's not that the developer should be
22 treated differently--

23 Q The site should be treated differently?

24 A The proximity to existing sanitary sewer and water
25 systems are a reasonable criterion in selecting sites

1 for higher density development.

2 Q Is it proper for me to assume also that in
3 the event that a public system were not available, and
4 let's take the simple matter where it is in proximity to
5 the site and by in proximity let's say it's three miles
6 away, to give us some frame of reference, is it proper
7 for me to assume that you will have no objection to the
8 requirement that a private supply system as opposed to
9 private individual wells for each townhouse be provided
10 and a private sanitary sewerage disposal system, be it
11 treatment plant or whatever, be provided?

12 A Yes.

13 Q Do you think that the operation of that
14 water system should be the developer's responsibility
15 and/or the eventual homeowner's responsibility?

16 A I think again each case would vary. For example,
17 it might be the developer's responsibility if there was
18 no alternative. I think it would probably be worth in-
19 vestigating whether there was a possibility of another
20 person picking it up.

21 I mean the fact that you are not close enough to
22 the lines to connect might not preclude the fact that
23 having built your system, an existing M.U.A. or private
24 utility in the case of water might be willing to ad-
25 minister the system once you have constructed it. I

1 think it's certainly preferable where it's feasible
2 to get an operation that is in that business to actually
3 run the system.

4 Q Assuming that you could do that?

5 A Yes, where it's feasible, exactly.

6 Q Where it is not feasible I would assume
7 that you would have no objection to the developer and/or
8 the homeowners association, let's say, in the situation
9 of a townhouse, open areas, running that system?

10 A That's correct.

11 Q Do you know of any systems that operate
12 such as that, that is, in the private sector in the
13 State of New Jersey? A There are quite
14 a number of them.

15 Q Okay. What is the nearest one to Morris
16 County? A That I really
17 couldn't say.

18 Q Okay. Are you familiar with the efficiency
19 of the operation of those systems?
20 It varies very widely.

21 I assume from poor to excellent?

22 A To good, yes.

23 Q Is there anything that a municipality
24 should do to guaranty to whatever extent possible that
25 the system to be run will be run in an excellent manner

1 as opposed to in a poor manner?

2 A Well, I think at this point the basic standards
3 for construction of such facilities are fairly closely
4 regulated by the State, so that there is no need for a
5 municipality to be engaged in the construction standards
6 as long as the development facility meets the State
7 D.E.P. standards. That should be adequate.

8 However, there is certainly an opportunity for a
9 municipality to become at the operating level. One
10 possibility, of course, which I think would be a
11 reasonable approach if there are likely to be a number
12 of such systems in a large spread-out municipality would
13 be the establishment of an M.U.A. for the purpose of
14 operating the systems under one umbrella in a manner that
15 the municipality could effectively see that it was
16 properly done.

17 Q Do you have any problem with the developer
18 of a site constructing such facilities for the purposes
19 of sanitary sewerage disposal or water generation?

20 A No.

21 You do not consider that an improper
22 exaction on a developer of a site?

23 A A development needs something done with its wastes.
24 And the treatment system should be the most economical
25 that is reasonably feasible. Certainly if it's more

1 economical for it to be done by the municipality within
2 the context of a public system, that is the most
3 reasonable approach. But where that's not the case,
4 it may have to be done by the developer.

5 Q But in terms of the cost of construction
6 of the facility, that treatment plant or that wellhouse
7 that is going to be disposed of or generate the item,
8 you do not have a problem of imposing that cost on the
9 developer?

A You mean as
10 distinct from having the municipality pay that cost?

11 Q That is right.

12 A I think it's a complicated issue.

13 Q Is that the answer? If you cannot answer
14 it, you cannot answer it. Or if you do not want to
15 answer it, that is fine.

16 A I think it would be reasonable for a municipality
17 to perhaps defray the cost or a part of it, but I think
18 it's a hard thing to be hard and fast about.

19 Q Okay. And in conjunction with that in
20 any offtract improvement to reach an existing
21 water or sanitary sewer system, so long as that
22 offtract requirement was imposed according to the
23 standards of the Municipal Land Use Law, I suppose you
24 do not have any problem imposing that condition on the
25 developer?

A I said as long

1 as it is both in conformance with the pro rata standards
2 of the Municipal Land Use Law and is modest in terms of
3 the distances involved, I'm not--

4 I understand what you are saying, but I
5 guess I am assuming in my question that the standard as
6 set forth in the Municipal Land Use Law require only
7 that the developer pay, in effect, his fair share, which
8 whether the line is six miles away and he has to pay for
9 one mile of it and, therefore, does not construct it,
10 but instead contributes to its general construction or
11 it is one mile away and he feels that although I only
12 have to pay one-sixth of it I am willing to pay the whole
13 thing and get reimbursed or whatever, no matter how you
14 slice it, the standards as set forth in the Municipal
15 Land Use Law will inherently take into account what you
16 consider the modesty of the requirement?

17 A Not completely, no, because the standards in the
18 Municipal Land Use Law do not create a situation where
19 the percentage drops in direct proportion to the increase
20 in distance. In other words, leaving aside that they're
21 extremely vague generally, extremely vague generally, the
22 fact is that you could argue under the standards that
23 he might have to pay the entirety of something that was,
24 say, a thousand feet, perhaps half of something that was
25 a mile which would amount to more than twice his cost,

1 and a quarter of something that was four miles. And
2 that would be potentially or theoretically consistent
3 with the Land Use Law, but would still result in a very
4 significant increase as distance went up.

5 Q So you are saying that a municipality
6 should not in certain cases require that offtract im-
7 provements be built by the developer or contributed to
8 by a developer in accordance with the standards as set
9 forth in the Land Use Act?

10 A Well, I'm not saying that the municipality should
11 not apply the standards in the Land Use Act, though
12 bearing in mind that those standards do give the
13 municipality some flexibility, they're not an absolute
14 mathematical formula. But what I'm saying is that there
15 may come a point, as I think the Madison decision
16 recognized implicitly, that the imposition of those
17 standards may become just unreasonable in its effect on
18 housing that is supposed to be least cost when the
19 distances involved or the extent of those offtract im-
20 provements goes beyond certain modest levels of the total
21 offtract improvements. That is regardless of pro rata
22 sharing formula.

23 Q Wasn't the Madison factual situation
24 developed before the existence of the Land Use Act?

25 A The Madison--That's an interesting thing. The

1 facts of the Madison ordinance that were under review
2 were developed before the Land Use Act. On the other
3 hand, the decision came out after the Land Use Act had
4 been enacted and probably more importantly it came out
5 well after what was basically the same court decided
6 the Davine case, which was the basis for that provision
7 of the Land Use Act. So clearly I believe the Court
8 must have been aware of this, at least subliminally.

9 Q Okay. Except that the requirement in
10 Madison that the Court felt was an exaction or cost-
11 generating feature was a requirement that the developer,
12 if I remember correctly, connect to the public water or
13 sewer system? I forget which, but it was approximately
14 six miles away--

15 A A few miles away, I forget the number.

16 Q Okay. You are not suggesting that that
17 requirement is incongruous with the requirements for
18 imposition of offtract costs in the Municipal Land Use
19 Law; are you? A No.

20 MR. BUCHSBAUM: Wait a second. We are
21 again getting into legal opinion questions. It
22 seems that the Madison decision is constitutional,
23 in any event, so whether it came before or after
24 or in the middle of the Land Use Law makes no
25 difference.

1 MR. BUZAK: What I am concerned with is
2 that Mr. Mallach seems to be implying that a
3 municipality in some cases should not take full
4 advantage of the powers that were specifically
5 granted to it in terms of improvements and
6 specifically offtract improvements. And if that
7 is his position, that is fine. But when I asked
8 that he seemed to say no, that is not exactly his
9 position.

10 THE WITNESS: Let me try to clarify it,
11 see if I can take another stab at it. Of course,
12 my reading, this is debatable, of course, is that
13 the Madison case was not, in the lengthy discussion
14 it gave to that exaction and the implications of
15 it, was clearly not dealing with the exact
16 language of that requirement, but the whole idea
17 of excessive exactions. Now, my point is that
18 the municipality is free to use the powers given
19 to them under the Land Use Law obviously. But if
20 the municipality uses those powers in such a way
21 as to require as a condition of development off-
22 tract improvements even with pro rata sharing
23 that are excessive, then that is inconsistent
24 with least cost housing, however legal it may be
25 from the standpoint of the offtract improvement

1 section of the Land Use Law.

2 Now, I cannot suggest a hard and fast line
3 where I say if it's X percent and Y feet, then
4 it's okay; if it's Y percent and X feet or miles
5 then it's not okay. But the principle is that
6 it must not only be pro rata shared, but the total
7 to be shared or the share of that total must also
8 be modest.

9 Q But that is modest in terms of only those
10 developments or only those sections which are zoned for
11 least cost housing? A different standard of modesty
12 applies to those areas which are zoned for three acre
13 single-family residential?

14 A Well, the short answer is yes.

15 Q Okay.

16 MR. BUCHSBAUM: It seems to me what we are
17 talking about is essentially the same standard
18 that would be applied to lot sizes in the
19 Municipal Land Use Law. A municipality is given
20 the power to zone for all sorts of lot sizes
21 under the Land Use Law.

22 MR. BUZAK: I guess my point is are those
23 standards different depending on who is doing the
24 offtract improvement?

25 MR. BUCHSBAUM: He just answered that.

1 MR. BUZAK: Mr. Mallach answered that,
2 yes, it is different.

3 MR. BUCHSBAUM: Okay.

4 MR. BUZAK: And that is fine.

5 (The luncheon recess is taken.)

