RULS-AD-1979-110
4/23/79

Brief of Plaintiff, Allan-Deane, on Compliance Hearings Pursuant to Order to Show Cause

Pgs 170

S-8541
S-9153

Entered / Indexed

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
DOCKET NO. L-36896-70 P.W. &
L-28061-71 P.W.

THE ALLAN-DEANE CORPORATION, et al.,

Plaintiff,

vs.

THE TOWNSHIP OF BEDMINSTER, et al.,

Defendant.

Civil Action

FILED
SEP 26 9 08 AM 1983
SOMERSET COUNTY
R. OLSON, CLERK

RULS - AD - 1979 - 110

BRIEF OF PLAINTIFF, ALLAN-DEANE, ON COMPLIANCE HEARINGS PURSUANT TO ORDER TO SHOW CAUSE

MASON, GRIFFIN & PIERSON
201 Nassau Street
Princeton, New Jersey 08540
(609) 921-6543

HANNOCH, WEISMAN, STERN & BESSER
744 Broad Street
Newark, New Jersey 07102
(201) 621-8800

On the Brief:
Henry A. Hill, Jr., Esq.
Dean A. Gaver, Esq.
~~Gulick D. Hirsch~~

Dated: April 23, 1979

RECEIVED
SEP 29 1983
JUDGE SERPENTELLI'S CHAMBERS

TABLE OF CONTENTS

TABLE OF CONTENTS (Con't.)

TABLE OF CONTENTS (Con't.)

TABLE OF CONTENTS (Con't.)

TABLE OF CONTENTS (Con't.)

TABLE OF CASES AND CITATIONS

TABLE OF CASES AND CITATIONS (Con't.)

TABLE OF CASES AND CITATIONS (Con't.)

TABLE OF CASES AND CITATIONS (Con't.)

TABLE OF CASES AND CITATIONS (Con't.)

PRELIMINARY STATEMENT

On March 22, 1978 this Court issued an Order to Show Cause based on certain affidavits filed by the Allan-Deane Corporation pursuant to Rule 1:10-5 of the Rules Governing the Courts of the State of New Jersey, alleging the failure of Defendants to comply with the Order for Judgment entered in this action on October 17, 1975 as modified by an Order Vacating Stay entered on September 28, 1977. The Order to Show Cause provided that a hearing would be held for the purpose of considering:

> a. whether Defendants have, in fact, complied with the previous Orders of this Court; and
>
> b. whether Plaintiff is entitled, in the event the Court finds non-compliance, to specific corporate relief.

Plaintiff takes the position, for the reasons set forth herein, that Defendants' revised Land Use Ordinances are more exclusionary by every objective criteria than the 1973 Ordinance which was previously invalidated by this Court. Specifically, we believe that the record established during 40 days of hearings conclusively demonstrates the following:

> 1. Bedminster's revised Land Use Ordinance permits, as of right, no new multi-family housing units at all and allows, as a conditional use, fewer multi-family housing units than the Ordinance previously invalidated by this Court.

2. Even if sewer and water were available in the Pluckemin Corridor and if all undeveloped land zoned in R-20 could be assembled, the gross residential densities permitted in that area previously defined by this Court as that "area of the Township east of a line drawn parallel with and 3,000 feet west of New Jersey highway Route 202," are lower under the new land use regulations than under the Ordinance previously invalidated by this Court.

3. The new Ordinance is more cost-generating to build under than the Ordinance which was previously invalidated by this Court.

4. The new land use regulations contain numerous provisions which are on their face invalid and violate the Municipal Land Use Law and the case law of this State.

5. The new Ordinance permits no economically feasible use on over one-half of the Allan-Deane property which has been confiscatorily placed in a critical area zone where no development is permitted.

Conceptually, what Bedminster has done in response to this Court's Order to revise their Land Use Regulations, is to reduce the size of the area in which multi-family housing was permitted from approximately 910 acres to an area of somewhere between 100 and 170 acres of undeveloped and otherwise suitable land. While the area on which multi-family housing can be built has been reduced to between 1/9 to 1/6 of its former size, the permissible multi-family density on the remaining land has been increased from a density range of 1.88 to 6.07 units per acre under the 1973 Ordinance,

to a present density range of between 5 and 10 units per acre.*

The increase of about 40% in maximum theoretical density does not offset the shrinkage by 80% to 90% of the land area available for multi-family housing, and the Township's zoned capacity has been reduced by the zoning ordinance provisions by between 621 and 3,266 multi-family units. William E. Roach, the County Planning Director, agreed, in answer to a hypothetical question containing these facts, that Bedminster's 1973 Zoning Ordinance was less exclusionary then the 1978 Zoning Ordinance because it would have permitted more housing units in the same area. (T-XXII-37).

When the conditions or restrictions under which multi-family housing can be built in this radically diminished area are considered in light of the proofs offered concerning:

a. the existing land uses, lot sizes and configurations in the R-20 Zone;

b. the Township's stated position regarding the sewering of the area;

---

*The actual density depends on bedroom mix unit size and whether, in the case of the 1973 Ordinance, the property was in an R-6 or R-8 Zone and, in the case of the 1978 Ordinance, a Compact Residential Cluster R-30 "density bonus" was allowed.

c. the expenses involved in developing under the ordinances and of building acceptable private sewage treatment facilities;

d. the front end costs involved in installing improvements prior to final approval and of applying for such approvals; and

e. the uncertainties involved in applying under ordinances replete with vague and indefinite standards.

this Court must conclude that in fact no multi-family housing is permitted in Bedminster as of right and that there is very little prospect that such development could take place even assuming local government cooperation under the existing ordinances.

Allan-Deane has attempted to outline in this brief what it believes it has proved, and has applied the existing statutory and case law to those facts. We have in addition taken the liberty of suggesting to the Court what relief we believe to be appropriate. A mere order to rezone, at this phase of this litigation, would be inappropriate and would leave Allan-Deane in no better position than it was in some six and a half years ago when Bedminster, on November 27, 1972, asked for an adjournment so it could rezone to fulfill its regional responsibilities.

For the reasons more fully expressed herein, we request the Court to invalidate Bedminster land use regulations and grant Allan-Deane specific corporate relief in the form of building permits pursuant to a site plan with an overall density of between 5 and 7 units per acre for the Allan-Deane property in Bedminster. More specifically, we request that the Court:

1. Invalidate the present zoning and formally determine that Bedminster has failed to comply with the previous orders of this Court.

2. Specifically invalidate the zoning of the Allan-Deane property including the critical area zoning and the R-3 zoning, and determine that the failure to rezone the entire Allan-Deane property at a uniform, reasonable density for multi-family housing is capricious and unwarranted.

3. Grant Allan-Deane "conceptual" approval of a site plan with an overall density for the entire Allan-Deane property in Bedminster Township of between 5 and 7 units per acre.

4. Appoint a "master" with the authority to hire planners, engineers and environmental scientists, as needed, with funds which will be deposited in the Court by the parties pursuant to a Court Order, to fulfill the following duties under the jurisdiction of this Court:

    a. Review the Allan-Deane site plan and advise the Court when he is satisfied that the proposed plan meets minimum health, safety and welfare considerations.

    b. Review Allan-Deane's proposal to structure its development so as to make a suitable land area available at a

reasonable price for subsidized housing or in the alternative to construct least cost housing and advise the Court as to the alternative, if any, it should pursue.

5. Order the issuance of building permits to Allan-Deane, and the adoption by the Township of reasonable land use ordinances in accordance with the master's recommendations.

   a. Recommend to the Court what other areas should be rezoned within the Pluckemin Corridor to higher density multi-family housing.

Over nine years have elapsed since Plaintiffs first applied to the Bedminster Township Planning Board and Township Committee for a zoning change and nearly seven and a half years have elapsed since Defendants commenced this litigation. The Procedural History in this case is a matter of court record and is chronologically summarized in "Appendix A".

STATEMENT OF FACTS

I. Viability of Mt. Laurel and Madison

A. The Accelerating Housing Crisis.

Since the Mt. Laurel* decision in 1975, courts of this state have taken judicial notice of the "desperate need for housing, especially of decent living accomodations economically suitable for low and moderate income families." (Mt. Laurel, 67 N.J. 151 at 158). In the first hearing in this case held prior to Mt. Laurel, the Cieswick plaintiffs proved the existence of a statewide housing shortage and the additionally severe situation in Bedminster Township which would be mitigated through a revision of the zoning ordinance (L.O. 2/24/75, p.25).** This crisis has not abated since that time. (T-IV-17).

Alan Mallach, a housing market and fair share expert, discussed the severity of the impact on the low and moderate income population,*** a group defined as families unable to purchase or rent housing without subsidies, or

---

*Southern Burlington County NAACP v. Tp. of Mount Laurel, 67 NJ 151, App. dism. and cert. den. 423 U.S. 808, 96 S.Ct. 18, 46 L.Ed. 2d 2028 (1975).

**References in this Brief are as follows: L.O. refers to Letter Opinion of this Court; "P" or "D" refers to Plaintiff's or Defendant's Exhibit; "T" is reference to Transcript followed by volume number and page.

***Mallach stated that the current income range for this group was 0 to $14,999 for a family of four members. Ranges vary up or down for each group depending on household size. See Exhibit P30.

those making less than 80% of the median income in the region (T-III-109). He asserted that the stock of subsidized housing had not recently increased and cost inflation in the housing market had priced out virtually all of the low income population (T-IV-17-18). William Roach, Somerset County Planning Board Director, verified the lack of subsidized housing in Somerset County, with two senior citizen projects (453 units) comprising the entire stock built since the late 1950's (T-XXIII-68-9).

While housing construction rates lag, the demand for housing has mushroomed in the Northeast region due to the increasing family formation rate and falling family sizes (T-VII-152). These factors and others, have caused a "vicious trend" in rising housing costs which was noted with regret by William Roach (T-XXI-192). Alan Mallach testified that this trend has priced out families with incomes of $15,000.00 to $22,499.00 from all but "least-cost" type units and that the upper-middle income group ($22,500.00 to $39,999.00) was also priced out of the housing market in Bedminster and the more elite communities in the Bedminster region (T-III-118-9; P-30).

In summary, the housing supply to demand relationship has not improved since this Court's decisions in 1975.

B. Corporate Relocation and Employment Trends.

As noted by William Roach, Somerset County has

been "rather fortunate during the slow economy to have major facilities built in the county." (T-XXI-119) Richard Williams, Somerset County's Director of Economic Development listed the following "blue-chip" companies attracted in the past 10 years:

1. American Hoecht Corp. Headquarters
2. National Starch Corporate Headquarters
3. AT&T Longlines Division Headquarters
4. AT&T General Services Department
5. Lehn & Fink (Division of Sterling Drugs)
6. Olivetti Corp.
7. Beneficial Corporation

(T-XI-5-6, 30)

In addition to these new employers, existing industries such as Johnson & Johnson and Research-Cottrell have stayed and expanded their facilities. (T-XI-15-16). Just within the short time span of this hearing, two new industries announced their plans to relocate in Somerset County: a third AT&T facility on 198 acres in Warren Township and Chubb & Son on 100 acres also in Warren Township (T-XXXIX-93); projected employment at the Chubb facility is listed at 3,200 relocated workers (T-XXXIX-113). Clearly, there is sufficient industrially zoned land to allow this trend to continue, for if such land in Bernards, Bridgewater and Warren Townships along Route 78 were fully developed, at least 20,750 primary employees would result (T-XXXIX-100). The reason for this trend and the likelihood of its continuance was explained by Richard Williams:

> "Q. Does the location of Somerset County have some relationship to the kind of industrial growth that you have described here?
>
> A. Yes. I think that the location of Somerset County being roughly equal distance between the first and fourth markets is an ad-

vantageous one which Somerset County is in." (T-XI-15)

"Q. Could you explain to the Court why that growth has occurred, as you understand it?

A. There are probably 40 different site location factors and why a company starts a new facility here and relocates an existing facility here. I would say one of the leading ones, a transportation system, the advent of interstate highway system and the means to generate a people flow on an interstate highway system. . . . .

I think Somerset County has a distinct quality of life advantage. . . . .

Another one would be the availability of Somerset County to have large industrial and office site tracts zoned in the county. You know there are tracts of 189, 200 acres, which major corporations like to buy to protect themselves. I think that is an advantage of Somerset County.

Q. Is there any indication that the trends that you have testified to are shifting?

A. No." (T-XI-28-9)

Industrial relocation and expansion benefits the host municipality in many ways. For example the tax revenues from the AT&T facility in Bedminster were $700,000.00 in 1978, over one-third of the total municipal levy (T-XIII-104). As a result of this single industrial ratable, residents of the Township have not paid significantly higher taxes despite major inflation and increased service costs; the equalized property tax rate in the Township has declined about one-third from $1.92 in 1971 to $1.27 in 1978 (T-XIII-104). Somerset County as a whole has consistently had the lowest unemployment rate in the State over the past four years (T-XI-8) and the county bond rating is Triple A (T-XI-18).

Unfortunately these local benefits must be balanced against the costs imposed on other parts of the relevant region; Dr. Paul Davidoff, an urban planning and housing expert described these costs:

> "The crisis of corporate relocation in the recent decade has been created in large measure by the fact that there is a fall off in minority employment and jobs for lower paid workers who resided in the city and worked for the corporations in the city and then were incapable of finding housing proximate to the new site at costs they could afford and the transporation costs that commuting to the new jobs were either too great in dollars or in time. . ." (T-XVII-87)

Joseph Douglas Carroll, Jr., the retired Executive Director of the Tri-State Regional Planning Commission, confirmed and explained this pattern:

> "Well, if you're referring to the case where a corporation moves a plant or an office from a center city to the suburbs and no other changes are made, then it is generally the case that the lower-paid employees are least likely to follow to the new location. The costs of commuting are too great, and the ability to relocate their households is much lower. Therefore, the higher the person on the scale the greater the probability that he'll move with the plant to the new location or the business, and the lower the salary, the less likely." (T-XXI-69-70)

This pattern is illustrated by the AT&T relocation to Bedminster, with over 75% of the 646 clerical-workers earning under $20,000.00 not following their jobs to the new location (T-XVIII-186). Defendant's witness, Robert Stahl, a relocation specialist described this as a standard pattern (T-XVIII-185). Another unfortunate by-

product of corporate relocation which Robert Stahl noted was the tendency to leave minority employees behind and to reduce the ethnic and minority mix required by the U.S. Office of Economic Opportunity Guidelines (T-XVIII-219).

The contribution of corporate relocation trends to existing housing problems was summarized in a letter from Sidney Willis of the New Jersey Department of Community Affairs to the Tri-State Commission:

> "Job-housing imbalances relate to the very heart of the problem of equal opportunity, for there is an appearance throughout the region that a very few citizens in a select number of local jurisdictions can capture the revenue base of the region for the exclusive benefit of a few. These jurisdictions can thus avoid the consequences of the massive unemployment in the inner areas and the associated declines in governmental service." (T-XXI-103)

Bedminster Township was in a unique position to prevent or plan for its current job-housing inbalance due to the warning of its planning consultant (Charles Agle) that the proposed AT&T rezoning would create a massive housing responsibility (T-XXX-167, 172; P-84). In a July 10, 1972 memorandum to the Planning Board, Mr. Agle projected that AT&T plus the secondary employment which would necessarily follow it would create a housing need of 5,775 units, and that if other corporate landowners followed suit, the Township would have to accommodate a population of 80,000 to 90,000 people. (T-XXX-171, 174). After making this projection, Mr. Agle warned:

"Bedminster now has a choice of two clear cut alternatives: to retain its lovely rural character or to relax and become a center of complete urban development" (P-84, T-XXX-166).

Mr. Agle in this hearing expressed his regret at the Township's choice of the latter alternative because of the absence of a large housing stock to support the employment base (T-XXX-173).

C. Urban Revitalization Policies and Mt. Laurel.

Virtually every housing/urban policy expert witness in this trial has theorized about the potential conflicts between recent federal and state urban revitalization policies and the Mt. Laurel fair share obligation (Ginman, T-I-137-138; Mallach, T-IV-37, T-V-41; Rahenkamp, T-VII-155; Davidoff, T-XV-85; Carroll, T-XIX-122-123; Roach, T-XXI-166). Alan Mallach testified to the consistency and necessity of a fair share allocation to urban revitalization:

"Because I believe that the only way that the cities are going to be regenerated and are going to become economically and socially more viable is if overall in the region there is a more equitable distribution of people by income.

I think the principal reason or a principal reason for the economic decline and the deterioration of the cities and for the other problems associated with it is that the cities in this country have become, in effect, the dumping grounds for the low-income population, the poorest people, the welfare recipients, the unemployed and the like. This, more than anything else, has

> contributed to the loss of other kinds of activities in the cities, the fact that the cities have become less desirable for many people who are more affluent, who have resources to spend, less attractive commercial and office centers and the like. (T-V-41-2)

John Rahenkamp and Paul Davidoff based their opinions on studies of the impacts of urban revitalization in the Society Hill section of Philadelphia and the Soho area of New York. (T-VII-155; XV-84). John Rahenkamp concluded that revitalization would <u>increase</u> the need for low and moderate housing in suburban areas:

> "There's one further point. If the basic premise is that Newark can increase in density, and therefore, absorb some of the middle class who is looking for housing now and if you're optimistic for that to happen because of the success of Society Hills or some of the other urban areas of the country, I'd suggest that there's another side of that coin.
>
> We've done work in urban areas including Philadelphia, including Newark, in which if the middle class returns to the city, the numbers of persons that would use the house that's being rehabilitated would be substantially less than those that live in it now.
>
> In other words, in many of the buildings in Newark in as bad shape as they are, you have three or four families sharing a four-story row house. If the middle class comes back, perhaps one or two families will share the same row houses at most.
>
> What you've essentially done is decrease the density legitimately so. The quality certainly improves, but the net impact is that the low-and-moderate-income people are being pushed out of the cities . . ." (T-VII-155-156)

Paul Davidoff summarized a study done by George Sternlieb

and Christina Ford of the Rutgers Center for Urban Policy Research which concluded that the numbers of people moving from the suburbs to the city were considerably less than the opposite flow to the suburbs as per the historical trend; and that the income of persons moving into the central cities is considerably lower than that of the persons moving out (T-XV-85-7). Joseph D. Carroll, Jr. as representative for the Tri-State Regional Planning Commission, which is the major proponent of "bending the trends", testified that he would not "bet on" a successful urban revitalization effort (T-XIX-122-123). Although much of the testimony may be based on early trends, the sum of the evidence in this case requires the conclusion that recent federal and state urban revitalization policies have not affected the Mt. Laurel obligations of any developing municipalities.

II. The Mt. Laurel and Madison Obligation.

A. Low and Moderate Income Housing

As the testimony in this hearing indicates, the population segment identified in Mt. Laurel as the low and moderate income group still requires subsidies to purchase new or existing housing (T-III-109). Alan Mallach testified that all subsidized housing in northern New Jersey is built with N.J. Housing Finance Agency mortgage money and Section 8 subsidies. A "resolution of need" is a prerequisite for qualifying for such funds (T-III-161); (defendant's

witness Alvin Gershen agreed (T-XXXIII-44)). This resolution is a basic statement of the municipal need for low or moderate income housing which might be adopted by the governing body at any time (T-IV-157). Bedminster has not adopted such a resolution. (T-III-161) Even in the face of a recognized need, the Township has failed to take this simple but necessary step toward facilitating the provision of subsidized housing.

With similar disregard for the federal regulatory conditions for the financing of subsidized housing, the Township has located large portions of its multi-family housing zones immediately adjacent to the interstate highways. (T-XXXVIII-96-97) The noise impacts of the projected highway traffic would jeopardize the potential for federal financing of subsidized housing, and would, in any event add substantially to the development costs on those tracts (T-XL-51,60).

B. Least-Cost Housing

Although developing municipalities may not be legally obligated to adopt resolutions of need, there is no doubt that they are required by the New Jersey Constitution to provide a variety and choice of housing including a reasonable amount of least-cost units (Madison,

72 N.J. at 512*) Defendant's economist recognized that through the filtering process, least-cost housing production generates better quality housing opportunities for low income families (T-XXXVI-42); as defendant's fair-share expert indicated, the quantity of housing which may be provided is an essential consideration in dealing with the housing crisis:

> "What we really need to do is to increase the pace of construction state-wide to allow more housing to meet more than just initial housing demand or current housing demand, which will get back down, the filter-down process and produce more housing than just the need itself" (T-XXIV-147).

The concept of least-cost housing has been defined in terms of three factors in this hearing: (1) gross densities and unit sizes, (2) housing types and (3) efficient siting of units and infrastructure.

In terms of density, Dr. Carroll of Tri-State, indicated that densities between .5 and 2 units per acre generated the highest costs for facilities such as streets, sidewalks, water and sewer (T-XVI-47-48). The R-3 twin house option,

---

*Oakwood at Madison, Inc. v. Tp. of Madison, 72 NJ 481 (1977).

all R-6 options and all R-8 options except the twin house in a VN (Village Neighborhood) fall within this range (T-II-7-9). John Rahenkamp cited a recent study which his experience verified, for the proposition that approximately 5.5 units per gross acre was optimum for planned developments. (T-X-163). Dr. Carroll expressed the view of Tri-State that the range of 7-15 units per acre was least-costly (T-XIX-106). It is important to remember that these are gross densities which indicate the number of units on a total parcel which includes the land on which the unit sits, roads, utilities, open space and critical lands (T-XI-125; T-XXIX-110).

Although there was no testimony to dispute multi-family units as the best least-cost housing type, several witnesses discussed "twin-houses", a less traditional alternative which does not fit the multi-family classification. (T-XXIII-159-160). "Twin houses" are defined in the Bedminster Zoning Ordinance as:

> "A structure containing two dwelling units, each separated by plane vertical party walls and having direct access to the outside without use of a common hall, laid out so that each unit can be sold as fee simple, cooperative or condominium property with front or rear access" (P-21).

William Roach suggested that twin-houses were suitable at 6-8 units per acre, with the lowest practical density being

4 units per acre (T-XXIII-162-163). John Rahenkamp recommended 5 units per acre relying on the experience of Radburn, New Jersey (T-XIII-3-4). The Bedminster ordinance, however, permits "twins" in open space clusters at densities only from .77 to 2.35 units per acre (T-I-187-189). James Murar, plaintiff's real estate development expert, testified that lot-size reductions achievable with twin-house development would be insufficient to overcome consumer preferences for detached single-family structures, and that "twins" would therefor not be produced in the R-3, R-6 and R-8 zones (T-VI-73-74). John Rahenkamp agreed with this conclusion that permissible densities in these zones made "twins" inefficient and impractical (T-XIII-4) and defendant's witness, Richard Coppola, stated that he had no knowledge of existing "twins" at this density (T-XXXV-77).

Another housing form permitted is "modular" housing meeting minimum floor area standards; William Roach testified that such housing could be built more cheaply than site built housing at roughly comparable site improvement costs if a density of four or five units per acre was allowed. (T-XXI-175). However, this density is achievable only in the R-20 Zone (T-II-7-11). Robert Graff, Bedminster's Planning Board Chairman, felt that modular units would have only marginal effect on housing costs (T-XXVII-19).

A third requirement of least-cost housing is the efficient siting of units and supportive facilities on the property; this is best achieved through the "planned development"

technique (T-X-12). The attributes of planned development which facilitate least-cost housing are:

1. the opportunity to cluster units and lower utility costs such as sewer lines or roads, (T-X-10-11);

2. the provision of shared open space which requires a lower maintenance cost per unit, (T-X-6);

3. subsidized housing can be mixed in without negative impacts (T-X-12-13); and

4. preservation of critical areas through flexible arrangements which provide substantial amenities, (T-X-8).

III. The 1978 Zoning and Land Development Ordinances.

A. Anti-Regional and Anti-Residential Bias

The starting point for any zoning ordinance analysis should be the ordinance's Statement of Purpose section. This section of the Bedminster Zoning Ordinance (P-21) is more noteworthy for the Municipal Land Use Law (N.J.S.A. 40:55D-1, et seq. "M.L.U.L.") purposes it excludes than for those that it lists (T-VII-40). Of the six purposes missing or altered, four involve issues of regional concern:

1. 40:55D-2(d) - "To ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the state as a whole";

2. 40:55D-2(e) - "To promote the establishment of appropriate population densities and concentrations

that will contribute to the well being of persons, neighborhoods, communities [and regions]" (all but the bracketed phrase appears in the ordinance.)

3. 40:55D-2(f) - "To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies" (multi-family and/or least-cost requires some public investment.)

4. 40:55D-2(m) - "To encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land". (Emphasis added)
(T-VII-40-42)

This lack of concern for regional responsibilities appears through various land use provisions, including those governing the Business district (T-VII-72-73). The stated purpose of this district is to provide for retail and personal service uses that the local residential public requires and to prohibit the resale or export of goods or services outside the municipality (P-21§5.1;T-VII-72). This provision follows a similar Master Plan (P-6§II-B) recommendation which John Rahenkamp asserted was impractical:

"We worked on the new town of Columbia, Maryland, in which many of the 7-11's and many of the stores in fact closed down because they required a service area well beyond those conveniently conceivable commercial areas.

The point is that a store, in order to succeed, will require its own market radius and in fact even the existing food store, the A&P, requires a population base of at least three to four thousand and preferably in the range of five to six thousand in order to satisfactorily accommodate a market and make a reasonable margin.

It obviously draws well beyond Township boundaries." (T-VII-180)

One of the principal uses permitted in the Business district includes "business and professional offices employing no more than 10 employees but not corporate administrative offices" (P-21§5.2.2;T-VII-81); corporate and administrative offices are defined as those offices which do not provide "direct services to immediate present members of the public" (P-21§20.2;T-VII-82) and are explicitly excluded from all zoning districts (P-21§9.2.20). The anomaly of this provision is that it makes massive non-conforming uses of the new AT&T Longlines facility and the Beneficial Finance Conference Center established through the grant of a variance in the R-3 residential district (T-VII-81-82).

As an illustration of how the "10 employee" limit affects future development, the "Floor Area Ratio" (FAR) regulation was applied to the 10 acre Business district on the Allan-Deane property (T-VI-61). Since a building of 115,000 sq. feet could be built under the ordinance to accommodate 300 to 1,000 employees, the 10 employee limit would require a series of very small businesses with the same cumulative impact as one large business (T-VII-82-84); Charles Agle recognized this result (T-XXXII-55). John Rahenkamp concluded that this regulation referred to ownership and not to physical use of lands and buildings (T-VII-84) and Richard Coppola found it inappropriate (T-XXXV-94).

