CN - Orgo Farms v. Twp of Colts Neck

March 1984

Trial brief of zoning board of adjustment of twp of Colts Neck

points:

- action denying Π's app for variance was proper
- Colts Neck has no Mt. Laurel obligation to provide for low income housing
  - in alternative, if Colts Neck has obligation, should be able to rezone
- Π should not receive builders remedy

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ORGO FARMS & GREENHOUSES, INC., a New Jersey Corporation and RICHARD J. BRUNELLI,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY
Plaintiffs,	:	DOCKET NO. L-3299-78 PW L-13769-80
-vs-	:	
TOWNSHIP OF COLTS NECK, a Municipal Corporation, and ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF COLTS NECK	:	Civil Action
Defendants	:	
Consolidated with SEA GULL, LTD. BUILDERS, INC.	:	

TRIAL BRIEF OF ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF COLTS NECK

LOMURRO, EASTMAN & COLLINS
Attorneys for Zoning Board
of Adjustment of the Township
Colts Neck
90 West Main Street
Freehold, N.J. 07728
(201) 462-7170

BY: KERRY E. HIGGINS
On the Brief

PROCEDURAL HISTORY

In August of 1978, plaintiffs met with Township officials to request rezoning of what is known as the Orgo tract in order to permit the plaintiffs to build a planned unit development (PUD) thereon. After receiving a negative response, on September 22, 1978, plaintiffs filed an action in lieu of prerogative writ alleging that the zoning ordinance of Colts Neck Township was exclusionary (Docket No. L-3299-80). On July 3, 1979, after a full hearing, the Honorable Merritt Lane Jr. rendered an opinion from the bench declaring the Colts Neck zoning ordinance void for failure to provide for appropriate variety and choice of housing types, including "Least cost housing". Judge Lane ordered the Township to adopt reasonable development regulations in their ordinance providing for least cost housing. The Township was given 90 days within which to comply. Judge Lane declined to grant a Builder's Remedy as plaintiffs failed to exhaust their administrative remedies.

Plaintiffs thereafter made an application for a variance to permit use of their tract as a planned unit development. On September 20, 1979, the defendant-Zoning Board of Adjustment, rejected said application without a hearing. Plaintiffs filed a complaint in lieu of prerogative writ (Docket No. L-6822-79), on October 11, 1979, to review said rejection. On April 24, 1980, the Honorable Patrick J. McGann, Jr. ruled that plaintiffs were entitled to a hearing before defendant-Zoning Board of Adjustment, on the merits of their application. He directed that defendant-

Board of Adjustment, render a decision thereon by August 22, 1980, which date was further extended to September 19, 1980.

Public hearings were conducted on the variance application on May 29, June 12, 17, 19 and 26, July 15, 17, 24, 29 and 31, August 7, 14, 21 and 25. At its meeting held September 18, 1980, defendant-Zoning Board of Adjustment adopted a resolution denying plaintiff's application. Plaintiffs filed a complaint in lieu of prerogative writ (Docket No. L-13679-80) to review this rejection of their application.

In the interim, plaintiff-Township of Colts Neck appealed the decision of the Honorable Merritt Lane, Jr. On October 23, 1979, the Appellate Division granted a stay of the 90 day period for re-zoning pending the appeal. On February 28, 1980, the Appellate Division affirmed the decision of Judge Lane below. On March 12, 1980, defendant-Township of Colts Neck petitioned for certification to the New Jersey Supreme Court, which certification was granted. In February of 1981, defendant's motion for a stay of L-13679-80 pending the Supreme Court decision in Mt. Laurel II was granted by the Honorable Thomas F. Shebell, Jr.

On May 4, 1983, the Supreme Court reversed the decision by the Appellate Division, denied plaintiff's cross-petition and remanded to the trial court for further proceedings in accordance with the principles enunciated in Mt. Laurel II.

On November 28, 1983, a consent order was filed consolidating the two causes of action, Docket No. L-3299-79 and Docket No. L-13679-80.

Defendant-Township of Colts Neck brought a Motion for Summary Judgment on the ground that plaintiffs should be denied a Builder's

Remedy as a matter of law. Plaintiffs cross-moved for the appointment of a Master. Both motions were denied on November 4th, 1983. Defendant-Township of Colts Neck moved for leave to file an interlocutory appeal, which was denied in December of 1983.

STATEMENT OF FACTS

The present case is a consolidation of two actions in lieu of prerogative writ brought by Plaintiff's Orgo and Brunelli against a) the Township of Colts Neck, seeking a judgment:

> "1)Rendering void the existing Colts Neck Master Plan & Zoning Ordinance.
> 2)Directing the Township of Colts Neck to adjust its zoning regulation so as to render possible and feasible least-cost housing (now amended to include Mt. Laurel II standards and remedies).
> 3)Rendering void the exercise of municipal land us regulation over the plaintiff's property, permitting the plaintiffs to commence construction of least-cost housing, consistent with minimum standards of health and safety, at minimum gross densities of eight dwelling units per acre.",

and b) against the zoning Board of Adjustment to review its action in adopting a resolution denying plaintiff's application for variance.

Plaintiff's variance application was denied upon the following grounds:

1. Plaintiffs failed to prove special reasons which would warrant the granting of plaintiffs' application for a variance and that the proposed variance could not be granted without substantially impairing the intent and purpose of the zone plan and zoning ordinance of the Township of Colts Neck. See the Resolution of the Board adopted September 18, 1980, copy of which is annexed hereto as Schedule A hereof, at page 24 Paragraph G.

2. That the scope and extent of plaintiffs' proposed project was such that it could be authorized, if at all, only by the legislative action of the governing body and that for that

reason the Zoning Board of Adjustment lacked jurisdiction to determine the matter, Schedule A hereof page 19 et seq.

3. That plaintiffs' proposed project was a Planned Unit Development (PUD) and as such could be authorized only in compliance with the statutory provisions providing for such developments, and that in the absence of such compliance the Zoning Board of Adjustment lacked jurisdiction over plaintiffs' application, Schedule A hereof, page 20 et seq.

The facts found by the Zoning Board of Ajdustment, its conclusions and determinations are all fully set forth in its aforesaid Resolution, Schedule A hereof.

A tiny sliver of Colts Neck is located in a growth area. This classification is arbitrary and capricious. The proper placement of the growth line is along a natural ridge which divides waters draining into and away from the Swimming River Reservoir. Colts Neck is predominantly rural in nature. The Monmouth County Growth Management Plan properly refines the State Development Guide Plan by moving the line depicting growth area westward along this natural ridge. The reasons for such movement include the need to protect the integrity of the Swimming River Reservoir, the desire to preserve the agricultural uses which predominate in Colts Neck, the desire to curb urban sprawl and the use of Colts Neck as a buffer between two development corridors.

Plaintiff's project is located in the heart of the limited growth area, near the intersection of Routes 34 and 537.

Plaintiff Orgo's new proposal would build 1253 residential units, a 120,000 square foot high rise office complex, a hotel with no less than 100 rooms, a 45,000 square foot low rise office complex and a bus stop area with convenience stores. The project would have on site sewer and water. The sewer package plant is planned for the area south of Route 18.

Their project is inconsistent with sound planning practices and poses an environmental hazard.

Colts Neck has a viable agriculture and equine industry which it seeks to preserve. Over 40% of the township is devoted to agriculture.

During the hearings before the Zoning Board of Adjustment, and the trial before Judge Lane, testimony was elicited concerning the adverse impact of plaintiff Orgo's project on the character and environment of the community. Robert Nelson testified that the existing traffic conditions at Route 34 and Route 537 were already at a poor level of service. The intersection doesn't have the disbursal of traffic that would permit it to operate at a better level of service. An increase in the growth rate will lower the quality of flow through the intersection (8-14-80 TR103-3 to 104).

Plaintiff's expert, Henry Ney, stated that without any traffic improvements, the impact of the PUD would be to reduce the level of service of D. He suggested improvements to county route 537

by way of road widening. However, testimony by Roy Unger, Superintendent of Schools was such that the proposed widening was not practical as the septic system for the Atlantic Elementary School was located in the front yard. Mr. Ney advised that the septic system would have to be moved. (6-17-80 TR pg 36 to 43)

Both Nelson and Ney spoke of the problems of the accessability to the industrial area.

Robert Halsey of the Monmouth County Planning Board and William Queale, the Colts Neck Planner, both stated that plaintiff Orgo's development constituted leap-frog development (7-29-80 TR29 - 20, 7-15-80 TR66 - 7)

Mr. Halsey further stated that the development is contrary to the Monmouth County Guide Plan and would alter the character of Colts Neck (7-15-80, TR66 - 18). It would move development away from development corridors and invite further development in the area, thereby undermining the sound planning design for the overall region. Plaintiff's project is inconsistent with the MCGMP.

Plaintiff's Orgo and Brunelli's project poses a substantial environmental hazard. General William Whipple gave extensive testimony regarding the adverse impact of a development such as that which plaintiff's propose on the Swimming River Reservoir. It will result in an increase in types and quantity of pollutants from cars, garbage cans, pets, etc., as well as having greater run off problems. Even with best management practices, this

pollution cannot be prevented. The waters from plaintiff's project drain into Slope Brook which runs one mile directly into the Reservoir. Defendant's expert, Allen Dresdner, confirmed the adverse environmental impact of plaintiff's project.

Plaintiff Brunelli's project is contrary to sound planning practices.

Plaintiff Seagull Ltd's project is located within the designated growth area as depicted on the SDGP. Colts Neck continues to assert that no part of the Township should be contained in the growth area.

POINT I

The Zoning Board of Adjustment Properly Denied Plaintiff's Application for Variance.

Applications for use variances in this State are made to zoning boards of adjustment under and by virtue of N.J.S.A. 40:55D-70 (the corresponding section of the prior Zoning Act being N.J.S.A. 40:55-39) which in pertinent part provides as follows:

> "The board of adjustment shall have the power to:
>
> "d. In particular cases and for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act, including, but not limited to, allowing a structure or use in a district restricted against such structure or use, but only by affirmative vote of at least five members, in the case of a municipal board, or 2/3 of the fully authorized membership, in the case of a regional board pursuant to article 10 of this act.
>
> No variance or other relief may be granted under the terms of this section unless such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance. An application under this section may be referred to any appropriate person or agency, including the planning board pursuant to section 17 of this act, for its report; provided that such reference shall not extend the period of time within which the zoning board of adjustment shall act."

New Jersey Courts have long taken the view that the spirit

of its zoning law is to restrict rather than increase non-conforming uses.

In Lumund v. Bd. of Adjustment of the Borough of Rutherford 4N.J. 577 (1950) Justice Burling speaking for the Supreme Court at Page 585 of the opinion said:

> "The spirit of the zoning act has been to restrict rather than to increase non-conforming uses, and authority to vary the application of the general regulation should be sparingly exercised. Sitgreaves v. Board of Adjustment of Nutley, 136 N.J. L. 21 (Sup.Ct. 1947). The zoning act does not contemplate variations which would frustrate the general regulations and impair the overall scheme which is set up for the general welfare of the several districts and the entire community. This philosophy has become increasingly prevalent since 1927 and is fortified by the language of the 1948 amendment to the zoning act. It is further strengthened by an amendment to the zoning act in 1949. Se L 1949, c.242."

In Speakman v. Mayor and Council for North Plainfield 8 N.J. 250 (1951) Justice Ackerson speaking for the Supreme Court at page 257 of the opinion said:

> "Moreover, a board of adjustment, when acting in such matters, is governed by the spirit of the Zoning Act which 'has been to restrict rather than to increase non-conforming uses, and authority to vary the application of the general regulation should be sparingly exercised.' Lumund v. Board of Adjustment of the Borough of Rutherford, 4 N.J. 55, 585 (1950).

In Kohl v. Mayor and Council fo Fair Lawn 50 N.J. 268(1967) Justice Proctor speaking for the Supreme Court at page 275 of the opinion said:

> "Variances to allow new non-conforming uses should be gratned only sparingly and with great caution since they tend to impair sound zoning. Grundlehner v. Dangler, 29 N.J. 256, 266 (1959); Beirn v. Morris, 17 N.J. 529, 536 (1954); Lumund v. Board of Adjustment of Borough of Rutherford, 4 N.J. 577, 585 (1950)."

See also Jenpet Realty Co., Inc. v Ardlin, Inc. 112 N.J. Super. 79, 83 (App.Div. 1970) and see Ring v. Mayor and Council of Bor. of Rutherford 110 N.J. Super 441 (App.Div. 1970) cert. den. 57 den. 57 N.J. 125 (1970) cert. den. 401 U.S. 911, 91 S.Ct. 876, 27L Ed 2d 810 (1971) where Judge Lewis speaking for the Appellate Division at page 445 ofthe opinion said:

> In order to maintain the fidelity of the general zoning scheme, a variant use is permitted only in an exceptional case where the justification is clear. See Grundlehner v. Dangler, 29 N.J. 256, 271 (1959). Accord, Sitgreaves v. Board of Adjustment, Nutley, 136 N.J.L. 21 (Sup.Ct. 1947)." (emphasis added).

and to the same effect Nigito v. Borough of Closter 142 N.J. Super 1, 8 (App.Div. 1976).

