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Pre-trial Brief of Plaintiff, Allan-Deare
- Cover letter to clerk

pgs. 88

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April 30, 1979

RULS - AD - 1979 - 120

Mr. Lawrence R. Olson
County Clerk
County of Somerset
110 Administration Building
Somerville, New Jersey 08876

Re: The Allan-Deane Corporation vs.
Township of Bernards
Docket Nos. L-25645-75 & S-1290 P.W.

Dear Sir:

In accordance with Paragraph 11 of the Pretrial Order entered on January 5, 1979, in the above-captioned matter, please find enclosed an original and one copy of the Pre-Trial Brief of Plaintiff as required by Judge Lucas.

Sincerely yours,

Henry A. Hill, Jr.

HAH/vwa
Enclosures (2)

cc: McCarter & English
Dean A. Gaver, Esquire
James E. Davidson, Esquire
John F. Richardson, Esq.

S-1290

Page

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-SOMERSET COUNTY
DOCKET NO. L-25645-75
S-1290 P.W.

THE ALLAN-DEANE CORPORATION, et al.,

Plaintiff,

vs.

THE TOWNSHIP OF BERNARDS, et al.,

Defendant.

Civil Action

FILED
MAY 1 8 51 AM 1979
SOMERSET COUNTY
L.R. OLSON CLERK

PRE-TRIAL BRIEF OF PLAINTIFF, ALLAN-DEANE

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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, 158). This crisis has not abated since that time as the various housing market indicators reveal:

> 1. In 1976 only 25% of all families in New Jersey could afford the median-priced home;
>
> 2. Most families who purchased new housing in 1976 earned $20,000 or more and 43% had two wage earners;
>
> 3. Homeownership is becoming a luxury; home purchases by middle-income families dropped to 38% of sales in 1975-1976 and purchases by the lowest one-third income group dropped to 4%;
>
> 4. In the rental market, costs rose but incomes did not keep pace, causing lower income renters to spend 35% of their incomes for this necessity.**

Alan Mallach, a housing market and fair share expert, will testify to the impact of the crisis on the low and moderate income population, a group defined as families

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

**See N.J. Department of Community Affairs, State Housing Programs and Policies: New Jersey's Housing Element (1977) p.7-8.

unable to purchase or rent housing without subsidies, or those making less than 80% of the median income in the region. The supply of housing for this group is still meager since the stock of subsidized housing has not recently increased; the situation in Somerset County is especially severe with two senior citizen projects (453 units) comprising the entire subsidized stock built since the late 1950's the projects are located in Basking Ridge and Somerville.

While housing construction rates lag the increasing family formation rate and decreasing family size trends have caused demand for housing to mushroom even as the rate of natural population growth slows in the Northeast region. These factors and many others, have caused a vicious trend in rising housing costs which has priced out middle income families ($15,000.00 to $22,499.00) from all but "least-cost" type units; the upper-middle income group ($22,500.00 to $39,999.00) is also priced out of the housing market in Bernards and the more elite communities in the Bernards region.

In summary, the housing supply to demand relationship has not improved since the Mt. Laurel-Madison decisions.

B. Urban Revitalization Policies and Mt. Laurel.

It is likely that most housing and urban policy experts who testify in this trial will discuss the potential conflicts between recent federal and state urban revitalization policies and the Mt. Laurel fair share obligation.

Actually, the conflict is a red herring because

suburban fair share allocations are a necessary condition of urban revitalization. The principal reason for the economic decline and deterioration of the cities is the disproportionate number of low income people trapped there by suburban growth policies. The cities will only become more attractive to more affluent populations, commercial and office centers if inner-city residents are given the opportunity to relocate throughout the region. In fact, recent studies of the impacts of urban revitalization, have shown that these trends tend to exacerbate the existing housing shortage and thus require greater affirmative action by suburban communities.* This is true because:

1. Large urban buildings which once accomodated three or four low income families are renovated to house only one family thereby considerably reducing densities and displacing several families;

2. The numbers of people leaving the city for the suburbs is substantially greater than the flow in the opposite direction (into the city);

3. The income of persons moving into the central cities is considerably lower than the income of persons moving out.

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*See, Sternlieb, G. and Ford, C., Some Aspects of the Return to the Central City (Rutgers Center for Urban Policy Research, 1978).

It is clear that recent federal and state urban revitalization policies have not and will not affect the Mt. Laurel obligations of any developing municipalities.

II. Bernards Township: An Overview

Bernards Township, located in northern Somerset County is a sprawling suburban community with a land area of 24.4 square miles, of which 50% is currently available for development. The Township's 1975 estimated population was 14,103, with a density of 462 persons per square mile. This density results from the predominant large lot zoning and is significantly lower than Somerset County's density of 635 people per square mile and New Jersey's density of 938 people per square mile.

A. Transportation and Accessibility.

Despite the geographical features of the Great Swamp and the Watchung Mountains, Bernards Township is conveniently accessible, both in terms of private and public transportation, to the major regional employment centers. This is evidenced by the fact that in 1970, 58% of Bernard's employed residents worked outside Somerset County.

Public transportation is utilized by 15% of all commuters from Bernards. The major public transit facility

used is the Conrail line (formerly Erie-Lackawanna) which has two station stops in Bernards and connects with Newark and New York. Commutation via the automobile is convenient due to the location of two federal interstate highways, Routes I-287 and I-78, which intersect within a mile of the Allan-Deane site in the southwest corner of the Township. These two highways place Bernards within 35 minutes of Newark and 45 minutes of New York City, as well as a short distance to Pennsylvania and points west, and about 25 minutes to the Garden State Parkway. Local access roads, Routes 202 and 206 traverse the Township in a North-South direction and provide convenient intra-county access.

B. Employment Growth.

The following tables compare employment growth rates for the State of New Jersey, Somerset County and Bernards Township. In general, although the Newark region is declining as an employment center in relation to the State as a whole, Somerset County is growing rapidly along with Bernards Township. In fact, Somerset County has the fastest growing industrial base in New Jersey. The inability of the housing market to keep pace due to zoning and other forces is illustrated by the fact that from 1970 to 1975 Somerset County has accomodated only 3.09% of the State's population growth, while attracting 13.71% of the State's new jobs. Recent employment growth in Bernards is even more staggering; from 1970-1975, covered employment, which excludes government workers grew by 49.9%.

Employment Change, 1970 - 1975

	Total Change	Ann. Change	% Change
New Jersey	127,938	25,588	5%
Somerset	16,632	3,326	26.7%
Bernards	860 (1970-74)	215	+49.9%

(See N.J. Department of Labor and Industry, Covered Employment Trends in New Jersey)

As summarized in the following table, corporate relocation and expansion which has occurred since 1974 in Somerset County has accounted for 8,330 new employment opportunities, apart from normal growth in the area.* Jobs at these primary facilities will undoubtedly attract secondary retail and personal services.

Employment Added Since 1974

Employer	Number of Employees
AT&T World Headquarters	3,500
AT&T Longlines Headquarters	3,500
American Hoechst	150
Ethicon	350
RCA Office Building	430
Johnson & Johnson	200
Ortho Pharmaceutical	200
	8,330**

*This growth is not a recent phenomena but represents acceleration of the general employment growth pattern which saw Somerset County's covered employment grow from 24,600 to 41,186 from 1968 to 1978 (Somerset County Economic Development Department). In addition to the corporations listed below, the following "blue chip" companies have moved into Somerset in the past 10 years:

1. National Starch Corporate Headquarters
2. Lehn & Fink (Division of Sterling Drugs)
3. Olivetti Corporation.

**In addition to the growth which has occurred, already Chubb & Son and Beneficial Corporation, have announced they have purchased land and are in the process of designing new corporate headquarters in Somerset County. These two new relocations alone will account for over 4,000 new primary jobs.

The reasons for this trend include Somerset County's superior access via I-78 and I-287, its equi-distant position between the first major market (New York City) and the fourth major market (Philadelphia), its superior quality of life and the availability of large tracts of industrially zoned land. Aside from the enrichment of the tax base, corporate relocation and expansion has benefitted Somerset County in other ways by contributing to its low unemployment rate (lowest in N.J. for the past 5 years) and its high bond rating (Triple A). To put these benefits in perspective, however, the costs imposed throughout the relevant region by corporate relocation must be considered. One immeasurable social cost is the unemployment of low income and minority workers who are left behind when a corporation abandons a city for a more spacious suburban location. An example of this pattern is the AT&T relocation from New York City to Bedminster; over 75% of clerical workers earning under $20,000.00 were unable to follow their jobs to the new location.

In addition to its new corporate residents, Somerset County now houses some of the wealthiest citizens in the State. In fact, in 1970 Somerset was the second wealthiest county in the state, with a median income of $13,433.00, which was exceeded only by Bergen County, with a median income of $13,597.00. Bernards Township's comparative wealth is even more striking. Bernards Township's 1970 median income ranks above 532

municipalities which contained over 95% of the State's population. And Bernards continues to grow wealthier still; by 1975, the Township's median family income had increased from $17,852 (1970) to $22,429, an increase of 25.6%. The following chart describes the 1970 family income distribution of Bernards:

Income ($)	Number of Families	%	Cumulative %
0 - 4,999	74	2.5	2.5
5,000 - 9,999	326	11.2	13.7
10,000 - 11,999	240	8.3	22.0
12,000 - 14,999	463	15.9	37.9
15,000 - 24,999	1,222	42.1	80.0
25,000 - 49,999	495	17.1	97.1
50,000 +	83	2.9	100.0

This chart demonstrates that the population of Bernards Township may be described as affluent by any standard, since over 78% of its families in 1970 earned above the State's median income of $11,370.