Article 9 lists various other prohibited regional uses, some of which are pervasively regulated by the state: sanitary landfills, hospitals, nursing homes, prisons,

correctional institutions, heliports and sanitariums (P-21§9.2; T-VII-93-94). Other uses prohibited which are not per se nuisances are: hotels and motels, diners, open fruit stores, building contractors and motor vehicle sales (P-21§9.2; T-VII-94). Defendant's own consultant preferred the utilization of performance standards to the total prohibition of a number of these uses (T-XXXV-96-98).

The last two M.L.U.L. purposes excluded from the Bedminster Zoning Ordinance (P-21) indicate an anti-residential bias:

> 1. 40:55D-2(k) - "To encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development to the particular site" (T-VII-41);
>
> 2. 40:55D-2(l) - "To encourage senior citizen community housing construction consistent with provisions permitting other residential uses of a similar density in the same zoning district " (T-VIII-41-42).

In summarizing his views on the anti-residential bias of the ordinance, John Rahenkamp alluded to the parallel between the Mount Laurel and Bedminster Ordinances; the former used industrial zoning, while the latter uses open space and exceptionally large-lot zoning as "holding zones" to prevent residential development. (T-VII-9). The record indicates this is a successful technique in Bedminster since only four single-family units were completed from 1976-1978 (T-III-6-7).

By reading together the definitions of "floor area ratio," "gross site area," and "lot area" another anti-residential provision surfaces (T-VII-36-38). This hidden provision allows a non-residential development to apply contiguous land

in an adjacent municipality towards the F.A.R., thereby increasing the permissible building size (T-VII-38). Defendant's consultant found no rational basis for this provision (T-XXXV-101-102). This Ordinance section is derived from the contract which allowed AT&T Longlines to apply its land in Far Hills Borough towards the FAR (T-XXVII-106).

B. Current Land Use. (See Appendix "B", photo #1, P-15)

The existing land use scheme provides the backdrop for the new zoning ordinance which will determine future development patterns. The existing land use analysis conducted by Plaintiff's expert-planning witness, Carl Lindbloom, indicates that 12,856 acres (75.2%) are undeveloped (vacant and agricultural) and 2,450 acres (14.3%) are in residential use; the remaining 10.5% of the town is divided among business office, community-serving, golf-course uses and streets (T-I-170-171; P-17). A certain amount of discretion was exercised in making the "residential" versus "vacant" versus "agricultural" classification because of the unusually large number of estate-sized parcels (T-I-177-178). For example, on a given large parcel, Mr. Lindbloom classified the portion under farmland assessment as agricultural (T-II-56); he then allocated some portion of the remaining land to the existing building as a residential use (T-I-178-179). The size of the portion allocated to residential use depended upon the size of the existing structure, and in no case was less than the minimum lot size of the zone so as to avoid the creation of non-conforming uses

(T-I-178). In comparison, the analysis of Richard Coppola arbitrarily allocated one acre per structure regardless of minimum lot sizes thus assuming the granting of a variance for a non-conforming use in every instance (T-XXXIII-211).

Although there was disagreement among the planners in this case as to the appropriateness of classifying agriculturally assessed lands as "undeveloped", a compelling rationale for this determination was stated by Alan Mallach:

> "The first reason is that land under farmland assessment as the history of development in New Jersey has shown very clearly, is not in any sense immune from development.
>
> There's disagreement about the degree to which farmland assessments may perhaps slow down development of land so classified but there is clear understanding that it does not prevent in any way that land from being developed as distinct from a State policy. For example, statutes dealing with wetlands development and the like so that there is no clear policy or statutory basis for this.
>
> The second factor, land in farmland assessment, land in farms, for better or for worse is often more suitable land for development.
>
> The third reason is that as I believe Mr. Lindbloom mentioned yesterday, is that there is not necessarily any meaningful relationship between land under farmland assessment and prime agricultural soil and land that is in use for major, serious agricultural activity, if you will....(T-III-143-144)

C. Zoning Districts. (See Appendix "B", photo #2, P-19)

The Bedminster Township Zoning Ordinance (P-21) abolishes the 1973 Ordinance's R-3, R-6 and R-8 residential zoning under which clustering and multi-family housing were permitted in all zones, and establishes seven new districts including: four residential districts (R-3, R-6, R-8 and R-20); a business district (B); a research and office district (RO); and a critical area district (T-I-172-177).

By far, the largest zone in the Township is the R-3 Zone (T-I-172). It comprises 81% of the Township's undeveloped land; the current zoning ordinance unconditionally prohibits multi-family housing in this zone (T-I-186-187). The sole permitted use by right is for minimum lots of 2.81 acres* (T-I-186). Of the Township's remaining 19% vacant land, 16% is encompassed by the Critical Area Zone, the second largest district in the Township (T-I-173). The Critical Area Zone prohibits all development and allegedly includes only areas with slopes in excess of 15% or flood plain areas (T-I-173). The Township's zoning ordinance thus patently prohibits multi-family and subsequently "least cost" housing on a full 97% of the township's vacant land.

The 1973 Zoning Ordinance permitted multi-family developments in the R-6 and R-8 zones, which at the time comprised 911 undeveloped acres (T-II-11-13). In holding this ordinance invalid, this Court ordered the Township to reconsider the zoning of the entire Pluckemin Corridor area (which comprises 1,596 undeveloped acres) in light of the Somerset County Master Plan recommended density of 5-15 units per acre (T-II-28). William Roach, who had testified in the first trial that the 1973 Zoning Ordinance conformed with the County Master Plan,

---

*2.81 acres assumes a perfectly square lot in which to inscribe a 350 foot circle and is a theoretically maximum achievable density. For a discussion as to why theoretically maximum achievable densities are not practicably achievable see Lindbloom Testimony at T-I-33-35.

said that the 1978 R-20 zoning would also be consistent with the County Master Plan* (T-XXI-152). Defendant's planning consultant had recommended high density for this area also (T-XXIX-10-11). The Township's response was to zone a grand total of 243 acres** (R-20) for multi-family housing and also to permit low density uses in this zone (T-XXXIII-213). This represents only 1.4% of the total acreage of the municipality.

1. Allan-Deane Property

The Allan-Deane holdings comprise 461 acres and constitute a substantial portion of the 690 undeveloped residentially zoned acres in the Pluckemin Corridor (T-VII-115). Since the Pluckemin Corridor is the only area where multi-family or least cost housing can be produced and Allan-Deane is by far the largest landholder therein and the only one capable of providing the infrastructure needed for multi-family development, Allan-Deane must be considered as the major factor in the Corridor's development and in the fulfillment of Bedminster's fair share obligation (T-VII-116).

*It should be noted that the Somerset County Master Plan is now some 10 years old. From all the evidence, it is clear that Somerset County has undergone dramatic changes in the past decade, particularly the influx of new jobs in large quantities. Accordingly, the present relevance of this aging plan is open to question.

**The acreage actually available for multi-family development is in dispute. Coppolla admits that only six parcels of R-20 land with a total of 171.3 undeveloped acres presently meet the minimum requirements of the Ordinance for such development. None of this land has sewer available to it and much of it is impacted by highway noise. See discussion of R-20 Zone in Statement of Facts at Point III-C-2 hereof.

The 1973 Ordinance permitted the clustering of 844 units on 80 acres of the Allan-Deane tract for a net density of 1.88 on the entire tract; the permitted net density on the plateau in 1973 was 5.29 units per acre (T-V-118-119). (See Appendix "B", photo #6, P-35). Under the 1978 Ordinance it is reduced to .33 units per acre, a full 93% reduction (T-II-7). (See following chart). The new three acre zoning for the plateau area will require private septics and water supply (T-XXXVIII-66-67). Private septics will cause a dangerous and unsightly health hazard because the effluent will be trapped by the largely fractured basalt underneath and will flow down the hill and emerge from seepholes. (T-XXXVIII-66). Sewers are thus necessary on the plateau for the protection of public health (T-XXXVIII-67). A second consideration is the management of the environmental controls on the site, since the minimization of soil and tree removal is best accomplished at higher densities. (T-XXXVIII-67-68). In addition, higher densities would allow greater numbers of people to benefit from the fine views and recreation opportunities of the adjacent open space area. (T-XXXVIII-69-70).

Unlike the 1973 unitary R-6 zoning, the 1978 Ordinance divides the Allan-Deane property into five zones. (T-V-162). Under the 1978 regulations a total of 572 units may be built on the entire site at a gross density of 1.27 units per acre (T-V-163) (See Appendix "B", photo #7, P-36).*

*This shrinking of the multi-family housing yield was carried forward throughout the entire corridor. Mr. Murar, utilizing actual site planning techniques and not mere formulaic density calculations, demonstrated that actual site planning constraints would cause the total number of multi-family units in the corridor to drop from the 1,794 which was achievable under the 1973 Ordinance to 1,122 under the more restrictive 1978 Ordinance. (T-VI-3)

Comparison of Dwelling Unit Yield on Allan-Deane Property - 1973 and 1978 Ordinances

Zoning Ordinance	Maximum Number Units	Net Density	Gross Density
1973	844	5.29	1.88
1978	572	6.80	1.27

2. The R-20 Zone

The R-20 Zone is the only zone in which multi-family housing (other than twin-houses on large lots) is permitted. Similarly, it is the only zone in which any substantial "variety and choice" of housing types is allowed. This zone is arbitrarily limited by a boundary line which bisects the three largest R-20 properties and is unrelated to the natural features of the land it bisects (T-VII-51). Robert Graff, as well as defendant's consultant, Richard Coppola, admitted the arbitrariness of the location of the line (T-XXVII-206-7; XXXIII-205). Multi-family housing is permitted in this zone as a "conditional use"* providing the following conditions can be met:

1. The Planning Board issues an authorization for the Village Neighborhood or Compact Residential Cluster as provided in Section 11.3 of the Zoning Ordinance and the standards set forth in Section 11.4 of the Zoning Ordinance are met.

2. The applicant has a tract area of at least 9 acres in the R-20 zone. (See Definitions Village Neighborhood and Compact Residential Cluster in Zoning Ordinance.)

*The Municipal Land Use Law, N.J.S.A. 40:55D-3, defines a "conditional use" as a "use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards for the location or operation of such use as contained in the zoning ordinance, and upon the issuance of an authorization therefor by the Planning Board." Multi-family housing in Bedminster, Plaintiffs contend, is clearly a "conditional use" as defined in the Municipal Land Use Law.

3. The applicant can make connections to sewer and water supply systems "satisfactory to the Planning Board" which must be "devised with minimal sanitary pollution discharge into streams..." (See Zoning Ordinance section 11.4.6)

4. The applicant submits a site plan showing the bedroom mixes and minimum Net Habitable Floor Areas prescribed in the Zoning Ordinance. (See Sections 11.2 and 10.3 of Zoning Ordinance.)

5. The applicant must agree, should the Township Committee so require, to dedicate the open space "in fee simple in perpetuity" to Bedminster (Section 11.5 Zoning Ordinance).

6. In the event the applicant seeks the R-30 density bonus then the following additional conditions apply:

(a) applicant must agree not to exceed minimum floor areas by 15%;

(b) applicant must show that his compact residential cluster is separated by required distance from other CRC's in Bedminster; and

(c) if 300 CRC units are already built applicant must convince Planning Board that Bedminster has adequate infrastructure to accommodate additional units, there are no environmental constraints and the Township's regional obligation is not satisfied in order to get authorization for additional units. (See Zoning Ordinance Section 11.1)

Although Bedminster has zoned a total area of 243* gross acres within the Pluckemin Corridor R-20 (T-XXXIV-119) a substantial portion of this land is unavailable for development for a variety of reasons. There are two impediments to multi-family development in the R-20 which are unrelated to the size or location of the zone itself. The first is that

*This is Richard Coppola's figure (T-XXXIV-119). Lindbloom's figure of 280.28 gross acres in the R-20 Zone and John Cilo's figure of 281.7 acres are gross acreage figures including roads; Richard Coppola's "gross acreage" figure of 243 acres excludes 46 acres in roads. (T-XXXIV-119). Plaintiff's and Defendant's planners thus differ with respect to the gross acreage of the R-20 Zone (excluding roads) as to only 8 acres or 2% of the total. As to the aggregate number of undeveloped acres in the R-20 Zone (including land in isolated small parcels unavailable

conditional use multi-family developments must compete with as of right quarter acre single-family uses and with "twins" at 6 units per acre; to the extent this small district is used up for these alternate uses, it will not be available for multi-family housing. (T-XXXV-29).

The second impediment is the requirement of "suitable" sewer and water in light of the town's historical failure to participate in private or regional sewer projects (T-XXXVII-100, 108). The first opportunity to sewer Pluckemin Village and the surrounding multi-family district was through the AT&T package plant; this alternative was rejected because:

1. the Township intended to sewer Pluckemin Village through the Chambers Brook Authority in Bridgewater (T-XXXVII-91-92);

2. AT&T did not want access to the plant through their property (T-XXXVII-116);

3. Force-maining would have been required (½ the capacity of the AT&T plant is currently force-mained) (T-XXXVII-124-125);

Although the original site for the AT&T plant would have been amenable to expansion for Pluckemin Village's needs, and the town was aware that it might utilize its condemnation powers to get alternative sites, the plant was instead built in a flood plain where expansion is prohibited. (T-XXXVII-

(Footnote continued)

*for multi-family due to tract size requirements, deed restriction and otherwise unsuitable land) Plaintiff's and Defendant's experts differed by 36.12 acres. Coppola testified there were 223.7 acres available for development in the R-20 Zone (See T-XXXIII-213) while Lindbloom testified there were 187.58 undeveloped acres. (See T-I-177). Part of this difference is explained by the different treatment of the YMCA camp, (compare Coppola at T-XXXIII-212 and Lindbloom at T-II-79) and Coppola's admitted error in including as available for multi-family the westerly R-20 Zone in Bedminster Village. (See T-XXXIV-136 to 143).

114-119). This action is suspect in light of the imminent health hazard due to over-flowing septics in Pluckemin Village. (T-XXII-126-127). Despite the continuation of the septic problem in Pluckemin Village and the obvious need for a sewer in this area to make the multi-family housing zone viable, the Township has made no attempt after 1975 to even investigate the feasibility of hooking into Bridgewater's Chambers Brook trunkline. (T-XXXVII-108).

A third future source of sewer capacity, the Middlebrook Regional Facility, has not been inquired into because Bedminster is concerned only with sewering the existing Pluckemin Village, and developers of new housing are expected to provide their own solutions to sewage problems. (T-XXXVII-99-100; 122). Since the Master Plan expressly states the municipal intention that no development should be permitted without on-site waste disposal until the completion of all regional water quality studies (which are at least 6 years away (T-XXVI-66-67)), there is a clear legislative intention to block all multi-family development with public or private sewer facilities in the immediate future.

Additionally, the actual capacity of the R-20 zone is reduced by the following problems created by the size and location of the zone:

> 1. A total of 46.46 acres in the R-20 Zone is already developed; developed uses include the 10.2 acre deed-restricted YMCA Camp (T-II-121), municipal police station (T-II-83), cemetery (T-II-96), a church and school permitted as conditional uses on 5 acre minimum lots (T-XXXIV-160-161).

2. Of this remaining undeveloped land a total of approximately 9 acres is the aggregate of the undeveloped portions of lots fronting on 202-206 and partially in the business zone. (See Block 57, lots 2, 3, 5, 7, 10, 11, 12, 6A). Due to the fact that there are existing non-conforming business or church uses on a portion of these lots their subdivision and assemblage would require protracted administrative approvals as well as the granting of numerous variances (T-XXVII-127-128).

3. Both R-20 Zones in Bedminster Village lack sufficient required acreage to both accommodate the existing use on the lots under the zoning ordinance and leave the necessary 9 acres to be eligible for multi-family uses. (T-XXXIV-140, 147).

4. A total of 9,600 lineal feet in the R-20 Zone (1.8 miles) border interstate Route 78 and 287, including the interchange area and a total of 54 acres in the R-20 zone are unsuitable under federal highway administration standards due to noise. (T-XXXVIII-96). Robert Rodgers, a traffic engineer, testified that building design and layout would not produce "acceptable" residential locations within the standards. (T-XL-13-14).*

5. The proposed Pluckemin Bypass as shown and described in the Master Plan consumes over 12 acres in the R-20. (T-V-152, 170).

If the above described R-20 land, constrained for practical and legal reasons, is substracted from the gross acreage zoned for multi-family development then only 100 to 130 acres (or approximately .6 of 1% of the Township's land) remains available to satisfy the Township's fair share obligation.

*In the case of The Austin Co. v. Bernards Township, Docket No. L-1711-76 P.W., (decided March 30, 1979), Judge Gaynor invalidated a 3 acre residential zone adjacent to Route 78 partially because:

> "The proximity of Route 78 to the lands of the Plaintiff will result in traffic noise to an extent that would interfere with the residential development of that portion of the properties within 1,000-2,000 feet of the highway. The noise levels now caused by the traffic on Route 78 are at the maximum of acceptable limits and the completion of Route 78 will result in increased traffic causing the noise levels to then exceed the accepted standards. See unpublished opinion page 6-7.

3. The Pluckemin Bypass.

A severe restriction on the development of the R-20 Zone is posed by the proposed "Pluckemin Bypass", which cuts off the access to Rte. 202-206 of the three largest properties in the zone (T-V-150-151). This proposed road is not listed on the N.J. Transportation Improvement Plan and feasibility studies have not been undertaken because the state considers Bedminster to be already bypassed by the interstate highway alignments (T-XXII-182-183; PC-34).* Rodgers analyzed projected traffic for the area and concluded that the Bypass was not needed either with or without the Allan-Deane development (T-XXXX-19). In fact, it could not be constructed as aligned in the Master Plan because it would violate state highway department standards; to meet the standards, the alignment would have to be moved east into the R-20 zone (T-XXXX-27-28). The road would create the following problems for multi-family development:

1. Limits the design of a circulation pattern within a VN (T-V-150);

2. Requires additional collector roads through critical areas to reopen access to 202-206, and therefore reduces density (T-V-151-152);

3. The required berm would use additional property in the R-20 zone and would be unsightly (T-V-153);

4. Cuts off present access available to R-20 residents to Pluckemin Village shopping (T-XXXI-182-183).

*The determination of Bedminster to continue to insist upon this bypass, despite the complete lack of receptivity on the part of the DOT and the lack of any traffic analysis even suggesting the need therefor, raises serious questions as to the true intent of the municipality with respect to the proposed roadway. It may well be concluded from the record herein that Bedminster is using this proposal to thwart the plaintiff's development plans rather than to solve any genuine traffic problem. Cf. Grosso v. Bd. of Adj., Millburn Tp., 137 N.J.L. 630 (Sup.Ct. 1948).

5. Would noise impact additional areas of the R-20 Zone including the Allan-Deane property. (T-XXXVIII-96).

D. Density Regulations. (See Appendix "B", photo #3, P-20)

Although various development options are authorized by the Ordinance, only single-family detached homes may be built "as of right" in any zone (T-XIII-13-14). The "as of right" theoretical densities range from .33 dwelling units per acre in the R-3 zone to 4.3 units per acre in the R-20 (T-II-7-9). The Bedminster land use ordinances make the following planned developments subject to a five to six step approval process (T-XIII-12-13)*:

1. Single-family "open-space clusters" in the R-3, R-6, R-8 and R-20 zones (density ranges from 2.80 to .22 acres per unit - T-II-7-10);

---

*These are:

1. Preliminary plat approval (D-116, Land Development Ordinance, Chapter II, §4.3);
2. Final plat approval process (D-116, Land Development Ordinance, Chapter II, §4.4);
3. Preliminary site plan approval (D-116, Land Development Ordinance, Chapter III, §3);
4. Final site plan approval (D-116, Land Development Ordinance, Chapter III, §7);
5. Application for approval of open space cluster, village neighborhood or compact residential (P-21, Zoning Ordinance, §113);
6. Applicants seeking to build Second 300 R-30 (CRC) must apply for additional CRC approvals showing adequate infrastructure, that the Township has not satisfied its regional obligation, etc. (P-21, Zoning Ordinance, §11.1).

2. "Twinhouses" in "Open Space Clusters" in the R-3, R-6, R-8 and R-20 zones (densities are: 2.58 acres per "twin" in R-3 to .30 acres per twin in R-20 (T-II-8-10);

3. Mixed single-family and multi-family "Compact Residential Cluster" in the R-20 zone (10.81 D.U.'s per acre - T-II-11).

Although most towns regulate residential density through minimum lot size or maximum units per acre regulations, Bedminster's new ordinance as well as the 1973 Ordinance utilizes the "Floor Area Ratio" (FAR) technique in conjunction with a definition of minimum lot size that requires that a circle of minimum diameter be inscribable within lot lines (T-I-179-180); a third new indirect density control in the 1978 Ordinance is the required bedroom mix which is critical in determining the floor area numerator in the FAR (T-I-183). The "circle" requirement defines a minimum lot size for a perfectly square lot that is theoretical because of the inherently unreasonable assumption that all parcels can produce perfectly square lots; Defendant's planner admitted that this requirement reduces density (T-XXXII-30). The circle diameters required for single-family "as of right" lots in the R-3, R-6 and R-8 zones are identical to those of the 1973 ordinance (compare: P-21 Schedule "A" and P-4 Schedule "A"). Charles Agle justified the circle by land requirements for septic systems although he failed to explain its utility in Pluckemin village which

he believed must be completely sewered (T-XXXII-16 and 100).*

The FAR is the relationship between the building size and the lot on which it is placed (P-21 §20.2); it is a tool used primarily in urban areas (T-VII-28). Since the building size or "minimum net habitable floor area" is set for all dwelling units in section 10.3 of the ordinance, the FAR operates to define a minimum lot size in relation to that floor area. (T-I-189). The FAR also reduces density because floor area is defined to include required parking spaces, thereby unjustifiably increasing lot size (T-VII-34-35); the FAR requirement for the R-3, R-6 and R-8 zones are the same as under the 1973 ordinance. (Compare P-4 Schedule "A" with P-21 Schedule "A"). The problem with the net habitable floor area requirements is that it prevents the flexibility and economy of layout and design necessary to keep costs low in a planned development (T-VII-59-60).

Section 11.2 of the 1978 Zoning Ordinance prescribes a percentage range mix of one, two, three and four bedroom units in all VN's and CRC's (T-VII-173). Although the prescribed

---

*Richard Coppola testified on cross-examination that he would have preferred the "more mundane" dwelling units per acre density control within the corridor (T-XXXV-59).

range is narrow, VN theoretical densities will vary from almost 6 to 7 units per acre merely by changing the bedroom mix (T-I-191-192; T-XXXIII-216). John Rahenkamp indicated that this mandated bedroom mix is inherently unresponsive to market conditions and too inflexible to accomodate market demand (T-VII-175-176). James Murar noted it as one of the four primary causes of the reduced unit yield under the 1978 Ordinance (T-VI-4). The "mix" is based on 1970 national census figures (T-XXIX-57-59).*

E. Zoned Capacity of Invalid 1973 Zoning Ordinance vs. 1978 Ordinance. (See Appendix "B", Photos #4, P-22, #5, P-24 and #10, P-50)

Allan-Deane presented substantial testimony concerning the zoned capacity of the new zoning ordinance vis-a-vis the 1973 ordinance invalidated by this Court. (See P-50). The utility, and indeed the necessity, of such a comparison in a proceeding to enforce litigants rights is evident; Carl Lindbloom felt this comparison was valid to show what the township represented in 1973 as the multi-family yield against the presently represented yield. (T-II-102).

*Defendant's expert Richard Coppola, admitted futhermore that the R-20 zone effectively barred, because of this bedroom mix, specialized market developments such as those targeted only for singles, empty-nesters or families with children. (T-XXXV-50). Moreover, these rigid requirements effectively preclude the construction of senior citizen community housing, singled out in the Municipal Land Use Law as a use to be encouraged and facilitated. See N.J.S.A. 40:55D-2(e). Because multi-family development in the R-20 is a conditional use, no relief from these rigid bedroom mix requirements is available through the variance procedure. See Brown Boveri, Inc. v. Tp. Committee of North Brunswick Tp., 160 N.J. Super 179 (App.Div. 1978).

The 1973 Zoning Ordinance permitted multi-family housing in the R-6 and R-8 Zone under a density formula which came out to between 1.88 and 4.55 units per acre in the R-6 Zone and between 2.51 and 6.07 units per acre in the R-8 Zone, the exact density depending on bedroom mix and unit size. (T-II-13-18). Because the R-6 zoning district contained 780 undeveloped acres (T-II-12) and the R-8 zoning district contained 131 undeveloped acres (T-II-13) under the 1973 zoning plan the Township's zoned capacity for multi-family units was between 1,794 and 4,344 (T-II-17-20).

The 1973 ordinance was invalidated because this Court concluded from the proofs that multi-family housing could not be built at the low densities permitted (L.O. Feb. 24, 1975, p.39). The cumulative effect of all the previously mentioned impediments to the new zoning ordinance's "theoretical density" may again require this court's conclusion that multi-family housing is infeasible and unlikely to be built; at any rate, the 1978 ordinance permits from 421 to 2,971 fewer multi-family units than the invalid 1973 ordinance, (T-II-17-33). Carl Lindbloom calculated the 1978 theoretical multi-family yield to be 1,373 units. Defendant's planner, Richard Coppola, originally calculated it to be 1,500 to 1,700 (T-XXXIV-17) but this number was obtained through his acknowledged overestimation of undeveloped acreage (T-XXXIV-137-

158; T-XXXV-197-200). He also assumed that all 600 conditional use CRC units would be approved (T-XXXIII-217).

F. Cost-Generative Provisions and Housing Costs.

For purposes of estimating the impact of the zoning and subdivision ordinances on housing which could be produced on the Allan-Deane property, James Murar costed out the 1973 and 1978 ordinance requirements and compared them with the Allan-Deane site plan costs;* his description of this process indicates the level of detail involved:

> "We estimated a cost per lineal foot of street frontage, which would include your road clearing, earth work, pavement, block curbs, storm sewers, catch basins, sanitary sewers, manholes, seeding and erosion controls, sidewalks. On top of that, add engineering contingencies as well as bond, permits and fees. We did that for both major collector residential streets. They would have a standard of a 60-foot right-of-way with 40 feet of roadway, parking on both sides. We estimated those costs at $157 a lineal foot, which includes all the items I just enumerated. We did the same thing for a minor residential street. The principal difference being the width of the right-of-way on the roadway of the minor residential street is a 50-foot right-of-way with a 30-feet roadway, parking on both sides. We estimated both costs at $150 per lineal foot. We then did a take-off of the estimated amount of lineal feet,measuring the amount of lineal feet of all the roadways." (T-VI-6-7).