It has repeatedly been held that zoning boards of adjustment are the proper and best equipped agencies to deal with applications for variance. It ws for this reason that the power and authority to do so was conferred upon them first by the Zoning Act, N.J.S.A. 40:55-39 and currently by the Municipal Land Use Law, N.J.S.A. 40:55D-70. See Kramer v. Board of Adjustment, Sea Girt, 45 NJ 268 (1965) in which the Supreme Court said at page 296:

> "In these highly controversial and oftentimes debatable zoning cases the courts must recognize that local officials 'who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people and are undoubtedly the best equipped to pass initially on such applications for variance.' Ward v. Scott, 16 N.J. 16,23 (1954). Therefore, the law presumes that boards of adjustment and municipal governing bodies will act fairly and

> with proper motives and for valid reasons. Discretionary authority to recommend to the governing body that a variance be granted for 'special reasons' in cases like the present one has been vested in the Board of Adjustment by the Legislature, N.J.S.A. 40:55-39(d); discretionary authority to accept or reject the recommendation has been placed in the hands of the governing body by the same statute."

See also Fobe Asociates v. Mayor and Council of Demarest 74 N.J. 519 (1977) at page 538 of the opinion where Mahler v. Borough of Fair Lawn 94 N.J. Super 173, 185-186 (App.Div. 1967) aff'd 55 N.J. 1 (1969) was quoted as follows:

> "Our cases recognize that there is an area of special discretion reposed in the local agencies within which, in many situations, either the grant or denial of a (d) variance would be judicially sustained. The board of adjustment weights the facts and the zoning considerations, pro and con, and will be sustained if its decision comports with the statutory criteria and is founded in adequate evidence. See Rain or Shine Box Lunch Co. v. Newark Board of Adjustment, 53 N.J. Super. 252, 259 (App.Div. 1958); Yahnel v. Board of Adjustment, Jamesburg, supra, 79 N.J. Super., at p. 519."

In considering variance applications, it is the duty of a zoning board of adjustment to hear, examine and weigh the testimony introduced in support of and in opposition to the application Tomko v. Vissers, 21 NJ 226, 239 (1956); Bierce v. Gross, 47 NJ Super 148, 158 (App.Div. 1957). The Zoning Board of Adjustment acting in its quasi-judicial role may evaluate credibility and accept or reject testimony by witnesses.

The court in Reinauer Realty Corp. v Nucera, 59 NJ Super 189, 201 (App.Div. 1960) stated:

> "The board of adjustment exercises a quasi-judicial function. Schmidt. v. Board of Adjustment of Newark, 9 N.J. 405, 420 (1952). In so functioning, as with other administrative agencies, it has

> the choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal."

See also Betts v. Board of Adjustment of Linden, 72 NJ Super 213, 219 (App.Div. 1962) and Dramer v. Board of Adjustment, Sea Girt, supra page 288.

An applicant for a use variance must satisfy two criteria: first, the "positive" criteria that "special reasons" exist for the variance; second, the "negative" criteria that the variance can be granted "without substantial detriment to the public good" and that the granting thereof "will not substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70, Kohl v. Mayor and Council of Fair Lawn, supra; Fobe Associates v. Mayor and Council of Demarest, supra.

The burden is upon the applicant to establish that both criteria are met Shell Oil Co. v. Zoning Board of Adjustment Shrewsbury 64 N.J. 334 (1974) reversing 127 N.J. Super 60 (App.Div. 1974) substantially for the reasons expressed in the dissenting opinion of Judge Kolovsky, 127 N.J. Super 62 et seq wherein he said:

> "An applicant for a use variance under N.J.S.A. 40:55-39(d) has the burden of establishing (1) that "special reasons" exist for the variance and (2) that the variance "can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance."

and see Weiner v. Zoning Board of Adjustment of Glassboro 144 N.J Super. 509, 516 (App.Div. 1976) where Judge Larner pointed out:

> "It was not the burden of the board to find affirmatively that the plan would be substantially impaired (although it did so in the instant case). It was, rather, the burden of the applicant to prove the converse. See Ring v. Mayork, Rutherford and Council, 110 N.J. Super. 441, 445 (App.Div. 1970), certif. den 57 N.J. 125 (1970), cert. den. 401 U.S. 911, 91 s. Ct. 876, 27 L. Ed. 2d 810 (1971)."

The function of the court in an action in lieu of prerogative writ in reviewing the decision of a zoning board was succinctly stated in Kenwood Associates v. Englewood Board of Adjustment 141 NJ Super 1, 4, App.Div.(1976):

> "[2] It has been emphasized over and over again in the many cases on the subject that the role of a judge in reviewing a local variance determination is solely to ascertain whether the action of the board is arbitrary. He cannot substitute his own judgment for that of the municipal board invested with the power and duty to pass upon the application. Stolz v. Ellenstein, 7 N.J. 291 (1951); Peoples Trust Co., etc. v. Hasbrouck Heights, etc., 60 N.J. Super. 569 (App.Div. 1959).
>
> [3] The action of the board is presumed to be valied. Rexon v. Haddonfield Board of Adjustment, 10 N.J. 1, 7 (1952); Bove v. Emerson Board of Adjustment, 100 N.J. Super. 95, 101 (App.Div.), certif. den. 57 N.J. 125 (1970), cert. den. 401 U.S. 911, 91 S. Ct. 876, 27 L.Ed. 2d 810 (1971). See Cummins v. Leonia Board of Adjustment, 39 N.J. Super. 452, 460 (App. Div. 1956).
>
> [4[In this connection it should be noted that the absence of evidence in support of the denial does not in itself mean that the board's determination is arbitrary. Since the burden rests with the applicant to establish the criteria for the grant of the variance, it must demonstrate that the affirmative evidence in the record dictates the conclusion that the denial was arbitrary."

In Mahler v. Fiar Lawn, 94 NJ Super 173, 185 (App.Div. 1967) aff'd 55 N.J. 1 (1969) the Court held:

> [6,7] Our cases recognize that there is an area of special discretion reposed in the local agencies within which, in many situations, either the grant or denial of a (d) variance would be judicially sustained. The board of adjustment weighs the facts and the zoning considerations, pro and con, and will be sustained if its decision comports with the statutory criteria and is founded in adequate evidence. See Rain or Shine Box Lunch Co. v. Newark Board of Adjustment, 53 N.J. Super. 252, 259 (App. Div. 1958); Yahnel v.Board ofAdjustment, Jamesburg, supra, 79 N.J. Super., at p. 519.
>
> [8] Moreover, as we stated in Cummins v. Board of Adjustment, Leonia, 39 N.J. SLuper 452, 460 (App.Div. 1956), the judicial philosophy of sympathetic approach to local zoning decisions Ward v. Scott, 16 N.J. 16, 23 (1955) is 'even more cogently applicable to a case where we review a denial of a variance than where we review a grant, for generally speaking more is to be feared from a breakdown of a zoning plan by ill-advised grants of variances than by refusals thereof'citing Beirn v. Morris, 14 N.J. 529, 536 (1954). Cf. Wilson v. Borough of Mountainside, 42 N.J. 426, 443 (1964).

In the present case that board made a full and complete exposition of the facts and reasoning for its conclusion that a grant of variance would offend the zone scheme in substantial particulars and that the "special reasons" advanced were not persuasive.

In this case, plaintiffs contend in their pretrial memorandum that special reasons, the "positive criteria" were advanced as follows:

> "(1) Fulfillment of the Township's constitutional obligation to zone for a variety and choice of housing types; (2) particular suitability of the site for least cost housing; (3) unsuitability of the site for its zoned uses resulting in deprivation of all practical and reasonable economic use; (4) promotion of several purposes of zoning including benefit to the public welfare, compatability with the land use of neighboring properties and municipalities; and appropriate location and design of land uses."

Defendant Zoning Board of Adjustment submits that the Mount Laurel obligation is not a sufficient special reason for the granting of a variance pursuant to N.J.S.A. 40:55D-70(d).

Although the court in Brunetti v. Mayor & Coun., Tp. of Madison, 130 N.J. Super 164, 168 (Law Div. 1979) held that:

> "A need for low and moderate-income housing constitutes a special reason justifying a zoning variance, whether served by semi-public housing as in DeSimone or by private housing as proposed by plaintiff,"

this decision has been seriously questioned in Castroll v. Township of Franklin, 161 N.J. Super 190, 193 (App.Div. 1978).

The Castroll court held:

> "...not surprisingly there is not a single case cited by the dissent which holds that proposed private commercial housing for even low or moderate-income families (let alone median-income families) constitutes a special reason warranting the grant of a use variance under subsection (d)--with the exception of the case of Brunetti v. Madison Tp. Mayor and Council , 130 N.J. lSuper 164 (Law Div. 1974). A decision authored by our dissenting colleague, Brunetti has never been subjected to the testing of appellate review. Indeed, although decided in 1974, Brunetti has yet to be cited with approval in the opinion of any appellate court in this State. On the single occasion on which it was mentioned--in a footnote to the opinion of the Supreme Court in Fobe Associates V. Demarest Mayor and Council, 74 N.J. 519 (1977)-- the court observed:
>
> "The decision in Brunetti v. Mayor, Coun. Tp. of Madison, 130 N.J. LSuper 164 (Law Div. 1974), up-

> holding a variance for construction of garden apartments on the grounds that such housing constitutes a special reason within the scope of N.J.S.A. 40:55-39 d. has been criticized as 'subverting rational land use planning' so as to 'inevitably result in even greater mis-planning in New Jersey suburbs.' Mallach, "Do Lawsuits Build Housing?": 6 Rutgers-Camden L.J. 653, 658, 676 (1975). Granting such variances 'largely on the basis of the absence of negative findings, would result in arbitrary changes in the use of land, precluding serious planning for services, facilities, traffic circulation and other community needs.' Id. at 659. To the same effect, Mytelka, "The Mount Laurel case: Where to Now?", 98 N.J.L.J. 513, 522 (1975). See also Mytelka and Mytelka, "Exclusionary Zoning: A Consideration of Remedies", 7 Seton Hall L. REv. 1, 11 (1975), rejecting the special use exception for low and moderate income housing as a remedy for exclusionary zoning because of its potential for abuse [at 536, n.5]"

While the satisfaction of the Mount Laurel obligation (if applicable) may be found to further the general welfare, and thereby qualify as a special reason, it is in the exclusive domain of the Board of Adjustment to make the determination, in a case by case basis, as to whether or not this particular applicant has set forth a special reason under Mt. Laurel I or II. Surely, a blanket claim of a Mt. Laurel obligation cannot stand on its own as sufficient special reason to qualify for a variance. The plaintiffs herein did not substantiate their claim that they would build low income housing.

The court in Castroll, supra, at 195, further stated:

> "...the existence generally of such need (whether low, moderate or median), however, is not the one-all upon which a use variance for such purpose may or should be grounded. Pascack Ass'n, Ltd. v. Washington Tp. Mayor & Council, 74 N.J. 470 (1977). Other concerns of equal or greater magnitude also must be given consideration and weight in reaching a determination as to whether a special reason or

> special reasons does or do exist that would justify the grant of the variance. See, for example, the discussion in Fobe Associates, supra 74 N.J., at 532-537, inclusive; Kohl v. Fair Lawn Mayor and Council 50 N.J. (268) (1967) and DeSimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428, 439-442, (1970). Thus, in addition to a demonstrated need for such housing, there must be considered such other significant factors as the character of the community and the surrounding area, the extent and nature of development of the community and the surrounding area, whether the community already has provided or has made provision for its fair share of the needed housing in the area, whether there are other districts in the community where the proposed housing may be constructed as a lawful permitted use under the current zoning regulations, whether the site for which the use variance is sought is peculiarly suited for such use, and many other factors of significance, including those relating to the negative criteria of the statute." (emphasis added)

These additional significant factors outweigh the need for housing as plaintiff's site is clearly inappropriate for such large scale development. The Zoning Board of Adjustment made this determination in their decision.

> In Demarest v. Mayor & Council of Borough of Hillsdale, 158 N.J. Super 507, 511 (App. Div. 1978), it was held:
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> "The Mt. Laurel decision on which the trial judge relied in part dealt with the constitutional validity of a zoning ordinance which by its operation excluded low and moderate-income housing from a developing municipality. The principles announced therein have no application to judicial review of a resolution denying a variance from the requirements of a presumptively valid ordinance. It is not the proper function of the courts to decide what land uses are appropriate from the standpoint of the public welfare. That function is vested in the legislature and the local officials. Pascack Ass'n, Ltd. v. Washington Tp. Mayor & Council, 74 N.J. 470, 485 (1977)."

