AD – Allan-Deane Corp. v. Bedminster ???

Trial Brief for Defendants

Pg. 92

AD000021B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKETS NOS. L-28061-71 P.W. S-9163 PW
L-28837-72 P.W. S-9955 PW
L-27700-72 P.W. S-9929 PW

LYNN CIESWICK, Plaintiffs THE ALLAN-DEANE CORPORATION, Plaintiff ASSOCIATION OF BEDMINSTER CITIZENS, Plaintiff -vs- TOWNSHIP OF BEDMINSTER, et al. Defendants	:	Consolidated Civil Actions

TRIAL BRIEF FOR DEFENDANTS

EDWARD D. BOWLBY and
McCARTER & ENGLISH
550 Broad Street
Newark, New Jersey 07102

I N D E X

Introduction

The fundamental issue in this case is the validity of the Bedminster zoning ordinance enacted on April 16, 1973, as amended. The amendments were introduced at the Township committee meeting on April 16, 1973, upon recommendation of the Planning Board, and were adopted on September 4, 1973. The references in this brief to the zoning ordinance will be to the ordinance as thus amended.

In 1946, Bedminster adopted its first zoning ordinance. That provided a zoning plan whereby the bulk of the Township was placed in a single-family 5-acre minimum lot residential zone. The reasonableness of this ordinance was upheld by the New Jersey Supreme Court in Fischer v. Bedminster, 11 N.J. 194 (1952).

Secure in the adjudicated validity of its low density land use scheme, Bedminster retained, without significant change, substantially the same plan in its zoning ordinance until 1973. In 1965, the Township Planning Board approved a Master Plan, which, in general terms, proposed a continuation of residential use on 5-acre minimum lots (except for existing settlements) west of Route 206 and Interstate 287, and on the bulk of what is now the Allan-Deane tract; denser residential development in Pluckemin and Bedminster Villages; and research and office development between the North Branch of the Raritan

River and Interstate 287 on what is now the AT&T tract (the zoning ordinance, however, retained 5-acre residential zoning for this tract).

In 1970, the Somerset County Planning Board adopted a County Master Plan. This proposed that Bedminster remain a low density area with a modest expansion of the Pluckemin and Bedminster Villages. Among the express reasons underlying this proposal were the desirability of preserving the character of the Somerset Hills area, and the necessity of protecting the Watershed of the Raritan River because of its importance to the public water supply.

The 1973 Bedminster zoning ordinance seeks to retain a low density land use scheme. The draftsmen of the ordinance were aware of the scientific evidence which the Township had assembled for defense of the first Allan-Deane suit. This evidence indicated persuasively that low density land use in Bedminster was necessary to preserve the water quality of the Raritan River. This evidence was reviewed by the Planning Board before it recommended to the Township Committee that the ordinance be adopted.

Among the salient features of the 1973 zoning ordinance are the following:

Density of land use is controlled, not primarily by prescribing minimum lot sizes, but by prescribing the percentage ratio of floor area to lot size (Art. III; Art. IX).

With relatively minor exceptions, the old 5-acre lot zone is the 3% zone, the 2-acre zone is the 6% zone, and the 1-acre zone is the 8% zone.

Single family twin houses, and manufactured or modular housing (i.e. a mobile home if permanently attached to a foundation, Amendment 16) are permitted in all residence districts (Amendment 4).

Open Space Clusters of single family houses are permitted, upon approval by the Planning Board, in all residence districts (Art. IX, Schedule A; Art. X; Art. XVII, Amendment 4).

Planned Residential Neighborhoods, including multiple dwellings, are permitted upon approval by the Planning Board in the 6% and 8% residence districts (Art. IX, Schedule A; Art. X; Art. XVII; Amendment 4).

Minimum square footage for net habitable floor area, based upon the number of bedrooms is specified (Art. IX); however, paragraph (4) of Article IX provides:

> "In lieu of complying with the provisions of this section, any housing project subsidized by the State of New Jersey or by the United States Government may comply with room and dwelling unit size standards promulgated by the State or Federal Government and made applicable to such project."

Thus the ordinance makes an affirmative effort to accommo-

date government subsidized housing.

An environmental impact statement must be submitted and approved by the Planning Board before any building permit will be issued, except for a single-family residence on an independent lot (Art. XVI, A, B, Q; Amendment 14). [This requirement was independently enacted in November 1973 and incorporated in the new ordinance.]

The AT&T tract was zoned for research-office.

The Allan-Deane tract was zoned for 6% residential (a far more intensive density than formerly and now permitting all types of housing structures but with the clustering provisions permitting preservation of the steep slopes of the Watchung Mountains in their natural state) with a small business district adjacent to the existing shopping center in Pluckemin.

It is submitted that the new zoning ordinance strikes a reasonable balance between the demands of the environment and the need for additional housing in Bedminster.

POINT I.

THE BEDMINSTER ZONING ORDINANCE IS REASONABLE AND THEREFORE VALID

A zoning ordinance is constitutionally valid if it is reasonable and serves the overall public interest of the community. Euclid v. Ambler Co., 272 U.S. 365, 395, 397 (1926); Mansfield & Swett, Inc. v. West Orange, 120 N.J. 145, 152 (S.Ct. 1938); Kozesnik v. Montgomery Township, 24 N.J. 154, 167 (1957); Harrington Glen, Inc. v. Municipal Board, etc. Leonia, 52 N.J. 22, 32 (1968).

A zoning ordinance is presumed to be reasonable and valid, and the party attacking its validity has the burden of proving clearly that it is arbitrary or unreasonable. Brandon v. Montclair, 124 N.J.L. 135, 149 (S.Ct. 1940); Shell Oil Co. v. Board of Adjustment, Hanover, 38 N.J. 403, 413 (1962); Morris v. Postma, 41 N.J. 354, 359 (1964); Bellings v. Denville Township, 96 N.J.Super. 351 (App. Div. 1967); Harvard Enterprises, Inc. v. Board of Adjustment, Madison, 56 N.J. 362 (1970); Davidow v. Board of Adjustment, South Brunswick, 123 N.J.Super. 162, 166 (App. Div. 1973).

In Harvard Enterprises, Inc., supra, the court stated at 56 N.J. 368:

> "Preliminarily, it should be noted that the judicial role in reviewing a zoning ordinance is tightly circumscribed. There is a strong presumption in favor of its validity, and the court cannot invalidate it, or any provision thereof, unless this presumption is

overcome by a clear showing that it is arbitrary or unreasonable. Morris v. Postma, 41 N.J. 354, 359 (1964); Napierkowski v. Gloucester Tp., 29 N.J. 481, 492 (1959); Zampieri v. River Vale Tp., 29 N.J. 599, 605-606 (1959); Bogert v. Washington Tp., 25 N.J. 57, 62 (1957).

"Furthermore, an ordinance that may operate reasonably in some circumstances and unreasonably in others is not void in toto, but is enforceable except where in the particular circumstances its operation would be unreasonable and oppressive. Isola v. Borough of Belmar, 34 N.J.Super. 544, 522 (App. Div. 1955); Independent, etc. Oil Co. v. Mayor, etc. of Gloucester, 102 N.J.L. 502, 504 (S. Ct. 1926); 5 McQuillin, Municipal Corporations (3d ed. 1969), § 18.05, p. 344. The determination of such an issue depends upon an evaluation of the proven facts within the context of applicable legal principles. The total factual setting must be evaluated in each case, and if the issue be in doubt, the ordinance must be upheld. Vickers v. Township Committee of Gloucester Tp., 37 N.J. 232, 242 (1962); Bogert v. Washington Tp. supra, 25 N.J. at 62; Yanow v. Seven Oaks Park, Inc., 11 N.J. 341, 353 (1953)."

In Bellings v. Denville Township, supra, the court stated at 96 N.J. Super. 355:

"In passing upon the validity of the present ordinance the role of the court is tightly circumscribed. There is a presumption that a municipality, in enacting or amending a zoning ordinance, acted reasonably, and that the resulting ordinance is a valid one. Ward v. Montgomery Tp., 28 N.J. 529, 539 (1959); Bartlett v. Middletown Tp., 51 N.J.Super. 239, 261 (App. Div. 1958), certif. denied 28 N.J. 37 (1958). The court cannot pass upon the wisdom of the particular ordinance and debatable issues and questions of policy which enter into the passage of an ordinance must be resolved in favor of the municipality. Vickers v. Township Committee of Gloucester Tp., 37 N.J. 232, 242 (1962), certiorari denied and appeal dismissed 371 U.S. 233, 83 S.Ct. 326, 9 L.Ed.2d 495 (1963). The wisdom of the course chosen by the governing body, as distinguished from its legality is reviewable only at the polls. Kozesnik v. Montgomery Tp., 24 N.J. 154, 167 (1957).

> "We may interfere only when the presumption in favor of the ordinance is overcome by an affirmative showing that it is arbitrary or unreasonable when measured by the standard prescribed by N.J.S.A. 40:55-32. Kozesnik v. Montgomery Tp., supra, at p. 167; see also Schmidt v. Board of Adjustment, Newark, 9 N.J. 405, 416 (1952); Pierro v. Baxendale, 20 N.J. 17, 20-21 (1955). The burden of establishing the invalidity of the ordinance is upon the plaintiffs, Fischer v. Township of Bedminster, 11 N.J. 194, 204 (1952), and is a heavy one. See Vickers v. Township Committee of Gloucester Tp., supra, at p. 242; Ward v. Montgomery Tp., supra, at p. 539, Kozesnik v. Montgomery Tp., supra, 24 N.J. at p. 167."

The Bedminster zoning plan is compatible with land uses in the surrounding municipalities. The evidence of the zoning ordinances of the municipalities surrounding Bedminster will show that Bedminster is largely surrounded by low density residential areas. Beginning with Tewksbury Township in Hunterdon County and stretching across Bedminster, Chester Township, Peapack-Gladstone, Far Hills, western Bernards Township, the northern part of Bernardsville, the southern part of Mendham Township, Harding Township in Morris County and into the Great Swamp, there exists a large area of land whose low density usage is broken only by the relatively compact built-up areas in Bedminster-Far Hills village, Peapack-Gladstone village and the center of Bernardsville. Only to the south in Bridgewater Township is there any significant concentration of population or commercial and industrial activity.

The reasonableness of the zoning plan in Bedminster must be considered in the light of the uses to which land in neighboring municipalities has been put. Duffcon Concrete

Products v. Borough of Cresskill, 1 N.J. 509 (1949); Kunzler v. Hoffman, 48 N.J. 277, 287 (1966); Quinton v. Edison Park Development Corp., 59 N.J. 571, 578 (1971); Hochberg v. Borough of Freehold, 40 N.J.Super. 276, 288 (App. Div. 1956); Borough of Roselle Park v. Twp. of Union, 113 N.J.Super. 87, 92 (Law Div. 1970).

In Duffcon Concrete Products, supra, Chief Justice Vanderbilt said for the court at 1 N.J. 513:

> "What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously. The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning."

Accordingly, the reasonableness of low density zoning in Bedminster is confirmed by the low density land uses in municipalities lying west, north and east. The mere fact that commercial and industrial uses exist immediately to the south in Bridgewater Township does not require such uses be extended into Bedminster, Barone v. Bridgewater Township, 45 N.J. 224 (1965).

The fact that Interstate Highways 78 and 287 pass through the Township does not render its low density zoning

plan unreasonable. The intersection of I-78 and I-287 is unusual in that it is a "sterile" intersection with no direct access to local roads at that point. The only exits from the Interstate Highways within Bedminster are the exit from 287 North of Pluckemin and the exit off I-78 at Rattlesnake Bridge Road at the western edge of the Township. These facts make the lands in Bedminster adjacent to the interstate highway unsuitable for the normal kind of commercial development that too often occurs around such interchanges. N. Williams, Jr., The Three Systems of Land Use Control; 25 Rutgers L. Rev. 80, 86 (1970).

The Bedminster zoning ordinance conforms to the Somerset County Master Plan. The County Master Plan seeks to deal in a rational way with the problem of accommodating a doubling of the population of Somerset County by the year 2000 (p.38, p.41 of the County Master Plan). It proposes that the Township, except for existing village areas, remain as a low density or "rural settlement" area. Bedminster's zoning ordinance with the bulk of the Township outside the existing village areas being zoned for residential use, with a 3% floor area ratio, thus conforms to the recommendations of the County Master Plan.

The zoning of the AT&T tract of 205 acres for research-office use does not, under the facts and circumstances, intrude an inconsistency into the zoning plan or constitute a departure

from the county master plan. The lands of AT&T in Bedminster are only part of a tract of 425 acres which AT&T owns and which extends into Far Hills. There is no road by which these lands can presently be reached from the rest of Bedminster Township without going through Far Hills. AT&T proposes to use the site for its Long Lines Division Headquarters Office Building and has designed its project so as to cause minimum impact upon the community and environment of Bedminster. A consulting ecologist worked with the architects in the design and location of the Building so as to insure the avoidance of adverse effects upon the land or upon the water quality of the Raritan River. Road access will be as directly from Interstate 287 as possible so that traffic on local roads will be avoided. Studies indicate that housing and the labor market in nearby communities convenient to Interstate 287 will accommodate practically all of the persons to be employed at the facility. Among the conditions imposed by Bedminster, as the result of its review of AT&T's environmental impact statement, is one that no future expansion of the facility will be made and also that no other building can take place on the entire tract at Bedminster and Far Hills, thus insuring the preservation of open space. The AT&T tract in Bedminster presents an exceptional problem which has been dealt with as such in the zoning ordinance and in a way to preserve as far as possible the spirit and meaning of the Somerset County Master Plan.