---

*The Allan-Deane site plan shows 1,849 total units for a gross density of 4 units per acre. The unit distribution is as follows: 880 condominiums; 504 townhouses; 200 senior citizen; 135 subsidized and 130 single-family. (T-VI-49-50) (See Appendix "B", photo #8, P-40)

The results of this analysis showed a per unit site development cost under the 1973 ordinance of $8,011, $10,056 under the 1978 ordinance and $6,523 on the Allan-Deane site plan (P-38). By adding these costs to alternative hypothetical land costs of $10,000 and $20,000 per acre and using a developers rule of thumb estimate of sales value as four times the finished lot cost, James Murar came up with the following sales prices under the three alternatives:

	1973 Ordinance	1978* Ordinance	Allan-Deane Site Plan
$10,000/acre	$57,148	$77,524	$37,864
$20,000/acre	$82,256	$114,828	$49,628

(P-38 & P-39; T-VI-58)

The increased site development costs on the Allan-Deane property under the 1978 ordinance as compared with the 1973 ordinance resulted from:

1. The density reduction due to the rezoning of the property from one to five different districts; (T-VI-4)

2. The lack of density credits for the new "critical" area district; (T-VI-4)

3. The prescribed bedroom mix (T-VI-4); and

4. The standards imposed on the "Pluckemin Bypass" within the Allan-Deane property. (T-VI-5)

*Not included in the above 1978 site development costs is the $270,000 expense of extending sewer lines the required 1/2 mile between CRC's (T-VII-187).

In addition, the requirement of the prior installation of virtually all substantial improvements prior to final approval of a subdivision or site plan and the excessive and burdensome application procedures and municipal fees for planned developments would further escalate development costs under the 1978 Ordinance. (See T-XXXVIII-13 through 17; T-IX-85; T-XXXVIII-32 through 35; T-XXXIX-70 and see Sections V, A-2 and 4 of this brief).

In contrast, site development costs under the Allan-Deane site plan are kept to a minimum through the following techniques:

1. Substitution of a collector road for the Pluckemin Bypass thereby providing more efficient access in and through the site (T-VI-51);

2. Minimization of road frontage by utilizing private driveways for access (T-VI-54);

3. Substitution of natural drainage ways for storm sewers (T-VI-55);

4. Clustering units in quads of 16 units to provide efficient parking and turning (T-VI-55);

5. Providing a higher density (T-VI-57).

IV. The Fair Share Issue.

In contrast to the speculative nature of the various

population projections presented in this case, the three housing allocation plans before the court may be evaluated without indulging in a betting game on alternative futures. Alan Mallach distinguished allocation plans from population projections in the following manner:

> "A population projection is an effort to use the best available techniques to reflect the trends of what are estimated to happen. . . . .
>
> It reflects the policies that are the reality at the time population projections are made. If, for example, you had a county that hypothetically was permeated by exclusionary zoning projections, which significantly limited the number and type of units that could be built, then it is perfectly legitimate that a population projection reflect, among other factors, those zoning provisions, because that is part of reality whether or not you approve of them.
>
> A fair share allocation plan is a policy goal or policy direction. If present reality provided full housing opportunities, which is in essence the premise of fair share allocation, then there would be no need to do fair share allocation plans.
>
> So, therefore, the fair share plan explicitly incorporates a significant change in policy and in the overall thrust of growth from the conditions that obtain at the moment. So it is clearly something very different from a population projection." (T-IV-31-32)

A. <u>New Jersey Division of State and Regional Planning</u>: "A Revised Statewide Housing Allocation Report for New Jersey" (P-12)

The report entitled "A Revised Statewide Housing Allocation Plan for New Jersey," (hereinafter referred to as

the "Housing Allocation Plan") was prepared by the New Jersey Division of State and Regional Planning in response to executive orders 35 and 46 and represents the only uniform and comprehensive fair share housing plan in New Jersey. (T-I-45-46). As to Bedminster Township, the Housing Allocation Plan sets a "fair share" goal of 1,346 units for the 1970-1990 period; this allocation includes only low and moderate income housing needs (up to $14,000 annual family income), and specifically does not include the needs of the "least-cost" group (ineligible for subsidies but unable to purchase in today's market) (T-I-46-47).

The Housing Allocation Plan distributes present and prospective housing need to individual municipalities by giving equal weight to the municipality's: (1) vacant land; (2) personal wealth; (3) nonresidential ratable growth (1968-1975) and (4) employment growth (1969-1976) (T-I-48).

The allocation to Bedminster is artificially low because of the following problems:

1. The vacant land calculation excludes land under farmland assessment, regardless of whether it is prime farmland or not, and despite the fact that this tax program does not prevent the development of this very suitable land (T-I-110; T-III-143);

2. In setting the income limits for the low and moderate income group a statewide median income figure was used; use of the substantially higher North New Jersey median income figure would yield a larger need figure (T-I-111; T-III-142);

3. Most dramatically the 1975-1976 cut-off for employment and non-residential ratables caused the need figure to not reflect the 3,250 jobs and $60,000,000 ratable added by AT&T after the cut-off (T-I-108; T-V-39).

Accordingly, an update of this base data and increase in the vacant land figure would significantly increase Bedminster's fair share allocation (see Kasler, T-XXV-119-122).

B. Plaintiff's Fair Share Expert: Alan Mallach.

The first step in the Alan Mallach study involves the choice of the appropriate region. Alan Mallach chose three alternative regions: (1) Newark SMSA (4 counties) used by the U.S. Bureau of the Census for housing related purposes; (2) the Division of State and Regional Planning Region (8 counties); and (3) the Tri-State Region (9 counties) which this Court defined to be Bedminster's region (T-III-102-104). In his testimony, he acknowledged the lack of absolute precision in defining a region but justified his choices:

"I'd like to make one or two general comments that a region, in this case, a housing region or region for fair share purposes is a large area which reflects both housing needs and the ability to meet housing needs. And in the case of low- and moderate-income households, these households are concentrated in the central cities of Newark, Jersey City, Paterson, Elizabeth, East Orange and the like.

To the degree that the fair share involves some redistribution of low- and moderate-income population around a region as a whole, the region

> has to include, as well, areas that have, in addition to the employment where low- and moderate-income people are employed, land area capable of assimilating new housing units and the economic capability to do so. But it has to reflect the very substantial disparities between core cities and suburban and ex-urbans as they exist in New Jersey." (T-III-102)

His second step was to break down the State's population into four categories on the basis of income (T-III-109). The first category is low and moderate income (up to 80% of median income or $15,000) which would require, principally, some form of subsidized housing or rental subsidies (T-III-109); the second category (80% to 120% of median income $15,000 to $22,500) is that group which would be the principal beneficiaries of "least cost" housing (T-III-117-118); the third category (120% to 200% of median income, or $22,500 to $40,000) is the "upper-middle income" group which may find housing in some municipalities in a region; the fourth group (over "200% of median income or $40,000 and up) may be termed "upper income" and may find housing almost anywhere within a region (T-III-118-119). From these demographic characteristics, he was able to derive the future housing need, on the basis of population analysis; these future needs were added to the present, existing need as determined by the Division of State and Regional Planning, to produce a total need for lower cost housing (T-III-134-136).

Alan Mallach then allocated the need to the counties

and to the municipalities on the basis of employment, vacant land availability, and relative wealth (T-III-136-137). He further explained that, while his model had many similarities with the Housing Allocation Plan, he had certain methodical differences that lead to a more refined analysis in specific municipality application: (1) he employed the median income figure applicable to northern New Jersey rather than New Jersey as a whole; (2) he found the Division's exclusion from the developable category of all land under farmland assessment, rather than merely prime farmland to be too limiting; (3) he declined to rely solely upon short-term employment growth, which, in a case like Bedminster with AT&T, would produce skewed results; (4) he employed a somewhat modified formula for reallocating excess units for municipalities at their development limit; and (5) his model defines Bedminster's fair share for all four groups not just the low and moderate income housing need (T-III-142-147).

The application of Mr. Mallach's comprehensive housing need model to the Bedminster situation produced the following ranges of housing units needed for the year 1990:

low and moderate	-	2,300 to 3,500	
least cost	-	1,500 to 2,400	
upper-middle	-	1,300 to 1,950	
upper	-	500 to 650	(T-III-149-150)

Mr. Mallach then reviewed the Bedminster Zoning Ordinance to determine what zones could provide housing to address these needs (T-III-151; see Appendix "B", photo #11, P-58); he concluded that only the Compact Residential Cluster provisions

(Article 11), which are limited to 300 units as of right, could possibly provide housing for the lower income categories (T-III-157-158)), but that subsidized housing would not be feasible in the R-20 zone (T-III-159-163).

Not only does the Bedminster zoned capacity of 300 least-cost units fall substantially short of its fair share, but the ordinance fails to provide a cushion over its own fair share; Mallach explained the need for this cushion as follows:

> "Well, it's impossible to construct a precise mathematical formula for the amount of overzoning that is necessary. But if we look at the reasons for overzoning, we talk about the danger of land prices being bid up. The fact that many landowners have land that's suitably zoned may not want to sell at all for the purpose in mind, the fact that much of the land within a given zone may not be buildable for the particular purpose in mind by the virtue of the multiple fragmented land holdings or unsuitable parcels in other regards, it should be clear that the amount of overzoning must be substantial.
>
> In addition, the lower the income group for which one is seeking to build housing, the greater the overzoning has to be because the greater the likelihood that people who could afford more expensive housing will take up some part of those units.
>
> So as a result, I would suggest as a rule of thumb that overzoning, when we're talking about low and moderate income or least-cost housing, must be at least three times the actual production goal of dwelling units and perhaps more." (T-III-172)

C. Economic Critique of Traditional Fair Share Methodologies

In purported rebuttal to the fair share methodologies of the State and Mr. Mallach, defendant offered an economist, Edwin

S. Mills, who professed neither to be a fair share expert (T-XXXVI-77) nor to being familiar with zoning patterns, housing market data, housing demand or employment trends in northeast New Jersey or locally. (T-XXXVI-78-83). His "criticism" was based upon a generalized assumption that, in areas distant from employment opportunities, relatively fewer low income persons would elect to reside, even in the absence of exclusionary zoning practices (which he readily admitted do exist and do impair the natural market process). (T-XXXVI-34-35; T-XXXVI-50-51). Mills was wholly unable and unwilling to quantify the magnitude of the expected demand for lower income housing in Bedminster, being unfamiliar with the dispersal trends of employment in Northern New Jersey and especially the projections indicating that the outer ring of suburban counties, including Somerset, (i.e., those areas described by Mills as being "on the fringe of employment centers") would have, by 1980, 52% of all jobs in the entire State! (T-XXXVII-68-72).

Furthermore, while insisting that no fair share plan could adequately deal with housing allocation problems without including his "demand" elements*, he was unable

---

*Although Professor Mills was, for unexplained reasons, not asked to review Kasler's fair share model it would appear that his general criticisms would apply with at least equal force and effect to the Kasler model.

to identify a single fair share plan in the United States which incorporated his approach, and he conceded that, in actual practice, his modeling would be exceedingly complex because of the fact that past exclusionary practices have influenced housing and employment decisions. (T-XXXVII-12-13, 80).

Finally, Mills conceded that it would be also appropriate to consider "equity" factors such as low tax rates and community wealth in fair share modeling (T-XXXVII-13-16), which plainly, if employed herein, would increase Bedminster's fair share figure.

In short, Professor Mills proposed a very generalized perspective to fair share allocations. Since no attempt was made to quantity the generalized hypothesis or to evaluate the offsetting effect of the inclusion of "equity" factors not taken into account by him, it is difficult to perceive what useful information he has added to the debate.

D. Defendant's Fair Share Expert: Malcolm Kasler.

As compared with the prior witnesses, Mr. Kasler, the Township's fair share witness, offered a totally novel and

untested approach to fair share calculation.* Mr. Kasler expressed a surprising lack of familiarity with any and all established governmental fair share plans used throughout the United States, and a general disregard for their methodologies as "probably invalid" due to differing government frameworks (T-XXV-149-150); he was also not acquainted with the publications of Professor Jerome Rose, the predominant commentator on New Jersey exclusionary zoning (T-XXV-192).

Malcolm Kasler's first step was a selection of an appropriate region, which he determined to be a hypothetical journey-to-work commute of 45 minutes driving time to and from Bedminster, but which took no account of railway service or other public transport (T-XXV-8, 22). He contended that Bedminster's region should logically extend westward to include portions of Hunterdon, Warren and Sussex Counties, but should exclude the eastern counties of Bergen, Passaic,

---

* Mr. Kasler's statement that his methodology has previously been "accepted" by the courts is simply untrue. (T-XXV-213-214). In fact, in the only prior case in which he has testified (Caputo v. Chester Township, Law Division, Morris County, Docket No. L-42857-74), Judge Muir pointedly rejected Mr. Kasler's fair share study with the comment that "lesser weight should be given to the specific formula of the defendants because it ignores the gross region's fair share needs and appears to be more a result directed formula rather than an empirical study based upon objective factors." (Oral decision, October 4, 1978 at pages 87-88, see also page 28). Herein, Mr. Kasler used the selfsame formulation that Judge Muir found to be "result directed"! (T-XXIV-21).

Hudson and most of Essex (T-XXIV-62-63). Mr. Kasler was, however, unable to dispute the conclusions of the N.J. Department of Labor and Industry document "Journey to Work, New Jersey, 1970" which showed actual commuting patterns with a heavy eastward orientation. (For example, more Somerset residents work in Essex County and New York than either Morris or Mercer counties; nearly the same number work in either Bergen or Hudson as in Hunterdon County (T-XXV-35-39). Even Charles Agle agreed that the region was to the south and east, not west (T-XXIX-31).

A serious methodological error in the Kasler region is its termination at the boundaries of Newark, East Orange, Hackensack, Paterson and other areas of large need generation before the 45 minute limit was reached (T-XXIV-63; T-XXV-12). The witness was unable to justify this (T-XXV-15-19), although all fair share models he has prepared to date have the same curious result (T-XXV-28). Alan Mallach suggested that this result may in fact be a natural characteristic of all journey-to-work models because they have the practical effect of basing a developing suburban town's fair share on an entirely suburban region and requiring older cities and developed suburbs to meet their own housing needs (T-III-107-108).

His second step was to aggregate the existing 1970 need for all communities within his region, as compiled by the Department of Community Affairs in the preliminary draft report of 1975 (P-77); he never explained his failure to use the figures in the revised document (T-XXIV-69). From

this number, he subtracted all multi-family units reflected by issued building permits in the region between 1970 and 1976, contending that such units served to reduce the 1970 need figures (T-XXIV-71-72). The problems with this process are:

> 1. He made no effort to determine the actual rent levels for such new units, and therefore can be in no position to claim that any or all of the units actually did provide housing for lower income persons (T-XXV-53);
>
> 2. It assumes that all structures for which building permits were issued were actually built, when in fact it is likely that only a portion were actually constructed (T-XXV-217);
>
> 3. Although it purports to reflect prospective least-cost housing needs, it does not include least-cost needs in 1970 (T-XXIV-184).

His third step was to use a study called Modelling State Growth (James and Hughes) to determine future multi-family housing needs (T-XXIV-75). Unfortunately, this study concerns only housing need generated by projected employment growth and does not include natural population shifts and other demographic pressures (T-XXV-56). The Kasler Study then allocates this total housing need using the factors of the: existing employment, existing population and vacant land of the subject municipality (T-XXIV-97-101). The problems with these allocation factors are:

> 1. Present employment fails to reflect regional growth trends and understate need in the "sun-belt" of Somerset County; in fact, when Kasler revised his need figures to reflect 1977 as opposed to 1976 employment data, Bedminster's fair share doubled (T-XXV-119-120).

2. Present municipal population is a factor used only in Mr. Kasler's formula; he was unable to justify its use (T-XXV-88-92), although he recognized that it tended to favor municipalities which kept their populations low through exclusionary zoning (T-XXV-91).

3. Insufficient weight is given to the vacant land factor because this witness contends that it "does not create demand" (T-XXIV-101) and disagrees that it is the most important fair share criteria (T-XXV-105).

4. The failure to use any personal or community wealth factor which deals with suburban economic discrimination (T-III-137-138), which even Professor Mills indicated would be appropriate to include. (T-XXXVII-13-16).

5. Reallocations are not made to deal with communities with little or no vacant land; Kasler termed this an "unfair share" (D-73, p.12).

By varying the weight given to these factors this formula yields a fair share range for Bedminster of 681 to 1,059 to the year 1980 (T-XXV-74); if these figures are doubled as Mr. Kasler conceded to be necessary for comparison with other studies with 1990 horizons, a range of 1,362 to 2,118 results (T-XXV-71). Using the 1980 horizon, Mr. Kasler compared his fair share allocation with the capacity of the Bedminster Zoning Ordinance:

> "You may differ as to the amounts of the numbers and in fact I wouldn't be surprised that, obviously, the numbers are, I think, greater than Bedminster has zoned for. So that I am not so sure that the town itself agrees with the position I have taken." (T-XXV-190)

Defendant's witness did not accept the zoning cushion over fair share as expressly required by the Madison decision and his calculations fail to incorporate this factor which he called an unequitable or unfair share (T-XXV-132).

E. The Planning Board's Fair Share Determination.

Although Charles Agle offered to do a mathematical fair share study, the Planning Board chose instead to "approximate" fair share as "in the same ballpark" of the privately determined fair share for neighboring towns (T-XXVIII-66-68).* This fair share is only for the next 5 years. (T-XXVII-41)

Various witnesses for defendant attempted to justify the fair share number by a double-barreled argument, which in essence says "no one wants to live here, and anyway we don't want to (or can't) accomodate them". Both Robert Graff and Charles Agle felt that a market demand for higher density development had not been demonstrated in the Bedminster area (T-XXVII-166; T-XXXII-171). Mr. Agle testified that in his opinion, demand for housing is demonstrated when non-residents of a municipality petition the governing body to build housing for them; since this had not occurred, he could perceive of no demand for housing in Bedminster (T-XXXII-171-172). In discussing the reasons for this lack of housing demand, Robert Graff unintentionally revealed a new type of bias which may either mask or supercede the more traditional racial and economic prejudices:

*It is instructive to note that Bedminster, in calculating its minimal fair share, failed to apply the Mount Laurel admonition that where a community permits industry, it must also permit and promote housing within the means of the employees thereof. Mount Laurel, 67 N.J. at 187. Bedminster made no attempt to directly consider or evaluate the housing demand created by the massive AT&T facility and its 3,500 employees, despite express advice from Mr. Agle, prior to approving that facility, as to the fair share impact thereof. (See P-84).

"Country people are not like city people. That applies to rich and poor country people and rich and poor city people.

Country people think in terms of a different scale of reference than people who grow up in towns and suburbs.

They are constantly aware of the relationship between them and the weather, between them and the land between them and what surrounds them. They are influenced by temperature. All sorts of things for which suburban and city people are considered as something other than them. Something -- an environment, an air, an atmosphere that does to them and they must react against it.

All right. So if we say in a year's time one hundred families come to Bedminster and ten don't like it and go away, that is all right. . . . .

Ten more come instantly and it will be filled up.

But if we say 300 persons or 200 families come to Bedminster in a given year and don't like it, then that starts -- all because of the large numbers of persons compared to the rest of the eight hundred or nine hundred families in Bedminster -- that starts all kinds of political complications, all kinds of conceivable disgruntlement and a big to do in the township about what kind of town it is." (T-XXVII-191-3)

Regardless of the existence, vel non, of demand for housing in Bedminster, Mr. Graff testified that the town could afford to provide supportive services but did not wish to accomodate more than its "fair share" because of some vague desire not to become a "mini-central city" in the suburbs (T-XXVII-180).

V. Critical Area Regulations

Article 8 of the 1978 Zoning Ordinance creates a new Critical Area District in which all residential or other construction is prohibited;* this district allegedly includes land with slopes in excess of 15%** (P-21, §8.1). The 15% cut-off has not been justified by any municipal studies and contradicts the steep-slope definition in the 1974 Bedminster Natural Resources Inventory (P-55, p. 14) which is incorporated by reference into the current Master Plan (P-6; T-IX-50). John Rahenkamp found this cut-off unreasonable because three developments his firm planned - Hunting Ridge in Pittsburgh, Pa.; Flying Hills in Reading, Pa.; and Edgehill in Richmond, Va. - were successfully built on slopes of up to 30% (T-VII-165-168; see Appendix "B", photo #9, P-44). His experience suggested that slopes above 15% were not only buildable, but that townhouses could be produced at least-cost on 18% slopes (T-VII-163). Sensitive design and engineering which considers the natural features of the site would allow the installation of sewer, water, electric and telephone lines, plus pedestrian walkways, bike trails, etc. (T-XI-189-190). The potential use of this land was not disputed by Defendant's Planning Board Chairman,

*This represents a downzoning from the 1973 zoning of R-6 which permitted a net density of 1.88 units per acre and a gross density of 5.29 units per acre (T-V-118-119).

**An additional problem with these regulations concerns the inaccurate mapping of the steep-slopes as defined on the Allan-Deane property; 28 acres or 12% of the zone is actually less than 15% slope (T-IX-47). John Rahenkamp calculated that 90 units are improperly prohibited by this mapping error (T-IX-48-49).

who explained that these severe restrictions were based upon the Board's inability to reach a scientifically based conclusion on how much development was appropriate (T-XXVII-48). Mr. Graff testified to this dispute despite the recommendation made to the Planning Board by Defendant's second planning consultant (Richard Coppola) that the density of one unit per 10 acres was appropriate (T-XXXIII-181).

Not only John Rahenkamp, but Dr. Carroll (T-XIX-119) and William Roach (XXIII-188) expressed the view that if a town intended to preserve a slope, the best planning technique was to allow increased density on contiguous land in common ownership. Robert Graff stated that this solution, recommended in the Master Plan, was abandoned due to indecision concerning how much density credit was appropriate (T-XXVII-49-50). One definitive solution to this controversy is suggested in the Department of Community Affairs study, "A Guide For Residential Design Review" (D-39) which Charles Agle expressed familiarity with: that critical areas might be counted towards up to 40% of any required common open space, thereby increasing net densities (T-XXXI-163). In contrast, the Bedminster Ordinance preserves slopes by permitting various agricultural and public uses which Dr. Tedrow, a soil morphologist, declared to be economically infeasible (T-II-146-152). At best, timber harvesting every 15-20 years would yield a net

profit of $58,000.00, or $17,000.00 in present value for the entire 240 acres (T-V-65-68; T-VI-66). If the site were clear-cut, as permitted under the Ordinance, a very severe erosion condition would result for a period of five to ten years (T-II155-156; T-XIII-71).

Marvin Davidson, a real estate appraiser, valued the steep-slope transfer credits under the 1973 Ordinance at $3,384,000.00; by using comparable sales of less-restrictively regulated flood-plains, he valued the 240 acres under the 1978 Zoning Ordinance at $240,000.00 for a decrease in value of over 92% (T-III-25).

In sum, the municipality has failed to explain, much less to justify, the severe limitations imposed on the slopes.

POINT I

AT THE CLOSE OF PLAINTIFF'S PRIMA FACIE CASE, BEDMINSTER BEARS A HEAVY BURDEN IN JUSTIFYING ITS LAND USE CONTROLS.

The Supreme Court in Mt. Laurel held that the burden of proof shifts to the defendant municipality when a prima facie showing is made that the subject land use regulations fail to provide a variety and choice of housing. 67 N.J. at 181; this burden was described as a "heavy one". Similarly, when faced with an "ecology" defense the Court warned that any municipality seeking to invoke this rationale would bear a formidable burden in attempting to demonstrate that its case falls within the purview of this extremely narrow doctrine:

> "Generally only a relatively small portion of a developing municipality will be involved, for, to have a valid effect, the danger and impact must be substantial and very real (the construction of every building or the improvement of every plot has some environmental impact) not simply a makeweight to support exclusionary housing measures or preclude growth - and the regulation adopted must be only that reasonably necessary for public protection of a vital interest." 67 N.J. at 186, 187

It is Plaintiff's contention that Bedminster can only meet its burden of proof by showing that its land use regulations are the minimum required to protect a substantial and real public interest, and are not just a "makeweight" to support exclusionary zoning.

POINT II

BEDMINSTER'S 1978 LAND USE REGULATIONS ARE MORE EXCLUSIONARY THAN THE INVALID 1973 REGULATIONS.

A. Variety and Choice

In Mt. Laurel consideration of the universal need for housing for all categories of people was found to be an absolute essential in the promotion of the general welfare. The categories of people typically barred by restrictive land use regulations were described thusly:

> "The minority group poor...young and elderly couples, single persons and large growing families not in the poverty class, but who still cannot afford the only kinds of housing realistically permitted in most places...." (67 NJ at 159).

In order to satisfy the needs of this diverse group, the Court imposed what is colloquially known as the "Mt. Laurel Obligation":

> "As a developing municipality, Mount Laurel must by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income. It must permit multi-family housing without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like to meet the full panoply of these needs." (67 NJ at 187; see also 72 NJ at 516).

And see Shepard v. Woodland Tp. Comm. and Planning Bd., 71 N.J. 230, 238 (1976), highlighting that the concept of promotion of the general welfare, as articulated in Mount Laurel, "contemplates housing for all categories of people in both the community and the surrounding region." (emphasis in original).

The monumental task which faces a trial court in exclusionary zoning litigation was prophetically recognized by Justice Hall in the Mt. Laurel case when he stated:

> "The demarcation between the valid and invalid in the field of land use regulation is difficult to determine, not always clear and subject to change." 67 NJ at 176.

Fortunately, this Court's burden in a Rule 1:10-5 proceeding subsequent to the Madison treatise is eased by the availability of standards for comparison. Since a R.1:10-5 proceeding is designed to provide relief for violation of a previous court order, the primary inquiry must be: has the defendant in fact effected compliance. In the within action, the 1973 Bedminster Zoning Ordinance was found exclusionary (L.O.2, p.2); it follows that the court-mandated 1978 ordinance must at a minimum be proven less exclusionary for defendants to sustain their burden of proof. Additional guidance is provided by the analysis in the Madison case where the New Jersey Supreme Court considered the following factors in measuring the Township's compliance with the Trial Court Order:

1. Vacant developable land zoned for multi-family and small lot uses (72 N.J. at 504-6);

2. Achievable capacity of high density zones (72 N.J. at 506-7);

3. The effect of planned development provisions (72 N.J. at 507-510);

4. Cost generative provisions and housing costs (72 N.J. at 508, 520-1);

5. Regulations limiting the numbers of multi-bedroom units (72 N.J. at 517).

When measured by these five factors utilized in Madison, the 1978 Bedminster Land Use Regulations patently fail to meet the Mt. Laurel variety and choice obligation.

