

ML - Morris County Fair Housing Council

5/18/79

v. Beonten Twp

Deposition of Alan Mallach, Cross-examination
by Mr. Mills

p 90

ML0008935

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

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

Plaintiffs,

vs.

BOONTON TOWNSHIP, CHATHAM TOWNSHIP,
CHESTER TOWNSHIP, DENVILLE 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 TOWNSHIP, MORRIS
PLAINS BOROUGH, MOUNTAIN LAKES
BOROUGH, MOUNT OLIVE TOWNSHIP,
PARSIPPANY-TROY HILLS TOWNSHIP,
PASSAIC TOWNSHIP, PEQUANNOCK TOWNSHIP,
RANDOLPH TOWNSHIP, RIVERDALE BOROUGH,
ROCKAWAY TOWNSHIP, ROXBURY TOWNSHIP
and WASHINGTON TOWNSHIP,

Defendants.

DEPOSITION
OF
ALAN MALLACH

Morris Township, New Jersey
Wednesday, April 25, 1979

B E F O R E:

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

KNARR - RICHARDS, ASSOCIATES
CERTIFIED SHORTHAND REPORTERS
OFFICES IN MORRISTOWN & NEWTON

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MORRISTOWN, N.J. 07960 NEWTON, N.J. 07860
539-7150 383-2866

1 Building, Morris Township, New Jersey, on Wednes-
2 day, April 25, 1979, commencing at 12:30 P.M.

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

4 THE PUBLIC ADVOCATE
5 BY: PETER A. BUCHSBAUM, ESQ.
6 For the Plaintiffs.

7 MESSRS. MILLS, HOCK, DANGLER & MILLS
8 BY: JOHN M. MILLS, ESQ.
9 For the Defendant Township of Morris.

10 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

<u>WITNESS</u>	<u>CROSS</u>	<u>RECROSS</u>
ALAN MALLACH		
By Mr. Mills	2	
By Mr. Buchsbaum		76

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

2 CROSS-EXAMINATION BY MR. MILLS:

3 Q Okay. My questioning will primarily
4 center around the course of Morris Township whom
5 I represent. Before that, I would like to have
6 established your area of expertise because I am
7 confused as to what you are going to testify to.

8 MR. BUCHSBAUM: Mr. Mills, before
9 we go into questions, you were present when
10 I discussed the arrangements of paying Mr.
11 Mallach with Mr. Murphy on the record?

12 MR. MILLS: And what were they?

13 MR. BUCHSBAUM: That he would be
14 paid for his time here at \$40 an hour plus
15 proportionately for his travel time to and
16 from Morris Township.

17 MR. MILLS: And is that \$40 an hour
18 the same rate that is being charged to the
19 Public Advocate?

20 MR. BUCHSBAUM: That is our stipula-
21 tion.

22 MR. MILLS: Okay.

23 MR. BUCHSBAUM: And you agree to
24 that?

25 MR. MILLS: I guess I have no choice.

1 Q Mr. Mallach, from what I understand
2 from your first session in the maxi-case is that
3 you are not a planner?

4 A I'm not a Licensed Professional Planner in
5 the State of New Jersey.

6 Q I have your report dated March 12,
7 1979 in which you say it is least cost housing
8 and zoning ordinance provisions.

9 A That's correct.

10 Q And will that then be the limits of
11 your testimony?

12 A With modest additions such as, for example,
13 the supplement dealing with site visits and the
14 like. But any additional work that may be done
15 will be clearly in the context of least cost
16 housing and zoning analysis.

17 Q We do not have to be concerned about
18 the C.D.A. report? A That's correct.

19 Q Or fair share or any of the other
20 factors that are involved?

21 A That's correct.

22 Q Okay. Very good. Well, now, how
23 familiar are you with Morris Township?

24 A I would say moderately familiar.

25 Q Well, what do you mean by moderately

1 familiar? A Well, aside from
2 having driven through parts of the township on
3 various occasions during the past couple of months
4 in preparation for the trial, I have paid two
5 separate visits to different parts of the township.

6 Q Could you give me the dates, please?

7 A Well, the second date was April 4, 1979.
8 I believe the first date was March 6, 1979.

9 Q Well, was it or wasn't it? Not
10 whether you believe it was, but was it or wasn't
11 it?

12 A When I checked my record, my
13 calendar, working backwards, it was not 100 per-
14 cent explicit on that point, but I'm reasonably
certain it was.

15 Q So you made two visits to Morris
16 Township? A That's correct.

17 Q And what was the duration of those
18 visits? A Well, they were in

19 different pieces, but altogether I would say in
20 the two days, I may have spent perhaps three or
21 four hours--No, I think that's excessive--two to
22 three hours in Morris Township.

23 Q And how many hours did you spend on
24 April 4, '79? A I guess about
25 an hour.

1 Q One hour. And how many other towns
2 did you visit on April 4th?

3 A Let's see. I believe six.

4 Q All right. And how did you visit
5 the township? A ~~One.~~ This is

6 specifically with regard to the April 4th visit
7 or generally?

8 Q Yes, okay.

9 A The purpose--

10 Q No, I did not ask you the purpose.

11 I said how did you make the visit, by airplane,
12 by automobile? A By automobile.

13 Q Your automobile, somebody else's
14 automobile? A This was Mr. Bisgaier's

15 automobile, to be specific.

16 Q Okay.

17 MR. BUCHSBAUM: Excuse me. When you
18 say a certain number of townships you
19 visited, you are referring to a number of
20 towns listed on the report?

21 THE WITNESS: That's correct. This
22 is the towns in--

23 MR. MILLS: Yeah, I assume that that
24 is what we were talking about.

25 MR. BUCHSBAUM: Okay.

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Q Now, explain how you did this by car.

A On both occasions, which were both by car, we attempted to look at the different sites that appeared on the zoning map as having been zoned for one or another multi-family use and by so doing, this took us to a variety of different parts of the township.

Q And you are willing to say that in one hour you looked at all of those sites that are zoned in Morris Township?

A No, we spent--We looked at some of them on the first visit, some of them on the second visit. And I believe there may be one site--one or two sites that we still have not visited, but that I will.

Q Well, would you say that that one hour visit on April the 4th which then leaves us possibly two hours on March 6th, was enough to familiarize yourself with Morris Township's area and Morris Township's zoning?

A As I say, with the exception of one or two sites that we have yet to visit, I would say for the purposes of my work, yes.

Q Well now, you qualify it for the purposes of your work. What is the purposes of

1 your work? A Well, to paraphrase
2 what I said to Mr.--I forget his name.

3 MR. BUCHSBAUM: Mr. Murphy?

4 THE WITNESS: Mr. Murphy.

5 A The--

6 Q Well, let us not go back to testi-
7 mony to somebody else.

8 A Well, when it's a repetitive question--No,
9 let me explain.

10 The purpose of my analysis of the zoning
11 ordinance out at the sites was in the context of
12 the provision of the municipality for least cost
13 housing and so it's in that context that I believe
14 that my survey was adequate, again with the excep-
15 tion previously noted.

16 Q And what are they?

17 A That there are either one or two sites
18 remaining to be visited.

19 Q And did you look at all the zones
20 did you say? A No.

21 Q Did you not look at all the zones?

22 A I stated that I looked at those zones in
23 which provision for multi-family housing is made
24 in the language of the ordinance.

25 Q And could you tell me what zones

1 they are-- A These include--

2 Q --by reference to the zoning map of
3 the Township of Morris?

4 A These include four zones: the GR-5 zone,
5 the SC zone, the TH-6 zone and the TH-8 zone.

6 Q All right. So you say you visited
7 the four zones? A Yes.

8 Q The GR-5, the SC, the TH-6 and the
9 TH-8? A Yes.

10 Q Why did you not look at the RA-7,
11 which is single-family detached residences and
12 the B-7, which is single-family detached residences?

13 A Well, these are not multi-family zones, nor
14 are they least cost single-family zones.

15 Q Well, have you not said previously
16 in your report that 50-by-100 lots would be in
17 your opinion part of least cost housing?

18 A That's correct.

19 Q And don't those two zones that I
20 just mentioned provide for that?

21 A No.

22 Q And do any of those two zones I just
23 mentioned provide for two-family residential use?

24 A Yes.

25 Q Which one?

1 A The RB-7 zone.

2 Q But you still did not look at it?

3 A That's correct.

4 Q And for what reason?

5 A That it did not provide for that use under
6 least cost standards.

7 Q Specifically in what respect?

8 A The lot size requirement.

9 Q Well, what lot size are you now
10 referring to?

A I'm referring
11 to 10,000 square feet.

12 Q So that you are saying then that in
13 your opinion a two-family house zone of 10,000
14 square feet with 70-foot frontage is not least
15 cost housing?

A That's correct.

16 Q Okay. Now, let's go specifically
17 then to Morris Township, now, as a whole in
18 relationship to its least cost housing. Are you
19 saying that Morris Township does not provide for
20 least cost housing?

