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March 1, 1984

Honorable Eugene Serpentelli
Court House
Toms River, New Jersey

RE: Orgo Farms & Greenhouses et al v.
Township of Colts Neck

Dear Judge Serpentelli:

Enclosed please find trial brief on behalf of the plaintiffs Orgo Farms & Greenhouses, Inc. and Richard J. Brunelli.

Respectfully submitted,

David J. Frizell

DJF:m
encl
cc: Robert O'Hagan, Esq.
Louis Locascio, Esq.

ORGO FARMS & GREENHOUSES, INC., a New Jersey Corporation, and RICHARD J. BRUNELLI, Plaintiffs, vs. TOWNSHIP OF COLTS NECK, a Municipal Corporation, et al, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY Docket Nos. L-3299-78 PW L-13769-80 PW
SEA GULL LTD. BUILDERS, INC., Plaintiff, vs. THE TOWNSHIP OF COLTS NECK, Defendant.	Docket No. L-3540-84

TRIAL BRIEF AND APPENDIX FOR PLAINTIFFS,

ORGO FARMS AND GREENHOUSES AND

RICHARD J. BRUNELLI

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STATEMENT OF FACTS

Plaintiffs are the owners of the legal and equitable interests in property located on Route 537 in the Township of Colts Neck and known as Block 48, Lots 11, 20 and 48-01 on the official tax map of the Township of Colts Neck. The Orgo family bought the subject property in 1935 and 1938 many years prior to the adoption of zoning regulations in the Township. Ernest T. Orgo, President of Orgo Farms & Greenhouses, testified that the family had farmed the property for 35 years. The property had been used for general farming and for a nursery for the wholesale florist business. (Transcript June 26, 1980, p.143-163). The property which consists of 214 acres is located near the intersection of Routes 537, N.J. Highway 34 and N.J. Route 18. The State Development Guide Plan (hereinafter referred to as "SDGP") designates Route 18 among the six major highways in Monmouth County. SDGP at p. 104.

Before contracting to purchase the Orgo tract, plaintiff Richard J. Brunelli engaged planning consultants to determine the suitability of the site for a planned development incorporating housing types mandated by the Supreme Court in Mount Laurel I. Plaintiff Brunelli engaged in an extensive analysis of the site from environmental and planning perspectives and reviewed available governmental studies, including but not limited to the Township Master Plan and supporting

documentation, the Monmouth County General Development Plan, and the TriState Regional Planning Commission Guide.

The Township Master Plan designates approximately one half of the property for commercial uses. The Master Plan of the Township also proposes a roadway, "Joshua Huddy Drive",which runs through the site. The Township Master Plan further envisages development in the southerly portion of the township as a result of the construction of the Route 18 Freeway. The Township Master Plan projected the possibility of an extension of a sewer line connector in the southerly portion of the Township in the vicinity of the Orgo tract. The Orgo tract is located at the intersection of the three major roadways which traverse the Township: State Highway Route 34, Monmouth County Route 537 and State Highway Route 18 Freeway. The proximity of this site to these major corridors minimizes the utilization of roads through existing or proposed low density residential/agricultural districts of the Township by the future residents.

In 1978 the Monmouth County General Development Plan designated the Orgo tract for two types of uses, office and research facilities and low density residential uses. The Highway 34 frontage adjacent to plaintiffs' project is designated under the County plan for commercial and retail uses. The County Planning Board's Natural Features Study specifically includes the subject property among those areas in "Planning Area V" which are highly suitable for development. The Growth Management Guide of the Monmouth County Planning Board, although not adopted until April 1982, shows

a village center at and near plaintiffs' property, even though the Guide shows Colts Neck Township as a limited growth area.

The TriState Regional Planning Commission, the interstate agency established by legislative action of the states of Connecticut, New Jersey and New York, which had been recognized by the Federal Government as the official planning agency for the tristate region, also finds that Colts Neck Township can and should provide residential densities for new developments up to seven units per net acre. The Orgo tract is within that area designated by the Commission to have recommended densities for new developments at 2 to 6.9 dwelling units per net acre. Among the major objectives of the TriState Regional Plan is the preservation of critical areas by concentrating development on suitable sites. The Commission conclusions are based on an analysis of prime farmland and public water supply watershed catchment areas. The Commission study shows that this site and Colts Neck Township has the lowest percentage of prime agricultural soils. The TriState study also reveals that almost all of the undeveloped portions of the tristate metropolitan region are part of catchment areas.

In August 1978 plaintiffs met informally with Township officials to request a rezoning of the Orgo tract in order to allow the development of a variety and choice of housing and to concomitantly relieve the property of unreasonable and confiscatory zoning regulations. After a negative response

from Township officials, plaintiffs filed an action on September 22, 1978 alleging that the zoning ordinance of Colts Neck Township was exclusionary.

On July 3, 1979 the Honorable Merritt Lane, Jr. rendered an opinion from the bench declaring the Colts Neck Township Zoning Ordinance void for failure to provide an appropriate variety and choice of housing types. The Township was directed to adopt within 90 days a reasonable zoning ordinance incorporating a variety and choice of housing types. The judgment was affirmed by the Appellate Division and cross petitions for certification were pending before the State Supreme Court until remand for Mount Laurel II relief. In rendering his opinion Judge Lane stated that plaintiffs were not entitled to specific relief for their property because of their failure to submit a development application for formal review by Township administrative agencies.

In order to exhaust administrative remedies in accordance with Judge Lane's opinion plaintiffs made an application with supporting documentation to the Zoning Board of Adjustment of Colts Neck Township for a variance pursuant to N.J.S.A.40:55D-70(d) to permit use of the tract in question as a planned unit development, and for approval of the preliminary site plan for that proposal.

On September 20, 1979 the Zoning Board of Adjustment rejected the application and refused to grant plaintiffs a hearing on the development application. On October 11, 1979 plaintiffs filed a complaint in lieu of prerogative writs to compel the Board of Adjustment to consider and grant the

development application. That complaint was docketed as L-6822-79.

On April 24, 1980 the Honorable Patrick J. McGann, Jr. ruled that plaintiffs had submitted a complete application to the Zoning Board of Adjustment on the merits of the application. Judge McGann further ruled that the Zoning Board must render a decision by August 22, 1980. That order was filed on May 5, 1980. On July 18, 1980 at the request of the Zoning Board and with applicants' consent the decision date was extended.

The Zoning Board of Adjustment conducted public hearings on the variance application on May 29, June 12, 17, 19, 26, July 15, 17, 24, 29, 31, August 7, 14 and 21. On August 25, 1980 the Board considered summation by counsel and evidentiary objections and also deliberated and voted on the application.

Plaintiffs requested a variance to permit construction of a well balanced Planned Unit Development (hereinafter referred to as "PUD") known as Colts Neck Village. The PUD was designed as a logical extension of the existing village and commercial center of Colts Neck. The project contains a variety of housing types and densities to satisfy regional and local demand including small lot design, townhouses, garden apartments and senior citizen housing. The residential uses are coordinated with neigh-borhood commercial and office areas to serve the needs of residents. Another distinct area of the site was proposed for office and industrial

uses as well as for the location of the Wastewater Treatment Plant. Four basic elements within the plan established its character: (1) circulation and pedestrian movement system; (2) open space system; (3) residential clustered neighborhoods; and (4) nonresidential support services. The project was designed to optimize preservation of existing wooded areas, to minimize environmental impacts by appropriate techniques, and to incorporate building design into the existing topography of the site. (Transcript May 29, 1980, pp.15-59) (Colts Neck Village Project Description, RSWA, Inc. pp.2-8, Exhibit A-7)

In support of its showing of special reasons plaintiffs presented extensive proofs to the Board of Adjustment. Several special reasons were advanced to justify the grant of a variance pursuant to N.J.S.A.40:55D-70(d), including:

(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 use 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. In addition applicants presented extensive proofs to demonstrate that the "negative criteria" would not be offended by the proposed PUD.

Plaintiffs showed that the application was specifically designed to fulfill Colts Neck Township's constitutional obligations to provide an appropriate variety and choice of housing, including lower income housing.