In Round Valley, Inc. v. Clinton Tp. 173 N.J. Super 45, 52 (App.Div. 1980) cert granted 84 N.J. 414 (1980) the court pointed out:

> "Our Supreme Court's decision in South Burlington Cty. NAACP V. Mt. Laurel Tp., supra, and Oakwood at Madison, Inc. v. Madison Tp., 72 N.J. 481 (1977), were intended to address the problems of exclusionary zoning. However, these decisions also make clear that they are not intended to replace the rights and remedies afforded to landowners under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. To utilize the principles enunciated in Mt. Luarel and Oakwood at Madison to invalidate the considered judgment of the municipality regarding the zoning classification of one parcel of property amounting to approximately 3.5% of the total land area of the township is to distort the clear import of these decisions. We are not here faced with the same situation as that which was presented to the Supreme Court in Oakwood at Madison, where it was deemed fair and equitable to grant the corporate plaintiff the right to begin construction because it had underwritten the cost of six years of litigation with the intent of invalidating the entire zoning scheme of Madison Township. Oakwood at Madison, supra at 548-551. In the present case, plaintiff neither sought nor succeeded in having the township's land use ordinances declared unconstitutional generally. To use the principles enunciated in Mt. Laurel and Oakwood at Madison to invalidate the zoning classification of a single isolated parcel of land without requiring a complete revision of the township's comprehensive zoning scheme is to subvert the purposes for which the decisions were intended i.e. to encourage comprehensive planning by municipalities to make provision for the housing needs of persons of low and moderate income. The remedy sought by plaintiff in this litigation was akin to that afforded by N.J.S.A. 40:55D-70(d). In declaring that the zoning and land use ordinances of the township were invalid only as they applied to plaintiff's property, the trial judge's action amounted to the granting of a subsection (d) use variance, which is properly the

> function of the township's zoning board of adjustment. This was error. Accordingly, we reject the reasoning of the trial judge with respect to the application of the principles of Mt. Laurel and Oakwood at Madison to this case, and we reverse the judgment of the trial court invalidating the application of the 1977 Land Use Ordinances of Clinton Township to plaintiff's property. (emphasis supplied).

See also Nigito v. Borough of Closter 142 N.J. Super 1 (App. Div. 1976) in which the Court reversed a Law Division decision which had reversed denial by a board of adjustment of an application for a variance for construction of 184 garden apartment units for families possessing moderate income capabilities. At page 6 of the opinion the Court said:

> "The trial judge, rejecting the borough's conclusions to the contrary, found a need for moderate-income housing in the Northern Valley area as a whole, and in the borough in particular, and in that need and the suitability of plaintiffs' land for moderate-income apartment construction found the special reasons necessary to justify the granting of a section (d) variance. The subject parcel was deemed to be of only marginal utility for single-family dwellings thereon, the judge noting in support of that conclusion that it had remained undeveloped since the adoption of the ordinance in 1940, that it abutted the tracks of a functioning railroad, and that it sloped to a degree making difficult normal residential development. Evidence adduced by the borough suggesting a ready marked for single-family dwellings on the subject parcel was either rejected or not considered. Because of some discordant uses in the immediate area, the trial judge concluded that the proposed garden aprtment complex would not be out of keeping with the character of the immediate area, and accordingly, that the parcel was particularly suited to garden apartment use. No apparent consideration was given to the borough's conclusion that the requested variance failed to comply with the negative criteria set forth in N.J.S.A. 40:55-39(d), necessary prerequisites to a variance pursuant to that provision.

> [1] Although the trial judge noted the general inadequacy of the evidence specifically demonstrating a housing need for moderate-income families in this area of the Northern Valley, or in the Northern Valley as a whole, and expressly avoided taking judicial notice thereof, support for his felt conclusion that the need existed was found in the legislative declarations of a housing shortage made part of the several rent-levelling ordinances of neighboring communities, in other legislative enactments (N.J.S.A. 55:14J-2), and in statements in court opinions of recent vintage. See, e.g., Inganamort v. Fort Lee, 62 N.J. 521 (1973). We question the sufficiency of such indications of a housing crisis (as distinguished from evidence of housing needs for a particular income group in a particular geographical area) to rebut the presumed validity of the borough's action in rejecting the variance based, in part, upon an express finding that whatever need there was, if any, was being met by housing afforded in neighboring communities. The municipality's findings to that effect did find support in the record and should not have been disturbed in the absence of clear evidence that they were incorrect." (emphasis added)

The furnishing of housing to accommodate low to middle income groups is generally conceded to serve the public welfare, however, although generally serving the public welfare it does not inherently so serve it. Castroll v. Township of kFranklin, supra page 13, in which it is said at page 196:

> "It is still the rule in New Jersey that a private commercial housing development does not inherently serve the public good and welfare. Kohl v. Vair Lawn Mayor and Council, supra. And where, as here, 'the use is not of the type [which] of itself provides special reasons, such as a school or hospital, there must be a finding that the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought.' Kohl, supra, 50 N.J. at 279." (emphasis added)

Such being the case, the furnishing of such housing in an area zoned against it does not constitute a special reason justifying

the granting of a variance unless it can also be established that the general welfare would be served best by locating the proposed accommodations at the specific site in question and that said site is peculiarly fitted to the particular location for which the variance is sought. Justice Proctor speaking for the Court in Kohl v. Mayor and Council of Fiar Lawn 50 N.J. 268 (1967) pointed out at page 279 of the opinion:

> "Where, however, the use is not of the type which we have held of itself provides special reasons, such as a school or hospital, there msut be a finding that the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought. Mocco v. Job, 56 N.J. Super. 468, 477 (App.Div. 1959); Cunningham, "Control of Land Use in New Jersey," 14 Rutgers L. Rev. 37, 93 n. 261 (1959); cf. Kramer v. Board of Adj., Sea Girt, 45 N.J. 268, 286 (1965). This is so because nearly all lawful uses of property promote, in greater or lesser degree, the general welfare. Thus, if the general social benefits of any individual use--without reference to its particular location--were to be regarded as an adequate special reason, a special reason almost always would exist for a use variance. Mere satisfaction of the negative criteria of the statute would then be all that would be required to obtain a variance under sub-section (d). Mahler v. Board of Adj. of Borough of Fair Lawn, 94 N.J. Super. 173, 184 (App.Div. 1967). In Ward, supra, 16 N.J. 16, this court approved a variance permitting construction of a supermarket in a residential zone. The use was permitted not because a supermarket per se serves the general welfare, but because a supermarket at the particular location did 'meet current needs of nearby areas which have already been developed and future needs of other nearby areas which have not yet been developed.' Id. at 22. Likewise, in Yahnel v. Board of Adjustment of Jamesburg, 79 N.J. Super. 509 (App. Div. 1963) a telephone wire center was permitted in a residential zone not merely because telephone facilities in general serve the public welfare but because the facts showed that suitable service could

be provided only by establishing the wire center at the particular location."

In the instant case plaintiffs' witnesses testified at great length and introduced voluminous reports in evidence tending to establish that the subject property was suitable for the proposed PUD; that the proposed PUD would be economically feasible and, in fact, highly profitable if permitted on the proposed site.

Plaintiffs did not, however, establish that there were not other areas in Colts Neck Township equally suitable or that the Township and the general welfare would be best served by locating their proposed PUD on the subject tract. Considering the nature of the surrounding areas as suggested by Negito v. Borough of Closter, supra, it is clear that plaintiff's project fails to meet the positive and negative criteria.

As pointed out above the burden was upon the plaintiffs to establish that their site is uniquely or peculiarly fitted for the proposed PUD and that the general welfare would be best suited by placing said PUD at that precise location. This they failed to do.

There was testimony by the Planning Board's witness, Kenneth L. Walker, that there were other areas in the Township better suited, better situate and more appropriate for development such as that suggested in the opinion of Judge Lane, Exhibit A-32 at page 26 line 16 et seq. or such as the proposed PUD August 7, 1981, TR49-24 et seq. and at TR54-1.

Mr. Walker further testified that the Orgo tract was not uniquely adaptable or situated for such development August 7, 1981, TR52-4 et seq.

The third "special reason" asserted by plaintiffs was based upon the alleged inutility of plaintiffs' property for a conforming use citing for that proposition Schere v. Freehold Tp. 119 N.J. Super 433 (App.Div. 1972) cert. den. 62 N.J. 69 (1972) cert. den. 410 US 931, 93 S. Ct. 1374, 35 L. Ed. 2d 593 (1973). The testimony in Schere was such as to establish firmly that the subject properties were "in a very substantial degree rendered beyond practical, reasonable utilization under the restriction thereof by the zoning ordinance of one-family residential development to lots of a minimum of 40,000 sq. ft., or almost an acre (R-40)." At page 435 of the opinion the Court said:

> "Strong and convincing evidence in the form of experty testimony and otherwise was adduced by plaintiffs demonstrating that these tracts were not feasibly developable for residnces on 40,000 sq. ft. lots -- which would entail selling prices of $50,000 and up. No comparable residential development abuts or is near either tract. Instead, there are surrounding uses for either industrial purposes, 25,000, 20,000 and 9,000 square-foot residential developments, or vestigial farming operations, with an expressway imminently projected for one side of the Wardell tract. There was no contradiction by any of defendant's witnesses of the fact that these properties were not developable for one-acre residences in the reasonable foreseeable future. A prognostication by one defense witness that when all the land now zoned for 25,000 square-foot development is used up (whenever that will be) there will then ensure a demand for homes on 40,000 square-foot lots in the township seems

to us sheer speculation, unrooted in any rational explanation based upon evidence.

The opinions of the plaintiffs' experts outlined above are strongly buttressed by the history, amply portrayed in the record, leading to the adoption of these zoning amendments. This indicates that the governing body's adoption of the restriction here involved was designed to inhibit residential development in the municipality at a rate which would outstrip what the town fathers thought the voters and taxpayers would accept in fiscal outlay to supply ancillary municipal services (schools, etc.). It is implicit in the record that the 40,000 square foot restrictions imposed for the R-40 zones were believed to be effective for that purpose as not inductrially acceptable to prospective builders. This appraisal has been borne out by the fact that there has been little or no development of homes on 40,000 square-foot lots since that restriction was first adopted by Freehold in 1965."

The principal thrust of plaintiffs' claim as to inutility of the Orgo tract was to the effect that it would not, as a whole, be developed economically under the requirements for single family residences in the A-1 Zone, May 29, 1980, TR88-17. Although it was conceded that some 20% of the tract was suitable for such development, May 29, 1980, TR111-17 et seq. Moreover, Kenneth L. Walker, a licensed real estate broker, a designated appraiser holding the MAI designation of the American Institute of Appraisers, holder of the SREA designation of the Society of Real Estate Appraisers and a certified real estate consultant of the American Society of REal Estate Counsellors (August 7, 1980, TR19-5) was of the opinion (August 7, 1980, TR24-14 et seq.) that plaintiffs' tract could be developed under the A-1 zoning requirements and that (August 7, 1980, TR25-15) so developed

it "would be a marketable and viable" development. Such viable and marketable development was more particularly analyzed and described in Exhibit PB-6 and on pages 25 and following of Mr. Walker's testimony.

Further, there was no testimony as to the inutility of plaintiffs' premises for other uses permissible in the A-1 Zone except that the plaintiff Orgo testified that his greenhouse and flower raising business had been discontinued because it was no longer profitable (June 26, 1980, TR144-16) that certain crops would not be profitable (June 26, 1980, TR145-13) and that in his opinion it was not feasible to continue farming or to farm his land on any profitable basis at the present time or in the immediate future. However, careful reading of Mr. Orgo's testimony (June 26, 1980, TR142-14 et seq.) will indicate that he had not explored other permissible methods of using his tract for agricultural purposes and had made little serious effort to sell his property (June 26, 1980, TR155-2 et seq.). It would appear that the Court might well take judicial notice of other agricultural uses which lands in Colts Neck and other rural Monmouth County municipalities are used. Among others these include nurseries, stock farming and the raising and boarding of horses, not to mention potato and truck farming. None of plaintiffs' witnesses testified that the tract could not economically be operated for any of these.

In sum, there was conflicting expert testimony as to whether or not the Orgo tract could feasibly be developed and marketed for single family homes under the requirements of the A-1 Zone and it was not established that said tract could not be successfully or economically operated and sold for one of the other uses permitted in said zone.

In Ring v. Mayor and Council fo Bor. of Rutherford 110 N.J. Super 441 (App.Div. 1970) Judge Lewis speaking for the Court at page 445 said:

> "It is well settled that an applicant is not entitled to a variance in order to effectuate the most profitable use of his property, at least so long as permissible uses are feasible. Kolsow v. Municipal Court of Wayne Tp., 52 N.J. 441,452 (1968); Bern v. Fair Lawn, 65 N.J. Super. 435,450 (App. Div. 1961). In order to maintain the fidelity of the general zoning scheme, a variant use is permitted only in an exceptional case where the justification is clear. See Grundlehner v. Dangler, 29 N.J. 256,271 (1959). Accord, Sitgreaves v. Board of Adjustment, Nutley, 136 N.J.L. 21 (Sup. Ct. 1947). Furthermore, it is fundamental that a determination of a zoning board is presumptively correct, and the property owner has the burden of proof in establsihing a cause for relief. Masterson v. Crhistopher Diner, Inc., 85 N.J. Super. 267, 273 (App.Div. 1964), certif. den. 44 N.J. 406 (1965)."