21 A I am saying that--I believe that Morris
22 County provides for very little, if any, least
23 cost housing.

24 Q I think you mean Morris Township
25 when you said Morris County?

A. Mallach - cross

10

1 A Morris Township. The same is true of the
2 county, but that's beside the point.

3 Q You do not consider that the garden
4 apartments in the township and the townhouse zone
5 and the--

6 A I think they have to
be treated separately.

7 Q Excuse me. --and the two-family
8 house zone and the small single-family lot zones
9 do not provide any least cost housing?

10 A Well, I said very little, if any.

11 Q Very little, if any?

12 A Yes, I did not say that none of them
13 provided any least cost housing.

14 Q Do you have any idea of how much
15 acreage is involved in those particular zones?

16 A In some of them, yes.

17 Q All right. Recite which ones.

18 A Okay. With regard to the senior citizens'
19 zone, the SC zone, there is one tract of land that
20 contains, and this is not based on a precise
21 measurement, but an approximate one, roughly six
22 acres. There are three sites zoned for townhouses,
23 either TH-6 or TH-8, which total some 30 to 35
24 acres. Of these, I inspected two. There are to
25 the best of my knowledge no sites zoned and

1 available for development in the garden apartment
2 zone.

3 Q All right. Now, in your statement
4 that Morris Township does not provide for least
5 cost housing, then you are saying what is already
6 built in Morris Township in a way that could
7 qualify for least cost housing does not count on
8 Morris Township's quota for least cost housing?

9 A The point of my answer when I said that
10 Morris County--

11 Q Morris Township.

12 A --Morris Township, I'm sorry, at present
13 does not provide is regarding what opportunity
14 for present and future development exists under
15 the zoning ordinance and the zoning map as they
16 are presently constituted.

17 Q So that you give no credit whatso-
18 ever to what has already been supplied in the way
19 of least cost housing in Morris Township?

20 A I am not familiar with whether any of the
21 housing in Morris Township is least cost.

22 Q Well, if not, then in view of the
23 fact that your one-hour visit on April 4th and
24 apparently two hours on March the 6th, do you
25 think that then that qualifies you to then make

1 any expert decision or opinion concerning Morris
2 Township? A Certainly.

3 Q All right. Now, what do you think
4 or what do you feel or what do you advocate is the
5 amount of least cost housing that should be
6 supplied by Morris Township?

7 A I have no idea.

8 Q Well, if you have no idea, then how
9 can you state that Morris Township does not supply
10 its proportionate share of least cost housing?

11 A Well, when I say I have no idea, that has
12 to be in context. As a developing municipality,
13 Morris Township is subject to the standard
14 established by the Mount Laurel and Madison
15 decisions. Those standards do not specify, as I
16 believe the Madison Court held, formulaic quotas
17 for individual municipalities.

18 So that, in other words, one does not have
19 to know a precise number of units that one wants
20 to see built in order to be able to make a deter-
21 mination as to whether or not Morris Township's
22 zoning provisions are consistent with the
23 standards set by Mount Laurel and Madison.

24 Q Well, then you are saying it makes
25 no difference as to what exists? It is a question

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1 of whether the zoning provides for it?

2 MR. BUCHSBAUM: Before you answer,
3 we are and have provided--

4 MR. MILLS: Wait. Hold it. You
5 cannot testify.

6 MR. BUCHSBAUM: I am not testifying.

7 MR. MILLS: Are you objecting to
8 the question?

9 MR. BUCHSBAUM: I am just trying to
10 put the question in context, which is that
11 we have provided data concerning each of
12 the townships in Morris County which we
13 will rely on at trial. And also in terms
14 of the fair share issues which I think you
15 are getting at, Miss Brooks will be the
16 prime witness.

17 MR. MILLS: Oh, I understood that in
18 the beginning, in my questions. I am just
19 concerned now as to what Mr. Mallach's
20 thought is as to how much should be supplied
21 by Morris Township.

22 Q All right. But understanding that
23 then at the moment, Mr. Mallach, do you have any
24 idea how much vacant land is available in Morris
25 Township?

A I have relied on the

1 D.C.A. study for that purpose.

2 Q You did not make the D.C.A. study
3 yourself? A That's correct.

4 Q You have no idea of the accuracy of
5 the figures in the D.C.A. study?

6 A I believe generally speaking the people
7 involved in that study are competent professionals
8 and that sort of thing and as professionals
9 employed by a reputable State agency, I believe
10 it's likely to be reasonably accurate.

11 Q But you have no idea at all as to
12 its accuracy? A Not from
13 personal knowledge.

14 Q Okay. Of the vacant land, do you
15 know how much of that vacant land is available
16 for development? A The study
17 excluded--

18 Q No, forget about the study. I am
19 asking you. Do you know?

20 A Exactly what do you mean by available I
21 guess is my question.

22 Q Well, I think you perfectly well
23 understand that there can be vacant land in a
24 municipality, but that some of the land may be
25 taken up by other governmental uses. I probably

1 shouldn't say other governmental uses, but other
2 uses such as reservations and State institutions
3 and park lands.

4 A All of that has been excluded from the
5 figures.

6 Q You say from the figures. You mean
7 the figure in the D.C.A. report?

8 A That's correct.

9 Q Okay. But you have no idea your-
10 self?

A From personal investigation?

11 Q Yes. A No.

12 Q All right. And then following that,
13 if there is any vacant land available for develop-
14 ment, you have no idea where it is either; do you?

15 A That's correct.

16 Q And again assuming that there is
17 vacant land available for development, you do not
18 even then know whether or not the land would be
19 buildable; do you?

20 A Well, again the two principal criteria
21 dealing with that fact have already been taken
22 into account and excluded from the total in the
23 D.C.A. study.

24 Q Well, again you keep referring to
25 the D.C.A. study. And I am asking you as a

1 witness yourself.
2 understanding--

A As it's been my

3 Q Now, I do not want your understand-
4 ing. A Let me explain the point.

5 You are asking a question. Let me try to give
6 you a responsive answer.

7 It has been my understanding throughout my
8 professional career and with every other profes-
9 sional with which I dealt that standard references
10 from established governmental sources, whether
11 they be the United States Census or others, can
12 be relied upon. If I want to know the population
13 of Morris County or Morris Township or New York
14 City, I refer to the U.S. Census. I do not go
15 out and count heads. So that--This whole point
16 has to be understood in that context.

17 Q So that you rely then completely
18 upon the D.C.A. study?

19 A For that specific item of information.

20 Q Well, I think we had several speci-
21 fic items; did we not?

22 A No, we did not.

23 Q The amount of vacant land, the
24 amount of vacant land which is available and the
25 amount of vacant land that is available if it is

1 buildable. A No, sir, I was refer-
2 ring and referred from the beginning very explicit-
3 ly to one figure that referred to the amount of
4 vacant land that remained after all public lands,
5 all lands with steep slopes, all lands in flood-
6 plains and all lands in farmland had been excluded
7 from the total.

8 Q All right. And you would then
9 reach different conclusions if it subsequently
10 were proved that the D.C.A. report was inaccurate
11 or incorrect in those areas?

12 A Different conclusions in what regard?

13 Q Well, in regard to what we were
14 talking about as to how much vacant land is avail-
15 able, how much vacant land is buildable.

16 A Well, obviously those numbers change over
17 time.

18 Q All right. Now, I am now referring
19 to your report of March the 12th. Unfortunately,
20 the pages were not numbered, so I numbered them
21 myself. I did not number the title page, but then
22 I started with the first page so that we can find
23 ourselves quickly here. Okay?

24 So going to the first page in your report,
25 okay, you state there that housing standards

1 contain a strong cultural element. And you have
2 attempted to frame, you know, your report here
3 with at least some sensitivity to the suburban
4 orientation of the communities to which it is
5 addressed. What did you mean by that?

6 A What I meant by that is that I focused my
7 attention principally and almost exclusively on
8 housing types of a sort that are characteristic of
9 suburban areas, in other words, single-family,
10 townhouses, garden apartments; secondly, that with
11 regard to the standards for those, I made them as
12 restrictive, in other words, the lowest densities,
13 that I could justify within the least cost
14 standard, recognizing that units could be built
15 of considerably higher density, that multi-story
16 units, three, four, five, ten-story unit develop-
17 ments could be built; that a variety of housing
18 types could be built of higher density, of greater
19 land coverage and so on that are not dealt with in
20 this report.

21 Q Well, isn't the sensitivity that you
22 talked about, the community in which we are in,
23 Morris Township, isn't that what you are talking
24 about?

A That would be one, yes.

25 Q How did you modify for the

1 sensitivity of Morris Township?

2 A Well, for example, as the point is made in
3 that paragraph regarding townhouses, that if I
4 chose to be, say, absolute about least cost
5 standards, I think it's easily shown that perfect-
6 ly livable townhouses can be constructed at
7 densities that are substantially higher than ten
8 units to the acre and that certainly many of the
9 kinds of land use provisions that would be possible
10 at ten units to the acre are not perhaps strictly
11 speaking required.