A zoning ordinance which conforms as closely as this to a County Master Plan should not be judicially declared unreasonable, -- at least in the absence of proof that the County Master Plan itself is unreasonable.

While the zoning power has been confined, solely to municipalities, New Jersey Constitution, Art. IV, 6 6, Par. 2, modern conditions require that land use controls be exercised with due regard to regional conditions. Duffcon Concrete Products v. Borough of Cresskill, 1 N.J. 509, 519 (1949); Bartlett v. Middletown Township, 51 N.J.Super. 239, 262 (App. Div. 1958); Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 20 (Law Div. 1971).

In addition to the courts, the Legislature has recognized the need for planning on a regional basis. The legislation necessarily has to accept that the power of land use control, -- at least through the mechanism of zoning, -- rests with municipalities. Nevertheless, given the constitutional limitations on land use control, the Legislature has clearly recognized the need for such control to be exercised so far as possible on the basis of regional or state-wide considerations.

Thus, in R.S. 13:1B-5.1, it is provided:

> "The Legislature hereby finds and determines that:
>
> "a. The rapid urbanization and continuing growth and development of the State and its regions, technological advances and changing standards of living have created, and are creating a need for

continuing assembly and analysis of pertinent facts on a State-wide basis pertaining to existing development conditions and trends in economic growth, population change and distribution, land use, urban, suburban and rural development and redevelopment, resource utilization, transportation facilities, public facilities, housing and other factors, and has created and will continue to create a greater need for the preparation and maintenance of comprehensive State plans and long term development programs for the future improvement and development of the State. * * *

"c. . . . There is also a vital need for stimulating, assisting and co-ordinating local, county and regional planning activities as an integral part of State development planning to insure a permanent and continuing interaction between and among various governmental activities."

R.S. 40:27-1, et seq. authorizes a county to create a County Planning Board. R.S. 40:27-2 provides in part:

"The county planning board shall make and adopt a master plan for the physical development of the county. The master plan of a county, with the accompanying maps, plats, charts, and descriptive and explanatory matter, shall show the county planning board's recommendations for the development of the territory covered by the plan, and may include, among other things, the general location, character, and extent of streets or roads, viaducts, bridges, waterway and waterfront developments, parkways, playgrounds, forests, reservations, parks, airports, and other public ways, grounds, places and spaces; the general location and extent of forests, agricultural areas, and open-development areas for purposes of conservation, food and water supply, sanitary and drainage facilities, or the protection of urban development, and such other features as may be important to the development of the county.

"The county planning board shall encourage the cooperation of the local municipalities within the county in any matters whatsoever which may concern the integrity of the county master plan."

In 1965 the Legislature adopted the Tri-State Transportation Compact, R.S. 32:22B-1, et seq., which was jointly entered into with the States of Connecticut and New York. It established the Tri-State Transportation Commission, the functions of which were stated in part (R.S. 32:22B-6):

> "The commission may act as an official planning agency of the party States for the compact region. It shall conduct surveys, make studies, submit recommendations and prepare plans designed to aid in solving immediate and long-range transportation problems, in facilitating the movement of people and goods and in meeting transportation needs generally and may consider all land use problems related to the development of proper transportation plans."

In 1971, the Legislature amended the Compact so as to change the name of the Commission to Tri-State Regional Planning Commission, P.L. 1971, c. 161. The functions of the Commission were amended so as to read:

> "The function of the Commission shall be to act as an official comprehensive planning agency of the Party States toward the compact region. It shall conduct surveys, make studies, submit recommendations and prepare plans designed to aid in solving immediate and long-range problems, including, but not limited to, plans for development of land, housing, transportation and other public facilities. * * * The Commission shall also act as a liaison to encourage coordination among and between all agencies and entities, charged with or having a substantial interest * * * in solving of problems connected with land development."

R.S. 32:22B-13, as amended, defines the "Compact region" to include in New Jersey and counties of Bergen, Essex, Hudson,

Middlesex, Monmouth, Morris, Passaic, Somerset and Union.

The foregoing legislative enactments make clear the importance, in the judgment of the Legislature, in having land use control decisions influenced as strongly as circumstances permit by regional considerations.

Commentators have expressed the same view. Freilich and Bass, in an article "Exclusionary Zoning" in "The Urban Lawyer", Vol. 3, No. 3, Summer 1971, state on page 361:

> "Litigation cannot place responsible persons in control of land use planning decisions, nor can it resolve the numerous accommodations and compromises necessary."

And at p. 367:

> "What is advocated, in essence, is that an element of regional planning be interjected into zoning."

In a commentary on Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165 (1952), app. dis. 344 U.S. 919 (1953), Professor Haar, in 66 Harvard L. Rev. 1051, stated at p. 1063:

> "The Wayne Township case again sharply points up the need for some type of regional or metropolitan planning in order that courts may have a standard against which to measure legislative determinations of the sort presented here."

Norman Williams, Jr., Professor of Urban Planning at Rutgers University, in an article "The Three Systems of Land Use Control" appearing in 25 Rutgers Law Rev. 80, makes some specific suggestions on improving the existing land use control system. He stated at p. 98:

"Third, to some extent the responsibility for planning and land use controls should be taken from the realm of local government and moved up to some higher level of government, which covers a much larger area; this could be either state or regional. The problem here is to define precisely which functions are best kept local, and which should be shifted to higher levels. As often, the rhetoric is easy; the serious work is less so. As far as land use controls are concerned, the most important guiding principle can be stated simply. The really basic controls (as for example those over the location of housing and employment) must be in the hands of public officials whose political responsibility is to a heterogeneous mix of the population, and not (as is now usually the case) to a small and homogeneous group, not representative of the interests of the population as a whole."

The desirability and importance of the zoning plan of a municipality conforming to a County Master Plan has been emphasized by Governor Cahill in a special message to the Legislature on March 27, 1972 entitled "New Horizons in Housing". In the section of the message entitled "Community Planning Program", which discusses legislation to be submitted, the Governor said:

"We need in New Jersey enactment of legislation that will update, simplify and coordinate the entire planning and regulatory process on both the municipal and state levels. * * *

"Other vital provisions of the legislation would tie together and coordinate the planning of different levels of government.

"For one, municipalities would be required to include in their Master Plans a statement describing how their plan relates to the plans of neighboring communities, the county plan, and the state plan. In other words, municipalities would have to think through the effect of the other plans on them."

A similar viewpoint has been expressed by an Advisory Committee of The American Law Institute which is currently, and for several years has been, engaged in the preparation of a Model Land Development Code. Implicit in the drafts which have been prepared thus far is the recognition that local determination of permissible land use by a municipality may have important effects upon a larger region, and that this effect must be considered in land development plans.

Thus, in the Introductory Memorandum in Tentative Draft No. 1 (1968), it is stated at p. XXV:

> "Much of the professional literature is concerned with the conflict between local and larger interests. * * *
>
> "From one point of view the problem is simply a boundary line problem -- ancient boundaries of urban places no longer coincide with the economic and social boundaries of urban places. From another point of view the problem is similar to that discussed earlier concerning the legal status of a plan; to devise machinery to assure consideration by existing decision makers of regional and state interests. From another point of view the problem is similar to that of development decisions of private owners: to devise a machinery which overrides decisions which the self-interest of a local government or private owner would otherwise make when the decisions have serious adverse impact on neighboring areas."

And in the commentary on Article 7, it is stated (p. 189):

> "Experience during the last half-century and especially in the years since World War II reveals, nevertheless, a number of important deficiencies in a system of land use controls involving exclusive reliance upon local governments. To remedy these deficiencies, the Code proposes the establishment of a department of state government, to be known as the Department of State and Regional Planning."

See also p. 192.

In Tentative Draft No. 3 (1971), the Reporters set forth for the consideration of the Institute, a proposed Article 7, State Land Development Regulation, which suggests criteria for state-wide or regional planning, within the broad frame of which local regulation would be operative. Article 7 includes Part 5, pertinent parts of which read (p. 37):

"Part 5

Analysis of Overall Impact of Development

Section 7-501. Balance of Detriments and Benefits.

Whenever under this Article the Land Development Agency is required to determine whether the probable net benefit from proposed development will exceed the probable net detriment it shall prepare a written opinion setting forth the findings on which the decision is based."

* * *

Section 7-502. Areas and Factors to be Considered.

In reaching its decision the Agency shall not restrict its consideration to benefit and detriment within the local jurisdiction, but shall consider all relevant and material evidence offered to show the impact of the development on surrounding areas. Detriments or benefits shall not be denied consideration on the ground that they are indirect, intangible or not readily quantifiable. In evaluating detriments and benefits under § 7-501 the Agency may consider, with other relevant factors, whether or not

(1) development at the proposed location is or is not essential or especially appropriate in view of the available alternatives within or without the jurisdiction;

> (2) development in the manner proposed will have a favorable or unfavorable impact on the environment in comparison to alternative methods. * * *"

Tentative Draft No. 3 (1971) also sets forth Article 8, State Land Development Planning. Sec. 8-402 (p. 71) provides that a State Land Development Plan shall include statements of objectives, policies and standards which, in turn, are to be based on studies of matters including:

> "(e) geological, ecological and other physical factors that would affect or be affected by development; * * *
>
> "(i) natural resources, including air, water, forests, soils, rivers and other waters, shorelines, subsurfaces, fisheries, wildlife and minerals."

The explanatory note says: "'Environmental' is intended to include matters of ecology in the broadest sense of the word." (p. 73)

More than one court has lamented the difficulties and problems which result from the vesting of land use controls in individual municipalities rather than in regional bodies. Golden v. Planning Board of Town of Ramapo, 30 N.Y.2d 359, 334 N.Y.S.2d 138, N.Y. Law Journal, May 16, 1972 (N.Y. Ct. of App. May 3, 1972); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (S.Ct. 1970). The response of the court in Golden was to allow the municipality an 18-year period of phased growth, despite the resulting unfairness to certain landowners. The response in Girsh was to require every municipality to permit every form of land use; this position has already been rejected in New

Jersey, Duffcon Concrete Products v. Borough of Cresskill, 1 N.J. 509 (1949). The best response, we submit, is that of encouraging municipalities to conform to established regional plans, which can be done by upholding a zoning ordinance which conforms to a reasonable county master plan. Only in this way can the benefits, -- indeed, the necessities, -- of regional planning be achieved under our present constitutional and statutory structure of vesting land use control solely in the municipalities.

POINT II.

THE SOMERSET COUNTY MASTER PLAN IS REASONABLE

The Somerset County Master Plan states on page 38:

> "The County Land Use Plan has allocated the development by categories so as to bring about the development of a regional center, communities and neighborhoods. The Plan endeavors to allocate the requirements of population and economic growth as against the available resources for a viable environment that provides an ecological balance between nature and man. While there is no single man-land ratio formula, there is the need to balance resources against the expected development pressures."

And on page 39:

> "On the local level, the County Planning Board has advocated greater attention be given to providing a variety of community development and of housing types, including a range of housing to meet needs of all sectors of the population. * * * Community design should include all densities of housing and allow for clustering of residential and community facilities. Community facilities and easy accessibility to available jobs are essential especially to lower income groups, black and white."

The County Master Plan proposes 11 areas of "community development" with residential densities varying from 5 to 15 families per acre and with low rise and garden apartments, town houses, etc. (p. 43). In short, the County Master Plan specifically provides for multi-family housing on land use densities that should be within the range of lower income groups. Provision is also made for economic development at suitable locations, but not in

Bedminster Township (pp. 53-55).

The proposal in the County Master Plan for rural settlement or low density areas in the western part of the county is not designed to appease local prejudices or to countenance "exclusionary zoning" but is grounded upon considerations of highest public importance: the protection of the public water supply. On page 51 of the County Master Plan, it is stated:

> "The areas designated Rural Settlement are all directly related to the Raritan River basin which has become New Jersey's major source of potable water. Spruce Run and Round Valley are already operational in the headwaters of the Raritan, and two additional reservoir sites are under acquisition, one at the Confluence of the North and South Branches of the Raritan River and the other in Franklin Township at Six Mile Run. All these reservoirs deliver, or will deliver, potable water via the Raritan and Millstone for north-central New Jersey. Fundamentally, if the headwaters and the runoff to these water supply facilities are not to be contaminated, there must need be highly restricted land development controls. The most suitable method of achieving this effect is to restrain and control intensive economic and residential development. Without these controls, the water resources of New Jersey will become so polluted as to force the State into a very uneconomic water purification program or radically restrict all economic and residential development in northern New Jersey."

In seeking a viable balance between additional housing, economic development, open space and protection of the public water supply, by means of suitable concentration of particular land uses in appropriate locations, the County Master Plan follows the approaches made by such

established agencies as the Tri-State Regional Planning Commission and the Regional Plan Association. These agencies suggest that economic development and increased residential densities be located in much the same areas in Somerset County as is proposed by the County Master Plan and they also indicate Bedminster Township as an area unsuitable for such forms of development.