6 Q Okay. We ended our discussion before
7 lunch break on the question of aesthetics and its
8 relationship, if I remember correctly, to a zoning
9 ordinance. I want to get into more detail with that in
10 terms of your Page 2 again of your report on requirements
11 designed to meet individual and aesthetic goals. With
12 regard to the zig-zag provisions or standards, can you
13 briefly define what that means?

14 A Okay. What a zig-zag standard is is where an
15 ordinance provision requires that the facade setbacks
16 vary by a specified number of feet for every again
17 specified number of feet of the facade width. So it
18 might say every 15 feet it must vary by at least five
19 feet.

20 Now, in terms of the effect on the pro-
21 portion of least cost units, does it matter at all, the
22 stringency of the particular zig-zag requirement?

23 A Certainly the dollar effect will vary. The more
24 often the setbacks are required and the greater the set-
25 back variation, the greater the dollar effect.

1 Q Depending upon those variables, could
2 conceivably the zig-zag provision be a de minimis type
3 of provision, again recognizing that in total a varying
4 number of items which might be de minimis might total
5 a detriment to construction of least cost housing? But
6 specifically with respect to zig-zag, independently,
7 assuming every other ordinance of the zoning ordinance
8 was in concept with your theory?

9 A It seems unlikely that it would be because if,
10 for example, you had something that required only a
11 negligible modification, it would hardly meet the
12 ostensible objective of the zig-zag ordinances. ~~So al-~~
13 though it might be theoretically possible, it seems
14 extremely unlikely.

15 Q In terms of look-alike provisions or no
16 look-alike provisions, do you have any estimate of the
17 cost increase that that provision might generate?

18 A I think it varies extremely widely depending on
19 the type of development and the type of the provisions.
20 A severe case is where you have an elaborate no
21 look-alike standard involving a number of different ways
22 in which each unit must vary from the next one and this
23 is being imposed in a zone which has otherwise very
24 modest least cost-type provisions such as 5,000 square
25 foot lots, modest floor area requirements. To build

1 least cost housing under such circumstances one must
2 build very simple housing with very straight forward
3 elevations, fenestration, roof treatments and the like.
4 So in such a situation if you then try to impose
5 a no look-alike ordinance on that type of a zone, you
6 tend to create what could be substantial cost increases
7 because your units will have to be substantially more
8 complex in order to have the necessary amount of
9 variation. In a large development, let's say one-acre
10 lots and large expensive houses, then it's not going to
11 have a significant cost effect because the units would
12 be of the sort where the no look-alike provisions would
13 not significantly add to the complexity of the structure.
14 So I can't give you a dollar figure, but that would be
15 the circumstance it would be relative to.

16 Q Is it not also possible that depending upon
17 the degree or extent of the no look-alike provision,
18 that such a provision could generate no increased costs
19 whatsoever? A Under any

20 circumstance?

21 Under any circumstance, yeah, under any
22 circumstance.

23 MR. BUCHSBAUM: The question is to
24 possibility or probability?

25 MR. BUZAK: I guess it is isn't it true

1 that a no look-alike provision, depending upon
2 its stringency, could not affect one iota the cost
3 of the housing and, therefore, the least cost of
4 the housing?

5 A It's conceivable that such a standard could be
6 drawn. Again it isn't likely, but it is conceivable or
7 theoretically possible.

8 Q I do not want to get into degree of the
9 possibility that you are referring to, but I guess my
10 problem is it seems to me that if a look-alike provision
11 or no look-alike provision were such that it ~~could be~~
12 complied with using materials of equal cost to the
13 materials used in the adjacent dwelling in a ~~townhouse~~
14 situation or in a single-family home situation in small
15 lots, that it would have absolutely no effect on the
16 ultimate cost; that is, he has got to put a front on
17 the building and whether it looks like A front or B
18 front or C front, as long as the ordinance were drawn
19 in such a way to make sure that the relative costs of
20 ~~are~~ are related and the same, that it would not
21 ~~cost~~ cost one more penny of cost?

22 A Well, it might. For example, and this is not as
23 negligible as it might seem, in terms of inexpensive
24 housing one of the major objectives of a developer is to
25 design and layout the units in such a fashion as to

1 achieve maximum economies in labor. And certainly the
2 construction of a facade that is of a single material,
3 say, is going to be more labor efficient than the
4 construction of a facade that, let's say if you had
5 townhouses, would require a change in the material,
6 the color of the brick or whatever, every 18 feet, say.
7 Now, there are cases where very careful scheduling and
8 construction, timing and what have you can mitigate this
9 effect, but in principle there is a possible problem
10 there.

11 Q In terms that you just mentioned, for
12 example, the colors of the brick, why would it be
13 different for a bricklayer, let's say, in labor to lay a
14 red brick as opposed to a brown brick?

15 A No, the problem would not be in the laying of the
16 brick. In that case the problem would be in the stopping
17 and starting, where the supplies were typically on a
18 construction site. Unless the operation is very efficiently
19 scheduled, what would happen in such a situation is that
20 the bricklayer would have his red bricks. He would finish. He
21 would then go back to the store and get the brown bricks
22 or the white bricks. It is not as trivial as it sounds.

23 (A discussion is held off the record.)

24 Q Seriously, folks, isn't it true, though,
25 that quite possibly, well within the realm of possibility,

1 that a no look-alike standard could be promulgated which
2 would in no way increase the cost at all for the pur-
3 poses of least cost housing?

4 A It is possible.

5 Q Okay. Now, in terms of the zoning or-
6 dinance of the Borough of Kinnelon, is there either a
7 zig-zag provision or a no look-alike provision?

8 A There is a no look-alike provision. There would
9 not be a zig-zag provision because again the zig-zag
10 provision applies only to multi-family housing.

11 Q Zig-zag does not apply at all to a single-
12 family residential dwelling?

13 A Theoretically one could have a varied setback in
14 a single-family dwelling. And there may be cases, I
15 don't know any offhand, but I believe I've seen ordin-
16 ances, where among other no look-alike provisions zig-
17 zag may be one aspect of it. But it is certainly not
18 the principal aspect of a single-family detached no look-
19 alike ordinance.

20 Q Would you have any objection to a zig-zag
21 provision relating to a single-family residential sub-
22 division?

23 A Well, you see,
24 a zig-zag provision could be--for a single-family
25 development could be construed in two ways I guess. One
would be that the individual unit had to have a setback

1 variation and, secondly--

2 Q You mean within the same unit?

3 [REDACTED] within the same unit.

4 Q Yes. A Or alternatively

5 that there would be variation in setback from Unit A to
6 Unit B and C and so forth.

7 Q Let's take the latter one, variation in
8 setback between A and B and C. Would you have any ob-
9 jection to that? A If a community

10 wanted to do that--In fact, most municipalities seek
11 exactly the opposite. They seek uniformity. [REDACTED]
12 assuming a municipality wanted to do that, I would have
13 no problem with that. It would have no cost effect that
14 I could imagine.

15 Q Okay. Next item, I will leave the open
16 space, we talked about that in another section, was
17 displacing of costs onto the developer. And I suppose
18 for the most part we are talking about offtract kinds
19 of infrastructure. I guess they would not be called
[REDACTED] structure; would they?

20 [REDACTED] that's correct. The first point in the report is
21 really a thumbnail statement on that whole issue.

22 Q Okay. Do you have any problem with re-
23 quiring the developer to install the infrastructure
24 assuming that the standards are those which are
25

1 required for the minimum health and safety of the
2 residents and of the municipality?

3 A In terms of streets, curbs and the like?

4 That is correct, sewer lines, water lines.

5 A No.

6 Q Should a consideration as to the useful
7 life of those items of infrastructure be taken into
8 account by a municipality in promulgating their
9 standards? A Could you

10 explain?

11 Q Yes, and I will just ask a different
12 question. In determining the standards to be used in
13 the construction of the infrastructure, should not a
14 municipality take into account among other things the
15 intended life of the particular item of infrastructure
16 that is being constructed?

17 A You mean in terms of developing the technical
18 specs and the like?

19 Q That is right.

20 Within reason, yes.

21 And do you have any knowledge of what
22 those standards should be, let's say, in terms of a
23 sanitary sewer line or in terms of a water line?

24 A No, that's really an engineering kind of issue
25 beyond my expertise for the most part.

1 Q Okay. Is there any provision in any of
2 the municipalities which I am representing for the
3 purposes of this deposition that you are aware of that
4 have unreasonable standards in terms of the infra-
5 structures?

6 A I have not
7 reviewed the technical standards for provision of infra-
8 structure in these municipalities.

9 MR. BUZAK: Will somebody be reviewing
10 that? Do you know?

11 MR. BUCHSBAUM: I do not think so.

12 (A discussion is held off the record.)

13 MR. BUCHSBAUM: The question is on the
14 record. The reason I would hesitate answering
15 that is, as you know, Mr. Abeles was supposed to
16 testify about housing construction costs. And I
17 have not reviewed the reports of his replacement,
18 so I really do not know what that report would
19 get into. But it is quite possible in that area
20 of testimony that expert report will deal with
21 this issue, but you will be informed of it through
22 the expert report.

23 MR. BUZAK: Okay. Fine.

24 Q Mr. Mallach, in terms of that same pro-
25 vision of displacement of cost, you mentioned the re-
quirements that the developer bear of the services of

1 trash removal and snow removal otherwise borne by the
2 municipality. Are you saying then that at least with
3 respect to snow removal that in townhouse developments
4 and/or apartment developments the roads within such
5 developments should be public roads?