12 And, in fact, for example, if you talk
13 about something like front yards on townhouses,
14 now, clearly from a standpoint of health, safety,
15 welfare and so on, there is no inherent need for a
16 setback from, say, the sidewalk to the townhouse
17 unit of more than three or four feet involved with
18 a short flight of stairs or the like. On the other
19 hand, in deference to what one might consider
20 suburban character, the standards that I have
21 provided here would make possible a setback of as
22 much as 25 feet from the sidewalk to the front door
23 of a townhouse.

24 Q All right. Now, sticking then for
25 the moment with townhouses, I think in your report,

1 and correct me if I am wrong, you say that you do
2 recommend a standard of ten dwelling units per
3 acre for the townhouses?

4 A Not less than.

5 Q No less than. Does that give room
6 for the 25-foot setback that you are talking about?

7 A Amply.

8 Q Where do you get that standard from?

9 A Which standard?

10 Q That we just talked about, the ten
11 dwelling units per acre.

12 A That standard was based on an analysis of
13 the functional requirements of a townhouse site.
14 In other words, if you are going to build town-
15 houses, you have to provide land for the townhouses
16 themselves, for the front yards or setbacks,
17 rather, for rear yards for the use of homeowners,
18 for adequate parking and for modest buffers and,
19 if possible, a small passive open area. The--

20 Q What do you mean? Excuse me. I
21 thought you were finished.

22 A These uses can be easily accommodated in a
23 development that provides a density of ten units
24 to the acre.

25 Q But in your response, you just said

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1 small open spaces if possible. Doesn't that run
2 contradictory to what you just said? First you
3 say that you can do it and now in your answer you
4 say if possible?

5 A Well, the point is open spaces in a town-
6 house unit is not essential since each individual
7 townhouse is provided with a yard that provides
8 open space for the individual family and since
9 one assumes that an enlightened municipality will
10 provide such park and recreational facilities as
11 is generally considered the obligation of a
12 municipality.

13 However, if the configuration of the land
14 so permits and if it can be done economically, I
15 believe it is a good feature of such development
16 to provide a small open area which can be a sit-
17 ting area where people in the development can
18 gather, which can provide common space for infant
19 play and things of that sort.

20 Q And this can all be done on the ten
21 dwelling units per acre?

22 A Yes.

23 Q But then you said if not, then you
24 think that the municipality should supply that
25 recreational area and the sitting area you are

1 speaking of? A I don't think that's
2 a matter of "if not." I think whatever a developer
3 may be doing on a site, a municipality I believe
4 it is generally accepted should provide recreation-
5 al facilities for the residents of the community.

6 Q You are a housing expert as we
7 established in the beginning. Have you ever
8 designed a townhouse development with ten dwelling
9 units per acre? A I'm not an

10 architect.

11 Q Okay. Have you ever laid one out,
12 let's say, not as an architect, but--

13 A I've laid one out for hypothetical purposes.

14 Q Only for hypothetical. Have you
15 ever supervised the building of one?

16 A I have not.

17 Q You have not. Okay. All right.

18 Okay. Mr. Mallach, at Page 4 of your report,
19 I guess the only way I can reference it would be
20 Paragraph A in brackets, (Subparagraph 2). In
21 talking about cost-generating features, you say
22 there that requirements designed to meet visual,
23 aesthetic goals. These include such requirements
24 as, and you have listed them there, work against
25 least cost housing? A That's correct.

1 Q And how do they do that?

2 A By increasing the cost of the units.

3 Q All right. But are you aware of the
4 fact that our State Planning and Zoning Act states
5 that one of the purposes of zoning in New Jersey
6 is, quote, "a view of conserving the value of the
7 property and to promote a desirable visual environ-
8 ment"? Are you familiar with that?

9 A Yes.

10 Q And how do you relate those two
11 statements then? A This is a sub-
12 ject that was gone into at great length in the
13 Common Defense deposition, so I will try to re-
14 state it in as succinct terms as I can. My point
15 there is that the general objective of visual
16 beauty is certainly something that nobody can
17 quarrel with. The point, however, of these
18 provisions is that they are, first, based on a
19 theory of aesthetics that in my judgment and that
20 of people who in my judgment are serious about
21 aesthetics is spurious, namely that the enforcing
22 of differences between units or between parts of
23 structures and so on is associated with beauty;
24 and, secondly, that whatever the merits of the
25 aesthetic theory underlying these standards, the

1 aesthetic results are clearly not of such order
2 that one can claim that this is a necessary or
3 even a logical reflection of any form of general
4 consensus or generally accepted standard of beauty.

5 Q Well, are you not ~~they~~ suggesting
6 that lower income or least cost housing need not
7 be attractive or that aesthetics need not be
8 considered-- A On the contrary.

9 Q Hold it--on the part of the overall
10 housing of the municipality?

11 A On the contrary. What I'm saying is that
12 these standards, these zig-zag and these no-look
13 alike standards, have no meaningful relationship
14 to aesthetics in any serious way. They are
15 arbitrary.

16 They are based on a judgment as to--an
17 aesthetic judgment that is certainly not any kind
18 of informed consensus. And they do not in them-
19 selves provide beauty and their absence would not
20 preclude beauty.

21 These are no more firmly grounded in any
22 sound aesthetic standards than would be an
23 ordinance provision that would require a ten-foot
24 high Greek god marble statue to be located in the
25 center of the front yard of every house in the

1 subdivision.

2 Q What ordinance requires this Greek
3 god that you are talking about?

4 A No ordinance requires it.

5 Q Okay. A But if an
6 ordinance did, it would be no more or less soundly
7 grounded than these standards in aesthetic
8 principles.

9 Q So that you feel then and this, of
10 course, is your personal opinion, that aesthetic
11 goals are not required at all then in low or least
12 cost housing? A No.

13 MR. BUCHSBAUM: He did not say that.
14 I will let the witness answer. He remembers
15 his testimony.

16 A I did not say that. I believe that
17 aesthetic goals are as important in least cost
18 housing as any other type of housing. I simply
19 state for the third time I believe that these
20 standards do not promote aesthetic goals in any
21 meaningful sense.

22 Q Okay. What aesthetic standards then
23 or goals do you recommend in least cost housing?

24 A Unfortunately, no one has yet been able to
25 come up with a meaningful aesthetic standard in a

1 zoning ordinance. To the best of my knowledge,
2 and this is based on extensive observation of any
3 number of different housing developments over the
4 last many years, the only factor that determines
5 whether a development, particularly a multi-family
6 development, is aesthetically good or better than
7 others is the quality of the architect who designs
8 it. And I know no way to impose that in the
9 zoning ordinance.

10 Q Well, what does he design in it then
11 to solve this question of aesthetics?

12 A He creates a beautiful design based on his
13 training, talent, competence and experience and
14 sensitivity.

15 Q Which according to you does not
16 include any zig-zag standards or any setbacks or
17 any look-alike standards or any requirements for
18 open space? Is that so?

19 A No, again you are missing the point. The
20 point is that if an architect, a talented archi-
21 tect, sits down and designs a building, depending
22 on the site, depending on the nature of the use,
23 depending on a whole variety of factors that may
24 include a variation in the setbacks if it's such,
25 then again it may not. In other words, this is a

1 specific aesthetic judgment that's based in the
2 context of a specific design for a specific site
3 requiring an architect or a builder or an
4 engineer to have a certain variation in setback
5 every number of. That does not in itself make
6 the design better or worse.

7 The same is true in a subdivision or town-
8 house development where there are ordinance
9 requirements that the unit shows significant
10 variation from one another in doors, windows,
11 facades, the like. A well-designed development
12 may have such variations. Then again, it may not.

13 Some of the most awful developments that
14 have come into being in my experience have been
15 those where bad architecture combined with no-
16 look-alike requirements has resulted in a develop-
17 ment.

18 MR. BUCHSBAUM: Before we go on any-
19 more, Mr. Mills, it was my understanding
20 that these subjects were covered in the
21 Common Defense deposition.

22 MR. MILLS: I do not know.

23 THE WITNESS: Extensively.

24 MR. MILLS: I do not know.

25 MR. BUCHSBAUM: And it is also my

1 understanding that this deposition was for
2 the purpose of the mini-trial and specific
3 comments with respect to Morris Township.

4 MR. MILLS: Well, I think these
5 things--

6 MR. BUCHSBAUM: I do not know that
7 I would cut you off, but I would certainly
8 appreciate it if you would direct the
9 questions to--

10 MR. MILLS: I do not think you would
11 cut me off unless you direct the witness
12 to refuse to answer. But that is beside
13 the point I think.

14 These questions that I am raising
15 are going to be very specific as far as
16 Morris Township is concerned when we get
17 to that part of the mini-trial. Unless you
18 have some different interpretation of how
19 this case is going to proceed, let me know.

20 MR. BUCHSBAUM: Well, based on what
21 I understand happened at depositions, it
22 was my belief that these questions of
23 general principles with respect to zoning
24 had already been dealt with in the
25 depositions and that these depositions

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1 were dealing with more specifics.