The approach to meeting housing needs for double the county's present population which has been taken in the County master plan is similar in many ways to that adopted by Governor Cahill in his special message to the Legislature on March 27, 1972 entitled "New Horizons in Housing". The purpose of the Governor's message was to suggest ways of alleviating the housing shortage in this state. He discussed various aspects of the total problem, including, among others, the need for a state construction code, the need for better regional and state-wide planning, the need for local property tax reform. Under the heading "Balanced Housing Plan" the Governor stated:

> "In essence, what we must achieve is a balance in housing; low, moderate and expensive, single and multi-family. I am not suggesting that the balance should be equal or that every community should be the same. It may well be that in some counties there are municipalities in which all types of housing are neither feasible nor appropriate. * * * housing locations and job locations are moving further apart * * *. This situation has caused a number of problems which ultimately affect all citizens. These include traffic congestion on the highways, increasing

> unemployment in the central cities and a shortgage of labor in the suburbs. It is apparent that the future sound development of the state is dependent upon a more reasonable relationship between housing and jobs."

The kind of regional planning reflected in the Somerset County Master Plan is similar to that which was upheld in County Com'rs. of Queen Anne's County v. Miles, 246 Md. 355, 228 A.2d 450 (C.of A. 1967) and Norbeck Village v. Montgomery County Council, 245 Md. 59, 254 A.2d 700 (C.of A. 1969).

In the Miles case, it appears that Queen Anne's County is located on the Eastern Shore of Maryland. The Chesapeake Bay Bridge has its eastern terminus in the county, in the vicinity of which the greatest population growth in the county took place during the 1950-1960 decade. The county was rural, with agriculture and fishing the predominant industries. There were many large, elegant and historic estates along the tidewater. Appellees were the owners of a large tidewater estate who brought suit to invalidate the inclusion of their property in a 5-acre minimum lot residential zone prescribed by a carefully planned county-wide zoning ordinance. As the court stated at 228 A.2d 457:

> "The position of the appellees is that when the County has attempted to exercise the power to zone primarily for the protection of the wealthy who live in the district, as they argue is the case here, the sovereign power is

not exercised for the promotion of a substantial public purpose but rather for the private benefit of individuals, and is therefore invalid. They submit that cases in other jurisdictions have rejected such zoning as is here involved as an improper exercise of the police power.

"We agree that if the primary purpose or effect of the ordinance is to benefit private interests, rather than the public welfare, the legislation cannot be held valid merely because some of its incidental effects may be for the general good. On the other hand, if the ordinance has a substantial relationship to the general welfare of the community in that it can fairly be taken as a reasonable effort to plan for the future within the framework of the County's economic and social life, it is not unconstitutional because under it some persons may suffer loss and others be benefited. Courts of other states have had occasion to balance these factors; the decisions, as we read them, turn on the various economic, physical and sociological factors involved in the particular case."

In rejecting appellees' argument and in upholding the validity of the zoning ordinance, the court held at p. 458:

"There was strong affirmative evidence that the ordinance makes fair and reasonable provision for all the different kinds of housing required in the County. * * * That a zoning ordinance endeavors to shape the future within the general framework of existing conditions does not render it arbitrary or unreasonable."

And at p. 459:

"The benefits to the estate owners in the R-1 District, in our opinion, are not the primary purpose or effect of the ordinance, but may be reasonably considered only incidental to the attempt to promote the general welfare."

In Norbeck Village, supra, the Maryland-National Capital Park and Planning Commission (MNCPPC) had adopted in

1964 a regional General Plan, and in 1966 the Montgomery County District Council approved a similar Master Plan. Both Plans envisioned (254 A.2d 703)

> "Olney as a satellite low density community ultimately to have 19,000 people at the core and 10,000 on the fringe. The Plans contemplated a green belt of open spaces and parks to shield the Olney area from the ever-lengthening and over-crowding suburban sprawl coming out of Washington, and changed the zoning designation of appellants' land, some 183 acres in the southeast quadrant along the east side of Georgia Avenue, from R-R (half acre lots) to R-A (two acre lots), as it did some 12,000 other acres. * * *
>
> "On December 29, 1966, the Planning Commission filed a comprehensive rezoning plan, application E-998, encompassing 49.5 square miles -- some 30,000 acres, including those of appellants -- to implement the Olney and vicinity Master Plan. * * *
>
> "The Planning Commission adopted the recommendation of its technical staff to the District Council that E-998 be approved. A public hearing was held on E-998 on April 21, 1966. MNCPPC's director, Hewins, testified in favor of the application as an implementation of the joint purposes of the Master Plan: the preservation of open spaces and the protection of the watershed area. He described the background of the Olney community plan as a result of the General Plan -- Year 2000 Plan -- which provided for the development of wedges and corridors throughout the county. Satellite corridors included plans for corridor cities such as Gaithersburg and Germantown with planned population in excess of 100,000. Olney as a self-identifiable community with its own hospital, schools, commercial area, and theatre was qualified and selected as a satellite community. The Olney area was selected above other possible locations in the County for this development because of its geographical setting and natural amenities which encouraged the planned growth concept. No other area was found to possess the assets of the Olney community. Hewins further testified that this plan was in

accordance with sound planning principles. According to Hewins, the plan promoted a land use pattern within which an integrated cultural social-community service complex can develop around a 75-acre shopping district. Also, he said that the Plan's highway network provides convenient access to residents of the community and fits into the broader transportation needs of the region.

"A purpose of the Plan was described as promoting the physical isolation of Olney from suburban sprawl. Low density residential zoning was recommended to break the development pattern from the suburbs. The proposed zoning in the plan is in accordance with existing development. It was stated that a serious deficiency of public services would exist if the Master Plan was not adopted. The plan was to accomplish a staged development using the tools of zoning and sewer access to avoid the excess costs of public services. A critical element of the Plan was to encourage earlier growth along the 70S corridor rather than on the Patuxent River Watershed thereby protecting the basin from pollution."

In upholding the validity of the zoning plan, the court concluded at 254 A.2d 705:

"The record clearly supports, if indeed it does not require, the finding Judge Pugh made that the challenged rezoning was not arbitrary, discriminatory or illegal. The Olney plan, in conformity with the General Plan was a carefully thought out, carefully implemented policy of preserving a portion of Montgomery County, presently suitable (by reason of its geographical setting and natural amenities which encouraged the planned growth concept) for preservation as a self-identifiable community with its own hospital, schools, commercial area and theater, as a relatively low residential area which would break and hold back the spreading urban intrusion into the country. The plan sought to encourage earlier growth along the interstate 70S corridor rather than on the Patuxent River Watershed, thereby protecting the basin from pollution. Appellants dispute the validity of the concept underlying the plan and of the legality of the plan but do not suggest that it was not conceived and adopted in the utmost good faith, and they did not overcome the strong

> presumption that the plan was valid legislative action, a presumption buttressed in this case by reason of the fact that the plan implemented the General Plan and the Master Plan."

It will be observed that one of the factors upholding the zoning plan in the last cited case was that it tended to protect the Patuxent River Watershed. There are two New York cases which hold that zoning legislation is valid if it tends to protect the public water supply because such zoning, even though working some detriment to the interests of a landowner, advances the public welfare.

In Salamar Builders Corp. v. Tuttle, 29 N.Y.2d 221 275 N.E.2d 585, 325 N.Y.S.2d 933 (C.of A. 1971), plaintiff took title to some 70 acres which, at the time of purchase, were zoned for 1-acre residential use. After plaintiff had filed a sub-division plan, a zoning amendment was adopted which required 1-1/2-acre minimum lots on plaintiff's property. The plaintiff attacked the validity of the zoning amendment showing, through uncontroverted evidence, that it has sustained a pecuniary loss as the result thereof.

> "The town, producing no contrary proof, introduced expert testimony to the effect that the topography and soil conditions were such as to inhibit the installation of central sewer and water systems, so that any present residential development would necessarily be limited to the use of wells and septic tanks; and that, in turn, largely because of the area's topography, its location within or contiguous to the New York City watershed, and drainage difficulties, the area would best be zoned for residences on two-acre

> plots in order to provide ample space for drainage and thus minimize the danger of water pollution. Additional testimony was adduced which established that the rezoning was initiated as part of a well coordinated and comprehensive land use scheme for the Town of Southeast generally, which was designed to reflect local land conditions and local development policies with respect to such factors as population growth, economic activity, the availability of transportation and communications facilities, as well as public utilities generally, profile and tax base." 275 N.E.2d 587.

In upholding the validity of the zoning amendment the court held at 275 N.E.2d 589:

> ". . . it is certain that the prospect of water pollution from the inadequate spacing of septic tanks in such rocky and hilly terrain provided more than adequate reason for the upzoning. The testimony introduced was uncontradicted by landowner and established that the threat of pollution to both local wells and the entire water basin was real and required affirmative steps in the form of pollution control. Obviously, measures in the form of water pollution control are '"held by the * * * preponderant opinion to be greatly and immediately necessary to the public welfare"' (Matter of Wulfsohn v. Burden, 241 N.Y. 288, 299, 150 N.E. 120, 123, supra), to relate to some subsisting evil which should be controlled, and, therefore, serve some legitimate public purpose. The only remaining question is whether the measure tends to remedy the evil perceived, i.e., does it reasonably serve to vindicate the policy sought to be effected. Here, the requirement of larger parcels was designed in the hope of reducing the number of septic tanks and thus allowing for sufficient land area to prevent the effluent from the septic tanks from seeping into the water source of the home owner or drainage into the reservoir serving the New York City area, and would indeed tend to minimize the danger of pollution."

In Nattin Realty, Inc. v. Ludewig, 324 N.Y.S.2d 668

(S.Ct. 1971, aff'd on op. 40 A.D.2d 535, 334 N.Y.S.2d 483 (App. Div. 1972; aff'd. 32 N.Y.2d 681, 343 N.Y.S.2d 360, 296 N.E.2d 257 (C.of A. 1973), plaintiff landowner attacked the validity of an amendment to the zoning ordinance which changed the classification of its property from multi-family to single-family residential zone. In upholding the validity of the zoning, the court stated at p. 670:

> "Respondents' primary emphasis, however, is that the petitioner's proposed local water supply and sewage disposal facilities were inadequate for the anticipated population to be housed in the buildings."

And at p. 671:

> "Upon a thorough review of the trial minutes and briefs, as well as the authorities cited by the parties, it appears that courts must consider a new criterion in reviewing zoning legislation: the factory of ecology. Upon the trial, the court was favored with the testimony of two distinguished academicians on behalf of the respondents. Professor Jerome Regnier, Professor of Geology at Vassar College, testified at considerable length respecting the availability of the water resources on the property as well as those throughout the entire County. Drawing upon his exceptionally distinguished background and expertise and utilizing the geological data contained in the 'Soil Survey of Dutchess County' prepared by the United States Department of Agriculture in cooperation with Cornell University Agricultural Experiment Station, this witness demonstrated that there indeed, exists a grievous problem of adequate water supply and sewage disposal absent a central, i.e., public piped water system which is not dependent upon the vagaries of the wells dug or to be dug on the immediate property. Nor, as was testified, were the sewage treatment plans sufficiently adequate, and particularly so since the municipality had been plagued by such problems created by existing

> large multi-dwelling buildings whose water upply or sewage disposal facilities had failed."

And at p. 672:

> "Professor Robert Rehwoldt of Marist College, Chairman of the Chemistry Department and also Director of its Environmental Science Program, has been conducting protracted research on pollution, in Dutchess County. It was Dr. Rehwoldt's considered opinion that erecting a substantial number of dwelling units without providing for adequate sewage disposal would be fraught with severely deleterious consequences to the ecology of the municipality and adjoining area.
>
> "Respecting ecology as a new factor, it appears that the time has come -- if, indeed, it has not already irretrievably passed -- for the courts, as it were, to take 'ecological notice' in zoning matters."

It is submitted, therefore, that the Somerset County Master Plan proposes a reasonable plan for land uses and development of Somerset County. It would meet the needs of double the present population for housing and jobs and it would safeguard for the benefit of people both within and without the county the public water supply furnished by the Raritan River.

POINT III.

THE BEDMINSTER ZONING ORDINANCE FURTHERS THE GENERAL WELFARE

The position of the plaintiffs Cieswick, et al. appears to be that the Bedminster zoning ordinance is invalid because it does not further the general welfare in that it fails to facilitate the solution of the regional housing needs for persons of low or moderate income.

Zoning regulations, in order to be valid, must of course further the general welfare in some way. The real question is, how does one define the general welfare? The statutes, N.J.S.A. 40:55-30 and 40:55-32 set forth many aspects of the general welfare. They add up to a requirement of "encouraging the most appropriate use of land throughout such municipality". N.J.S.A. 40:55-30; Cobble Close Farm v. Board of Adjustment, Middletown, 10 N.J.442, 453 (1952); Thornton v. Village of Ridgewood, 17 N.J. 499, 513 (1955). Determining the most appropriate use of land must depend upon the facts, and not upon the wholesale exaltation of an ironclad rule that the need for low-cost housing must prevail over every other consideration. "The constitutional and statutory zoning principle is territorial division according to the character of the lands and structures and their peculiar suitability for particular uses, and uniformity of use within the divisions." Rockhill v. Chesterfield Township, 23 N.J. 117, 125 (1957) [Emphasis supplied].