Plaintiffs entered proof that on August 3, 1979, Superior Court Judge Merritt Lane, Jr. entered a Judgment Order declaring the Zoning Ordinance of the Township of Colts Neck void for failure to provide an appropriate variety and choice of housing, including least cost housing. The decision on which the Judgment Order was based was submitted by the applicants as A-32. The Judgment Order specifically directs the Township to permit single family houses on small lots, townhouses, garden apartments, patio houses, and zero lot line houses, development of housing pursuant to a plan which mixes housing types together with commercial uses adjunct to that housing, and a development plan for innovative and creative housing and site design. (Colts Neck Village Housing Plan by Patrick M. Gilvary, Architect Planner, Exhibit A-33)

As disclosed by the project description, the land use plan, the housing plan, the engineering plans, and the project model, the application requested permission from the Township to construct a PUD incorporating the housing mix and adjunct uses mandated by Judge Lane's order. (Transcript July 17, 1980 pp.19-31) (Colts Neck Village Housing Plan by Patrick M. Gilvary, Exhibit A-33)

Development of the project includes innovative and crea-

tive housing and site design. As described by the designers Rahenkamp, Sachs, Wells & Associates, Patrick J. Gilvary and Abbington-Ney Associates, the physical design of this proposal is intended to take advantage of every natural feature on the project site. The applicant hired Rahenkamp, Sachs, Wells & Associates, one of the most qualified PUD designers available on the East Coast. Mr. Rahenkamp displayed a slide show to demonstrate to the Board the general advantages of PUDS: the generation of less costly and more varied housing, the preservation of open space and the flexibility of design which allows for a higher quality of environmental and land use planning, concomitantly minimizing the negative impacts of land development. (Transcript May 29, 1980, p.15-22)

Mr. Rahenkamp explained that the Orgo Farms tract is peculiarly suited for PUD by virtue of its access to major transportation routes and commercial and school areas. (Transcript May 29, 1980, p.33-34). The tract's position in regard to the watershed is also crucial in that sewerage effluent can be discharged into Hockhockson Brook without draining into the Swimming River Reservoir. (Transcript May 29, 1980, p.35, 1.7 to 13) In addition the natural features, including the slopes, ponds and wooded areas, allow for sensitive utilization of the land and harmonious accommodation of the varied housing types. (Transcript May 29, 1980, p.36-37). Garden apartments can be shelved into existing grades while single family homes can utilize flatter land complimented by wooded areas. (Transcript May 29, 1980, p.37, 1.4 to 6; 1.13-16). The tract is also perfect for

utilization of detention ponds and drainage swales and can be developed so as to reduce impervious surfaces and actually improve water quality leaving the site. (Transcript May 29, 1980, p.23-25, p.54-55). Mr. Rahenkamp thoroughly explained the several major advantages of developing the Orgo tract for the proposed PUD and the various reasons why the Orgo tract is so perfectly suited for such a project. The project is designed to accommodate, wherever possible, offsite features which impact the development of the site. (Transcript May 29, 1980, p. 15-59). Even William Quaele, the Township Planner, admitted that the project is "generally well designed." (Transcript July 29, 1980, p.29, l.14).

The Gross Residential Density of the project is 5.66 units per acre (Exhibit A-7, p.3). 48% of the housing to be provided by this project, or approximately 550 units, is designed pursuant to "least cost" design principles. The project was redesigned after Mount Laurel II to incorporate manufactured housing for lower income families. The preliminary architectural designs for the housing proposed by the applicant were prepared by Patrick Gilvary, Architect, who testified that 48% of the project had been designed for "least cost", including the following:

(1) Section 1 - approximately 52 units, patio homes. These units were estimated to cost approximately $60,000 - $70,000, depending on actual size of the individual unit, in 1980 dollars.

(2) Section 6 - 72 units, two story garden apartment

condominiums. Estimated price range, $44,000 - $55,000.

(3) Section 7 - 233 units, two and three story garden apartment condominiums. Estimated price range, $44,000 - $55,000.

(4) Section 8 - 68 units, single family homes on small lots (approximately 80' frontage). Estimated price range, $72,000 - $90,000, depending on actual size.

(5) Section 12 - 90-120 units, subsidized housing (either 90 family units or 120 senior citizen units, at the discretion of the Zoning Board of Adjustment). (Transcript June 26, 1980, p.115) (Colts Neck Village Housing Plan, Patrick Gilvary, Exhibit A-33).

The applicant offered to demonstrate, upon application for final approval, that the above referenced "least cost" housing units had not been transformed into luxury units, and to demonstrate at that time that the final design of the units was consis-tent with the testimony given by the architect, to the effect that these units were designed to reach the lowest income levels that can be reached by the private housing industry for each respective housing type. Applicant further offered to restrict Section 12 to only subsidized housing. (Applicants' Exhibit A-57).

Applicants also presented Stuart Sendell, an expert in financing for low and moderate income housing. Mr. Sendell testified that the mix of subsidized and nonsubsidized housing units gave the proposed PUD a priority rating and a high chance of being selected for funding. (Transcript June 26, 1980, p.98, l.12-25; p.99, l.1) Mr. Sendell reviewed

the site criteria utilized in granting housing funding and concluded that a partially assisted program through Federal or State Authorities would be available with priority in selection because of the mixture of housing types. (Transcript June 26, 1980, p.111-112). Mr. Sendell also stated that in order to obtain the subsidies, certain densities are required with townhouses for sale at six to eight units per acre, rental townhouses up to thirteen per acre, traditional rental units up to 16 per acre and senior citizen housing between 20 to 30 units per acre. (Transcript June 26, 1980, p.120-121). Mr. Sendell further informed the Board that a Resolution of Need must be adopted by the Township in order to obtain the necessary subsidies. (Transcript June 26, 1980, p.124-125).

Plaintiffs further demonstrated that there was a need for the number and variety of housing units proposed. Plaintiffs analyzed data from the New Jersey Department of Community Affairs, the New Jersey Department of Labor and Industry and the Monmouth County Planning Board demonstrating a strong demand for housing in Monmouth County, (Market Study, Rahenkamp, Sachs, Wells & Associates, pp.21-29, Exhibit A-9).

The revised Statewide Housing Allocation Report, by the Department of Community Affairs, submitted by the applicant as A-30, indicates that the Township of Colts Neck should provide for 679 low and moderate income housing units within the Township of Colts Neck by the year 1990. The applicants estimated that this proposal would be built over a five year

period, and, if this approval were granted, would seek to commence construction in the spring of 1981. This application would fulfill the Township's obligation to provide low and moderate and "least cost" housing.

Plaintiffs further showed that unless the application is approved, it was not likely that the Township would fulfill any of its obligations to provide housing in the foreseeable future. Even if the Township were to zone other properties for "least cost" housing, it would take several years for development plans to be prepared, submitted and approved while the development for this project has been under way for approximately three years.

Plaintiffs proved that the applicants were the same as the plaintiffs in the above referenced action. Prior to the institution of that action, the Township of Colts Neck did not recognize any obligation to provide for the regional general welfare in its Development Regulations Ordinance, and did not provide a variety and choice of housing types, including "least cost" housing anywhere in its zone plan. These applicants spent a great deal of time, money and effort to establish the principle that Colts Neck Township has a constitutional obligation to include provisions in its Zoning Ordinance for all categories of persons who may wish to reside within the Township, and especially those economic classes who were excluded under the present zoning scheme. The expenditure of this time, money and effort, which served the public interest, was advanced as a "special reason" in the review of the applicants' proposal.

Plaintiffs proved that the Orgo Farm is particularly suited to the type of development proposed by the applicant, and mandated by Judge Lane's Order.

The location of the Orgo tract is central to the Township of Colts Neck and complies with the Monmouth County Planning Board's "Residential Timing Location Criteria." The Planning Director of the County of Monmouth testified that, because of the site's proximity to existing and proposed commercial facilities, existing public services including fire protection, its direct vehicular access to major transportation routes, and its location on a local bus service route, the project could receive 26 points out of a possible 46 points. It would not receive the 10 possible points for access to an existing water supply, or 10 points for access to an existing public sewer service. No location in Colts Neck Township could, however, receive points for access to an existing water or public sewer service. (Transcript July 15, 1980, p. 34-41.) Therefore, the Orgo tract is an optimum location for the proposed PUD.

The Orgo Farm tract is designated on the County General Development Plan for two types of uses: office facilities and low density residential uses. Although the County Planning Director testified that the development of the proposal at that location would be inconsistent with the County General Development Plan, development of any of the uses mandated by the Superior Court would be inconsistent with the County General Development Plan in any part of Colts Neck.

In that the County General Development Plan shows commercial office/research facilities in this location, conflict with the County General Development Plan is minimized by location of the development at this site.

Although the State Development Guide Plan, of the Department of Community Affairs of the State of New Jersey, designates Colts Neck generally in a "limited growth area", the Director of the Division of State and Regional Planning filed a report with the Board of Adjustment to the effect that, in that this project proposes no funding from public sources for the provision of public utilities, its approval would not conflict with the principles expressed in the State Development Guide Plan.