2 MR. MILLS: Well, I do not think
3 so. And I do not think they have been
4 perhaps as well as I would like them to be
5 or as well as I want them to be as far as
6 Morris Township is concerned. Okay? All
7 right. So let us proceed then.

8 Q On Page 5 of your report, again
9 Paragraph 3, under these cost-generating features
10 you say, "Requirements designed to displace cost
11 onto developers and by extension residents of new
12 housing are cost-generating factors." Is that
13 right? A That's correct.

14 Q Okay. And just specifically what
15 are they? I mean those things, the way you state
16 it there is very general. What are you talking
17 about? A Well, in the first
18 case, this deals very specifically as noted in the
19 report with the discussion in the Madison case
20 about the site improvement costs and in that
21 example, the observation of the Madison Court
22 that the P.U.D. sites in Madison Township appeared
23 to have been selected with an eye towards forcing
24 the developers to bear the burden of expanding
25 infrastructure for the benefit of the community

1 as a whole.

2 The second category is I believe also
3 straightforward. Many municipalities have,
4 particularly when dealing with large-scale develop-
5 ers, imposed requirements whereby the development
6 must take responsibility for a variety of services
7 that are customarily the purview of municipal
8 governments. These add costs specifically onto
9 the development.

10 Q Okay. Morris Township does not do
11 that in its zoning ordinance; does it?

12 A Not to my recollection.

13 Q Well, does it or doesn't it? You
14 studied the township ordinance.

15 A Well, I believe the answer not to my
16 recollection is fairly clear.

17 Q Okay. So that does not then apply
18 to Morris Township then. So then the first ele-
19 ments there, the facility improvements, are you
20 stating then that the developer of least cost
21 housing should not be required to make any of
22 these on-site improvements?

23 A On-site improvements are generally made by
24 a developer, certainly.

25 Q Well, you say then that they

1 should be made by the developer of least cost
2 housing? A On-site improvements,

3 yes.

4 Q Okay. And what is included in there,
5 streets? A Internal streets.

6 Q Only internal streets?

7 A Well--

8 Q How about streets on which the
9 property fronts, if there is no street there?

10 A How can the property front on a street if
11 there is no street there?

12 MR. BUCHSBAUM: Could we go off the
13 record for a second?

14 (The last question and answer are
15 read.)

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

18 (The luncheon recess is taken.)

19 Q Well, we are back on the record.

20 And I had asked you a question which you objected
21 to which I think rightfully so in that I did not
22 make myself clear in that we were talking about
23 infrastructure or facility improvements and we
24 are talking about streets. And I think I said
25 what if the development was not on a street.

1 What I meant was if it is not on a regular,
2 improved street such as a paved street, would you
3 not feel then that that requirement should be
4 placed upon the developer of low cost housing?

5 A Okay. It's a question of degree. This
6 goes back to another issue where I believe in the
7 general deposition I said in looking at sites,
8 trying to decide which are the best sites for
9 least cost housing, clearly the sites that are
10 most accessible to things like streets, sewer,
11 water and so on are preferable. So the difference
12 would be if it's a matter of running a couple of
13 hundred feet to provide frontage or to provide
14 access to a major kind of road, that's a reason-
15 able kind of expenditure. If it's a matter of,
16 say, a quarter of a mile, then it's a highly
17 debatable proposition. And I would not venture
18 to suggest exactly where the break point between
19 them would be.

20 Q If, let's say, it does become a
21 matter of a quarter of a mile, what then?

22 A Well, then it goes back to looking at the
23 overall zoning. If a municipality, for example,
24 has zoned purportedly to provide least cost hous-
25 ing and when one looks at the sites, one finds

1 that they are remote from existing roads and yet
2 there is land that is not so remote from existing
3 roads, that really raises a question of what the
4 zoning is doing. This is the point of the Court
5 in Madison, where the Town had placed in that case
6 P.U.D. zones.

7 Q And what if there is no other land
8 available? Then what?

9 A Then, of course, one does the best one can.

10 Q Okay. So in that case, where it is
11 a matter of necessity, then you do not consider it
12 a cost-generating provision?

13 A That's correct, when there is literally no
14 alternative.

15 Q Right. Where in Morris Township's
16 ordinances are there any of these cost-generating
17 provisions that we are talking about?

18 A That one I am not familiar with any such--

19 Q If I told you there was no such
20 provision, would you agree with that?

21 A I have no reason not to.

22 Q Okay. And I presume that the same
23 thing we are talking about as far as streets are
24 concerned would apply also to water and sewer?

25 A Yes.

1 Q And you would adopt that same, let's
2 say, perhaps a quarter of a mile basis?

3 A I wouldn't want to suggest, you know, a
4 specific amount. I was just giving that for
5 hypothetical purposes.

6 Q Okay. Well, do you think then if
7 it is beyond a quarter of a mile, that the
8 municipality should then bear the cost of a new
9 street and water and sewer?

10 A Well, from a practical standpoint, there
11 is a standard of sorts provided in the Land Use
12 Law which is embodied in some zoning ordinances
13 dealing with the pro rata sharing of such off-site
14 improvement costs, which is often applicable to
15 such situations.

16 Q Well, would you say the same bear-
17 ing then of off-site improvement costs should
18 apply equally to regular housing developments as
19 well as low cost, least cost housing?

20 A It's a grey area. I would think, for
21 example, that if you had a municipality that
22 literally had no developable sites, that could
23 not be developed for least cost housing or pre-
24 sumably, for that matter, for anything else with-
25 out requiring major infrastructure costs and, as

1 is likely, those infrastructure costs benefitted
2 other developers, other landowners and so on in
3 addition to the specific owner trying to build a
4 least cost housing development, then under such a
5 circumstance, a municipality that was actively
6 interested in encouraging least cost housing
7 ought to consider picking up itself that pro rata
8 share of the extension that was attributable to
9 the least cost housing.

10 Q And what if it did not benefit other
11 housing or other properties?

12 A Well, it should still consider it. Obvious-
13 ly, how realistic it would be would be a matter of
14 how much money it would be.

15 Q And if the municipality did do that
16 for the low cost, wouldn't that then be discrimi-
17 nation? A No.

18 Q No. You feel a municipality could
19 spend public funds to extend these facilities to
20 the low or least cost housing and not have to do
21 the same thing for normal housing developments?

22 A I think again without presuming to be a
23 lawyer, I think there is an abundant basis for
24 the use of public funds for support of low and
25 moderate income housing on the basis that it is

1 clearly a public purpose and--and of public value
2 to the community.

3 Q Do you know of any such law?

4 A Well, for example, the Community Develop-
5 ment--

6 Q No, that is not the question. Do
7 you know of any such law?

8 A I am citing a law. Bear with me. Don't
9 interrupt.

10 The Housing and Community Development Act
11 of 1974 which deals with the expenditure of in
12 this case federal funds explicitly requires that
13 the funds be used principally to benefit the
14 housing and living conditions of low and moderate
15 income families and establishes a series of tests
16 which are embodied in H.U.D. regulations to ensure
17 that the funds are used towards that end. This
18 is a program which is, as I am sure you are
19 familiar, Morris County and through the County, a
20 number of County municipalities participate in.

21 Q And that is all very well and good
22 for federal funds. But what if there is no such
23 program?

24 A Well, the point is not
25 whether there is a program or not. The point is
whether it is legal to expend funds for the

1 principal--principally to benefit low and moderate
2 income housing and by extension low and moderate
3 income people. And I think it's a reasonable
4 assumption that if it's legal to spend federal
5 funds for that purpose, it is legal to spend funds
6 from other levels of government. And again I'm
7 not portending to give a definitive legal opinion
8 here, but it seems to be a basis.

9 Q Also under the cost-generating
10 features on Page 4 in Paragraph A-1, you state
11 the requirements here which you say are designed
12 to enhance house value such as basements rather
13 than slabs and extensive parking spaces.

14 MR. BUCHSBAUM: Which page are you
15 on? There is a number on top.

16 MR. MILLS: Okay.

17 A You are referring to Page 2 in my numbering
18 at this point. Is that correct?

19 A I guess I did not see those pages up there.
20 Okay. A Yes, yes, the general section
21 is numbered, even though the individual municipal
22 ones are not.

23 Q Page 2? A Yes,
24 that's correct.

25 Q Now, does Morris Township require

1 basements rather than slabs?

2 A Not to my recollection.

3 Q Does Morris Township require

4 excessive parking spaces? A Yes.

5 Q Morris Township requires excessive

6 parking spaces? A Yes.

7 Q How many do they require?

8 A Two per unit.

9 Q Isn't that what you recommended,

10 two per unit? A No, it is not.

11 Q How many do you recommend?

12 A As I stated, I suggest that 1.5 for garden

13 apartments and 1.8 for townhouses are adequate.

