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Post Trial Brief and Summation of Defendant
Badminster Township
— cover letter to Judge

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May 17, 1979

Re: The Allan-Deane Corporation, et al. v. The Township of Bedminster, et al.

The Honorable B. Thomas Leahy
Court House Annex
Somerville, N.J. 08876

My Dear Judge Leahy:

We enclose original and one copy of the Post Trial Brief and Summation on behalf of defendant Bedminster Township.

We have not briefed the issue of remedy, as did Mr. Hill and Mr. Gordon, since we believe it inappropriate to brief that issue at this time. It is our firm belief, of course, that this issue need never arise.

Respectfully,

Alfred L. Ferguson

ALF:ko'b
Enc.

cc: Edward D. Bowlby, Esq.
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-SOMERSET COUNTY
DOCKET NOS. L-36896-70 P.W.
L-28061-71 P.W.

THE ALLAN-DEANE CORPORATION, et al.,

Plaintiffs,

v.

THE TOWNSHIP OF BEDMINSTER, et al.,

Defendant.

Civil Action

POST TRIAL BRIEF AND SUMMATION OF DEFENDANT BEDMINSTER TOWNSHIP

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PRELIMINARY STATEMENT

The defendant, Bedminster Township, submits this written summation of the evidence which it believes establishes that its land use ordinances fully comply with this Court's order of October 17, 1975, as modified by the order of September 28, 1977.

This conclusion follows from an analysis of the substance of the prior opinions, in light of tests of compliance established by court decisions and standards of the Municipal Land Use Law. Unfortunately, resolving the issue of compliance in this case has been needlessly confused because of the approach taken by plaintiffs. Though plaintiffs repeatedly asserted that the case was a compliance proceeding, the bulk of their evidence involved issues totally unrelated to this Court's orders. Rather, the plaintiffs' evidence attempted to shape this proceeding to impose tests and obligations on the Township of Bedminster in no way envisioned by this or any other court.

A. Purpose of Plaintiff's Presentation

The purpose of the Allan-Deane presentation is to convince this Court that only the Planned Development mode of development can comply with Mt. Laurel and Madison, and further that only the Allan-Deane site plan with 1714 units of high priced housing and 135 units of hypothetical subsidized housing is acceptable.

The purpose of the presentation of the Cieswick plaintiffs', enthusiastically joined by Allan-Deane, is to (1) create as large a "fair share" number as possible; (2) increase the numerical goal of least cost housing which Bedminster must meet; and (3) proffer the Allan-Deane development as the method of achieving this goal. This is all based on the strategy of geographic dispersal of low income population from central cities to suburbs espoused by Mallach and Davidoff to eliminate racism and poverty. There can be no doubt but that these goals are laudable. But there is absolutely no evidence in the record that the Mallach-Davidoff dispersal strategy will work; indeed, Professor Mills is very skeptical, and there is no general acceptance anywhere, in court decisions or the academic or planning community, of the geographic dispersion solution of our major social problems.

This is social engineering at its worst: motivated by good intentions (Davidoff and Mallach, the A.C.L.U. and the Public Advocate), but totally untested and probably not workable (Mills and Kasler); contrary to and at odds with all current regional planning theory (Tri-State; DCA Development Guide Plan; Somerset County Master Plan); and put forward vigorously and expertly by a private litigant (Allan-Deane) seeking a pot of gold at the end of the Mt. Laurel rainbow (a building permit for 1849 units, a motel-conference center, and a sewer plant which it hopes will

make possible an additional 1700 units in Bernards Township).

The warning of Mt. Laurel, 67 N.J. at 191,

> We do not intend that developing municipalities should be overwhelmed by voracious land speculators and developers . . ..

anticipated this case. This Court must not be fooled by the clever, slight of hand presentation of numbers and statistics generated by Allan-Deane in its quest.

B. The Numbers Game

One of the more egregious examples of misleading statistics is the fact that plaintiffs defined the Township's obligations in terms of the percentage of the entire Township zoned for high density housing. In its findings of fact, this Court found that the Township's regional obligations were several. On the one hand, the Township was obligated to satisfy its obligations to provide its fair share of housing. On the other hand, since the bulk of the Township consisted of the watershed of the Raritan River, responsible for providing potable water for millions of New Jersey residents, the Township also had a significant regional obligation to provide for open space protection of potable water supply areas. To accommodate these combined and conflicting obligations, the Court ordered that Bedminster Township's regional obligations for housing be satisfied in the corridor area, where dense housing could be adequately served since infrastructure

either existed or was sure to be provided. All of the Township west of the corridor, however, was held to be appropriately zoned for low density residential uses.