6 A Well, it would depend. A road that is a road
7 that serves a number of buildings and has driveway
8 accesses off roads to parking areas and the like I be-
9 lieve should be a public road as a general matter, though
10 there may be exceptions. The driveways and the parking
11 lots themselves would not necessarily be.

12 Q So in terms of snow removal, for example,
13 you are not advocating that the parking lots be plowed
14 by the municipality, only the roads leading to those
15 parking lots. Is that correct?

16 A That's correct, as well as the roads--any road
17 that has a function beyond this parking and parking
18 access.

19 Q In terms of trash removal, I assume that
20 other residents of the municipality independently
21 bear the cost of trash removal, you would not feel that
22 higher density housing, be it townhouses or apartment
23 dwellings, should be treated any differently?

24 A Not fundamentally differently. I think if the
25 individual members of the community bear the

1 responsibility for trash removal as a result of a
2 municipal franchise or the rate schedule, which I think
3 is often the case, then certainly the picking up of
4 trash from the apartments or townhouses should be set
5 at a rate which reflects the greater efficiencies of
6 trash pickup for higher density housing. But the principle,
7 of course, would be the same.

8 Q In terms of the Borough of Kinnelon, is
9 there anything in its ordinance that places the cost of
10 snow removal or trash removal or other services upon the
11 developer, I suppose, or the development as opposed to
12 the individual? A Well, again

13 since there are no multi-family units permitted in
14 Kinnelon, the issue does not arise.

15 Q Okay. Well, let me begin with this
16 question. Are you saying then that without multi-family
17 housing, that is, with only single-family dwellings,
18 there could not be or there should not be considerations
19 given to least cost of those units?

20 A Oh, certainly there should be. That's somewhat
21 in the case of Kinnelon as well. But in a
22 general sense certainly single-family subdivisions,
23 especially where the lot and floor area standards are
24 least cost, should not have other provisions. The reason
25 I mention it is that these kinds of things are typical

1 of requirements for multi-family development only and
2 are really rarely found as conditions for single-family
3 subdivision approval.

4 How about in terms of Washington Township
5 and its multi-family dwellings? Do they have any re-
6 quirements in their ordinances which displace the cost
7 of services on the apartments or the townhouses as
8 opposed to the municipality?

9 A The one possible--

10 (A discussion is held off the record.)

11 Q We were on Washington Township I think.

12 A Oh, yes.

13 Q All right. A The only pro-
14 vision with which I am familiar at present which could
15 have such an effect is it is required that the P.U.D's
16 and other developments be served by public sewer and
17 water. Whether it would have a significant bearing or
18 not would depend on the location of the respective
19 extensions relative to the areas that are zoned to those
20 areas which I have not determined at this point. With
21 possible exception, that's all I'm familiar with.

22 Q In Washington Township?

23 A Yes.

24 Q Now, in terms of the sewer and public
25 water, if you look at your report, Item 1-C, it must be

1 served by sewer and public water, now, I assume that
2 the sewer does not have to be a public sewer?

3 Well, the ordinance I would say is somewhat
4 ambiguous because, as you notice on the following page,
5 when they have the standards for multi-family units,
6 the language is public water and sewer. So I just wonder
7 whether one or the other is not a mistake.

8 Q Assuming that they are not, okay, then in
9 terms of a requirement of at least sewer services, you
10 do not have a problem with that I assume?

11 A In the P.U.D. zone as distinguished from the
12 M.D.U. zone?

13 Q That is correct.

14 A That's correct.

15 Q How about in terms of public water? Why
16 do you have a problem with that?

17 A Well, again I am saying under certain circum-
18 stances there may be a significant cost there associated
19 with developing the zone area. You see, I don't know
20 these circumstances are such.

21 Is there not also a consideration to be
22 given to the availability of water generally in the
23 Township, that is, aquifers and the like, as to whether
24 or not a provision requiring that public water be used
25 in a P.U.D. or in an M.D.U. zone be required?

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MR. BUCHSBAUM: Excuse me. When you are talking about public water here, does that term encompass privately-owned water utilities?

MR. BUZAK: No.

MR. BUCHSBAUM: So the Elizabethtown Water Company would not be--

MR. BUZAK: That is not true. In my mind it would be any water system not created, owned or operated by the developer.

MR. BUCHSBAUM: Okay.

MR. BUZAK: Okay.

A Or specific to the development?

Q Right. A Yes, I think that that could have a bearing.

Q All right. Now, do you know in terms of Washington Township the extent of aquifers or the extent of water availability in those zones which are zoned for P.U.D.'s or those zoned which are zoned for M.D.U.'s?

A No.

In terms of Randolph Township's ordinance, are there any requirements there that you find displace the cost of services on the developer or the complex as opposed to on the individuals or on the municipality as in other zones? A No.

Q In regard to the zig-zag provisions and

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1 look-alike standards we did Kinnelon, but I do not think
2 we did Washington Township, Randolph and East Hanover.

3 Q In Washington Township are there pro-
4 visions which are zig-zag provisions or no look-alike
5 provisions?

6 A Townhouses are--
7 and garden apartments either in M.D.U.'s or P.U.D.'s are
8 subject to a zig-zag provision. I have nothing here
9 regarding no look-alike provisions in single-family
houses.

10 Q In single-family houses or--

11 A Or multi-family.

12 Q Or multi-family. In regard to
13 Township, zig-zag provisions?

14 A There is a zig-zag provision that applies to the
15 townhouses in Randolph Township. There is a provision
16 governing exterior materials in the garden apartment
17 zone. I'm not certain whether that's a no look-alike
18 provision. I'd have to doublecheck that.

19 Q All right. But there is no zig-zag
20 as to garden apartments in Randolph?

21 That's correct.

22 Q And in terms of East Hanover they do not
23 permit apartments as a use?

24 A That's correct.

25 Q And also in regard to East Hanover as to

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1 the displacement of costs onto the multi-family develop-
2 ment, since there is none, I assume that is not applicable?

3 That's correct.

4 Q With regard to the next area, which is
5 floor area standards, you cite the HUD standards for
6 apartment units based upon bedroom requirements for one
7 bedroom 550 to 600, two bedrooms 660 to 720, three
8 bedrooms 850 to 900. And I notice you designate as the
9 HUD minimum property standard or HUD designates them
10 as minimum property standards?

11 A Again I should clarify just one point or two
12 points actually. The Minimum Property Standards refers
13 to the name of the volume that HUD uses to review
14 applications. And it's not meant to be again absolute
15 minimums, but it is their standards for the purposes of
16 making loans, insuring mortgages and the like.

17 Also these actual square foot totals do not
18 appear in the Minimum Property Standards. These are the
19 result of taking all of the specific performance
20 HUD uses for individual rooms, storage, hall-
21 way enclosures and the like and constructing hypo-
22 thetical units and seeing how many square feet you have
23 after you have constructed such a unit.

24 Q Do you find that these results are
25 reasonable requirements? A Yes.

1 Q Now, you in the same report stated that
2 the standards, Minimum Property Standards, have been in
3 use for over 40 years and has resulted in the con-
4 struction of thousands of highly satisfactory and livable
5 housing units. On what do you base that statement
6 regarding the results of these property standards?

7 A Well, leaving aside the fact that it's true,
8 these standards have been in use regarding all of the
9 developments that HUD has financed and prior to the
10 creation of HUD as such the Federal Housing Administration
11 has financed, subsidized, insured or otherwise dealt
12 with. Obviously some units are larger than those, but
13 generally speaking the units are in this ball park.

14 I personally am familiar with large numbers of
15 developments constructed at these standards that have
16 been attractive and livable housing. In addition, as
17 part of the preparation for the Home Builders case
18 which dealt explicitly, you know, with floor area
19 requirements, my office met with the HUD area office
20 and reviewed floor plans of developments selected or
21 developments funded and insured by HUD and selected a
22 number of them developed at or close to these standards,
23 which we then presented as part of the evidence in that
24 case.

25 Q And that is in terms of actual photographs

1 of these particular units or--

2 A What we presented were the floor plans.

3 Q Okay. Highly satisfactory means what in
4 the context of this report?

5 A What it means is that these would be units,
6 developments, that have been constructed over a period
7 of many years and are still after many years clearly
8 attractive, visually attractive, well maintained
9 communities.

10 Q In terms of the study that you are in-
11 volved with in regard to the Home Builders case, did
12 you see these units? Did you go out to see that they
13 were now at the point in time that you were involved in
14 the case attractive, satisfactory units?

15 A The particular ones we selected for that case I
16 did not inspect personally.

17 Q In terms of satisfaction, did you speak
18 with any of the people who were living in those units
19 to determine their satisfaction with those units?

20 At those, I have spoken with people who live in
21 units built under these standards who were
22 eminently satisfied with them.

23 Q Did you ever speak with anyone who was not
24 eminently satisfied with the unit?

25 A As a dwelling unit, no.

1 Q Are you aware of any people who were not
2 satisfied with those units through studies that you have
3 read or used or employed in conjunction with your
4 business?

5 A I have no
6 specific awareness of dissatisfaction with the units as
7 such in these developments. People have other reasons
8 for dissatisfaction at times, but not with the units
9 that I'm familiar with.

10 Q How many people have you spoken with who
11 have expressed their satisfaction with units of this
12 nature?

13 A I really would
14 not want to guess. This, as I say, has not been any
15 kind of formal study, but it's been conversations dis-
16 cussing over many, many years, going back at least a
17 decade if not longer.

18 Q And based on that you feel confident with
19 the statement that thousands of these units of highly
20 satisfactory living units have been made available by
21 using the HUD standards?

22 es.

23 Now, I understand from your deposition and
24 also from the report that the Farmers Home Administration
25 has different standards?