14 Q And what about single-family?

15 A Two in that case.

16 Q Two for single-families?

17 A That's correct.

18 Q So Morris Township is in line as

19 far as single-families is concerned. All right.

20 And does Morris Township have a requirement that

21 they have enclosed garages?

22 A No.

23 Q Okay. And does Morris Township

24 require more open space dedication than bears a

25 reasonable relationship to the needs of the

1 occupants? A In the townhouse zone,
2 yes.

3 Q To what extent?

4 A It requires that 25 percent of the site of
5 a townhouse development must be dedicated for open
6 space.

7 Q And what would be your recommenda-
8 tion? A Well, again as I stated

9 before the lunch recess, within a townhouse develop-
10 ment, strictly speaking, there is no need for
11 dedicated open space. If one felt it was impor-
12 tant, certainly no more than ten percent.

13 Q And I cannot find the page, but I
14 thought that in your report you stated that 20

15 percent was-- A I suggested as
16 a general standard 20 percent, but that is with
17 particular reference to garden apartments.

18 Q So Morris Township is not that far
19 off. And what--

20 MR. BUCHSBAUM: Is that a question?

21 MR. MILLS: Yes, okay.

22 Q Answer it. Is Morris Township that
23 far off? Put it that way.

24 A That's not quite as simple or entertaining
25 as all that. I mean the point is obviously at

1 some point one has to draw a standard. And again
2 as I stressed, the standards that I'm recommending
3 in my report here are not absolute minimum
4 standards. So you can say if it's a little worse,
5 if it's a little more than, that it's not that
6 far off.

7 The point is these points have been drawn
8 well down the line as it were, so the difference
9 between 20 percent and 25 percent is potentially
10 significant. because the 20 percent is already, as
11 I've said, more than strictly speaking required.

12 Q What are the standards that you have
13 reference to? What is the basis for those
14 standards? A The basis for these

15 standards is a very extensive or varied number of
16 sources and practical experience dealing with
17 different aspects of living in these units. The
18 point is and the point that I'm trying to stress
19 throughout this is when you are looking for
20 standards and you are trying to go about this in a
21 rational fashion, you don't pick numbers out of a
22 hat and say 25 or 20 percent or whatever. You
23 look at what a unit, a yard, a housing site, a
24 what-have-you has to do in terms of providing
25 adequate, sound living conditions for its

1 residents and then work backwards from that to
2 looking at questions of numbers. So there are
3 very few firmly-grounded absolute numbers in this
4 business.

5 Q But you just came out with some
6 numbers? A That's correct.

7 Q And we were discussing this--

8 A Yes.

9 Q --about excessive parking spaces.

10 And where did you get those numbers?

11 A Okay, those numbers--And I believe if you
12 look at the Common Defense transcript you will
13 find some specific source references for those,
14 but these are based on literature and available
15 information about the number of cars that people
16 living in different kinds of units, different
17 sizes of units, are likely to have, making some
18 allowance for additional space for visitors and
19 service vehicles.

20 Q Well, then you have no quoted source
21 for this. Is that right? I mean it is something
22 you have-- A You will find in the

23 transcript the specific quoted sources.

24 Q Supposing you give this to me?

25 A The two sources that are referenced for

1 this purpose include the volume entitled Planning
2 and Design Criteria which is by DeChiara and
3 Koppleman; and a New Jersey source entitled, if
4 memory serves, Site Plan Review Guide or something
5 to that effect.

6 Q And who put out this New Jersey
7 Site Plan Review Guide?

8 A The New Jersey Department of Community
9 Affairs.

10 Q Now, along the line here, you also
11 recommended H.U.D. minimum property standards be
12 applicable? A That's correct.

13 Q And these other guides that you
14 mention, are they in conflict with the H.U.D.
15 minimum property standard?

16 A No.

17 Q And aren't the H.U.D. standards
18 nationally established? A Yes.

19 Q But earlier in your report, you
20 recommended that supposedly, you know, the require-
21 ments here be sensitive to the local inhabitants
22 in the area in which, you know, these units are
23 to be constructed?

24 A Yes.

25 Q Would not then there be some

1 deviation from these minimum standards because of
2 that? A No, the local inhabitants of
3 Morris County are not different in those regards
4 from the local inhabitants of any part, for all
5 practical purposes, of the United States in
6 reference to same size. They eat and sleep in
7 roughly the same fashion.

8 Q Well, then your statement then--
9 Let me see if I can find it. I am quoting what
10 should have been Page 1, but is not numbered, the
11 first unnumbered page of your report where you
12 say, in essence, recognizing that housing standards
13 contain a strong cultural element, we have
14 attempted to frame those presented here with at
15 least some sensitivity to the suburban orientation
16 of the communities to which it is addressed.
17 That statement then makes no sense in view of
18 what you said?

19 MR. BUCHSBAUM: Maybe I can put this
20 in context because the particular subject
21 of the H.U.D. standards is minimum square
22 footage. And maybe Mr. Mallach can clarify
23 this. As I read his report on Morris
24 County, there was no standard for that
25 particular characteristic in Morris

1 Township.

2 MR. MILLS: I appreciate your
3 willingness to testify here, but I think
4 you completely miss the point also. And
5 if it is going to take all afternoon, we
6 will get back to it.

7 MR. BUCHSBAUM: I object to that
8 remark for the record.

9 A The cultural standards that I referred to
10 and that I have already explained deal with a
11 choice within density ranges of lower minimum
12 densities and more liberal standards than might
13 strictly speaking be required in terms of certain
14 questions of density and land use. In the case
15 of the floor area requirements of H.U.D. that
16 are recommended here, I see no relationship
17 between that and any plausible cultural variations.

18 Q Okay. Okay. Now, turning to your
19 Page 4, you are suggesting, and I guess it is the
20 bottom paragraph, you are suggesting that one
21 acre recreational space could be created for
22 every 40 to 45 units, common amount suitable for
23 small child's play activities. And you are talk-
24 ing about this under standards for detached
25 single-family houses. Where did that standard

1 come from? A This is not being
2 proposed here as an explicit standard.. I'm not
3 advising that a municipality adopt an ordinance
4 that one acre of small child play space be created
5 for every 40 to 45 small lot units. I'm merely
6 suggesting that this is an approach that could be
7 taken towards creating additional open space
8 while maintaining least cost standards in lot size
9 and frontage.

10 Q Well, isn't this recommendation
11 considerably below that recommended by the
12 National Recreation Association?

13 A This is not a recommendation for the total
14 amount of open space in a community, which is I
15 believe what you are referring to. As I stated
16 already, the greater responsibility for provision
17 of open space in a community is that of the
18 municipal government.

19 Q Now, Mr. Mallach, getting back to
20 what we were touching on before about the required
21 parking spaces, on Page 5 of your report, you
22 recommend I believe 1.8 parking spaces per
23 dwelling unit in townhouses?

24 A That's correct.

25 Q Okay. And we went through before

1 how you arrived at that 1.8 parking spaces. And
2 then in townhouses, I believe you recommend 1.5--

3 A In garden apartments.

4 Q In garden apartments, yes, I am
5 sorry. And I am wondering, in making that
6 recommendation, did you take into consideration
7 that in an area like Morris Township which we are
8 talking about now, which is a suburban area, the
9 fact that if both parents are working that live
10 in that housing unit, that two cars would be
11 required, one for the parent that has to commute
12 to a job someplace and another for the other
13 parent who may be working someplace else or may
14 have to take the children to school or to extra-
15 curricular activities?

16 A This is based on what families of the
17 typical-sized distribution that are likely to
18 live in garden apartments and townhouse develop-
19 ments are likely to have in terms of automobiles.

20 Q But you beg the question. We are
21 talking about Morris Township. You stated that
22 you have seen the township. You have traversed
23 the township. A The answer to your

24 question is based on my experience and judgment,
25 families living in Morris Township are likely to

1 have the same number of cars as families of
2 similar size and economic level living in other
3 communities.

4 Q And you have given that deep
5 consideration? A Yes.

6 Q And you are aware of the fact that
7 there is no public transportation in Morris
8 Township? A If memory serves,
9 there is public transportation in a number of
10 locations in Morris Township. You should be more
11 informed.

12 Q Yes, there is a railroad at Convent
13 Station. A There are also a num-
14 ber of bus routes through town.

15 Q The bus routes are on Madison
16 Avenue I believe. But are you aware of the fact
17 that if you live, say, in the western section of
18 Morris Township, you are four to five miles away
19 from those places?

20 A Well, actually that is the case at the
21 moment. The County is proposing a bus route
22 along Route 24. And if there were intensive
23 development of multi-family housing in that area,
24 I don't doubt that that proposal would be imple-
25 mented in short order.

1 Q But that does not exist; right?

2 And you still-- A Well, there
3 are two answers to the question. First, where
4 there is a reasonable prospect of providing pub-
5 lic transportation, it can be provided. One of
6 the advantages of a bus route over a train, for
7 example, is that there is a great deal of flex-
8 ibility in the planning process, especially as is
9 the case in Morris County where you have a county
10 that is taking an active role in providing and
11 extending public transportation services. The
12 second point is in the final analysis, the like-
13 lihood of representative families of a given
14 size and a given economic level of having a given
15 number of cars is independent of, to a large
16 degree, the availability of public transportation.