See also Jenpet Realty Co., inc. v. ARdlin, Inc. 112 N.J. Super 79, 82 (App.Div. 1970), and Shell Oil Co. v. Zoning Bd. Adj. Shrewsbury 127 N.J. Super 60 (App.Div. 1973) reversed substantially for the reasons expressed in the dissenting opinion of Judge Kolovsky, reported at 127 N.J. Super 60,62 by the Supreme Court 64 N.J. 334 (1974). At page 65 of his dissenting opinion

Judge Kolovsky said:

> "Undue hardship" may of course constitute a "special reason" for a use variance. Andrews v. Ocean Twp. Board of Adjustment, 30 N.J. 245, 251 (1959). But undue hardship is not established by a showing that the proposed use would be more profitable to the owner than the permitted uses. 'The extension by variance of land use zones is not to be measured by the dollar.' Schoelpple v. Woodbridge Twp., 60 N.J. Super. 146, 153 (App. Div. 1960); Jenpet REalty Co., Inc. v. Ardlin, Inc., 112 N.J. Super. 79, 85 (App.Div. 1970), cert. denied 57 N.J. 436 (1971); Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268 (1967). See also Bern v. Fair Lawn, 65 N.J. Super 435 (App. Div. 1961), in which this court said at 450:
>
> "Certainly a property owner is not entitled to a variance merely to serve the most profitable or economical use of the property if other less profitable uses are still reasonable feasible.
>
> Here the trial court said in reaching its conclusion that "undue hardship" existed:
>
> There was sufficient competent evidence to show that it would not be reasonably feasible to use the lot for any of the permitted uses. Unless used for a gasoline station the evidence indicates that the lot will remain vacant.
>
> As I have heretofore noted, however, the controlling question is not whether 'there was sufficient competent evidence to show that it would not be reasonably feasible to use the lot for any of the permitted uses.' (emphasis added) Rather it is whether the evidence was such that it was arbitrary and unreasonable for the Board to find otherwise.
>
> In my view, not only did the evidence presented not rise to that stature, it would not support a finding that other permitted uses were not reasonably feasible on the 1.7 acre tract. At most, the testimony of Shell's real estate expert, who noted that a shopping center was to be built on an adjoining tract, indicated that a gasoline station in the area was needed,

> that such use was the highest and best use to which the property could be put and would present fewer problems, traffic and otherwise, than would any of the uses permitted by the ordinance."

It was fully within the province of the Board of Adjustment after hearing the testimony and examining the exhibits introduced by the witnesses Kiefer andWalkier (Exhibit A-10 May 29, 1980 TR65-14 et seq.) (Exhibit PB-6 August 7, 1980, TR25-13) to reject plaintiffs' claim as to the inutility of the tract for development with single family residences with the restrictions imposed by Section 707 of the zoning ordinance.

Moreover, there can be no question but that the proofs fell far short of establishing the inutility of the tract for permissible agricultural purposes.

As pointed out in Anderson, American Law of Zoning 2d, Volume 3, Section 18.20 the proofs to establish inutility must be of a high order

> "Clearly, no variance may be granted where the record is barren of facts tending to negate a reasonable return from permitted uses, where the only evidence is the testimony of the applicant, or where the sole proof is the statement by a single witness that he "questioned" whether a reasonable return could be realized from certain uses."

Under the circumstances it must appear that the claim of inutility as a special reason should not prevail.

Plaintiffs fourth alleged special reason, namely "(4) promotion of several purposes of zoning including benefit to the public welfare, compatability with the land use of

neighboring properties and municipalities; and appropriate location and design of land uses", is similarly the subject of conflicting testimony by witnesses for the plaintiff and witnesses for the objectors, Planning Board and Board of Education. As the above cited cases have held it is for the Board of Adjustment to weigh such testimony and to make their determination based thereon. They may accept or reject testimony and give credence to those portions thereof which they deem convincing Kramer v. Bd. of Adjust., Sea Girt, supra page 7.

The carefully considered comprehensive resolution by which the Board denied the variance is ample evidence that the Board conscientiously and fully performed their duties in that respect. A copy of said resolution with marginal references to the Transcripts and Exhibits is annexed hereto as Schedule A hereof.

Plaintiffs further contend that they "presented extensive proofs to demonstrate that the 'negative criteria' would not be offended by the proposed PUD" namely, that the granting of the variance would not substantially impair the intent and purpose of the zone plan and zoning ordinance and the variance could be granted without substantial detriment to the public good.

There is not question that plaintiffs introduced a great deal of testimony and many exhibits in support of this contention. However, the objectors, Planning Board and Board

of Education, presented testimony and exhibits to establish that the "negative criteria" were not met and that on the contrary the granting of the variance would substantially impair the intent and purpose of the zone plan and zoning ordinance and would result in substantial detriment to the public good. See the testimony of Kenneth L. Walker, August 7, 1980, TR54-13 et seq.; Robert Nelson, a licensed professional engineer and traffic expert, August 14, 1980, TR30-17 et seq. whose testimony as to the generation of traffic and effect upon the intersection of State Highway 36 and County Route 537 differed substantially from that of Mr. Henry Ney the traffic expert who testified for plaintiffs; Robert D. Halsey, a licensed planner of the State of New Jersey and Director of the Monmouth County Planning Board who testified (July 15, 1980 TR14-12) that the proposed PUD was not consistent with the development plan of the County of Monmouth Planning Board, and that the area in question was not suitable or desirable for such high density development (TR30-9 et seq.) that he would not recommend the Orgo Farm for the proposed PUD (TR39-3), that "There is no real element of the public good that can be served at this site than cannot be better served at other locations of the county" (TR56-12) that "If Colts Neck were to seek to zone an area for high densities, I would like to see other areas of the Township or another area of the Township in which to find

a more suitable site" (TR56-20), that there would be a negative impact for two basic reasons: "One is very general in that it would create a focal point for other pressure for development that would be inconsistent with our county development plan. The second would be more specific and that relates to drainage into the Swimming River Reservoir. One of the reasons that there is a large area shown for rural residential is an effort by the County Planning Board through its influence to hold down the density of develpment of the area tributary to the Swimming River Reservoir to the greatest extent possible in the current statutes and other factors relating to ownership of property and rights of property. The concern for that is that urban development, the higher the density of development, generally the greater the adverse impacts on surface water quality. And in this particular instance a good portion of the Orgo site would drain through Slope Brook into the reservoir. So we would have a concern about those impacts."(TR60-12)(TR72-3), that the proposed PUD wold result in undesirable "urban sprawl" (TR66-7) and contrary to what the Planning Board perceives to be the best use for that particular area of the County (TR66-72); Richard Alaimo, a licensed professional engineer both of New Jersey and Pennsylvania who testified as to sewer and water feasibility and in particular pointed out the deficiencies of the feasibility study Exhibit A-21 introduced in evidence by

plaintiffs' witness Dale S. McDonald of Killam Associates July 31, 1980, TR 4 et seq. and see summarization at TR61-21 et seq.; William Queale, Jr., a licensed professional engineer of New Jersey, a zoning and planning expert and an expert in the field of pollution and environmental protection (July 29, 1980, TR10 et seq.), who testified that in his opinion, bearing in mind the special reasons advanced by plaintiffs as well as the Mt. Laurel issues and the provisions of the Municipal Land Use Law, (TR15-18 et seq.) "a use variance should not be granted for this application; that there is neither a particular case nor special reason to warrant it; that the development as proposed will impair the intent and purpose of the zone plan and zone ordinance; and, if developed, the development would have substantial detriment to the public good and would not meet several purposes of the Land Use Law. "And I've then taken each of these and outlined them with some specific responses.", the reasons for said opinion being more fully set forth and explained (TR17-19 et seq.) and who further testified (TR52-12 et seq.) as to the adverse urban sprawl effect which might be anticipated if the variance were to be granted; William Whipple, Jr. whose expertise more fully described in Exhibit PB-10 and at August 21, 1980, TR3 et seq., covered all aspects of water pollution control, water resources and food control, who pointed out (TR40-25) that in his opinion the storm drainage system of the proposed PUD as

designed would not prevent certain pollutants from entering the streams, Slope Brook among others crossing or abutting the property, and from ultimately entering the Monmouth Consolidated Water Company reservoir, and that the proposed PUD 'would result in more than twice as much net pollution remaining in the streams" that development for single family housing on two acre lots (TR84-14); Richard Moser of American Waterworks Service Company, Inc. a subsidiary of the American Waterworks Company which is the parent company of Monmouth Consolidated Water Company who testified (TR111-13 et seq.) that the proposed development would unquestionably have a deteriorating effect upon the water quality of the Monmouth Consolidated Water Company reservoir which (TR115-19) serves approximately 250,000 people and that were the PUD to be permitted he "could foresee the ultimate possible need for carbon filler facilities to remove the organics that lead to and cause the tastes or odors in water, or maybe a possible health threat. At that time I estimated the facility would be six and a half million dollars." (TR120-22); Dr. John R. Vig, a physicist and member of the Environmental Commission of the Township of Colts Neck who crossexamined plaintiffs' witness on environmental impact; Thomas Krakow (August 7, 1981, TR146 et seq.) pointing out the shortcomings of the environmental impact statement Exhibit P-15 and Mr. Krakow's testimony (TR148-8) (TR150-1) (TR152-23) (TR161-13)

(TR169-4) (TR172-17) (TR174-15) (TR177-9) (TR181-24); and Mr. Kenneth Noland, Principal of the Atlantic Elementary School, property of which abuts that of plaintiffs; who testified (July 24, 1980 Tr153 et seq.) as to the adverse effects that the proposed PUD would have upon the Atlantic Elementary School itself (TR164-1 et seq.) as to crowding (TR164-20), as to noise (TR162-10), as to diminution of space and outdoor facilities (TR167-24) (TR168-17) including parking and playground (TR171-12) and as to safety (TR174-8). Finally, with respect to the anticipated impact upon the Township Schools it should be noted that, as pointed out at the end of paragraph 17, page 8, of the resolution of the Board of Adjustment,

> "The developer did not make any study of or present any proofs as to the impact the proposed development would hae on the secondary school system pertaining to children of high school age."

From the foregoing it must appear not only that the Board could properly find that no special reasons existed which would warrant the granting of a variance but also that the proposed PUD would adversely affect the public good and would be adverse to and substantially impair the intent and purpose of the zone plan and zoning ordinance.

In this connection it must be borne in mind as pointed out in paragraph 16, page 7, of the Board's resolution, Schedule A hereof, that the validity of the zoning ordinance from which the variance is sought is the ordinance, is presently being tested

in Orgo Farms and Greenhouses, inc. et al v. Township of Colts Neck, L 3299-78 P.W. There is no other ordinance from which to seek a variance. Had plaintiffs followed the usual and appropriate procedure of exhausting their administrative remedy they would have been seeking a variance from the then and presently existing ordinance. In no event could they properly secure or have secured a judgment that based upon the principles enunciated in Mt. Laurel and Oakwood at Madison said ordinance was invalid as to a particular parcel of land. Round Valley, Inc. v. Clinton Tp. 183 N.J. Super 45,52 (App.Div.1980), quoted supra pages 16 & 17.

As plaintiffs' attorney has repeatedly conceded, if the Mt. Laurel and Oakwood at Madison principles are inapplicable in the case at bar the principal special reason for which plaintiffs contend is eliminated. (July 15, 1980, TR82-1) (July 17, 1981, TR4-23) and see also (July 24, 1980, TR14) and (June 26, 1981, TR157-25). See also plaintiffs' brief at page 34.

Assuming but not conceding that the instant case is one in which an application for relief by variance might be appropriate it is submitted that the Board of Adjustment's determination that neither the affirmative or negative criteria upon which a variance could properly have been granted have been established is unassailable and should be affirmed.

POINT TWO

THE STATE DEVELOPMENT GUIDE PLAN SHOULD BE REFINED TO BE CONSISTENT WITH THE MONMOUTH COUNTY GROWTH MANAGEMENT PLAN.
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The State Development Guide Plan (hereinafter referred to as SDGP) has designated the vast majority of the land in Colts Neck as limited growth. A tiny sliver of the southwest corner of the Township was described as a growth area.

Colts Neck is a rural municipality consisting of approximately 31.6 square miles. Approximately 46 percent of the land mass in Colts Neck is devoted to farm uses, while 37 percent is owned by the Federal, State, County and Local Governments. Approximately one square mile of its land mass underlies the Swimming River Reservoir, which serves as the source of water to over 250,000 consumers in Monmouth County.