1. Vacant Developable Land Zoned for Multi-Family and Small Lot Uses.

Of the four residential districts established by the 1978 ordinance, over 81% of the vacant developable land is zoned for theoretical minimum lots of 2.81 acres. Another 16% of the remaining undeveloped land is zoned as a "critical area" which precludes all development. This 97% zoning for larger than 2 acre lots or no development at all may be compared with the invalid Madison zoning of only 17% of the vacant developable land for this use (72 N.J. at 504). A similar imbalance is revealed by comparing the ½ acre or larger minimum lot zones considered exclusionary in Mt. Laurel and Madison; in Madison, 65% of the vacant developable land was so zoned; in Bedminster the comparable figure is 98%. The third factor considered significant in Madison was the proportion zoned for multi-family uses; this zone in Madison comprised 2.3% of the township's vacant-developable acreage; in Bedminster the R-20 zone comprises only 1.3%* of

*The vacant developable acreage in the R-20 Zone is in dispute. If the court accepts defendants' expert Richard Coppola's testimony to the effect that there are 223.7 vacant developable R-20 acres (see T-XXXIII-213) then the precentage is 1.3. If the court accepts Allan-Deane proofs to the effect that the Bedminster Village R-20 zones are not usable for multi-family housing, that the YMCA property is deed restricted and that further land is unusable due to highway noise, the need for assemblage and variances and because land will be needed for the bypass, the usable acreage is about half of that asserted to be developable by Coppola. Even Coppola admitted that only 172 acres is presently developable without assemblage in accordance with the ordinance provisions. (See also full discussion of R-20 Zone in Statement of Facts).

such available land and additionally is the only area where housing on "very small lots" is permitted. In Mt. Laurel, minimum lot sizes of 9,375 to 20,000 sq. feet (or 2-5 units per acre) were declared not to be "very small lots" (67 N.J. at 170); in Madison, minimum lot sizes of 7,500 (or 6 units per acre) were implied to be "small" but were not considered to be a bona-fide attempt at least-cost housing because they were permitted on only 2% of the vacant developable land (72 N.J. at 505). The R-20 zone is the only zone where small lots, whether through as-of-right or planned development provisions, are permitted. The cumulative effect of this zone plan is that the 1978 Ordinance at best permits from 421 to 3,066 fewer multi-family units than the invalid 1973 Ordinance, and from 621 to 3,266 fewer total units. (Range depends upon bedroom mix) (See Appendix "B", photo #10, P-50). The defendants may claim that the 1973-1978 zoned capacities are not comparable because this Court found that the 1973 ordinance permitted multi-family development but at densities which made such development economically infeasible. (L.O., P25) However, for the reasons stated in the next section, the 1978 zoned capacity is equally theoretical and economically infeasible.

2. Achievable Capacity of High Density Zones.

Unlike the invalid 1973 Ordinance which permitted multi-family units in 2 of 3 residential zones, the 1978 Ordinance limits such housing to the R-20 Zone. One obstacle to housing

production recognized by the Madison Court was the substantial proportion of already developed land in the zone (72 N.J. at 506). In Bedminster, the testimony reveals that substantial portions of the R-20 Zone are comprised of existing residential uses, portions of existing business or institutional uses and existing and proposed roadways.

The second obstacle is the multiplicity of individually owned tracts which fail to meet the required 9 acre minimum for VN and CRC multi-family development; of nineteen individual parcels in the R-20, only six qualify for high density development. Testimony by plaintiff's experts indicated that assemblage of parcels to comply with the 9 acre minimum would be impossible; and variances from this minimum requirement for VN's and CRC's which are "conditional uses" (N.J.S.A. 40:55D-3) may not be granted by the board of adjustment (Brown Boveri, Inc. v. Tp. Comm. North Brunswick Tp., 160 N.J. Super 179 (App.Div. 1978)). Therefore, these undersized parcels can be used only for single-family development.

A third obstacle is formed by the interplay of the 150 unit maximum on "least-cost" developments, the required provision of "suitable sewer and water" and the Township's refusal to provide sewer services until long range regional water quality studies are available. Since regional water quality studies will not be completed for at

least six (6) years and the cost of individual package plants to small developments is impracticably high, no multi-family housing can be built under present regulations.

A fourth major obstacle arises from the fact that some 54 acres of the R-20 Zone is so noise impacted by the interstate highway system as to be deemed "unacceptable" under federal standards. At the least, such impact would jeopardize any realistic possibility of federal funding for subsidized housing. At most, the noise effects renders these properties wholly unsuitable for high density development and would require, as a necessary precondition to any form of residential development, the expenditures of very substantial monies to minimize the impacts (T-XL-60-61).

The choice of the Rte. 287-78 intersection area for multi-family development, given the relative amount of vacant developable land throughout the Pluckemin Corridor, raises serious questions with respect to both the rationality of the rezoning process and the Township's true intentions. Bedminster, which professes heightened environmental sensitivity in defending its large lot zoning in the great bulk of the community, demonstrates little comparable regard when addressing the "environment" of its future lower income residents.*

3. The Effect of Planned Development Provisions.

The Madison Court analyzed the "PUD" and "cluster" provisions of that town's ordinance to determine if it

*See unpublished opinion of Judge Gaynor, March 30, 1979, in the Austin Co. v. Bernards Township, supra, for discussion of anticipated noise levels associated with completion of Route 78 and unsuitability of zoning abutting lands residential.

would be justifiable to rely on such provisions to satisfy the town's fair share (72 N.J. at 507); the Court termed such reliance illusory because of various defects which also are present in the Bedminster Ordinance.

The Madison Court found that allowable densities of up to 1.67 units per acre in a cluster were still too low to create significant cost savings (72 N.J. at 509). More than two years later, Bedminster permits densities up to 1.86 units per acre in "open-space clusters" in the R-8 Zone. "Twin houses" in open-space clusters range from .77 to 2.35 units per acre, but all planning testimony in this case indicated that twin houses would not be actually produced at densities less than 4 units per acre.

Other problems the Bedminster ordinance shares with the Madison planned development provisions are:

1. Minimum tract areas which were unlikely to be met through assemblage of individually owned parcels (72 N.J. at 508); Allan-Deane's experts testified to the same result from nine and 25 acre minimums in the Bedminster Ordinance;

2. Three-stage approval process (72 N.J. at 508); Bedminster requires a 5 to 6 stage process.

The Bedminster Ordinance's implicit lack of commitment to good planned development is indicated by its failure to include, in its own purpose section, the Municipal Land Use Law statement of purpose which deals with the encouragement of efficiency and proper design (N.J.S.A. 40:55D-2(k)).

4. Cost-Generative Provisions and Housing Costs.

Some of the cost-generative provisions of the 1978 Ordinance are discussed at pages 40-42 of the Statement of Facts. The site development costs attributable to these and other provisions which could be "costed out" under the 1978 Ordinance were $10,056.00 per unit, a full 25% higher than under the invalid 1973 Ordinance and substantially higher than the "exactions" found to be unreasonable in Madison. (72 N.J. at 520-521).

Other cost-generative provisions which could not be "costed out" are:

Land Development Ordinance

1. The "Environmental Impact Statement" which parallels the N.E.P.A. requirements recognized by H.U.D. and the Council on Environmental Quality as cost-generative when applied to individual projects, (§4.3.1) (2 EIS's are required per development);

2. Failure to permit phasing of bond releases with construction (§4.3.12.1);

3. Fees discussed at Point V, A, 2 of this brief;

4. Requirement of percolation tests for all developments including those with sewers (§5.2.7);

5. Design of on-site stormwater systems discussed as Point V, A, 5 of this brief.

6. Granite curbing. (Art. IV, §2.3)

7. Excessive curbing requirements. (Art. IV, 2, 3, 4)

The Bedminster land use regulations prevent the production of reasonably priced housing because of the disproportionately large amount of land zoned for large lot residential

use, the ineffective planned development provisions, the minimal housing capacity of the multi-family zone and the general cost-generativeness of defendant's land use regulations.

The magnitude of this effect was indicated by Alan Mallach in a breakdown of housing need by income group:

Group	Need	% of Need Met by 1978 Bedminster Ordinance
1. low and moderate	2300-3500	6.2%
2. least-cost	1500-2400	6.2%
3. upper middle	1300-1950	83.7%
4. upper	500-650	653.7% (P-33)

The New Jersey Supreme Court has indicated by clear and unambiguous language in Mt. Laurel that the municipal zoning obligation is to provide a variety and choice of housing for all categories of people. See also Shepard v. Woodland, supra, 71 N.J. at 238. The 1978 Bedminister Ordinance is a blatent failure in this respect.

5. Regulations Limiting the Number of Multi-Bedroom Units.

A separate and distinct limitation on a prospective resident's variety and choice is Bedminster's required bedroom mix applicable only to multi-family units. Section 11.2 of the Ordinance requires that all VN and CRC developments have a fixed percentage of one (25-40%), two (25-30%), three (20-25%) and four (10-25%) bedroom units.

This regulation violates the equal protection mandate of the New Jersey Constitution by placing a limit on the

number of members of a family that may reside in a given type of housing. Molino v. Mayor and Council of Borough of Glassboro, 116 N.J. Super 195, 204 (App.Div. 1971). In Molino, when faced with a similar regulation setting a maximum percentage for one, two and three bedroom units, the Court said:

> "The effort to establish a well-balanced community does not contemplate the limitation of the number in a family by regulating the type of housing. . . . Exclusionary zoning may lead to illegal and unwanted conditions, which are violative of individual rights. No municipality may isolate itself from the difficulties which are prevalent in all segments of our society. When the general public interest is paramount to the limited interest of the municipality, then the municipality cannot create roadblocks. Zoning is not a boundless license to structure a municipality" 116 N.J. Super at 203-4.

This decision was cited with approval in Mt. Laurel where the Court found bedroom limitations to be "so clearly contrary to the general welfare as not to require further discussion" 67 N.J. at 183.

When faced with implicit bedroom limits which resulted from the interaction of a 23% FAR (10,000 sq. ft. per acre) and building economies, the Supreme Court in Madison did not retreat from its disapproval of set bedroom-mix requirements; it merely required municipalities to act to encourage rather than discourage moderate and large sized units:

> ". . .a municipality can and should affirmatively act to encourage a reasonable supply of multi-bedroom units affordable by at least some of the lower income population." 72 N.J. at 517

The Court then recommended three "encouragement" methods:

1. Bulk and density restrictions;

2. Density bonuses;

3. Minimum bedroom provisions and expansion of the FAR.

Bulk and density controls were thought to be a necessary complement to FAR regulations, since the FAR by itself caused an over production of small units. Since Bedminster has implemented bulk (minimum dwelling unit sizes) and density controls* (the FAR and minimum "circle"), the bedroom mix is an unnecessary, superflous and unjustified regulation.

A second type of control permitted was density bonuses, described as:

> "The density bonus indicated in this context as the bonuses of, for example, an additional single-bedroom or efficiency (in addition to those densities generally permitted) for every three or four bedroom unit constructed." 72 N.J. at 517 n.27. (Emphasis added)

The Bedminster bedroom mix clearly does not grant a bonus beyond permitted densities; and the effect is contrary to the bonus provision above because the more multi-bedroom units a developer provides, the fewer the small units that can be included in the mix.

The third type of permitted control is a minimum

---

*Due to insufficient densities these regulations by themselves would not provide multi-bedroom units of the least cost variety.

bedroom provision in conjunction with an expanded FAR; this provision would operate in the same way as the second control, namely to allow increased lot coverage (density) in return for more multi-bedroom units.

Bedminster has chosen none of the three approved methods for encouraging multi-bedroom units. Instead it has adopted a required bedroom mix, purportedly based on family size distributions from the 1970 national census.* These regulations on their face violate Molino by setting a 25% maximum on the number of three or four bedroom units and prohibiting larger units. In addition, the overwhelming weight of testimony in this trial indicates that this inflexible mix requirement is not responsive

---

*The Court in Home Builders League of So. New Jersey v. Berlin Tp., 157 N.J. Super 586 (Law Div. 1978) found that:

> "the average size of all households in the United States steadily decreased from an average of 3.37 persons in 1960 to 3.14 persons in 1970, with a projected continued decline to 2.17 persons by 1990. This trend is reflected in statistics for New Jersey which project that 83.6% of new households in the State between 1970 and 1990 will consist of one or two persons" 157 N.J. Super at 592.

The Court concluded on the basis of this decrease in household sizes that an ordinance requiring homes to have a minimum floor area was invalid. Mallach presented the same testimony in this case indicating that Bedminster's mix requirement no longer approximates family size distributions.

to market demands and might by itself prevent the production of any multi-family units; specialized market developments such as senior citizen housing is also prohibited by this provision. Because bedroom limits are so clearly contrary to the general welfare they must be removed in their entirety.

Moreover, because these bedroom mix requirements practicably prevent the provision of senior citizens housing, comprised of one bedroom and, at most two bedroom units, the ordinance restrictions are contrary to the public policy of this State. In N.J.S.A. 40:55D-2 (l) it is expressly provided as an intent and purpose of the Municipal Land Use Law:

> "To encourage senior citizens community housing construction consistent with provisions permitting other residential uses of a similar density in the same zoning district."

The Supreme Court of New Jersey has explicitly recognized that the provision of senior citizens housing promotes the general welfare of the citizens of the state at large and represents a particular and pressing need to be addressed. Shepard v. Woodland Tp. Comm. and Planning Bd., 71 N.J. 230 (1976); Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., 71 N.J. 249 (1976). Yet, despite this clear and recognized need, the bedroom mix requirements in the Bedminster ordinance effectively thwart any such development.

B. Fair Share of Least-Cost Housing

In recognition of the fragmentary availability of federal subsidy programs, the Madison Court supplemented the Mt. Laurel obligation of "adequately providing the opportunity for low and moderate income housing" with an obligation to zone for least-cost housing. (72 N.J. at 512). In support of its conclusion that low income housing could be provided through this mechanism, the Court said:

> "Nothing less than zoning for least-cost housing will in the indicated circumstances, satisfy the mandate of Mt. Laurel. While compliance with that direction may not provide newly constructed housing for all in the lower income categories mentioned, it will nevertheless through the "filtering down" process tend to augment the total supply of available housing in such manner as will indirectly provide additional and better housing for the insufficiently and inadequately housed of the region's lower income population." (72 N.J. at 514) (Emphasis added)

In an early part of the Madison decision, the Supreme Court indicated that a reviewing court does not have an absolute duty to determine a numerical fair share, but instead, should look to:

> ". . .The substance of a zoning ordinance under challenge and to bona-fide efforts

toward the elimination of undue cost-generating requirements in respect of reasonable areas. . ." (72 N.J. at 499) (Emphasis added)

As section II A of the Argument section of this Brief indicates, Bedminster's zoning effort fails to pass even this general test of validity. However, the Court's inquiry should not terminate with this preliminary analysis since the Madison Court did pose and answer the question of how much least-cost zoning is enough:

". . .it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible least-cost housing. . .in amounts sufficient to satisfy the deficit in the hypothesized fair share."

* * *

". . .sound planning calls for providing a reasonable cushion over the number of contemplated least-cost units deemed necessary". (72 N.J. at 512, 519) (Emphasis added)

1. The Appropriate Region.

The Madison Court suggested according other fair share studies as much weight as they merit in light of their emphasis on a properly demarcated region. (72 N.J. at 543). The question of the appropriate region was considered essential because:

"Harm to the objective of securing adequate opportunity for lower income housing is less likely from imperfect allocation models than from undue restriction of the pertinent region." (Emphasis ours)

The Madison Court left no doubt that the definition of region it favored was "the housing market area of which the subject municipality is a part" (72 N.J. at 537, 538-9, 543). Examples offered of regions large enough to form legitimately functional housing markets included:

1. Miami Valley Regional Planning Commission - (5 counties, 31 municipalities, up to 60 miles from center of Dayton, Ohio)
2. Metropolitan Washington COG - 15 counties
3. Metropolitan Council of the Twin Cities - 7 counties, 300 local jurisdictions
4. Delaware Valley Regional Planning Commission - 9 counties

(72 N.J. at 538 - 539)

The advantage of these cited regions is that they are of such size that it is difficult to conceive of a substantial demand for housing therein coming from any one locality outside the "region". Like the regions cited above, both of the court-determined Mt. Laurel and Madison regions covered at least one older built up city in order to include demand generated by city residents living in over-crowded, substandard housing far from the suburban job market (67 N.J. at 190; 72 N.J. at 528).

When compared with the court mandated "market area" definition of region, only the Kasler study comes up

short. The inherent defect of his "hypothetical journey to work" methodology is that it defines the pertinent housing region by existing home-to-work commuting patterns which incorporate existing exclusionary zoning patterns; this is not responsive to the general concept of region supported by the Madison Court:

> "the area from which, in view of available employment and transportation, the population of the township would be drawn absent invalidly exclusionary zoning" (72 N.J. at 537).

A further defect which makes the Kasler methodology inconsistent with the rationale of Mt. Laurel and Madison is its failure to include any of the major need-generating cities which appear to fall within his 45 minute commute circle. Mt. Laurel suggests that if commuting times or distances are used to define the applicable region the centroid must be a large need-generating city like Camden (67 N.J. at 162).

Although this Court has already determined, for the purpose of this litigation, the appropriate housing region for Bedminster, Defendants continued to argue for a smaller region. (see L.O.2 - p.2). We contend that the appropriate region is that nine county region originally determined by this Court, not only under the doctrine of collateral estoppel but also because that region continues to meet the criteria set forth in the evolving case law.

2. Fair Share Allocation Formulas.

Both the New Jersey Housing Allocation Report and the Mallach study utilize the recognized allocation factors of vacant land, present and future employment and personal wealth. All three of these factors are explicitly approved of in Mt. Laurel and Madison (see 67 N.J. at 172-173; 72 N.J. at 542). The inadequacy of the Kasler approach is adequately discussed at pages 33-37 of the Statement of Facts.

3. Resulting Fair Share Numbers and Appropriate Horizon.

The fair share of regional low and moderate income housing need to 1990 allocated to Bedminster by each of the studies are as follows:

	Need to 1990
N.J. Housing Alloc. Plan	1,346
Mallach (3 regions)	2,300 - 3,500
Kasler (weighted factors)	1,362 - 2,118

By comparison, the Bedminster Zoning Ordinance provides for only 300 "least-cost" units; this fair share number has been defended as a "staged fair share" to be increased if and when the hypothetical demand for "housing in the country" materializes.

Aside from its facial violation of Mt. Laurel, this provision fails to meet the Municipal Land Use Law requirements for conditional uses. The second 300 "least cost" CRC

units are a conditional use because they are permitted only on a special planning board authorization indicating a showing of compliance with zoning ordinance standards (N.J.S.A. 40:55D-3). The "second stage 300" are also a conditional use and are permitted unless:

> "review at the time should indicate that adequate infrastructure cannot be provided, environmental constraints dictate such additional units cannot be accommodated or the Township's regional obligation has been fully satisfied." (Article II, section 11.1 Bedminster Zoning Ordinance, P-21).

All of Plaintiff's planners concluded that these standards fail to meet the Municipal Land Use Law conditional use requirements of "sufficient certainty and definiteness to enable the developer to know their limit and extent" (N.J.S.A. 40:55D-67). Even if these prohibitive "standards" were removed, Bedminster's good faith in using the unsanctioned timed growth mechanism to put a "cap" only on least-cost housing raises the specter of exclusion and differentiates this approach from typical growth controls (67 N.J. at 188).*

*In fact, some growth control plans require developers to provide a minimum percentage of low and moderate income units - see the plans of Montgomery County, Maryland, Boulder, Colorado and Petaluma, California discussed in Einsweiler, R.C., et al, "Comparative Description of Selected Municipal Growth Guidance Systems," Management and Control of Growth, Vol. II, (American Law Institute, R. Scott, ed.) p. 283.

See also: Wolfson, "Exclusionary Zoning and Timed Growth: Resolving the Issue After Mt. Laurel," 30 Rutgers Law Review 1237 at 1256 (1977); Zumbrun, R.A. & Hookano, P.E., "No Growth and Related Land Use Legal Problems: An Overview" 9 Urban Lawyer 122 (1977); Ellickson, R.D., "Suburban Growth Controls: An Economic and Legal Analysis" 86 Yale Law Journal 388 (1977).

Both Defendant's planning consultant and its planning board chairman justified the least-cost "cap" by the absence of housing demand in Bedminster; however, the record in this case, as well as defendant's planning consultant's own fair share study (Kasler) do not support this reasoning. Additionally, if defendants were correct in their assessment of the lack of housing demand, no amount of high density zoning would cause excessive population growth.

All the testimony in this case indicates that a 5 to 6 year "fair share" planning horizon is unrealistic. Even municipalities willing to push approvals through to enable the speedy production of housing cannot assure that planned development and/or large multi-family housing developments will be planned, approved and constructed in such a short span of time. As a result, when Bedminster re-examines its master plan and development regulations in 5 years pursuant to N.J.S.A. 40:55D-89, it will find no housing produced as a result of its "least-cost" provisions and will conclude that the regional need has been met elsewhere. In other words, this short time frame assures the result of no further fair shares.

Since Defendants have failed to produce a real and substantial public interest to justify the exclusionary effect (as measured by their own fair-share study) of this "staged" fair-share mechanism, they have failed to meet their heavy burden of proof.

POINT III

BEDMINSTER'S CRITICAL AREA REGULATIONS ARE AN UNAUTHORIZED, UNREASONABLE AND ARBITRARY EXERCISE OF THE ZONING POWER AND HAVE A CONFISCATORY EFFECT.

A. THE CRITICAL AREA REGULATIONS ARE AN UNAUTHORIZED EXERCISE OF THE ZONING POWER BECAUSE THEY CONFLICT WITH THE LAND USE PLAN ELEMENT OF THE MASTER PLAN.

The Municipal Land Use Law (N.J.S.A. 40:55D-62(a)) requires a Zoning Ordinance to be substantially consistent with the "Land Use Plan Element" of the Master Plan. No definition of the "Land Use Plan Element" is set out in the Land Use Law, but it is described in N.J.S.A. 40:55D-28b to be the most comprehensive element of the Master Plan. The Bedminster Planning Board has declared its intent to continue "environmentally-based zoning" (P-6, Preamble pp. 2-3; Art. II, Land use Plan p. 4, 6; Art. III, Housing Plan p. 8, 9, etc.). Because of this, the court should consider the MLUL "Land Use Plan Element" to include both the Environmental Protection Plan (Art. VIII) and the Land Use Plan (Art. II) of Defendant's Master Plan in determining whether the 1978 Zoning Ordinance conforms with the requirements of N.J.S.A. 40:55D-62a. To do otherwise, would be to exalt form over substance by blindly respecting labels used to frustrate the legislative intent of N.J.S.A. 40:55D-62.

The section of Defendant's Environmental Protection

Plan with which the Zoning Ordinance conflicts concerns the proper compensation for private owners of land in critical areas and reads as follows:

> "Open land in critical areas has great social and ecological value but limited economic value. It is not yet practical to finance the purchase of all such areas for public ownership. In fairness to private owners, two approaches to such land areas should be taken.
>
> On steep slopes, 15% grade or above, erosion becomes more dangerous and expensive to control. Wild forestry and tree farming under supervision of the state are the only feasible land uses. Second, the possible inclusion of minimal credit in the gross Floor Area Ratio calculations for the usable (non-critical) land on the same parcel or on one immediately adjacent to the critical parcel. This is justified because the increased number of residences on the non-critical land will enjoy and benefit from the light, air and view resulting from the immediately adjacent and visible open space." (Emphasis added)

Although the Master Plan mandates a combination of restricted uses and compensatory density credits, several provisions of the zoning ordinance when read together prohibit density credits for land in critical areas. This conclusion results from the use of the "Floor Area Ratio" to control density in each district. FAR is defined as the ratio of "gross floor area" to "gross site area"; and "gross site area" is the total lot area lying within a single zoning district, thus precluding density credit transfer on an individually owned parcel lying partly in a critical area district and partly in a residential district.

Despite Defendant's Planning Consultant's familiarity with the compensatory density credit approach, this provision was explicitly not incorporated into the Zoning Ordinance. The Critical Area Regulations are thus not substantially consistent with the Land Use Plan Element of the Master Plan and are beyond the power to zone granted by N.J.S.A. 40:55D-62a. Since municipalities have no power to zone except as delegated to them by the legislature, these Critical Area Regulations are void ab initio. Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., 71 NJ at 263, J.D. Construction Corp. v. Freehold Tp. Bd. of Adjustment, 119 N.J. Super 140, 144 (Law Div. 1972); they are also similarly invalid under the State Constitution, Mt. Laurel, 67 N.J. at 175.

B. The Critical Area Provisions are Confiscatory.

1. The Preservation of Public Park Land on Private Property--the Absence of Governmental Power.

The Fourteenth Amendment, as well as the New Jersey Constitution, (Article I, par. 20), prohibit the effective appropriation of private property rights without due process of the law and the payment of just compensation therefor.

Although a taking may be more readily found when the interference may be characterized as a physical invasion, it is well established in the decisional law of this jurisdiction, and throughout the nation, that a taking may occur indirectly through excessive regulation or restriction under the police power. In Morris County Land, etc. v. Parsippany - Troy

Hills Township, 40 N.J. 539 (1963), the New Jersey Supreme Court embraced what it described as the "universal truth of the pithy observation of Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L.Ed. 322, 326 (1922)":

> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 40 N.J. at 555.

Accord: Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370 (Sup. Ct. 1945); Kozesnik v. Montgomery Tp., 24 N.J. 154, 182 (1957); Spiegle v. Borough of Beach Haven, 46 N.J. 479 (1966); cert. denied, 385 U.S. 831, 87 S. Ct. 63, 17 L.Ed. 2d 64 (1966); Washington Market Enterprises v. city of Trenton, 68 N.J. 107 (1975).