26 A No, definitely not.

27 Q Okay. On Page 36 of the deposition that

1 Mr. Bernstein took of you, and I know you do not have it
2 in front of you, on April 9, 1979, I am trying to put
3 ~~in~~ in the context, Mr. Mallach, there were questions
4 ~~regarding~~ regarding the problems getting financing underway for
5 certain projects, including the Suffolk project, Salem
6 City project. And the question, you are speaking in
7 terms of F.H.A. financing. The question that was asked
8 at Page 35, Line 22:

9 "QUESTION: Are there any other difficulties with
10 F.H.A. financing?

11 "ANSWER: Well, F.H.A. in my judgment at least im-
12 poses certain standards that are significantly higher
13 than those required by HUD."

14 MR. BUCHSBAUM: I would like to see what the--

15 MR. BUZAK: Okay. Just let me finish.

16 MR. BUCHSBAUM: Okay. I am sorry.

17 Q And then you go on on Page 36, Line 8:

18 "QUESTION: Could you give me an example of that since
19 it is an area that I do not have any knowledge of?

20 "ANSWER: Well, for example, if you were building
21 a HUD apartment and you wanted to put up a two-
22 bedroom apartment, that unit would have somewhere in
23 the area of 700 and 750 square feet of interior habitable
24 floor space. The F.H.A. looks for such units to have
25 900 feet of habitable floor space."

1 That is basically the gist of what I am getting
2 at. As I read that it appears that there are different
3 standards imposed by HUD and by Farmers Home Administra-
4 tion for unit size?

5 A There's a typographical error there and it's a
6 very important one. I hesitate to blame a Reporter, but
7 every reference in what you read to F.H.A.--

8 (A discussion is held off the record.)

9 MR. BUCHSBAUM: In response to Mr. Mallach's
10 assertion there was a discussion with the
11 Reporter at this deposition who is the same one
12 that recorded the deposition of which Mr. Buzak just
13 spoke. And he agrees that the statements were
14 with respect to H.F.A. rather than F.H.A. and
15 that Mr. Mallach is correct in saying that the
16 transcript should be corrected.

17 MR. BUZAK: I have no comment because I
18 was not there, but I assume that that is an
19 accurate portrayal.

20 Can you tell me what the F.H.A.--
21 actually F.H.A. standards, or Federal Housing
22 Administration, is a division within HUD. Farmers
23 Home Administration is abbreviated, in order to dis-
24 tinguish it, F.M.H.A. Finally, the New Jersey Housing
25 Finance Agency is abbreviated H.F.A.

1 Q So we are speaking about standards that
2 are imposed for the purposes of financing by F.H.A. as
3 compared to those imposed by HUD?

4 A Or F.M.H.A.

5 Q Okay. A Yes.

6 Q In any event, regardless of which one it
7 is, there is a different standard in terms of financing
8 and size of unit. Is that correct?

9 A The State as part of their mortgage program using
10 tax exempt financing imposes a larger unit size.

11 Q Now, is the State standard in terms of
12 the H.F.A. contrary to a least cost standard?

13 A Yes.

14 Q And you would say then that the State
15 standard is improper for the purposes of least cost
16 housing?

17 A If it were im-
18 posed as part of an ordinance, it certainly would be
19 improper.

20 Q Now, if I understand you correctly, the
21 reason for the H.F.A.'s increased size of one-bedroom
22 units has to do with the saleability of bonds, if I
23 understand your deposition correctly. You go on the
24 next few pages to explain that.

25 A That's their assertion, yes.

Q Do you feel that that is an accurate

1 assertion? A I am somewhat
2 skeptical. I believe that they believe it and have
3 most likely been told by bond counsel that that's
4 desirable. I doubt if they've ever really pursued the
5 matter closely.

6 Q The standard that you have set or agreed
7 with in terms of HUD for one-bedroom apartments, 550 to
8 600 square feet, do you feel that that is the minimum
9 necessary to comply with health and safety standards?

10 A Well, it gets into a question as to what are health
11 and safety standards. And, for example, what this
12 space does is it provides you with enough room to have
13 a bedroom that two people can occupy reasonably, a
14 living room so that a few people can sit around, watch
15 television or whatever in, a dining space where you can
16 put a table and chairs, what they call a galley kitchen
17 with serving counter to the dining area, one full bath
18 and a reasonable amount of storage space, closets, and
19 enough clearance between rooms, doors, to allow free
20 of people and full opening of doors and closing

21
22 Now, in terms of what we might call general
23 American standards for a two-person family or perhaps
24 even a three-person family where it's a small baby, this
25 I would consider to be probably pretty close to the

1 minimum for health and safety. You could chip away a
2 little here and there, but all of these facilities appear
3 to be required.

4 On the other hand, you could conceivably have a
5 much smaller--for example, a single space that had all
6 of the kitchen facilities, dining and living areas in
7 it in a single and much smaller space where you would
8 have to move things, move furniture when you wanted to
9 eat or cook or whatever. That might be consistent with
10 health and safety, but it's--I think it would be
11 generally perceived as undesirable by many people.

12 Q But wouldn't that comply with the least
13 cost provisions as promulgated by the Supreme Court in
14 Madison?

15 A Well, I think
16 within least cost one must take some account of what one
17 might call cultural standards. I mean it's quite
18 possible that a Mongolian yurt would be substantially
19 less expensive, but people would find it difficult to
20 be living with the goats.

21 Is that what the Supreme Court said,
22 Did it say that you could take into account
23 cultural aspects of American life or of the region's
24 life, which I do not want to get into in too much detail?

25 A I'm hesitant to try to read the mind of Justice
Conford.

1 Q Oh, come on. You are sitting here testi-
2 fying as to whether 27 towns' ordinances comply with the
3 provisions of that case. And now you are telling me you
4 do not want to get into their mind? With all due
5 respect--

A To put it
6 differently, I only want to delve so far into the psyche
7 before things get very blurry. Obviously one can't have
8 a definitive answer on that. But my belief would be
9 taking that decision in general context, that they ex-
10 pected it to be applied within some kind of a general
11 American cultural framework, if you will.

12 Q Okay. But in terms of the deposition that
13 you had given, the initial deposition, the difference
14 between 700 and 750 feet and 900 square feet, couldn't
15 that be accounted for in terms of cultural preferences
16 or cultural necessities that the Supreme Court would
17 still consider least cost housing?

18 A No.

19 Q I guess my problem is you are drawing the
20 the number, you know, according to your report
21 to 800 square feet.

22 MR. BUCHSBAUM: Wait a second. I am
23 having trouble with this line of questioning be-
24 cause you are not asking his opinion as to what
25 are sound least cost standards. You are asking

1 him what he thinks the Supreme Court meant. He
2 is taking the general language in the Supreme
3 Court opinion and applying his knowledge as a
4 housing expert to that language. That is proper
5 cross questioning.

6 MR. BUZAK: Okay.

7 MR. BUCHSBAUM: But this business of trying
8 to figure out what the Supreme Court had in mind
9 is really not fair.

10 MR. BUZAK: Okay. I agree with that.

11 Q I will withdraw the question and I will
12 ask you this one: Could the square footage be larger
13 than the square footage you had here at 550 to 600 square
14 feet and still be least cost?

15 A No.

16 Q And I assume it could be less and, of
17 course, be least cost? A Yes.

18 Q In terms of the ordinance of Washington
19 Township, is there any square foot requirement set forth?
20 with the very insignificant exception of apart-
21 ments over commercial uses in the C-1 district,
22 there is not.

23 Q Would you say then that the Township's
24 ordinance does not contain an improper restriction on
25 floor size or area of a unit?

1 A That's correct.

2 Q In terms of Randolph Township, first its
3 garden apartments, does it set forth minimum floor area
4 standards? A Yes.

5 Q Okay. And, in fact, are the standards in
6 square footage less than the standards you have
7 promulgated? A That's correct.

8 Q So would you say that Randolph's ordinance
9 in terms of square footage, the unit size for garden
10 apartments, complies with the standards for least cost
11 development? A Yes.

12 Q In terms of townhouses is there a minimum
13 floor size? A Yes, there is.

14 Q And does that comply with the minimum
15 standards for townhouses that you have set forth?

16 A It would not comply for a two-bedroom unit. It
17 would comply for a three-bedroom or larger unit.

18 Q Okay. Mr. Mallach, can you tell me on
19 what you based the numbers that you have set forth in
20 your report? Are those solely on the M.P.S. standards?

21 A They're derived from the M.P.S. standards, yes.

22 Q Do you know if there are any other standards
23 that are less stringent than the standards as set forth
24 there? A The standards

25 in what I believe is the New Jersey Housing Code, which

1 just referred to square footage per occupant, are
2 effectively substantially less stringent.

3 Q And do you feel that those should not be
4 the standards for least cost housing?

5 A Well, those standards would not really make it
6 possible for a newly constructed unit that provides a
7 full range of facilities that a family expects.

8 Q Now, two things: First, can you be more
9 specific about the full range that the family would
10 expect?

11 A I think this
12 goes back to earlier in terms of the facilities. I
13 think an American family seeks--I think most families
14 seek this, but the likelihood of achieving it varies
15 from society to society, but would seek the following in
16 a dwelling unit: a bedroom where the adult couple or
17 adult single person of the family, if there is only one,
18 can have some privacy; secondly, a separate area for
19 sitting indoor recreation, conversation, social activity
20 and the like; thirdly, an eating area; fourthly, a food
21 preparation area; fifthly, a bathroom; sixthly, closet
22 and storage space; and seventhly, to the degree there
23 are children, say, over three or four years of age, one
24 bedroom, one separate bedroom for the children of either
25 sex.