The general welfare is broad enough to include matters

not expressly mentioned in the statute, such as the regional needs for low and moderate income housing, Oakwood at Madison, Inc. v. Township of Madison, 117 N.J.Super. 11 (Law Div. 1971), and aesthetic considerations, Vickers v. Township Committee of Gloucester Township, 37 N.J.232, 248 (1962); United Advertising Corp. v. Metuchen, 42 N.J. 1, 6 (1964); Hankins v. Borough of Rockleigh, 55 N.J.Super. 132, 137 (App. Div. 1959); Livingston Township v. Marchev, 85 N.J.Super. 428, 433 (App. Div. 1964). Surely the general welfare can also include protection of the natural environment.

The Bedminster zoning plan is designed to provide for relatively low density land usage for the purposes of preserving the character of the community and of fulfilling other statutory mandates, and of avoiding degradation of the natural environment to the extent that would significantly reduce the water quality of the Raritan River, which is an important source of the public water supply. In a sense, this case presents a conflict between the social interest in more adequate housing for low and moderate income people and the social interest in protecting the natural environment. The resolution of this issue may well be different in different localities. Whatever may be appropriate in other circumstances, defendants submit that the Bedminster zoning ordinance is valid because it goes as far as possible in permitting various types of housing for various income and social groups without unreasonably jeopardizing the water quality of the Raritan River. Under the conditions existing in the case at bar, the Bedminster zone plan does promote the general welfare.

A. The zoning power requires consideration of environmental matters.

By virtue of N.J.S.A. 40:55-30, municipalities have been given power to regulate "the nature and extent of the uses of land * * * the percentage of lot that may be occupied, the sizes of * * * open spaces, the density of population * * *". N.J.S.A. 40:55-32 mandates that zoning regulations be made for the purposes, among other things, to "secure safety from * * * flood * * *; promote health * * * or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses * * *." Without dispute, the effect of these statutory provisions is to require that consideration in zoning matters be given the natural environment.

B. Protection of the natural environment is part of the general welfare.

Zoning is an exercise of the police power, and is justified only by furtherance of the general welfare. Euclid v. Ambler Realty Co., 372 U.S. 365, 387 (1926); Mansfield & Swett, Inc. v. West Orange, 120 N.J.L. 145, 150 (S.Ct. 1938); Schmidt v. Board of Adjustment, Newark, 9 N.J. 405, 414 (1952). It is now becoming widely recognized that the protection of the

natural environment is an important element in the general welfare.

In N.J. Sports and Exposition Authority v. McCrane, 61 N.J. 1 (1972), Mr. Justice Hall (concurring in part and dissenting in part) stated at p. 62:

> "Modern man has finally come to realize -- I hope not too late -- that the resources of nature are not inexhaustible. Water, land and air cannot be misused or abused without dire present and future consequences to all mankind. Undue disturbance of the ecological chain has its devastating effect at far distant places and times. Increased density of population and continuing residential, commercial and industrial development are impressing these truths upon us. We trust solution of our problems in this vital area can be aided by modern technology and the expenditure of money, but it seems evidence that we must also thoroughly respect the balance of nature."

Sierra Club v. Morton, 405 U.S. 727 (1972) was decided on the question of plaintiff's standing to sue. However, the court speaking through Mr. Justice Stewart, said at p. 734:

> "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."

And Mr. Justice Blackmun, in his dissenting opinion, said at p. 755:

> "The case poses -- if only we choose to acknowledge and reach them -- significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our

> procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"

The courts are now recognizing that zoning restrictions on land which limit the uses of the property to accord with the limitations which its natural characteristics impose, are reasonable and valid.

In Spiegle v. Beach Haven, 46 N.J. 479 (1966); cert. den. 385 U.S. 831, the court sustained the validity of a zoning ordinance which enacted drastic use restrictions. In rejecting a claim that the ordinance took plaintiff's property for public purposes without just compensation, the court held, at p. 492:

> "The gist of this testimony was that such regulation prescribed only such conduct as good husbandry would dictate that plaintiffs should themselves impose on the use of their own lands. Consequently, we find that plaintiffs did not sustain the burden of proving that the ordinance resulted in a taking of any beneficial economic use of their lands."

In Frankel v. Atlantic City, 124 N.J.Super. 420 (App. Div. 1937), rev. 63 N.J. 333 (1973), the Supreme Court adopted the views of the dissenting opinion of Judge Handler, who said at 124 N.J.Super. 424:

> "* * * the public interest has been equated with a curtailment of the use of naturally endowed property to the end that it may be preserved and enhanced for the benefit of the community at large."

In Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (S.Ct. 1972), the court upheld the validity of drastic

zoning restrictions on shore lands and wet lands. The court stated at p. 768:

> "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.
>
> "This is not a case where an owner is prevented from using his land for natural and indigenous uses. The uses consistent with the nature of the land are allowed and other uses recognized and still others permitted by special permit."

In Candlestick Properties, Inc. v. San Francisco Bay etc. Commission, 11 Cal. App.3rd 557, 89 Cal. Rptr. 897 (1970), a regulation which prohibited the filling of lands on the edge of San Francisco Bay was held to be a valid exercise of the police power rather than a taking of property without due process of law.

In Turner v. County of Del Norte, 24 Cal.App.3d, 311, 101 Cal. Rptr. 93 (1972), plaintiffs owned land in the flood-plain which they had subdivided into lots, some of which had been sold, and had built roads and a water system. Following a disastrous flood, zoning regulations were adopted which restricted plaintiffs' land to agricultural and recreational uses. In upholding the validity of the zoning regulations, the court stated, at p. 96:

> "The zoning ordinance in question imposes no restrictions more stringent than the existing danger demands."

In Salamar Builders Corp. v. Tuttle, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (C.of A. 1971), the plaintiff's tract, pending application for subdivision, was upgraded from 1 acre minimum lots to 1-1/2 acre minimum lots. In upholding the validity of the amendment, the New York Court of Appeals stated at 325 N.Y.S.2d 938:

> "* * * it is certain that the prospect of water pollution from the inadequate spacing of septic tanks in such rocky and hilly terrain provided more than adequate reason for the upzoning. The testimony introduced was uncontradicted by the landowner and established that the threat of pollution to both local wells and the entire water basin was real and required affirmative steps in the form of pollution control. Obviously, measures in the form of water pollution control are '"held by the * * * preponderant opinion to be greatly and immediately necessary to the public welfare"' (Matter of Wulfsohn v. Burden, 241 N.Y. 288, 299, 150 N.E. 120, 123, supra), * * *. Here, the requirement of larger parcels was designed in the hope of reducing the number of septic tanks and thus allowing for sufficient land area to prevent the effluent from the septic tanks from seeping into the water source of the home owner or draining into the reservoir serving the New York City area, and would indeed tend to minimize the danger of pollution."

In Nattin Realty, Inc. v. Ludewig, 67 Misc.2d 828, 324 N.Y.S.2d 668 (S.Ct.1971); affd. without op. 40 A.D.2d 535, 334 N.Y.S.2d 483 (App.Div. 1972), affd. 32 N.Y.2d 681, 343 N.Y.S.2d 360, 296 N.E.2d 257 (C.of A. 1973), the owner had secured Planning Board approval for construction of 342 garden apartment units, but prior to issuance of a building permit, the town

rezoned the property for single family houses. In upholding the validity of the rezoning, the court stated at 324 N.Y.S.2d 670:

> "Respondents' primary emphasis, however, is that the petitioner's proposed local water supply and sewage disposal facilities are inadequate for the anticipated population to be housed in the buildings."

And at 671:

> "Upon a thorough review of the trial minutes and briefs, as well as the authorities cited by the parties, it appears that courts must consider a new criterion in reviewing zoning legislation: the factor of ecology."

And at 672:

> "Respecting ecology as a new factor, it appears that the time has come -- if, indeed, it has not irretrievably passed -- for the courts, as it were, to take 'ecological notice' in zoning matters.
>
> "I hold that under Udell, supra, the municipality has here presented sufficient evidence to warrant the rezoning of the petitioner's property for it was prompted to do so by ecological considerations based not upon whim or fancy but upon scientific findings. The definition of 'public health, safety and welfare' surely must now be broadened to include and to provide for these belatedly recognized threats and hazards to the public weal."

In Turnpike Realty Company v. Town of Dedham, Mass. , 284 N.E.2d 891 (S. Jud. Ct. 1972), cert. den. 409 U.S. 1108, the court upheld the validity of a zoning ordinance, and rejected the contention that it was confiscatory, which restricted a floodplain to essentially agricultural or recreational

uses. There was evidence that the effect of the zoning ordinance reduced the value of plaintiff's property by 88%.

In In Re. Spring Valley Development, Me. , 300 A.2d 736 (S. Jud. Ct. 1973), the court upheld the validity of a requirement that a subdivider and developer of a lakeside residential area secure a license from the Environmental Improvement Commission. The court stated, at p. 748:

> "We consider it indisputable that the limitation of use of property for the purpose of preserving from unreasonable destruction the quality of air, soil and water for the protection of the public health and welfare is within the police power."

Other non-zoning cases giving effect to the social need for environmental protection may be briefly noted. Fred v. Mayor, etc. Old Tappan Borough, 10 N.J. 515 (1952) upheld a municipal ordinance regulating the removal of soil. State v. Mundet Cork Corp., 8 N.J. 359 (1952), cert. den. 344 U.S. 819 upheld the validity of a municipal air pollution ordinance. In Silva v. Romney, 473 F.2d 287 (1st Cir. 1973), the court ruled that the trial judge should consider on the merits an application by neighbors for a preliminary injunction to prevent a developer from cutting trees pending the submission and approval of an environmental impact statement. In Crane v. Brintnall, 29 Ohio Misc. 75, 278 N.E.2d 703 (1973), the Ohio Court of Common Pleas held that the pollution of plaintiff's lake by effluent from the upstream sewage treatment plant operated by the defendant, County Commissioners, was a "taking"

of plaintiff's property that required the payment of just compensation.

Thoughtful students now question the traditional doctrine that excessive land use regulation amounts to a "taking" for which compensation must be made; see "Zoning - Areas of Critical Environmental Concern", by James C. Pitney, Jr., 65 N.J.State Bar Journal, Nov. 1973, p. 34; "Takings, Private Property and Public Rights" by Joseph L. Sax, 81 Yale Law Journal 49 (1971),* and "The Use of Land: A Citizens' Policy Guide to Urban Growth", Thomas Y. Crowell Company, 1973. The latter book, a Task Force Report sponsored by The Rockefeller Brothers Fund, states at p. 174:

> "The courts should 'presume' that any change in existing natural ecosystems is likely to have adverse consequences difficult to foresee. The proponent of the change should therefore be required to demonstrate, as well as possible, the nature and extent of any changes that will result. Such a presumption would build into common law a requirement that a prospective developer who wishes to challenge a governmental regulation prepare a statement similar to the environmental impact statements now required of public agencies under federal programs.
>
> "Equally important is the need for the U.S. Supreme Court to re-examine its precedents that focus on the diminution of property values affected by regulations and seek to balance public

*Professor Sax questions the soundness under modern conditions of Morris County Land Improvement Company v. Township of Parsippany-Troy Hills, 40 N.J. 539 (1963); see 81 Yale L.Journal, 157-158.

benefit against land value loss in every case. We are aware of the sensitivity of this matter, and of the important issues of civil liberty associated with ownership of property. But it is worth remembering that when U.S. constitutional doctrine on the takings issue was formulated during the late nineteenth and early twentieth centuries, land was regarded as unlimited and its use not ordinarily of concern to society. Circumstances are different today."

C. The legislative policy of New Jersey requires restrictions on land use in ecologically sensitive areas.

Recent New Jersey legislation of this character would include:

P.L. 1970, c. 272, N.J.S.A. 13:9A-1, et seq. - Coastal Wetlands.

P.L. 1971, c. 417, N.J.S.A. 13:18-1, et seq. - Pinelands Environmental Council.

P.L. 1972, c. 185, N.J.S.A. 58:16A-50, et seq. - Flood Hazard Areas.

P.L. 1973, c. 185, N.J.S.A. 13:19-1, et seq. - Coastal Areas Facility Review Act.

The last cited statute requires the preparation and approval of an environmental impact statement before certain major kinds of development can proceed. Other legislatures have required environmental impact statements as a precondition to important developments.

Federal - National Environmental Policy Act of 1969, 42 U.S.C.A. §4321, et seq.

California - Environmental Quality Act of 1970, Pub. Rec. Code §21,000, et seq.

Montana - Environmental Policy Act of 1971 M.R.C. c. 69-6501, et seq.

New Mexico - Environmental Quality Act of 1971, N.M.S.A. §12-20-1, et seq.

North Carolina - Environmental Policy Act of 1971, Gen. St. §113A-1, et seq.

Puerto Rico - Public Policy Environmental Act of 1970, Title 12, L.P.R.A. §1121, et seq.

On March 7, 1973, the New Jersey County and Municipal Government Study Commission, chaired by Senator Musto, issued a draft report entitled "Water Quality Management: New Jersey's Vanishing Options". The report opens with the following statement: "New Jersey must overhaul its approaches to water quality issue or face increasing threats to overall quality of life." Throughout the Report, the Commission emphasizes that during recent decades as population growth and economic development have risen, the problem which was originally perceived as a matter of health became one of pollution control and is now recognized by knowledgable and thoughtful persons as involving water quality management. It is implicit in the Report, and is occasionally made explicit, that water quality management involves, among other things, land use control and the

location of housing and economic development so as to minimize environmental damage which, in turn, directly affects water quality.*

---

*Pertinent quotations from the Report include the following:

(p.1) The Passaic River and the Arthur Kill are among the 10 worst polluted streams in the nation.

