

RULS - AD - 1978 - 90

? / ? / 1978

Factual and Legal Contentions of Defendants

pgs 22

Copy.

FACTUAL AND LEGAL CONTENTIONS  
OF THE DEFENDANTS

RULS - AD - 1978 - 90

As to the Issue of Compliance

The Bedminster Township zoning December 1777 is in compliance with the opinion of this Court dated February 24, 1975, the letter opinion of October 17, 1975, and the order of September 28, 1977, which, inter alia, ordered compliance with Mount Laurel and Oakwood at Madison.

The following are guidelines of the prior orders of this Court.

1. Bedminster Township has a regional obligation to protect the water supplies and open space needs of the 500,000 member population of Union, Middlesex and Somerset Counties dependent upon water from the Raritan River.
2. Bedminster Township also has an obligation to provide in its zoning ordinance for a variety and choice of housing, including its regional share of low cost housing consistent with the mandates of Mount Laurel and Oakwood at Madison.

3. Preserving much of Bedminster Township in an open, lightly populated state is essential to serve its legitimate public purpose of protecting and preserving water supplies and open space needs, and is consistent with certain recognized regional, state and county planning goals.
4. Bedminster's fair share of least cost housing needs can be met by reasonably dense housing development provided in the Pluckemin-Bedminster corridor. The substantial and very real danger to the ecology from increased population and development can be alleviated in the corridor by devising appropriate solutions to the drainage and sewerage problems.
5. The appropriate density for the Pluckemin-Bedminster corridor can be provided in compliance with the following findings:
  - (a) The 3 dwelling units per acre maximum density under the 1973 Bedminster ordinance is too low to allow for economical construction of multi-family housing.

(b) Reasonable densities would comply with the following guidelines:

(1) Plaintiff's expert (Robert Catlin) estimated that a density of 4 dwelling units per acre would have no adverse impact on traffic, drainage and utilities and is reasonable.

(2) The Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., requires that a municipal master plan "include a specific policy statement indicating the relationship of the proposed development in the municipality" to county and regional plans. N.J.S.A. 40:55D-28d. The Bedminster Master Plan contains such a statement (Section VIII). The Somerset County Master Plan provides for densities between 5 and 15 dwelling units per net buildable acre in a village neighborhood, the designated zone for the Bedminster-Pluckemin corridor. The current draft of the Tri-State Regional Plan provides for densities of 2 to 7 dwelling units per acre in the Bedminster-Pluckemin corridor.

6. Appropriate zoning for the Allan Deane tract can be devised in light of the following factual findings:

- (a) The Allan Deane property includes land appropriate for multi-family housing. Such housing cannot be economically built at the maximum 3 dwelling units per acre provided in the 1973 zoning ordinance.
- (b) In the opinion of plaintiff's expert, Mr. Catlin, approximately 540 multi-family dwelling units at approximately 4 dwelling units per acre would be reasonable for the site.
- (c) On the Allan Deane land approximately 240 of the 461 acres are unuseable because of excessive 40 - 50% slopes which render installation of roads and sewers impracticable.

Bedminster Township has complied with the court orders, inter alia, as follows:

- 1. Bedminster Township rezoned 282 acres within the Bedminster-Pluckemin corridor as R-20 to permit multi-family housing at densities in excess of 5 dwelling units per acre. Within

the R-20 zone, least cost housing units, termed Compact Residential Clusters, can be constructed at densities in excess of 8 dwelling units per acre.

2. The location selected for the R-20 zone permits construction in the area of the township most suitable for least cost construction, since it provides the greatest access to existing or planned public services and utilities. In the Pluckemin Village area, where public sewerage capacity is not available, the zone exists on the land most suitable for on-site sewerage disposal. In the Bedminster Village area, there is some sewer capacity currently available.
3. The numbers of least cost units contemplated in the Master Plan is 600 and comports with the Township's currently estimated least cost obligation. The Township is committed to upward revision of the number if additional need is demonstrated. (Master Plan, Section III, Housing Plan). Sufficient land exists in the R-20 zone to allow construction in excess of 600 least cost units. The 300 unit limit for CRC least cost housing is only a staging

mechanism and is not intended to be an absolute limit. When some units have been built successfully and the demand for more is perceived, the 300 limit will be increased.