The SDGP, which designates that tiny portion of Colts Neck as growth, is subject to appropriate revision and refinement. Colts Neck is the only town within the SDGP's designated 2 county region, that is virtually entirely within the limited growth area. The Monmouth County Planning Board has determined that all of Colts Neck should be within the limited growth area with the exception of a village center. See Monmouth County Growth Management Plan, (hereinafter referred to as "MCGMP").

The SDGP map consists of broad, generalized areas without site-specific detail or precise boundaries SDGP at pg. ii, iii. The SDGP recognized, at page 43, that "its purpose was not to supplant more detailed plans prepared by municipalities, counties,

or other State departments, the categories on the concept map are general."

It is further stated that:

> "Regional and county plans and the local concerns they reflect are also important influences on land use. These planning activities have the potential to provide greater levels of detail to the concept map, as well as to reinforce state policy. Regional and particularly county planning activities work in greater detail with smaller refined mapping with respect to growth and conservation areas. In addition, counties are more aware of local concerns, municipal regulations and private market activities and so manage to achieve in their plans a necessary blend between the ideal and the actual.
>
> Both in preparing the preliminary draft of the Guide Plan and since its publication, regional and county planning agencies provided information and many useful suggestions which are reflected in this draft. Efforts have been undertaken, and are continuing, to examine the Guide Plan in relation to regional and county plans. Where substantial agreement is found among the plans compared, those plans are considered as appropriate refinements of the Guide Plan." (emphasis added.) SDGP at 108, 109.

The Monmouth County Planning Board has indeed prepared a more detailed plan concerning growth in the county. Substantial agreement exists between the goals and plans set forth in the SDGP and the MCGMP. The inclusion of approximately 262 acres of Colts Neck within a growth area is an illogical and inappropriate classification by the SDGP.

The Supreme Court chose not to make the SDGP the absolute determinant of the locus of the Mt. Laurel obligation. Mt. Laurel II at 239. In order to vary the locus of the Mt. Laurel obligation from the SDGP, the litigant will have to prove:

> "(1) accepting the premises of the SDGP, the conclusion that the municipality includes any

> growth area, or as much growth area as is shown on the concept map, is arbitrary and capricious, or alternatively that the municipality does not contain any growth area whatsoever is arbitrary and capricious...." Mt. Laurel II at 240.

The classification of Colts Neck, containing a growth area was arbitrary and capricious. Furthermore, as the Court set forth Colts Neck has offered numerous proof that "it is arbitrary and capricious not to place the line somewhere else." Mt. Laurel II at 241. It would be arbitrary and capricious not to move the boundary line pursuant to the MCGMP classification. The county's more detailed and site-specific plan, designating all of Colts Neck as limited growth, with the exception of a village center, is an appropriate refinement of the SDGP. The reasons for such designation, as set forth by Robert Clark, Director of the Monmouth County Planning Board, include the need to protect the integrity of the Swimming River Reservoir, the desire to preserve agricultural uses which predominate in Colts Neck, the desire to curb urban sprawl and the use of Colts Neck as a buffer between the two development corridors situate along the Garden State Parkway and Route 9. These concerns are consistent with the SDGP and serve to effectuate sound planning for the overall region.

The first stated goal of the SDGP is the protection of the State's air, water, wildlife and land resources from the adverse affects of man's activities and the correction of past misuses. SDGP page 21. The third goal of the SDGP is the maintenance of a viable agricultural economy in New Jersey.

Clearly, the protection and preservation of the State's key natural resources, such as agriculture, is a major concern of the

Department of Community AFfairs. It was noted on page 18 that "the quantity of agricultural land in New Jersey has decreased significantly since 1950". Because farmland is so suitable for development, it is important to preserve the ever decreasing agricultural acreage in the State. The SDGP specifically stated at page 28:

> "if agriculture is to remain an important economic activity in New Jersey, then the areas most suited for agriculture must be protected from intensive urbanization. The location of prime agricultural soils and existing farms are indicants for determining such areas".

As is readily evident, Colts Neck is one of the few remaining municipalities in the area which still contains considerable farmland. The attempt to preserve this farmland is certainly consistent with both the SDGP and the MCGMP.

A major problem facing agriculture is that fertile farmland is being converted to urban and suburban use. SDGP page 23. Farmland is attractive to developers as it is cleared and generally well drained.

> "Department policy must halt the converstion which would result in the irreversible loss of the State's resource of prime soils". SDGP at 23.

These goals, espoused by the SDGP, were major factors in the County's desginations of Colts Neck as limited growth. In his report dated February 1981, William Queale of Queale & Lynch, Inc., states that Colts Neck is one of nine towns in Monmouth County and one of eleven in the 2-county region having over 3,850 acres under farmland assessment and at least one-fifth of their land area under farmland assessment, respectively. According to the chart depicting trends in agricultural land, 8,373 acres in Colts

Neck were devoted to agricultural and horticultural use in 1972. This figure decreased less than 200 acres to 8,195 in 1982. However, the total farm assessable acres decreased from 9,157 acres in 1972 to 8,831 acres in 1972. Thus, while the total number of farm assessed acres decreased 326 acres, the number of acres actually devoted to farming only decreased by 178 acres. This makes it clear that farming in Colts Neck is still a viable economic activity.

The intent and desire of both the township planner and Monmouth County Planning Board to preserve this agricultural activity is a legitimate concern which reflects sound planning practices for both Colts Neck and Monmouth County. Colts Neck has maintained over 40% of its land area under Farmland assessment. This figure would be considerably higher if the major government owned land tracts were excluded. (Queale & Lynch, page 6-7). The horse population in Colts Neck has increased steadily which is consistent with the State's desire to attract investment in breeding and training facilities in New Jersey.

The MCGMP refines the SDGP by moving the growth line westward, along a geographical ridge which creates a drainage divider for waters flowing into the Swimming River Reservoir. All lands east of the ridge drain into the Swimming River Reservoir while the lands west of the ridge drain away from the Reservoir. This ridge is a natural and logical line of demarcation. It would be arbitrary, capricious and inconsistent with sound palnning not to place the line establishing the parameter of the growth area along this ridge. In his affidavit previously submitted to the court, Robert

Clark, Director of the Monmouth County Planning Board, stated that his opinion that the growth line be moved westward, was based on a site by site inspection of the land mass within Colts Neck and within the county. This type of localized scrutinization was anticipated as a proper refinement of the SDGP.

Testimony was offered by Robert D. Halsey, then Director of the Monmouth County Planning Board, at the Board of Adjustment hearing on July 15, 1980, at which time he related that in his opinion, to avoid urban sprawl,

> "the county would be better served by having development channeled into particular areas, leaving other areas with less development; or ideally, in some cases, no development." (7-15-80 TR 65-15).

Mr. Halsey further stated that a PUD such as the one envisioned by plaintiff would alter the character of the area. (7-15-80 TR 113-3). His opinion was that the welfare of the county would be best served by development in growth areas adjacent to development corridors. (7-15-80 TR 65-15). He further stated that a large scale development in this area would have a detrimental impact on the entire region. It would invite further development in the area, thereby undermining the sound planning design for the county and municipality.

Here the county has worked within the guidelines of the SDGP to thoughtfully plan for the development of the overall region. This is not merely the case of Colts Neck trying to preserve its character. Rather, the growth planned for Colts Neck reflects a countywide effort to channel growth and protect agriculture and open space. Colts Neck, which lies within the watershed of the

Swimming River Reservoir, is not equipped with municipal sewers or utilities and thus, not conducive to intense development. Most of the lands in Colts Neck drains into the Swimming River Reservoir. A great increase in the intensity of development in the area would adversely affect the integrity of the Reservoir. It is the desire of the County Planning Board to channel growth into those areas which are best suited for such growth and in a manner so as to curb urban sprawl. This regional Board of independent planners has determined that development in Colts Neck should be limited for the benefit of the entire region. Their plan is consistent with and is properly a more specific refinement of the SDGP as envisioned by the Department of Community Affairs.

POINT THREE

IF THE COURT FINDS COLTS NECK HAS A MT. LAUREL II OBLIGATION, THE TOWNSHIP SHOULD BE GRANTED THE OPPORTUNITY TO REZONE CONSISTENT WITH THIS OBLIGATION.

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The obligation to provide a realistic opportunity for low and moderate income housing attaches to those municipalities, a portion of which, is located in a growth area. As mentioned previously, a tiny portion of Colts Neck lies with a growth area. Facially, this inclusion raises the obligation on the part of the Township to adopt zoning which will provide an opportunity for lower income housing.

As stated above, Colts Neck challenges the validity of the SDGP classification which includes that small portion of Colts Neck within a growth area. Nevertheless, the Township governing body has worked diligently since the Mt. Laurel II decision was rendered to develop a coherent plan for Colts Neck.

The governing body devised and recently adopted an ordinance to provide for the improvement and/or rehabilitation of owner occupied delapidated or overcrowded lower income housing units with the Township of Colts Neck. A copy of same is attached hereto as Schedule "B". Further, Colts Neck will be readily amenable to adopt a zoning ordinance which will satisfy any obligation which this Court sees fit to order.

If the Court determines that Colts Neck has a Mt. Laurel obligation and that its zoning ordinance fails to satisfy that obligation, it should order the Township to revise such ordinance. Mt. Laurel II at 281. Upon a judicial determination of its obliga-

tion, Colts Neck will promptly rezone in accordance with the spirit of the court's order. Colts Neck should be given 90 days within which to rezone. A Builder's Remedy should not be granted without giving the Township the opportunity to rezone in accordance with whatever obligation it is deemed to have. To do otherwise would place the court in a legislative rather than judicial role and would subvert the intent of Mt. Laurell II. The Supreme Court reasoned:

> "We adhere to the belief that where conventional remedies are adequate to vindicate, they should be employed, that it is unwise to devise remedies that partake more of administrative and legislative than of judicial power where traditional remedies will do. Judicial legitimacy may be at risk if we take action resembling traditional executive or legislative models; but it may be even more at risk through failure to take such action if that is the only way to enforce the constitution". Mt. Laurel II at 287. (emphasis added).

Colts Neck has been litigating this case in good faith. There are very real and legitimate questions concerning Mt. Laurel I and Mt. Laurel II's affect on Colts Neck in addition to the environmental concerns. The Supreme Court conceded that the doctrine is complex. Mt. Laurel II at page 291.

Prior to any consideration of a Builder's Remedy in this case, the Court should grant the Township of Colts Neck an opportunity to revise its zoning ordinance consistent with the Court's dictates.

As a result of its on-going analysis of the Mt. Laurel decisions, Colts Neck has been developing a new zoning ordinance establishing agricultural districts and cluster development as logical extension of regional and local development patterns. Its efforts in this regard have been diligent.

Sound planning can best be achieved by allowing the Township to develop a zone plan consistent with the County, State and Court dictates, taking into consideration Colts Neck's environmentally sensitive nature. It was not the Court's intention to promote development in non-growth areas. Mt. Laurel II at 231. Neither was it the Court's intention to remove the zoning power from the municipalities.

Colts Neck contributes the major drainage area to the Swimming River Reservoir, the prime source of drinkingwater for 250,000 people, in Monmouth County. Legitimate concerns for the preservation of the integrity of the Seimming River Reservoir have been voiced by various experts including William Whipple, Richard Moser, Allen Dresdner, William Queale and Robert Clark.

An additional concern expressed above is the preservation of viable farmland in Colts Neck. The Township, together with input from the County and the Court, isbest able to devise a sound zone plan with these considerations in mind. Certainly, Mr. Laurel II does not direct that zoning be removed from the jurisdiction of the municipalities. The granting of a Builder's Remedy, discussed more fully hereafter, is inappropriate at this point. It is most appropriate to direct the Township to rezone in accordance with the spirit of the Court's Order. To do otherwise would deny the Township the opportunity to develop reasonable zoning plans and would subvert the intent of Mt. Laurel II. There is every indication that Colts Neck will comply with such a directive from thge Court. This is the most desirable remedy in order to achieve the Mt. Laurel obligation while still promoting logical and sound planning.

POINT FOUR

IF COLTS NECK IS DEEMED TO HAVE A MT. LAUREL OBLIGATION, IT'S FAIR SHARE IS MINIMAL.

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Reports were submitted to the court setting forth the present and prospective need for lower income housing and Colts Neck's fairshare of that need.

Plaintiff's planning expert, William Queale, indicated that the initial step for the Township was to identify the region within which the Township is located. Mr. Queale suggested in an analysis of Colts Neck by Queale & Lynch (hereinafter "Queale Report") the use of a 30 minute travel time to define the region. Using this criteria, he suggested the appropriate region to consist of Middlesex, Monmouth and Ocean Counties. Queale Report page 12.

The Queale Report then calculated that 23 percent of the households in the region fell into the low-income category (under $10,250.00) and 16 percent fell into the moderate income group. Queale Report page 12.

The prospective need of the region was based on population projections made by the N.J. Dept. of Labor & Industry in February, 1982 (hereinafter L & I).

This household growth throughout the region was distributed based on Colts Neck's portion of the region's growth area. Queale Report page 13. Thus, the entire region has 670 square miles in the growth area. Colts Neck has 0.4 square miles in the growth area. Queale Report page 13.