(p.7) Due to the overloading and poor efficiency of treatment facilities, as many as 100 municipalities in New Jersey face building bans in 1973. Municipal planning boards rarely consider water quality when giving approval for more and more construction.

(p.8) Land use and community development planning continues to be incoherent as long as water quality is not viewed as an equal, basic factor in decision-making.

(p.140) There has been insufficient vertical and horizontal communication on a systematic basis within the functional area of water quality management. Also lacking has been the incorporation of interdisciplinary planning into the larger concerns of economic development, land and water use, solid waste disposal, and air pollution.

(p.151) Without controls it is impossible to force authorities to plan with municipal, county, and State planning agencies. The absence of integration and coordination which was observed in all twenty-one counties, has thus resulted in a hindrance to orderly development and wanton sewering of headwater areas, flood plains, and wetlands which in turn precipitated development where it should not occur. Sewers are meant to protect the environment from the adverse impact of polluted waters. It seems a contradiction that millions of dollars are being expended without stringent controls and that the net result is often environmental degradation and uncontrolled growth patterns.

POINT IV

THE ZONING ORDINANCE OF THE DEFENDANT TOWNSHIP DOES NOT VIOLATE EQUAL PROTECTION

Plaintiffs Cieswick et al contend that the zoning ordinance of the Township violates equal protection of the laws, essentially on the theory that its requirements raise the cost of homes within the Township, with the effect of excluding lower income groups. Neither the Amended Complaint nor plaintiffs' answers to Interrogatories contain an allegation or contention that this alleged exclusionary effect is intentionally discriminatory. It has been observed that such "de facto classifications" are "[b]y their very nature . . . apt to be generated in the course of the good-faith pursuit of legitimate governmental ends." Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent, 21 Stan. L. Rev. 767, 778 (1969) [hereinafter cited as Sager].

The initial problems with plaintiffs' equal protection argument are factual. If the Township has attempted to exclude persons of low income, it has been notably unsuccessful. According to the 1970 census, 5.6% of its residents are below the poverty level, compared with 3.1% for Somerset County as a whole. Moreover, the central premise of plaintiffs' theory is that without the zoning restrictions here in issue,

persons of low and moderate income would be able to live in the Township. However, a study of the housing market in northeastern New Jersey suggests that the cost of land per acre would rise if smaller minimum lots were permitted. Williams, Exclusionary Land-Use Controls: The Case of Northeastern New Jersey, 22 Syracuse L.Rev. 475, 496 (1971) [hereinafter cited as Williams]. See also, Note, 69 Mich. L. Rev. at 340 n.10. Accordingly, developers can often sell smaller lots for almost as much as larger lots. Williams at 496. As a result, commentators have concluded that in some situations even zoning that established only the minimum requirements of health and safety would, in combination with other factors such as land value, place the price of residential access far beyond the means of the poor. Sager at 792. See also Note, 69 Mich. L. Rev. at 340 n.8. Professor Williams has concluded that subdivision requirements often have a more telling impact than zoning on the cost of housing and are often more strict for areas of intense development than low density areas. Williams at 496. Finally, it is especially unrealistic to speak of the feasibility of low income housing in a traditionally high-cost and attractive area such as northern Somerset County. Williams at 494. In short, plaintiff's equal protection argument is

based on a simplistic, a priori assumption concerning Bedminster and the housing market in northern New Jersey and is unsubstantiated by fact.

I. The "Rational Relation" Test.

Even if these problems are overcome, the zoning provisions in issue do not violate the equal protection clause. The general and fundamental principle of equal protection decisions is that a legislative classification is invalid only if it bears no rational relationship to a legitimate state end. McDonald v. Board of Elections, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

In McGowan, the constitutional validity of the state's Sunday closing law was upheld. Chief Justice Warren said for the court:

> "Appellants argue that the Maryland statutes violate the 'Equal Protection' Clause of the Fourteenth Amendment on several counts. First, they contend that the classifications contained in the statutes concerning which commodities may or may not be sold on Sunday are without rational and substantial relation to the object of the legislation. ****
>
> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The

> constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."
> 366 U.S. at 425.

The court also pointed out that equal protection applies to persons, not localities:

> "Secondly, appellants contend that the statutory arrangement which permits only certain Anne Arundel County retailers to sell merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches, amusement parks et cetera is contrary to the 'Equal Protection' Clause because it discriminates unreasonably against retailers in other Maryland counties. But we have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite. With particular reference to the State of Maryland, we have noted that the prescription of different substantive offenses in different counties is generally a matter for legislative discretion. We find no invidious discrimination here."
> 366 U.S. at 427.

In Douglas v. California, 372 U.S. 353 (1963), Justice Harlan, dissenting, said at p. 361:

> "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law

> of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.
>
> "Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses. Nor could it be contended that the State may not classify as crimes acts which the poor are more likely to commit than are the rich. And surely, there would be no basis for attacking a state law which provided benefits for the needy simply because those benefits fell short of the goods or services that others could purchase for themselves.
>
> "Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.' To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford."

In Dandridge v. Williams, 397 U.S. 471 (1970), the court upheld the validity of Maryland's statutory determination of the standard of need for eligibility under the federal aid

to families with dependent children program (42 U.S.C. §601, et seq.). In holding that the Maryland regulation was free from "invidious discrimination" the court held at p. 484:

> "For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought'. Williamson v. Lee Optical Co., 348 U.S. 483, 488. That era long ago passed into history. Ferguson v. Skrupa, 372 U.S. 726.
>
> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality". Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific". Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it". McGowan v. Maryland, 366 U.S. 420, 426.
>
> "To be sure, the cases cited, and many others enunicating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by

> contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. See Snell v. Wyman, 281 F.Supp. 853, aff'd, 393 U.S. 323. It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities. Goesaert v. Cleary, 335 U.S. 464; Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552. See also Flemming v. Nestor, 363 U.S. 603. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."

As applied in the area of comprehensive zoning ordinances, equal protection, together with due process, requires only that the provisions not be "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). This standard has consistently been applied by New Jersey courts in assessing the validity of zoning ordinances against an equal protection challenge, Roselle v. Wright, 21 N.J. 400, 410 (1956); Katobimar Realty Co. v. Webster, 20 N.J. 114, 123 (1956); Schmidt v. Bd. of Adjustment, 9 N.J. 405, 418 (1952); Clary v. Eatontown, 41 N.J. Super. 47, 69 (App. Div. 1956).

Under the "rational relation" test, the Township's ordinance is valid. Control of population density has long been recognized as a legitimate state objective. Euclid v. Ambler Realty Co., supra, at 388; Note, 69 Mich. L. Rev. at 344. As stated in Clary v. Eatontown, 41 N.J. Super. 47 (App. Div. 1956), "control of density of population is a proper zoning objective and a commonly approved technique for that purpose is minimum building lot area." 41 N.J. Super. at 56. Moreover, the Township lies in a critical area of the Raritan River Watershed and the evidence will show that the density of development there has serious implications for the availability of potable water for northeastern New Jersey. For this reason, several plans for regional development, including the County Master Plan, have advocated low density development in the Township. On this basis, the Bedminster zoning ordinance bears a rational relation to legitimate local and regional governmental purposes.

As stated by one commentator:

> "The control of population density has long been recognized as a valid state objective, and many other state concerns -- such as water pollution control -- could also be set forth in response to an attack on minimum-lot-size requirements. Moreover, zoning laws appear to be an extremely rational

> way to achieve these objectives, and the discrimination resulting from these laws seems no more invidious than that alleged in Dandridge. Note, 69 Mich. L. Rev. at 344.

II. "Active Review" and Equal Protection.

In certain cases, the Supreme Court has subjected legislative classifications to more stringent standards than the rational relation test. If the state action in question is based upon a "suspect classification", e.g., McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Korematsu v. United States, 323 U.S. 214 (1944) (alienage) or impinges upon a "fundamental interest", e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (constitutional right to travel), it will be held to violate the equal protection clause unless it is "necessary" to implement a "compelling" state purpose.

A. "Suspect" Classifications.

Plaintiffs contend that the zoning ordinance in issue raises the cost of housing in the Township beyond the means of persons of low income, thus creating, in effect, a classification based upon wealth. Plaintiffs also argue that racial and other minority groups are also excluded, and that therefore the ordinance creates de facto racial discrimination. But since any member of a minority group who has sufficient funds is not excluded, and both Caucasian and Negro persons of low and middle

income are allegedly excluded, the primary exclusionary effect, if any, is based on lines of wealth. Note, 69 Mich. L. Rev. at 344; Sager at 767, 781; Aloi at 15. Plaintiffs' racial discrimination argument is based on a statistical correlation between persons of low income and minority groups. Such an argument transforms most cases of wealth discrimination into racial discrimination, an approach for which there is no cited authority and which has been implicitly rejected by the United States Supreme Court. See, e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). Accordingly, to establish a "suspect classification", plaintiff must establish that lines drawn on wealth are "suspect".

In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) the Supreme Court held that the Texas system of financing public education was constitutionally valid, even though there was a disparity of tax revenues and cost per pupil between a district inhabited largely by Mexican-Americans and another nearby district which had an affluent and more predominantly Anglo population. Mr. Justice Powell, speaking for the court, said in his opinion:

> "Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that at least where wealth is involved the Equal Protection Clause does not require

absolute equality or precisely equal advantages."

* * *

"However, described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

"We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. But in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention. They also assert that the State's system impermissibly interferes with the exercise of a 'fundamental' right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. Graham v. Richardson, 403 U.S. 365, 375-376 (1971); Kramer v. Union Free School District, 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969). It is this question -- whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution -- which has so consumed the attention of courts and commentators in recent years."

411 U.S. at 23-24, 28-29 (Emphasis added).

Although some language in earlier Supreme Court decisions suggested that wealth might be considered a suspect classification (see Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)), all these decisions involved either the rights of criminal defendants, (Griffin and Douglas) or the right to vote (Harper and McDonald) and more recent Supreme Court decisions indicate that strict scrutiny will be given to wealth classifications in those areas alone. Compare Williams v. Illinois, 339 U.S. 235 (1970) (incarceration of a convicted indigent beyond the statutory maximum prescribed for the offense, in order to "work off" court costs, violates equal protection), Tate v. Short, 401 U.S. 395 (1971) (incarceration of an indigent for failure to pay a fine violates equal protection), Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam) (equal protection requires state to provide indigent prisoners with legal research materials) and Mayer v. Chicago, 404 U.S. 189 (1971) (denial of record of trial to indigent defendant for failure to pay required fee denies equal protection), with Bullock v. Carter, 405 U.S. 134 (1972), Dell v. Burson, 402 U.S. 535, 539 (1971) (dictum) (required liability insurance or posting of security in order to obtain driver's license does not violate equal protection), Boddie v. Connec-

ticut, 401 U.S. 371 (1971) (state law requiring filing fee for divorce actions, as applied to an indigent, violates due process, with no mention of equal protection), Simmons v. West Haven Housing Authority, 399 U.S. 510 (1970) and Williams v. Shaffer, 385 U.S. 1037 (1957). 85 Harv L. Rev. 1049, 1050 & n.14, 1055 (1972); Note, New Tenets in Old Houses: Changing Concepts of Equal Protection in Lindsey v. Normet, 58 Va. L. Rev. 930, 938 (1972); P. Houle, Compelling State Interest v. Mere Rational Classification: The Practitioner's Equal Protection Dilemma, 3 The Urban Lawyer 375 (1971). Indeed, the Douglas, Harper, and Griffin decisions are now generally interpreted as based upon the fundamental interest involved rather than a conclusion that classifications based on wealth are "suspect". McInnis v. Shapiro, 293 F.Supp. 327, 334 (N.D. Ill, 1968), aff'd sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969) (per curiam); Puchalski v. State Parole Bd., 104 N.J. Super. 294 (App. Div.), aff'd 55 N.J. 113 (1969), cert. denied, 398 U.S. 938 (1970); Hobson v. Hansen, 269 F.Supp. 401, 507 & authorities cited at 507 n.197 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir.) appeal dismissed, 393 U.S. 801 (1969). Moreover, even if de facto racial discrimination is held invalid, there are basic differences between race and wealth which justify different treatment: (1)

discrimination in allocation of resources based upon race is basically intolerable, while allocation of resources on the basis of individual purchasing power is a fundamental tenet of the economic system; (2) distinctions in wealth, unlike race, lie along a continuum, creating fundamental problems in defining both the objects of a constitutional protection and the nature and degree of constitutional obligation with respect to a given individual; (3) the source of racial discrimination is essentially personal attitudes, whereas the source of disparities in wealth is entrenched within the economic system itself; and (4) the adverse effects of poverty and, arguably, poverty itself, are remediable by a combination of individual effort and government assistance. Freilich, Exclusionary Zoning, Suggested Litigation Approach, 3 Urban Lawyer 344 (1971); Note, Exclusionary Zoning and Equal Protection, 84 Harv. L. Rev. 1645 (1971); Sager at 785-87.