C. Property Tax.

Relative to their income, Bernards Township residents have long been bearing a substantially lower burden in property taxes than residents in other parts of New Jersey.

The 1970 Census shows that despite the fact that Bernards Township's average income was 57% above the New Jersey median and the median housing value reported for Bernards Township in the 1970 Census was 71% above the New

Jersey median, 213 of New Jersey municipalities sustained a heavier tax burden.

Since 1970, Bernards Township has enjoyed an even more favorable tax climate: the equalized tax rate has decreased from $3.93 per $100.00 in 1971 to $2.86 per $100.00 in 1975. Thus, while equalized tax rates in other areas of New Jersey have increased generally by 10% to 20% in order to obtain minimum funds to finance local education and other required services, the equalized tax rate in Bernards Township has significantly decreased.

The principal reason for this decrease in Bernards Township's tax rate is its 1969 rezoning (from residential R-3A to office/laboratory) of that piece of land in the Basking Ridge section of the Township now occupied by the A.T.&T. Worldwide Headquarters. This A.T.&T. facility will be valued at 100 to 110 million 1975 dollars when completed; 1976 tax revenues from A.T.&.T. amounted to approximately $1,800,000.00.

D. Housing Costs.

A survey of listings of housing units for sale in Bernards Township in 1976 revealed a median sale price of $88,500.00 and an average value which was significantly higher because of the weight added by units priced as high as $425,000.00. Of the 129 housing units listed, only one was selling for under $40,000; three were listed between

$40,000 and $49,999; and twelve were listed for $50,000 - $59,999. All of the lower priced units were older homes, with new houses being invariably listed for between $79,900 and $139,000.

The following table summarizes the proportion of families who can afford to purchase the median cost housing valued at $88,500.00. Ability to purchase is defined by the empirically estimated housing-value-to-income ratio of between 2.5 to 1, or a more realistic estimate of 2.0 to 1.

Families That Can Afford 1976 Median-Priced Housing in Bernards Township

Ratio	Somerset Cty.	Newark SMSA
2.0 to 1 ($44,250)	3.3%	3.3%
2.5 to 1 ($35,400)	7.5%	5.9%

It is not surprising that the Somerset County Housing and Employment Survey of 1970 found that a vast majority of the county's employees were being priced (or zoned) out of the housing market and that this trend continues unabated.

E. Planning and Zoning History.

Although Bernards Township has had land use controls for a relatively long time (since 1937), common threads

run from these earlier enactments to current controls and land use patterns. The following enactments are highlighted herein:

1. 1937 Zoning Ordinance
2. 1954 Zoning Ordinance
3. 1959 Master Plan
4. 1962 Amendments to 1954 Zoning Ordinance
5. 1966 Master Plan
6. 1969 Zoning Ordinance
7. 1973 Zoning Ordinance Amendments
8. 1974 Zoning Ordinance Amendments
9. 1976 Zoning Ordinance Amendments
10. 1977 Zoning Ordinance Amendments*

1. Multi-Family and Small-Lot Single-Family Provisions

The first zoning ordinance, adopted in 1937, provided for a variety of housing types, including multi-family units, two-family houses and small-lot single-family houses** in both two of three residential zones and the Business and Industrial Zones. The 1954 ordinance deleted the provisions for multi-family and small-lot houses*** while adding an explicit prohibition of trailer camps and motels. The 1959 Master Plan revived the discussion of multi-family units though deferring the creation

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*Discussion of the 16 Amendments since 1977 omitted.

**Lots as small as 5,400 square feet or 1/8 of an acre were permitted.

***Minimum lot size was reduced to 20,000 square feet or 1/2 acre permitted in only one of five residential zones.

of a multi-family district until I-287 was closer to completion. The proposed location for the district was the Northeast part of the township between U.S. Route 202 and I-287 which is presently zoned for low density use. The Master Plan stated that only middle or uppoer income apartments were considered suitable for the future, because low-cost apartments, especially units constructed with governmental assistance "were not consistent with the nature and character of Bernards". In 1971, after submission of the Allan-Deane proposal for development, multi-family provisions were finally considered; however, the Planning Board reacted negatively to its consultant's proposals, subsequently dismissing him and hiring its present consultant, Charles Agle.

Although multi-family provisions did not materialize until 1973, development pressure revealed itself in the form of a number of proposals in this interim period including:

(a) Townhouses on a 12.25 acre site near Rankin Avenue and Cedar Street;

(b) Garden apartments at 10 units per acre on a 15 acre site near Lyons Station;

(c) Garden apartments at 10 units per acre on a 7 acre site along Washington Avenue;

(d) A 780 unit townhouse and apartment complex at 3 units per acre in the southeast part of the township;

(e) A 240 unit apartment development.

None of these diverse proposals for varying density and size developments were approved. Although public hearings were held concerning both cluster provisions* and multi-family zones (PRN) in July of 1972, the PRN provisions were not adopted until September 3, 1974. Three areas were rezoned at this time from R-3A (3 acre minimum lot) to PRN, including land at issue in the Hansen case. Although the Chairman of the Planning Board had indicated that these revisions were designed to settle pending litigation, seven PRN property owners filed suit claiming that the ordinance precluded construction of moderately priced housing units. Some density control provisions of the PRN ordinance of overlapping scope include:

(a) "FAR's"** of 6% for PRN-6 and 8% for PRN-8;

(b) Minimum lot sizes defined by a specified

---

*Cluster development is a form of planned development (N.J.S.A. 40:55D-6) which is permitted in Bernards if elaborate conditional use standards are met. Although clustering permits higher density in return for the provision of common open space, "small" lot single-family development is not possible at densities permitted by the Bernards Ordinance.

**Although most towns regulate density through minimum lot size requirements, Bernards utilizes the "Floor Area Ratio" (FAR) in concert with the other seven methods to control density. A FAR of 6% limits the total building area to 6% of the lot area on which it is placed.

circle diameter which must fit within lot lines;

(c) Front, side and rear setbacks;

(d) Minimum street frontage;

(e) Minimum building height;

(f) Stringent bedroom mixes (specified %'s of one, two, three and four bedroom units;

(g) Minimum habitable floor area requirements by bedroom;

(h) Requirement of one parking space per bedroom.

(See Section II, E-4 of this Brief for multi-family provisions in response to Mt. Laurel and Madison).

2. Three acre Zoning

Three acre large lot zoning was first established by the 1954 Zoning Ordinance. The rationale for this zone was provided in the 1959 Master Plan which recommended the substantial enlargement of the R-3A to include:

1. VA Hospital, Bonnie Brae Farm, the Deaconry, Skyfarm and adjacent lands (currently R-3); and

2. The area bounded by Mine Brook Road, the Dead River, Somerville Road and Allen Road (currently PRN-6).

Most of these areas had been added to the R-3A by zoning amendments; 1967, a grand total of 2,600 acres had been added to the zone as mapped in 1954.

Owners of land which had been rezoned into the R-3A zone filed, altogether, six separate lawsuits challenging the action of the Township. Four of these

suits were settled through the Township's amendment of the zoning ordinance to remove the plaintiff's property from the R-3A zone;* the other two suits came to trial, and in each case the court found against the Township.**

The most notable of these out of court settlements resulted in the development of the American Telephone & Telegraph world headquarters facility in Basking Ridge. This suit was filed in April 1967 (two months after adoption of the revised zoning ordinance) by Dr. Easling, the owner of property adjacent to the North Maple Avenue Interchange, which had been rezoned from R-40 to R-3A. Before this case went to trial, a firm of industrial real estate brokers representing Dr. Easling submitted a proposal to the Township, consisting of an assemblage of five parcels totalling 138 acres, on which AT&T had obtained an option to purchase. In a letter written January 3, 1969, attorneys for the Township asked the trial judge for a postponement, stating that the Township had received a proposal toward which it was favorably inclined. This postponement was

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*Knights Development Corp. v. Township of Bernards, (No. L-24450-66 P.W.); Easling v. Township of Bernards; Selmer Loft v. Township of Bernards (No. L-25497-69 P.W.); Krogal v. Township of Bernards (No. L-31732-70 P.W.).

**Hansen v. Township of Bernards (No. L-12870-72 P.W.) and Olson v. Township of Bernards (No. L-35200-66 P.W.).

granted, and in May of that year the case was dismissed. Approximately one year later, the Township Committee rezoned these parcels to Office-Laboratory use, making possible development of the AT&T complex.

In Olson v. Township of Bernards, the first of the two disputes to go to trial, the court ruled in a letter opinion dated December 18, 1968, that the ordinance as it applied to plaintiff's property, which had been rezoned from R-40 to R-3A, was invalid since it denied the owner any feasible economic return on his property, and was therefore tantamount to confiscation. In the second case, Hansen v. Township of Bernards, the owners of a 326 acre parcel located near the King George Road interchange with I-78 sued the township for rezoning all but an insignificant part of their land to R-3A. Prior to trial, the Township had attempted to settle the matter by including the area in the proposed PRN zone, to be created by an amendment to the zoning ordinance (which had not yet been adopted at the time of the trial.) The court found that plaintiffs' property was the only undeveloped parcel in private ownership in the eastern portion of the municipality that was still zoned R-3A. After reviewing the actions of the Township subsequent to the adoption of the 1967 ordinance amendments, the court concluded that Bernards had acted, not in accordance with a comprehensive plan as required under

N.J.S.A. 40:55D-62(a)), but "in compliance with a patently calculated policy of zoning for three acre home sites and withdrawing from that position when challenged." The court ruled that such behavior was ultra vires. It should be noted that during this period other development applications were at issue in the Township, beyond those involved in the litigation outlined above.