Additionally, Colts had .002 of the region's employment as reported by L & I. (Queale Report page 13).

Queale states on page 13:

> "If these two categories of the region are applied to the total need for lower income housing through the year 2000, Colts Neck's fair share would be 63 units based on land area and 209 based on employment. Averaging these two numbers produces the township's fair share at 136, both present and prospective need.
>
> Since this Memo in March, 1983, more recent projections have been generated by the Department of Labor and Industry. The Year-2000 population for the 3-county area was dropped from almost 1.9 million, to 1,792,600. Using the same process and assumptions outlined above, the Township's present and prospective need would be reduced to 117."

In determining the fair share allocation, plaintiff Orgo's planner, Carl Hintz, considered the total vacant developable land, including land which is farm assessed. This is not realistic. He would penalize those municipalities with a large agricultural area. They, in fact, would bear more than their fair burden. He did not take into consideration the percentage of land in the township within the growth area. His plan would result in towns becoming mirror images of each other, which was not the court's intent.

If growth is to be channeled pursuant to the SDGP, as dictated by the court, then the portion of land in the growth area must be a factor in determining fair share. Mt. Laurel II at 244.

The Supreme Court itself indicated that:

> "In determining fair share, the trial court shall review the SDGP's characterization of each of the municipalities before it... Determination of fairshare must take into consideration, where it is a fact, the in-

> clusion within particular municipalities of non-growth areas where, according to the plan, growth is to be "discouraged." Mt. Laurel II at 351.

Clearly, this was not a factor in Mr. Hintz's calculation of fair share. Mr. Hintz admitted in his deposition that he did not limit the vacant developable land figure to that land located within the growth area. (2-20-84 TR 36-20). He indicated that once a portion of a town was in a growth area the total amount of vacant developable land in the municipality was considered for fair share methodology. (2-20-84 TR 37-1). This is clearly contrary to the intent of the court. As stated above, the court dictated that the amount of non-growth area, where growth is discouraged, must be taken into consideration. Mt. Laurel II at 351. Thus, Mr. Hintz's methodology is improper and of no import. By way of example, Mr. Hintz established fair share allocations for Manalapan Township up to the year 2000 at approximately 2300 to 2400. Manalapan has 11,591 acres within the growth area. His figures for Colts Neck which has 262 acres in the growth area was 1698 to the year 2000. Clearly the two figures show the impropriety of Mr. Hintz's calculation. Growth is to be channeled into growth areas. Mt. Laurel II at 244. This cannot occur unless the acreage of growth or non-growth is considered in the fair calculation.

Defendant has not had the opportunity to review the fair share methodology of plaintiff Sea Gull, Ltd. and can make no comment thereon.

POINT FIVE

PLAINTIFF'S PROPOSED PROJECT IS CONTRARY TO SOUND LAND USE PLANNING AND AS SUCH IS NOT APPROPRIATE FOR A BUILDER'S REMEDY

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The Supreme Court has indicated that a Builder's Remedy will be granted as a matter of course where:

> "(i) the plaintiff-developer will provide a substantial amount of lower income housing and (ii) the proposed project accords with sound land use plannint." Mt. Laurel at 330.

Plaintiff cannot satisfy both of these preconditions in this case. Firstly, plaintiff's project is contrary to sound land use planning.

A. THE SUPREME COURT DISCOURAGED GROWTH IN LIMITED GROWTH AREAS.

Plaintiff's tract is located in an area designated for limited growth. The Supreme Court has stated:

> "The Mt. Laurel obligation should as a matter of sound judicial discretion reflecting public policy, be consistent with the State's plan for future development. Consequently, the obligation should apply in these growth areas, and only in these areas...
> Mt. Laurel II at pg. 226-227.

Assuming arguendo that Colts Neck is deemed to have a Mt. Laurel obligation, development should be limited to the land contained in the growth area.

> "It is our intention... to channel the entire prospective lower income housing need in New Jersey into "growth areas". It is clear that that is what the SDGP intends and there is nothing to indicate that those areas are not more than sufficient to accomodate such growth for the forseeable future. Mt. Laurel II at 244.

The Supreme Court's intent is clear. To allow dense development outside of the growth area would subvert the intent of both

the Supreme Court and the SDGP. The Supreme Court repeatedly stated that the primary function of the SDGP is to determine where growth, including residential growth, should be encouraged or discouraged. Mt. Laurel II at 230. The SDGP itself suggests that " major portion of the State's development efforts should be directed to areas within and contiguous to existing development" SDGP at 25. "The strategy is one of 'discouraging population expansion in limited growth areas'." Mt. Laurel II at 231, SDGP at 91.

The purpose of the Supreme Court's reliance on the SDGP was to makecertain that the Mt. Laurel obligation is 'consistent with the State's paln for future development." Mr. Laurel II at 233. "Channeling the development impetus of the Mt. Laurel doctrine into "growth areas" is precisely the kind of use of the plan that was intended by those who prepared it." Mt. Laurel II at 227. This philosophy is consistent with sound planning. Allowing intensive growth in a limited growth area constituted poor planning. A development such as plaintiffs is indeed a medium to high density development which plaintiffs wish to locate in the center of a limited growth area, adjacent to farmland.

The Supreme Court recognized that the Mt. Laurel obligation sould not be inconsistent with sound planning when it stated:

> "...the Constitution of the State of New Jersey does not require bad planning. It does not require suburban sprawl. It does not require municipalities to encourage large scale housing development. It does not require wasteful extension ofroads and needless construction of sewer and water facilities for the out migration of people from cities and suburbs. There is nothing in our Constitution that says we cannot achieve our constitutional obligation or provide lower income housing and, at the same time, plan the future of the state intelligently." Mt. Laurel II at 238.

The Court further assured that:

> "...use of the SDGP tends to assure that the judiciary will not contribute to irrational development, discordant with the State's own vision of the future, by encouraging it in areas that the State has concluded should not be developed, areas more suited for other purposes, or by inadvertently leading municipalities to encourage low income housing in such areas." Mt. Laurel II at 247.

Clearly, plaintiff's proposed development is located well within the limited growth area. The SDGP indicates that the overwhelming majority of Colts Neck lands are designated as limited growth. The tiny portion designated as growth is located in the southwest quadrant of the Township, near Freehold Township. Plaintiff's project is massive, containing approximately 1253 housing units, a proposed 120,000 square foot office complex, a hotel complex containing no less than 100 rooms, a 45,000 square foot low rise office complex and a bus stop area containing convenience stores.

Considering that Colts Neck presently contains approximately 2,220 housing units, one can see that plaintiff's project will mark a considerable change in the present character of the Town. If Colts Neck is found to have an obligation to provide for low cost housing, it certainly would not zone for such a development on that particular site, several miles from its desginated growth area and in the heart of this rural community's limited growth area. It is evident that the State deemed most of Colts Neck to be limited growth. It is inconceivable that sound planning practices would encourage such a large scale development in this area. (7-29-80 TR 29-11; 7-29-80 TR 36-3)

B. PLAINTIFF'S PROJECT WILL ATTRACT SECONDARY GROWTH CONTRARY TO IT'S LIMITED GROWTH DESIGNATION.

Initially, defendants contend that such a developmentwould tend to spur additional growth, or growth which is secondary to this type of development. In histestimony at the July 15, 1980 meeting before the Zoning Board of Adjustment, Robert Halsey, then Director of the Monmouth County Planning Board, indicated that this proposal would create a focal point for other pressures for development that would be inconsistent with the general development plan. (7-15-80 TR 60-13). He stated that history of other areas indicates that developments of this kind attracts pressures for more development of a similar nature and that this would create more urban sprawl. (7-15-80 TR 66-10). In his deposition taken on February 20, 1984, plaintiff's own planner John Rahenkamp, conceded that a high denisty development <u>will</u> generate a demand foradditional services.

Colts Neck does not have the infra structure to support this massive development. Not only does it not have public water and sewers, it has very little shopping opportunities. While Delicious Orchards, a large farm market, is located near plaintiff's proposed project, it is not reasonable to assume that it will meet the needs of the residents of the development. The "commercial Area" in Colts Neck also contains a general store, Cumberland Farms, an expensive women's clothing store, pharmacy, gift shop, hardware store and various other similar type stores. The commercial district in Colts Neck consists of specialty type stores and cannot support the everyday needs of the community. The residents of this PUD would have to travel to either Freehold,

Marlboro, Lincroft or Shrewsbury to do their weekly food shopping. It is likely that pressure from the PUD will lead to further development in order to support the PUD's needs. This PUD and its anticipated further development is at variance with the SDGP's classification of Colts Neck as limited growth.

C. PLAINTIFF'S PROJECT REPRESENTS A SUBSTANTIAL ENVIRONMENTAL HAZARD.

Environmental concerns make this project undesirable. Defendant's experts have testified throughout the Zoning Board of Adjustment hearings and the trial before Judge Lane that this development would have a deleterious affect on the integrity of the Swimming River Reservoir (7-15-80 TR 60-15; 8-21-80 TR 43-16; 8-21-80 TR 113-8). Colts Neck contributes the major drainage area to the Swimming River Reservoir. A little over 50% of the entire watershed of the Reservoir lies within Colts Neck. Plaintiff's land drains into the Reservoir.

In his August 21, 1980 testimony before the Board of Adjustment General William Whipple spoke about water runoff. He stated that the quantity of runoff depends largely on the impervious surface (8-21-80 TR 7-22). Taking a Class Two rain storm as defined by the Agricultural Service, General Whipple stated that land developed at one-quarter acre would have seven times as much runoff as undeveloped land. (8-21-80 TR 8-20). A development of six units per acre would have a runoff factor three times as high as one acre zoned developments. (TR 9-14). General Whipple stated that there is "no doubt that multi-family housing generates more pollution. Not only because...[it] generates

more runoff, but because that runoff has a high proportion of pets and a greater concentration of garbage cans." (8-21-80 TR18-8). He further stated that there are several times the quantity of hydrocarbons coming from a given area of multi-family housing as against single family. (8-21-80 TR 25-4). General Whipple's opinion was that a development of this density would contribute about 3 times as much pollution to the streams as a traditional development, even with state of the art retention and detention basins. (8-21-80 TR 43-16). This non-point pollution will have an adverse impact on the streams leading into the Reservoir. According to Richard Moser of the American Water Works, Co., the Reservoir is presently pure and pristine (8-21-81 TR 121). He expressed concern that this PUD would increase the amount of hydrocarbons, lead and other pollutants entering the Reservoir. As General Whipple relates, any level of hydrocarbons is a threat to human life (8-21-80 TR 46-5); 8-21-80 TR 45-5).

According to the report submitted by Allen Dresdner, approximately 85% of the Orgo property drains into Slope Brook which flows directly into Swimming RiverReservoir. Slope Brook rises on the Orgo property. From the ORgo property line to the Reservoir, Slope Brook travels approximately one mile. (page 4 & 5). Thus, one can readily see the significance of development on the Orgo tract to the integrity of the Reservoir. Mr. Dresdner specifically states that development of the Orgo site at a density of 6 units per acre will have a negative impact on the Swimming River Reservoir. Environmental Impact of Orgo Farms Development, page 6, (hereinafter "Dresdner Report").

The Dresdner Report on pages 5-6 indicates some common and unavoidable water quality consequences of the development on the Reservoir as follows:

> (i) Increased water supply demand accompanied by decreased groundwater recharge from reduction in previous or open soil areas. ...shallow groundwater serves the purpose of maintaining base stream flow during summer months.
>
> (2) Removal of trees and vegetation, bulldozing and other construction efforts resulting in accelerated land erosion, increased stormwater flows and increased sedimentation of lands and the Reservoir, leading to accelerated thermal distablilization of the surface waters.
>
> (3) Installation of hydraulically efficient stormwaterdrainage systems and sanitary sewers and treatment facilities, resulting in:
>
> a. increased flood peaks;
> b. decreased runoff infiltration and decreased groundwater recharge; and
> c. decreased base flow in streams, resulting in reduced assimilative capacity of streams and reduced water quality in the Great Swamp.

According to the Dresdner report, these impacts are directly related to the intensity of the development; re: the higher the density, the greater the environmental consequence - page 6.

A developmentsuch as plaintiff's proposal would contribute various types of pollution from a number of sources. The Dresdner Report page 7, 8 first spoke of stormwater pollutants. The various types of storm pollutants are as follows:

1. significant stormwater pollutants come from street pavement. The aggregate material is the largest contributor of runoff, with additional quantities coming from the binder,

fillers and any substance applied to the surface; and

2. Motor vehicles also contribute a wide variety of materials to the street surface runoff. The pollutants emanate from fuel and lubricant leakage and spillage, particles worn from tires and brake linings, exhaust emissions which collect on the road surface and corroded and broken parts which fall from the vehicles. On page 7 of his report, Dresdner indicates that while the quantity of material left by by vehicles may be relatively small, the pollution potential is significant. He states that vehicles are the principal non-point source of asbestos and some heavy metals, including lead.