Moreover, the Supreme Court decisions evince a less expansive approach to classifications based on wealth than those based on race. Compare James v. Valtierra, 402 U.S. 137 (1971) with Hunter v. Erickson, 393 U.S. 385 (1969). See S. Siegel, Postscript to Babcock, Suburban Zoning, Housing and the Courts, 27 The Record of the Association of the Bar of

the City of New York 230, 236 (1972). See also, Palmer v. Thompson, 403 U.S. 217, 220 (1971). In Hunter the Court held invalid an amendment to the charter of the City of Akron, adopted by referendum, which repealed a previously-enacted fair housing ordinance and provided that any ordinance to regulate realty on the basis of "race, color, religion, national origin or ancestry" must first be approved by a majority in a public election. The Court noted the explicit racial classification of the amendment and concluded that since the provision made it more difficult to enact ordinances directed at racial discrimination than ordinances prohibiting the kinds of discrimination not covered, the provision violated the equal protection clause. In contrast, James upheld a provision of the California Constitution, adopted by referendum, providing that no low-rent housing projects could be developed until the project was approved by a majority of those voting at a community election. All other housing projects receiving public assistance were not subject to a mandatory referendum. In distinguishing Hunter, the Court stated:

> "Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' Id., at 391. The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is

> in fact aimed at a racial minority, Cf. Gomillion v. Lightfoot, 364 U.S. 339 (1960). The present case could be affirmed only by extending Hunter, and this we decline to do." 402 U.S. at 137.

Finally, a decision that de facto classifications based upon wealth must be subjected to "active" review would have implications far beyond the field of "exclusionary" zoning. Such a rationale would also invalidate tuition at state universities, any required licensing fees, building and subdivision codes, which also raise the cost of housing construction, and any state regulation which has the effect of raising the cost of any commodity. Although it might be argued that some such regulations could be valid as "necessary" to serve a "compelling" state interest, the cases are rare in which a classification is subjected to "active review" and ultimately upheld. As one commentator has concluded, "[h]owever sympathetic one is to the active equal protection principle, it is hard to deny the possibility of it leading the judiciary beyond all reasonable restraint." Sager at 800. In light of these implications, if the equal protection clause is to be so applied, the decision, and its limitations, should be established by the United States Supreme Court. Sager at 800.

B. Fundamental Interests.

The second possible basis for active review under the equal protection clause is that the state action in question denies a "fundamental interest". However, plaintiffs'

brief does not contend that any "fundamental interest" has been denied. In light of two recent Supreme Court decisions, it is difficult to discern any possible basis for such a contention. In San Antonio Independent School District v. Rodriquez, supra, the Court concluded that education was not fundamental interest, arguing:

> "The lessen of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. Eisenstadt v. Baird, 405 U.S. 438 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942).
>
> 411 U.S. at 33-34.

Moreover, in Lindsey v. Normet, 405 U.S. 56 (1972) the Court upheld an Oregon statute prescribing the judicial procedure for eviction of tenants for non-payment of rent. In rejecting plaintiffs' contentions that the provisions should be subjected to "strict scrutiny", the Court stated:

> "Appellants argue, however, that a more stringent standard than mere rationality should be applied both to the challenged classification and its stated purpose. They contend that the 'need for decent shelter' and the 'right to retain peaceful possession of one's home' are fundamental interests which are particularly important to the poor and which may be trenched

> upon only after the State demonstrates some superior interest. They invoke those cases holding that certain classifications based on unalterable traits such as race and lineage are inherently suspect and must be justified by some 'overriding statutory purpose.' They also rely on cases where classifications burdening or infringing constitutionally protected rights were required to be justified as 'necessary to promote a compelling governmental interest.'
>
> "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to preceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom."
> 405 U.S. at 73-74.

In light of the San Antonio and Lindsey decisions, there appears to be no plausible basis on which to contend that the zoning ordinance of the Township denies a "fundamental interest".

C. A "compelling" State interest.

Even assuming that the higher standards of "active" equal protection review are applicable to the present case, the provisions of the zoning ordinance in issue are necessary to serve a compelling state interest. The provisions which plaintiff challenges essentially regulate the density of

development within the Township. The fundamental purpose of zoning is to serve the public welfare, and it is well established that the preservation of open spaces and the prevention of pollution of drinking water supplies are essential to the public health and welfare. See R.S. 13:8A-2, -3(c); 42 U.S.C. 1500-1500e; R.S. 58:19-2; R.S. 58:22-2. The Legislature has specifically found that:

> "Adequate supplies of wholesome water are essential to the health, welfare, commerce and prosperity of the people of the State. Such supplies will be best developed by plans, to be put into effect in stages during a period of years. The formulation and execution of such plans cannot safely be allowed to wait until the shortage of water in the State becomes critical in all parts of the State." R.S. 58:19(a). (Emphasis added)

Moreover, the Township lies in the Watershed of the Raritan River, and testimony will be introduced concerning the effect of more intense development, such as plaintiffs propose, upon the quality of the river waters. In this respect, the Legislature has specifically found that:

> "There is an immediate need for a new major supply of water to meet the present acute water requirements in the northeastern metropolitan counties and in the Raritan Valley, areas which directly and indirectly affect the commerce and prosperity of the entire State.
>
> * * *
>
> "The Raritan river basin is the only area where large quantities of additional water can be obtained immediately and economically to serve the northeastern metropolitan counties as well as the counties in the Raritan Valley. This basin is

> about equal in size to the Passaic river basin, is wholly within the State, is reasonably close to the counties needing water and is virtually undeveloped for water supply." R.S. 58:22-2(c), (f).

Low density development is necessary to serve these legitimate state purposes. Pollution of the Raritan River could not be avoided through sewage treatment plants, since, as expert testimony will indicate, existing methods of sewage treatment are of limited effectiveness and the polluting effects of intense development are attributable to surface runoff at least as much as sewage. Accordingly, the provisions in question are necessary to serve a compelling state interest and are valid under both the rational relation test and active equal protection review.

III. AUTHORITIES CITED BY PLAINTIFFS.

In support of their contention that the Bedminster zoning ordinance should be subjected to strict scrutiny, plaintiffs cite several cases, all but one of which involve racial discrimination. (The only case involving discrimination on basis of wealth is San Antonio Independent School District v. Rodriquez, which has been discussed above.) Since the Township Zoning Ordinance involves, at most, de facto discrimination by wealth, the racial discrimination cases cited by plaintiffs are inapposite. Moreover, those cases do not stand for the broad propositions stated by plaintiffs.

In Kennedy Park Homes v. City of Lackawanna, 436

F. 2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971), the Court affirmed a District Court decision entered after a non-jury trial. The Complaint alleged that the defendants had deliberately rezoned the property in question and declared a moratorium on subdivisions in order to deny housing to low-income and minority families and the trial court found "racial motivation resulting in invidious discrimination". Accordingly, the case did not involve a "supposedly neutral local decision" as stated in plaintiffs' brief.

In Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970), the defendants Planning Commission and City Council changed the zoning restrictions so as to prevent a low-income housing project. The District Court found these actions to be "racially motivated, arbitrary and unreasonable." In affirming, the Tenth Circuit concluded that the finding of racial motivation was not clearly erroneous.

In Norwalk CORE v. Norwalk Redevelopment Authority, 395 F.2d 920 (2d Cir. 1968), plaintiffs appealed from a dismissal of the Complaint. The Complaint alleged that defendants acted "knowingly and deliberately" so as to compound the problem of racial discrimination and that defendant "intended through the combination of the project and the rampant discrimination in rentals in the Norwalk housing market to drive any Negroes and Puerto Ricans out of the City of Norwalk." 395 F.2d at 931. In affirming, the Second Circuit specifically

limited its holding to racial discrimination:

> "We wish to stress that the specific problem is not that non-white displacees are, on the average, poorer than white displacees. That may be so, but it is a more general problem. What we are concerned with is that discrimination which forecloses much of the housing market to some racial groups, thereby driving up the price they must pay for housing." 395 F.2d at 931 n.18 (Emphasis added).

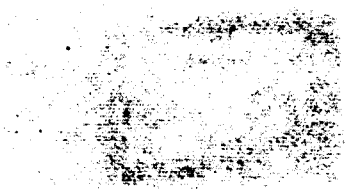
In Crow v. Brown, 332 F.Supp. 382 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972), a building permit for a low-income housing project, which would house predominantly blacks, was denied although the land in question was rezoned for apartments. Plaintiffs alleged and the trial court found that the only objection to the project was that its inhabitants would be low-income blacks. In affirming, the Fifth Circuit found that the record clearly established a "purpose and foreseeable result of continuing the present pattern of racial segration." 457 F.2d at 790.

Finally, in SASSO v. City of Union City, 424 F.2d 291 (9th Cir. 1970), the City government enacted an ordinance rezoning a tract of land to permit plaintiff's low-income housing project. Shortly thereafter, a referendum was passed which repealed the ordinance and prevented re-enactment of the ordinance by the City government for one year. Plaintiffs asserted that the referendum was racially motivated and moved for a three judge court and preliminary injunction. The District Court denied both motions and the Ninth Court affirmed.

However, in dictum the court suggested that if the effect of the zoning were discriminatorily to deny decent housing and an integrated environment to low-income residents of the city, it might be under some affirmative duty to accommodate the needs of its low-income, predominantly minority group, families. However, the Ninth Circuit did not so hold, but merely suggested that plaintiff's contention presented a substantial question. Moreover, it has been suggested that municipal officials owe a higher duty to plaintiffs who are citizens within their municipality, as in SASSO, than outsiders allegedly excluded. R. Babcock, Suburban Zoning, Housing and the Courts, 27 Record of the Association of the Bar of the City of New York 230, 234 (1972). Moreover, the SASSO decision involved an ordinance re-zoning a specific tract; this and the other circumstances of the case strongly suggest discriminatory intent. Finally, the equal protection rationale suggested in SASSO is questionable in light of recent United States Supreme Court decisions discussed above.

Plaintiffs also rely on several cases involving hiring and promotion practices which statistically exclude a higher proportion of black applicants than white. Some were decided under the standards of Title VII of the 1964 Civil Rights Act. Others were decided on an equal protection standard since public employers were not initially subject to the requirements of Title VII; however, the decisions were

clearly influenced by the existence of Title VII and the potential anomaly of more stringent standards for private employers than for public employers. None of these cases involved the validity of a zoning ordinance. Finally, none of the decisions based on the equal protection clause were decided by the Supreme Court and, in light of its recent decisions discussed above, it seems unlikely that the Supreme Court would uphold the broad rationale suggested by plaintiffs or extend it uncritically to the area of municipal zoning ordinances.



POINT V.

COMMENTS ON BRIEF OF CIESWICK PLAINTIFFS

A striking feature of the brief submitted by the Cieswick plaintiffs is the very narrow view it takes of the zoning power. To these plaintiffs, the general welfare means solely that every municipality must zone itself so as to insure that housing for persons of all economic levels is in fact provided. Their view of the general welfare is exclusionary of most of the elements thereof enumerated in N.J.S.A. 40:55-30 and 40:55-32. They ignore the fact that the availability of housing at a given price is necessarily determined by many factors, partly or wholly beyond the control of municipal officials, including such matters as the general level of land values, taxes, interest rates, wage rates and material and general construction costs.

These plaintiffs' effort to mandate housing for low income persons runs counter to a very recent decision in Virginia which invalidated a zoning ordinance requiring very large scale development to make 15% of the dwelling units available as low and moderate income housing. This case is Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc., Va. 198 S.E.2d 600 (S.Ct. 1973). The zoning amendment before the court required:

> ". . . the developer of fifty or more dwelling units in five zoning districts (RT-5,

RTC-5, RT-10, RTC-10 and RM-2G) to commit himself before rezoning or site plan approval to build at least 15% of these dwelling units as low and moderate income housing within the definitions promulgated from time to time by the Fairfax County Housing and Redevelopment Authority (FCHRA) and the United States Department of Housing and Urban Development (HUD). Under the amendment the housing units designated as low and moderate income units can be sold or rented only to persons of low and moderate income as defined by FCRHA and HUD regulations and the sale or rental price for such units cannot exceed the amount established as price guidelines by those agencies. * * *

"The hearing before the trial court clearly demonstrated both a demand and an urgent need for housing units for low and moderate income families in Fairfax County. Indeed, the uncontroverted evidence indicates that the need then existed there for 10,500 such dwelling units. * * *

"Thus it would appear that providing low and moderate income housing serve a legitimate public purpose. The question, then, becomes whether this public purpose can be accomplished by the amendment to the ordinance which rests upon the police power."

After discussing The Board of Supervisors of Fairfax County v. Carper, 200 Va. 653, 107 S.E.2d 390 (S.Ct. 1959), the court stated at p. 602:

"In Carper we held invalid a zoning ordinance which had as its purpose the exclusion of low and middle income groups from the western areas of Fairfax County. The effect of this decision is to prohibit socio-economic zoning. We conclude that the legislative intent was to permit localities to enact only traditional zoning ordinances directed to physical characteristics and having the purpose neither to include nor exclude any particular socio-economic group. * * *

"The amendment, in establishing maximum rental and sale prices for 15% of the units in the development exceeds the authority granted by the enabling act to the local governing body because it is socio-economic zoning and attempts to control the compensation for the use of land and the improvements thereon.