3. Reactions to the Mount Laurel Decision

Land use control activities by Bernards Township since 1975 can be characterized predominantly as reactions to the Mount Laurel decision of the New Jersey Supreme Court.

The Township's only voluntary response to Mt. Laurel was to reduce the amount of land zoned for commercial and industrial use by rezoning 406 acres from commercial to R-3A and 52 acres from Office-Laboratory to R-40 (1 acre); this occurred by zoning amendments in 1976. The Bernardsville News reported that the League of Women Voters, and other residents endorsed the measure "as a means to . . . reduce the Township's eventual obligation to provide low and moderate income housing for persons employed in the region." In the recent unpublished opinion of Austin Co. et al. v. Bernards Township,* this zone change was held invalid as to

*The Austin Co. v. Bernards Township, (No. L-1711-76 P.W.) decided March 30, 1979.

300 acres with reasonable access to the Rte. 78 interchange at Martinsville Road. The court made findings of fact that this rezoning was in furtherance of a plan to reduce potential employment growth in order to limit the town's Mt. Laurel obligation for higher density. The court concluded that this action did not promote the general welfare, had an exclusionary impact and substantially affected the use and marketability of plaintiff's property. Although Bernards was not ordered to rezone for a designated use, the facts adduced at trial indicated that the property was uniquely suited for commercial and industrial uses and clearly unsuitable for either low or high density residential uses.

On April 22, 1976, Judge B. Thomas Leahy, who was hearing the Lorenc case challenging the PRN provisions, ordered the Township to comply with Mount Laurel by June 18, 1976. The Township reacted by adopting Ordinance 385 (Balanced Residential Complex-BRC) and Ordinance 388 (Rezoning From Non-Residential to Residential). The BRC Ordinance was amended in May of 1977 by Ordinance 425 as a result of Bernards interpretation of the New Jersey

Supreme Court's opinion in the Madison case* and provides for multi-family and single-family housing as a conditional use in residential zones with densities of 1/2 to 2 acre lots. Some of the provisions of the BRC Ordinance which will impede the construction of even a small number of the permitted units are discussed in the next section of this Brief.

4. Current Land Use and Zoning

The current land use pattern, in concert with zoning determines the course of future development. The land use analysis conducted by Plaintiff's expert planning witness (Carl Lindbloom), indicates that about 49% of the Township is undeveloped, 26% is in residential use and the remaining 25% is split between commercial, municipal, and institutional uses.

Present zoning divides the Township into 14 districts, of which 7 are residential and 8 are non-residential primarily allowing office uses. Each residential zone is discussed in general terms below; for specific statistics see Chart 1, page 22.

R-3A - This zone is the largest in the Township, comprising 48% of its total area. R-3A

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

zoning is found in four separate locations, each with a distinctive current use;

1. Northern R-3A - current use of housing
2. Eastern R-3A - current use of golf course and county park
3. South-Central R-3A - current use of V.A. Hospital
4. West and Southern R-3A - current use of agriculture

The permitted use as of right is for single-family homes on 3 acre minimum lots; if all specified criteria are met,* "open-space clusters" (OSC) and 2 acre minimum lots are permitted.

R-2A - This zone is very small and only 4% of it is undeveloped. Two-acre single-family units are permitted as of right, with OSC's of 1 acre per unit and "Balanced Residential Complexes" (BRC) with a limit of 531 units as conditional uses.**

R-40 - This is the second largest zone (23% of total land in the Township) and is 67% developed. OSC's at 3/4 acre per unit and BRC's are conditional uses.

R-30 - This zone comprises 9% of the Township and is 85% developed. Three-quarter acre lots are permitted as of right, with OSC's at 1/2 acre per unit and BRC's as conditional uses.

R-20 - Only 3% of the Township is zoned R-20 with 90%

---

*Bernards open-space clusters are conditional uses within N.J.S.A. 40:55D-67.

**See disucssion of BRC's at p. 21-22.

of it already developed. Half-acre lots are permitted as of right with only BRC's as a conditional use.

PRN-6 - 9% of the township is zoned PRN-6 with a 6% FAR permitting 1-1/2 units per acre (or 2/3 acre, about 28,000 sq.ft. per unit). Much of this land is flood-plains or in institutional use.

PRN-8 - 1.4% of the town is zoned PRN-8 with an 8% FAR permitting 2 units per acre.

As the previous zoning history analysis indicates, Bernards has not evidenced a commitment to allowing a substantial quantity of multi-family or small lot units since 1937, and the present zoning scheme does not deviate from this pattern. Multi-family units are permitted only at impractical densities in the PRN-6 and PRN-8 zones and as part of a "least-cost" BRC for a maximum 531 units. Small-lot development is permitted in a BRC in competition with multi-family for the 531 unit limit. The following ordinance requirements make the production of any BRC units unlikely;

1. BRC units are permitted only as conditional uses subject to excessive administrative approvals;
2. Totally subsidized projects are prohibited;
3. Each BRC is inflexibly limited to 75 to 150 units on a tract of between 12.5 and 25 acres; economies of scale are impossible in this range;

4. BRC's must be separated by a mile, thereby requiring an unjustified extension of utilities;

5. Bedroom ranges are inflexible and unresponsive to current market demand;

6. Excessive site plan and subdivision requirements add unjustified costs.

CHART 1

Zone	Minimum Lot Size	Acres In Zone	Acres Agric. or Vacant	% of Twp. Agric. & Vacant In Zone
R-3A Res.	3 Acres	7,462	4,526	59%
R-2A Res.	2 Acres	167	7	*
R-40 Res.	1 Acre	3,586	1,199	16%
R-30 Res.	30,000sq.ft.	1,374	208	3%
R-20 Res.	20,000sq.ft.	526	52	1%
PRN-6	2 Acres (6% FAR)	1,532	1,242	16%
PRN-8	1 Acre (8% FAR)	225	187	2%
B-Business	20,000sq.ft. (res.)	50	5	*
I-Ind.	20,000sq.ft. (res.)	77	0	0%
OM-Office Mfg.	5 Acres	203	128	2%
OL-1	5 Acres	214	34	*
OL-2	15 Acres	139	72	1%
OB	5 Acres	61	36	*
	TOTAL	12,616	7,696	100%

*Negligible

III. Bernards' Fair Share Obligation

A. New Jersey Division of State and Regional Planning: "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. As to Bernards Township, the Housing Allocation Plan sets a "fair share" goal of 1,433 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).

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).

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

1. The vacant land calculation exlcudes land under farmland assessment, regardless of whether it is prime or not, and despite the fact that this tax program does not prevent

the development of this very suitable land;

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;

3. The 1975-1976 cut-off for employment and non-residential ratables caused the need figure to not reflect the disproportionately large number of jobs and ratables added to Bernards after the cut-off.

Accordingly, an update of this base data and increase in the vacant land figure would significantly increase Bernards fair share allocation.

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). Although there is a necessary lack of absolute precision in any definition of a region, the Mallach Fair Share Plan is superior because it satisfies the Mt. Laurel mandate for a region which is large enough to reflect both housing need areas (Newark, Jersey City, East Orange, etc.) and areas with enough vacant land to assimilate new housing units.

His second step was to break down the State's population into four categories on the basis of income.

The first category is the low and moderate income group (up to 80% of median income or $15,000) which would require, principally, some form of subsidized housing or rental subsidies; 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; 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) may be termed "upper income" and may find housing almost anywhere within a region. Useing population analysis techniques, he was able to project future housing need for each group and 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.

The Mallach study then allocates this need to the counties and to the municipalities on the basis of employment, vacant land availability, and relative wealth. While this model has many similarities with the Housing Allocation Plan, it contains certain methodical differences that lead to a more refined application: (1) use of the median income figure applicable to northern New Jersey rather than New Jersey as a whole; (2) only prime farmland is excluded from developable land; (3) reliance is placed upon future

employment growth projections which reflect recent trends; (4) a modified formula for reallocating excess units from municipalities at their development limit is used; and (5) his model includes "least cost" housing need, as well as low and moderate income housing need.

C. Bernards Fair Share Calculation: The JORD Model.

Ordinance No. 425, adopted in May of 1977 explicitly discusses the Township's intention to provide its fair share of "least-cost" housing:

> "A total of not more than 531 such units (least-cost, BRC) shall be approved within the Township, unless any higher legislative or executive authority shall finally determine that the Township's fair share of the regional need for least-cost housing is less than 354 units, in such latter case, the total number of units permitted under this ordinance shall be proportionately reduced." (Emphasis added)*

These numbers are divined from a fair share study completed by a Township Committeeman, William Allen. Committeeman Allen developed a fair share methodology based on the JORD model in July of 1976 which estimated Bernards fair share of new low and moderate income housing from 1976 to 1982 to be 354 units. This allocation of future housing needs was based upon the principle that place of residence is related

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*Note that Bernards does not propose to increase the number of least-cost units permitted if some higher authority allocates a fair share of more than 354 units. . . .

to place of employment in such a way that "the further we go from an employment site, the fewer residences of that site's employees we will find." Mr. Allen, previously an engineer at RCA, based his mathematical model of the relationship between employment and residence on studies done at RCA in Bridgewater Township; he concluded that approximately 50% of employees at that job site lived within 10 miles of their job. This 10 mile figure was distance 'as the crow flies', not the distance actually travelled by road.*

Plaintiff will prove at the trial that the so-called "JORD Fair Share Analysis", relied upon by Bernards Township, is a result directed formula specifically designed by the Defendants to justify their exclusionary scheme rather than an empirical study based on objective factors.