The several planners and other experts who testified in this proceeding, including Robert Halsey, John Rahenkamp, Abbington-Ney Associates, and William Queale, generally agreed that the following locational criteria should be considered and used in analyzing the suitability of a particular tract of land for the type of development mandated by the Court Order: proximity and access to commercial facilities and to public services including police, fire, post office, municipal building, schools; environmental suitability for development considering both on-site and off-site factors; access to or suitability for water utilities and sewer; access to major transportation routes, public transportation and major highways for commutation to employment and for general purposes; compatibility with existing and proposed land uses under the Master plan - including residential,

commercial, agricultural and industrial; and the ownership pattern of large contiguous tracts of land in single ownership so that extensive "assemblage" is not required.

Relative to the above criteria, the Orgo Farm site was shown to have the following characteristics:

(1) It is immediately adjacent to the commercially zoned and partially developed commercial area between Route 537 and Route 18, and Route 34. It is within a short distance of the commercially zoned and developed commercial area along Route 34 north of Route 537. (Transcript May 29, 1980, p. 33-35.)These areas are the only commercially zoned and developed sections of Colts Neck Township.

The Orgo Farm site, near the intersection of Route 537 and Route 34, is located relatively a short distance from the following public services: a volunteer Fire Department located on Route 537 less than one-half mile west of the site; the U.S. Post Office located along Route 34, less than one mile from the site; the municipal building located central to the Township, northeast of the site approximately two miles; and one of the Township's three public schools, Atlantic Elementary School, located immediately adjacent to the site.

According to the Monmouth County Natural Features Study by the Monmouth County Planning Board, and more specifically according to the environmental analysis done by Abbington-Ney Associates and the other experts' reports, the Orgo Farm site is highly suitable for development of the type proposed by

this application. Most of the site is comprised of soils which are, according to the Soil Conservation Service, rated highly suitable for development. These soils are well drained and capable of supporting development of the type proposed. The topography of the site is gently sloped and contains natural drainage contours which are maintained by the proposed development. The more intense forms of development proposed by the applicants are located on or in areas of the site which were previously used for grain farming. This area has been largely stripped of native vegetation, so that extensive clearing and grading is not required for development of the site. That portion of the site which is heavily wooded is designated for low density, single-family residential uses in order that this native vegetation can be disturbed as little as possible. The existing drainage contours and existing ponds on the site are preserved for common open space and no development. (Transcript July 15, 1980, p. 98-101.)

The Orgo tract is also advantaged by the availability of Hockhockson Brook which can contain the sanitary sewer effluent without any drainage into the Swimming River Reservoir. In addition, the Raritan formation is directly under the site and is an excellent source of water supply for the new PUD.

Both the plaintiffs' experts, including Rahenkamp, Sachs, Wells & Associates, Abbington-Ney Associates and John Lazarus & Company, and the Township Planning Board's real estate expert testified that the development proposed on this

site was compatible with the existing and proposed commercial used to the west of the site along Route 34, and compatible with the existing and proposed uses to the South of the site, the Route 18 Freeway and the Earle Naval Installation. Kenneth Walker testified that the proposed use would be incompatible with possible future large lot residential development to the east of the property along Route 537. Since most existing and all proposed land uses in Colts Neck are for very large lot single family residential uses, or agricultural uses, it is impossible for a project of this type to be located within Colts Neck Township yet in an area where it would not affect existing or proposed residential or agricultural development. Even accepting Walker's analysis applicants' proposal would effect only properties on the east side and would not effect all adjacent properties.

The location of a project of this type in any other portion of the town, including that portion referred to by the Planning Board's experts in the easterly section of Colts Neck along Route 537, would perforce be substantially more incompatible with existing and proposed uses. That quadrant of Colts Neck Township along Route 537 has been substantially developed and improved for the horse breeding industry -- a land use which this Township seeks to encourage and promote. Many of the properties designated by the Township Planner and real estate expert are substantially developed as horse breeding installations, including the Stavola Farms and Bernadotte Stables. Furthermore, the existing industrial com-

mercial uses along Route 34, including NAD Earle and the retail and service establishments, are among the only uses located anywhere in the Township of Colts Neck which would be characterized as compatible with the proposed form of development. This type of development anywhere else in Colts Neck Township would necessarily be less compatible in that it would have to be surrounded on all sides by large lot residential and/or agricultural uses.

Planning Board's expert Kenneth Walker testified that the uses mandated by the Court Order required parcels of land in single ownership or under single control having at least 100 to 125 acres in size. This testimony is consistent with the plaintiffs' experts testimony that large contiguous parcels of land are required for this form of development. The Orgo Farm is 214 acres in single ownership and under single control.

As another special reason in support of the application, plaintiffs demonstrated that the Orgo Farm tract is unsuited to its zoned use, and its owners are deprived of all practical and reasonable economic use thereof. Because of rising energy costs and other economic factors Orgo Farms discontinued the use of the subject property for the wholesale florist business in 1979. Orgo testified that the farming operation at this location had lost almost $20,000 each year for the last five consecutive years. About $2,700 of this loss was in depreciation, and no other non-cash losses were reported. Orgo testified, based on his 35 years of experience, that the property could not be profitably used

for agricultural purposes. Of the 214 acre tract, there are approximately 100 tillable acres which could be leased for agricultural purposes. The highest possible income to be derived from this source would be $40.00 to $50.00 per acre, per year, or about $4,000 to $5,000 per year. (Transcript June 26, 1980, p.143-163). Real estate taxes based on farmland assessment on the non-residential area of this tract alone are approximately $3,300 per year according to Walker's report. Total actual taxes are $7,751.53 per year.

Donald Kiefer, a real estate appraiser, analyzed the feasibility of developing the site under present zoning and concluded that the site had been zoned into inutility and that it was not economically feasible to develop the property as a large lot residential subdivision. Mr. Kiefer pointed out several factors which make the Orgo tract unsuitable for its zoned use and which contribute to the unmarketability and noncompetitiveness of the tract.

Kiefer testified that current zoning mandated the development of housing in the $150,000 to $200,000 range. Mr. Kiefer personally investigated the "absorption rate," based on the actual experience in Colts Neck over the past five years, and concluded that six units per year was a reasonable expectation of absorption of these lots at this site. Based on actual improvement cost estimates for subdivisions in Colts Neck, he estimated that $18,800 was a reasonable per lot improvement cost estimate for A-1 zoned lots. Kiefer concluded that the "development value" of the Orgo tract was

negative. Kiefer stated that the zoning resulted in a negative land value of (minus) $1,700,000 and concluded that the zoning was confiscatory and the property could not be developed as zoned with a reasonable expectation of a fair return. (Transcript May 29, 1980, p.74 to 92).

The Planning Board presented Kenneth Walker to refute the conclusion presented by Mr. Kiefer. Mr. Walker used the same analysis utilized by Mr. Kiefer but instead concluded that the land had a "development value" of about $1,250,000 for the portion north of Route 18 only. He did not render an opinion on land south of Route 18. This "value" assumed improvement costs of $8,600 per lot and that 21 lots per year could be marketed from this site. The "development value" includes the amounts needed for raw land, subdivision approvals, developer's profits, interest on loans or mortgages, legal expenses for the above, and any other carrying costs, administrative or overhead expenses incurred until the approvals are obtained and closing of title. The value does not allow for the time required to obtain approvals. Walker had not analyzed this property's "fair market value" and could not give an opinion on whether the stated "development value" was higher or lower than fair market value. (Transcript August 7, 1980, p.19-74).

Plaintiffs further demonstrated that the proposed PUD promotes all the purposes of zoning as set forth in the Municipal Land Use Law. Plaintiffs analyzed the purposes of zoning as set forth in N.J.S.A.40:55D-2 as they relate to the proposed PUD and developed the necessary corresponding

proofs. (See plaintiffs' exhibit A-51).

Plaintiffs further demonstrated that the variance could be granted without substantial detriment to the public good. Plaintiffs presented the following facts in support of this negative criterion.

Public good is defined as the welfare of surrounding properties, the welfare of the town as a whole, and the general welfare of the region of which the Township is a part.