Q So are you saying that the standards as

1 set forth by the State of New Jersey are almost impossible
2 to apply in terms of coming up with a number which would
3 constitute, let's say, the least cost housing size for
4 an efficiency apartment or for a one-bedroom apartment?

5 A That's correct.

6 Q Because it is based upon occupancy?

7 A Well, it's not because it's based upon occupancy.
8 It's because it's a very low figure for occupancy. I
9 mean it's designed as a basic minimum below which one
10 can actually perceive a literal health peril, if you
11 will.

12 Now, I have not done any specific study at this
13 point, but if you are talking, for example, as I believe
14 the standards are, 150 feet for the first person and
15 100 for each subsequent person, this would give you, say,
16 450 feet for a four-person household unit. Now, at most
17 you can construct a one-bedroom unit--

18 Now, for example, if you wanted to build a square
19 or a cube with 450 square feet in it and then allow
20 individual family members to construct little cubicles
21 and things, you could house four people in 450 feet
22 without creating an imminent health or safety problem.
23 But it would not correspond I think to the normal ex-
24 pectations, particularly in a newly-constructed unit.

25 Q Okay. But is it not then true that the

1 standards that you have set forth and established as
2 least cost standards could be, first, lower than those
3 which you have set forth in terms again of the apartment-
4 [REDACTED] context that we--

5 A Not significantly, but slightly.

6 Q And could it be higher and still comply
7 with least cost? A I can't imagine
8 how.

9 Q Well, Mr. Mallach, isn't it to some extent
10 a subjective line that you have drawn at 550 to 600
11 square feet? Couldn't you just as soon as set that at
12 600 to 650 square feet or 450 to 500 square feet?

13 A Not really, there's relatively less room--As long
14 as you are really talking about functional requirements
15 and no more than that, there is not that much room to
16 play around with. For example, if you have a kitchen,
17 now, a kitchen has to do certain things functionally.
18 Now, obviously if you say, for example, that you would
19 like to have an eat-in kitchen as well as a separate,
20 [REDACTED] dining area, that's going to take a good
21 [REDACTED] space. But if you want a kitchen that's going
22 to do everything that a modern American homemaker, male
23 or female, is likely to want to do in a kitchen in terms
24 of food preparation and food storage and related matters,
25 then that is a pretty fine amount of space.

1 So you need a double bed most likely, conceivably
2 two separate single beds. You need to have the double
3 bed separated in such a way. This I would not say is
4 a need, but it's a general desire so that--And this is
5 not trivial. This is the sort of thing that planners,
6 interior designers and planners and government people
7 devote a good deal of attention and time to.

8 Q I am sure they do.

9 A You should be able to situate that bed so that
10 each of the two people using it can get in and out of
11 it without stepping over the other. So that ~~there is~~
12 have a certain amount of clearance on three sides of
13 the bed. Equally you have to have a certain amount of
14 room in the room for clothing storage, dressers, a small
15 closet with hanging hooks or rods as the case may be and
16 so forth.

17 Q And I recognize what you are saying, but
18 don't those items come down to a subjective judgment as
19 to whether or not the area for storage of clothing and/or
20 in private in the bedroom, which could just as
21 well be done in the bathroom, vary depending upon who
22 is looking at it and what standards you are going to use
23 to judge the number that you are going to put in for that
24 particular function?

25 A Until you get to the point where you are talking

1 about taste, if you will, rather than functional re-
2 quirements, they do not vary significantly.

3 Q But functional requirements could have
4 conceivably the unit sizes that the State in its code
5 suggests on a per occupant basis? If you are going to
6 use a functional view of it--

7 A No, unfortunately they do not render themselves
8 to that. For example, if you have 450 square feet, if
9 you have an envelope containing 450 square feet for
10 four people, I don't know how you could construct a
11 workable two-bedroom apartment in 450 square feet, which
12 would have two bedrooms, kitchen area, eating area,
13 social area, bathroom, hall and storage. I don't be-
14 lieve it could be done.

15 Q Could you do it in 550 square feet?

16 A I'd be inclined to doubt it.

17 Q Well, aren't you inclined to doubt it be-
18 cause you are viewing it in terms of certain standards
19 that you have established in your own mind or for the
20 purpose of this report, which standards would not fit
21 into a space of 550 square feet or 450 square feet?

22 A Well, I've reviewed the standards, for example,
23 that go into a one-bedroom apartment unit, 550, 560
24 square feet. And I don't know that there's a great deal
25 of slack in those again in terms of the kind of

1 functional standards that I spoke of.

2 Now, let's say you can juggle a little bit here
3 and there. You could, for example, say that it doesn't
4 matter that one person sleeping in the double bed step
5 over the other and so you put it against a wall and you
6 lose--you save maybe a total of 20 or 30 feet altogether.

7 Q But how about other items? I understand
8 that item. But let's say area to dress or area for
9 recreation or social activities as you define it. Couldn't
10 that area be just as soon 50 square feet with a couch
11 and a little cocktail table in that 50 square feet as
12 well as being 100 square feet having a ten-by-ten living
13 room where you can--

14 A Face your opponent as it were?

15 Q That is right.

16 MR. BUCHSBAUM: Well, isn't the point of
17 what is going on here that the actual level
18 chosen has actually stood the test of time be-
19 cause it has been in use? As I understand Mr.
20 Mallach's testimony, that is the reason he
21 settled on an established level, because it fit
22 with the functions and also at that particular
23 level it had been used and been proven.

24 MR. BUZAK: Well, I got the second part
25 in terms of the fact that it has been taken from

1 the HUD standards and the statement was made that
2 it has produced satisfactory livable units,
3 thousands of them.

4 And then when I got to the functioning
5 of it, I thought that it was not just this
6 standard, but there was a reason behind it,
7 that is, minimum standards based upon livability
8 and functions that were necessary. And that is
9 why these numbers were better; not only because
10 HUD said they were and on the average of looking
11 at all the HUD units and extrapolating from that
12 figure, not only that, because there were
13 functional standards related to that.

14 MR. BUCHSBAUM: Well, as I understood the
15 point, it was combination of factors. And it
16 devolved on the thought that these particular
17 functional standards have been shown to work.
18 And, for instance, if I am characterizing the
19 testimony correctly, a ten-by-ten living room
20 had been shown through the years to work because
21 it has been used. And that is a conservative
22 estimate. Rather than trying to cut another
23 20 feet off the living room, the point was made
24 in the report to stick with a functional level
25 that was modest, but that had been

1 shown to work.

2 Q Well, is that your testimony, Mr. Mallach,
3 that the standards are based upon an examination of that
4 which has worked in the past?

5 A Well, it's a combination of the two. These are
6 standards that have worked in the past. They are
7 standards also which, in turn, are set on functional
8 definitions of uses and use areas which I consider to be
9 reasonable. I don't believe I said that a ten-by-ten
10 living room is a reasonable standard. I'm not sure
11 about that. But be that as it may, these are basic
12 functional standards.

13 Now, one can develop other functional standards
14 and say that these are functional standards that although
15 more modest than the one the HUD M.P.S. are based on,
16 is nonetheless adequate. But I believe for the normal
17 range for family life in a unit without serious con-
18 straint that the functional standards used here are
19 reasonable ones and any significant diminution of
20 would reduce the livability of the unit in a
21 significantly significant fashion. It would not mean that
22 a smaller unit would be an imminent hazard to health and
23 safety.

24 Q But it would mean that a larger unit would
25 not conform to least cost?

1 A That's correct.

2 Q Okay. I am going to ask one more question
3 on that point. The HUD standards that were set forth
4 here were based upon, if I understand your testimony
5 correctly, an extrapolation of the sizes of varying units
6 which HUD has through the years financed or been in-
7 volved with. And the median or average or something of
8 those units results in the figures that you present
9 here. Is that-- A No, not quite.

10 Q Okay. Can you explain what it is then?

11 A The actual figures were based on hypothetical
12 units constructed in our office on the basis of
13 application of all of the HUD standards. The HUD units
14 that we subsequently obtained floor plans of for the
15 purposes of exhibits were consistent with these, but
16 were not the basis for the analysis.

17 Q Okay. So, in effect, this is a model taking
18 into account HUD's standards?

19 A That's correct.

20 So HUD does have standards?

21 HUD has standards for the different rooms that
22 will serve for different functions, for storage space
23 and so on and so forth. You take all of these standards.
24 You sit down at the drawing table and you construct a
25 unit that meets all the standards. And then you find

1 out how many square feet it has.

2 Q Could the standard be any bigger than this,
3 the ultimate result that you come up with?

4 A Well, you can always do something that's bigger
5 than the HUD standards. It's unlikely--Assuming that
6 you apply the HUD standard as such, if they say 100
7 square feet for this you put in 100 square feet for that
8 and so on and so forth, and construct a reasonably
9 efficient, not an optimally efficient, but a reasonably
10 efficient layout, they will be within this range.

11 Q What were they expressed in terms of
12 feet per occupant, feet per bedroom?

13 A A standard in feet for the first bedroom, a
14 standard in feet for the subsequent bedrooms, a standard
15 for combined living room and dining room area. There
16 are various package standards for some total of kitchen,
17 living room and dining room functions, depending on--
18 Well, they treat the functions of food preparation,
19 eating and socializing as being very closely related,
20 create modules for those functions depending on
21 how you break them down.

22 So, for example, there would be one module if you
23 had an eat-in kitchen and a living room. There would be
24 a different module for a serving kitchen and a dining
25 room and a living room and so on and so forth.