IV. The Allan-Deane Site

The 1532-acre site of the proposed Allan-Deane open space community is located in the Somerset Hills of north central New Jersey; about 70% of the site, 1071 acres, is in Bernards Township. The property is situated less than a mile from the interchange of Interstate Routes 287 and 78, and is approximately 45 minutes from Manhattan. Public transportation is conveniently available at two commuter service stations of the Erie Lachawanna Railroad in Bernards Township. The development pattern adjacent to the site is characterized by large residential lots and three areas of more intensive development; Pluckemin Center, Liberty Corners and Bridgewater Township.

The development capacity of this site depends substantially upon environmental constraints including the following which are detailed in the Bernards Township Natural Resource Inventory:

1) Soil Characteristics

   (a) depth to bedrock
   (b) seasonal ground water levels
   (c) slope/erodability

2) Septic Limitations

3) Hydrological Limitations

   (a) flood plains, floodways
   (b) wetlands

4) Natural Systems Suitability

5) Critical Areas

A summary of these limitations follow.

The Allan-Deane site is underlain with two rock formations: 90% of the site consists of basaltic trap rock (Brunswick Formation-Triassic) varying in depth from 3½ to 4½ feet which contains fractures which may be easily splintered; the remaining 10% consists of soft red shale and sandstone (Newark Group-Triassic) which is very amenable to construction activities.

The site does not contain any large aquifers or acquifer recharge areas, although it occupies a position in the headwaters of both the Raritan and Passaic River Watersheds. Floodplains and wetlands are associated with several streams on the site, primarily in the northeast corner of the site.

Although the property is located in the Second Watchung Mountains, steep slope conditions predominate only in the western portion. Several soil types are found on the site; soils subject to flooding are in the northeast corner, and the rest of the area is divided between soils with moderate to slight limitations due to the seasonal high water table.*

The combination of poor drainage soils and hard basaltic water-poor rock formations makes the Watchung Mountain area of Bernards unsuitable for septic systems

*The capacity of moderate to slight limitations for single-family homes with or without basements does not reflect limitations for other housing types such as multi-family housing.

and sufficient private water supply. Despite knowledge of these conditions, the Bernards Township Planning Board has not designated the southwestern third of the Township (including plaintiff's land) for public water or sewer service. No evidence exists that the Allan-Deane site is unsewerable because of bedrock conditions, and public water supply is unavailable from the Commonwealth Water Company only because of the area's designation for low-density development.

V. The Allan-Deane Proposal - A General Description

The Allan-Deane Open-Space Community was planned with several objectives in mind. First, the plan seeks to create well-defined neighborhoods with open spaces in close proximity. The second objective is to create a balanced community which meets the diverse needs of the regional housing market, including the need for least-cost housing units. Third, the plan is designed to respect the natural environment of the site by preserving the most sensitive areas as open space and determining the location and type of development most appropriate to the natural landscape.

Over seven years ago, on November 1, 1971, Allan-Deane formally presented its proposal and applied to the Planning Board of the Township of Bernards for a zoning

change. By letter dated November 11, 1971 the Planning Board acknowledged the receipt of this application and the proposed amendment to the Bernards Township Zoning Ordinance. The Board agreed with Allan-Deane that some corrections of the existing zoning were necessary and it informed plaintiff that a major rezoning effort was being considered, not only for plaintiff's property but for the entire Township. The Board advised Allan-Deane that in view of the magnitude of the Allan-Deane concept, plaintiff should be patient and allow the Board to educate the public concerning the Allan-Deane proposal.

Four years later on December 18, 1975 the Board formally adopted a new Master Plan in which the Allan-Deane property was designated for sparse residential development. On February 10, 1976 Allan-Deane submitted a revised plan for the development of the property and again requested the Planning Board to recommend to the Township Committee the rezoning of this property. Plaintiff's application was, of course, not approved.

Bernards Township has conducted a general township-wide environmental base study (Natural Resources Inventory) on which it has based its recently adopted Master Plan. The Allan-Deane proposal has been carefully coordinated with the Township goals and policies as expressed in these documents; each of the major findings listed in the Natural Resource

Inventory is reflected in the Allan-Deane plan.

1. The NRI found that the major limitation on land use in Bernards Township is adequate sewage. The Allan-Deane proposal has recognized this problem and the restrictions inherent in the use of septic systems. While the exact sewage method must still be approved by the appropriate officials, solutions other than septics form the basis of the Allan-Deane program.

2. The second finding in the NRI that "the determination of sewage capacity must be based upon the water quality of the receiving streams" is, and will be, a central factor in Allan-Deane's choice of potential sewage method, a decision which will be made in consultation with the appropriate officials.

3. The NRI finding that the scenic integrity of transportation corridors and ridgetops should be protected is incorporated in the Allan-Deane design by suitable setbacks of natural vegetation and landscaping along major roadways and by siting structures along ridgelines so that the natural terrain is reinforced and complemented by design features.

4 An extensive open space (278 acres) is proposed for the Allan-Deane project. Allan-Deane has proposed to leave all slopes over 15% as open space with a network of bikeways linking areas of public park land, (recommended by

NRI), also incorporated within the project's design.

5. The NRI recommends that flood control be accomplished on the land being developed. This would be extremely difficult under standard 3-acre zoning. The Allan-Deane proposal, on the other hand, includes ponds for storm water retention, a complete swale system to promote natural groundwater recharge, limited paved surfaces, and the avoidance of development in flood plains, all contributing to effective storm water management and flood control. Indeed, storm run-off under the Allan-Deane Development will be <u>less</u> than that from the undeveloped land.

POINT I

BERNARD'S LAND USE REGULATIONS HAVE AN EXCLUSIONARY IMPACT IN VIOLATION OF THE MOUNT LAUREL-MADISON OBLIGATION.

A. Introduction to the Mount Laurel-Madison Doctrine.

The Mount Laurel opinion of the New Jersey Supreme Court has been called the "Magna Carta of suburban low and moderate income housing"* and is considered by most housing commentators to be the most important exclusionary zoning** opinion to date. The precise holding of Mt. Laurel has come to be known colloquially 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." 67 N.J. 187

The legal rationale for this obligation is the affirmative requirement that zoning regulations, like all

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*Kushner, "Land Use Litigation and Low Income Housing: Mandating Regional Fair Share Plans", 9 Clearinghouse Rev. 10 (1975).

**Exclusionary zoning" is a descriptive term for a complex of land use control regulations which singly or in concert tend to exclude persons of low or moderate income from the municipality. The term includes overt racial exclusion although the more typical pattern is to exclude minorities through economic restrictions. "Snob zoning" is a synonym coined in the 1960's.

exercises of the police power advance and promote the general welfare.* Two major aspects of the general welfare were explored. First, the court stated explicitly that access to housing was one of the major elements of the general welfare and was of "fundamental import". Secondly, the court decided that the general welfare to be considered by each municipality must be the regional, rather than local welfare. This regional perspective was fundamentally required because the Court found that housing decisions which have a substantial external impact beyond the subject municipality must consider this impact:

> "It is, of course, true that many cases have dealt only with regulations having little, if any, outside impact where the local decision is ordinarily entitled to prevail. However, it is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.
>
> . . .
> In recent years this court has once again stressed this non-local approach to the meaning of "general welfare" in cases involving zoning as to facilities of broad public benefit as distinct from purely parochial interest." 67 N.J. 177-178

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*The more traditional use of the general welfare theory was as a shield to justify police power actions against claims of developers.

This extension of the general welfare theme was the logical result of a progression of cases requiring municipalities to consider the needs of citizens beyond their borders. See: Borough of Cresskill v. Borough of Dumont, 15 N.J. 238 (1954); Roman Catholic Diocese of Newark v. Ho-Ho-Kus Borough, 47 N.J. 211 (1966); Kunzler v. Hoffman, 48 N.J. 277 (1966). Although potentially exclusionary zoning regulations had been sustained during this same period;* the court had warned that a change in the judicial approach was inevitable:

> "We are aware of the extensive academic discussion following the decision in the Lionshead and Bedminster cases, and the suggestion that the very broad principles which they embody may intensify dangers of economic segregation. . . . In the light of existing population and land conditions within our state these powers may fairly be exercised without in any way endangering the needs or reasonable expectations of any segment of our people. If and when conditions change, alterations in zoning restrictions and pertinent legislative and judicial attitudes need not be long delayed." Pierro v. Baxendale, 20 N.J. 17, 29 (1955).

The foundation for the new judicial approach embodied in Mount Laurel was the state housing crisis, more specifically, the "desperate need for housing, especially

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*See Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165 (1952) where minimum floor areas were approved and Fischer v. Township of Bedminster, 11 N.J. 114 (1952) sanctioning 5 acre minimum lot requirements in 90% of the township.

especially of decent living accomodations economically suitable for low and moderate income families."* The magnitude of the general housing shortage in this state has not been recently estimated, but stood at 400,000 units in 1970; annual construction rates have not met this historical demand or the additional demand generated by natural population growth.