In Parsippany-Troy Hills, plaintiff challenged the constitutional validity of zoning ordinance provisions which restricted the use of a 1500 acre tract of swampland known as Troy Meadows. Plaintiff's property in issue consisted of a 66 acre tract which was continguous to its more substantial holdings in an adjacent township. The character of the land was typical swampland, of low elevation, high water table, with a surface and underlying soil formation which made it marginal for building. There

was little existing development in Troy Meadows, which served as a "sponge" or natural detention basin protecting municipalities further downstream in the Passaic River Valley. Earlier zoning ordinances placed this swampland in a large-lot residential zone (similar to defendant's R-3 zone) in order to minimize development. The zoning classification at issue, however, was more restrictive (although variances were possible), allowing only the following uses:

> agricultural
> woody and herbaceous plant-raising
> greenhouses
> aquatic plant and fish food raising
> recreational
> public conservation, utility or water supply

Justice Hall found such regulations blatantly unconstitutional:

> "While the issue of regulation as against taking is always a matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention basin or open space. Nor is the situation saved because the owner of most of the land in the zone, justifiably desirous of preserving an appropriate area in its natural state supports the regulations. Both public uses are necessarily so all encompassing as practically to prevent the exercise by a private owner of any worthwhile rights or benefits in the land So public acquisition rather than regulation is required."
> 40 N.J. at 555-556.
>
> "It is generally obvious from the proofs, and legally of the highest significance, that the main purpose of enacting regulations ... was for a public benefit." Id. at 553. (Emphasis added).

See also Fred French Investing Co., Inc. v. City of New York, 39 N.Y. 2d 587, 38 N.Y.S. 2d 5, 350 N.E. 2d 381 (1976) appeal

dismissed, 429 U.S. 090, 97 S.Ct. 515, 50 L.Ed. 2d 602 (1976); Grimpel Associates v. Cohalan, 41 N.Y. 2d 431, 361 N.E. 2d 1022 (1977); MacGibbon v. Bd. of Appeals of Duxbury, 356 Mass. 635, 255 N.E. 2d 347 (1970); Dooley v. Town Plan and Zoning Comm. of Fairfield, 151 Conn. 304, 197 A. 2d 770 (1964); State v. Johnson, 265 A. 2d 711 (Me. 1970).

Thus, one of the major factors focused upon in analyzing the taking question is whether the challenged regulation has the purpose or practical effect of appropriating private property for public benefit.

Defendant's ordinance is explicit in its statement of regulation for public benefit. Article 8, §1 of this ordinance reads:

> STATEMENT OF PURPOSE. Development in Critical Areas, ... those areas having slopes 15% or greater, increase the risk of flooding and erosion both on and off-site. Therefore, development in these areas must be minimized and carefully regulated to protect the public safety and welfare. (Emphasis added).

The Bedminister Township Master Plan forms the basis for these zoning regulations and states within the sections entitled Environmental Protection Plan:

> "the steep slopes in excess of 15% grade have been designated for permanent open space and should be left wild or devoted to timber stand improvement to prevent erosion."
>
> "open land in critical areas has great social and ecological value but limited economic value. It is not yet practical to finance the purchase of all such areas for public ownership."

For purposes of following the evolution of the present

Master Plan and Zoning Ordinance the following deleted sections of the November 14, 1977 Master Plan are of interest to this discussion:

I. General Objectives

"It is clear that private ownership of open space is essential to New Jersey's future because the state cannot afford to own sufficient open land" (deleted)

VII. Recreation Plan

"The steep slopes of the Watchung Mountains should be reserved for forestry and nature walks." (deleted)

VIII. Environmental Protection Plan

"The steep slopes in excess of 15% grade have been designated for permanent open space. . . ." (deleted)

The deletion of these statements hasn't altered the clear intentions underlying the steep slope regulations. The Township has attempted herein to accomplish by indirection that which it declines to do directly--the retention of large areas of private property in their natural state. Indeed, as the Defendant's own economic expert conceded, the preservation of raw land, for essentially aesthetic and recreational purposes, principally inures to the benefit of those nearest (T-XXXVI-92-94) the open land and not those located far away--thus belying the Township's alleged intention to keep open areas for the benefit of all the region's populace. In fact, it is readily apparent that the Township seeks to retain, by these regulations, the amenities of vast forest areas for the pleasure of local, existing residents only, at the expense

of the property owner.*

2. The Taking Issue.

The second part of the test for confiscation involves the determination of whether the challenged regulation has the practical effect of appropriating private property. Appropriation may be demonstrated if the subject land owner retains no reasonable use of the property, or in the alternative, if the value of the property is substantially destroyed.**

---

*In fact, a more sinister intent may be divined from the zoning history in Bedminster. Under the prior zoning regulations, development was permitted on these slopes, or, at the very least, development credits were permitted for adjacent properties. The Township, despite actual knowledge of the plaintiff's intentions not to build on the slope if crediting were allowed, elected to carve out this area for total non-development and thereby tried to thwart the plaintiff's plan to maximize the enjoyment of this natural amenity by future residents. The zoning history of Bedminster, then, strongly suggests that the municipality seized on this gross regulatory provision as a tactic to deflect any reasonable PUD development proposal, rather than in any reasoned sense of concern for the commonwealth. Indeed, Professor Mills, the Township's economist witness, stated his opinion from a general survey of suburban zoning, that the use of "open space" zoning, as well as bans on development until the provision of public sewers, represented more refined exclusionary techniques employed by sophisticated municipalities. (T-XXVI-87).

**It should be noted that the fact that the plaintiff herein does not presently intend to develop on the slope, if reasonable densities are permitted elsewhere on its property, in no way depreciates its right to challenge the lawfulness of the Critical Area zoning. See Piscitelli v. Tp. Comm. of Tp. of Scotch Plains, 103 N.J. Super. 589, 594 (Law Div. 1968).

Clearly a restraint against all reasonable use of private property is confiscatory and beyond the police power. Morris County Land, etc. v. Parsippany-Troy Hills Township, 40 N.J. 539, at 557; Kozesnik v. Montgomery Township, 24 N.J. 154, at 182 (1957). Such a result follows where the land cannot practically be utilized for any reasonable purpose, or when the permitted uses are those to which the property is not adapted or which are economically infeasible. Gruber v. Mayor and Township Committee of Raritan Township, 39 N.J. 1, at 12 (1962); Arverne Bay Construction Co. v. Thatcher, 278 NY 222, 15 NE 2d 587, 117 ALR 1110 (Ct.App. 1938).

The following general uses (which are the same as those found confiscatory in Parsippany - Troy Hills) are permitted by defendant's zoning ordinance in a critical area:

class 1. floriculture, horticulture, silviculture, sod farms, grain and feed crops, dairy and poultry production, greenhouse products, fruit and vegetable production, and related activities;

class 2. golf courses, pervious tennis and other open air sports; and

class 3. public uses (approved by N.J. Department of Environmental Protection), parks and playgrounds.

The designated "steep slope" section of the Allan-Deane property is clearly unsuited to the first class of uses because of the property's steepness and the stoniness of the Neshaminy soil type found thereon; the second class of uses is also prohibited by soil type and slope considerations; the third class of uses are public in nature, of the same type found economically infeasible in Parsippany - Troy Hills. Ibid. at 552. Dr. Tedrow of Rutgers University testified at length as to the unsuitability of the property for the listed agricultural uses, concluding that the only conceivable application of the land would be for the growing of trees, although he has serious reservations as to the economic viability thereof; he based his conclusions upon data in the Somerset County Soil Survey (D-6), verified through on-site inspection. In this vein, it is significant to note that the Township used the Somerset County Soil Survey (D-6) in compiling the Natural Resources Inventory (included by reference in P-5), and therefor should have been aware of the unsuitability of steep-slope areas for agricultural use.

As to the forestry use, the testimony of Paul Berezny, a New Jersey forester, demonstrated this alternative to be clearly unprofitable; the best net return possible is $58,000 every 10-15 years, which translates into a return of between $12 and $16 per acre per year, without discounting for present worth and without subtracting real estate taxes. Such a "return" is nominal at best. Thus, defendant's critical area regulations do not permit any reasonable use of 240 acres or 52% of Allan-Deane's property in Bedminster. This impermissible effect upon the 240 acres located in the separate "Critical Area" Zoning District is not mitigated because the value of plaintiff's other holdings in Bedminster may have been increased by virtue of the enactment of the challenged ordinance.* AMG Associates v. Tp. of Springfield, 65 N.J. 101 (1974), considered the propriety of a zoning ordinance which zoned the portion of plaintiff's property within 150 feet of the roadway for certain commercial use, and a strip of land 40 feet wide across the rear of plaintiff's lot for residential use; this rear portion

*This mitigation argument, if pursued by the Township, is both curious and illogical. Apparently, Bedminster would urge that it might appropriate for public purpose more than 1/2 of plaintiff's property in return for higher density zoning elsewhere in the municipality. Short of the exercise of eminent domain, the Township simply is without power to prohibit the utilization of private property.

was too small to meet the area requirements of the residential zone in which it was placed. The New Jersey Supreme Court indicated that the "taking v. regulation" analysis will focus upon the diminution in value and utility of each specific portion of a parcel affected by an ordinance, and award compensation whenever the value and utility of any one given part of a parcel of property has been impaired:

> "We rather hold to the view that, in the split lot situation, an owner cannot validly be deprived of all reasonable utilization, for the benefit of another private landowner, of that portion of land (beyond a de minimis situation) which otherwise, by reason of inability to meet the requirements of the zone in which it is situate, is practically unusable, yet remains subject to the burden of taxation." 65 N.J. 101 at 111-112.

The appropriation of the Allan-Deane property may also be demonstrated by the degree to which the value of land is diminished by the challenged regulation. Admittedly, every restriction on the use of land, imposed pursuant to the police power, abridges some property right, Pennsylvania Coal Co. v. Mahon, supra. (dissenting opinion of Brandeis, J.). However, when the regulation challenged decreases its value substantially, a confiscation of private property occurs:

> "The especially relevant thesis running through our cases in this field of the law is that the test of invalidity is not necessarily the complete unusability of the property involved for the now permitted

> uses, but rather whether, in view of the extent of the now prohibited uses in the close vicinity of the parcel, its value will be substantially depreciated and its marketability greatly impaired if the prohibited uses are not allowed." Odabash v. Mayor and Council of Dumont, 65 N.J. 115 124 (1974). (Emphasis added).

The appraisal by Halpern-Davidson, Inc. indicated that these regulations caused a 93% devaluation (from $3,384,000 to $240,000) of 240 acres of the Allan-Deane holdings. The remedy which the AMG court proposed was the utilization of the rear portion of plaintiff's property for some purpose auxiliary to the use in the commercial zone, such as "a building or on-site parking." The remedy for the instant controversy short of required condemnation would be to permit the steep slope area to serve a use auxiliary to plaintiff's adjacent parcel, by providing acreage to be included in planned development area requirements computations or as a basis for building "credits", which plaintiff could utilize on the portion of its Bedminster property outside of the steep slope area. This "transfer" provision was included in defendant's previous ordinance and although recommended in the new Master Plan, has been explicitly omitted from the present zoning ordinance.

Bedminister's focus has apparently been narrowed rather than broadened by this Court's earlier opinion, and this manner of functionally-interrelated perspective was eliminated.

At this point, and in order to attempt to determine the public purpose to be served by these regulations, it is appropriate to focus upon the justification advanced by the Township to support the extreme restraints in the "Critical Area Zone." In short, there was none! Despite the many witnesses offered by the municipality, no one attempted to explain or justify the scope and extent of the use proscriptions on the slope. No one offered any evaluation or analysis, made either before the enactment of the zoning ordinance or thereafter, of the economic or functional feasibility of the limited prescribed uses on the slope. No one indicated any recognition by the zoning officials of the obvious, and very real, differences between environmental constraints in a flood plain as compared with a slope.* Indeed, the only actual consideration that seems to have been given to the slope by the zoning bodies was how much density credit should be allowed; upon failing to agree on the appropriate measure of crediting, the Township

*Mr. Rahenkamp explained at length the functional differences between flood plains and slopes. (T-XXXVIII-86-89). In flood plains, very real problems exist in development that do relate to considerations of the health, safety and welfare of potential residents. In sharp contrast, slopes present only design problems, which merely require appropriate development standards.

Moreover, the lack of serious attention to detail given by Bedminster with regard to the slope is evidenced by Mr. Graff's equating the development problems and concerns there with those attendant to the Palisades. (T-XXVII-43, 44). Mere reference to the actual degree of slope and the development capabilities on the Allan-Deane slope amply demonstrate the lack of insurmountable development problems on plaintiff's property. (See P-92, P-93, P-95 and P-96).

chose to allow nothing, despite advice from its outside planner to the contrary and despite actual knowledge of the potential confiscation issue involved. (T-XXVII-48-49).* In short, with full knowledge of the legal ramifications of their conduct, the planning personnel of Bedminster chose, without any apparent basis in fact and without any substantiating analysis, to simply ban all development on the plaintiff's slope property. On these facts, it can hardly be concluded that Bedminster has acted in good faith or has even attempted to bring to bear its substantial resources in order to generate a reasonable zoning scheme, particularly as regards this property. At best, it seems that the consideration of the steep slope was wholly cavalier and arbitrary; at worst, it represents a wilfull attempt to prevent the plaintiff from effecting any realistic development plan.

C. The Critical Area Zoning Provisions Constitute an Unreasonable and Arbitrary Abuse of the Power to Zone Because the Means Selected do not have a Substantial Relation to the Object of Flood and Erosion Control.

It is an unassailable principle of zoning law that use restrictions upon real property must be justified by the police power, reasonably exerted for the public welfare. Katobimar Realty Co. v. Webster, 20 N.J. 114, 122 (1955). A zoning

*Mr. Coppola advised the Township, prior to this trial, to allow development credits for preservation of the slope; Bedminster ignored this advice. (T-XXXIII-181). At trial, Mr. Coppola was unable and unwilling to defend the slope restrictions, absent such crediting. (T-XXXIII-181-183).

ordinance must not be unreasonable, arbitrary or capricious. The means selected must have a real and substantial relation to the object sought to be attained; the regulation must be reasonably calculated to meet the evil and not exceed the public need. J.D. Construction v. Board of Adjustment, Tp of Freehold, 119 N.J. Super 140, 145 (1972); Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251 (1971); Schmidt v. Board of Adjustment, Newark, 9 N.J. 405, 412 (1952); Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super 341, 346 (App. Div. 1970). If regulations impress unnecessary and excessive restrictions on the use of private property, they are confiscatory regardless of the magnitude of deprivation imposed on the private property owner. J.D. Construction v. Board of Adjustment, Tp of Freehold, 119 N.J. Super 140, 145 (Law Div. 1972); Katobimar Realty Co. v. Webster, 20 N.J. 114, 122-123 (1955); Kent v. Borough of Mendham, 111 N.J. Super 67, 77 (App. Div. 1970).

In the exclusionary zoning context, the Supreme Court of New Jersey has served clear notice that it will cast a wary eye on environmental defenses. In Mount Laurel, the high court advised that development restrictions premised on ecological concerns can be countenanced only where:

> "... the danger and impact [is] substantial and very real (the construction of every building or the improvement of every plot has some environmental impact)--not simply a makeweight to support exclusionary housing measures or

> preclude growth--and every regulation adopted must only be that reasonably necessary for public protection of a vital interest. Otherwise difficult additional problems relating to a 'taking' of a property owner's land may arise." 67 N.J. at 187.

This cautionary language was adopted and reaffirmed in Madison Township, where the court further observed that there was testimony, just as herein, that:

> "... the answer to the ecological problem posed was not prohibition or regulation of the density of development per se but careful use of land, with adequate controls in respect of construction, sewerage, water control and treatment, sufficient open space per structure and other services." 72 N.J. at 544-545.

Although the Critical Area Statement of Purpose section of defendant's zoning ordinance (Article 8, §1) describes the scope of the restrictions as careful regulation and minimization of development, the actual regulations have the effect of zoning the steep-slope section of plaintiff's property into inutility because of its alleged ecological importance.

Within the framework of these Supreme Court admonitions, this Court must closely scrutinize both the nature and extent of the Bedminster "environmental" restrictions, especially since the steep slope area occupies 240 acres in the only area of the Township zoned for multi-family least-cost development -- the Pluckemin Corridor.

One appropriate standard against which defendants critical area regulations should be measured is various state critical-area legislation and regulations, such as The Coastal Wetlands Act, N.J.S.A. 13:9A-1 et seq. (1970) and Coastal Area Facility Review Act, (CAFRA), N.J.S.A. 13:19-1 et seq. (1973). Such enactments have followed comprehensive and carefully considered factual evaluations of the concerns of the entire state, rather than, as herein, being bottomed on a parochial and vague view of the general welfare, and applied uniformly throughout the State.*

Perhaps the most startling distinction between the recent legislative enactments concerning the environment and Bedminster's attempted expansion of the police power, is the manner and degree to which the beneficial use of private property is sought to be controlled under the two approaches. Toms River Affiliates v. Dep't. of Environmental Protection, 140 N.J. Super. 135 (App.Div. 1976), a case which considered, and upheld, the constitutionality of CAFRA, is illustrative.

The Toms River Affiliates opinion put crucial emphasis on the fact that CAFRA set forth specific uniform criteria for the Commissioner of Environmental Protection to apply uniformly throughout the state, in evaluating the propriety of certain land uses within the area subject to the act.

> [T]he standards outlined therein establish an adequately defined check-list for the guidance of the agency in granting or denying a permit - a

*See Chirichello v. Zoning Bd. of Adj. Borough of Monmouth Beach, N.J. (January 22, 1979).

> checklist which has sufficient flexibility to carry out the purposes of the legislation in light of the rapidly changing conditions and body of scientific knowledge in the area of environmental protection." Id. (Emphasis added).

Defendant's ordinance provides no such specific criteria to guide zoning decisions made pursuant to it and the history of this litigation demonstrates that defendant has continually vacillated respecting standards and criteria.

The thrust of CAFRA is the reasonable "regulation" of land use within the coastal zone. Its purpose is not to prohibit development, but merely insure that it takes place within the guidelines which the state Legislature established. The Toms River Affiliates opinion emphasized the fact that "[t]here are alternative uses for the development of the property which will conform with the Board's objections to the proposed project." 140 N.J. Super. at 148. Furthermore, CAFRA affords the applicant for a permit the opportunity to modify its proposed project in order to conform it to existing criteria:

> "It should be noted that the act specifically provides that 'denial of an application shall in no way adversely affect the future submittal of a new application.'" N.J.S.A. 13:19-15. Id. at 149.

A similar discussion, concerning the constitutionality of the Coastal Wetlands Act, is contained in Sands Point Harbor, Inc. v. Sullivan, 136 N.J. Super. 436 (App.Div.

1975). The Appellate Division observed initially that regulation of the use of marshes and wetlands is a valid exercise of government power. The court also distinguished the type of regulation it was sanctioning from the type of confiscatory prohibition of all beneficial uses involved in Parsippany - Troy Hills:

> "In the instant case neither the statute nor the order under attack impose such all-encompassing restriction. The only activities which are absolutely prohibited are the dumping of solid waste, the discharging of sewage and the storage or application of pesticides. N.J.S.A. 7:7A-5.1 and 5.2. None of these are activities which plaintiff seeks to conduct. The statute clearly delegates authority to the commissioner to grant permission for the conduct of regulated activities in areas which have been designated to coastal wetlands." Id. at 441.

The distinction between mere regulation by uniform performance standards, and total prohibition is very real indeed, both from a factual and legal standpoint. Defendant's imposition of a bar to all but the most minimal of uses of plaintiff's 240 acres parcel in Bedminster Township is a far cry from the even-handed regulation of potentially environmentally dangerous uses authorized by CAFRA and the Coastal Wetlands Act. Defendant has attempted, without the benefit of enunciated guidelines or specific legislative authorization, to preserve, in its natural state, a huge parcel of private property within its municipal boundaries. Such action exceeds the limits of even the most vigorous state-sanctioned

exercise of the police power and amounts to a taking without just compensation.*

---

*The New Jersey Supreme Court recently intimated, in a footnote to AMG Associates v. Tp. of Springfield, 65 N.J. 101 (1974), that more latitude may be given to a municipality in the exercise of its zoning power where "vital ecological and environmental considerations of recent cognizance" are involved. Id. at 112, 113. In support of this statement, the court cited The Coastal Wetlands Act, which plaintiff has already demonstrated is inapplicable, in terms of scope and manner of regulation, to the case at bar. Furthermore, no reported New Jersey case has extrapolated the AMG Associates footnote to sanction an otherwise impermissible taking of private property merely because environmental factors are alleged as a justification by the municipality. If such an extension of the police power is constitutionally permissible, and plaintiff submits that it certainly is not, it should not be undertaken on a record such as this, where the defendant municipality has failed to establish the legitimacy of its allegations of environmental concern and the necessity of the imposition of the most drastic land use device available--total nondevelopment.

At least one commentator, in discussing the ramifications of the AMG Associates footnote, has firmly concluded that it has no relevance whatsoever to the situation in Bedminster Township. Referring specifically to the prior opinion of this Court in the instant case (Allan-Deane v. Bedminster), Bruce Ackerman has written:

> "Unlike the hazardous portion of a flood plain or even a strip of coastal wetland, a watershed area encompasses large stretches of territory, often including most or all of the land in many municipalities. To recognize this kind of environmental attribute of land as a basis for open-space zoning without compensation would represent a radical departure from present property law notions of confiscation and nuisance. A nuisance analogy supports stringent land-use regulation in cases of the most exceptional land conditions and the negative spillover caused by the impact of development on these conditions. On the other hand, a watershed justification for open-space zoning would remove land which is common in a relatively large area and which spawns relatively common development-related impacts from the protection of the taking doctrine. This broader justification for strict controls would far transcend the nuisance principle. It offers too easy an escape from taking constraints.

FOOTNOTE CONTINUED

> Moreover, the Mount Laurel analysis of environmental regulation, read as an indication of what land is exempt from the traditional taking protections, allows only a small amount of land in a municipality to qualify for stringent environmental controls."
>
> Ackerman, "The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform", 1976 U. of Ill. Law Forum, 1, 54.

Ackerman proposes that the proper fashion in which to effecutate the AMG Associates concern for environmental degradation is as follows:

> "In brief terms, the two guiding principles can be explained in terms of (1) controlling negative externalities caused by the development of especially sensitive areas and (2) implementation of the least drastic means of control with regard to the use and enjoyment of private property." Id. at 52.

Applying Ackerman's analysis to the instant case, the method of proper control of negative externalities has been established by plaintiff's expert witness testimony delineating the manner in which plaintiff's land could be developed in an environmentally sound way. Defendant's zoning scheme completely ignores Ackerman's principle of employing the least drastic means possible and the use and enjoyment of plaintiff's property has been completely destroyed.

Defendant's zoning scheme is afforded no further support by American Dredging Co. v. New Jersey, 161 N.J. Super. 504 (Ch.Div. 1978). That case is readily distinguishable from the case sub judice in that: (1) only one specific use of the property in question was prohibited, and viable alternative uses existed; and (2) it was required that the use restriction be "reasonably necessary" to the effectuation of the municipality's goal, and plaintiff has clearly demonstrated that less drastic means are available, herein, such as reasonable performance standards to control the development of plaintiff's property.

The means selected by Defendant (allowing only agricultural and recreational uses), does not have a sufficient relationship to the stated objective of flood and erosion control. It is widely recognized that the quality and quantity of erodible sediment from agricultural use (if such uses were feasible) is substantially worse than that from residential development. As the testimony in this case indicates, slopes in excess of 30% cannot accommodate development but least-cost housing can be built on moderate slopes. Even defendant's Planning Board Chairman conceded the Planning Board had been aware of the utility of steep slopes when it decided not to allow development or density credits. Development controls such as soil removal limits, tree clearage limits, detention basins and ponds would all serve to prevent erosion from steep slopes.

Since alternatives to prohibiting all reasonable use of hillsides are not only available but were known to Bedminster, these Critical Area regulations are excessive and unjustified restrictions on land with slopes exceeding 15%.

Within this "reasonable regulation" purview, the sparse proofs offered by Bedminster to justify the slope zoning fail completely. The municipality has not demonstrated, either during its planning process or at trial, any "substantial and very real" "danger and impact" purporting to support the gross restrictions on slope development. Indeed, is has not even attempted to identify with any specificity the environmental concerns to be addressed, much less to develop

any reasonable regulatory process to deal with such issues. It has simply banned all development on the basis of vague notions of protecting the environment. Nothing more is proferred.

Defendant cannot distinguish the instant case from Parsippany-Troy Hills, supra., which remains the controlling case in New Jersey regarding the interplay of the zoning and eminent domain powers. Defendant's zoning ordinance explicitly states that it seeks to retain plaintiff's property in its natural state for the public good. Plaintiff has unequivocally established that its land is deprived of all beneficial use by the application of defendant's ordinance.

Reference to recent legislative enactments concerning environmentally sensitive areas offers defendants no support. The Legislature has merely sanctioned the regulation of land use in such areas, while defendant's ordinance has the practical effect of flatly prohibiting any use of plaintiff's property, regardless of its ecological reasonableness and safety. The tortuous history of this case reveals that defendant has employed an array of land use devices in an attempt to prevent multi-family development generally and plaintiff's sophisticated and far-sighted development plans specifically. Simply put, Bedminster's attempted appropriation of plaintiff's property, allegedly to prevent environmental injury, is suspect and unlawful at best, and willful and obvious at worst.

POINT IV

THE REZONING OF THE PLATEAU AREA OF THE ALLAN-DEANE PROPERTY FROM R-6 UNDER THE 1973 ORDINANCE TO R-3 UNDER THE 1978 ORDINANCE WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE.

The plateau area along the easterly portion of Allan-Deane property in Bedminster was zoned R-6 under the 1973 Ordinance at a theoretical density of between 1.88 and 4.55 units per acre, depending on bedroom mix and unit size. This portion of the property has now been placed in an R-3 or roughly 3 acre zone. Defendant's Master Plan does not attempt to justify this zoning change; however, Mr. Coppola testified that in his opinion the new zoning was appropriate because it was compatible with Bernards' adjacent 3-acre zone and because of its distance from Pluckemin. (See T-XXXV-118,119).*

The following evidence was offered during the course of the trial which compels a higher density for the plateau area:

1. The plateau area is clearly within growth area grids of the Regional Development Guide of the Tri-State Regional Planning Commission where residential densities of 2-6.9 units per acre are recommended (T-XXXV-120-121);

*In addition, the Township has generally attempted to defend the R-3 zoning throughout the Township on the absence of existing or planned sanitary sewers. The premising of the failure to zone substantial quantities of land for multi-family use on the absence of existing sewers is deficient as a matter of law. As was indicated by the Mount Laurel court, the short answer to this lack of infrastructure is to require the installation of utilities by developers or for the municipality to install sewers itself. 67 N.J. at 186. Indeed, in the federal context, the failure to provide sewering to publicly assisted low-income projects may, under appropriate circumstances, be violative of federal housing law. See United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F. 2d 799 (5 Cir. 1974).