With respect to the effect of the PUD on surrounding properties, applicants' expert as well as the Planning Board's expert, Kenneth Walker, agreed that there would be no adverse impact on the properties to the west and the south of the proposal. (Transcript May 29, 1980, p.68, 1.7-21; Transcript August 7, 1980, p.35, 1.8-14). In fact, the commercial properties along Route 34 would be substantially enhanced by the proposed development. (Tran-script May 29, 1980, p.69, 1.16-25). With respect to the properties north and east of the proposal along Route 537, the project is designed to minimize adverse impacts by focusing the development in a westerly direction. This focus can be substantially enhanced by Township action in fulfillment of the Master Plan in constructing the collector road referred to as Joshua Huddy Drive from Route 34 through the proposed development. Applicant's consultant Donald Kiefer of John Lazarus & Company, testified that the adverse impacts on properties north and west of the project would not be substantial and

the site would be effectively buffered. (Transcript May 29, 1980, p.68, 1.11-21). Kenneth Walker testified that there would be some effect on these properties, but did not characterize this effect as substantial. (Transcript August 7, 1980, p.55, 1.8-14). The neighboring property immediately east of the subject property is Stavola Brothers Angus Steer Cattle Breeding Installation. Most of the other areas of Colts Neck Township are substantially developed for large lot single family residential neighborhoods and/or active horse breeding facilities and stables. Location of a development of this type in any other area of Colts Neck Township would necessarily require its proximity to these established facilities. (Transcript May 29, 1980, p.71-73).

Plaintiffs also proved that the approval of the proposed development at this location would not adversely affect the ability of the Township of Colts Neck to provide municipal services to its present or future inhabitants. Despite continued residential development, the school enrollment of the Colts Neck public school system has been on a steady decline for several years and is projected to continue to decline. The school population projected form this development can be accommodated without substantially overburdening the existing capital improvements of the school system. (Transcript June 19, 1980, p.43-47; 59-64). There is currently in Colts Neck Township no municipal assessment for municipal services. Because of "intragovernmental transfers," primarily state and federal funding sources, the Township of Colts Neck enjoys an annual budget <u>surplus</u> of between $200,000 and $300,000 per

annum. (Transcript June 19, 1980, p.14-19). Mr. Radway, the witness who presented the fiscal impact data, noted that PUD developments in general require less municipal services that conventional residential subdivisions. (Id, p.25-30). Mr. Radway extensively reviewed the municipal budget and concluded that, if the average value of homes in the PUD was $50,000, the costs attributed to the project would increase the Township budget by only $10.00 (total, not per unit). By increasing the average value to $60,000 the municipality would benefit from a $20,000 surplus! Additional increases in average value result in corresponding increases in municipal revenue from the project. (Transcript June 19, 1980, p.68-69). It was later demonstrated that the average value of units would be in excess of $70,000, thereby resulting in a substantial economic benefit to the Township. This evidence is largely mathematical and is unrefuted in the record. It is consistent with similar studies throughout the nation, as described by Radway, that planned developments actually are very beneficial to municipal budgets, a fact not commonly understood.

Henry Ney, a recognized authority in traffic planning, thoroughly studied the proposed means of access to the PUD and prepared exhaustive traffic counts in support of his study based on accepted projections of traffic generation from the Institute of Traffic Engineers. Mr. Ney projected the volume of traffic which would be generated from the PUD. (Transcript June 12, 1980, p.99, l.15-23). Based upon his

projections he developed a series of recommended offsite access designs which would maintain the current "B-C" levels of services that exist along Routes 537 and 34. (Transcript June 12, 1980, p.101, 1.14-19).

Mr. Ney pointed out that the Orgo tract was advantaged by its "access to all of the major highways in Monmouth County and in this area." (Transcript June 12, 1980, p.104, 1.18-25). Only local improvements to Route 537 would be required in order to accommodate the PUD and maintain existing levels of service. A road widening on the south side of Route 537 would be required in order to accommodate the PUD and maintain existing levels of service. A road widening on the south side of Route 537 to improve the 537-34 intersection was designed without disturbance to the existing land uses. A shopping center site on the corner had already dedicated sufficient right of way to accommodate the widening. The only other property affected would be the Atlantic Elementary School and this could be accomplished without damaging existing trees. (Transcript June 12, 1980, p.108, 1.3-13). In addition upon completion of the project modifications in the timing of the intersection traffic control devices was recommended. (Id. p.108, 1.20-25). It was further noted that the Township Master Plan designated Joshua Huddy Drive as a collector road through the Orgo tract, which, if built, would further improve traffic access and even eliminate the need to widen Route 537. Consistent with his conservative approach, however, Mr. Ney did not rely upon Joshua Huddy Drive in designing the traffic plan. (Transcript June 12,

1980, p.109, 1.3-15).

The applicant offered to make any necessary street improvements required as a result of this proposal, and to contribute toward the cost of the same pursuant to N.J.S.A.40:55D-42, and to pay, if necessary and appropriate, the full cost thereof.

The Planning Board's traffic expert, Robert Nelson, agreed with Mr. Ney that adverse impact on the Route 537 - Route 34 intersection could be anticipated as a result of the proposed development. Nelson testified that while a change in the timing of the lights at that intersection might "balance" the level of service, in his opinion it was unlikely to have this change made by State authorities. Both experts agreed that offsite improvements should be made to that intersection simultaneous with the construction of this proposal. (Transcript August 14, 1980, p.73, 1.6-10).

Nelson's testimony and analysis did not deal with any proposed improvements for the intersection and he did not attempt to determine what improvements are necessary to maintain and provide acceptable levels of service at this intersection. Nelson could not testify whether the proposed improvements, or any other improvements, would provide acceptable or better levels of service. (Transcript August 14, 1980, p.72, 1.12-25). The application should have been approved upon the condition that the applicant install at its own expense the street improvements to the intersection of Route 537 and Route 34 as determined to be reasonable and

necessary pursuant to N.J.S.A.40:55D-42 at the time of final site plan approval.

With respect to offsite environmental factors, applicants retained Elson T. Killam Associates, noted environmental and hydraulic engineers, to develop water supply and sewerage treatment systems for the project. Nicholas DeNicholo, an engineer involved in the design of such systems submitted a report to the Board and testified that the water supply system was developed to pump 2,500 gallons per minute for a two hour duration, an amount which satisfies the maximum daily demand, peak hourly demand and anticipated fire demand in compliance with the standards of the National Fire Protection Association. (Transcript June 26, 1980, p.14-16). The Raritan formation, an extensive underground potable water supply, is directly below the Orgo tract and it is feasible to use that aquifer for water supply. (Transcript June 26, 1980, p. 18, 1.3-16). Two wells would be constructed and an emergency generator supplied so as to insure water supply in the event of mechanical failure. (Transcript June 26, 1980, p.27, 1.5-13). Because the system would draw from a 700 foot deep aquifer, Mr. DeNicholo stated that there would be "no effect whatsoever" on wells 50 to 150 feet deep. (Id. p.35, 1.21-25; p.36, 1.1 to 9). Mr. DeNicholo also found that the PUD would not "cause any unfavorable effect or detrimental effect to the recharge of the aquifer because the recharge is obtained, in essence, outside of Monmouth County." (Id. p.40, 1.19-24). Mr. DeNicholo also explained that the New Jersey Water Policy and Supply Council mandates lengthy re-

view proceedings before granting diversion rights in the process of which considerations of the potability and availability of water for the project are thoroughly reviewed. (Id. p.41, l.18-25; p. 42, l.1 to 5).

Elson T. Killam Associates also prepared the plans for construction of sanitary sewer facilities for the project. Dale McDonald, a civil engineer with the firm, testified that it was feasible to provide a package tertiary treatment plant to collect, treat and dispose of all sewerage form the PUD. (Transcript June 17, 1980, p.89-91). Under the supervision of the Department of Environmental Protection the water in Hockhockson Brook, the stream into which the effluent would be discharged, was sampled and discharge standards were established. (Id. p.92-93). A total flow projection for the residential and commercial sections was made. Mr. McDonald testified that the effluent from the PUD would be of approximately the same quality as the existing quality of water in the Brook. Further, the topography of the site allows for construction of a gravity fed system with corresponding cost savings. (Transcript June 17, 1980, p.105, l.2-100). As additional site advantages Hockhockson Brook does not discharge into the Swimming River Reservoir and the southerly portion of the Orgo tract is very well buffered to contain the treatment plant. (Transcript June 17, 1980, p.107, l.7-13). Mr. McDonald explained the oversight mechanisms employed by the State to assure that the plant is operated in a satisfactory fashion. (Id. p.100, l.9 to 25). With proper

maintenance and design, odors from the plant are not detectable. (Id. p.101, 1.12-20). Applicants demonstrated the feasibility of providing an effective, environmentally sensitive sewerage treatment facility. Since the Board of Adjustment hearings, plaintiff Brunelli acquired an additional parcel of land known as the Zimmerer tract which has allowed for a redesign of the sewer treatment facility so as to eliminate the discharge of all effluent into the Hockhockson Brook.