This theory was echoed by General Whipple in his testimony before the Board of Adjustment. There, he stated that a major source of lead pollution was the "bullseye" that comes out of a car's exhaust. (8-21-80 TR 21-25; TR 22-3). He additionally stated that the petro chemical hydrocarbons come mostly from automobiles. (8-21-80 TR 22-20 to 23-8). General Whipple had no doubt that concentrations of hydrocarbons in high density housing was materially greater than the concentration in low density housing. Additionally, there would be the greater amount of runoff to contend with. (8-21-80 TR 24-15 to TR 25-8). General Whipple indicated that areas with a great concentration of hydrocarbons and dense development are under extremely polluted condi-

tions. He directly related the developments to the presence of the hydrocarbons (8-21-80 TR 27-4). Again, best management practices will not eliminate this pollution. (8-21-80 TR 41-A). It is obvious that a development containing 1253 residential units alone will contain a great number of vehicles. This is not even considering plaintiff's proposed 120,000 square foot office complex, its hotel and 45,000 square foot low-rise office complex. The immense nature of this development necessitates a large number of vehicles and a great deal of black top parking areas to contain these vehicles. It is evident that the presence of these vehicles, traversing and parking on a considerable area of pavement which drains into Slope Brook, which runs only one mile directly into the Swimming River Reservoir, will adversely affect the integrity of the Reservoir and the health and safety of the drinking water of over 250,000 Monmouth County residents.

3. Litter, spills, anti-skid compounds and chemicals, construction sites, land surface and collection networks are additional sources of pollutants within an urbanization basin.

The Dresdner Report further speaks of the impact of development related pollution on receiving waters. He concludes by saying, on page 10 that the impact will be received first by Slope Brook and then by the Swimming River Reservoir. He specifically states on page 10 that:

> "channelization of Slope Brook will reduce its assimilative capacity thereby reducing its roll as a protective buffer to the Reservoir. Slope Brook is a first-order headwater stream and as such has an important function in preserving and protecting water quality in downstream receiving waters."

Dresdner recognized that not all waters can be protected from urban development. He suggests a prioritization of those waters which are most sensitive to contamination and which will present a health hazard to the public if contaminated. "The Swimming River Reservoir is such a water body and its protection is essential to all residents of its service area". Dresdner Report, page 11.

As mentioned above, the Supreme Court did not intend to promoite poor planning for the State in imposing the Mt. Laurel obligation. Mt. Laurel II at 238. The adverse environmental impact of this development, without more, makes this proposal contrary to sound land use planning, requiring a denial of plaintiff's request for a Builder's Remedy. Mt. Laurel II at 279.

D. PLAINTIFF'S PROJECT WOULD LEAD TO LEAP FROG DEVELOPMENT.

Testimony before the Board of Adjustment showed that plaintiff's proposal would constitute "leap frog" development which is inconsistent with sound planning. (7-29-80 TR 29-20; 7-15-80 TR 66-13). It is the stated intention of the Supreme Court, the SDGP and the MCGMP to logically plan and channel growth in the State and County.

Testimony by William Queale indicates that plaintiff's project recommends "a leap frog pattern into the center of the Township, away from the coastal corridor of development within the region." (7-29-80 TR 29-20). Mr. Queale stated that the project conflicts with the development and general welfare of the County and State. It places itself, with its great size and intensity, within the

midst of the agricultural area. It is far from utility corridors, and the designated development corridors and, as such, opposes the logical expansion of the State and County plans by leap frogging into the center of the Township. (7-29-80 TR 36-6 to 20). Mr. Queale's opinion was that its' location in the center of the Township in the midst of an agricultural area would require greater travel to work and to shopping and social functions. (7-29-80 TR 36-8).

Plaintiff's proposed project is massive and would be located in one of the most sparsely populated sections of Colts Neck. All parties concede that plaintiff's property is located in a limited growth area.

The Supreme Court advised that the Mt. Laurel obligation "should be consistent with the State's plan for future development." Mt. Laurel II page 226. As stated previously, it is the expressed goal of the SDGP, endorsed by the Supreme Court, to discourage population expansion in limited growth areas. Mt. Laurel II at 231. Plaintiff's tract is situate in the heart of the limited growth area, well away from existing development corridors. As suggested by Robert Halsey, former Director of the Monmouth County Planning Board, a high density development, such as the one envisioned by plaintiffs would alter the character of the area. (7-15-80 TR 113-3). It is clear by looking at the map prepared by the SDGP that plaintiff's project is located well within an area which the State has deemed should experience limited growth. To grant plaintiffs a Builder's Remedy would permanently alter the character of the area in direct opposition to the intent of the Supreme Court and the SDGP. To encourage

such development in this area is clearly contrary to sound land use planning. What the State designated as limited growth would no longer remain as such. This area, which serves as a buffer between the two development corridors of the Garden State Parkway and Route 9 would merge into the growth areas. This cannot be what the court intended. The court repeatedly spoke of its desire to discourage growth in limited growth areas. Even without the secondary anticipated growth engendered by this development, the PUD itself is so massive as to alter the character of the area from limited growth to growth. Once this fateful step is taken, it cannot be retracted. Colts Neck would become a mirror image of its neighboring growth municipalities. Leap frogging is not what was anticipated by a court whose stated intention was to "channel development into growth areas". Mt. Laurel II at 227; to make certain that the Mt. Laurel obligation is consistent with the State's plan for future development". Mt. Laurel II at 233 and to "provide low incoem housing and at the same time plan the future of the State intelligently" Mt.Laurel II at 238. Clearly, a massive development such as the one proposed on the Orgo site is contrary to the State's plans for the future development of the State and is contrary to sound planning.

E. PLAINTIFF'S PROJECT WILL HAVE AN ADVERSE IMPACT ON LOCAL TRAFFIC.

Additional evidence of the undesirability of plaintiff's project on this site is the impact on the traffic flow at the intersection of Routes 537 and 34.

On August 14, 1980, Robert Nelson testified on the adverse

impact of this PUD on traffic at the intersection of 537 and 34. He projected that by 1985, the eastbound lane of 537 would have a "F" level of service ("A" being the best), the westbound lane of 537 having a level of service "E". (8-14-80 TR 53-2-14). His figures took into account that Route 18 had been open longenough to stabilize.

Mr. Nelson felt that major roadways are not necessarily desirable for high density development. In his opinion, it is more desirable to have many local roads to disperse the traffic. (8-14-80 TR 58-1). In this instance, the PUD will exit onto 2 major arteries which are already overcrowded.

Additionally, cross-examination of Henry Ney, plaintiff's traffic expert and Mr. Nelson highlighted access problems to the industrial area of the Orgo tract.

Thus, from a traffic standpoint, it is evident that this development is ill-planned for this area. The intersection of Rt. 537 and Rt. 34 is already at capacity. With just the normal 3% increase in traffic the situation will be at an "F" level. The addition of the PUD's anticipated 700 vehicles during peak hours will obviously exacerbate an already difficult problem. The development of plaintiff's project at this location is contrary to sound planning practices.

F. FOR THE ABOVE REASONS, PLAINTIFF'S PROJECT IS CONTRARY TO SOUND PLANNING.

The Supreme Court acknowledged that growth in New Jersey should be channeled in a logical and consistent pattern. Plaintiff's proposal is inconsistent with this purpose. A massive

development on the Orgo tract, located in the heart of the area's limited growth section, is inconsistent with the intent of the Supreme Court and the SDGP. The SDGP has designated that this area is to experience limited growth only. In reviewing the SDGP map for Monmouth County one can see how far the plaintiff's project invades into the limited growth area. This is clearly contrary to the intent of the SDGP. The SDGP advises:

> "...unguided growth will progressively blur the distinctions between urban-suburban and low density conservation areas. Unguided growth will result in continuing incursions into vital, irreplaceable natural resources and jeopardize the possibility of retaining agriculture as an economically viable activity in the State." SDGP at 72.

This is precisely what will occur by the granting of a Builder's Remedy on the Orgo tract. Agriculture in Colts Neck is still a viable economic activity. However, the development of such a massive project constitutes a considerable incursion into the limited growth area and will adversely affect the remaining agriculture sought to be preserved. High density development, with its corresponding potential for litter, vandalism, unwanted light and noise, air and water pollution and increased vehicular traffic is not conducive to the agriculture and equine industry. This project will invite more development which will result in more farms being converted to commercial and higher density residential use. This is precisely what the court and the SDGP seek to avoid.

Plaintiff's proposal is environmentally unsound due to its proximity to the Swimming River Reservoir. Further, its location well into the limited growth area, far from the planned develop-

ment channels, is contrary to sound land use planning. Plaintiffs were advised by zoning Board of Adjustment, at the initiation of this case, that the location of their project on the Orgo tract was not desirable and was environmentally unsound. Plaintiffs must be denied a Builder's Remedy.

Defendant concedes that the granting of a Builder's Remedy will no longer be rare. However, it has shown this project to represent a substantial environmental hazard and be contrary to sound planning practice.

Furthermore, the court shouldexercise caution when confronted with a developer who discovers a municipality with allegedly exclusionary zoning practices and, with a Mt. Laurel case in mind, choose the prime piece ofreal estate in the town on which to propose his project, regardless of its impact on the community. While a Builder's Remedy is desirable in that it gives incentive to developers to challenge exclusionary zoning, it can also be used by the developer to subvert the intent of Mt. Laurel II and the SDGP by allowing development in limited growth areas.

G. PLAINTIFF FAILED TO ESTABLISH THAT THIS PUD WILL PROVIDE LOW INCOME HOUSING.

Finally, plaintiff has failed to demonstrate that his project will provide a substantial amount of lower income housing as required. Mt. Laurel II at 330. "When it comes to a Builder's Remedy, ...there is no substitute for low and moderate income housing". Mt. Laurel at 330. Plaintiff must prove that lower income housing will result from his development.

To date, no plan has been submitted by the plaintiff which

indicates that his proposal will result in a substantial number of lower income housing units. Absent this proof, plaintiff lacks standing to assert a claim of relief for a Builder's Remedy.

POINT SIX

PLAINTIFF'S APPEAL OF THE DECISION OF THE ZONING BOARD OF ADJUSTMENT IS BARRED BY RULE 4:69-6(b)(3)

****

After many hearings thereon before the defendant, Zoning Board of Adjustment of the Township of Colts Neck, plaintiffs' application for variance was denied by resolution of said Board of Adjustment adopted September 18, 1980. A true copy of said resolution is annexed to the affidavit in support of this motion made by Dolores O'Connor, Secretary to said Board of Adjustment as Schedule "C" thereof.

Further, as will appear from said affidavit true copies of said resolution were mailed to plaintiff, Richard G. Brunelli and to plaintiff's attorney, David J. Frizell, Esq. by first class mail on September 23, 1980 and a notice of the denial of said application for variance was published in the Asbury Park Press on September 25, 1980 and in the Daily Register on September 26, 1980.

Notwithstanding the aforesaid mailing and publication the complaint herein, as appears from the stamp of the Clerk of the Superior Court on said complaint, was not filed until November 12, 1980. This was 50 days after the aforesaid date of mailing of the resolution denying plaintiff's application for variance, 48 days after the publication of the notice of denial in the Asbury Park Press and 47 days after publication of the notice of denial was published in The Daily Register. The 45th day after publication in the Asbury Park Press fell on Sunday,

November 9, 1980 thus, the last permissible day for filing said complaint was Monday, November 10, 1980, two days prior to the date upon which it was actually filed.

It is this defendant's position that since the complaint was not filed within the period prescribed by R4:69-6(b)(3) the First Count of the complaint which seeks to review this defendant's denial of plaintiff's application for variance should be dismissed.

R4:69-6 in pertinent part provides as follows:

> (b) Particular actions. No action in lieu of prerogative writs shall be commenced
>
> **********
>
> "(3) to review a determination of a planning board or board of adjustment, or a resolution by the governing body or board of public works of a municipality approving or disapproving a recommendation made by the planning board or board of adjustment, after 45 days from the publication of a notice once in the official newspaper of general circulation in the municipality; provided, however, that if the determination or resolution results in a denial or modification of an application, after 45 days from the publication of the notice or the mailing of the notice to the applicant, whichever is later. The notice shall state the name of the applicant, the location of the property and in brief the nature of the application and the effect of the determination or resolution (e.g., "Variance--Store in residential zone denied"), and shall advise that the determination or resolution has been filed in the office of the board or the municipal clerk and is available for inspection; or" **********

It must certainly be the case that the mailing of the resolution itself is the equivalent of or has the same effect as the mailing of a notice of the action embodied in said resolution. Further, it is submitted that as against the applicants themselves

who know better than anyone else the location of the premises in question and the nature of their application the notice of denial as published was adequate. Moreover, since plaintiffs were furnished with true copies of the resolution, certified by the Secretary of the Zoning Board to be true copies thereof, the requirement that it be made available for inspection is fully met.