> "Of greater importance, however, is that the amendment requires the developer or owner to rent or sell 15% of the dwelling units in the development to persons of low or moderate income at rental or sale prices not fixed by a free market. Such a scheme violates the guarantee set forth in Section 11 of Article 1 of the Constitution of Virginia, 1971, that no property will be taken or damaged for public purposes without just compensation."

The Carper and DeGroff cases illustrate the point that, while the courts will act to prevent discrimination, they will not act to produce affirmative sociological results.

Moreover, it has been held that racial imbalance in a municipality does not of itself require judicial intervention. Spencer v. Kugler, 326 F. Supp. 1235 (D. N. J. 1971); affd. per curiam 404 U.S. 1027 (1972) was a case seeking to set aside existing school district boundaries in New Jersey on the grounds of de facto racial segregation. A three-judge court dismissed the complaint and the judgment was affirmed. The District Court said at 326 F.Supp. 1240:

> "It is clear that these legislative enactments prescribe school district boundaries in conformity with municipal boundaries. This designation of school district zones is therefore based on the geographic limitations of the various municipalities throughout the State. Nowhere in the drawing of school district lines are considerations of race, creed, color or national origin made. The setting of municipalities as local school districts is a reasonable standard especially in light of the municipal taxing authority. The system as provided by the various legislative enactments is unitary in nature and intent and any purported racial imbalance within a local school district results from an imbalance in the population of that municipality-school district. Racially balanced municipalities are beyond the pale of either judicial or legislative intervention."

The Cieswick plaintiffs go to great lengths to portray Bedminster Township as a bastion of white affluence, -- as if there were anything illegal about that. In point of fact, however, the 1970 census data shows that the percentage of families whose incomes were below the poverty level was 5.6 for Bedminster (the percentage for Morristown was 5.8), a figure exceeded by only one municipality in Somerset County (Rocky Hill was 6.1%) and nearly twice the percentage of all of Somerset County, which was 3.1. That Bedminster was able to come closer to these plaintiffs' ideal of a desirable population mix than any other municipality in the county, except for tiny Rocky Hill, after 24 years of a zoning ordinance which these plaintiffs criticize as exclusionary, is eloquent proof of the inherent fallacy of plaintiffs' position.

While there may be a numerical shortage of dwelling units in Bedminster -- as elsewhere -- the rentals are not of a rate to exclude the Cieswick plaintiffs. According to 1970 census data, there were 90 rental units in Bedminster, the average monthly rent of the 78 renter occupied premises being $125 as against a county average of $132, and the 12 units that were vacant having an average rental of $136 per month. In answer to interrogatories, each of these plaintiffs stated

the monthly rental that he or she was prepared to pay. The plaintiff Cieswick was prepared to pay $75 to $95 per month; 20% of the rental units in Bedminster were priced at $79 per month or less (as compared with 12.4% for all of Somerset County). Plaintiffs Diggs and Rone were prepared to pay $175 per month; 70% of the rental units in Bedminster (which was the same percentage for all of Somerset County) were priced at $149 or less. The plaintiff Kent was prepared to pay $250 per month; 91% of the rental properties in Bedminster were priced at $200 per month or less.

Even in the area of the value of one-family houses, 8% of the houses in Bedminster were valued at less than $20,000,* and hence, within the range of someone with plaintiff Rone's annual income of $9,500. 40% of the one-family houses in Bedminster are valued at less than $35,000,** and therefore within reach of plaintiffs Diggs and Kent, whose family incomes are both in the $16,000 to $18,000 range. The average value of one-family houses in Bedminster was found to be $40,489, which

---

*This percentage compares with a county-wide average of 12% and is higher than the percentage in Bernards, Branchburg, Warren and Watchung.

**This percentage is higher than that in Bernards or Watchung.

compares with those in other Somerset County municipalities as follows:

Bernards	$40,795
Bernardsville	40,068
Rocky Hill	40,102
Watchung	46,676

These 1970 census figures indicate that housing is not demonstrably more expensive than it is in other Somerset County communities; in fact it is less expensive than some of the other municipalities. Hence, the cost of housing in Bedminster must be due to factors other than simply the Bedminster zoning ordinance.

Answering plaintiffs' Point I

Defendants do not dispute plaintiffs' standing, in a procedural sense, to bring this action. They do, however, challenge on substantive grounds, the right of non-resident plaintiffs to require a municipality to take affirmative steps to provide them with housing.

Answering plaintiffs' Point II

Plaintiffs' discussion of the general welfare is, as already indicated, too narrow, in that it would require the subordination of all other considerations to that of low and moderate cost housing. Defendants do not dispute that the general welfare may include housing needs for all segments of the population, but contend that the general welfare is not limited to that one factor. The defendants' view is supported by the position taken by the Attorney General of New Jersey in the brief filed amicus curiae on behalf of Commissioner Richard J. Sullivan. Our position is also supported by the viewpoint developed in "The Use of Land, a Citizens Policy Guide to Urban Growth", a Task Force Report sponsored by the Rockefeller Brothers Fund and issued on May 24, 1973; this report is in the form of a book published by Thomas Y. Crowell Company.

These plaintiffs charge Bedminster with believing "that it can pick and choose among the regional considerations to be furthered by its zoning ordinance." Such a choice is, of course, entirely valid if it is a reasonable choice which, in fact, furthers the general welfare. These plaintiffs, however, arrogate to themselves the right to pick and choose among the regional considerations which they contend should be furthered by the Bedminster zoning ordinance and the only consideration which they identify is that of low and moderate income housing.

These plaintiffs overlook the fact that housing can be erected in many places, whereas the public water supply, particularly from a river, is not peripatetic but is wherever the river happens to be located. This case does not involve a juxtaposition of generalities, -- of housing vs. the environment, -- but it does involve a determination of what is the most appropriate use of a particular area of land, namely, that falling within the municipality of Bedminster. This issue is not to be resolved by the use of pejorative terms ("affluent estate development"); indeed, large tracts of privately owned land in the hands of those who can afford to retain them are regarded as having an important part to play for the public welfare in the program of open space proposed in the Somerset County Master Plan (pp. 56-58).

Answering Plaintiffs' Point III

Defendants do not dispute the existence of a shortage of low or moderate income housing in New Jersey. The fact that plaintiffs find a lack of decent low cost housing in the urban communities where they presently live is eloquent proof that the shortage cannot be simplistically ascribed solely to suburban zoning patterns. The problem is far more complex than that.

The fundamental fallacy in these plaintiffs' argument is the assumption that, thanks to the technology of sewerage

systems, density of population does not adversely affect stream water quality. Hence, plaintiffs blithely assume that the water supply will not suffer from dense residential development in such localities as Bedminster. Plaintiffs' assumptions are factually untrue.

The evidence will show that increasing the population in a watershed inevitably and unavoidably increases water pollution. This is partly because of the effects of land development upon surface water runoff. Moreover, a sewerage system inhibits the recharge of ground water, which is essential for the maintenance of stream flow in dry seasons and consequently to ensure sufficient dilution of unavoidable pollution so as to provide for the maintenance of water quality. And there is a limit to the amount of treated sewage effluent that a stream can absorb without becoming unduly polluted. These scientific facts, ignored by plaintiffs, were considered by the Somerset County Planning Board in its formulation of its County Master Plan wherein it is stated:

> "The areas designated rural settlement are all directly related to the Raritan River basin which has become New Jersey's major source of potable water. * * * Fundamentally, if the headwaters and the runoff to these water supply facilities are not to be contaminated there must need be highly restricted development land controls." (p. 51)

> "Probably the most critical turning point in relation to the achievement of a low density settlement pattern is the exclusion of major trunk sewers. The trunk sewer corridor will perforce lead to an intensification of development." (p. 52)

> "The urbanization of many of the drainage basins in Somerset and in the upstream regions would

> threaten the water supply for Somerset and northern New Jersey. A balance of urban development and water resources is a critical component in planning for open space acquisition and zoning for accompanying low density Rural Settlement areas." (p. 56)

In a draft report entitled "Water Quality Management: New Jersey's Vanishing Options" issued by the New Jersey County and Municipal Governing Study Commission on March 7, 1973, it was stated at p. 151:

> "Without controls it is impossible to force authorities to plan with municipal, county and State planning agencies. The absence of integration and coordination which was observed in all twenty-one counties, has thus resulted in a hindrance to orderly development and wanton sewering of headwater areas, flood plains, and wetlands which in turn precipitated development where it should not occur. Sewers are meant to protect the environment from the adverse impact of polluted waters. It seems a contradiction that millions of dollars are being expended without stringent controls and that the net result is often environmental degradation and uncontrolled growth patterns."

In a study entitled "Urbanization, Water Pollution and Public Policy" issued by the Center for Urban Policy Research at Rutgers on April 10, 1972, it was stated with particular reference to the Raritan River Basin, at p. 6:

> "Present water quality standards cannot be met in all reaches of the basin -- even if effluent standards are rigorously enforced -- unless regional development in both population and industrial growth is not only restricted, but reversed so as to diminish both industrial activity and population density."

The real questions in this litigation are (1) whether controlling density of population and protection of the public water supply are legitimate purposes of zoning, and (2) whether

the Bedminster ordinance has adopted means reasonably related to those purposes. Defendants say that both these questions must be answered in the affirmative.

Controlling the density of population is a legitimate goal of zoning. N.J.S.A. 40:55-30 gives municipalities the power to regulate "the density of population", and N.J.S.A. 40:55-32 provides that the zone plan may be designed to "avoid undue concentration of population." The cases have given effect to these statutory provisions. Clary v. Borough of Eatontown, 41 N.J.Super. 47, 66 (App. Div. 1956); Chrinko v. South Brunswick Township Planning Board, 77 N.J.Super. 594, 601 (Law Div. 1963); Mountcrest Estates, Inc. v. Rockaway, 96 N.J.Super. 149, 154 (App. Div. 1967), cert. den. 50 N.J. 295 (1967); J.D. Construction Corp. v. Board of Adjustment, Freehold, 119 N.J.Super. 140, (Law Div. 1972). In J. D. Construction Corp. v. Board of Adjustment, Freehold, supra, the most recent case on the point, the court stated at 119 N.J.Super. 148:

> "Control of density of population is a proper zoning objective. Problems of congestion and overcrowding are legitimate concerns of the municipality and may be regulated by zoning ordinances. See Gruber v. Mayor, etc. of Raritan Tp., 39 N.J. 1, 9 (1962); Vickers v. Township Com. of Gloucester Tp. supra, 37 N.J. at 246-248; Lionshead Lake v. Township of Wayne, 10 N.J. 165, 173-174 (1952), app. dism. 344 U.S. 919, 73 S. Ct. 386, 97 L.Ed. 708 (1953); Mountcrest Estates, Inc. v. Rockaway Mayor and Tp. Com., 96 N.J.Super. 149, 154-155 (App. Div.), certif. den. 50 N.J. 295 (1967); Clary v. Borough of Eatontown, 41 N.J.Super. 47, 66 (App. Div. 1956). Cf. Kirsch Holding Co. v. Borough of Manasquan, supra, 59 N.J. at 253-254."

Protecting the public water supply is another legitimate purpose of zoning. Salamar Builders Corp. v. Tuttle, 29 N.Y. 2d, 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (C. of A. 1971); Daugherty v. City of Lexington, 249 S.W.2d 755 (Ky. C. of A. 1952); Anderson, American Law of Zoning, vo. 2, p. 14, § 8.36.

There is a reasonable relationship, -- and it is essentially a fact question, -- between density of population or development in a watershed and the water quality in the stream. Therefore, other cases involving different factual situations are not controlling. Plaintiffs' position appears to be that the absence of available housing within their means in Bedminster requires a judicial ruling that the zoning ordinance is unreasonable as a matter of law. They ignore the part that interest rates, wage rates, material costs and other construction expenses -- all of which are beyond the power of a municipality to control or even influence, -- play in the ultimate cost of housing. Williams and Norman, in their article "Exclusionary Land Use Controls: The case of Northeastern New Jersey" 22 Syracuse Law Rev. 475 (1971), state at p. 496:

> "As indicated above, a sophisticated analysis is needed on the relation of large lot requirements and housing costs in New Jersey now. Some substantial evidence is available from other states some years ago; and this evidence does not confirm the oft-stated hypothesis that such zoning is a major factor in preventing low- and moderate-cost housing."

These plaintiffs continually overlook the well settled rule of the New Jersey courts that the reasonableness of a zoning

ordinance depends upon the factual setting and circumstances. Euclid v. Ambler Realty Co., 272 U.S. 365, 387, 388 (1926); Duffcon Concrete Products v. Cresskill, 1 N.J. 509 (1949); Fischer v. Bedminster, 11 N.J. 194, 205 (1952); Zampieri v. River Vale Township, 29 N.J. 599 (1959); Harvard Enterprises, Inc. v. Board of Adjustment, 56 N.J. 362, 369 (1970). In Duffcon Concrete Products v. Borough of Cresskill, supra, the court stated at 1 N.J. 513:

> "What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously."

In Zampieri v. River Vale Township, supra, the court stated at 29 N.J. 606:

> "The reasonableness of a zoning ordinance must be tested in the setting or physical characteristics of the area in which it is sought to be enforced. Duffcon Concrete Products v. Borough of Cresskill, 1 N.J. 509, 9 A.L.R.2d 678 (1949); Scarborough Apartments, Inc. v. City of Englewood, 9 N.J. 182, 186 (1952); Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320 (1958)."