Messrs. Hauswirth and Ament, of the construction firm of Pizzo and Pizzo, testified not only as to the high quality of the project but also as to the suitability of the site. They indicated that the site is ideal for the type of development proposed, particularly in view of the ability to develop the site without changing the grades or dealing with major site improvements. (Transcript July 17, 1980, p.111, 1.7 to 19). The builders also noted that the project is high quality least cost housing planned to provide the proper facilities and roads for the anticipated density. (Transcript July 29, 1980, p.112, 1.1-6). These builders also strongly felt that the housing could be developed at the prices shown by applicants. (Transcript July 29, 1980, p.114, 1.14-20).

Messrs. Francheschini and Sirotek, Canadian construction management consultants also testified that the tract could be feasibly developed with flexibility and quality design. (Transcript July 15, 1980, p.144-146).

Mr. James Kovacs, an engineer with the firm of Abbington-Ney Associates detailed the improvements to be included in

the site design. Mr. Kovacs demonstrated that "best management practices" for the preservation of the quality of offsite drainage would be utilized, including onsite detention facilities, crushed stone road shoulders and drainage swales designed according to standards established by the Delaware and Raritan Canal Commission. (Transcript July 29, 1980, p.138-141; p.151, 1.1-14). Flood protection based on a 100 year flood standard, is also provided. These detention basins and vegetated drainage swales result in drainage from the site being of at least the same quality as presently leaves the site. (Transcript July 29, 1980, p.141, 1.9-12). Moreover, Mr. Rahenkamp indicated that the management practices incorporated into the PUD actually result in a higher quality of water going off the site than under conventional agricultural operations. (Transcript May 29. 1980, p.23, 1.1-25). Applicant also offered to accept reasonable standards of site design and maintenance found necessary for the preservation of the quality of the water which leaves the site after completion of the proposed development. With respect to visual impact, Mr. Kovacs explained that an open space buffer had been designed between the building and the Atlantic Elementary School so as to avoid any negative impact on the school. (Transcript July 29, 1980, p.143, 1.13-20). The project is also buffered with extensive landscaping along Route 537 and a tree save approach was adopted to preserve wooded areas. (Transcript July 29, 1980, p.139, 1.1-9; p.150, 1.4-10).

Thomas Krakow, another engineer with Abbington-Ney Associates, submitted a preliminary environmental impact statement (EIS) to the Board and testified as well. The EIS thoroughly reviewed the geology and topography of the site and reaffirmed that the site is ideal for development. Because the area is a fringe area and is not a significant wildlife area due to the surrounding transportation routes, no adverse impact on wildlife will occur. (See applicants' exhibit A-41). No significant impact on water supply would result from the proposed water supply system. (Applicants' exhibit A-41). The sewerage treatment plant was also found not to have a significant impact on Hockhockson Brook or the surrounding area. (Exhibit A-41). Mr. Krakow also explained that due to the efficiency of the entire traffic design and the PUD's central location, no significant or adverse impact on ambient air quality would result. (Exhibit A-41). Insofar as noise impact was concerned, Mr. Krakow aptly noted that Routes 537 and 18 generally exceed noise levels for residential development and that this project would not contribute in any significant way to existing noise levels. (Exhibit A-41). In relation to runoff pollution Mr. Krakow reviewed the state of the art in measuring such water quality and indicated the techniques to minimize such impacts which had been incorporated in the PUD. In summary, no significant adverse impact from an environmental point of view was found by Mr. Krakow.

Nor did any of the witnesses presented by the Planning Board or by the Zoning Board of Adjustment demonstrate any

ascertainable negative impact which would result from the proposed PUD. The only environmental witness presented was General William Whipple, a retired general and consultant for the Delaware and Raritan Canal Commission engaged in the handling of storm water management analysis. General Whipple testified in general terms that the quantity of runoff depends largely on the impervious surfaces in a development. (Transcript August 21, 1980, p.7, 1.22-25). General Whipple explained that denser development, having greater impervious surfaces, causes greater runoff. (Id. p.8-9). Because nonpoint source pollution, consisting of miscellaneous pollutants from automobiles, inadequate solid waste disposal and pets, is contained in surface water runoff, storm water management techniques are utilized to reduce or eliminate such pollution. (Id. p.18, 1.2-18). In reviewing the engineering plans submitted by applicants, the General noted that in storm water management the term "detention ponds" is commonly used to refer to ponds utilized for flood control while "retention ponds" refers to ponds utilized to settle out the nonpoint source pollutants. (Id. at 30-31). The primary distinction between these terms is the amount of time which the pond will hold water, thereby allowing the pollutants to settle. (Id. at 31, 1.1-7). General Whipple noted that two of the ponds designed by applicants' engineers were satisfactory retention ponds and a third pond required a smaller outlet pipe to achieve the longer period of time required to settle out the pollutants. (Id. p.33-35). The

General stated that the third pond could be redesigned to achieve the desired result and applicants were voluntarily amenable to effectuate such changes. The General was careful to note that measurements as to the efficacy of retention facilities and storm water management practices are "not precise at this stage of the game ." (Id. p.41-42).

Although General Whipple gave the broad opinion that multifamily housing produces about twice as much runoff as single family housing, the crucial assumption of his analysis is that multifamily housing has a greater amount of impervious surface. Applicants' PUD retains significant areas in open space and incorporates sensitive environmental management practices to alleviate runoff problems. Moreover, the studies on which Whipple based his conclusions were for projects with twice the density as applicants' PUD and without the environmental protections contained in applicants' PUD. What is important about General Whipple's testimony is what he did not say. He did not know what amount of additional pollution might be generated by the PUD, he could not estimate the effect of the management practices incorporated into plaintiffs' project and he could not state if there would be any adverse impact on the reservoir. (Id. p.44, 1.9-21; p.47, 1.3-7; p.86, 1.16-17). On cross examination the General admitted that land flow swales, covered garages and adequate solid waste disposal and pet control requirements are additional practices which can reduce the amount of nonpoint source pollution. (Id. p.67). He further admitted that in drawing his comparisons as to the amount of

surface runoff, he had not considered the comparative impact of onsite septic systems. (Id. p.79, 1.15-20), nor had he considered the effect of drainage swales provided in applicants' plans. (Id. p.67-68). Neither had the General compared the runoff from the proposed PUD to the runoff from existing agricultural uses. (d. p.89, 1.14-18). Finally, and most importantly, the General clearly and unequivocally stated that he had not rendered an opinion as to the effect of the proposed PUD on the Swimming River Reservoir. (Id. p.86, 1.16-17).

Mr. Richard Moser, an employee of the parent company of Monmouth Consolidated Water, testified that degradation of the Swimming River Reservoir would require increased expenditures to remedy. (August 21, 1980, p.111, 1.15-25). Mr. Moser based solely on an opinion which General Whipple specifically declined to make, concluded that the proposed PUD would impact on the reservoir. (Id. p.113, 1.4-8). Absolutely no foundation was presented for this testimony nor was the witness qualified to make or render an opinion requiring such speculation that even General Whipple would not render it.

In summary, applicants demonstrated that the project is designed to minimize adverse environmental impacts, with the primary concern being surface water runoff. While plaintiffs presented several witnesses who confirmed this, the Planning Board and the Board of Adjustment failed to produce any competent witness who could render an opinion as to any

substantial adverse impact of the project or any design feature which had not been incorporated to achieve maximum quality. General Whipple's testimony was generalized and not directed to the particular project. Mr. Moser's testimony is worthless insofar as there was no foundation or expert qualification for his opinion. It is submitted that the failure to produce proof of adverse environmental impact was not a mere omission by the Planning Board and Board of Adjustment. Rather, no such proof was available in view of the sensitive environmental techniques incorporated in plaintiffs' project.

Plaintiffs also demonstrated that the relief requested will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

Except for a few commercially zoned parcels along Route 34, virtually the entire undeveloped portion of Colts Neck Township is zoned A-1. The A-1 zone permits single family residential uses at a density of approximately one unit for each 2.2 acres. The residence must have a minimum floor area of 2,000 square feet. Agricultural uses, including horse breeding stables, are permitted uses in the A-1 zone.

The Master Plan of Colts Neck Township designates virtually all undeveloped portions of the Township for low density residential and agricultural uses, except for the commercial district at the intersection of Route 34 and Route 537 and except for an office/research zone between Route 537 and Route 18 west of the J.C.P.&L. right of way. A substantial portion of the applicants' property is located in

this designated office/research zone. This designation in the Master Plan recognizes that this area, near the interchange of Route 18 and Route 34 and south of Route 537, is not appropriate for land uses in the A-1 zone and that more intense land uses are consistent with the adjacent uses -- the highway network and the commercial uses along Route 34.