1 Q Okay. So it is on those standards from
2 which you extract the figures here meaning that the
3 smallest combination of those factors would result in
4 an apartment with a one bedroom of 550 square feet and
5 the largest being one of 600 square feet?

6 A That's correct.

7 (A recess is taken.)

8 Q One of the last items regarding floor
9 sizes, you mentioned that the floor sizes should be
10 occupancy based and then qualified that by saying varying
11 with the number of bedrooms rather than a single unit
12 requirement. Is it not possible to vary the floor
13 standards by the occupancy, the number of persons that
14 could occupy? A Well, theoretically
15 it would be. From a practical standpoint that creates
16 a rather awesome regulatory difficulty because when a
17 municipality is reviewing a plan submitted by a builder,
18 there is no nexus at that point between the review
19 process and the number of occupants.

20 In terms of single-family detached dwellings
21 standards that you have set forth, does not the
22 lot area size vary with other environmental constraints
23 that the particular piece of property might possess?

24 (A discussion is held off the record.)

25 A There would be sites--or environmental constraints

1 that would make certain areas of sites less suitable for
2 very small lots as discussed here.

3 Q What do you consider very small lots, the
4 50-by-100? A That's correct.

5 Q And what would be the proper handling by
6 a municipality of a lot which has, let's say, an environ-
7 mental problem regarding sanitary sewerage disposal,
8 bad perc and the like?

9 A Well, generally speaking with the exception of
10 extremely good soils for the purpose, developments on
11 50-by-100 lots would require some form of central
12 sanitary sewer system.

13 Q Which would be one constructed either to
14 serve only that particular development or part of the
15 public sewer system? A That's correct.

16 Q And who should bear the cost of the
17 construction of that system if it is only to serve as
18 that subdivision? Again, I am sorry, continuing the
19 question, consistent with least cost housing standards.

20 I think this cost could be borne by the developer,
21 I think it would be reasonable but perhaps not
22 essential for a municipality to share in the cost.

23 Q Now, Mr. Mallach, are you aware of the
24 standards that are established by the Department of
25 Environmental Protection in the State of New Jersey

1 regarding the construction of a package plant or a
2 treatment plant in a particular area?

3 A Not in detail.

4 Q Are you aware that among the requirements
5 is a requirement that there be stream or a stream or
6 streams of a certain volume into which the treated
7 effluent from the plant could be discharged?

8 A No, that would only apply if the nature of your
9 treatment facility involved discharge into a stream.

10 Q What other types of facilities for
11 treating sewerage are there?

12 A Well, there are two distinct types. I believe
13 there is testimony on this. And again I must qualify
14 this by the fact that my familiarity is of a general
15 rather than a detailed technical nature. There are
16 treatment facilities that provide spray irrigation as
17 a means of disposal and that provide discharge in the
18 ground water after lagooning.

19 Q And the Department of Environmental
20 Engineering recognizes both such systems?

21 A That's correct.

22 Q And will accept both such systems, given
23 the proper construction?

24 A That's correct, yes.

25 Q How about in terms of maintenance of

1 those systems? First, are you familiar with any costs
2 of maintenance of those systems?

3 Not specifically, but I understand that they are
4 not significantly different from what might be called
5 traditional systems.

6 Q In terms of operation of that type of
7 system serving a single-family development consistent
8 with the least cost housing concept, who should bear the
9 cost of the operation of that system?

10 A Well, again I don't see any fundamental difference
11 between the single-family houses and the multi-family
12 developments we discussed earlier.

13 Q Okay. And if I remember your answer to
14 that--Maybe I better not try to remember it. What was
15 your answer to that? In terms of that question, if I
16 recall, your answer was it really could be done either
17 way, that it could be run by the municipality and perhaps
18 if there were a number of them an M.U.A. could be created
19 to operate these various treatment facilities or it can
20 be operated by the home owners or residents who are serviced

21 something? A I think the
22 former in terms of some form of M.U.A. operation would
23 be preferable, but I can imagine circumstances where the
24 latter would be called for.

25 Q All right. You would not require, though,

1 a municipality to create such an M.U.A. in order to
2 administer that system?

3 A Not across the board, no.

4 Q Is it your position that a private sanitary
5 sewer system, and by that I mean one that is not run by
6 the municipality and one that is constructed by the
7 developer in conjunction with the development, is that
8 system a viable alternative for any given area in a
9 municipality? A Any area I

10 believe that is suitable for development of higher
11 density housing, yes.

12 Q And what would be the standards to deter-
13 mine those areas which would be suitable for the develop-
14 ment of higher density dwellings?

15 A Well, and in particular reference to least cost,
16 we are talking about areas that have relatively few
17 environmental constraints creating extraordinary develop-
18 ment costs or obstacles. And those would be the
19 significant ones that would apply in this case.

20 In terms--I am sorry. Are you finished?
21 Yes, in this situation.

22 Q In terms of the Borough of Kinnelon, are
23 you familiar with the environmental aspects of the Town
24 in terms of its zoning?

25 A No.

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1 Q With respect to Washington Township,
2 Randolph Township or East Hanover are you familiar with
3 the environmental characteristics of the certain zoned
4 areas within those municipalities?

5 A To some degree in Randolph and Washington Township.

6 Q Okay. With respect to Washington Township
7 specifically, what are you familiar with regarding the
8 environmental aspects of the Township?

9 A I have observed the eastern parts of the Township
10 principally. And this is east of Long Valley. And the
11 area is generally rolling with a good deal of land that
12 is--has little or moderate slope. It appears to be in
13 large part well drained. There is a fair amount of land
14 that's actively farmed.

15 Q Okay. Are you familiar with the soil
16 characteristics or percolation characteristics of the
17 land that you are referring to?

18 A I've looked over it in general terms in the soil
19 survey. I don't remember the specifics offhand. I
20 can refer to that if you would like.

21 Q Well, if it is necessary to answer the
22 question, I think you have to. Maybe I can speed it up
23 a little bit.

24 Are you aware of any impediments to sanitary
25 sewerage disposal in the areas you referred to with

1 respect to Washington Township?

2 A No.

3 Q Now, in connection with Randolph Township,

4 what is your knowledge of the environmental aspects of

5 the Township?

A Well, Randolph

6 Township is more varied, at least the areas that I've

7 seen of it. It ranges from relatively flat areas in

8 the northern part--There are some areas of fairly steep

9 slopes around some of the lakes. It's a very mixed bag,

10 if you will, environmentally and physiographically.

11 Q And the townships should take into account

12 I assume those characteristics I assume in terms of its

13 zoning ordinance?

A That's correct.

14 Q Has the Township in delineating its town-

15 house zones and garden apartment zones taken into

16 account those considerations to your knowledge?

17 A Not significantly, no.

18 Q Are you saying then that the present

19 zoning in Randolph Township has disregarded these factors?

20 I won't say that the zoning has entirely dis-

21 environmental factors. I'll say there is no

22 evidence that the Township has provided zoning for high

23 density townhouse and apartment uses in areas which are

24 environmentally suitable for that. There is--

25 Q Go ahead. I will stop you later.

1 A There is no evidence that in the placement, the
 2 designation, of areas for apartments and townhouses
 3 environmental factors have been taken into consideration,
 4 that aspect of the zoning ordinance.

5 Q And how do you derive that conclusion?

6 A The first conclusion is that the areas in which
 7 apartments and townhouses have been permitted are such
 8 an infinitesimal part of the area of the Township that
 9 they clearly have not identified in any comprehensive
 10 way environmentally or otherwise suitable areas for
 11 multi-family development. If they have, it's not re-
 12 flected in the zoning ordinance. Those areas that have
 13 been zoned for multi-family development are not as far
 14 as I can tell significantly better suited for that pur-
 15 pose than large numbers of other areas in the Township.

16 Q Well, are there other areas in the
 17 Township which are better suited for apartment house
 18 zoning or townhouse zoning?

19 A I have not done such an analysis.

20 Are you aware that there is a sewer ban
 21 of the public sewer system which affects Randolph
 22 Township-- A Yes.

23 Q --and limits the number of connections that
 24 can be made to the public sanitary sewer system within
 25 Randolph Township? A I'm not

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1 familiar with the specific features of the ban.

2 Q Assuming that the ban limits the number of
3 connections that can be made and that at the present time
4 the Authority, the Randolph Township Municipal Utilities
5 Authority, has allocated all the connections that can be
6 made to the public sewer system, what effect does that
7 have in terms of the zoning of townhouses and garden
8 apartments in the area permitted for such units?

9 MR. BUCHSBAUM: Well, in part that is a
10 legal question because under Mount Laurel as
11 explicitly stated in that case lack of sewers is
12 no excuse for not changing the zoning. So that
13 you are asking Mr. Mallach to answer is a legal
14 question about the influence of sewer capacity on
15 zoning. And the Supreme Court has dealt with
16 that question. However, as we are going along
17 here as before, if you can answer the question,
18 feel free.

19 A Well, there is not that much I can add to that
20 I think certainly in identifying sites that are
21 rather that should be zoned for higher density
22 least cost housing, this should take in consideration
23 first if there is going to be additional sewerage
24 capacity at some point, access to lines and extensions
25 or if there is not areas suitable for development on

1 reasonably large scale, to encourage the construction of
2 private facilities. But, in any event, the sewer ban
3 is not a barrier to rezoning.

4 Q In terms of the size of townhouses as you
5 set forth in your study--

6 MR. BUCHSBAUM: On Page 5, now, of the
7 report?

8 MR. BUZAK: Yes.

9 Q What was the minimum size of the unit that
10 you found to be acceptable under least cost standards?

11 A The minimum sizes I cited earlier are applicable
12 to all types of units.

13 Q Okay. So the three-bedroom townhouse unit
14 could range from 850 to 900 square feet in size?

15 A That's correct.

16 Q Now, in terms of Randolph Township--

17 MR. BUCHSBAUM: As a minimum standard?

18 THE WITNESS: Yes.

19 Q Now, in terms of the Randolph Township
20 ordinance, does it provide for minimum floor area

21 for townhouse units? A Yes.

