

ML - Morris County Fair Housing Council  
v. Brenton Twp.

6/11/79

Deposition of Alan Mallach - direct  
examination by Mr. Kenihan

p19  
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ML 000900S

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,

ML000900S

DEPOSITION OF:  
ALAN MALLACH.

Plaintiffs,

-vs-

BOONTON TOWNSHIP, CHATHAM TOWNSHIP,  
CHESTER TOWNSHIP, DENVILLE TOWNSHIP,  
EAST HANOVER TOWNSHIP, FLORHAM PARK  
BOROUGH, HANOVER TOWNSHIP, HARDING  
TOWNSHIP, JEFFERSON TOWNSHIP, KINNELON  
BOROUGH, MENDHAM BOROUGH, MENDHAM TOWN-  
SHIP, MONTVILLE TOWNSHIP, MORRIS TOWN-  
SHIP, 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.

B E F O R E:

VICTOR SELVAGGI, JR., a Notary Public  
and Certified Shorthand Reporter of the State of New  
Jersey, at the MORRIS TOWNSHIP MUNICIPAL BUILDING,  
CONVENT STATION, NEW JERSEY, on Wednesday, May 30,  
1979, commencing at 11 a.m.

**KNARR - RICHARDS, ASSOCIATES**

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

THE PUBLIC ADVOCATE  
BY: VERICE M. MASON, ATT'Y.  
Attorneys for the Plaintiffs.

MESSRS. KENIHAN & COHEN  
BY: JAMES M. KENIHAN, ESQ.  
Attorneys for the Defendant  
Jefferson Township.

VICTOR SELVAGGI, JR.  
Certified Shorthand Reporter

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WITNESS

DIRECT

**EMLO**

ALAN MALLACH

By Mr. Kenihan

2

1 A L A N M A L L A C H, previously sworn, recalled;

2 MISS MASON: Initially I would like to  
3 have Mr. Kenihan agree that Jefferson Township  
4 will pay the cost of Mr. Mallach's depositions  
5 here today. That will be \$40 an hour and a  
6 prorata share of his travel expenses beginning  
7 at ten o'clock.

8 MR. KENIHAN: As an incident to the  
9 procedure for taking depositions, we are  
10 required to contribute and we will do so.

11 MISS MASON: Thank you.

12

13 DIRECT EXAMINATION BY MR. KENIHAN:

14 Q Mr. Mallach, I represent Jefferson  
15 Township. Although we may get into some general  
16 discussion, I'm particularly concerned with any  
17 opinions that you have pertaining to Jefferson Town-  
18 ship. I'm not going to go into any preliminary  
19 instructions because you have been through this before.

20 First of all, with reference to your background,  
21 not as a planner, but as an individual engaged in  
22 planning, can you tell me what types of clients you  
23 have represented in the past, what categories of  
24 clients you have represented in the past?

25 A I've had a fairly wide cross section of clients

1 including governmental agencies at the Federal, State  
2 and local levels, developers, corporations engaged in  
3 development and non-profit civic organizations.

4 Q And you have been engaged by them for  
5 what purposes?

6 A Well, the purposes  
7 vary, of course. They generally fall into three or  
8 four areas. One has to do with housing activities of  
9 different sorts. This is actually to attempt to develop  
10 housing or to provide technical services in support of  
11 a housing development. For example, a market study or  
12 feasibility study or cash flow analysis or something  
13 of that nature.

14 The second area would be studies or activities  
15 relating to zoning, often, although not entirely with  
16 regard to litigation.

17 A third area would include economic planning,  
18 research analysis. This will include economic impact  
19 studies and the like; and the fourth area would be  
20 social research, social surveys, community studies,  
21 community needs and the like.

22 Q Have you specifically ever been engaged  
23 by developers or public agencies for the purpose of  
24 drawing up plans for construction of housing?

25 A I'd have to say a qualified yes. I mean, I'm  
not an architect, so the actual design of the buildings

1 would not be within my purview. What I have done has  
2 been to develop what one might call a program for  
3 housing. For example, I've looked at a site, evaluated  
4 the ordinances applicable to it. I've evaluated the  
5 various government programs in order to come up with  
6 a concept that might include the type of housing, the  
7 number of units, the bedroom mix, the proposed rents  
8 or sale prices and things of this sort and then  
9 essentially come up with a package that is then given  
10 to the architect to do the actual design.

11 Q Have you ever been charged with the  
12 obligation of preparing or drafting a zoning ordinance  
13 for a municipality? A No.

14 Q Now, in your considerations with reference  
15 to the zoning of a municipality, have you given any  
16 consideration toward the environmental aspects of a  
17 particular region? A Well, it would  
18 depend on the context. Do you mean in terms of my  
19 specific analysis for this case?