The proposal is located in the area south of Route 537, near Route 34, which has not been developed under A-1 standards, as has occurred throughout the Township, including the northerly section of the Township, westerly section of the Township along Route 537, and the easterly section of the Township along Route 537. Extensive facilities for the horse breeding industry have been established in the eastern section of the Township along Route 537. These development patterns are consistent with the recognition in the Master Plan that the areas adjacent to the commercially zoned land are more suitable for more intense uses, and not for large lot single family residential or for active agricultural uses.

The proposed uses for commercial/industrial development according to the current zoning ordinance of Colts Neck, in that portion of the tract south of Route 18, will not impair the zoning plan in that this proposal is in a remote section of the Township between federally controlled land (N.A.D. Earle, which is unzoned) and Route 18. There is no A-1 development in this area. The proposal in this area is in conformance with the Master Plan, according to the Township

Planner. (See Feasibility Study, p.1-15, Exhibit A-10).

Despite the comprehensive nature of applicants' presentation on September 18, 1980 the Zoning Board of Adjustment adopted a resolution denying plaintiffs' variance. This appeal ensued.

Both the Township's petition for certification and the plaintiffs variance case remained undecided while the Supreme Court decided the "Mount Laurel II" cases. On January 20, 1983, the Court rendered its decision and on May 4, 1983, remanded this case to the trial court for consideration in light of that decision.

On October 3, 1983, Eugene D. Serpentelli, J.S.C. rendered an opinion holding that the fact that the plaintiff's properties were located in a "limited growth" area of the SDGP, does not bar plaintiffs from obtaining a remedy. The plaintiffs could still, under appropriate circumstances be entitled to a builders remedy.

Throughout the pendancy of this litigation, the Township of Colts Neck has failed and refused to take any action to revise its zoning ordinance in order to provide a variety and choice of housing types and in response to its constitutional obligation to provide its fair share of the regional need for lower income housing as mandated by Mount Laurel II. A portion of the township is located in a growth area under the SDGP yet the Township has failed to provide even for its indigenous poor. The zoning ordinance of the Township of Colts Neck fails to provide a realistic opportunity for the construction of the municipality's numerical fair share of

the region's need for lower income housing as defined by the Supreme Court in Mount Laurel II. The ordinance permits only large lot zoning and contains none of the affirmative devices such as lower income density bonuses and mandatory setasides required by the decision. The municipality refuses to cooperate with this developer's attempts to obtain federal subsidies and has taken no action to encourage the construction of low and moderate income housing. The ordinance clearly violates Mount Laurel II and plaintiffs are entitled to a builder's remedy since the project is in accordance with the soundest of planning and enviromental standards.

Plaintiff recently revised the plans for development of the tract in order to increase the percentage of low and moderate income housing to be included in the project. As part of the builder's remedy which plaintiffs request, they propose two alternatives for phasing of the project. Plaintiffs first request that the first 25% of the project be constructed as conventional housing without the inclusion of any low and moderate income housing. Thereafter, plaintiffs request the approval of two alternatives for lower income housing. Both alternatives would permit a phasing in of the lower income units after the first 25% conventional housing is built. Thereafter, at least 30% of the remaining housing constructed would be for lower income households.

The first alternative includes a total of 1073 units with 20% of the project or 215 low and moderate income units being

proposed. Under alternative "A" a total of 40 acres would be planned for commercial uses: 2 acres for neighborhood commercial and bus stop; 24 acres for offices in Section 17 and 14 acres for offices or a hotel and a sewer plant in Section 18. II. With alternative "A" 56 low and moderate income units would be modular or reduced size condominium flats in section 13 and 159 units would be reduced size condominium flats intermixed in sections 6 and 7.

The second alternative calls for a total of 1253 units with 20% or 251 units being set aside for low and moderate income housing. 16 acres in total would be utilized for commercial purposes with two acres for neighborhood commercial and bus stop on Route 537 and 14 acres for offices and a sewer plant in Section 18 at the intersection of Routes 18 and 537. Fifty six modular or reduced size condominium flats would be provided in Section 12; 180 modular units would be built south of Route 18 and 15 condominium flats would be set aside in Section 6.

POINT ONE

UNLESS THE DEFENDANT TOWNSHIP CAN SHOW THAT THE SDGP MAPPING IS ARBITRARY AND CAPRICIOUS, COLTS NECK HAS AN AFFIRMATIVE CONSTITUTIONAL OBLIGATION TO PROVIDE FOR LOWER INCOME HOUSING

In 1975 the New Jersey Supreme Court announced the doctrine that developing municipalities in this State have a constitutional obligation to provide a realistic opportunity for construction of lower income housing within their boundaries by eliminating restrictive zoning devices. Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975) (hereinafter referred to as "Mount Laurel I"). Eight years later in the same captioned case the Supreme Court expanded and strengthened its commitment to the constitutional obligation of municipalities to provide a fair share of the regional need for lower income housing.

In Mount Laurel II, the Supreme Court imposed an affirmative obligation to provide a realistic opportunity for construction of lower income housing. Southern Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158 (1983) (hereinafter referred to as "Mount Laurel II"). The Mount Laurel II decision asserts a positive obligation to foster the provision of lower income housing. The focus and intent of the Mount Laurel II decision is to prevent widespread noncompliance with the constitutional mandate of the original decision and to make it clear to the municipalities of this State that the full panoply of judicial powers

will be exerted by the Courts in an unprecedented drive to fulfill the constitutional obligation to provide fair housing opportunities to all citizens of this State. Mount Laurel II, 92 N.J. at 199.

The Supreme Court, in its unanimous opinion in Mount Laurel II, set the tone of the opinion by stating:

> Subject to the clear obligation to preserve open space and prime agricultural land, a builder in New Jersey who finds it economically feasible to provide decent housing for lower income groups will no longer find it governmentally impossible. Builders may not be able to build just where they want -- our parks, farms, and conservation areas are not a land bank for housing speculators. But if sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor. 92 N.J. at 211.

In order to simplify Mount Laurel litigation and encourage voluntary compliance by municipalities, the Supreme Court incorporated the concept maps of the State Development Guide Plan (hereinafter referred to as "SDGP") into its decision. The Court determined that the constitutional obligation to provide fair housing opportunities extends "to every municipality any portion of which is designated by the State through the SDGP as a 'growth area'. 92 N.J. at 215. Moreover, all municipalities, regardless of the SDGP designation, are required to meet their affirmative obligation to provide safe and decent housing for their indigenous poor. 92 N.J. at 243.

The SDGP designation of any part of the municipality in a growth area is sufficient to subject that town to Mount Laurel II, although this is not the "absolute determinant" of

the locus of the Mount Laurel obligation. 92 N.J. at 239-240. The Township must show that the inclusion of any part of Colts Neck in the Growth Area was arbitrary and capricious and that the only reasonable place to put the line was outside the Township boundary. The evidence shows that, in fact, all of Colts Neck, except N.A.D. Earle, could just as reasonably be classified as a growth area under the SDGP. The data base for the SDGP, which established the "limited growth" designation, incorrectly shows the 1976 population at 50 to 200 persons per mile, when in fact it was over 200 persons per mile and in the same category as the rest of suburban Monmouth County. It also neglects to show Route 34 extending north of the Route 18 Freeway, and shows Route 34 terminating in N.A.D. Earle. The data base also shows Route 18 as not completed at that time.

Colts Neck Township clearly is subject to the constitutional obligation set forth in both Mount Laurel opinions. A portion of the township is located in a growth area, there is a need to provide for the indigenous poor, and the Township has zoned and permitted its land to be used for residential development on large lots. The township zoning ordinance is designed to assure that only those of upper income will be able to afford homes in the township. Even the limited growth designation of the SDGP permits development at residential densities of up to 5 units per acre and does not insulate the township from the Mount Laurel obligation. The constitutional obligation set forth in both Mount Laurel

opinions apply to the Township of Colts Neck.

POINT TWO
THE TOWNSHIP HAS FAILED TO PROVIDE ITS FAIR SHARE OF THE REGIONAL NEED FOR LOWER INCOME HOUSING.

As acknowledged by the Supreme Court, the "most troublesome issue in Mount Laurel litigation is the determination of fair share." 92 N.J. at 248. Determination of the fair share question requires determination of three separate issues: identification of the region; determination of present and prospective housing needs; and allocation of those needs to the municipalities involved. Id. The Supreme Court referred to the methodology established in Mount Laurel I and Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977) as "benign flexibility" and departed from such an approach since the Court had "underestimated the pressures that weigh against lower income housing." 92 N.J. at 251-252. By appointing three judges throughout the State to handle Mount Laurel litigation, the Supreme Court hopes to achieve consistency and predictability in the determination of the issues of region and regional need. The Court anticipates that within the next several years "the fair share question will be confined to the allocation issue." 92 N.J. at 255.