17 Now, one might be able to argue that if
18 there is no public transportation and no prospect
19 of there being public transportation, it's un-
20 fortunate that such families do not have more
21 cars. But that is another matter.

22 Q And if the public transportation
23 never gets built, what happens then?

24 A You don't have to build public transportation.

25 Q All right. Supplied, if you wish

1 to argue. A I am still saying that
2 is in the final analysis an irrelevant considera-
3 tion, how many cars a family is likely to have.
4 Now, again holding family size and economic level
5 reasonably constant, I mean again the point is
6 you can say that it should not be, but it is.

7 Q I do not understand that, you see,
8 it should not be, but it is.

9 A Whether a given family holding economic
10 level and size constant is likely to have one or
11 two cars or three or four is not dependent upon
12 whether there is public transportation in the area.

13 Q Yes, but we are talking about the
14 reverse, where there is not public transportation,
15 they need those cars.

16 A Not necessarily.

17 Q Not necessarily, okay. So then when
18 I give you the proposition that if the party
19 commutes by the railroad and has to go to Convent
20 Station and lives in the western part of Morris
21 Township, that he would then walk five miles to
22 get to that railroad station? Is that what you
23 are saying? A Obviously that would

24 vary with the individual.

25 Q Okay. Okay. On Page 6, your Page

1 6, now, under F, Standards for Senior Citizens'
2 Housing, you make the statement there that, quote,
3 "There is no particular justification to single
4 out zones for senior citizen housing." Why do you
5 make that statement?

6 A Because if a site is suitable for senior
7 citizen housing, it will almost invariably be
8 suitable for high-density housing for non-senior
9 citizens.

10 Q But don't you think this runs some-
11 what contrary to our again Municipal Land Use
12 Law which states that the municipality can zone
13 to encourage senior citizen housing?

14 A If you will read the rest of that sentence,
15 and I forget the exact phrasing, at standards and
16 densities consistent with other housing. That
17 particular phrase could hardly be quoted in con-
18 tradiction to this statement.

19 Q Well, then if you do not have a
20 senior citizen housing zone, how do you guarantee
21 that it is going to be built for senior citizen
22 housing?

23 A Actually, it's sort
24 of ironic that you should ask such a question
25 because the problem has been the exact opposite,
that because of municipal pressures, the only

1 subsidized housing that is being built in
2 communities such as Morris Township is senior
3 citizen housing. And the problem which has been
4 commented upon by almost everybody concerned with
5 low income housing needs is that no housing or
6 virtually no housing for low income non-senior
7 citizens is being built. I think it is quite
8 safe to assume that given municipal preferences
9 and given the political conditions of New Jersey,
10 that the needs of senior citizens will still be
11 met at least in proportion to their share of the
12 total housing need.

13 Q I do not understand what you mean
14 by that. Would you elaborate on that, please?

15 MR. BUCHSBAUM: Can you?

16 A Well, I thought it was more or less entire-
17 ly self-explanatory, but I will try. What I'm
18 saying is that if you create zones in which senior
19 citizen and non-senior citizen housing can be
20 built, there are many factors operating to ensure
21 that at least a fair share of that, if I can
22 slightly misuse that term, will be for senior
23 citizens rather than exclusively for non-senior
24 citizens.

25 Q But you cannot guarantee that that

1 would occur? A As much as anything
2 in the field of housing, land use, can be guaran-
3 teed, that can be.

4 Q Okay. Well, what difference does
5 it make if you do zone separately for senior
6 citizen housing? Why do you single that out and
7 make the statement in your report there is no
8 particular justification? What difference does
9 it make if you do zone separately for senior
10 citizens? A Because it has been
11 a common practice for many municipalities to zone
12 for senior citizens as a way of singling out that
13 need as one to be met and disregarding the other
14 needs. Now, in the context of that entire section,
15 Section F on Page 6, it's quite clear that my
16 point is, first, that there is a need for senior
17 citizen housing as part of the total and, secondly,
18 that there are reasonable standards for that.

19 However, given the fact that zones suitable
20 for senior citizen housing are also in the main
21 suitable for non-senior citizen housing from a
22 straight land use standpoint, there is rarely any
23 basis for saying this zone should be purely for
24 senior citizens.

25 Q Yeah, but what difference does it

1 make if you do have a separate zone for senior
2 citizens? What is the difference?

3 A Well, leaving aside whether that can legal-
4 ly be done under the Municipal Land Use Law, if
5 a municipality has more than ample land zoned for
6 other uses and has a--such as family low income
7 housing, townhouses, garden apartments, small
8 lot single-family units and the like, then from
9 a practical standpoint it would probably not make
10 a difference. However, from a standpoint of
11 planning and housing standards, such a distinction
12 is not rationally-grounded.

13 Q But then it is purely academic then
14 because you just admitted it makes no difference?

15 A It's not purely academic. I'm saying there
16 are circumstances under which it conceivably
17 wouldn't make any difference, but again given
18 practices that are common in municipal zoning, it
19 could easily as is the case today in many munici-
20 palities, make a difference.

21 Q Well, then couldn't you have the
22 same comment to make then if you zone for a garden
23 apartment zone and you zone for a townhouse zone?
24 Aren't you doing the same thing?

25 A I would certainly argue that if you zone

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for multi-family, that such a zone again except for perhaps unusual circumstances, but as a general rule such a zone should provide either garden apartments or townhouses certainly.

Q And according to you, senior citizens?

A Yes.

Q But you do not make the comment as far as Morris Township is concerned where we have separate zones for townhouses--

MR. BUCHSBAUM: Wait a second.

What exact comment are you talking about here?

THE WITNESS: The first sentence after--

MR. BUCHSBAUM: No, no.

MR. MILLS: On Page 6 of Mr. Mallach's report, Paragraph F, under Standards for Senior Citizens' Housing, he made the comment, quote, "Generally speaking there is no particular justification to single out zones for senior citizen housing."

MR. BUCHSBAUM: What I am trying to understand is are you assuming garden apartment zoning necessarily excludes

1 senior citizens?

2 MR. MILLS: No, no, the question
3 was if he can make that statement under
4 Standards for Senior Citizens' Housing,
5 why does he not make the same under the
6 Standard for Townhouses and Standards for
7 Garden Apartments?

8 A I think it's self-evident. Again, senior
9 citizens, you are dealing with a population group.
10 And there is no rational basis here to single out
11 that such-and-such housing which may be of
12 physically different types should be occupied only
13 by a single population group. Townhouses and
14 garden apartments are uses that differ so that
15 even though I believe there is no particular
16 reason to distinguish, they're nonetheless separate
17 uses, so that it is a legitimate at least in
18 principle distinction to make.

19 Q On Page 10 of your report on the
20 fourth paragraph down, you are talking about
21 fixing the level of overzoning for least cost
22 housing. And you state that it must be done in
23 the context of market demand analysis for least
24 cost and other housing in the community. What
25 community are you talking about there?

1 A In the community, whichever community is
2 analyzing precisely how much rezoning is appro-
3 priate in its process of framing an ordinance
4 that would meaningfully comply with the Madison
5 and Mount Laurel standards.

6 Q Well, then in the case of Morris
7 Township which we are talking about, you are
8 talking about Morris Township then?

9 A Yes, that would be correct.

10 Q Then doesn't that conflict with the
11 whole theory of the eight-county region which the
12 Public Advocate has been stressing there?

13 A No.

14 Q We have then two different standards?

15 A No, the point here is, and this report
16 provides a framework and as stated previously the
17 framework makes clear that, the general level of
18 overzoning in the region should provide between
19 three and five times the amount of land needed to
20 meet the fair share. However, for a variety of
21 reasons, there may be local variations in the
22 pattern of land ownership, the pattern of housing
23 demand and so on which would require either more
24 or less overzoning in order for the fair share
25 that is appropriate for that municipality to be

1 achieved. So that the exact amount of overzoning
2 would take those factors into account. But over-
3 all, it would fit within the regional context.

4 Q Where in your report do you recom-
5 mend this three to five times the amount for over-
6 zoning? A I do not know that it
7 appears explicitly in the report.

8 Q Isn't it a fact that on Page 10 in
9 the sixth paragraph which starts out with the
10 figure one, you, in effect, are recommending 50
11 percent overzoning? A No.

12 Q Well, what are you saying then in
13 Paragraph 1 where you say, "Overzoning must make
14 possible enough housing for families in need of
15 least cost housing, recognizing that many units
16 (generally around 50 percent) will not be occupied
17 by such families."?