Plaintiffs' argument in their Point III overlooks the obvious (although not judicially defined) distinction between the legal obligation of a municipality to provide housing for its own residents, and the legal obligation of a municipality to provide housing for non-residents. Many of the cases cited by plaintiffs in fact involve the problem of housing for

residents of the municipality. De Simone v. Greater Englewood Housing Corp., 56 N.J. 428 (1970); Molino v. Mayor, etc. Glassboro, 116 N.J.Super. 195 (Law Div. 1971) ("Glassboro needs housing for its own citizens" p. 203); Southern Burlington County NAACP v. Township of Mt. Laurel, 119 N.J.Super. 164, 178 (Law Div. 1972); Pascack Association Limited v. Mayor, etc. Township of Washington (unreported, Dkt. L-2756-70 P.W., Law Div. 1972) ("where, as here, the zoning power has been exercised in a manner . . . to deprive people, because of their economic circumstances of all opportunity to continue residence within the municipality*or to locate there, the mandated statutory criteria have not been met" slip opinion p. 21); Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920 (2 Cir. 1968); South Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9 Cir. 1970); Dailey v. City of Lawton, 296 F.Supp. 266 (W.D. Okla. 1969); affd. 425 F.2d 1037 (10 Cir. 1970); Kennedy Park Homes Ass'n. v. City of Lackawanna, 436 F.2d 108 (2 Cir. 1970); cert. den. 401 U.S. 1010; Crow v. Brown, 332 F.Supp. 382 (N.D. Ga. 1971); affd. 457 F.2d 788 (5 Cir. 1972).

On the assumption that regional considerations require a municipality to zone itself with due regard to the needs of non-residents, the question then becomes that of defining the particular needs of other people in the region which the municipality may best serve. In the case of Bedminster, those needs as identified by the Tri-State Regional Planning Commission and

*Emphasis supplied.

in the Somerset County Master Plan, are the preservation of open space and protection of the public water supply furnished by the Raritan River. As Chief Justice Weintraub said for the Supreme Court in Fanale v. Hasbrouck Heights, 26 N.J. 320 (1958) at p. 328:

> "Lastly, plaintiffs seem to urge that Bergen County needs more apartment houses and hence Hasbrouck Heights is obliged to leave its area open for them. We heretofore noted the inter-municipal aspects of zoning, Kozenik v. Montgomery Township, supra (24 N.J. at p. 163) and expressly left undecided the question whether a municipality may assail its neighbor's legislation. Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 245 (1954); Al Walker, Inc. v. Borough of Stanhope, 23 N.J. 657, 662 (1957). But it is quite another proposition to say that a municipality of 960 acres must accept uses it believes to be injurious, in order to satisfy the requirements of a county. There, of course, is no suggestion that the county is so developed that Hasbrouck Heights is the last hope for a solution, and hence we do not have the question whether under the existing statute the judiciary could resolve a crisis of that kind."

Perhaps a word should be said about the Pennsylvania cases cited on p. 30 of plaintiffs' brief. National Land & Investment Co. v. Kohn (Easttown Township), 419 Pa. 504, 215 A.2d 597 (S. Ct. 1966), and Appeal of Kit-Mar Builders (Concord Township Appeal) 439 Pa. 466, 268 A.2d 765 (S. Ct. 1970) held unconstitutional 4 acre and 2 acre minimum lots, respectively, while Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (S. Ct. 1970) held unconstitutional a zoning ordinance that made no provision for multi-family housing. All were decided by a divided court, the two later cases being 4-3 decisions. The dissenting opinions

argued that the controlling issues were issues of fact, not of law.* Moreover, in Kit-Mar, Chief Justice Bell, in providing the swing vote, based his vote on the old-fashioned doctrine that the 2 acre lot size restriction unduly interfered with the rights of private property owners to use their land as they choose (268 A.2d 772), so it can hardly be said that a majority of the Pennsylvania Supreme Court favored the doctrine that 2 acre zoning is invalid because exclusionary.** The Pennsylvania doctrine was succinctly evaluated by Williams & Norman, "Exclusionary Land Use Controls: The Case of Northeastern New Jersey", 22 Syracuse Law Review 475 (1971) at p. 498:

> "The law on exclusionary land-use control is evolving so rapidly that a summary of the situation at any given point in time may be obsolete before it is in print. Briefly, two very different lines of argument are emerging; these might be called the Pennsylvania rationale and the sensible rationale. . .. The rhetoric in these opinions is excellent; their only shortcomings lie in their rationale and the precise decision made."

---

*The position of the dissenters is that of the New Jersey courts, viz.: that the validity of a zoning ordinance turns on the facts and circumstances; see supra, p. 77.

**The comments of Richard F. Babcock, Esq. on the Kit-Mar case (The Record of the Association of the Bar of the City of N. Y., Vol. 27, No. 4, p. 232, April 1972), are instructive:

> "This case is going to titillate the law reviewers, I suspect, for a number of years. What interests me is the way in which the court split on this decision. Justice Roberts could only get two judges to go along with him. Three judges dissented, and said the Township could, if it wished, in the interest of its own citizens, decide how it wanted to have its development take place. So

Even if one accepts the view of Justice Roberts of the Pennsylvania court that potential future sewerage problems cannot justify low density zoning (Kit-Mar, supra, 268 A.2d 767, 768) despite the dissenting opinions of Justices Jones and Pomeroy (268 A.2d 773-780), the problem in Bedminster is different. The case at bar does not present the situation of a municipality refusing or unwilling to provide for its inhabitants; rather, the issue is whether sewerage systems ought ever to be installed in the portion of the Upper Raritan Watershed that lies in much of Bedminster.

(footnote continued)

> Justice Roberts only has two judges joining him in his rationale, that's three. Three are opposed. Where does he get his fourth concurrence? From Chief Justice Bell who could accept Justice Robert's conclusion but not his rationale.
>
> "Here was Justice Bell's reason for concluding that Concord could not constitutionally do what it had done. I quote:
>
> > "'I believe that this zoning ordinanee, which has no substantial relationship to the health, or safety, or morals, is an unconstitutional restriction upon the owners' basic right to the ownership and use of his property. And it cannot be sustained under the theory or principle of general welfare.'
>
> Here then were two judges, one concerned with the needs of the region, the other only interested in the rights of the land developer, and joining on only one point: that the municipal regulation was unconstitutional."

Answering plaintiffs' Point IV

Plaintiffs criticize particular provisions of the Bedminster zoning ordinance.

As to the limits on the amount of land on which garden apartments and town houses may be built, plaintiffs calculate that there are 200 acres in addition to the Allan-Deane tract of over 400 acres, on which garden apartments and town houses may be built. They argue that as a matter of law, this acreage is so small as to invalidate the zone plan. The facts and considerations in the Mount Laurel and Madison Township cases are so different from those pertaining to Bedminster, that the decisions involving those townships are not controlling here. Note that Judge Furman distinguished Fischer v. Bedminster Township, 11 N.J. 194 (1952) in the Madison Township case at 117 N.J.Super. 19. It has been repeatedly held that strict limitations on the number and location of multi-family dwellings are not unreasonable per se. Guaclides v. Englewood Cliffs, 11 N.J.Super. 405 (App. Div. 1951); Pierro v. Baxendale, 20 N.J. 17 (1955); Fanale v. Hasbrouck Heights, 26 N.J. 320 (1958); Meridian Development Co. v. Edison Township, 91 N.J. Super. 310, 316 (Law Div. 1966); see also: Tidewater Oil Co. v. Mayor and Council of Carteret, 84 N.J.Super. 525, 534 (App. Div. 1964); affd. 44 N.J. 338 (1965).

On pages 36 to 41 of their brief, these plaintiffs

argue that certain provisions of the Bedminster zoning ordinance unreasonably raise the cost of multi-family housing. Their argument is factual in nature, based upon plaintiffs' own assumptions and presuppositions rather than on the evidence which, we submit, will establish the reasonableness of the provisions of which plaintiffs complaint. The Zoning Enabling Act, N.J.S.A.40:55-30 specifically empowers municipalities to regulate the "* * * sizes of buildings and other structures, the percentage of lot that may be occupied * * *." Plaintiffs cannot challenge the validity of this statutory legislation Oakwood at Madison, Inc. v. Township of Madison, 117 N.J.Super. 11, 15-16 (Law Div. 1971). So the question is whether Bedminster has validly -- i.e. reasonably, -- exercised these statutory powers and the burden rests upon plaintiffs to prove by evidence that it has not done so; see supra, p. 5.

Moreover, there is nothing illegal per se in minimum floor areas larger than those required by the Standard Housing Code of the State of New Jersey, Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165 (1952). The evidence will show that the minimum floor areas in the Bedminster zoning ordinance have been derived from the Report "Planning the Home for Occupancy" prepared by Prof. Winslow in 1950 for the American Public Health Association. The Winslow Report was favorably considered and relied upon by the New Jersey Supreme Court in Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. at 173, 177. The Standard

Housing Code of the State of New Jersey deals with the criteria for occupancy whereas the Winslow Report and the Bedminster zoning ordinance deal with construction. So long as a new dwelling unit in Bedminster is constructed with the minimum square footage required by the zoning ordinance, the plaintiffs could cram all the inhabitants into it that they wish so long as they do not violate the Standard Housing Code.

The plan review requirements in the Bedminster ordinance (see Plaintiff's brief pp. 42 to 46) are valid. Extensive and detailed criteria are specified in Article XVI of the ordinance. We are not here concerned with the reasonableness of particular actions that may be taken under the ordinance but rather with the validity of the legislation itself. In LaRue v. East Brunswick, 68 N.J.Super. 435 (App. Div. 1961) the court upheld the validity of a zoning ordinance which permitted multiple dwellings in certain zoning districts subject to Board of Adjustment approval, and stated at p. 456:

> "By ordinance, a municipality can make no more than generalized value judgments; where particularization is necessary, administrative refinement must be relied upon -- and that refinement is provided, hopefully, by the Board of Adjustment. Plaintiffs' challenge to the 'special exception' procedure is therefore without foundation."

See also Tullo v. Millburn Township, 54 N.J.Super. 483, 490-491 (App. Div. 1959). Cf. Rudderow v. Township Committee of Mt. Laurel, 121 N.J.Super. 409 (App. Div. 1972) upholding

municipal action in approving a planned unit development.

Answering Plaintiff's Point V

Much of what plaintiffs say in their Point V relates to factual issues as to which the court has not yet heard the evidence. Insofar as a legal argument is presented, it is sufficiently answered by our Points I and II, supra, pp.

Answering Plaintiff's Point VI

This point, which deals with the equal protection of the laws, is fully answered by our Point IV, supra, p. 43.

Answering Plaintiff's Point VII

Plaintiffs argue that Bedminster's zoning ordinance unconstitutionally infringes upon plaintiffs' right to travel. The cases cited by plaintiffs do not support any such conclusion.

Crandall v. Nevada, 73 U.S. 35 (1967) struck down a head tax on every person leaving the state by railroad or stage coach. Edwards v. California, 314 U.S. 160 (1941) struck down as violative of the Commerce Clause a state criminal statute punishing the bringing of an indigent person into the state. Shapiro v. Thompson, 394 U.S. 618 (1969); Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970); King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971) and Dunn v. Blumstein, 405 U.S. 330 (1972) all struck down stated periods of a residency requirement as a basis for eligibility for welfare assistance, for residing in public housing, or for voting; the courts held that the classification of persons by duration of residence is not related to a compelling state interest and was invalid. In Krzewinski v. Kugler, 338 F.Supp. 492 (D. N.J. 1972) held that there was a compelling state interest to sustain legislation requiring firemen and policemen to live in the municipality of their employment. Worden v. Mercer County Board of Elections, 61 N.J. 325 (1972) held that students were entitled to register to vote where they attended college on the same basis as other

residents of the locality.

Crandall and Edwards are clearly distinguishable because Bedminster is not purported to use the taxing power or the prevention of crime in a way to inhibit plaintiffs' asserted right to travel. Nor has Bedminster adopted any formal requirements, such as were presented in the other cited cases, as the basis for extending or denying the right to live in Bedminster. Bedminster has not enacted any classification of persons. There are no legislative restrictions whatever on plaintiffs or any other persons who want to live in Bedminster, provided they can find a place to live or can afford the rent or the purchase price. This would also be true in almost every municipality in the country. The constitution does not guarantee that everyone must be able to enjoy the identical goods and services that only a wealthy person can afford. An increase in the gasoline tax to fifty cents a gallon in order to husband petroleum supplies would certainly put much traveling beyond the financial means of many persons, but it would not necessarily be unconstitutional for that reason.

Plaintiffs cite no case which has invalidated a zoning ordinance on the ground of an asserted violation of the constitutional right to travel. Moreover, Lindsey v. Normet, 405 U.S. 56 (1972) denied that there was "any constitutional guarantee of access to dwellings of a particular quality"; see supra, pp. 59-60.

CONCLUSION

Defendants submit that the complaints should be dismissed on the merits and judgment entered in favor of the defendants.

EDWARD D. BOWLBY and
McCARTER & ENGLISH
Attorneys for Defendants

By Nicholas Conover English
Nicholas Conover English
A Member of the Firm

Of counsel:

Edward D. Bowlby
Nicholas Conover English
Bingham Kennedy