The Court also clearly stated that Mount Laurel litigation shall proceed using the previously accepted definitions and methods of determining region, regional need and fair share. Thus, a slightly modified version of Judge Furman's definition of region as "that general area which constitutes, more or less, the housing market area of which the subject municipality is a part, and from which the prospec-

tive population of the municipality would substantially be drawn, in the absence of exclusionary zoning"is the requisite definition, unless there are special circumstances. 92 N.J. at 256.

Although declining to become more specific on the issue of region and regional need, the Court did "offer some suggestions" regarding the fair share issue by stating:

> Formulas that accord substantial weight to employment opportunities in the municipality, especially employment accompanied by substantial ratables, shall be favored; formulas that have the effect of tying prospective lower income housing needs to the present proportion of lower income residents to the total population of a municipality shall be disfavored; formulas that have the effect of unreasonably diminishing the share because of a municipality's successful exclusion of lower income housing in the past shall be disfavored. 92 N.J. at 256.

The Court also rejected a fair share methodology which would depend on probable future population growth of the municipality since such a methodology might tend to reinforce past exclusionary patterns. Use of regional population data to determine fair share is approved. 92 N.J. at 258. The Court cautioned that the methodology employed be designed to effectuate and enforce the constitutional obligation. 92 N.J. at 257-258.

The utmost concern of the Supreme Court is to reverse exclusionary housing patterns whereby lower income families are relegated to living in urban slums while those who work in the cities commute to outer ring exclusionary suburban communities. Adoption of any fair share methodology must of necessity be sensitive to the overriding concern of the Supreme Court to <u>reverse</u> exclusionary housing patterns.

Thus, while the availability of present jobs are to be given substantial weight in the formula, overemphasis on fixed present jobs tends to reinforce past exclusionary patterns by giving existing urban centers high fair share allocations. Further, overemphasis in the formula on fixed jobs ignores an essential socioeconomic fact verified by the C.U.P.R. -- those of the lowest income brackets are likely to be unemployed, disabled or aged.

Given the likely possibility that an inadequate fair share methodology can worsen rather than improve exclusionary housing patterns in this State, it is important to include as many factors as necessary in order to meet the objectives of the Mount Laurel II opinion. Thus, in order to reverse the tendancy to overallocate to urban centers and older industrialized suburbs due to existing fixed jobs, credit should and must be given in the formula for past production of lower income housing units.

The "ability to pay" the fiscal costs associated with lower income housing must also be considered. Colts Neck has no municipal taxes and a $200,000.00 to $300,000.00 per year surplus in the municipal budget. The relative ability of one municipality to accept lower income housing with no loss of services to the other residents is consistent with the Supreme Court's intention not to reward past exclusionary practices.

Another factor should be included in the formula in order to assure that each municipality bears its fair share

of the regional need for lower income housing. Although the data may be incomplete or outdated, the availabilty of vacant developable land cannot be ignored as an essential ingredient in the determination of fair share. If the developer or the master has supplied information on vacant developable land with which the municipality differs, then the burden of proof on that issue can shift to the municipality which will be free to demonstrate that the data provided has changed. Without consideration of the question of vacant developable land, a fair share formula will defeat the realistic opportunity for construction of lower income housing. Certainly, the Court cannot hope to achieve construction of lower income housing if vacant developable land is not available. There are sufficient other pressures to prevent the construction of such housing but where vacant developable land exists, it must be considered in the formula.

POINT THREE

THE DEVELOPMENT REGULATIONS OF COLTS NECK TOWNSHIP ARE BLATANTLY EXCLUSIONARY AND PRESUMPTIVELY INVALID.

In addition to simplifying and strengthening the enforcement of the Mount Laurel obligation, the Supreme Court expanded upon the nature of the obligation itself. In order to meet its obligation to provide its fair share of the regional need of lower income housing, the local land use ordinances must affirmatively provide for a realistic opportunity for construction of lower income housing. Elimination of unnecessary cost producing requirements will ordinarily be insufficient in providing a realistic opportunity. Affirmative governmental measures, including density bonuses and mandatory set asides, are required as well as cooperation with developers' efforts to obtain federal subsidies, including the granting of tax abatements. Mobile homes are not to be prohibited unless sound planning requires such prohibition. 92 N.J. at 261-277.

If a municipality has not met its fair share of the regional need for lower income housing "in terms of the number of units needed immediately, as well as the number needed for a reasonable period of time in the future," then the municipality has failed to comply with the decision. 92 N.J. at 215-216. A "numberless" response that some lower income housing is provided is insufficient. A plaintiff may also prove a prima facie case by demonstrating that the ordinance is "substantially affected by restrictive devices." Such proof creates a presumption of invalidity. Id. See

also 92 N.J. at 305. In such event the municipality must demonstrate by a preponderance of the evidence that it has met is fair share of the regional need. 92 N.J.at 221.

Plaintiff will demonstrate that the zoning ordinance of Colts Neck Township is openly exclusionary and permits development of only one kind -- single family residences on two acre lots. The ordinance is substantially affected by restrictive devices which make development costs prohibitive. The ordinance is therefore presumptively invalid and the township must demonstrate that it has made provision in its ordinance to meet the township's fair share of the regional need for lower income housing.

POINT FOUR
PLAINTIFFS ARE ENTITLED TO A REMEDY PERMITTING CONSTRUCTION OF A WELL-PLANNED DEVELOPMENT TO SATISFY THE TOWNSHIP'S CONSTITUTIONAL OBLIGATION.

Certainly the clarification and strengthening of the constitutional obligation to provide fair housing opportunities is of importance in the Mount Laurel II decision. Central, however, to effectuation of the obligation is the judicial insistence upon providing a remedy. The decision is replete with references to the importance of devising, enforcing and granting builders' remedies. The Court stressed that "[e]xperience ... has demonstrated to us that builder's remedies must be made more readily available to achieve compliance with Mount Laurel." 92 N.J. at 279. The Court clearly recognized that "judicial legitimacy may be at risk ... through failure to take such action if that is the only way to enforce the Constitution." 92 N.J. at 287. It is appropriate to quote directly from the Court's decision emphasizing the importance of "devising remedies suitable for the complete redress of exclusionary zoning." 92 N.J. at 255 (emphasis supplied).

> In short, there being a constitutional obligation, we are not willing to allow it to be disregarded and rendered meaningless by declaring that we are powerless to apply any remedies other than those conventionally used. We intend no discourse on the history of judicial remedies, but suspect that that which we deem "conventional" was devised because it seemed perfectly adequate in view of the obligation it addressed We suspect that the same history would show that as obligations were recognized that could not be satisfied through such conventional remedies, the courts devised further remedies, and indeed the history of Chancery is as much a history of remedy as it is

of obligation. The process of remedial development has not yet been frozen. 92 N.J. at 287.

In focusing intently upon the remedial aspects of the decision, the Court stated that the remedies authorized are "intended to achieve compliance with the Constitution and the Mount Laurel obligations without interminable trials and appeals." 92 N.J. at 290. Thus, the Court established simple prerequisites for a builder's remedy in connection with Mount Laurel litigation. Where a plaintiff, in good faith, attempts to obtain relief without litigation, subsequently succeeds in Mount Laurel litigation and proposes a project with an appropriate portion of lower income housing located and designed in accordance with sound planning and zoning, including environmental impact, a builder's remedy is to be granted. 92 N.J. at 218 and 279. Where the builder has established the failure of the municipality to meet its fair share, the burden is on the municipality to establish that because of environmental or "substantial planning concerns" the project is clearly contrary to sound land use planning. The Court emphasized that the builder's remedy "should not be denied solely because the municipality prefers some other location for lower income housing, even if it is in fact a better site." 92 N.J. at 279-280 (emphasis supplied).

As noted by this Court in ruling on defendants' motion for summary judgment, while the "precise nature of the remedy is to be determined on a case by case basis," the general purpose of the remedy "is to assure a builder who shouldered the burden of Mount Laurel litigation that the end result of

a successful litigation would be some specific relief in terms of a right to proceed with construction of a specific project." Orgo Farms et al v. Township of Colts Neck, Slip Opinion, Docket No. L. 13769-80 P.W. - L.3299-78 (Decided October 7, 1983). The Court further noted the Supreme Court's desire for flexibility of administration of the Mount Laurel obligation and liberal application of a builder's remedy. The overwhelming desire to achieve compliance with Mount Laurel through the use of the builder's remedy results in the award of such a remedy, a remedy which realistically recognizes that "adequate economic incentives are held out to developers so that they will seek to enforce the Mount Laurel obligation of our municipalities." Slip Opinion at 7.