4. The 1977 Zoning Ordinance permits approximately 1,437 dwelling units (including 300 CRC least cost units) in excess of 5 dwelling units per acre where previously there were none. This figure represents 168% of the total number of dwelling units in the entire Township, which was 856 as of 1977.
5. The Township satisfied its regional obligation to protect the water supplies and open space needs by the use of the Floor Area Ratio approach as a planning mechanism which is consistent with sound environmental planning, along with other techniques, such as flexibility of frontage requirements, etc. Two major devices are as follows:
  - (a) the R-3 zone was maintained in the Township west of 202-206, where soil conditions and environmental constraints are significant and where there are no utilities. The 3% F.A.R. allows for larger lots necessary for on-site septic disposal and on-site water supply by well.

(b) a critical zone with limited allowable uses was created for lands designated as flood plains and having slopes in excess of 15%.

6. The Bedminster Zoning Ordinance contains inclusionary devices which encourage the construction of a variety and choice of multi-family units in the Township:

- (a) Units constructed in the multi-family zones must comply with a bedroom mix which assures that a variety of needs will be satisfied. §10.3.4, n.4.
- (b) Units constructed in the most dense zone, the Compact Residential Clusters, are limited in floor space, in an attempt to prevent use of the density bonus of the CRC to construct luxury rather than least cost housing. §4.4.6.
- (c) Twin units are permitted in open space clusters throughout the Township. §4.4.4
- (d) Manufactured or modular housing complying with the state construction code is allowed in all residential zones. §4.2.2



(e) Minimum allowable lot sizes for single family houses are as small as 3,600 square feet. §10.3.4, Schedule A.

The Master Plan and Zoning Ordinance were necessarily enacted in some haste to comply with the deadline for compliance set by the Court. It was not possible to complete revision of the subdivision and site plan ordinances to meet that deadline of December 31, 1977. Following enactment of the zoning ordinance, members of the Township Planning Board and Township Committee were aware that additional changes would be necessary to the Zoning Ordinance to carry out the intent of the Master Plan and cure some mistakes which had been made. When this action was filed, a new site plan ordinance had been adopted, revision of the subdivision ordinance was still incomplete, and some amendments to the Zoning Ordinance had been prepared.

The Township is in the process of drafting many changes in its development regulations, principally the Zoning Ordinance and the Subdivision Ordinance. For purposes of this pretrial memorandum, and to enable the Court and counsel to deal with the changes, they can be grouped into two categories: (1) those which deal with specific subject matter raised by the plaintiff's affidavits; and (2) those which are not the subject of the plaintiff's objections but which the Township believes should be made as a matter of sound land use planning.

Changes in the zoning and subdivision ordinances will remove objections raised by the plaintiffs to the current ordinances as follows:

1. Net site area computation eliminated. §10.3.4
2. Parking requirement in R-20 and R-30 modified to two spaces per unit. §16.1; §11.6.4.
3. Restrictions on dwelling unit types eliminated from §10.3.4, Schedule A, n.4 and §11.6.3 and §11.6.3.1-3. Efficiency units permitted.
4. Screening requirement modified to eliminate 7-foot requirement and provide protection from headlight glare in abutting residences and streets. §11.6.6
5. All planned unit developments allowed as permitted rather than conditional uses. §4.4.4; §11.2
6. Language concerning location of Village Neighborhood adjacent to business district eliminated. §20
7. 70 foot right-of-way street widths reduced to 50 feet, except for streets on the Master Plan or Official Map. (Subdivision Ord.)
8. 4 stage review process reduced to 2 with optional "concept stage" review. (Subdivision Ord.)