2. The plateau falls within the State Development Guide's growth area description for higher density residential patterns (T-XXXV-124);

3. Under the 1973 zoning, (which Defendants defended at the previous trial) the overall zoning of the Allan-Deane property was 1.85 to 4.55 units per acre and the plateau could have been developed, due to the previous liberal clustering provisions, at considerably higher net densities. This zoning was approved by the County Planning Board and defended as appropriate by its planning director;

4. Because development through the use of septic systems on the plateau would be problematical, due to the geology of the site, the underlying basalt and the difficulty of preventing seepholes along the slopes (See T-XXXVIII-66-67) the entire area should be sewered for public health reasons. Given the necessity of sewers the 3 acre zoning is inappropriate due to the high per unit cost of running sewer lines in low density areas (T-XXXVIII-67);

5. A higher intensity use permits the utilization of environmental management techniques needed in proximity to the slopes (T-XXXVIII-68);

6. Because the plateau abuts the slope area, which will be maintained as open space, a higher intensity residential use in that area maximizes the number of persons who will be the beneficiaries of that open space area. Conversely a three acre lot has its own open space and the least need for an abutting public open space area. From a public planning point of view it is more appropriate and efficient to have higher population densities and concentrations around such a large open space area to maximize the number of beneficiaries of such an amenity. (See T-XXXVIII-69-70; see also, N.J.S.A. 40:55D-2(e), (g) and (i)) regarding the purposes for which the municipal planning powers should be used.

7. The plateau area is in fact an integral part of the Pluckemin Corridor and not, as defendants witnesses suggests, more reasonably a part of Bernards Township. All impacts of development on the plateau are directed towards Bedminster. The plateau is a part of the same watershed as the rest of the corridor (T-XXXVIII-58), it should be sewered through Pluckemin (T-XXXVIII-59). Most of the traffic generated from any development on the plateau will be downchanneled into the Pluckemin Corridor (T-XXXVIII-60), the water runoff impact from the plateau will be westerly into the corridor (T-XXXVIII-59), and the plateau is tied to Pluckemin and the rest of Bedminster from a visual point of view since the visible environment of the site is down to Bedminster.

8. Since 81% of the Township's undeveloped land is already zoned R-3 (See T-I-172), there is no justifiable need to rezone this property to increase the opportunity for that housing choice.

9. Finally, this Court, in the previous trial, found the densities for those areas designated by the Township as apppropriate for multi-family development, including the Allan-Deane land now zoned R-3, as inappropriately low. The rezoning of those same lands to an even lower density constitutes a patent breach of this Court's previous order.

Plaintiff contends that the down zoning of the plateau area does not comply with N.J.S.A. 40:55D-62 which requires that zoning be adopted with "reasonable consideration to the character and its peculiar suitability for particular uses and to encourage the most appropriate use of land." The use designated (single family house on three acres) is not suitable to the physical character of the land because:

a. the permitted use when coupled with the public health need for sewers are not

economically feasible due to the economics of running sewer lines in low density areas. See Gruber v. Mayor and Township of Rariton Township, 39 N.J. 1,12 (1962); Morris County Land, etc. v. Parsippany-Troy Hills Township, supra., 40 N.J. at 557.

b. Under the harms-benefit balance test the zoning amendment must fail because there is no reasonable relationship between the public good sought to be achieved (compatability with Bernards zoning) and the restrictions imposed. Scarborough Apts., Inc. v. Englewood, 9 N.J. 182 (1952) and Gruber, supra., 20 N.J. at 131.

c. This rezoning conflicts with both the Tri-State and D.C.A. development plans, and is not even mentioned in the Bedminster Master Plan and is therefore not in accordance with a comprehensive plan. See Wilson v. Mountainside, 42 N.J. 426 (1964) and N.J.S.A. 40:55D-62.

d. As was said in Schere v. Township of Freehold, 119 N.J. Super 433, 437 (App. Div. 1972), certif. den., 62 N.J. 69 (1972), "attempts to prevent by zoning the residential utilization of land, apt for the purpose, on behalf of the generality of the population in need thereof, in favor of reserving such land for future utilization by more affluent uses, would seem to conflict with present-day judicial thought as to appropriate relationships between zoning policy and social housing needs."

e. There is substantial evidence in the record to the effect that the plateau area is suitable for the multi-family use it was previously zoned for, that the use would be compatable with the County Master Plan and all regional plans and Bedminster was specifically ordered to increase rather than decrease the densities allowed under the 1973 Zoning Ordinance.

In short, the overwhelming weight of the evidence herein is that the plateau property is both suitable and appropriate for multi-family housing at high densities, as has generally been acknowledged by the municipality by its prior zoning of the same site. The vague and insubstantial justifications offered by the municipality are wholly inadequate to sustain adding this property to the already existing surfeit of R-3 lands in the municipality. Indeed, the particular zoning of this site can only serve to thwart the realistic possibility of the development of a meaningful and comprehensive Planned Unit Development in Bedminster.

POINT V

THE BEDMINSTER LAND USE REGULATIONS CONTAIN MANY VIOLATIONS OF THE MUNICIPAL LAND USE LAW.

A. Violations Which Impede Planned Developments and/or Least Cost Housing.

1. Provisions of the Bedminster Zoning and Land Development Ordinances Dealing With "Open-Space Clusters", "Village Neighborhoods" and "Compact Residential Clusters" Violate Provisions of the Municipal Land Use Law Dealing With Planned Developments.

(a) Although the decision to provide for planned developments is within municipal discretion, ordinances allowing such development must comply with the enabling statute. Niccollai v. Planning Bd. of Tp. of Wayne, 148 N.J. Super 150 (App.Div. 1977), certif. denied 75 N.J. 11 (1977). Indeed, all manners of "open space", "cluster", and "planned community" zoning provisions, however denominated, must comply with the provisions of the Planned Unit Development sections of the zoning enabling legislation. See Mountcrest Est., Inc. v. Rockaway Mayor and Tp. Comm., 96 N.J. Super. 149, 156 (App.Div. 1967). The provision of common open space for residents of a "residential cluster" is protected by N.J.S.A. 40:55D-43 which expressly prohibits a municipality from conditioning approval of a planned development upon public dedication of such open space. Section 12.1 of the Bedminster Zoning Ordinance violates this provision by delegating discretion to the planning board to require public dedication; the Township's Subdivision Ordinance perpetuates this illegal possibility by failing to require

that open space be reserved for the use and benefit of the residents.

(b) The Bedminster Land Development Ordinance also fails to meet the mandate of N.J.S.A. 40:55D-65(c) which requires the Subdivision Ordinance to incorporate zoning ordinance standards; such standards with regard to residential clusters are absent both from the Zoning and Land Development Ordinances.

2. The Land Development Ordinance Requires the Payment of Excessive Fees Not Authorized by N.J.S.A. 40:55D-8b.

N.J.S.A. 40:55D-8(b) authorizes the required payment of "reasonable fees" by an applicant for development. The limits of "reasonable fees" was first discussed in Daniels v. Borough of Point Pleasant, 23 N.J. 357 (1957), where the court pointed out that although the municipal power to regulate building construction carried with it an inherent power to charge permit fees designed to defray the costs of regulation, the fees must not exceed "the bounds of reason considered in connection with the service and the cost of the service granted," 23 N.J. at 361. These principles have been adhered to in later opinions: Moyant v. Paramus, 30 N.J. 528 (1959); Konya v. Readington Tp., 54 N.J. Super 363 (App. Div. 1959); Colonial Oaks West, Inc. v. Tp. of East Brunswick, 61 N.J. 560 (1972).

The fee schedule would operate as follows were it to be

applied to the Allan-Deane site plan (P.40):

Subdivision Section of Land Development Ordinance

Section	Purpose	Total cost for 1,849 units on Allan-Deane prop.
4.5.1	Filing fee for preliminary plat (more than 10 lots)	$ 100
4.5.1	Filing fee for final plat	100
4.5.2	Review deposit for preliminary plat ($40/lot)	73,960
4.5.2	Review deposit for final plat ($15/lot)	27,735
4.5.3	Inspection cost deposit (5% of improvements cost)	600,000
	Site Plan Section of Land Development Ordinance*	
11.9.1.1	Preliminary review fee ($50/acre + $.02/sq ft gross floor area)	7,300* .02/sq ft gross floor area
11.9.1.3	Inspection deposit (5% of improvements costs)	600,000
	TOTAL:	$1,309,195
	per unit:	$ 713

*does not include review of 130 single family houses which are theoretically exempt from site plan review under N.J.S.A. 40:55D-37(a).

A special problem with the required "review deposits" is that they fail to recognize economies of scale in large developments and so are inherently unreasonable when so applied. Another related problem is the presumption of reasonableness accorded license fees and allocation of the burden to prove otherwise to the developer. Gilbert v. Irvington, 20 N.J. 432 (1956). Although this burden exists with any license "fee," it is worsened when a "deposit" implicitly unrelated to regulatory costs is imposed, because the developer must sacrifice a

substantial amount of money up-front, secure in the knowledge that a future battle with the town is imminent.

Last, but not least, "deposit fees" for inspection of subdivision improvements have been held to be void as against public policy since 1969!

In Economy Enterprises, Inc. v. Township Committee of Manalapan Township, 104 N.J. Super 373 (App.Div. 1969), the Appellate Division struck down a township ordinance almost identical to sections 4.5.3 and 11.9.1.3 of the Bedminster Land Development Ordinance on the grounds that requiring a developer to deposit with the municipality "a fee in cash or certified check amounting to five per cent (5%)" of the estimated cost of improvements was void as against public policy. The court reasoned as follows:

> Under the foregoing arrangement the developer is completely at the mercy of the engineer. The latter is under no restraint save his conscience as to how much to charge the developer. The governing body has no economic incentive to curtail the charges since they do not come out of the municipal treasury. The developer may be loath to take issue with the charges as he may have future problems with the engineer and may not wish to court the possibility of antagonizing him by objecting to the amount of his charge.
>
> Moreover, such an arrangement subjects the engineer to the temptation to overcharge an unfriendly developer or undercharge a friendly one. We, of course, do not imply any such motives to the particular engineer here involved. But the criterion of contravention of public policy in a given case is not the lack of integrity of the particular persons involved but the inherent capacity of the questioned arrangement to tempt toward improper conduct. Cf. Jones v. MacDonald, 33 N.J. 132, 135 (1960)." 104 N.J. Super at 380-381.

3. The "Second Stage" CRC Provisions Violate N.J.S.A. 40:55D-67 Concerning Conditional Uses.

N.J.S.A. 40:55D-67 delegates authority to the Planning Board to grant conditional uses "according to definite specifications and standards which shall be clearly set forth with sufficient certainty and definiteness to enable the developer to know their limit and extent". Although the Bedminster Zoning Ordinance does not characterize the "second stage" authorization of 300 CRC's as a conditional use, the additional and separate authorization process and special showing required for this use make it a conditional use as defined in N.J.S.A. 40:55D-3. In a "second stage" application it must be shown that:

1. existence of adequate infrastructure;
2. environmental constraints do not prohibit it; and
3. the Township's fair share obligation has not been satisfied.

These standards are hardly certain or definite and constitute an unreasonable burden particularly on the small developer; they are a blatant violation of N.J.S.A. 40:55D-67.

4. The Required Completion of All Improvements Prior to the Grant of Final Subdivision Approval Is Not Authorized by N.J.S.A. 40:55D-53 and Constitutes an Unreasonable Exaction Preventing Least-Cost Housing.

Section 4.3.10 of the Bedminster subdivision ordinance provides that:

> "Before consideration of a final subdivision plat, the subdivider shall have installed all required improvements as specified in Article VI...."

The ordinance permits the Township to accept performance guarantees, in lieu of actual installation, only as to the final road cover, sidewalks, monuments, streets signs and shade trees. Thus, before he can even apply for final approvals, the developer must fully install all sewering or septic facilities, all roadways, curbing, storm sewers, culverts and water mains, which may also include contributions for off-site improvements. This extraordinary provision, requiring massive capital contributions in advance of any assurance of approval, is not authorized by the Municipal Land Use Law and is self-evidently destructive of any realistic possibility of PUD development.

We contend that this provision is illegal because; (1) it is not authorized by the enabling act* and (2) it represents an unreasonable cost exaction precluding "least-cost" housing.

*Bedminster's apparent reliance upon the unreported, oral decision in C.A.P. Enterprises, Inc. v. Mayor and Council, Tp. Montville, (Law Division - Morris County, Docket No. L-3859-77 P.W.), is misplaced. In this somewhat confusing decision, Judge Gascoyne seemingly determined that a municipality could require the installation of all improvements on the ground that a change in statutory law should be express and not implied. As demonstrated above, the prior statute (N.J.S.A. 40:55-1.21) clearly authorized the requirement of the installation of improvements, while the present law (N.J.S.A. 40:55D-53) omits this power--so that the change in law is clear. However, the court then went on to opine that if, in fact, a municipality were to actually exercise such power, it would likely be "unreasonable" and suggested that if that court were confronted with that situation, it would not permit it--"it just doesn't make any sense". (Transcript of oral opinion, pp. 39, 20). Thus, the court seems to have concluded that a municipality does impliedly have the power to require such improvements, but that the court would not, in fact, permit such a requirement to stand, as being facially unreasonable. In any event Judge Gascoyne was not confronted with the question of whether such a requirement constitutes a cost exaction.

Under the prior enabling legislation, a municipality was empowered to require the installation of site improvements prior to the final approval of plats. Specifically, N.J.S.A. 40:55-1.21 provided that:

> "Before final approval of plats the governing body may require, in accordance with the standards adopted by ordinance, the installation, or the furnishing of a performance guarantee in lieu thereof, of any or all of the following improvements it may deem to be necessary or appropriate: street grading, pavement, gutters, curbs, sidewalks, street lighting, shade trees, surveyors, monuments, water mains, culverts, storm sewers, sanitary sewers or other means of sewage disposal, drainage structures, and such other subdivision improvements as the municipal governing body may find necessary in the public interest"*

However, that power is not granted under the Municipal Land Use Law. In N.J.S.A. 40:55D-53, the new counterpart to N.J.S.A. 40:55-1.21, it is provided that:

> "Before recording of final subdivision plats or as a condition of final site plan approval or as a condition to the issuance of a zoning permit pursuant to subsection 52d of this act, the approving authority may require and shall accept in accordance

---

*It is open to question whether the Bedminster provisions comply even with the preexisting enabling legislation. That is to say, the cited section 1.21 has been construed to permit municipalities to condition final approvals upon the installation of on-site improvements. See, for instance, Divan Builders v. Planning Board, Township of Wayne, 66 N.J. 582, 595 (1975). However, the Bedminster subdivision ordinance makes installation of the improvements a precondition even to consideration of the final approval such that all such improvements would have to be completed prior to the developer knowing whether or not final approval will actually be granted.

> with the standards adopted by the ordinance for the purpose of assuring the installation and maintenance of on-tract improvements:
>
> (1) the furnishing of a performance guarantee...."

In short, the local municipalities have no delegated power to require the actual installations of site improvements prior to issuance of final approvals. In obvious recognition of the onerous nature of the prior enactment, the Legislature now permits, at most, the required furnishing of a performance bond.

The absence of any clear enabling authority wholly forecloses the municipality from seeking to impose such conditions. As was said in Dresner v. Carrara, 69 N.J. 237 (1976) (coincidentally involving prior section 1.21):

> "There is, however, no statutory source for the power defendants seek to exercise. No enactment authorizes a municipality to impose requirements of this kind where no subdivision approval is sought and where there is no change in the use. The absence of an enabling act is fatal to the argument that such power exists, for a municipality has no inherent power to adopt zoning and other land use ordinances; it may act only by virtue of a statutory grant of authority from the Legislature." 69 N.J. at 241.

See also, Divan Builders v. Planning Board of Wayne, 66 N.J. 582, 593 (1975); Klegman v. Lautman, 53 N.J. 517, 536 (1969); Levin v. Livingston Township, 35 N.J. 500, 507-508 (1961).

The requirement of completed improvements prior to final subdivision approval is particularly burdensome in the case of planned unit developments and multi-family residential subdivisions. A liberal reading of the provision would

require the commitment of possibly several million dollars to on-site improvements prior to the sale of a single house. Since the only way that a large scale development can be constructed is to sell units in phases and thereby produce new capital to complete an overall project, this requirement constitutes an unreasonable exaction preventing least-cost housing. See Round Valley, Inc. v. Tp. of Clinton, (Dkt No. L-29710-75, P.W., decided January 13, 1978 at pages 68 and 69)*.

Moreover, as explained by Mr. Rahenkamp, the precondition of the installation of improvements creates a very serious practical financing problem, because institutional financing would be unavailable in advance of the granting of final approval. By requiring the installation of all designated improvements prior even to consideration of the grant of final approval, Bedminster in effect requires the owner to "front end" potentially millions of dollars of costs without any assured right to go forward. (See T-XXXVIII-18, 118-185).

---

*At page 68-69 of his unpublished opinion in Round Valley, supra, Judge Beetel said:

> "Another major exaction testified to by Mr. Rahenkamp was the requirement in the land use ordinance that all on-site improvements must be constructed before final subdivision approval is given. While this precondition might make sense for very small scale subdivisions, its impact upon larger scale developments geared towards providing least-cost housing, is devastating.

(Footnote continued next page)

In requiring the burdensome completion of roads, street lighting, sidewalks, etc. prior to subdivision approval, when a clearly authorized alternative (guarantees) to protect

---

Footnote continued from page 115

> In essence, a literal reading of the document would require the commitment of possibly several million dollars of on-site improvements prior to the sale of any houses. Although the plaintiff's PUD is scheduled to be developed over a ten year time period, the ordinance would require that on-site improvements be constructed even for areas which will not have any housing units built for years to come. Since the only way that a large scale develoment can be constructed is to sell units in phases and thereby produce new capital to complete an overall project, this requirement constitutes a clear, unreasonable subdivision exaction. . . ."
>
> * * *
>
> "Other exactions contained in the ordinance were the requirement that two percolation tests be made for each lot before preliminary subdivision approval, rather than before final subdivision approval, without any recognition that multi-family units would have to have public water and sewer anyway. (6/9/77 Tr. p.19, 20). The maintenance guarantee requiring that there be a two-year guarantee for roads, rather than the standard one-year guarantee, was also an exaction (supra, p.20). So too the absence of any vesting, as would be allowed under the PUD act (N.J.S.A. 40:55D-1 et seq.). Thus, neither the developer nor homeowners would ever be assured that all stages of the PUD could be completed until the final subdivision approval is granted for the entire project. Thus, no developer could be assured that the municipality would grant approval for later stages of a development after approving earlier stages. Therefore no assurance could be given to banks, investors, contractors, and homeowners during the early stages, making financing of a large scale project impossible."

the public interest is availalbe, the Defendant has exercised its exclusionary preference in a most effective manner.*

5. The Required Design of On-Site Stormwater Systems is Inconsistent with N.J.S.A. 40:55D-42.

Section 6.1.3 of the Land Development Ordinance requires on-site stormwater systems to be designed to accommodate all potential development upstream and off-site. This provision violates N.J.S.A. 40:55D-42 because it requires all "downstream" developers to pay for construction impacts of upstream development which cannot be attributed to their project. N.J.S.A. 40:55D-42 explicitly prohibits this and requires each development to pay only its pro-rata share of off-site impacts.**

B. The Prohibition of Corporate Administrative Offices and the "10 Employee" Limit for Business and Professional Office Uses Violates the Municipal Land Use Law.

Section 5.2.2 of the Bedminster Zoning Ordinance lists

*Plaintiff's concern over this permissive power to require the installation of improvements prior even to consideration of final approval is neither speculative nor undercut by any assumed good faith conduct by municipal officials. Under the Mount Laurel mandate, the courts are directed to be alert to subtle, as well as obvious, exclusionary provisions, and, it must be recalled, it is incumbent upon a developing municipality, such as Bedminster, to avoid all restrictions which tend to discourage the building of least-cost housing. Thus, even if such provisions might have some less burdensome application with respect to single family home subdivisions, they are wholly impractical and onerous in connection with large scale Planned Unit Development projects which require far more extensive on-site improvements. Cf. J.D. Construction v. Board of Adjustment, Township of Freehold, 119 N.J. Super. at 150-151. But the Bedminster Ordinance recognizes no such distinction and the broad grant of such discretionary power, even if legally permissible, would plainly chill the interests of all but the most determined of developers.

**This illegality is of constitutional dimension, See Divan Builders v. Planning Board of Township of Wayne, above.

as a principal permitted use "business and professional offices employing no more than 10 employees" while prohibiting corporate administrative offices. Other provisions of the Zoning Ordinance would allow Allan-Deane to construct an office building of 115,000 square feet on their acreage in the business district. (T-VI-61; T-VII-84) Since an office building of that size would normally accommodate between 300 to 1,000 employees, section 5.2.2 of the Bedminster Zoning Ordinance would have the effect of forcing plaintiff to subdivide such a building into between 30 and 100 separate offices and to sell the offices separately as office condominiums or rent them out as separate tenancies. The physical impact of the use, would be the same if such a building were used by one employer of 1,000 persons or one hundred employers of 10 persons. The effect of Section 5.2.2 is to regulate the ownership or tenancies within a building in the business zone.

In Bridge Park Co. v. Borough of Highland Park, 113 N.J. Super 219 (App.Div. 1971) the Appellate Division considered the question of whether a municipality could, under the zoning power, attempt to regulate the ownership of property. In that case the Borough of Highland Park attempted to prohibit the conversion of a garden apartment complex into condominiums because their zoning ordinance defined the uses as "a building or series of buildings under single ownership ..." The Appellate Division held, after analyzing N.J.S.A 40:55-30 (Now N.J.S.A. 40:55D-62 and 40:55D-65), that the legislature had granted "no power

to regulate the ownership of buildings or the types of tenancies permitted." 113 N.J. Super. at 221. The Court dismissed Highland Park's argument to the effect that the form of ownership constituted a "use" by saying:

> "It is apparent, however, that after change of ownership as planned, the same buildings will be on the premises in question and the use to which they are put will also remain the same. We conclude that the word "use", as contained in the statute above, does not refer to ownership but to physical use of lands and buildings. A building is not used as a condominium for purposes of zoning." 113 N.J. Super at 222.

The Supreme Court reminded us again in Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., 71 N.J. at 276 that:

> "...zoning is not a panacea for all social, cultural and economic ills especially where they are unrelated to the use of land... . [citing cases] Furthermore, zoning ordinances which bear too tenuous a relationship to land use will be stricken as exceeding the powers delegated to municipalities by the enabling act."

Not only has Bedminster, in this case, exceeded the power delegated to municipalities under the Municipal Land Use Law but it has done so out of an anti-regional bias that itself directly contravenes the legislative purposes of zoning set forth in the Municipal Land Use Law. (See N.J.S.A. 40:55D-2 and discussion in section III, A of Statement of Facts.) The stated purposes of these regulations is to provide for retail and personal service uses that Bedminster's citizens require and to prohibit the resale or export of

goods or services outside the municipality (P-21 §5.1, T-VII-72). This provincialism is in itself a departure from state legislative policy and is but another example of Bedminster's inclination to isolate itself from its region and its regional responsibilities.

POINT VI

VARIOUS LAND USE REGULATION STANDARDS ARE IMPERMISSABLY VAGUE AND INDEFINITE.

The due process guarantee of the New Jersey Constitution requires that a land use ordinance be clear and explicit in its terms, setting forth adequate standards to prevent arbitrary and indiscriminate interpretation and application by local officials. J.D. Construction Co. v. Bd. of Adjustment, Township of Freehold, 119 N.J. Super 140, 149 (Law Div. 1972); Schack v. Trimble, 48 N.J. Super 45, 53 (App.Div. 1957), aff'd. 28 N.J. 40 (1958); Morristown Rd Associates v. Mayor of Bernardsville, 163 N.J. Super 58 (Law Div. 1978). The right of a landowner to utilize his property should not depend upon the "outcome of litigation, after the event on which a provision, which he apparently fully meets, assumes a new and different significance by a process of refined interpretation." Jantausch v. Borough of Verona, 41 N.J. Super 89, 104 (Law Div. 1956) aff'd. 24 N.J. 326 (1957).

In the recent case of Morristown Rd Associates v. Mayor of Bernardsville, supra, Judge Gaynor invalidated standards for site plan review and architectural design which were essentially identical to the sections of the Zoning Ordinance and Land Development Ordinance of Bedminister cited below:

The following land use standards are vague and indefinite:

A. Zoning Ordinance

1. Section 7.4 requiring the Planning Board to consider the following in allowing development in the Historic Village of Pluckemin:

7.4.1 - "significance" of the structure

7.4.2 - general "compatibility" of proposed design with "rural atmosphere" of the Village

7.4.3 - whether any proposed structure would be "excessively dissimilar" or "inappropriate".

2. Section 11.1 requiring showing to Planning Board that Bedminster has "adequate" infrastructure, there are no environmental constraints, and regional obligation is not satisfied.

3. Section 11.4 requiring Planning Board consideration of the following in reviewing VN's, CRC's and OSC's:

11.4.4 - collective parking lots shall be "adequately" screened

11.4.5 - landscaping shall be provided "satisfactory" to the Planning Board

11.4.6 - connections must be made to sewer and water supply "satisfactory" to the Planning Board, . . . to be devised with "minimal" sanitary pollution discharge

B. Land Development Ordinance.

1. Section 7.1.1 and 11.11.1 - The landscape shall be preserved in its "natural state" . . . by "minimizing" tree and soil removal;

2. Section 7.1.2 - Surface water drainage systems will "not adversely affect" neighboring properties;

3. Section 7.1.3 and 12.1-12.8.7 - Environmental Impact Statement requires the listing of various impacts but does not indicate acceptable impact levels;

4. Section 7.2.3.7 - Catch basins, curbs, culverts and storm sewers shall be installed "to the satisfaction" of the municipal engineer; lots shall be graded to secure "proper" drainage;

5. Section 7.2.5.2 - trees shall be preserved;

6. Section 11.4.1.1.15 - Any other information "reasonably necessary" may be required;

7. Section 11.12.1 - proposed buildings shall be "harmoniously related" to the terrain....

These alleged "standards" offer almost limitless possibilities for "imaginative" interpretations by local officials and consequent litigation and delays. Allan-Deane should not be required after seven and a half years of litigation, as Bedminster's defense counsel suggested, to bring separate legal actions at some later date if and when these "standards" are applied against its proposed development.