Many factors which contributed to the shortage were recognized by the Mt. Laurel court. The primary cause of the crisis was the shift of commerce and industry from the central cities to the suburbs. This trend continues today as businesses seek land for the accomodation of new technology or for expansion purposes; the increased access via interstate and state highways, the aesthetic surroundings and lower property taxes of the suburban areas also continue to beckon industry from the cities. One source of housing demand eminates from the lower-income workers who could not follow their jobs to the suburbs due to high commuting costs and the absence of affordable housing there. A second related and overlapping source of demand for reasonably priced suburban housing comes from the large segments of population compelled to live in substandard and dilapidated

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*In 1975 the low and moderate income category included families with incomes up to $12,000 per annum; currently that ceiling is close to $15,000.

housing by reason of their economic condition. This situation isn't confined to the central cities or minority population, but exists in all types of municipalities and includes young couples, elderly people and large families who cannot afford or are not accomodated by the kinds of housing which most outlying municipalities permit to be built.

Before the dramatic shift of population from the cities to the suburbs, development per se was not perceived as a threat to the social or physical amenities of rural living. Land owners profited, good ratables were added to the tax base and few public improvements were required by development. When demand began to mushroom, however, residents of suburbia moved to protect what they had sought in leaving the city for the suburbs:

> "Some had migrated to gain the advantages of a rural atmosphere; development rapidly gave the suburbs an appearance not unlike that of the city. Some had moved to escape deteriorating neighborhoods; they regarded the intrusion of minority persons and families of modest income as causes rather than symptoms of decay. And they viewed with some alarm the likelihood that modest housing would not only congest the area but cause the rapid deterioration of suburban neighborhoods. Some residents of the suburbs undoubtedly sought what they regarded as the social advantages of a white upper middle class neighborhood. To these persons, the intrusion of apartments, mobile homes and even modest single-family dwellings posed a threat."*

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*Anderson, American Law of Zoning (2d Ed.) Vol. II, p.11

A more pervasive cause of suburban exclusion was noted by the Mt. Laurel court in its discussion of "fiscal zoning":*

> "This policy of land use regulation for a fiscal end derives from New Jersey's tax structure, which has imposed on local real estate most of the cost of municipal and county government and of the primary and secondary education of the municipality's children. The latter expense is much the largest, so, basically, the fewer the school children, the lower the tax rate. Sizeable industrial and commercial ratables are eagerly sought and homes and the lots on which they are situate are required to be large enough, through minimum lot sizes and minimum floor areas, to have substantial value in order to produce greater tax revenues to meet school costs. Large families who cannot afford to buy large houses and must live in cheaper rental accommodations are definitely not wanted, so we find drastic bedroom restrictions for, or complete prohibition of, multi-family or other feasible housing for those of lesser income." 67 N.J. at 171

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*Fiscal zoning was disapproved in an earlier case, Rutgers v. Piluso, where the court had said:

> "The township's present zoning ordinance, enacted in 1964, along with amendments thereto, reflects the usual means employed by this type of municipality in attempting to meet local financial problems by land use regulation, i.e., so-called "fiscal zoning." The legally dubious stratagems of zoning wide expanses of vacant land for industrial use only, requiring large lots for undeveloped residential land, and rigidly regulating multi-family dwellings are all utilized to restrict private growth to land uses which will produce few school children and show a "tax profit." . . .
>
> The possible additional local cost of educating children living in housing is clearly not a legitimate local interest from any proper land use impact point of view." 60 N.J. 142, 146 (1972)

Regardless of the intent or motivation behind land use regulations, the Mt. Laurel court required "developing" municipalities to utilize their powers to make realistically possible a variety and choice of housing including low and moderate income housing.*

While reaffirming the "variety and choice" obligation (67 N.J. 187; 72 N.J. 516), the Madison opinion supplemented the low and moderate portion of it with a "least-cost" one in response to a question which was only marginally considered by the Mt. Laurel court: whether it was realistic under current market conditions and without subsidy, to expect any housing construction at prices within the reach of low and moderate income groups. The court answered this question in the negative and substituted the least-cost mandate to provide appropriate land with minimal regulations to enable the production of the least expensive privately built housing:

> "To the extent that the builders of housing in a developing municipality like Madison cannot through publicly assisted means or appropriately legislated incentives (as to which, see infra) provide the municipality's fair share of the regional need for lower income housing, it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the "least

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*The Court specifically indicated that it was the exclusionary impact not the underlying intent which violated the State Constitution.

> cost" housing, consistent with minimum standards of health and safety, which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share." 72 N.J. 512

B. Bernards Township Is a "Developing" Municipality.

In the most recent Mt. Laurel type case to reach the New Jersey Supreme Court, the Court left no doubt that the Mt. Laurel-Madison mandate applies only to "developing" municipalities; See, Pascack Ass'n., Ltd. v. Mayor and Council Washington Township, 74 N.J. 490 (1977). A general description of this prototype is found in Mt. Laurel:

> "As already intimated, the issue here is not confined to Mount Laurel. The same question arises with respect to any number of other municipalities of sizeable land area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas. . . .which like Mount Laurel have substantially shed rural characteristics and have undergone great population increase since World War II or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth." 67 N.J. 160

Although Bernards has not explicitly stipulated in this litigation* to its status as a developing municipality, in paragraph 4 (Factual and Legal Contentions) of its Pretrial Memo it indicates that it considers itself subject

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*See Lorenc, et als. v. Township of Bernards, Letter Opinion of 1/23/78, page 2, where the court approved defendant's stipulation to its "developing" status.

to the Madison least-cost obligation which applies only to "developing" municipalities. This Court should have no difficulty in declaring Bernards to be "developing" in light of the following characteristics:

1. Substantial land area of 24.4 square miles (Mt. Laurel is 22, Madison is 42);

2. Sufficient undeveloped land (50% for Bernards as compared with 65% in Mt. Laurel and 40% in Madison);

3. Convenient access via interstate routes 78 and 287 (see 67 N.J. 162; 72 N.J. 501);

4. Substantial employment growth in recent past and projected for future;

5. Bernards has tripled its population since 1940 for a growth rate of four times the state.

C. The Variety and Choice Obligation.

The variety and choice of housing which a developing municipality must provide is intended to serve those categories of people typically barred by suburban land use policies:

> "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 N.J. 159)

The Madison Court considered the following factors in measuring the Township's compliance with the variety and choice mandate:

1. vacant developable land zoned for multi-family and small lot uses and achievable capacity of high density zones (72 N.J. 504-507)

2. the effect of planned development provisions (72 N.J. 507-510)

3. cost-generative provisions and housing costs (72 N.J. 508, 520-1)

4. prohibition of multi-bedroom units (72 N.J. 517)

When measured by these four factors utilized in Madison, the current Bernards land use regulations patently fail to meet the Mt. Laurel variety and choice mandate.

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

Over 59% of the vacant developable land in the seven residential districts are zoned for theoretical minimum lots of 3 acres. This 59% zoned for larger than 2 acre lots may be compared with the invalid Madison zoning of only 17% of the vacant developable land for this use (72 N.J. 504). A similar imbalance is revealed by comparing the 1/2 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 Bernards the comparable figure is 94%. 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 Bernards it effectively comprises only 1.2% of such available land* and additionally is the only area

*Only 531 BRC units are permitted in developments of 75 to 150 units on tracts between 12.5 and 15 acres in size, respectively. Seven developments of 75 units each would use the maximum amount of BRC land, for a total of 93.5 acres: 93.5 - 7,696 (total developable) = 1.2%. The PRN densities were found to be too low for multi-family use by the Lorenc court.

where housing on "very small lots" is permitted.

2. The Effect of Planned Development Provisions.

The Madison Court analyzed the "PUD" and "cluster" provisions of that town's ordinance to determine if it would be justifiable to rely on such provisions to satisfy the town's fair share (72 N.J. 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. 509). Bernards permits marginally higher densities of at best, 2.0 units per acre in "open-space clusters" in the R-30 Zone which is 85% developed.

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

1. Minimum tract areas for planned developments which can be met only through assemblage of individually owned parcels (72 N.J. 508).

2. An excessive approval process (72 N.J. 508); Bernards requires a 6 to 8 stage process.

The Bernards 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 in Planned Developments (N.J.S.A. 40:55D-2(k)).

3. Cost-Generative Provisions.

The Bernards 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.*

It is plaintiff's contention that the New Jersey Supreme Court 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, not just those of upper income, and that the current Bernards Ordinance is a blatent failure in this respect.**

4. Limitation of Multi-Bedroom Units.

A separate and distinct limitation on a prospective resident's variety and choice is Bernards required bedroom mix applicable only to BRC units. Section 5.4n of the Ordinance requires that all BRC developments have a fixed percentage of one (25-30%), two (25-30%), three (20-25% and four (20-25%) bedroom units.