The decision by this Court on the availability of a builder's remedy in a limited growth area is the law of the case. This Court ruled that "Mount Laurel II demonstrates in at least three distinct ways an intent not to make the SDGP a component of builder's relief." Slip Opinion at 8. This Court carefully analyzed the Mount Laurel II decision and concluded that the Supreme Court articulated the elements of a builder's remedy without reference to the SDGP. 92 N.J. at 279-280. Second, the Supreme Court applied the remedy standards in three of the cases before it and did not implicate the SDGP in its rulings. 92 N.J. at 308; 315-316; 321; 330-332. Third, the Supreme Court "meticulously explained the limits it would impose on the grant of a builder's relief" without limiting the remedy to growth areas. Slip Opinion at 8.

In addition to this Court's careful analysis of the Mount Laurel II references to the availability of a builder's remedy, the impact of a contrary ruling was considered. Growth management rather than than growth limitation is the focus of the limited growth designation under the SDGP. Therefore, where a builder's remedy is sought in an area designated as limited growth, the question of the availability of the remedy is one directed to planning concerns. The limited growth designation is dispositive only of the question of obligation and not of the question of remedy. Construction of lower income housing in a municipality subject to the Mount Laurel obligation in accordance with sound planning principles is the concern. Slip Opinion at 7-10.

This Court is well aware of the lengthy litigation which these plaintiffs have pursued in order to repeatedly establish the Township's obligation under Mount Laurel I. Based on the legal rulings in Mount Laurel II, plaintiffs will demonstrate that the zoning ordinance of Colts Neck Township continues to be directly and openly hostile to the inclusionary zoning obligations mandated by our State Constitution. Not only does the Township's ordinance contain exclusionary provisions designed to preserve the Township as an enclave of the upper class, but also the ordinance fails to contain any provisions which positively foster the development of anything other than luxury housing. The Township, in this stage of the litigation and as it has done since Mount Laurel I, continues to oppose its basic obligation to zone even for

its own indigenous poor. Plaintiffs' will clearly and convincingly demonstrate that the Township of Colts Neck has failed to comply with the constitutional mandate of Mount Laurel II.

Plaintiffs also propose a well planned development which will provide a substantial amount of lower income housing as well as a variety and choice of housing, including least cost housing. The type and extent of housing to be provided will comply with the spirit and intent of the Mount Laurel II decision.

Other court decisions in this State support the development of lower income housing at development nodes near historic village centers. In Montgomery Associates v. Tp. of Montgomery, 149 N.J. Super. 536, 541 (Law Div. 1977), aff'd o.b. 160 N.J. Super. 219 (App. Div. 1978) the trial court ruled that the municipality had acted in accordance with sound planning by placing its multifamily housing zone near the historic center of the township within walking distance of shopping centers. The court characterized the area as accessible and attractive and approved placement of the entire fair share obligation of the township in that location.

Third, and most importantly, plaintiffs' project is conceived and designed in accordance with sound planning principles and is located in the most logical and appropriate location possible within the Township. The development represents a logical extension of the existing village and

commercial center of Colts Neck. The Monmouth County Growth Management Guide designates this part of Colts Neck as a "village center" -- the only exception to the "limited growth" designation in the entire Township. The site is directly adjacent to the major roadways which traverse the Township: Routes 34, 537 and 18. The tract sewer system is designed to discharge into the Hockhockson Brook which does not drain into the Swimming River Reservoir, thereby resulting in no interference with the watershed. The natural features of the site are conducive to a planned development of the type proposed. The sensitive design of the project and the incorporation of best management practices into the engineering leave no doubt that this project is in accordance with the soundest of planning principles.

Other planning documents, produced <u>independently of this litigation</u>, have recognized the benefits of a development node at this unique location. The Monmouth County General Development Plan - effective throughout the trial below and changed by the Growth Management Guide after this litigation had been decided by Judge Lane against Colts Neck - designated most of this property for commercial and industrial uses.

The Tri-State Regional Development Guide designated this property for densities of 2 to 6.9 units per acre. In the heat of litigation below, Tri-State apparently reviewed this designation at the request of the Township through the local acceptance process. The original plan, however, with medium density assigned to this site, continues to be published and

relied upon. In fact, the Tri-State Regional Development Guide is reproduced in the County Growth Management Guide. (at p. 83. See Appendix PA-1 attached).

Both the Tri-State Plan and the County Plan are recognized by the SDGP as the next, higher and more detailed level of planning. SDGP at p. 115. This principle is recognized by the Supreme Court in the Mount Laurel II decision. 92 N.J. at 232, n. 13. Thus, it can be stated affirmatively that this project is not only consistent with the SDGP, but by "concentrating growth" at this node at a critical intersection of three major transportation links in the County, it actually promotes the SDGP.

Incorporated into the County Growth Management Guide is a project review methodology called "Residential Timing Criteria." Planning Director Halsey testified that this project would score very favorably using that system, because of its proximity to important services and losing points only due to a County Planning Board policy discouraging private utility systems. (Transcript July 15, 1980 at p. 34-41) This latter policy of the County Planning Board is contrary to the Monmouth County Water Quality Management Plan prepared by the Department of Environmental Protection (DEP) and current DEP policy, both of which encourage private, decentralized subregional utility systems as a better alternative for environmental quality and as a cost effective way to provide important public services. (Monmouth County Water Quality Management Plan).

Based on the Residential Timing Criteria of the Mon-

mouth County Planning Board, this project would receive 26 of a possible 46 points, with the remaining 20 points not being allocated due to nonavailability of a public water and sewer systems. (Transcript July 15, 1980, p. 34-41) Plaintiffs have arranged to provide both of these systems to service the entire planned development without expenditure of public funds.

The Director of the Division of Planning, Richard Ginman, submitted a letter indicating that the location of the project is not contrary to the goals of the SDGP. (See Appendix PA2) The impact of this development upon the zone plan and environment of the Township will be a positive one -- in fact, an improvement environmentally over the present agricultural use. (Transcript May 29, 1980, p. 23) The facts in this case and the Supreme Court's unequivocal decision are overwhelmingly in favor of the grant of a builder's remedy to the plaintiffs.

State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS

JOSEPH A. LeFANTE
COMMISSIONER

363 WEST STATE STREET
POST OFFICE BOX 2768
TRENTON, N.J. 08625

July 23, 1980

Mr. George Handzo, Clerk
Colts Neck Township
P. O. Box 158
Colts Neck, NJ 07722

RE: SDR-80-14

Dear Mr. Handzo:

This office is in receipt of a copy of an application for development in Colts Neck Township entitled, "Colts Neck Village," which has been furnished in compliance with N.J.S.A.40:55D-12(g).

The Division of Planning has prepared a State Development Guide Plan for the State of New Jersey pursuant to C.13:1B-15.52. The purpose of this plan is to recommend general areas where growth should be encouraged, as well as where it should be discouraged.

The proposed "Colts Neck Village" residential project is in a designated Limited Growth Area. Within the context of the Guide Plan, this designation reflects low-density development patterns and the absence of major growth-supporting infrastructure or services. To maintain the character of Limited Growth Areas the Guide Plan recommends that public investments in such areas be limited to those required to maintain health, safety and general welfare standards for existing development and not for major new growth. The applicant's project would be in general conformance with the Guide Plan if the development does not alter the general character of the surrounding area and does not require the support of new public investments.

We understand that the Township has been ordered by Superior Court to rezone land within its jurisdiction to provide suitable areas for a variety of residential uses. It is not the purpose of the Guide Plan to suggest how this order is to be addressed by the Township, but rather to indicate generally where public investments over which the State government exercises some control should be directed to accomplish long-range, statewide land use goals. Consideration of the Guide Plan at the local level is encouraged, but other factors, such as the relationship of the zoning ordinance to the Township's overall land use plan, are also important.

PA-2

Since the proposed development apparently will not require additional public investments, its ultimate acceptability as currently designed requires a local determination. Furthermore, while the Court does not seem to require the acceptance of this proposal, it does require the Township to provide appropriate areas where developments such as this one are permitted.

It should be noted that an in-depth review of the submitted application has not been made by the Division of Planning. I would appreciate being informed of the Township's disposition of this application as soon as official action is recorded. If you have any questions regarding this matter, feel free to contact me at (609) 292-2953.

Very truly yours,

Richard A. Ginman, Director
Division of Planning

RAG:kcj

cc: Planning Board Chairman
Zoning Board of Adjustment Chairman
Monmouth County Planning Director
Mr. David J. Frizell