POINT VII

THOSE SECTIONS OF BEDMINSTER'S LAND DEVELOPMENT ORDINANCE AND BOARD OF HEALTH ORDINANCE WHICH PURPORT TO REGULATE THE EFFLUENT DISCHARGE OF SEWAGE TREATMENT FACILITIES ARE CLEARLY PRE-EMPTED BY STATE LAW.

Sections 7.1.3 and 12.1 et seq. of the Land Development Ordinance of Bedminster Township (D-116) provide for the review by the municipality of effluent quality of sewage treatment facilities so as to "preclude water pollution" (see Section 12.3). Section 7.1.3 of this Ordinance specifically prohibits the approval of subdivision or site plan applications without a determination that the project:

a. will not result in significant adverse impact on the environment;

b. has been conceived and designed in such a manner that it will not significantly impair natural processes;

c. will not place a disproportionate or excessive demand upon the total resources available to the project site and to the impact area.

Putting aside the question of whether these constitute adequate local standards under the Municipal Land Use Law, the data requested by the municipality at Section 12.3 of the Land Development Ordinance is the same information which the Department of Environmental Protection requests prior to issuing approvals for sewage treatment plants and wasteload allocations. (See T-XXXVIII-40-42).

Defendants own witness, the Assistant Director of the Division of Water Resources of the Department of Environmental

Protection, testified that the D.E.P. considered itself "the sole permitting authority in the State of New Jersey to approve waste water treatment plants." (T-XXVI-5). He said that the state considered municipalities pre-empted with respect to the power to "determine what water quality standards are for a segment of the State's waters" and with respect to the power "to translate that water quality standard into an effluent limitation and to issue point source discharge permits." (T-XXVI-5). Trial counsel for Bedminster has acknowledged to the Court that Bedminster is in his opinion pre-empted from attempting to regulate sewer effluent. (T-XX-35, 14).

During the course of the trial, Allan-Deane submitted a memorandum arguing that the state water quality regulatory scheme pre-empts local regulations such as those contained in the Land Development Ordinance and Board of Health Ordinance (P-9). We pointed out in that memorandum that since 1977 four new comprehensive acts have been enacted which radically alter New Jersey's approach to the control of water pollution. See Water Pollution Control Act, N.J.S.A. 50:10A-1 et seq; Realty Improvement Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq.; Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.; Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq.

A review of this comprehensive legislation reveals

a legislative intent to pre-empt all municipal legislation in this area as found by the Supreme Court in Ringlieb v. Township of Parsippany-Troy Hills, 59 N.J. 348 (1971).

Finally, Bedminster's Zoning Ordinance on its face prohibits as a permitted use in all districts Sewage Treatment Facilities (See Article 9, Section 9.1). Although this may be an oversight, it is clear that this provision alone effectively precludes all multi-family development.

POINT VIII

THE NEED FOR SPECIFIC CORPORATE RELIEF AND SUGGESTED FORM THEREOF.

A. The Need for and Appropriateness of Specific Corporate Relief.

While the particulars of any appropriate relief must await the conclusions of the principal case, it is respectfully submitted that this Court should and must seriously entertain the awarding of "specific corporate relief"--permitting the plaintiff Allan-Deane to develop its project as proposed.

The Township of Bedminster has been engaged in the subject litigation for nearly 7½ years, during which time it has had ample opportunity to adjust its zoning in accordance with the constitutional strictures. The law of Mount Laurel and Madison is no longer new and untested, so that the municipality cannot be heard to argue lack of sufficient opportunity to respond.

After the first trial, this Court declared the existing multi-family zones to be "phantom"--that is, without realistic prospect of ever being developed. And, as shown in this proceeding, the revised provisions are equally inadequate and exclusionary. In short, the reaction of Bedminster, even in the face of specific court direction, has been minimal, reluctant and seriously deficient.

Moreover, the undisputed development setting is also compelling. By all accounts, the Pluckemin area of the

Township is, and has been, in serious need of sewering to solve an existing health problem. No multi-family housing is permitted under the ordinance in the absence of a sewering system. The Township has elected to await the conclusion of various studies before even considering the implementation of a public sewering plan. These studies are years from completion, and any actual construction of sewers would have to further abide future studies and funding.* In sum, there is no prospect of public sewers in Bedminster in the foreseeable future; if they ever come, they will be many years off.

Given the curious design of the small multi-family districts in Bedminster, it is wholly unlikely that private sewering facilities will be economically feasible except through the plaintiff Allan-Deane. That is to say, the multi-family areas, chopped up into small, separated parcels, virtually insure that no single landowner, or

---

*The Bridgewater situation provides an excellent example of the true time parameters of the provision of public sewering. Despite the fact that the community did not wait for the lengthy federal study programs, it has been seeking to extend trunk lines to meet existing, similar problems. Even with a diligence of effort not evident in Bedminster, Bridgewater has been working its way through the federal channels for some years and has yet to receive even the priority funding designation necessary for sewer construction. (T-XXII-1125 to 127). Given the lack of urgency demonstrated by Bedminster officials, it may well be concluded that public sewers in Bedminster are problematic at best and, more likely, will never voluntarily be produced.

even a group of them, can reasonably fund the heavy capital investment necessary for the construction of a treatment plant. Plainly, sewering--and thus multi-family housing--will only come to Bedminster through Allan-Deane. On the other hand, somewhat easing the Court's evaluative burden in this connection is the fact that the municipality concedes, with the concurrence of the county planning board, that the only area suitable for multi-family development is the Pluckemin Corridor, wherein Allan-Deane property is the only large undeveloped tract. Thus, unlike the Madison situation, the focus for appropriate relief is sharply narrowed.

In sum, Allan-Deane is clearly the linchpin to the actual provision of multi-family housing in Bedminster. Only through it can private sewering be provided on an economically feasible basis. Only it has lot holdings of sufficient size to provide the necessary infrastructure, as well as a mix of housing types. The other multi-family areas are little more than lines on a map, incapable of making material inroads to the existing housing shortage. Moreover, only Allan-Deane is prepared to meet and capable of meeting all legitimate environmental and ecological concerns resulting from development in the Pluckemin Corridor.

For these trying years, Allan-Deane has, alone, borne the cost of funding this difficult litigation and alone has undertaken the complex and costly scientific

analyses necessary to sustain the project. As was said in Madison :

> "[The] corporate plaintiffs have borne the stress and expense of this public interest litigation, albeit for private purposes, for six years and have prevailed in two trials and on this extended appeal, yet stand in danger of having won but a pyrrhic victory. A mere invalidation of the ordinance, followed only by more zoning for multi-family or lower income housing elsewhere in the township, could well leave corporate plaintiffs unable to execute their project.
>
> * * *
>
> "Such judicial action, moreover, creates an incentive for the institution of socially beneficial but costly litigation such as this and Mount Laurel, and serves the utilitarian purpose of getting on with the provision of needed housing for at least some portion of the moderate income elements of the population." 72 N.J. 549-551

As discussed in more detail in the limited concurrence of Justice Pashman:

> "... granting the specific relief sought by the corporate plaintiff...will serve several important functions.
>
> "First, as previously noted, even after an exclusionary zoning provision has been invalidated, a shrewd, intransigent community may rezone plaintiff's property in such a manner as to frustrate the proposed use. Towns may also require lengthy approval procedures or withhold from the corporate plaintiff permits necessary to proceed with a project. As one court has noted, such actions 'effectively grant the municipality a power to prevent any challenger from obtaining meaningful relief after a successful attack on a zoning ordinance.' Casey v. Warwick Tp. Zoning Hearing Bd., supra,

328 A. 2d at 468. By affording the corporate plaintiff specific relief, a remedial order will effectively prevent this form of harassment and will obviate the need for further litigation with respect to the property involved. See Sinclair Pipe Line Co. v. Village of Richton Oak, infra, 19 Ill. 2d 370, 167 N.E. 2d 406 at 411. Moreover, it will furnish an important incentive for developers to bring suits in the public interest. As our own Court has recognized, 'unless the immediate litigant can hope to gain, there [will] be no incentive to challenge existing practices or prior holdings which, in the public interest, ought to be reviewed.' Goldberg v. Traver, 52 N.J. 344, 347 (1968).

"Second, this remedial device directly advances the fundamental objective of promoting actual construction of low and moderate income housing. By allowing the corporate landowner to proceed with his project without further delay it offers one of the fastest and surest ways of accomplishing this objective. Mytelka & Mytelka, supra, 7 Seton Hall L. Rev. at 16.

"Finally, issuance of a variance or building permit under these circumstances also serves to protect the interests of the municipality because it assures that the corporate plaintiff will undertake the proposed use and no other." 72 N.J. at 597-598.

The situation is even more egregious herein, given the length of these proceedings and the mammoth expense incurred. Accordingly, it is respectfully urged, specific corporate relief is both appropriate and compelling herein. Moreover, in order to avoid a continuation of the procedural and substantive roadblocks erected in the past by Bedminster, it is further urged that this Court retain

jurisdiction over the consequent development stages, either directly or through a court-appointed special master, so that meaningful and real relief can be afforded and so that least cost housing can actually be constructed in Bedminster.

B. Considerations in Molding the Form of Specific Corporate Relief.

If a determination is made that Bedminster has not, in fact, complied with the previous orders of this Court and that specific corporate relief would be appropriate then the Court will be faced with the following general issues:

1. What additional information does this Court need to make a specific determination that the issuance of actual building permits on the Allan-Deane property would be compatible with minimum health, safety and welfare considerations and that the rezoning of other specific properties would be appropriate in terms of their access to basic infrastructure such as sewer, water and roads?

2. Would the development of the Allan-Deane property at appropriate residential densities meet Bedminster's regional housing obligation or should additional areas of the Township be rezoned for housing on very small lots and multi-family housing? What additional areas should be rezoned to what density and do they have the necessary "infrastructure" or access to such "infrastructure" as to make their redesignation reasonable?

3. Should this Court itself hold hearings with regard to the remaining technical issues such as the design of detention and retention basins, the traffic impacts of a

specific development proposal and their proposed solution, appropriate additional locations for multi-family housing, the proposed location of sewer lines and the numerous site plan and construction plan details in order, as stated in Madison, 72 N.J. at 551, "to assure compliance with reasonable building code, site plan, water, sewerage and other requirements and considerations of public health and safety."

4. Finally, if the answer to the above is negative, what mechanism would be appropriate to both ensure that the community would be protected against unregulated development and that Allan-Deane would have parallel protection from further harassment and the need for further litigation with the Township?

Allan-Deane suggests that it would be neither efficient nor appropriate to attempt through a judicial hearing process to resolve the technical issues inherent in a specific development proposal or in a new rezoning of the corridor area. Defendants through counsel have admitted to the Court that it is technically possible to solve the engineering and environmental problems associated with greater development (See T-XX-49-50). Bedminster has indicated through counsel that there is no "environmental capacity" which Bedminster has been able to quantify which would specifically limit the amount of development the corridor area can absorb or justify their zoning for less than their "fair share." (See T-XX-46 et seq.). In fact, Bedminster conceded that the Wapora Study, whose purpose was to have "that firm quantify a nonpoint pollution impact of various proposed development arangements in the corridor

area" (T-XX-7) came up with findings which were "not adverse" to Allan-Deane's position (T-XX-67). Thus, defendants,themselves, have admitted through their counsel directly to the Court and through their failure to enter proofs that insofar as they have been able to determine there are no environmental limits to development in the Pluckemin Corridor which cannot be solved through engineering and development techniques.

The question of what techniques are most appropriate from the standpoint of either cost or effectiveness should, we submit, be handled administratively through a mechanism under the supervision of this Court. If the Court concurs with this suggestion, then there is no further need for judicial evidentiary hearings since all remaining issues involve questions of the relative effectiveness of proposed techniques for solving the potential impacts of development.

Although some guidelines exist, in the design of that mechanism, this Court must leave the protective umbrella of prior case law.

The New Jersey Supreme Court has suggested in Oakwood at Madison, 72 N.J. at 553 and 554 through their reference to Pascack Associates v. Mayor and Counsel of Township of Washington, 131 N.J. Super. 195 (Law Div. 1974)* that the appropriate authority for such action is N.J. Court Rule 4:59-2(a) which provides:

> "Judgment for Specific Acts. If a judgment or order directs a party to perform a specific act and he fails to comply within the time specified, the court may direct the act to be done at the cost of such defaulting party by

*Later reversed on other unrelated grounds, 74 N.J. 470 (1977).

> some other person appointed by the court, and the act when so done shall have like effect as if done by the defaulting party."

In addition, upon approval by the Chief Justice, a trial court, pursuant to R.4:41-1 et seq. may appoint a master for the hearing of matters with powers which may be specified by the court.

Unquestionably, this Court possesses the inherent power to appoint persons unconnected with the court to aid in the performance of specific duties arising in a case. See Matter of Walter Peterson, 253 U.S. 300, 312, 40 S.Ct. 543, 64 L.Ed. 919, 925 (1920); Mt. Laurel, 67 N.J. at 216 (Pashman, J., concurring); Madison, 72 N.J. at 583-584; Handleman v. Marwen Stores Corp., 53 N.J. 404 (1969); Pascack Ass'n. v. Washington Township, supra.

This Court should, we suggest, in attempting to mold a remedy to fit the facts of this case, consider the following general principles:

1. The general parameters of the appropriate specific corporate relief should be set forth by this Court; so that the master appointed by the court is not required to make basic judicial policy decisions such as those which were litigated at this hearing (i.e., this Court should determine, based on the record which has been made, that a site plan with an overall gross density of between 5 and 7 units per acre should be approved and the required building permits issued once the master has assured the court that the plan in question complies "with reasonable building code, site plan, water sewerage and other requirements and considerations

of public health and safety." 72 N.J. at 551.) Similarly, this Court should determine the appropriate extent and density of other lands which should be considered, within the corridor, for rezoning for multi-family housing but leave to the master their exact location.

2. In order to avoid further extensive delays through a multiplicity of appeals, this Court should retain jurisdiction of this matter and enter final judgment when the process is completed and the administrative mechanism is dissolved. As Justice Pashman said in his concurring opinion in Oakwood at Madison, supra., 72 N.J. at 568, "by retaining jurisdiction to supervise implementation of the remedial order, the trial court will forestall the possibility of diliatory tactics or bad faith compliance on the part of the municipality."

3. In order to balance "the need to vindicate the rights of persons who have been or will be deprived of the opportunity for decent housing if no relief is granted against the principle of local decision-making in land use planning matters," (See Pashman, concurring in South Burlington County N.A.A.C.P. v. Mt. Laurel, supra., 67 N.J. at 217 and Pashman concurring in Oakwood at Madison, 72 N.J. at 580 and 581) the remedy molded by this Court should allow the community to participate in the rezoning process before the court appointed "master" and provide for an early return of the decision-making power to the community. That is to say, once final building permits have been issued to Allan-Deane and the court appointed administrator has revised Bedminster's land use ordinances and they have been "adopted" the power to administer such regulations should be returned to the community once the court has been

assured that Bedminster will not use those powers to frustrate development or impede remedial efforts.

4. Due to the probable complexity of the procedures required and the need to protect both parties from legal errors, such as inadvertent due process violations, during the course of the remedial process and consequent numerous appeals, the court appointed administrator should in this case be a lawyer or retired judge with authority in turn to hire the experts he deems appropriate to advise him.

   Ordinarily such consultants are to be appointed at the expense of the defaulting defendants, see R. 4:59-2(a) and Madison, 72 N.J. at 584. In this case, however, since a portion of the court appointed consultants' work would involve the review of Allan-Deane's site plan and engineering, ordinarily subject to "reasonable" review fees "roughly correlative with the reasonable cost of administration," (See Economy Enterprises, Inc., supra., 104 N.J. Super at 381), it would be reasonable to require Allan-Deane to bear some portion of the cost of the review of its site plan and construction plans. Allan-Deane will stipulate that it will contribute an amount the court deems appropriate for this purpose.

5. This Court should build into its remedial order for specific corporate relief a density range, so that the municipality will have some incentive to abandon its historic policy of intransigence towards this Court's efforts to implement the principles of Mount Laurel, i.e., an order to the effect that an overall gross density of 5 to 7 units per acre is appropriate for the 461 acre Allan-Deane site would be both conservative and consistent with the testimony. (See Dr. Carroll at T-XIX-106 to effect that 7-15 units per acre is least costly; William Roach at T-XX-175 to effect that 5-15

units per acre appropriate in Village Neighborhood; Coppola Testimony at XXXIV-32 to effect that 7 to 10 units per acre reasonable for multi-family; and Rahenkamp at T-X-163 to effect that 5.5 units per acre is ideal for site planning for Planned Unit Developments).

6. To avoid, to the extent possible, further litigation between the parties, this Court should address itself to all issues raised at the trial which would effect the remedy and, as suggested by Justice Pashman in Madison, 72 N.J. at 596, "continue to solicit suggestions and comments from the parties in the case" so that additional measures may be adopted, as problems arise which will provide effective relief for plaintiff. For example, there was testimony by Donald A. Brown, Assistant Director of Water Resources, Department of Environmental Protection to the effect that one of the requirements for approval of a private treatment plant, meeting certain effluent criteria, was a finding by DEP that there were "necessary and justifiable economic or social developments" to be served. (See T-XXX-VI-10, 12). Mr. Brown indicated on cross-examination that the DEP would "seriously consider" a court determination as to whether there were necessary justifiable social and economic reasons for the development. (See T-XXVI-41-42). Thus a court determination in this regard may in fact save a retrial of this issue before an administrative agency.

7. In order to expedite the administrative proceedings, this Court should require Bedminster to specify the areas where they contend the corporate plaintiff's site plan does not comply with reasonable building code, site plan, water, sewerage and other requirements and considerations of public health and safety. Bedminster's attorneys have had, for some time, the full reports

of Allan-Deane's engineering and environmental consultants and have undoubtedly already had them reviewed by experts. To narrow the focus, Bedminster should carry the burden of proof and the obligation of challenging Allan-Deane's experts.

C. Subsequent Proceedings.

This Court has a number of options with respect to the timing and order of subsequent proceedings in this case. Since the Public Advocate has requested and received permission to take a position with respect to remedy, in the event there is a decision adverse to Bedminster, this Court will have to first determine whether there is compliance, notify the Public Advocate, and then determine what the remedy should be.

We would like to suggest that the Court consider the following sequence of proceedings or scenario:

1. Determination made as to whether Bedminster has in fact complied with previous orders of this Court.

2. If yes, proceedings dismissed. If no, notify parties and Public Advocate by letter that Court would like to hear oral argument on Remedy. Court may advise parties as to which issues it wishes addressed.

3. Oral argument on remedy.

4. Rendering of determination addressing and describing general perameters of appropriate relief.

5. Order consistent with opinion entered.

6. Master or administrator appointed pursuant to order with specified powers and a time-table. Master's duties include:

   (a) To review an Allan-Deane site plan and engineering details within a designated density range and recommend changes as needed. When plan conforms with reasonable site plan, public health and safety requirements to recommend site plan approval with building permits to Court;

   (b) Rewrite land use ordinances at Bedminster's expense and recommend new provisions to Court for approval; and

   (c) Designate additional areas in accordance with opinion for multi-family housing.

7. Court directs issuance of building permits for phased development of Allan-Deane site in accordance with Master's recommendations. Final Judgment entered as to Allan-Deane.

8. Court directs adoption of new Land Use Ordinances with new zoning districts in accordance with Master's recommendations. Final Judgment entered as to other plaintiffs.

CONCLUSION

On the evidence adduced at the hearing held pursuant to R.1:10-5 and for the reasons stated herein, it is respectfully submitted that judgment should be entered to the effect that:

1. Bedminster's revised land use ordinances do not comply with the previous orders of this Court.

2. The rezoning of the Allan-Deane property is arbitrary and void, including determinations that the critical area zoning of the slope area is confiscatory and unlawful, that the R-3 zoning of the plateau area is unreasonable and unjustified and that the failure to re-zone the entire Allan-Deane property at a uniform reasonable density for multi-family housing is capricious and unwarranted.

3. Specific corporate relief to Allan-Deane, the designation of additional areas within the Pluckemin Corridor for least-cost housing and a extensive revision of Bedminster's land use ordinances are an appropriate remedy in view of the history of this case and the previous opportunities offered to the community for voluntary compliance.

4. An appropriate administrative mechanism, under the authority and jurisdiction of this Court, be established to:

   a. Advise the Court with respect to whether the Allan-Deane Site Plan, or such modified plan, within the density range established by this Court, complies with reasonable building code, site plan, water, sewerage and other requirements and considerations of public health and safety.

   b. Designate additional areas with the Pluckemin Corridor, consistent with this Court's opinion, for multi-family housing.

   c. Revise Bedminster's land use ordinances, consistent with this Court's opinion, and recommend such revisions to this Court for approval.

5. Order the issuance of building permits to Allan-Deane consistent with an "approved" site plan, the adoption of new land use ordinances by Bedminster and the creation of new zoning districts, upon the adoption of the recommendations forwarded to this Court through the administrative process hereinabove created.

Respectfully submitted,

MASON, GRIFFIN & PIERSON

By: Henry A. Hill, Jr.
Henry A. Hill, Jr.

HANNOCH, WEISMAN, STERN & BESSER

By: Dean A. Gaver
Dean A. Gaver

On the Brief:
Henry A. Hill, Jr., Esq.
Dean A. Gaver, Esq.
Guliet D. Hirsch

Dated: April 23, 1979

APPENDIX "A"

PROCEDURAL HISTORY

The Procedural History of this case is a matter of court record and can be chronologically summarized as follows:

1. December, 1969 - Allan-Deane formally approached the Township of Bedminster Planning Board and Township Committee with a proposal for the rezoning of its property to permit multi-family uses.

2. August 23, 1971 - After waiting 21 months without response from Defendants, Allan-Deane filed a Complaint in Lieu of Prerogative Writ alleging that the Bedminster Zoning Ordinance was invalid.

3. December 25, 1971 - Allan-Deane applied to the Bedminster Board of Adjustment for variances under N.J.S.A. 40:55-39.

4. May 26, 1972 - Bedminster Board of Adjustment denied the variance application primarily because the requested changes were so substantial as to require implementation through the Zoning Amendment process.

5. June, 1972 - The Cieswick Plaintiff's filed a Complaint, also alleging the invalidity of the Bedminster Township Ordinances and sought to consolidate it with the pending Allan-Deane action. This motion was denied, appealed and eventually remanded. See Allan-Deane Corp. v. Township of Bedminster, 121 N.J. Super 288 (App.Div. 1972), remanded 63 N.J. 591 (1973).

6. November 27, 1972 - The trial on the first Complaint is adjourned at Defendant's request on their express representation that the Township would rezone.

7. April 16, 1973 - Bedminster Township adopts a new Zoning Ordinance.

8. May 31, 1973 - Allan-Deane files a new Complaint attacking the new ordinance.

9. September 4, 1973 - Bedminster Township adopts minor amendments to new Zoning Ordinance.

10. September 13, 1973 - Allan-Deane's action is consolidated with similar action brought by Cieswick Plaintiffs.

11. March 4 thru March 28, 1974 - First trial of the consolidated action takes place.

12. February 24, 1975 - The Court issued written opinion requiring Defendant to rezone an area which included the Allan-Deane property to comply with standards and goals of the Somerset County Master Plan.

13. October 17, 1975 - The Court issues a supplementary opinion in view of the Supreme Court decision case of Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151 (1975) and an Order requiring Bedminster to rezone by January 31, 1976.

14. November, 1975 - Bedminster appeals to the Superior Court, Appellate Division.

15. January 29, 1976 - Order of October 17, 1975 is stayed by trial Court pending appeal.

16. January 21, 1977 - The Superior Court, Appellate Division enters per curiam decision affirming the trial court's decision.

17. May 3, 1977 - Defendants petition for certification to the New Jersey Supreme Court is denied.

18. September 28, 1977 - Order entered

vacating the stay of January 29, 1976 and Defendants ordered to rezone by December 31, 1977.