18 A Okay. What this means is that one of the
19 reasons for overzoning taken in and of itself
20 requires a factor of two-to-one. If you were
21 merely overzoning just to deal with the fact that
22 approximately half of the units that are likely
23 to be built as least cost housing will not be
24 occupied by the families in need, you would have
25 to overzone by a factor of two-to-one. That would

1 assume that all of the land that you zoned for
2 would be available, readily available on the mar-
3 ket at a reasonable price and that all of the
4 people buying that land would then proceed to
5 build least cost housing on it.

6 So if you had a perfect housing market
7 for least cost, which is an ideal state that
8 clearly does not exist, you would have to zone
9 by--overzone by a two-to-one factor simply to
10 deal with that aspect of it. Now, given these
11 imperfections in the housing market which I have
12 discussed, my conclusion is that a reasonable
13 range for where the zoning would likely to lie is
14 three to five times the amount of land needed to
15 satisfy the fair share. That, however, would
16 vary somewhat from municipality to municipality
17 based on the way the housing market works in that
18 community.

19 Q Well, if I were to suggest to you
20 that there is a greater demand for more expensive
21 housing in Morris Township because of it being a
22 very desirable community, would you then say that
23 this overzoning would have to be increased beyond
24 that three to five times?

25 A Quite possibly, yes.

1 Q And what would the end result then
2 be? A The end result would be that
3 the Township would get some more expensive housing,
4 multi-family, as well as some least cost housing.
5 Q And wouldn't the end result really
6 be just to zone the remainder of the town for low
7 cost housing? A I really can't
8 say.
9 Q In this case, Morris Township, what
10 if that much land is not available?
11 A You do what you can.
12 Q Now, do you have any proof of this
13 point that we are talking about, that three to
14 five times overzoning would actually make the land
15 available to low cost housing and least cost hous-
16 ing? A Again, this is not a
17 mathematical standard. The principles are estab-
18 lished in the Madison decision. And the three
19 to five times represents again a conservative
20 effort to translate the principles that are clear-
21 ly enunciated in that decision into some practical
22 terms. I think it should be apparent that if you
23 argue, for example, that there's no proof that
24 three to five times would achieve the least cost
25 housing, then it should be equally apparent if

1 not more so that anything less would have presum-
2 ably less success in achieving least cost housing.

3 Q Well, other than overzoning, is
4 there any way that a municipality can guarantee
5 that least cost housing will be built?

6 A Well, in certain regards, for example, as
7 I discussed this morning, one subset, if you will,
8 of least cost housing is low and moderate income
9 subsidized housing. A municipality could certainly
10 ly assure provision of some amount of low and
11 moderate income housing by affirmatively assist-
12 ing public housing authorities, nonprofit housing
13 sponsors, by using community development funds or
14 municipal funds for such things as site acquisi-
15 tion or infrastructure extension and a variety of
16 other things.

17 A municipality, furthermore, if it wanted
18 to encourage least cost housing could again
19 affirmatively encourage those developers or
20 builders who agree to provide least cost housing
21 in terms of the same matters. So a municipality
22 that actively wanted to provide its fair share of
23 least cost housing has a large number of resources
24 at its disposal. It need not be limited to the
25 zoning ordinance.

1 Q There are no community funds avail-
2 able in Morris County.

3 A Community development funds?

4 Q Yes, there are no community develop-
5 ment funds available in Morris County for Morris
6 Township.

A I--

7 MR. BUCHSBAUM: That is not a
8 question. That is a statement. This coun-
9 sel objects to it on that basis, but you
10 can ask your questions.

11 MR. MILLS: He started to answer
12 before I finished.

13 Q What I was stating was that there
14 are no community development funds available for
15 Morris Township. Given that fact, how else can
16 Morris Township assist in this least cost housing?

17 MR. BUCHSBAUM: First off, you have
18 noted our general reservation of rights
19 for the record in terms of the record, but
20 in this case, I am going to take the
21 trouble to single out this question because
22 it starts with an incorrect premise. You
23 can answer that if you want.

24 A Okay. There are two or three answers to
25 it. First, I am by no means as certain as

1 counsel, Mr. Mills, that there are indeed no
2 community development funds being made available
3 at present to Morris Township. Secondly, even
4 assuming that's the case, community development
5 funds are provided on an annual basis. And there
6 is the opportunity to obtain funds next year, if
7 not this year. Thirdly, even if the amount that's
8 allocated to the County through which Morris
9 Township would apply for its share is inadequate
10 this year or next year, there are discretionary
11 funds that are made available directly through
12 H.U.D.

13 Indeed, since H.U.D. has a very strong
14 policy concerned with the provision of low and
15 moderate income housing, I believe if Morris
16 Township were willing to undertake a bona fide
17 commitment to use its resources, its good offices
18 and so on affirmatively to encourage low and
19 moderate income housing in the township, I
20 believe that there would be very little difficulty
21 in obtaining funds to at a minimum match costs
22 with municipal funds and quite likely pay for the
23 greater part if not the entirety of the special
24 costs involved.

25 Q And you think that would be legal

1 to do that? A Certainly.

2 Q In Morris Township?

3 A Certainly.

4 Q Can you cite any legal authority
5 for that?

6 MR. BUCHSBAUM: Well, you can answer
7 if you can.

8 MR. MILLS: If he knows, he is mak-
9 ing a statement that the municipality can
10 use money to--

11 MR. BUCHSBAUM: We are talking about
12 a matter that really should be in a brief.
13 Your initial question started with that.
14 And I do not want to see us get sidetracked
15 into matters that we can brief at some
16 point. The witness is testifying as to
17 facts and expert opinions.

18 MR. MILLS: What are you saying?

19 MR. BUCHSBAUM: He can answer if he
20 can.

21 MR. MILLS: Okay.

22 MR. BUCHSBAUM: I am not instructing
23 him not to answer, but we are wasting time.
24 That is what I am saying.

25 A I believe the authority can be found in

1 the Housing and Community Development Act of 1974
2 and the accompanying federal regulations.

3 Q Now, supposing Morris Township does
4 these things that you are talking about to
5 encourage or assist in least cost housing and
6 least cost housing becomes constructed. Is there
7 any way that Morris Township can guarantee that
8 the housing will be always available for low and
9 moderate income people?

10 A Well, if the housing is constructed under
11 a government subsidy program, the matter is not
12 really a problem. For example, if you have a
13 subsidized housing development constructed under
14 the federal Section 8 Program, the commitment of
15 subsidies to that development and the attendant
16 control on the qualifications of who lives in
17 that development can be made by H.U.D. for terms
18 up to 40 years, which although it's not always,
19 is as long a period as is relevant in this kind
20 of situation.

21 When dealing with least cost housing that
22 is not subsidized, in other words, that's built
23 at moderate--built to sell or rent at moderate
24 cost by private developers, the situation is more
25 complicated. There is relatively little

1 experience with this matter. There are a number
2 of approaches that have been discussed, but I'm
3 not familiar with very much actual practical
4 experience over the long haul.

5 Q Well, then you are saying it is your
6 opinion that you see no way then that Morris
7 Township could then ensure itself that if they
8 did encourage and assist in--

9 MR. BUCHSBAUM: This is about the
10 15th time that counsel has mischaracterized
11 the previous statement of the witness.
12 That is not what he said. He talked about
13 subsidy programs.

14 I just wish counsel would not do
15 this. The witness is quite capable of
16 correcting counsel, but I do not see why
17 we have to keep going through it.

18 A What I am saying now--

19 MR. MILLS: Hold everything now.
20 Mr. Reporter, go back and read his answer.
21 And I think you will find you are wrong.
22 because he mentioned federal and H.U.D.
23 first and then after that he said--

24 MR. BUCHSBAUM: Then you made a
25 flat statement--

1 MR. MILLS: Then he mentioned
2 unassisted. That is when I came in with
3 my question. Can you read it back, please.

4 (A discussion is held off the
5 record.)

6 A We are dealing with two types of least
7 cost housing. With regard to housing that's
8 built under a subsidy program, there is no
9 problem with ensuring its continued occupancy to
10 benefit lower income households. With regard to
11 the second type, which deals with that that is
12 not subsidized, there is--it is a more complicated
13 issue.

14 There are techniques to ensure that at
15 least some percentage of the units in a least cost
16 development would be continually occupied by low-
17 er income households. However, as I stated, they
18 are relatively untried, so one can't be certain.
19 So, in other words, it's not that they can't do
20 it at all, but that at least with regard to the
21 unsubsidized units, there is still some uncertain-
22 ty because of the relative newness of the concept
23 and the approaches involved.

24 Q Okay. What is this concept or
25 approach that you are suggesting?

1 A Well, I think that there are a number of
2 possibilities. For example, if, for example, you
3 are talking about a rental development that is
4 initially rented at modest rents and that has
5 been assisted in some fashion, given the general
6 prevalence of rental control, rent leveling
7 ordinances affecting all kinds of housing, there
8 would be certainly in my judgment no serious
9 impediment to a municipality insisting on some
10 form of continued control of rents to assure that
11 the units stayed in the least cost range over
12 time.