20 Q You have done what type of analysis  
21 relative to Jefferson Township?

22 A With regard to Jefferson Township, at this  
23 point the only analysis I have done has been to review  
24 the zoning ordinance in light of least cost housing  
25 standards.

1 Q All right. Now, you have prepared a  
2 certain report which I don't have before me, but it  
3 was several pages, as I recall it.

4 As regards an evaluation of least cost housing,  
5 do you consider at all the environmental aspects of  
6 the municipality, of Jefferson?

7 A No.

8 Q Why not? A Because the  
9 standards for least cost housing essentially are  
10 independent of the possible environmental constraints  
11 that may exist on certain sites or certain locations  
12 for the Township. Clearly the environmental constraints  
13 that affect certain areas are relevant when a town sits  
14 down and identifies which areas should be zoned for  
15 what or which are the most suitable sites for least  
16 cost housing as distinct from other uses, but the  
17 basic least cost standards are themselves not affected  
18 by those environmental constraints.

19 Q All right. When you talk about least  
20 cost housing, what elements are you specifically  
21 considering?

22 A Okay. There are  
23 at least three elements. One is the availability of  
24 a wide variety of different housing types. In other  
25 words, single family houses on small lots, garden  
apartments, townhouses and so forth.



1                   Second, the absence of unnecessary cost  
2                   generating provisions or exactions as I believe the  
3                   **Madison** case referred to them; and thirdly is that  
4                   the basic standards governing these uses in the  
5                   ordinance be such that one can build, as the court  
6                   said, the least cost housing consistent with health  
7                   and safety.

8                   Q           And you feel that environmental considera-  
9                   tions play no factor at all in any of those particular  
10                  elements, either individually or jointly?

11                 A           Environmental considerations play no role in  
12                  the standards themselves. They play a role in finding  
13                  the fit between a set of standards and particular sites.

14                 Q           Have you reviewed at all any environ-  
15                  mental factors relative to Jefferson Township?

16                 A           No.

17                 Q           In any of the studies that you have done  
18                  preparatory to this suit were for your anticipated  
19                  testimony?                                   A           No.

20                 Q           All right. Do you, as a part of your  
21                  analysis, get into the other aspects, such as trans-  
22                  portation, availability of energy, factors such as  
23                  that as regards least cost housing?

24                 A           Well, I'd have to answer that in a multiple  
25                  fashion. I do look, generally speaking, at the trans-

1 portation systems in the County and in the towns.  
2 Again, that does not affect the definition of least  
3 cost housing or the evaluation of the ordinance as  
4 such. It may have a bearing when the time comes to  
5 decide the degree or the nature of the remedy for an  
6 invalid ordinance.

7 Q All right. In order to be able to  
8 determine what least cost housing is as regards  
9 Jefferson Township, must you not of necessity know  
10 the transportation problems, the water problems, the  
11 sewerage problems in order to determine exactly what  
12 is the norm, if there such a thing for least cost as  
13 it relates to Jefferson Township?

14 A No.

15 Q Why not? A Well, again  
16 it goes back to the distinction I made earlier. There  
17 are a set of standards. Now, if we take townhouses,  
18 we establish a certain net density on a building site  
19 that is appropriate for townhouses. Assuming that  
20 <sup>are</sup> there/sites in Jefferson Township where environmental  
21 factors are not so overwhelming as to make that density  
22 impossible, and I know of no reason why that should not  
23 be the case, those density factors are equally applicable.

24 Now, when you get into factors such as water  
25 supply, sewerage systems and so on, clearly the

1 standards do not dictate the nature of the water  
2 supply or the sewerage system. Clearly those are  
3 going to vary from a practical standpoint from town to  
4 town. The objective would be when applying this to  
5 Jefferson Township to identify sites, locations within  
6 the town for multi-family housing, least cost housing  
7 and so on where the most economical means could be  
8 arrived at for providing water supply, for providing  
9 sewerage treatment that met reasonable standards. The  
10 same would be true for transportation. Clearly the  
11 idea would be to provide sites that would have the  
12 best available transportation linkages relative to  
13 what is available overall in Jefferson Township.

14 Q Are you aware as to whether those  
15 reports, which I assume are being drawn up by the  
16 Public Advocate, by other experts dealing with those  
17 factors such as transportation, water, sewerage, are  
18 going to be provided to you for your use in this  
19 matter or whether your reports are going to be  
20 provided to them so that there is some comprehensive  
21 understanding of exactly what is anticipated to be  
22 required for Jefferson Township as a standard?

23 A Well, obviously the experts, to the best of my  
24 knowledge all the expert reports being prepared for the  
25 Public Advocate are being shared among all of the

1 experts. I've received copies of those reports that,  
2 to the best of my knowledge, represent what has been  
3 done so far.