9. Fee schedule modified to allow staging of payment, an escrow account, and fees identical with costs to the Township. (Subdivision Ord.)
10. Mixes of bedroom units in R-20 and R-30 zones reduced to minimum of 10% for 4 bedrooms; one bedroom and efficiencies limit raised to 40%. §10.3.4
11. Automatic trigger mechanism added to begin process of reconsideration of number and allowable location of least cost units permitted in the Bedminster-Pluckemin corridor.
12. Minimum habitable floor space and storage requirements revised to comply with New Jersey Housing Finance Agency standards, provide for efficiency apartments, and eliminate 5 bedroom requirements. §10.3.1
13. Pluckemin historic district limited to Artillery Park and existing business district of Pluckemin. §7.2
14. Requirement that townhouses be "susceptible to sale on individual lots" revised to read "laid out so that they can be sold or marketed in the private, condominium or cooperative form of ownership." Language clarified to allow for front or rear access. §20

15. Compact Residential Clusters permitted in all R-20 zones, including those in Bedminster Village. §4.4.6
16. Language revised to provide for approval of departures from zoning regulations by the Planning Board rather than Board of Adjustment, as required by the Municipal Land Use Law. §11.3
17. The provision in the Subdivision Ordinance requiring completion of improvements prior to final approval modified to clarify that approval can be granted on a section by section basis, provided that required utilities are in place for the units in the section.

The following changes go beyond the specific objection of the plaintiff. The Township believes they are necessary to implement the intent of the Master Plan and effect sound land use planning:

1. The special F.A.R. computation for Compact Residential Clusters eliminated from the definition of Compact Residential Clusters. §20
2. 20% open space requirement for Village Neighborhoods and Compact Residential Clusters removed. §13.8.3

3. 350 foot playground diameter for 150 units in Village Neighborhood and Compact Residential Clusters reduced to 250 feet. §4.4.6; §11.2
4. 50 unit minimum for Compact Residential Clusters eliminated; 9 acre minimum acreage retained. §4.4.6; 13.8.1; Village Neighborhood definition, §20.
5. Language of "no more than one residential unit per lot" replaced by "no more than one residential building per lot except in R-20". §14.6
6. Required separation of Compact Residential Clusters by "interstate or state highways" modified to read "by roads." §4.4.6
7. Definition of basements included in gross floor area modified to provide for only those basements which qualify under state building code definitions as habitable space. §20
8. Minor reorganization of zoning ordinance as follows:
  - (a) permitted dwelling units in residential zones specified in Article 4 instead of Article 11.
  - (b) requirements for 3 types of planned developments: Compact Residential Clusters, Village Neighborhoods, and Open Space Clusters consolidated into one section.

(c) all minimum lot sizes specified in 10.3.4,  
Table A.

The rezoning of Allan-Deane property complies with the factual findings in the Court's decision of February 24, 1975, (findings on Pages 1-26, 39), as follows:

1. 69.05 acres of the Allan Deane land were rezoned from R-6 (1.88 units/acre) to permit multi-family housing at densities in excess of 5 dwelling units per acre (including a Compact Residential Cluster at 8 units acre).
2. 220.9 acres of the Allan Deane site, containing slope in excess of 15%, were placed in the critical zone, with allowable uses restricted; 240 acres were previously found to be unusable (findings, page 12).
3. Overall density allowed on buildable residential zones in the tract, averaging the R-20, R-30, and R-8 zones at the bottom of the mountain, is in excess of 4 dwelling units per acre.
4. The 1977 zoning permits 416 dwelling units at densities in excess of 5 dwelling units per acre, and a total of 585 dwelling units on the entire tract.

Plaintiff Allan-Deane has made allegations which in fact either misstate the ordinance or misstate the Township's duty under the Municipal Land Use Law, as follows:

1. The minimum single family lot size under the ordinance is not 10,000 square feet, but rather 5,626 square feet for single family lots, and 3,600 square feet in Open Space Clusters. §10.3.4, Scedule A. R-20, R-30
2. Townhouses are not required to individually abut a public street. There is a single 50 foot street frontage requirement for an entire Open Space Cluster, Village Neighborhood or Compact Residential Cluster, taken as a collective unit. §10.3.4, Schedule A, n(1).
3. The ordinance does not require excessive setbacks. Setback requirements only apply to single family free-standing houses and to the perimeter of an Open Space Cluster, Village Neighborhood or Compact Residential Cluster. §10.3.4, Schedule A n.(2).
4. The ordinance is in compliance with the requirements of the Municipal Land Use Law in the following provisions:
  - a. Three types of Planned Unit Development (Compact Residential Clusters, Open Space Clusters, and Village Neighborhoods) are permitted under the ordinance, complying with the encouragement of this type of

construction under the Municipal Land Use Law. §4.4.4

- b. The Planning Board is empowered to protect the interests of the public and owners of the units in a development by provisions to assure the total completion of the project. §11.6.10
  - c. The requirement of simultaneous submission of the site plan and environmental impact statement with application for approval of a Planned Development complies with N.J.S.A. 40:55D-67b and N.J.S.A. 40:55D-38b.
5. The Township of Bedminster is under no legal obligation to provide for tax abatements, passage of a resolution of need or public sewerage improvements.

The Township of Bedminster did not add new provisions in the 1977 Ordinance to deprive plaintiffs of land previously considered available for development. The 1977 Zoning Ordinance designates Artillery Park as an historic site, without specific boundaries. Artillery Park is located in the critical zone of the 1977 ordinance, since it contains slopes in excess of 15%. Plaintiffs have been aware of its historical significance and undefined boundaries at least since 1971. They have repeatedly offered to cooperate with



the Township in setting the area aside for public purposes and investigating its precise boundaries. Their own site plans have designated the land as open space. Plaintiff never contended that Artillery Park was available or appropriate for development. There is archeological research being conducted at the site at the present time, pursuant to a contract with the plaintiff.

Finally, location of the proposed 202-206 by-pass on plaintiff's land is also not a new development. Provision for the 202-206 by-pass was included in the 1965 Master Plan, in effect when plaintiff purchased the property in 1969.

In brief, Beminster rezoned the corridor in accordance with the Court's findings of February 24, 1975, pages 1 - 26 and 39, the Municipal Land Use Law, the Somerset County Master Plan, and the draft Tri-State Regional Development Guide. The location of the R-20 and R-30 zones is appropriate; the densities are sufficient; there are density bonuses for least cost housing in Compact Residential Clusters; the total number of multifamily units under the new ordinance, 1437, is approximately 168% of the entire present housing stock of the township; and the ordinance provides for a variety and choice of housing.

Whatever errors were made during the accelerated planning and rezoning process are in the process of being corrected; other improvements will be made.

Bedminster has in good faith tried to comply with the many competing constraints imposed upon it:

1. an obligation to provide a variety and choice of housing;
2. an obligation to provide for least cost housing;
3. accelerated planning and zoning under a court imposed deadline in this litigation;
4. a critical environment;
5. an obligation to plan for and protect the quality of the surface and ground water resources;
6. no existing sewer capacity (except for the excess capacity of the AT&T plant, capable of serving Bedminster Village only);
7. a very rural community with very limited infra-structure and services;
8. incomplete water quality planning under §201, 208 and 303(e) of PL 92-500, the Fresh Water Pollution Control Act Amendments of 1972;
9. competing priorities resulting from all of the above, at a time of the energy crisis and New Jersey's new status as a net exporter of population in 1976.

The principles set forth in the 1977 Master Plan and Zoning Ordinance of Bedminster Township are consistent with the principles of least cost housing, as enunciated in Madison Township, in that they utilize the principles of sound environmentally based siting and zoning and the nonstructural approach to the solution of potential engineering problems caused by the environmentally critical nature of the Township, and in particular its surface water resources, soils and topography. See discussion of Allan-Deane proposal as to least environmental cost and nonstructural solutions, infra.

As to the Issue of Corporate Relief

The Allan-Deane Corporation is not entitled to the extraordinary remedies requested, the grant of a permit to build under its site plan and approval of the proposed sewerage treatment plant.

The approval of a proposal for sewerage treatment is not the proper function of this Court and is the responsibility of the Department of Environmental Protection. This Court should consider, however, under the Municipal Land Use Law and generally accepted planning principles, the effect of sewer effluent from a treatment plant and the effect of non-point pollution from the proposed development on the surface and ground water resources of the area.