13 With regard to sales units, there are a
14 variety of techniques. One point, if a unit has
15 received some form of internal subsidy or assist-
16 ance, from community development funds or other
17 funds, that could be then taken back in the form
18 of, say, a second mortgage on the development on
19 the unit, that if the person sold it, the money
20 could then go back into a pool to subsidize an
21 additional unit elsewhere.

22 There are many techniques. They tend to
23 be complex in housing.

24 The Bergen County Housing Authority,
25 incidentally, is working to apply some of these

1 techniques to its own program of constructing
2 least cost housing where the land is bought with
3 community development funds. Units are construct-
4 ed and sold on that land.

5 Q Okay. Now, I listened very care-
6 fully to what you are saying, but I still want to
7 get where there is no subsidy to this housing.
8 What controls can a municipality possibly have?

9 A Well, okay. As far as the rental develop-
10 ment is concerned, that can be imposed with or
11 without subsidies involved. But with regard to
12 least cost housing generally, I think there are
13 a number of issues. And some of these are made
14 quite clearly by the Court in the Madison case
15 really.

16 First is at least part of the purpose for
17 least cost housing is the provision of filtering.
18 I believe it's understood that not all least cost
19 units will be occupied by lower income people and
20 that to some degree the benefit of generating
21 that construction is by opening up additional
22 existing housing in the community. The second
23 point is that to think of a least cost housing
24 objective as a kind of once and for all thing, we
25 build the units, here they are and that's that

1 in perpetuity, I think is misleading. I think
2 what we are talking about here is an ongoing
3 program of providing housing.

4 As long as housing at all income levels is
5 at short supply, then there will be problems see-
6 ing to it that the less affluent people benefit
7 from the housing. So this has to be seen in the
8 context of a process whereby housing continues to
9 be provided as housing needs exist, as households
10 are formed.

11 Q Are you answering my question that
12 a town cannot protect itself against this type of
13 thing or are you saying something else?

14 A I'm not sure what you mean by protect it-
15 self.

16 Q Well, I said leaving out the
17 absence of any kind of subsidies, whether they be
18 federal, state or local, and a municipality zones
19 for least cost housing and encourages least cost
20 housing, how can the municipality guarantee that
21 this will actually be least cost housing?

22 MR. BUCHSBAUM: Other than rent
23 control? You are talking about single-
24 family houses actually?

25 MR. MILLS: I did not say other

1 than rent control. I said how can they.

2 A This goes back basically to part of the
3 overzoning issue. If a municipality simply zones
4 for least cost housing--

5 (A discussion is held off the
6 record.)

7 Q Did you answer that question or
8 shall we go back to it?

9 A Why don't you read back just the last part
10 of the question.

11 (The second previous question and
12 answer are read.)

13 A --it does so, and the Madison Court clearly
14 understands this point, without the certainty
15 that the units will be used or that the land will
16 be used rather in its entirety for least cost
17 housing. This is part of the purpose for over-
18 zoning.

19 You have to recognize or accept that some
20 of the housing built in a zone that permits least
21 cost housing will not be least cost and, further-
22 more, that some of the housing that may be least
23 cost will be occupied by families who could
24 afford more expensive housing. This is why the
25 whole thing has to take place within the market

1 demand. The only exception for this, of course,
2 is where one has affirmatively gone about promot-
3 ing subsidized housing.

4 Q Well, we prefaced the whole question
5 leaving out the subsidy.

6 A Okay.

7 Q I did not get from your answer then
8 that there is any real control that a town can
9 enforce that would then protect against this low
10 cost housing either being built or if it is built
11 and occupied to continue to be occupied?

12 A To some degree. That's the point of over-
13 zoning.

14 Q Is the municipality the only one
15 who should be involved in low cost housing?
16 What I have reference to is the State of New
17 Jersey where the State owns in a number of munici-
18 palities State-owned land. Should not the State
19 also be required to use that for low cost housing
20 or least cost housing?

21 A Well, this goes somewhat far afield. I
22 think it is an interesting question.

23 Usually the land that the State owns is
24 used for a very particular purpose. It's a park.
25 It's an institution. And it may or may not be

1 amenable for use for housing.

2 On the other hand, I would certainly think
3 it desirable to the degree that the State owns
4 land that it can be used for housing, least cost
5 housing in particular, and that is not needed for
6 other purposes, that it could be used for develop-
7 ment of least cost housing.

8 Again, in the final analysis, and I think
9 Madison is very clear on this point, too, the
10 principal obligation of the municipality is to
11 make the opportunities available for private
12 organizations, be they developers, builders, non-
13 profit housing sponsors, but through its zoning
14 provisions or its overzoning provisions, if you
15 will. But to the degree that the municipality,
16 through use of municipally-owned land or the
17 State through suitably State-owned land contri-
18 buted to that, so much the better.

19 Q One final question: It is my
20 opinion that the only real and practical way to
21 solve the whole problem of least cost housing for
22 low and moderate income families is for the State
23 to come in and do it on a state basis where the
24 State can provide the funds and infrastructure
25 and all of the requirements. Do you agree with

1 that or not? A I don't think so.

2 There are a lot of factors involved.

3 I think in terms of providing really low
4 income housing, that a low income person,
5 typically defined as people earning 50 percent or
6 less of the median income in the area, can really
7 afford has got to have some kind of subsidation
8 involved. And from a practical standpoint, even
9 though there are ways that a municipality can
10 help a project along, if you will, the amount that
11 is really needed is beyond a municipality's
12 resources to provide on its own. And if it's
13 going to be built in any large numbers, probably
14 the only place the subsidies are really going to
15 come from is the federal government.

16 Now, that doesn't mean that least cost
17 housing doesn't benefit some significant popula-
18 tion groups. And again this is what the Madison
19 Court comes back to, that to the degree that there
20 are subsidies that can be made available, heaven
21 knows they should be used. And to the degree
22 that you can get the state and federal governments
23 to move towards meeting housing needs, they should
24 do so.

25 But since that's unpredictable, the Court

1 finally concluded that in the here and now one
2 had to at the municipal level provide the oppor-
3 tunity for least cost housing because that was
4 the closest that could be got to, that goal.

5 Q But now you are stating what you
6 felt that the Court said. But my question was or
7 my question is do you agree or disagree that
8 isn't really it the only practical way, for the
9 State to come in and do it?

10 A In regard to low income housing, as you
11 say, state and federal, perhaps, but in terms of
12 full spectrum of housing needs--I mean if housing
13 in a given area, say, is at present being built
14 for prices, say, at \$80,000 and up, say, and
15 through zoning for least cost housing, one could
16 produce a fair amount of housing that people could
17 buy, say, for \$45,000 or \$50,000 or whatever,
18 that's not low income housing. But it does bene-
19 fit some people who are not otherwise being bene-
20 fitted. And through filtering, as the Court goes
21 into in great detail, it would facilitate other
22 people improving their housing elsewhere. So it's
23 not either/or really.

24 Q All right. Now, weren't you the
25 author of this book, Housing and Suburbs?

1 A Yes.

2 Q Okay. You were cited in here as
3 being the author. And on Page 124, you made a
4 recommendation. And I will read it. It says,
5 this is your recommendation, "The creation of a
6 New Jersey community facilities agency empowered,
7 one, to sell bonds for the construction of new
8 community facilities and infrastructure and to
9 provide financial support independent of use sur-
10 charges and municipal contributions for the repay-
11 ment of the bond; and, two, to administer a pro-
12 gram of state assistance to meet the operating
13 costs in the municipalities." And the rest of it
14 I do not think makes too much difference.

15 Now, that was your position when you
16 authored this report; wasn't it?

17 A That was the position of the County
18 Municipal Government Study Commission.

19 Q Well, I believe that on Page II it
20 says that the principal author of this report was
21 Alan Mallach. Are you Alan Mallach?

22 A Yes.

23 Q So you now are denying making that
24 recommendation?

25 A No, I am merely pointing out what I believe is a significant

1 difference.

2 Q Isn't that statement contrary to
3 what you just said, that it should be the
4 municipalities that supply this--

5 A Not necessarily, I think you have to look
6 at the context of that statement and the straight
7 meaning of that statement. That deals with and
8 the clear context of that statement is to deal
9 with the kinds of major facilities that are the
10 byproduct of large-scale growth. I think it's
11 important to bear in mind also that when that
12 report was written, New Jersey had not yet enter-
13 ed into its leveling off process in terms of
14 rapid growth, population growth and development.

15 I still believe that there are undoubtedly
16 many situations in which such State assistance
17 would be valuable and desirable. I did not
18 believe, however, and this is I think the distinc-
19 tion, that it would be impossible to achieve
20 respectable housing goals without such assistance.

21 MR. MILLS: I have no further
22 questions.

23
24 RECROSS-EXAMINATION BY MR. BUCHSBAUM:

25 Q I just want to ask you one question.

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

MORRIS COUNTY FAIR HOUSING :
COUNCIL, et al,

Plaintiffs,

vs.

CERTIFICATE

BOONTON TOWNSHIP, et al,

Defendants.
- - - - -

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: 5/18/79

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