4 Q All right. Well, the crux of this  
5 action at present is that Jefferson Township has failed  
6 to provide for least cost housing and as an aspect of  
7 that I would assume that you had been asked then to  
8 develop an opinion as to what least cost housing is  
9 or should be in Jefferson Township. Is that right?

10 A Again, I would have to go back to the earlier  
11 statement. I've been asked to develop an opinion or  
12 theory as to what least cost housing is. I have not  
13 made a distinction for the reason that I tried to  
14 explain between what that is in one municipality  
15 versus another.

16 Q Let me go over this with you so that  
17 perhaps I'll understand a little better what you are  
18 getting at.

19 You have a schedule in one of your reports that  
20 is, as regards Jefferson -- A There are a  
21 total of three pages there.

22 Q Okay. Now, the first you have under  
23 least cost provisions, number one relates to small  
24 single family detached houses, small lot single family  
25 detached houses and you indicate none, with the smallest

1 lot being 10,000 square feet and that's footnoted.

2 What does the none relate to?

3 A The none relates that there is no provision  
4 under the Jefferson Township Ordinance for small lot  
5 single family detached houses as defined in the  
6 general section of this report.

7 Q That does not say that there does not  
8 presently exist in the Township lots of lesser than  
9 10,000 square feet? A No, it does not  
10 say that. It merely says under the provisions of the  
11 ordinance in effect there is no zoning for that and  
12 no possibility of building it under the ordinance.  
13 There may be prior non-conforming lots, of course.

14 Q Okay. Does the municipality, for lack  
15 of a better word, get any credit under your theories  
16 for the existence of what may now be non-conforming  
17 smaller lots? A Well, I have to  
18 qualify the answer in advance that I am not -- I can  
19 speak to that in terms of my opinion. As to whether  
20 that reflects the position of the Public Advocate in  
21 the case is not necessarily so because I am not, as I  
22 understand it, going to be testifying on behalf of the  
23 Public Advocate on the fair share issue which is  
24 essentially what that relates to. So with that quali-  
25 fication I can give you my personal opinion on that.

1 Q Well, let me ask you this: I'll ask you  
2 your opinion in a second, but I want to preface it with  
3 this. If you are indicating, which I am sure you are  
4 that Jefferson does not provide least cost housing or  
5 a standard for least cost housing, I'm not sure which  
6 at this point, if you do not recognize the existence  
7 of minimum lots of less than 10,000 square feet, are  
8 you not ignoring what the municipality already has?

9 A I think, if I may say so, you are confusing  
10 apples and oranges in a sense.

11 Q All right. A The issue of  
12 a litigation, as I understand it, this is my under-  
13 standing of the entire line of cases in this regard,  
14 is the ordinance or ordinances of a municipality, that  
15 they do or do not meet a body of standards that were  
16 set down in a court. That is one issue. Assuming  
17 that a court finds that an ordinance is not consistent  
18 with the standard set down in Mount Laurel and Madison,  
19 you therefore come into a secondary area, a question  
20 of what, if anything, a municipality is obligated to  
21 do about it and that to my mind is where this question  
22 may arise. It does not arise in the context of the  
23 ordinance. It may arise in the context of what a  
24 municipality's obligations may be.

25 For example, one could argue, I'm not sure I

1 hold this position, but one could argue that if a  
2 municipality already has a substantial amount of  
3 inexpensive modest housing in it, that given an  
4 identical ordinance on its face with a much more  
5 affluent municipality elsewhere, that the obligation  
6 of the more affluent municipality would be more  
7 extensive in terms of remedy and that would be one  
8 issue where that might arise, but it would not affect  
9 the analysis of the ordinance at the first level.

10 Q All right. Now, your same answer would  
11 relate to two family houses. When you say it's not  
12 permitted, you are not talking about what is there,  
13 you are talking about what the present ordinance  
14 permits? A That is correct.

15 Q Now, you have garden apartments under  
16 number four. You have it's permitted in the RM Zone,  
17 but not under least cost standards. Tell me what you  
18 mean by that. A What it means, as  
19 you may recall I mentioned three tests, if you will,  
20 for least cost housing. One being the fact that the  
21 use is permitted, the second it was without exactions  
22 and the third that it was under the least cost  
23 standards consistent with health and safety, so the  
24 RM Zone meets the first test, but does not necessarily  
25 meet either or both of the subsequent tests, so there-

1 fore even though garden apartments are permitted, they  
2 would not be permitted for least cost garden apartments.