22 Q And is that floor area consistent with
23 your standards? A As I believe I

24 answered a little while ago, it would be adequate for
25 the purposes of three bedroom or larger units, but

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1 would be excessive possibly for one or two-bedroom units.

2 Q Okay. Why do you say possibly?

3 A I shouldn't have said possibly. I should have
4 said definitely.

5 Q Okay. In terms of Washington Township,
6 are there standards conforming to the standards you have
7 promulgated?

8 A Washington
9 Township does not impose minimum floor area standards
for townhouses.

10 Q So, therefore, I would assume that it
11 complies or does it not violate the least cost standards?

12 A In that specific regard.

13 Q That was going to be the rest of my
14 question.

15 A Right.

16 Q Fine. Now, Mr. Mallach, you mentioned an
17 interesting thing on the bottom of Page 5 regarding the
18 width of units, saying that ordinances requiring 18 or
22 foot widths are--

19 A Twenty to 22 foot.

20 I am sorry. What did I say?

21 Eighteen.

22 Q --20 or 22 foot widths are patently absurd
23 in your language, as any visit to any attractive older
24 community will show. And then you go on to cite
25 Philadelphia and Washington, D.C. containing townhouses

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1 that are actively sought after and livable at widths of
2 15 and even 12 feet.

3 In terms of cost are those units that you
4 are referring to within the purchase price affordable
5 by low-income persons?

6 A Well, it varies very widely depending. In the
7 case of Philadelphia certainly the cost of the townhouse
8 will vary more depending on where it is rather than what
9 it is.

10 Q But you cannot give me a number?

11 A Oh, certainly, there are townhouses in Philadelphia
12 that will sell for \$20,000 or less.

13 Q And the condition of those units is that
14 the attractive, livable and actively sought-after housing?

15 A Actively, if it was that actively sought after,
16 it would be more expensive. It varies very widely.
17 There are attractive and livable townhouses in modest
18 working-class areas that are not slums in the \$20,000
19 price range if--

20 And they are--I am sorry.

21 The same townhouses in areas that have some
22 particular positive feature attracting more affluent
23 people will be, of course, more expensive.

24 Q Are there not also units at widths of 15
25 and 12 feet that are in abhorrent conditions?

1 A That's true, as are many units of 20, 22 and 24
2 feet.

3 Q Okay. In terms of the P.U.D. development
4 which you referred to on Pages 7 and 8 of your report,
5 you talk about internal skewing or the mandatory sub-
6 sidation form to provide least cost housing. What does
7 a municipality do, if anything, to encourage internal
8 skewing or mandatory subsidation?

9 A Well, the simplest thing would be to frame an
10 ordinance which would either make it a mandatory con-
11 dition of development in a given zone or alternatively
12 they could frame it in such a way that if not mandatory,
13 it was tied into incentives such as density bonuses and
14 would be attractive to do so.

15 Q And in your opinion would that be con-
16 sistent with the standards as enunciated in the Municipal
17 Land Use Law? And I do not mean that as a legal question.
18 I recognize that you are not a lawyer. I mean it in
19 terms of--

A Didn't we do
morning?

21 We might have, you know. Go ahead.

22 A Again as far as I know the Municipal Land Use Law
23 is silent on this issue.

24 Q You are right. I am sorry. You are right.
25 We went into it before.

1 Now, Mr. Mallach, is there anything in the
2 ordinances or the ordinance of Washington Township re-
3 garding its P.U.D. zone which times the development of
4 different units or structures within that P.U.D. zone?

5 A The ordinance is not explicit about timing. It
6 does require, however, that at least ten percent of the
7 area of a P.U.D. be devoted to commercial, office or
8 industrial uses, which is essentially the same matter.

9 Q Well, isn't the definition of a P.U.D. a
10 development which has not only different types of
11 residential dwellings within it, but also retail, in-
12 dustrial, commercial areas in it?

13 A Well, I believe the definition of a P.U.D. is a
14 development which contains different uses so that it
15 could be single-family or multi-family, but mainly that
16 it's been developed as a single-planned unit as distinct
17 from separate zones. Within that overall umbrella I
18 believe the Land Use Law provides for P.U.D.'s that are
19 purely residential, purely industrial or a mixture.

20 Well, a planned residential development it
21 seems to me would be one that is limited to
22 residential dwellings?

23 A That's correct.

24 Q A planned unit development would be one
25 other than--

A That's not my

1 reading. I believe that's a generic term that includes
2 it all.

3 MR. BUCHSBAUM: You are arguing about some-
4 thing in the Municipal Land Use Law.

5 Q Why are you opposed to a requirement of a
6 ten percent use of a planned development in Washington
7 Township being retail, industrial or office or research?

8 A Again it's not whether I'm opposed to it. It's
9 whether I consider it consistent with the goal of least
10 cost housing.

11 The imposition of that requirement essentially
12 holds the residential hostage on commercial development.
13 Since residential development, particularly multi-family
14 residential development, is something that is in short
15 supply and meets an enormous demand, it could usually
16 be quickly and efficiently filled just by itself. In
17 office development or in this retail development in
18 excess of the neighborhood level is something for which
19 there is substantial supply and less unmet demand, the
20 reason of which is that by imposing such a requirement
21 the pace of development is slowed down. The cost of
22 the development as a result of the slowing in pace is
23 increased.

24 Q But that does not have to be built
25 initially? That could be built at the last ten percent,

1 families could be accommodated in that development.

2 Now, marketing standards indicate that 300 to 400
3 families in itself is able to support roughly speaking
4 the general purpose convenience store such as a Seven-
5 Eleven or a Cumberland Farms store. Now, this certainly,
6 even with ample parking for those people who are in too
7 much of a hurry to walk from their townhouses to the
8 store, would still require say at the most an acre.
9 So that we would be talking about one percent of the
10 site in this case being used for commercial serving the
11 development and the balance would have to be something
12 else.

13 MR. BUCHSBAUM: I do not understand. Do
14 those standards apply to on-site developments
15 necessarily?

16 THE WITNESS: How do you mean?

17 MR. BUCHSBAUM: Are those standards saying
18 that the one acre for commercial has to be on the
19 same site as the residential? The market standard
20 you are talking about?

21 THE WITNESS: Oh, no, I mean if somebody
22 built a Seven-Eleven across the street from the
23 P.U.D., that would presumably--whoever got there
24 first would get the market.

25 Q Mr. Mallach, I want to go into two areas

1 to conclude the deposition. The first goes back for a
2 second to the environmental factors and the zoning
3 ordinances, consideration of them.

4 As a housing expert is there any problems in
5 permitting housing development, be it high or low
6 density, in a flood area or floodway?

7 A Housing development is generally not a good idea
8 in a floodway.

9 Q Okay. Now, how do you define floodway?

10 A Floodway is the area in which the actual flow
11 of water takes place during flooding.

12 Q Okay. And the next area is defined as--

13 A As the flood fringe or flood hazard area. And
14 the two make up the floodplain.

15 Q Okay. Now, how about flood hazard area?

16 Do you find any difficulty in using that for high or
17 low density development?

18 A The flood hazard or flood fringe area can be used
19 for development. In fact, as evidenced by this recent

20 citizens development in Lambertville, it can be
21 te successfully because in a situation like that
22 in all multi-family elevator buildings the ground floor
23 is not used for any actual habitation purposes. So that
24 in the admittedly in this case unlikely event that the
25 flood level would reach that building, there would be

1 no hazard to life or limb.

2 Q So, in effect, you are saying you can
3 construct in a flood fringe--

4 A With appropriate care and careful planning and
5 so on.

6 Q Anticipating the results of a flood should
7 they happen? A Yes, yes.

8 Q But other than that you do not see a
9 problem with the construction in a flood fringe?

10 A I believe you should be selective about it and
11 plan it very carefully. The point is that the flood
12 fringe area does not have the same more or less absolute
13 bar to development that the flood hazard--I'm sorry, the
14 floodway has.

15 Q In terms of the Township of East Hanover,
16 are you familiar with the floodways and the flood
17 fringes within that Township?

18 A No.

19 Q Okay. But I assume that your general
20 [REDACTED] would apply to them also, that is, the develop-
21 [REDACTED] should not take place in the floodway, but could
22 be permitted in the flood fringe?

23 A Yes.

24 Q Also with respect to the environment, was
25 it not the position of the plaintiffs in the Madison

1 case that the way to handle environmental problems was
2 not to prohibit the development therein or require
3 larger lot zoning or the like, but instead to have
4 presented a strict set of standards and restrictions
5 regarding the manner in which development could take
6 place within that area?

7 MR. BUCHSBAUM: Wait a second. Mr. Mallach
8 can answer that one if he feels comfortable with
9 it, but are you seeking to get his position on
10 that issue?

11 MR. BUZAK: Well, I am seeking to know
12 whether he understands that to be one of the
13 positions taken in the Madison case.

14 A That I really don't know.

15 Q The last item I want to speak to you about
16 is the mobile home aspect. I realize that there is a
17 separate expert on mobile homes. But I take it that
18 it is your position that a mobile home should not be
19 prohibited from being erected, brought upon land, within
20 a family zone?

21 A That's correct.

22 Q And that you have no problem as a housing
23 expert that there would be single-family home develop-
24 ment on small lots on which interspaced would be small
25 lots with mobile homes?