It is true that R4:69-6(c) provides as follows:

> "(c) Enlargement. The court may enlarge the period of time provided in paragraph (a) or (b) of this rule where it is manifest that the interest of justice so requires."

However, as Judge Pressler in Current Rules Governing the Courts of the State of New JErsey with Comments and Annotations by Sylvia B. Pressler points out at page 806 thereof:

> "Paragraph (c) of the rule was added by 1957 amendment of the source rule and was intended to 'restate in the form ofa generalized standard, decisional exceptions which had already been engrafted upon the rule', Schack v. Trimble, 28 N.J. 40, 48 (1958). These exceptions include (1) substantial and novel constitutional questions and (2) informal or ex parte determinations made by administrative officials which do not involve 'a sufficient crystallization of a dispute along firm lines to call forth the policy of repose' and where the right to relief depends upon determination of a legal question; and (3) an important public rather than a private interest which requires adjudication or clarification."

and see Kohler v. Barnes 123 N.J. Super. 69 (Law Div. 1973) in which Judge Lane commencing at page 78 of his opinion said:

> "Defendants argue that plaintiff is barred by R.4:69-6 or laches from challenging the appointment of members of the Commission other than Patterson.
>
> R.4:69-6 provides:
>
> (a) General Limitation. No action in lieu of

prerogative writs shall be commenced later than 45 days after the accrual of the right to review, hearing or relief claimed, ***.

****

(c) Enlargement. The court may enlarge the period of time provided in paragraph (a) ***where it is manifest that teh interest ofjustice so requires.

[1] Generally, a cause of action accrues when facts exist which entitle one party to maintain an action against another. Band's Refuse Removal, Inc. v. Fair Lawn, 62 N.J. Super. 522, 540 (App. Div.), modified 64 N.J. Super. 1 (App. Div.), certif. den. 33 N.J. 387 (1960) Marini v. Borough of Wanaque, 37 N.J. Super, 32, 38 (App. Div. 1955).

[2] The rule is generally established that mere ignorance of the existence of a cause of action or of the facts which constitute a cause of action will not prevent the running of the statute of limitations or postpone the commencement of the period of limitation. Diamond v. N.J. Bell Telephone Co., et al., 51 N.J. 594, 597 (1968); Joseph V. Lesnevich, 56 N.J. Super, 340, 355 (App. Div. 1959); Zimmerman v. Cherivtch, 5 N.J. Super 590, 593 (Law Div. 1949). The only exception made to this rule has been where the basis for an action has been fraudulently concealed, Joseph V. Lesnevich, supra, 56 N.J. Super. at 355; Zimmerman v. Cherivtch, supra, 5 N.J. Super at 593-594, or where the facts of which plaintiff is ignorant could not have been discovered by reasonable inquiry ordiligence. Cf. Diamond v. N.J. Bell Telephone Co. et al., supra, 51 N.J. at 597 51 Am. Jur. 2d, Limitation of Actions, S146, p. 715 (1970). It has been held that each official step in the course of an illegal program has the capacity to invoke the remedy of certiorari without the necessity of awaiting specific damage or tangible manifestation Marini v. Borough of Wanaque, supra, 37 N.J. Super at 38."

and on page 80 went on to say:

"[5,6] Exceptions to the time limitations imposed upon the in lieu procedure should be but exceptionally condoned and only in the most persuasive circumstances Robbins v. Jersey City, 23 N.J. 229, 238 (1957); Kent, et al v.

> Bor. of Mendham, et al., 111 N.J. Super. 67, 76 (App. Div. 1970). R. 4:69-6(c) was intended to restate in the form of a generalized standard decisional exceptions which had been engrafted upon the former limitation rules. Schack v. Trimble, 28 N.J. 40, 48 (1958). These exceptions include substantial and novel constitutional issues, informal or ex parte determinations made by administrative officials which do not involde 'a sufficient crystallization ofa dispute along firm lines to call forth the policy of repose,' and an important public rather than private interest requiring adjudication. See Schack v. Trimble, supra, 28 N.J. at 47, 49-51; Kent, et al v. Bor. of Mendham, et al., supra, 111 N.J. Super at 76; Bernstein v. Krom, 111 N.J. Super. 559, 564 (App. Div. 1970).
>
> [7] Plaintiff's complaintfalls within none of the exceptions to the limitation rule. Insofar as plaintiff seeks to challenge individual appointments made to the Commission more than 45 days before the complaint was filed on October 17, 1972 the challenge is out of time.

Also see Trenkamp v. Township of Burlington 170 N.J. Super 251, 259, et seq., (Law Div. 1979) in which it was held (page 270 of the opinion) that an action in lieu ofprerogative writ filed more than 45 days after plaintiff's knowledge of the issuance of a building permit was too late.

The instant case does not come within any of the three permitted exceptions.

First: No substantial or novel constitutional question is involved. Plaintiffs are seeking to reverse the denial of an application for variance upon the ground that said denial was for various reasons alleged to be "arbitrary, capricious, unreasonable, discriminating, unlawful and oppresive". The controlling rules for disposition of such cases have been developed and applied by the New Jersey courts for many years

since the enactment of the Zoning Act, N.J.S.A. 40:55-30 et seq. in 1928.

As to what constitutes a substantial or novel constitutional question see Tidewater Oil Co. v. Mayor and Council of Carteret, 44 N.J. 338, 341-342 (1965), Colocurcio Contracting Co. v. Weiss, 20 N.J. 258, 262 (1955) and In Re Windsor Mun. Util. Auth. v. Shapiro 57 N.J. 168 (1970).

SEcond: The matter here sought to be reviewed is not an informal or ex parte determination of an administrative official but on the contrary, a fully contested application for variance denied by a zoning board of adjustment. Therefor, it is obvious that the matter does not come within the second exception.

Third: This is not a situation involving an "important public rather than private interest which requires adjudication or clarification." One of the plaintiffs, Orgo Farms and Greenhouses, hopes to sell the subject real estate to the other plaintiff, Richard J. Brunelli, a developer. See paragraphs 5 and 6 of the Board's resolution, a copy of which is annexed to the affidavit of Dolores O'Connor in support of this motion to dismiss.

Obviously, the sale price depends upon the use to which Brunelli can put the property. He is seeking a variance to put the property to a highly profitable use, namely, the planned unit development described on page 1 of the aforesaid Resolution of the Zoning Board of Adjustment as follows:

> "The Plaintiff's application for the use variance for a PUD proposes four types of housing plus commercial and industrial uses as follows:
>
> Approximately 1/3 of the developed land is

for single family detached housing.

Approximately 1/3 is for attached, single family units referred to by the developer as townhouses, inclusive of dwellings described as townhouses, zero lot line houses and patio houses of a height of two stories with a net density of eight units per each acre developed for this use.

Approximately thirty-one acres or 1/7 of the total land involved is proposed for rental housing--being two and three story garden apartments. This term is used to describe all housing anticipated for rental except: (a) the five acre "senior citizen" section; and (b) five acres of the site designed for commercial/office use. "Neighborhood-commercial" uses to service this development are also included in the application.

Twenty acres South of Route #18 is offered for office/industrial use.

Forty acres of land is proposed to be preserved and set aside as "open space" never to be developed.

There will be an estimated 1,170 dwelling units and an estimated residential population increase of 2,500 people."

and on page 5 paragraph 8 thereof as follows:

"8. The proposal submitted by the developer through its witness Mr. Patrick Gilvary, planner and architect, who presented a model Exhibit A34A and A34B and represented the same as follows:

Residential units: 1,170 including

2-story garden apartments;
one-family dwellings;
townhouses;
patio houses;
zero lot line houses;
condominium flats or apartments
subsidized housing;
midrise (6-story)(senior citizen)
commercial (notspecified)
industrial (notspecified)
open space recreational (not specified)
water supply facility/sewerage
treatment plant."

The plaintiffs are a private business corporation and a developer. As above indicated the rules pertinent to the granting

and denial of use variances have long been well established.

The situation involves the private interest of the applicants. There is nothing unique about the issues or applicable law.

The courts of this State have not hesitated to apply strictly the time limitations prescribed first by statute and subsequently by Rule 4:69-6 to bar applications for writs of certiorari and actions in lieu of prerogative writs where the situation was one in which none of the three well recognized exceptions could properly be invoked.

Robbins v. Jersey City 23 N.J. 229, 238-239, 1957);
Donovan v. Gabriel and Gruber, 57 N.J. Super, 542, 547-549 (App. Div. 1959).
Olsen v. Fair Haven 64 N.J. Super 90, 95 (App. Div. 1960).
Kent, et al v. Borough of Mendham, et al 111 N.J. Super, 67 (App. Div. 1970).
Peckitt v. Board of Adjustment of Spring Lake 136 N.J.L. 405 (Sup. Ct. 1947).
Bruno v. Borough of Shrewsbury 2 N.J. Super 550 (Law Div. 1949)
Gammond v. Livingston Twp. 53 N.J. Super 449, 452, (Law Div. 1958).
Haack v. Ranieri 83 N.J. Super 526, 538-540, (Law Div. 1964).
Kohler v. Barnes, supra page 4.
Trenkamp v. Township of Burlington, supra page 6.

Moreover, the courts have repeatedly stressed that "Exceptions

to the time limitations imposed upon the in lieu procedure should be but exceptionally condoned and only in the most persuasive circumstances".

Kohler v. Barnes, supra page 4.

Robbins v. Jersey City, supra page 10

Donovan v. Gabriel, supra page 10

Kent, et al v. Bor. of Mendham, et al,

supra page 10 at page 76 of the opinion.

As stated by the HOnorable Hydn Proctor in Pagano v. Krispy Kernals, Inc. 10 N.J. Super 580, 591 (Law Div. 1950).

> "It is unpleasant for the court to dismiss actions because of failure to abide by the rules, but ifthe rules are to have any significance they must be respected by the bar as well as the bench."

It is submitted that in the instant case there is no valid reason why the 45 day rule should not apply and that the First Count of the Complaint, not having been filed within the period required by the rule, should be dismissed.

POINT SEVEN

THE ZONING ORDINANCE OF COLTS NECK IS PRESUMPTIVELY VALID AND IS NOT AN UNCONSTITUTIONAL TAKING OF PLAINTIFF'S PROPERTY.

****

Absent particular fundamental interests, any government action is presumptively valid. Mt. Laurel II at 305. A municipal ordinance is presumptively valid. Hasbrouck Heights Hospital Ass'n. v. Borough of Hasbrouck Heights, 15 N.J. 447 (1954). The burden of proving the ordinance invalid is on the attacking party. Fisher v. Bedminster Twp., 11 N.J. 194 (1953). Sunrise Village Associates v. Borough of Roselle Park, 181 N.J. Super 567, aff'd. 181 N.J. Super 565 (Law Div. 1980). Ordinances are presumed valid. Shapiro v. Essex County Bd. of Chosen Freeholders, 177 N.J. Super 87, aff'd. 183 N.J. Super 24. (Law Div. 1980).

The Supreme Court indicated that presumption validity of an ordinance will attack, but once in the face of a Mt. Laurel challenge Mt. Laurel II at 306. Defendant is entitled to the presumptive validity of its ordinance. Plaintiffs have not shown evidence to attack said presumption of validity, nor have they shown that the ordinance acts as a taking of their property. As stated above, there are many uses for plaintiff's property. Plaintiffs have not shown that no effective use can be made of the property in the event the variance is denied. Commons v. Westwood Zoning Bd. of Adj. 81 NJ 597 (1980).

Plaintiffs failed to show that their property is "in a very substantial degree rendered beyond practical, reasonable utilization under the restriction by the zoning ordinance. Schere v. Freehold

Township, 119 N.J. Super 433 (App. Div. 1972).

Thus, defendant Colts Neck's zoning ordinances is presumptively valid. Plaintiffs have failed to demonstrate their property has been rendered useless by the ordinance. There has been no unconstitutional taking of plaintiff's property.

C O N C L U S I O N

For the reasons stated above, defendant Zoning Board of Adjustment respectfully suggests that the court find as follows:

A. The action by the Zoning Board of Adjustment in denying plaintiff's application for variance was proper;

B. Colts Neck does not have a Mt. Laurel obligation to provide for low income housing as no part of the Township is properly in the growth area;

C. In the alternative, if Colts Neck has such obligation, it should be given an opportunity to rezone consistent with this obligation;

D. Colts Neck fair share obligation is minimal;

E. Plaintiff Orgo and Brunelli's proposed PUD is not appropriate for a Builder's Remedy as it violates sound planning practices and poses an environmental hazard;

F. Plaintiff's appeal of the decision of the Zoning Board of Adjustment is barred by Rule 4:69-6(b)(3);

G. Colts Neck's zoning ordinance is entitled to presumptive validity; and

H. There has been no unconstitutional taking of plaintiff's property.

Respectfully Submitted,
LOMURRO, EASTMAN & COLLINS
Attorneys for Zoning Board
of Adjustment of Colts Neck

BY: _____
KERRY E. HIGGINS
For the Firm