19. November 14, 1977 - Defendants adopt a new master plan.

20. December 19, 1977 - Defendants adopt a new Zoning Ordinance.

21. March 23, 1978 - Order to Show Cause pursuant to Rule 1:10-5 issued.

22. May 22, 1978 - a pretrial order was issued.

23. June 12, 1978 - Amendments to Master Plan Adopted by Planning Board.

24. August 21, 1978 - Amendments to Zoning Ordinance.

25. September 18, 1978 - Further amendments to Zoning Ordinance.

26. September 8, 1978 - Hearings commenced on Order to Show Cause.

27. November 1978 - Bedminster adopts new site plan and subdivision ordinance.

28. April 2, 1979 - Hearings on Order to Show Cause end after forty full trial days.

P - 15 EXISTING LAND USE

(149)

(150)

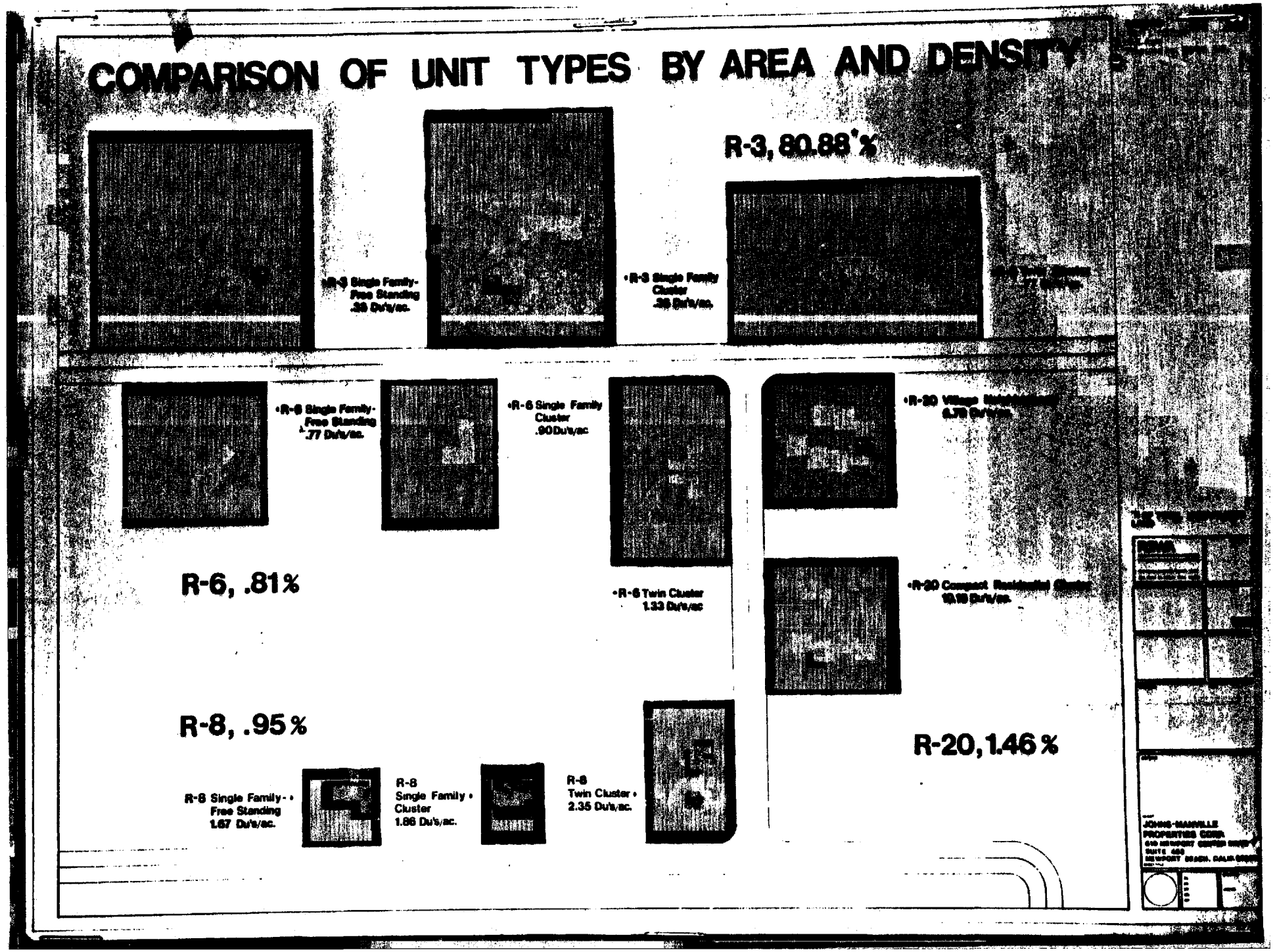
CHARACTERISTICS OF [illegible]

	SIZE (ACRES)	% OF TOWNSHIP AREA	NO. OF ACRES UNDEVELOPED	% [illegible]
[illegible]	13,223.25	77.38%	10,398.61	[illegible]
R-6	319.82	1.87%	104.30	[illegible]
R-8	248.40	1.45%	122.66	[illegible]
R-20	280.28	1.64%	187.58	1.46%
CRIT. AREA	2,749.48	16.09%	2,009.27	15.63%
BUSINESS	79.61	.47%	14.43	.11%
RESEARCH - OFFICE	187.16	1.10%	19.44	.15%
	17,088.00	100%	12,856.29	100%

SOURCE: CARL LINDBLOOM
PREPARED BY RSWA, INC.

(157)

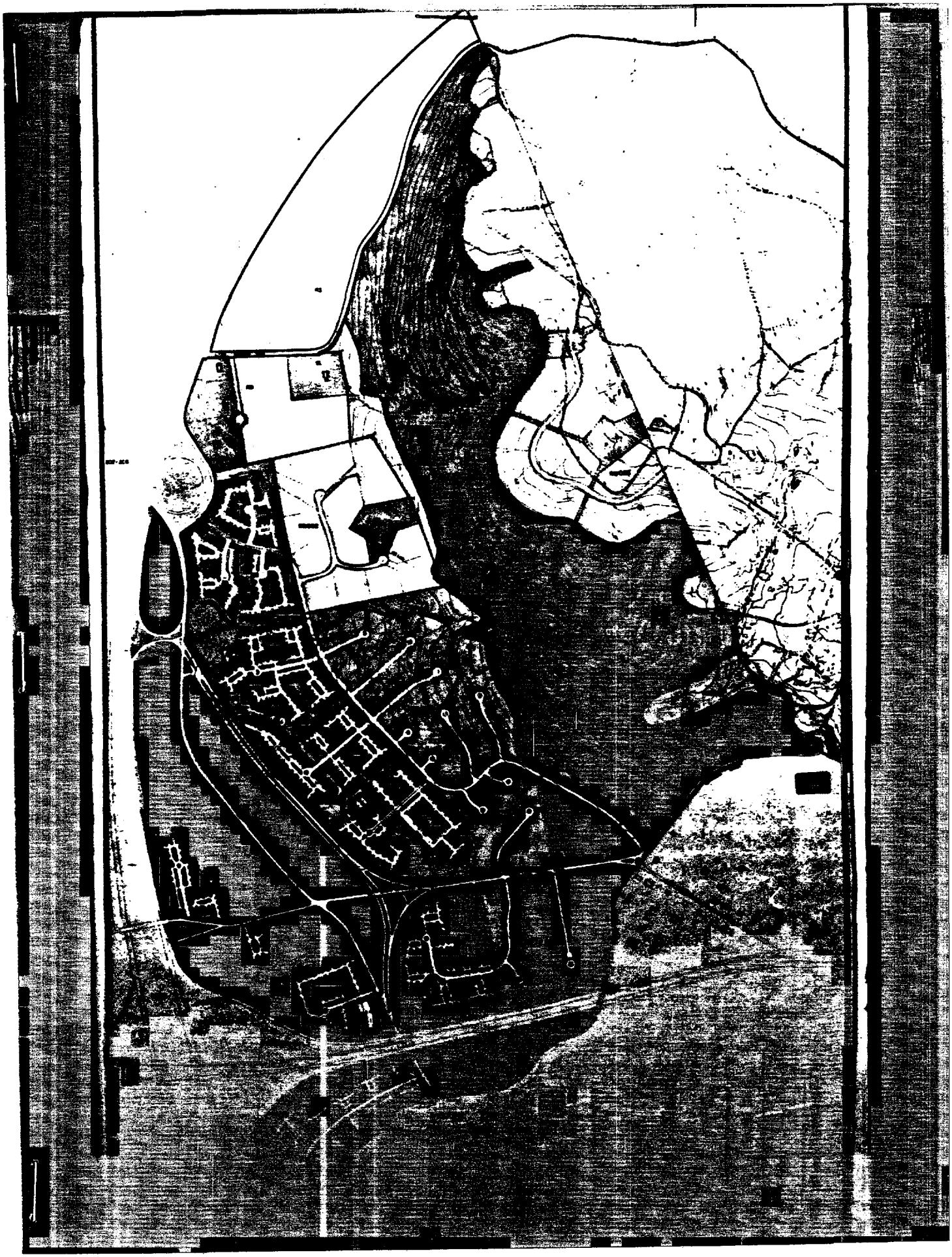
COMPARISON OF UNIT TYPES BY AREA AND DENSITY



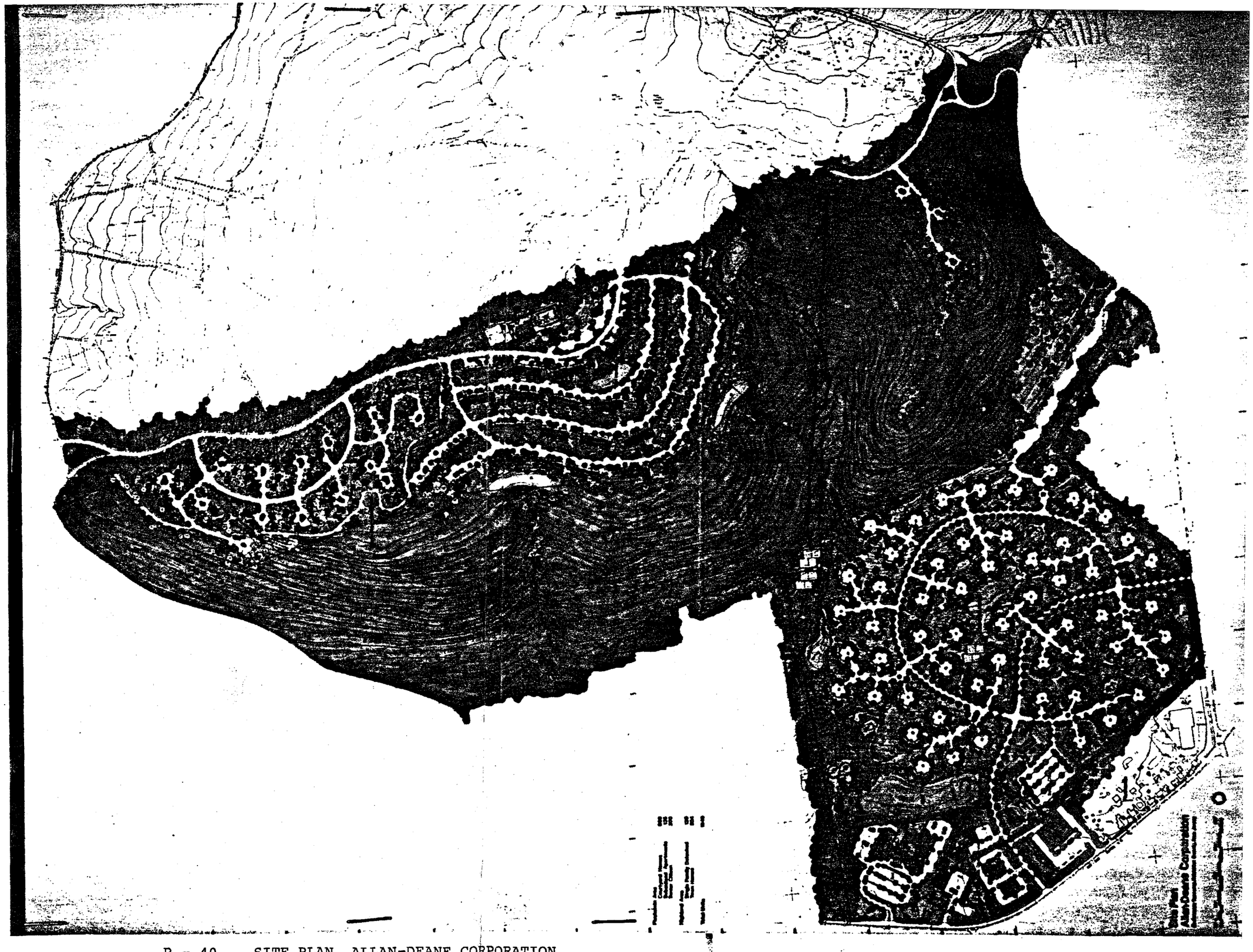
P - 22 PERMISSIBLE MULTI-FAMILY: 1973 ZONING

P - 24 PERMISSIBLE MULTI-FAMILY: 1978 ZONING

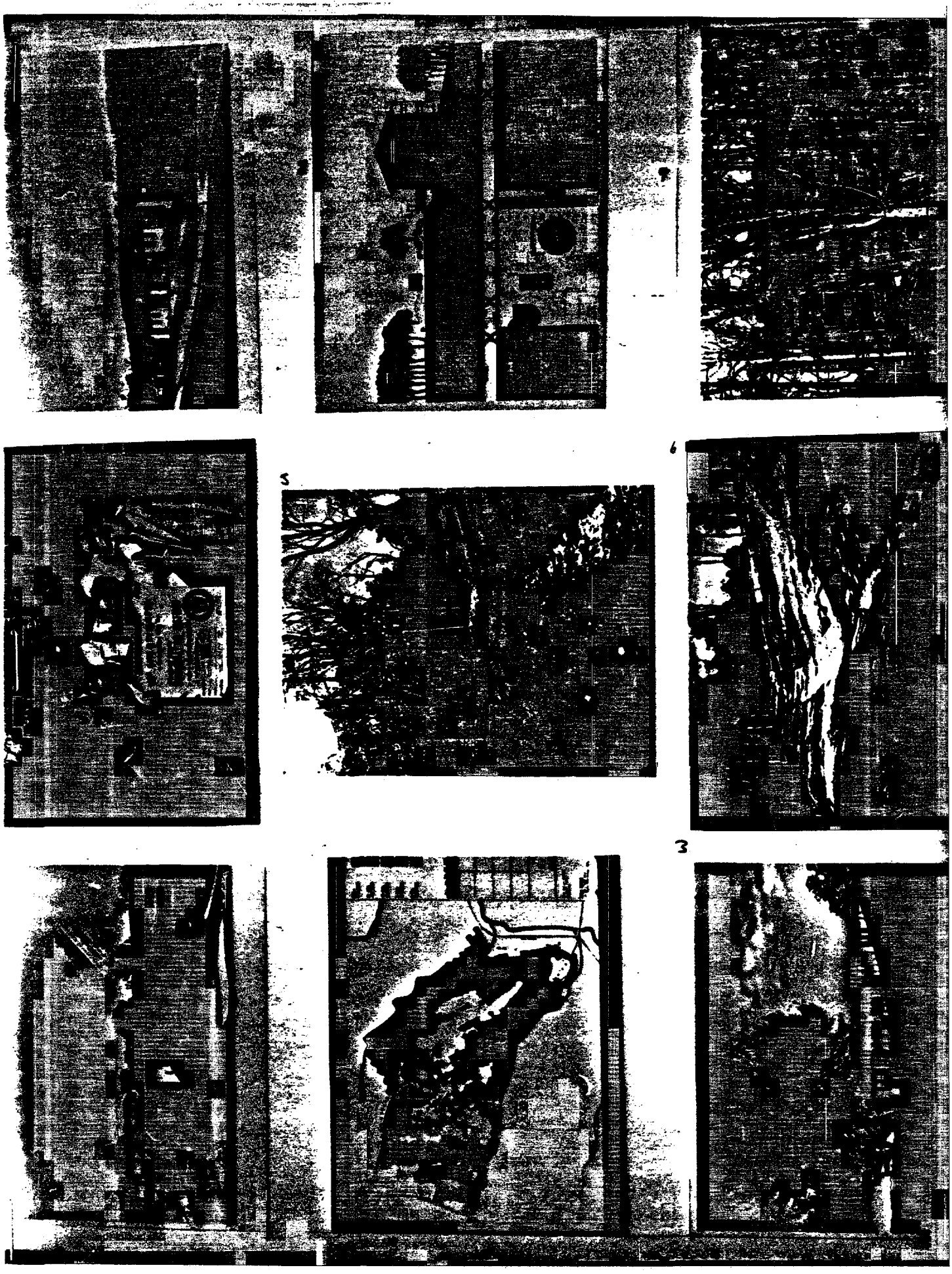
P - 35 DEVELOPMENT PLAN UNDER 1973 ZONING ORDINANCE
ALLAN-DEANE CORPORATION



P - 36 PROPOSED MAXIMUM DEVELOPMENT PER ORDINANCE
ALLAN-DEANE CORPORATION

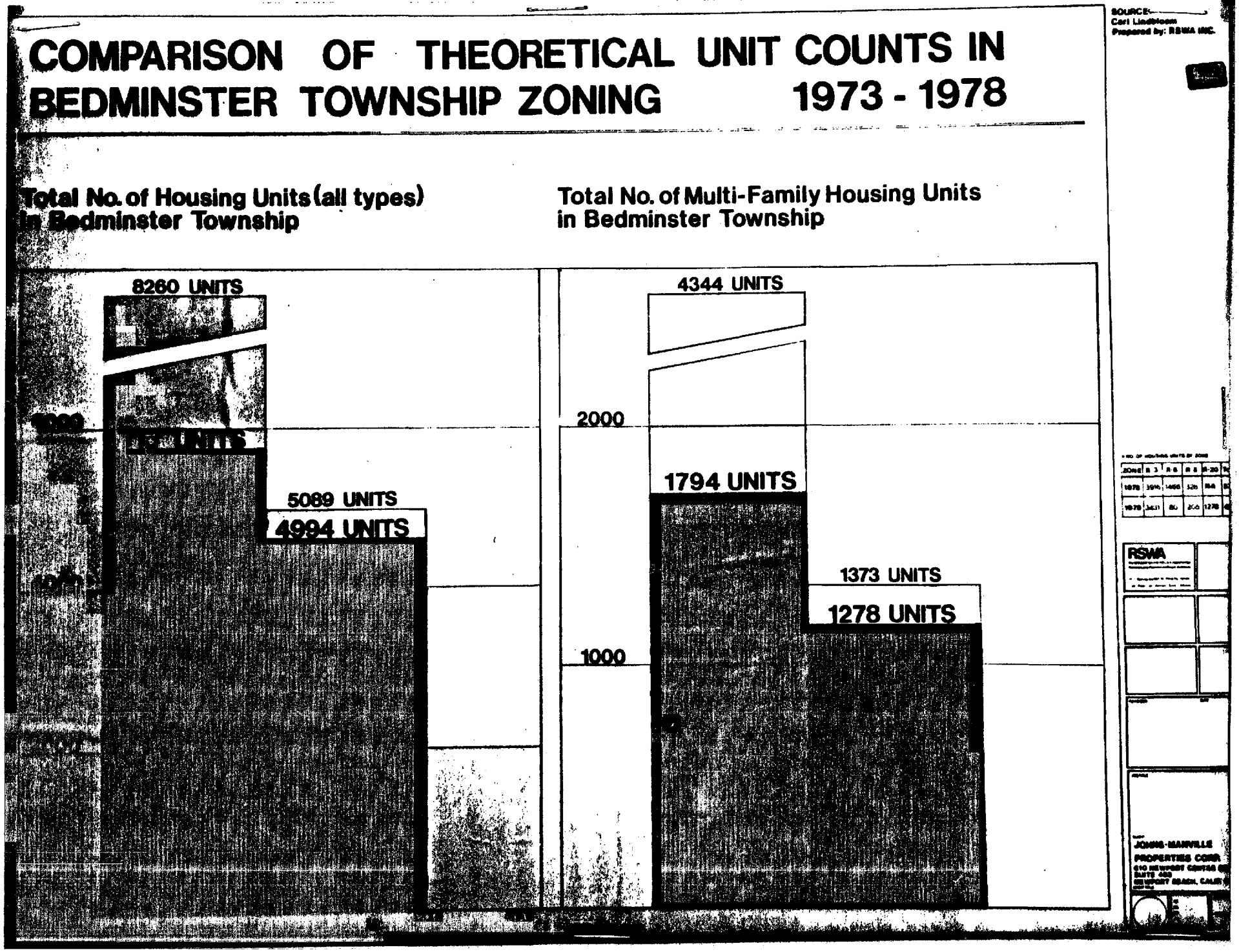


P - 40 SITE PLAN, ALLAN-DEANE CORPORATION

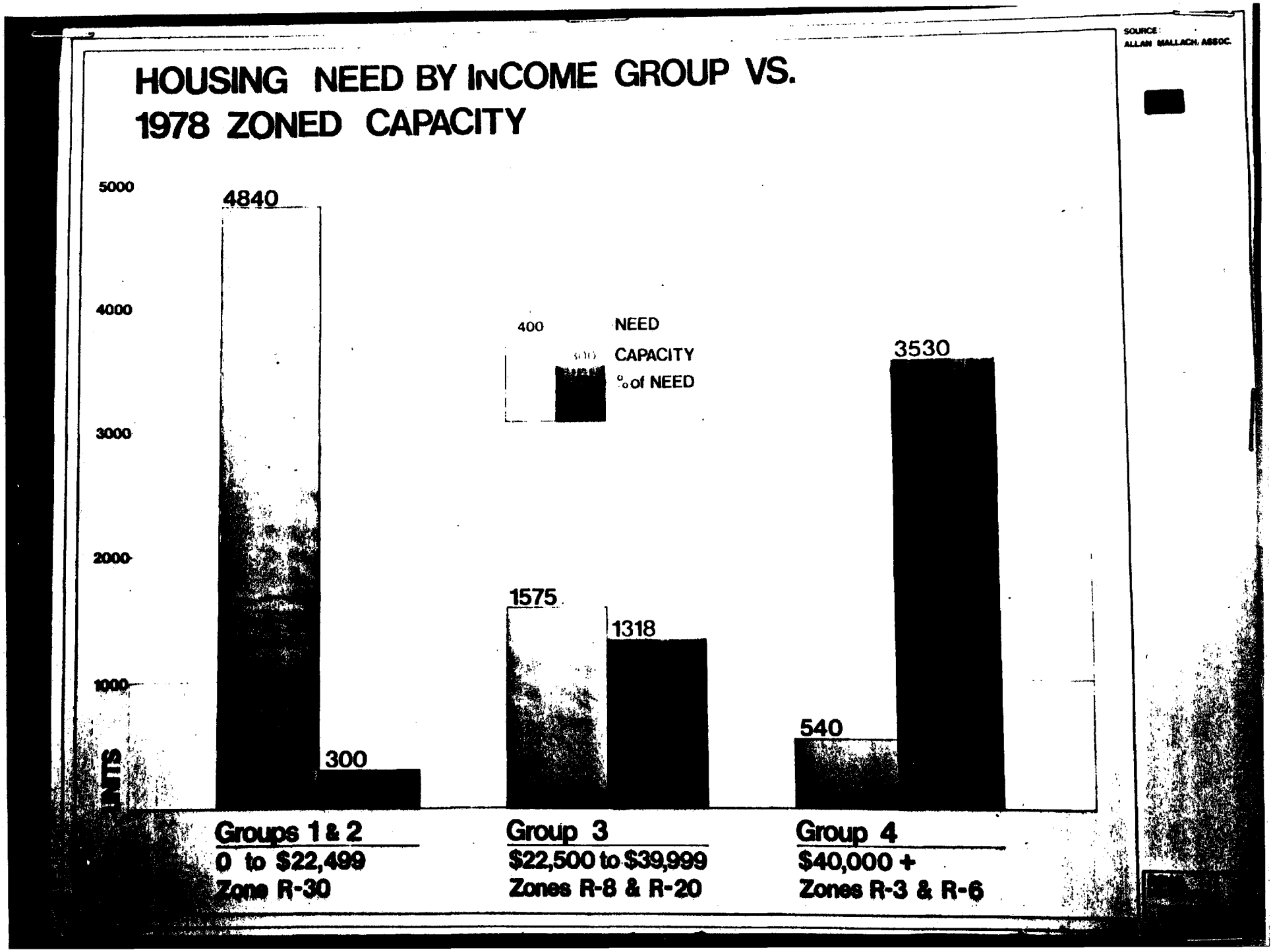


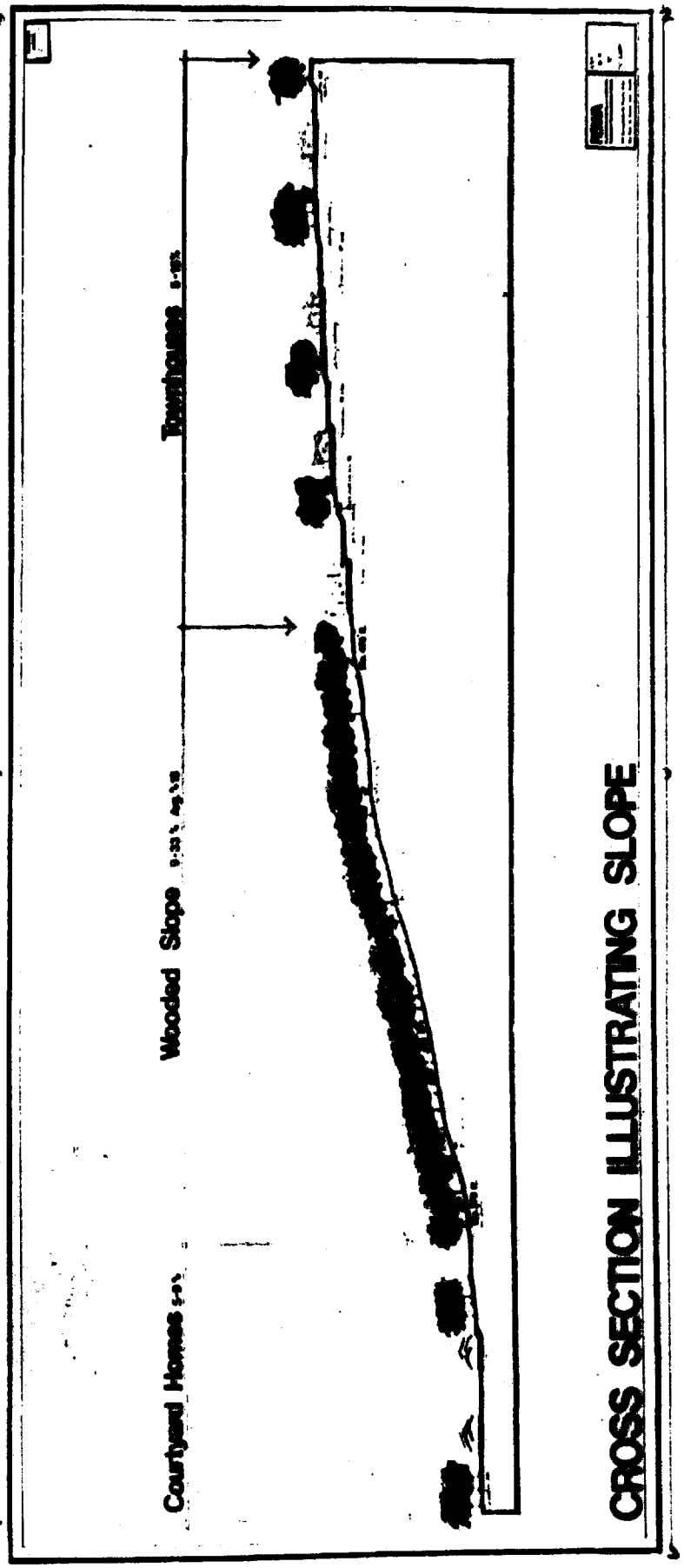
P - 44 PHOTOGRAPHS OF DEVELOPMENT ON STEEP SLOPES

COMPARISON OF THEORETICAL UNIT COUNTS IN BEDMINSTER TOWNSHIP ZONING 1973 - 1978



(59)


HOUSING NEED BY INCOME GROUP VS.
1978 ZONED CAPACITY
SOURCE:
ALLAN MALLACH ASSOC.
NEED
CAPACITY
% of NEED
5000
4000
3000
2000
1000
UNITS
4840
300
1575
1318
540
3530
Groups 1 & 2
0 to $22,499
Zone R-30
Group 3
$22,500 to $39,999
Zones R-8 & R-20
Group 4
$40,000 +
Zones R-3 & R-6



P - 92 CROSS SECTION ILLUSTRATING SLOPE