A sewer treatment plant as proposed by plaintiff is itself an undue cost generating element which is

necessary only to generate profit for the corporate plaintiff.

The special circumstances which justified the grant of a building permit in Oakwood at Madison, which the New Jersey Supreme Court stated is a rare remedy, do not exist in this case for the following reasons:

1. Bedminster Township, unlike Madison Township, provided adequate densities and numbers to satisfy its fair share obligation in locations most suitable for least cost housing and intends no unnecessary cost exactions.
2. The zoning of plaintiff's property, unlike that of the plaintiff in Oakwood at Madison, is not confiscatory. The R-3 and R-8 zones provide densities consistent with lot sizes of existing development in the area. Part of the newly created R-20 multi-family zone, allowing densities in excess of 5 and 8 dwelling units per acre, was placed on the Allan-Deane tract. In fact, the 1977 Bedminster Zoning Ordinance permits Allan-Deane to construct 416 dwelling units at densities in excess of 5 dwelling units per acre, or 30% of the total number of such units permitted in the Township.

3. This corporate plaintiff did not bear the stress and expense of public interest litigation. The public interest aspects in this litigation were borne by the Cieswick plaintiffs.
4. The plaintiff's land is not suited to the density and type of development plaintiffs propose. Plaintiffs purchased environmentally sensitive land served by no utilities. They are seeking excessive densities to overcome a bad investment, densities which will generate the "most environmental cost" on the land.
5. The "site plan" for which a building permit is requested was seen for the first time when it was served with the Order to Show Cause. It is not a site plan and is not sufficiently detailed to allow defendant's expert witnesses to evaluate it for trial. Discovery is needed. Furthermore, defendant is advised that the site plan is in process of revision by plaintiff.

Due to the necessity of expensive engineering techniques which are necessary to solve the problems caused by the environmentally critical nature of the area, the plaintiff's proposal, with its excessive densities, is in fact a proposal for "most cost" housing.

Multi-family zones in general, and least cost housing zones in particular, should be zoned for areas in which the housing can be constructed without the necessity for expensive engineering solutions to construction problems. For instance, multi-family housing built on slopes requires large and complicated drainage systems and detention basins, which would not be as extensive or as costly if built upon more suitable ground. The cost of installing utilities (water and sewer) will be increased in the Allan-Deane proposal over what it would be on more appropriate land. The Allan-Deane proposal therefore is directly at odds with the public policy as set forth in Mt. Laurel and Madison Township, of providing for a variety and choice of housing, and to zone for least cost housing, in areas most appropriately suited to that kind of construction, so that the units will be available to the greatest number of people.

The proposal of Allan-Deane to build luxury town houses in sufficient numbers and at sufficient densities to be able to subsidize some lower cost units labeled as least cost housing raises severe legal and planning problems. For instance neither Allan-Deane nor the Township can restrict the transfer of least cost units to buyers of limited incomes. Price skewing by private developers is a mechanism which is not feasible under present market and legal conditions.

The concept of zoning for least cost housing must include the concept of zoning for least environmental cost,

both on site, near-site, and far away from the site. The Allan-Deane project may require more expensive treatment of surface waters downstream. If so, the cost of the downstream facilities must be considered in the evaluation of whether the zoning for the site is consistent with the policy of providing for least cost housing.

The concept of structural versus non-structural solutions to environmental problems is also encompassed with the concept of least cost housing. If poor siting for dense developments results in the necessity for a structure (detention ponds, sewer treatment plants, downstream water treatment works, etc.), and if the structure could be avoided by proper siting on appropriate land in the first instance, then a non-structural solution of significantly lower cost is preferred.

Only if proper environmentally based zoning and the achievement of non-structural solutions are utilized as basic tools of the land use planning process can the public policy of Madison Township and Mt. Laurel be implemented. The Allan-Deane proposal is not consistent with sound environmentally based siting and zoning, or with the non-structural solution of problems, and is therefore inconsistent with the concept of least cost housing and should be specifically disapproved by this Court.