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*Some examples in the Bernards Land Use Ordinance of impediments to "least-cost" housing which constitute zoning, subdivision and site plan cost exactions without constitutional or statutory foundation and which arbitrarily

(Footnotes continued on next page)

(FOOTNOTES CONTINUED FROM PAGE 45)

and unreasonably restrict housing availability to the moderate income and low income families are:

1. The protracted multi-stage approval process similar to that found to be "unduly cost generating" in Madison.

2. The requirement that improvements be installed prior to final approval.

3. The requirement of detailed Environmental Impact Reports.

4. The excessive width requirements on all streets and walkways.

5. The Requirement that all streets be curbed.

6. Excessive sidewalk requirements.

7. The requirement that all utilities be underground.

8. Unreasonable fees.

9. Bedroom restrictions.

10. The prohibition of efficiency units and the prohibition of apartments with more than three bedrooms.

11. Excessive parking, landscape and buffer requirements for multi-family housing.

12. Excessive open space requirements for multi-family housing.

**See Shepard v. Woodland Tp. Comm. and Planning Board, 71 N.J. 230, 238 (1976), highlighting that the 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.

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. 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 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 Bernards 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.

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

The Bernards 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 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 higher densities.

Bernards 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, this inflexible mix requirement is not responsive to market demands and effectively prohibits senior citizen housing developments comprising one and two bedroom units.* Because these provisions are so clearly contrary to the general welfare they must be removed in their entirety.

D. Fair Share of Least-Cost Housing

In recognition of the fragmentary availability of federal subsidy programs, the Madison Court replaced the

*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. Shepard v. woodland Tp. Comm. and Planning Bd., 71 N.J. 230 (1976); Taxpayers Ass'n. of Weymouth Tp. v. Weymouth Tp., 71 N.J. 249 (1976).

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. 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. 514)

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, need only 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. 499)

Bernards'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. 512, 519)

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. 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. 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 municipalitie, 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. 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. 190; 72 N.J. 528).

Only the eight county D.C.A. region and the nine county Mallach region meets 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. 172-173; 72 N.J. 542).

3. Defendant's Fair Share Commitment.

As previously indicated, Bernards has determined its fair share of least-cost units to the year 2000 to be 354 units and has allowed 531 such units (BRC) in its current ordinance. Because BRC developments are permitted only as a conditional use subject to many onerous requirements,*

*For example, the applicant must demonstrate that he has acquired subsidy for two-thirds of the units of a project.

it is unlikely that any "least-cost" units will result under current market conditions. Even if it is assumed that all 531 could be produced, this total is a mere token response in light of the Township's NRI Master Plan growth projection of 30-35,000 for the same time frame and the D.C.A. allocation of 1433 to the year 1990.

E. Plaintiff Has Proven a Prima Facie Case of Exclusionary Zoning.

The Supreme Court in Mount 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 (including the appropriate fair share of moderately-priced units), 67 N.J. 180-181. In Madison the court held that plaintiffs had established a prima facie case by showing the disproportionate amount of land zoned for low-density, single-family residences (72%) vis-a-vis that zoned for multi-family units (23%), 72 N.J. 515-516.

Plaintiffs in the within action have established a more significant discrepancy than in Madison, (59% of vacant residential land zoned for larger than 2 acre lots, 1.2% zoned multi-family). Bernards Township thus has the "heavy burden" of justifying the totality of its land use regulations, and mere, unsupported assertions that controls

such as "minimum net-habitable floor areas", "gross-residential site area", and "gross floor area ratios" are necessary to protect the general welfare will not satisfy the burden.

POINT II

THE R-3 ZONING IS ARBITRARY AND CAPRICIOUS AND HAS A CONFISCATORY IMPACT.

A. The R-3 Zoning Is Arbitrary and Capricious.

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 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, and must be reasonably calculated to meet the evil and not exceed the public need. J.D. Construction v. Board of Adjustment, Township of Freehold, 119 N.J. Super 140, 145 (1972); Kirsch Holding Co. v. Borough of Manasquan, 50 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, 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, Freehold, 119 N.J. Super 140, 145 (1971); Katobimar Realty Co. v. Webster, 20 N.J. 114, 122-3 (1955); Kent v. Borough of Mendham, 111 N.J. Super 67, 77 (App.Div. 1970).

The 1976 Bernards Township Master Plan justifies the imposition of 3 acre zoning as follows:

> "Future Land Use:
>
> . . . .
>
> 4. Sparse open areas to the west and north on basalt. These would be prohibitively expensive to sewer, since trenches would have to be blasted. Moreover, such action would overload the ultimate capacity of the treatment plant. This capacity should be used to service areas already within the immediate range of mains in easier to trench soils. These areas accordingly are appropriate for sparse development of free-standing single-family dwellings". (Master Plan, p.11).

When read in the context of the whole Master Plan and the Natural Resource Inventory, (which is incorporated into it by reference), the rationale for large-lot zoning appears to be two-fold. First, that areas of the township which are underlain by Triassic Basalt are impossible or too expensive to sewer and therefor lot sizes must be large enough to assure adequate on-site well water supply and septic disposal. Second, that sewer capacity must be limited to the existing Bernards public sewer plant because of the limited receiving ability of the Passaic River and its tributary, the Dead River.

The first rationale suffers from a number of defects, not the least of which is its facial inaccuracy. Allan-Deane will prove at trial that the Triassic Basalt on its property is quite easily fractured without blasting trenches. Furthermore, sewers are the <u>least-cost</u> way of

dealing with sewage disposal due to the proximity of the proposed D.E.P. approved Allan-Deane tertiary treatment facility in Bedminster. On-site water supply is not a significant constraint either since Allan-Deane has a "will-serve" commitment from the Commonwealth Water Co. which has a nearby line with sufficient supply to serve a high density development.

In addition to Bernards exaggeration of the Triassic Basalt constraints for development, there is a serious mismatch between the designated R-3 areas and the occurrence of this geology; the R-3 zone is both over-inclusive and underinclusive. The R-3 is over-inclusive because as the NRI indicates:

1. at least half of the western R-3 is underlain by shale;*
2. most of the northern R-3 is underlain by gneiss;**
3. most of the northeastern R-3 is underlain with shale; and
4. most of the south-central R-3 is underlain with shale. (See OL-2 of NRI)

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*The Bernards Natural Resource Inventory (NRI) considers shale capable of yielding a good water supply and does not discuss any septic/sewer limits for its use (p.26); the Master Plan makes an unsupported statement to the contrary (p.10).

**The NRI and Master Plan do not indicate development limits on gneiss.

The R-3 is underinclusive because many other areas of the township zoned for densities greater than one unit per three acres have an equal amount of Triassic Basalt as a base. It is therefor apparent that the purported "geology" justification for three acre zoning is not supported by the facts as presented in Defendant's own N.R.I.

The second rationale involves the impact of additional sewer effluent on the downstream quality of the Dead and Passaic Rivers. Pertinent comments on this problem are found in the Master Plan at page 10:

> "The Township drains to the Dead River, originating in the northwestern section of the Township, and to the Passaic River on its eastern boundary, originating only a few miles north. Both are extreme headwaters, having small watersheds and flow sluggishly through flat floodplains trapped by the Watchung Mountains. This low volume and slow flow handicaps them severely in serving as outfalls for sewage treatment plants. . . . . Any overloading or pollution of the streams at their headwaters will have a sequentially worsening effect on the reuse of the waters (said to be 5 times by the downstream municipalities."

The preceding quote from the Master Plan cites no scientific studies which determine how much development would be an "overload"; perhaps it is based on the NRI. The NRI also fails to cite supportive scientific studies which determine development limits although there is an admission at page 62 that the technical limits of growth have not been defined for the Passaic River and might be defined in

future regional studies by DEP. Despite this lack of data, the Environmental Commission had no trouble concluding that:

1. Secondary treatment will not be adequate for the Passaic River (p.63);

2. Tertiary treatment costs are too high (p.63);

3. Increased sewer plant capacity is not a cost-effective solution; (p.63);

4. New sewer trunks and extensive development requiring sewers should be discouraged (p.81);

5. Sewage and pollution controls prevent development of farmland (p.82).

Even if Bernards had the facts to support these broad conclusions, the control of future sewage quality and quantity has been pre-empted by the State's pervasive water quality regulatory scheme. (See Point V, p. of this Brief). In addition, Allan-Deane will offer extensive proof at trial that non-point pollution* is best controlled through planned development at high densities.

Since the R-3 zoning is not required to assure adequate water supply or sewage disposal, and Bernards Township is pre-empted from regulating downstream water quality, the three acre minimum lot size designation is

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*Storm-water run-off is a type of non-point pollution which the Bernards NRI declares to be correlated with density (p.81); this statement is true if what is meant is that higher densities provide a greater number of inexpensive opportunities for limiting storm water run-off.

an arbitrary and capricious use of the power to zone.

B. The R-3 Zoning Has a Confiscatory Impact.

The Fourteenth Amendment as well as the New Jersey Constitution (Article 1, par. 20) prohibit the effective appropriation of private property rights without due process of law and payment of compensation therefor.

Although a taking may be more readily found when interference may be characterized as a physical invasion, it is well established in the decisional law of the jurisdiction 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 Township, 24 N.J. 154, 182 (1957); Spiegle v. borough of Beach Haven, 46 N.J. 479 (1966), cert. denied 385 U.S. 831,

S.Ct. 63, 17 L.Ed. 2d 64 (1966); Washington Market Enterprises v. City of Trenton, 68 N.J. 107 (1975).

Clearly a restraint against all reasonable use of private property is confiscatory and beyond the police power. Morris County Land, supra., 40 N.J. 557; Kozesnik v. Montgomery Township, 24 N.J. 154 (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, 12 (1962); Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 NE 2d 587 (Ct.App. 1938).