3 Q Now, have you broken that down as to  
4 exactly what the deficiencies are?

5 A These would appear on the second and third  
6 pages.

7 Q Okay. Now, you have number six is mobile  
8 homes. It says not regulated in the ordinance, refer-  
9 ence to Chapter 124 in zoning ordinance noted.

10 I'm not sure I understand what you mean by that.

11 A What that means is that the zoning ordinance  
12 appears to incorporate a provision dealing with mobile  
13 homes that appears in another ordinance that had not  
14 been provided to the Public Advocate, at least at the  
15 time I did the analysis, so in other words, in the  
16 absence of that, it was impossible to draw a conclusion  
17 as to the status of mobile homes.

18 Q Okay. You don't also get into the  
19 question dealing with the census or population growth  
20 in township as regards your particular field of

21 analysis? A No. I believe that's  
22 generally in Mary Brooks' scope of her work for the  
23 case. I know her report includes a number of tables  
24 dealing with the relevant census data.

25 Q Now, when you say absence of cost

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1 generating conditions, can you give us an example of  
2 what you are referring to? A Yes. Well,  
3 for example, one type of cost generating provision would  
4 be what are sometimes called aesthetic provisions in  
5 ordinances such as those requiring zig zags or varying  
6 setbacks within single buildings, no look alike require-  
7 ments in single family subdivisions, a requirement, for  
8 example, that single family houses have basements.

9 Q And the element of health and welfare or  
10 health and safety I think you said?

11 A Well, those go to certain things as the basic  
12 features of the zoning ordinance. Minimal floor area  
13 requirements for dwelling units, minimum lot size  
14 requirements say in single family zones, density  
15 standards, frontage, setback standards.

16 Q As regards least cost housing, is it  
17 your position that none of those elements should be  
18 involved in a zoning ordinance per se?

19 A No. It is my position that those elements  
20 should be carefully analyzed so that they be as  
21 ~~much~~ as possible while still consistent with the  
22 health and safety of the occupants of the proposed  
23 housing.

24 Q But are those elements to be considered  
25 based on standards of zoning or based on standards

1 outside zoning concepts? A Well, how  
2 the standards are derived in the first place is  
3 independent of zoning. I mean, then, of course, one  
4 can embody them in the zoning ordinance. For example,  
5 one would try to develop such standards on the basis  
6 of sort of functional requirements, what amount of  
7 land you need to do the things that have to be done  
8 on a site for it to be good sound housing. Then you  
9 work from that to arrive at methods that you could  
10 incorporate in a zoning ordinance.

11 Q All right. Just so I'm clear in my mind,  
12 your opinions and analysis are not projected toward  
13 providing exactly what Jefferson should be incorporating  
14 in the ordinance in specific terms of specifics to  
15 meet your opinion of what least cost housing means?

16 A I'm not sure that's the case. I think the  
17 standards that I present in the general section of my  
18 report are appropriate for incorporation as a basis  
19 for what is incorporated in the ordinances of Jefferson  
20 or any other municipality in the County.

21 Q Why is it necessary to provide for  
22 single family detached units at a lot size which  
23 could be built with attached units at the same density  
24 with lower costs? A Well, I think

25 there are two answers to that. The first answer, of

1 course, is that in the Supreme Court in both the -- I  
2 guess in the Mount Laurel decision in particular and  
3 the Madison decision as well, that this idea of  
4 detached houses on very small lots as a particular  
5 type of housing that should be provided. The second  
6 answer is that within, I guess one might call the  
7 American cultural context, if you will, there is a  
8 particular association of the detached house with  
9 child rearing, and as a desired housing type for  
10 families that are in the child rearing age group as  
11 well as for other families, generally. It's a very,  
12 very highly desired type of housing for a large part  
13 of the population, so that it's appropriate in terms  
14 of meeting the housing needs of the population as a  
15 whole and to provide at least some detached single  
16 family housing at modest standards, as well as the  
17 detached single family housing units at higher  
18 standards that are generally provided amply in most  
19 zoning ordinances.

20 MR. KENIHAN: Excuse me one minute.

21 (There is a discussion off the record.)

22 MR. KENIHAN: I really don't have any  
23 other questions.

24 MISS MASON: Fine.

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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  
BOONTON TOWNSHIP

MORRIS COUNTY FAIR HOUSING COUNCIL, :  
et als, :

Plaintiffs, :

-vs- :

CERTIFICATE

BOONTON TOWNSHIP, et als, :

Defendants. - - -

I, VICTOR SELVAGGI, JR., a Certified Shorthand Reporter and Notary Public of the State of New Jersey certify that the foregoing is 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 this action in which this deposition was taken and further that I am not a relative or employee in this case, nor am I financially interested in this action.

*Victor Selvaggi Jr.*

A Notary Public of the State of New Jersey

Dated: 6/11/79

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