1 A None whatsoever.

2 Q In terms of planning concepts to the ex-
3 tent that you are involved with them, and I recognize
4 that you are not a planner, do you see a problem with
5 that? A No.

6 Q In terms of market demand for the units,
7 either single-family units or the mobile home units,
8 do you see an effect on that?

9 MR. BUCHSBAUM: This is getting into a
10 fair amount of detail with respect to mobile
11 homes. And I really prefer that be left to our
12 expert for that subject. I am concerned about
13 questions of market demand and getting into that
14 kind of detail because we do have someone to
15 testify about mobile homes.

16 MR. BUZAK: I am specifically relating it
17 only to the situation where you have what Mr.
18 Mallach advocates in his position paper, which is
19 that you can put mobile homes on lots interspaced
20 with single-family homes or vice versa I suppose
21 depending upon which came first. And I want to
22 know the effect of that on the market.

23 MR. BUCHSBAUM: I thought you were asking
24 a question about the comparable effect between
25 that versus a mobile home park.

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MR. BUZAK: No, no, no.

MR. BUCHSBAUM: If your question simply

is would a mobile home on a single-family plot be marketable interspersed with regular homes--

MR. BUZAK: That is right. And vice versa, would a single-family home be marketable. But the effect on the market of having this interspacing of, you know, your single-family dwelling and the mobile home next to it and the mobile home next to two single-families and three mobile homes or whatever.

A I don't believe there would be a significant issue..

Q Do you know of any areas where that is permitted in New Jersey or been done?

A I can't think of any specific areas. I believe it's not uncommon in parts of South Jersey.

Q But you do not know of any specific areas where that is done? A That is correct.

And in the areas where you think that it done, has it been done consciously, that is, specifically permitted in a zoning ordinance or has it, in effect, been created before the zoning ordinances were even in effect?

A I really wouldn't be able to say.

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1 Q Okay. In terms of Kinnelon's zoning
2 ordinance, is there anything in the Kinnelon zoning
3 ordinance that prohibits mobile homes?

4 A Well, in a nutshell, the minimum floor area
5 requirements prohibit conventional mobile homes. They
6 would permit the very largest of what are known as
7 doublewide mobile homes, but not regular mobile homes.

8 In addition, the language that I quote in my
9 report regarding the condition that, quote, "the design
10 of any building or use will not be so incongruous with
11 the character of the neighborhood as to adversely affect
12 the value of adjacent or nearby properties," end quote.
13 I think given the character generally of the Kinnelon
14 zoning ordinance, I believe were somebody to erect or
15 seek to erect a mobile home on a site, that it's certainly
16 at least possible that this ordinance provision would
17 bar--In addition, of course, the requirement of a garage
18 would be another hinderance because mobile homes do not
19 customarily come with garages.

20 Isn't it your opinion, though, that the
21 erection of a mobile home, and let's take the double-
22 sized unit that would conform to the square footage re-
23 quirement, would not adversely affect the value of the
24 adjacent property? A I believe that
25 it most probably would not. But I'm not sure the

1 Planning Board of Kinnelon Borough would hold that
2 position.

3 Q Okay. And you take that position with all
4 respect without having either made a study yourself
5 or reviewed a study or seen, in effect, or have any
6 empirical data to support that position?

7 MR. BUCHSBAUM: Answer the question, but
8 again we have an expert on mobile homes.

9 MR. BUZAK: But I am referring to the
10 interspacing.

A Yes.

11 Q Now, in terms of Washington Township, they
12 specifically have mobile homes within the Township; do
13 they not? A They have a

14 single mobile home park in the Township.

15 Q Okay. And do they permit mobile home
16 parks in the zoning ordinance specifically?

17 A Outside of the mobile home park--They permit
18 mobile home parks in the zoning ordinance.

19 Q Okay. A There is a
20 mobile home park zone, a single specific location.

21 Q Okay. And would that then comply with the
22 least cost standards that you have set forth?

23 A Well, that mobile home park would provide least
24 cost or approximately least cost housing since the
25 densities appear to be generally reasonable.

1 Q Okay. So in terms of mobile homes and
 2 least cost housing with respect to Washington Township,
 3 would it be your opinion that the Township conforms to
 4 the least cost housing standard with respect to mobile
 5 home parks?

A Well, in that
 6 they have a mobile home park that contributes to it,
 7 the reading of the ordinance, however, indicates that
 8 one would not be allowed to put a mobile home on a
 9 residential lot in Washington Township outside of the
 10 single mobile home park site.

11 Q If a township has a mobile home park site,
 12 is it essential for the purposes of the construction of
 13 least cost housing that it also permit mobile homes
 14 interspaced with single-family detached dwellings?

A I believe so.

16 Q And what is the basis of your opinion in
 17 terms of least cost housing?

A The basis of my opinion is that the two address
 19 somewhat different housing needs, both of which come
 20 the variety of housing needs that a municipality
 21 address. The advantage of being able to locate mobile homes
 22 on individual building lots is that you thereby provide
 23 what is essentially single-family housing in fee simple
 24 ownership of the land and unit at a somewhat lower cost
 25 than you could build conventional single-family housing.

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1 This is I think a fairly significant housing need. The
 2 mobile home park with the whole idea of pad rental and
 3 facilities is more efficient in terms of land use,
 4 but responds I believe to other housing needs, more those
 5 of a somewhat temporary nature.

6 Q Is there anything in the Washington Town-
 7 ship zoning ordinance concerning mobile home parks that
 8 would prohibit the division of that in fee simple to
 9 sell the land upon which the units would be located?

10 A That's an interesting question. There are certain
 11 standards prescribed in the ordinance for a mobile home
 12 park in terms of minimum tract size, frontage, buffers,
 13 what have you, which would not be met by individual
 14 lots or by any single tract if they were sold off. So
 15 from a practical standpoint I don't think you could sell
 16 off the individual lots in fee simple.

17 Q Except does not the townhouse section of
 18 that ordinance and many ordinances provide for both the
 19 minimum tract size, various setbacks and side yard re-
 20 quirements in terms of the tract itself and yet still
 21 permit the division and the selling in fee simple of
 22 the units? A Yes, except--

23 And again this would have to be a question of interpre-
 24 tation, that there is in my judgment a customary inter-
 25 pretation of a mobile home park that does not include

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1 the selling in fee simple of the individual pads.

2 Q If you were to--I am sorry. Go ahead.

3 [REDACTED] But I am willing to acknowledge that this would
4 appear to be a gray area.

5 Q If you were interested in constructing a
6 mobile home park with the concept of selling the units,
7 selling the areas in fee simple, would that not be an
8 argument that you would make in terms of the existing
9 zoning ordinance in the Township of Washington?

10 MR. BUCHSBAUM: You are asking him to pose
11 as an attorney now. This is asking for his legal
12 argument for something that he said would require
13 further study. I really do not think it is a
14 fair question.

15 MR. BUZAK: I am asking him to pose as a
16 potential mobile home tycoon, which is probably
17 as much out of character as--

18 A I would have to review the ordinance much more
19 closely in other areas before making assessment of that.
20 [REDACTED] don't know.

21 [REDACTED] Mr. Mallach, I am disappointed to tell you
22 that I have finished my questioning. I have enjoyed it.

23 MR. BUCHSBAUM: I have a few questions in
24 order to clarify the record.

25

1 mentioned their possible cost implications. Might they
2 not also restrict layout flexibility in site planning
3 and possibly render it more difficult to develop least
4 cost site plans for particular sites?

5 A Obviously the more an ordinance specifies in
6 terms of specific uses of land, in other words, parking
7 spaces, each parking space adds approximately four to
8 500 square feet of paved area between the parking space
9 itself and additional access space that's required. So
10 that certainly would affect the flexibility of site
11 development.

12 Q And finally, you mentioned two forms of
13 waste disposal that would not involve stream discharge
14 and that could be properly operated. These were lagooning
15 and spray irrigation?

16 A Yes.

17 Q Would you also recognize central septic
18 systems and possibly holding tanks as other mechanisms
19 that might be used in the appropriate situations?

20 Yes, each of those has more narrow relevance
21 than the two I mentioned. Central septic systems may be
22 usable in intermediate situations where the gross density
23 may be relatively modest, but too high--or the site
24 planning may be too confined to permit individual septic
25 tanks. Usually without highly suitable soil conditions

1 it would not be an answer for high density development.

2 Holding tanks may be usable in situations where,
3 for example, you have a public sewer system or some
4 other sewer system with limited treatment and carrying
5 capacity, but irregular flows through the system. And
6 a holding tank could be used to discharge flows at points
7 where the demand on the system was lower.

8 So again these are two specific things that may
9 have specific applicability, but would not be generally
10 applicable as solutions to waste treatment. But they
11 would have to be considered.

12 Q Thank you.

13

14 RECROSS-EXAMINATION BY MR. BUZAK:

15 Q With regard to the septic system, the
16 large septic system, is that acceptable to the Department
17 of Environmental Protection as a source of sewerage
18 disposal? A Yes.

19 Q And the holding tank, assuming they are
20 used in conjunction with the public sewer system
21 or a private sewer system with a treatment facility,
22 using it as you stated to discharge at the non-peak
23 hours, non-peak use, is that acceptable?

24 A It's acceptable, though it's preferred as a
25 temporary rather than permanent part of the system.

MR. BUZAK: I have no further questions.

(The witness is excused.)

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

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MORRIS COUNTY FAIR
HOUSING COUNCIL, et al,

Plaintiffs,

vs.

BOONTON TOWNSHIP, et al,

Defendants.

CERTIFICATE

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 of 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: 5/23/79

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