The three acre zoning of the Allan-Deane tract permits only two economically infeasible uses of the entire parcel:

1. Three-acre single-family uses with sewers;
2. Ten acre single-family uses with private septic disposal.*

Allan-Deane will prove at trial that three acre alternative would allow the construction of houses with a minimum selling price of $200,000.00; the ten acre alternative

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*Studies by Apgar Associates for Allan-Deane show that 10 acre minimums would be required for adequate water supply on the property.

would yield houses selling for at best $300,000.00; Allan-Deane will also prove at trial, through extensive housing market analysis, that there is no demand for housing in this price range in the Bernards Township region. The R-3 zoning is therefor confiscatory as applied to the Allan-Deane tract.

POINT III

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

Zoning is inherently an exercise of the State's police power. Rockhill v. Chesterfield Township, 23 N.J. 117, 124-25 (1957); Schmidt v. Newark Bd. of Adjustment, 9 N.J. 405, 413-14 (1952); cf., Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L. Ed. 303 (1926). Consequently, municipalities have no power to zone except as delegated to them by the Legislature. J.D. Construction Corp. v. Freehold Tp. Board of Adjustment, 119 N.J. Super. 140, 144 (Law Div. 1972); Kirsch Holding Co. v. Manasquan, 111 N.J. Super. 359, 365 (Law Div. 1970), rev'd on other grounds, 59 N.J. 241 (1971); Piscitelli v. Scotch Plains Tp. Comm., 103 N.J. Super 589, 594-95 (Law Div. 1968); see N.J. Const. (1947), Art. IV, §VI, par.2. In this regard, zoning powers are granted to municipalities by the zoning enabling act, N.J.S.A. 40:55D-1 et seq.

The Bernards Land Use Ordinances contain Municipal Land Use Law violations which are too numerous to detail in this Brief, but the following are offered as examples:

1. Planned development provisions violate N.J.S.A. 40:55D-65(c) and 40:55D-39(c);

2. Required fees are excessive and not within N.J.S.A. 40:55D-8 which permits the charging of "reasonable" fees for the review of development applications;

3. The Master Plan fails to meet the requirements of N.J.S.A. 40:55D-28;

4. Subdivision requirements violate N.J.S.A. 40:55D-38;

5. Site plan requirements violate N.J.S.A. 40:55D-41;

6. The Zoning section of the Bernards Land Use Ordinance is substantially inconsistent with the land use plan element of the Master Plan in violation of N.J.S.A. 40:55D-62(a);

7. The Zoning section violates N.J.S.A. 40:55D-62(a) in that it is not drawn with reasonable consideration of the character of each district and its peculiar suitability for particular uses;

8. Amendment No. 480 concerning conditional use approval of home offices violates N.J.S.A. 40:55D-65.

9. The Land Use Ordinances contain an unnecessary time consuming multi-staged approval process unauthorized by the Municipal Land Use Law and specifically prohibited as a cost inducing exaction in Madison at 72 N.J. 508.

10. The Land Use Ordinances violate N.J.S.A. 40:55D-53 and N.J.S.A. 40:55D-50(a) concerning the bonding of required improvements and the requirements for final approval of subdivisions and site plans.

11. The Land Use Ordinance requires dedication to the Township of common open spaces shown on the Master Plan contrary to N.J.S.A. 40:55D-43.

12. Numerous provisions of the Land Use Ordinances violate N.J.S.A. 40:55D-67 concerning conditional uses.

13. The Land Use Ordinance requires the submission of Environmental Impact Statements and Reports not authorized by the Municipal Land Use Law.

POINT IV

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. Board of Adjustment, Township of Freehold, 119 N.J. Super 140, 149 (Law Div. 1972); Schock v. Trimble, 48 N.J. Super 45, 54 (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).

The following are some of the vague and indefinite standards in the Bernards Land Use Ordinance:

1. the requirement that a tract be "adequately" drained;

2. that streets be of "sufficient" width and "suitable" grade;

3. the authority granted to the Planning Board to waive the environmental impact report if "sufficient" evidence is submitted that the subdivision will have a "slight" or

"negligible" environmental impact;

4. "adequate" provision shall be made for the proper disposal of storm water;

5. "monotonous" repetition of housing elements is to be avoided;

6. landscaping shall be provided "satisfactory" to the Planning Board;

7. air conditioning equipment shall be screened in such a manner as "may" be required;

8. the required finding of the "adequacy" of provision through the physical design of the proposed development of public services, etc.;

9. each BRC must be "reasonably accessible" to "essential" residential and community services and available transportation forms;

10. the approving authority "may" require common open space to be "consolidated" or linked with open space in adjacent tracts.

POINT V

ORDINANCE NO. 495 PURPORTING TO REGULATE THE CONSTRUCTION OF PRIVATE SEWAGE TREATMENT PLANTS IS PRE-EMPTED BY STATE WATER QUALITY REGULATIONS.

Ordinance No. 495 amending the 1968 Bernards Zoning Ordinance was adopted on October 17, 1978 to require the approval of the Bernards Township Sewerage Authority over the design and construction of future private sewerage facilities. It is Plaintiff's contention that the New Jersey water quality regulatory scheme pre-empts this kind of local regulation.

Since 1977 four new statutes have been enacted which radically alter New Jersey's approach to the control of water pollution:

1. Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq;
2. Realty Improvement Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq;
3. Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq; and
4. Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq.

Although a review of this comprehensive legislation would reveal a legislative intent to pre-empt all municipal regulation as found by the New Jersey Supreme Court in Ringlieb v. Township of Parsippany-Troy Hills, 59 N.J. 348 (197), this Court need not decide whether all municipal action is precluded; it need only address the regulations

imposed in the Bernards Zoning Ordinance.

Ordinance No. 495 implicitly requires sewerage authority approval of the method of sewage treatment and the quantity and quality of effluent discharge from all multi-family units and/or small lot development. This local regulation contravenes N.J.S.A. 58:10A-6 which delegates the authority to D.E.P. to approve sewage treatment plants pursuant to administrative regulations (§N.J.S.A. 7:4-1.1 et seq.). Since New Jersey municipalities may exercise only those powers granted by the State, and Article 4, §7, par. 11 of the New Jersey Constitution, prohibits a liberal construction of local regulations when the issue of pre-emption is raised, Bernard's attempt to control regional water quality must be found to be pre-empted.

Another fatal defect of this ordinance is its cost-generative impact on multi-family or least-cost housing developments. This cost-generative effect is a result of the ordinance requirement that future development to be served by private sewerage facilities be later connected to duplicative public facilities when they become available, thereby mandating the abandonment of the private facility. Since even the smallest and lowest quality treatment facilities today cost millions of dollars and consume years in the federal-state approval process, this mandatory abandonment provision is enough to prevent any development utilizing a

private-sewerage facility; it may, in fact, constitute a deprivation of property without due process or just compensation if enforced.

POINT VI

THE SOMERSET COUNTY PLANNING BOARD HAS CONSPIRED WITH BERNARDS TOWNSHIP AND OTHER MUNICIPALITIES IN SOMERSET HILLS TO PRESERVE THE EXCLUSIONARY ZONING IN THAT AREA OF THE COUNTY.

At common law, a conspiracy consists not merely in the intention but in the agreement of two or more persons to do an unlawful act. State v. Carbone, 10 N.J. 329, 336 (1952). The essential elements of a conspiracy are a combination of two or more persons, a real agreement or confederation with a common design,* and existence of an unlawful purpose or of a lawful purpose to be achieved by unlawful means. Board of Education of City of Asbury Park v. Hock, 38 N.J. 213 (1962); Naylor v. Harkins, 27 N.J. Super 594 (Ch.Div. 1953).

It is not requisite, in order to constitute a conspiracy at common law, that the acts agreed to be done be criminal; it is enough that the acts be wrongful, i.e., amount to a civil wrong. State v. Carbone, 10 N.J. 337. The gravemen of an action in civil conspiracy is not the conspiracy itself but the underlying wrong which gives an

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*Since the illegal agreement is the basis of the complaint, prosecution is not barred if the objectives of the conspiracy are frustrated. State v. La Fera, 35 N.J. 75, 86 (1961); State v. Sherwin, 127 N.J. Super 370 (App. Div. 1974).

independent right of action. Board of Education of City of Asbury Park v. Hock, 38 N.J. 238; Middlesex Concrete Products and Excavating Corp. v. Carteret Industrial Ass'n., 37 N.J. 507 (1961); Louis Kamm, Inc. v. Flink, 113 N.J.L. 582 (E&A 1934).

A conspiracy may be proven by direct or circumstantial evidence, from which the jury may draw presumptions. Though the act of conspiracy is the gist of the offense, it is not necessary to show an actual association or confederacy, but it may be left to reasonable inferences. State v. Carbone, 10 N.J. 341-2. Two evidentiary consequences flow from a prima facie proof of conspiracy; the first is that the declarations of co-conspirators are admissable not only to show conspiracy but to prove the commission of the underlying substantive crime. State v. Farinella, 150 N.J. Super 61, 69, certif. den. 75 N.J. 17 (1977); State v. Louf, 64 N.J. 172 (1974); State v. Rios, 17 N.J. 572 (1955); State v. D'Arco, 153 N.J. Super 258, 266 (App.Div. 1977). The second consequence is that statements made by one conspirator are admissable against other conspirators. N.J. Rule of Evid. 63(9)(b); State v. Louf, 64 N.J. 172 (1974); State v. Benevento, 138 N.J. Super 211 (App.Div. 1975); State v. Carbone, 10 N.J. 329 (1952).

One foundation for the admissability of conspiratorial

statements is the showing of the existence of the conspiracy and Defendant's participation in it by proof aliende the statements sought to be admitted. State v. Boiardo, 111 N.J. Super 219 (App.div. 1970); Glasser v. U.S., 315 U.S. 60, 62 S.Ct. 457, 82 L.Ed. 680 (1942); State v. Seaman, 114 N.J. Super 19 (App.Div.), certif. den. 58 N.J. 594 (1971) certif. den. 404 U.S. 1015, 92 S.Ct. 674, 30 L.Ed. 2d 662. Another prerequisite to admissability required by N.J. Rule of Evidence 63(9)(b) is that the statements be made in the course of and in furtherance of the conspiracy; essentially this requires proof that the conspiracy was on-going and not terminated. In New Jersey, a conspiracy is presumed to continue as to each member of it until either the object of it has been accomplished or there is proof of an affirmative act of withdrawal as to one or more members thereof. State v. Farinella, 150 N.J. Super 61, 67, certif. den. 75 N.J. 17.

It is Plaintiff's contention in this action that the Somerset County Planning Board (S.C.P.B.) has conspired with the "Somerset Hills" communities of Bernards, Bedminster and Far Hills to preserve exclusionary zoning schemes therein in violation of Mt. Laurel. A short chronological outline of events is sufficient to meet Plaintiff's burden of proving a prima facie case of

conspiracy. On November 6, 1975, William Roach, Somerset County's Planning Director, wrote a letter to the Commissioner of the New Jersey Department of Community Affairs (DCA) criticizing Judge G. Thomas Leahy's decision which invalidated the Bedminster zoning scheme; in this letter the author requested that DCA run interference for Bedminster by intervening in the Township's appeal. This letter is just a sample of many actions taken by the S.C.P.B. on behalf of the Somerset Hills communities; correspondence with DCA concerning the State Development Guide Plan and with other regional planning agencies will be introduced at trial.

The most overt conspiratorial actions taken by these parties involves a meeting called for by the S.C.P.B. originally scheduled for March 4, 1976. In the S.C.P.B. letter of February 19, 1976, to the Mayors of Far Hills, Bernards and Bedminster under the subject heading "Meeting to describe the Allan-Deane proposal and its impact on the Somerset Hills area", the purpose of the meeting was described thusly: "to convene a meeting of the Somerset Hills municipalities where the long established zoning and planning goals are threatened by massive development proposals". Upon learning of this meeting the Allan-Deane Corporation demanded the right to attend and was refused. The S.C.P.B. then rescheduled the meeting for two weeks later and directed each of the municipal agencies to send only one of its members to attend the "informal" session where no "official" action was anticipated. On October 5, 1977, the Appellate Division of the Superior

Court ruled that this meeting was held with the express purpose of circumventing the Open Public Meetings Act requirement that all members of the public be allowed to attend and ordered the transcript of the proceedings released. See Allan-Deane Corp. v. Tp. of Bedminster, et al., 114 N.J. Super 114 (1977). In view of the age of the Somerset County Master Plan (not upated since its adoption in 1970) and the divergence of zoning and land use patterns from the plan throughout the county since 1970, one might well ask: why so much action on behalf of only three of the twenty-one municipalities; the answer to this question is supplied by the transcript to the meeting of March 18, 1976.

At this illegal meeting, Dr. Mottern (Somerset County Master Plan Committee Chairman) stated the purpose for the gathering as "to present a more unified position in planning land use; we must develop a position of mutual support" (T-5-6). He expanded on this statement later in the meeting:

> Dr. Mottern: "Have you any expression that you can make of what you consider support between the several Boards?"
>
> Mr. Todd: "What do you mean by support for the several Boards?"
>
> Dr. Mottern: "Most areas which have been planned for land use are always open to change. They're open to profit making. So it does seem that if we have a plan "which is fairly unified, that in case if there are demands made upon these plans which seem to be a point of breakdown in the plan, a point where the plan is being discarded for reasons that we might give in the way of economic advantage, some kind of social deliverance, that we might find it useful to support one another" (T-41-42).

All participants at this meeting agreed with this goal of putting "some muscle" into the Somerset County Master Plan so that it would have some validity in court (T-64). Representatives of Bernards Township went even further in suggesting that the courts be put in their place:

> Mr. Senesy: I think we do have to be sure that the professionals in the court system, don't misconstrue that they're not the planners or they're not the engineers or they're not--they're just the courts. That's what they are and they don't do the planning. I think you've mentioned that before, Dr. Mottern. They may not be necessarily very competent--(T-66).

At different times in the meeting, all municipal representatives suggested that the Planning Board oppose court actions, intervene on behalf of municipalities or lobby for legislation to over-ride court-mandated obligations.

As was pointed out above, the Appellate Division has already determined, based on the record below, that a conspiracy existed between the Somerset County Planning Board, Bernards, Bedminster and Far Hills to illegally circumvent the Open Public Meetings Act in order to privately conspire to thwart the Allan-Deane development. See 153 N.J. Super at 120.

Although the Mt. Laurel obligation was never explicitly discussed at this meeting, its presence nevertheless is pervasive when the transcript is viewed in

light of the past actions of the Planning Board and the denial of admittance to Allan-Deane representatives. The only rational conclusion which may be drawn from this evidence is that an on-going conspiracy exists between the S.C.P.B. and the Somerset Hills municipalities to continue the exclusionary zoning pattern which has been unchanged for decades.

POINT VII

THE TAX REVENUES GENERATED BY THE A.T.&T. FACILITY IN BERNARDS TOWNSHIP SHOULD BE UTILIZED TO PROVIDE LOCAL HOUSING FOR A.T.&T. EMPLOYEES.

The A.T.&T. office complex in Bernards Township generates upwards of $2,000,000 per year as property tax revenue. This constitutes a substantial portion of the Township's total tax receipts. The New Jersey Supreme Court has held that receipt by a municipality of such a benefit from an industrial or other commercial tax ratable imposes a commensurate duty upon the municipality to offer suitable housing to the employees of such a facility.

> "Certainly, when a municipality zones for industry and commerce for local tax benefit purposes, it without question must zone to permit adequate housing within the means of the employees involved in such uses." Southern Burlington County N.A.A.C.P. v. Twp. of Mt. Laurel, 67 N.J. 151, 187 (1975).

Bernards Township has failed to provide adequate low and middle income housing for its fair share of regional housing needs generally, and for the employees of A.T.&T. specifically. Obviously, these employees have had to find suitable housing in neighboring municipalities, thereby creating a "windfall" situation for Bernards Township. This Court should exercise its equitable powers to "undo" such windfall by: (a) directing Bernards Township to compensate the neighboring municipalities monitarily out of the property

tax revenues it receives from A.T.&T. to the extent that such municipalities permit and provide housing for such employees; or, in the alternative, (b) imposing a constructive trust upon said tax receipts for the benefit of the public in general in requiring that such funds be applied for the provision of subsidized or publicly assisted housing.

Our Supreme Court has encouraged and has recently engaged in similar jurisdictional "activism", Robinson v. Cahill, 70 N.J. 155 (1976), and has expressly stated that the "awesome" problems which confront our society concerning housing demand require "forceful and decisive judicial action". Southern Burlington County N.A.A.C.P. v. Twp. of Mt. Laurel, 67 N.J. at 220. It would therefore be completely proper, and in accordance with current judicial attitudes, to award the relief which Plaintiff seeks herein.

POINT VIII

SPECIFIC CORPORATE RELIEF IS AN APPROPRIATE REMEDY IN THIS CASE.

The proof Allan-Deane will produce at trial will show:

1. That Bernards Township has a long, notorious history of intransigence towards previous court orders to plan to meet their regional responsibilities and to zone with reasonable consideration to the suitability of the land for particular uses. That this Township has instead misused this local power to promote local parochial purposes contrary to the general welfare.

2. That despite previous court orders and opinions invalidating the zoning as to specific pieces of property on the ground that the overall zoning is exclusionary, Bernards has failed to comprehensively review their zoning and land use ordinances in order to provide the opportunity for a variety and choice of housing consistent with the regional need therefor.

3. That Bernards' officials have shown clearly in their public statements that they have no intention of voluntarily complying with the mandates of Mt. Laurel and Madison.

4. That despite this municipality's relative wealth, it has deliberately used the lack of sewers to further and promote this unlawful policy of exclusion.

5. That despite the fact that they have access to extraordinary legal talent, Bernards has enacted ordinances which clearly on their face contain numerous provisions contrary to the Municipal Land Use Law and the case law of this State designed to preclude or thwart "least-cost" development.

6. The enactment of these patently illegal land use restrictions is so blatent in this case as to justify immediate specific corporate relief in the form of building permits for Allan-Deane to construct the development it has proposed.

CONCLUSION

For the reasons stated herein and on the evidence to be adduced at the trial, it is respectfully submitted that judgment should be entered as follows:

1. Invalidating Bernards exclusionary and cost-generating Land Use Ordinances generally.

2. Specifically ordering the rezoning of the Allan-Deane property to an overall gross density of between 5 and 7 units per acre.

3. Directing the issuance of Building Permits to Allan-Deane pursuant to a reasonable site plan providing for a broad range of housing types.

4. Impose a constructive trust on the tax receipts received by Bernards Township from A.T.&T. and requiring that such funds be applied for the provision of subsidized or publicly assisted housing.

Respectfully submitted,

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