This Court's holding was consistent with the approach to fair share obligations of the New Jersey Supreme Court in Mt. Laurel. The Supreme Court recognized that substantial ecological and environmental problems must be considered in defining fair share obligations, 67 N.J. 153, 187. Concern for protection of the potable water supply, in a significant watershed area totally unserved by public sewers, satisfies this test.

This Court's prior findings with regard to the Township's dual regional obligations have been overwhelmingly corroborated by the evidence submitted in this compliance proceeding. All the official planning documents presented in this case, including the recommendations of Somerset County, the State of New Jersey Department of Community Affairs, and the Tri-State Regional Planning Commission, unite in recommending that the land in the Township west of the corridor remain in low density use.

The plaintiffs, however, ignore this and present volumes of testimony and complex exhibits comparing the percentage of land zoned for high density use with the total land available in the Township. Mallach, the plaintiff's fair share expert, presented a fair share calculation which incorporated all of the Township's vacant land as area for development; he also ignored problems of

unavailability of current or future infrastructure in the western areas. Allan-Deane's summation even uses a comparison of the percentage of the total Bedminster land zoned for multi-family use with similar percentages cited by the Court in Madison Township. Of course, there were no findings that Madison Township had substantial environmental problems in a large percentage of its land area, similar to the watershed character of most of Bedminster.

Since over 90% of the Township lies west of the corridor, it is not surprising that the Allan-Deane evidence gives startling statistical comparisons. All this evidence should be totally discounted, however, because it is absolutely meaningless in terms of the actual obligations imposed on the Township by this Court.

Another example of misleading statistics: the plaintiffs rely on detailed comparisons between theoretical multi-family units permitted under the 1973 and 1978 ordinances. This Court's findings of fact in its prior orders stated unequivocally that the densities permitted in the Township's 1973 multi-family zones, nowhere in excess of three dwelling units per acre, made possible the construction of absolutely no multi-family housing. These inadequate densities forced the Court to find that the 1973 Zoning Ordinance failed to comply with Mt. Laurel obligations.

Now, however, vast amounts of testimony and elaborate exhibits show that the 1978 Ordinance failed to provide as many

multi-family units as were permitted under the 1973 Bedminster Ordinance. Defendant repeatedly pointed out by way of objection that these comparisons were meaningless since the number of multi-family units allowed in 1973 was zero.

Indeed, Mr. Davidoff admitted on cross-examination that, given the Court's prior holding on the 1973 density, Exhibit P-50 and the comparison were wrong. Yet the plaintiffs continue to press the same point.

The game of comparisons is further suspect because of the way plaintiffs' calculations were made. The maximum permitted numbers of units under the 1973 and 1978 ordinances were based on hypothetical site plans. The 1973 site plan included all available land areas and calculated a total based on an assumption that all units would be efficiencies. The 1973 site plan even used a maximum permitted density of 5.79 dwelling units per acre for multi-family housing, 2.79 dwelling units per acre in excess of that which this Court found was the maximum permitted density under the 1973 ordinance. Not surprisingly, these magic calculations produced a high number of multi-family units theoretically permitted under the 1973 ordinance.

The same magic, which produces an enlarged figure for 1973 multi-family units, converts the 1978 Ordinance into a mere shadow of its actual self. A substantial amount of the available land area was removed as unsuitable for development. The hypo-

thetical site plan further reduced permitted numbers by a design which allotted 50 feet of street frontage for every townhouse, though the Ordinance only requires a minimum of 50 feet for an entire townhouse development. As a result, plaintiffs calculated that not only were fewer multi-family units permitted under the 1978 ordinance, but also they found 600 fewer multi-family units possible than did the defendants.

C. The Quest for the Perfect Ordinance.

Plaintiffs have attempted to impose obligations on the Township not to do what is reasonable, but to invent an ideal zoning scheme, which removes any possibility of the exercise of discretion by the Planning Board. By admissions of the Allan-Deane major planning witness, John Rahenkamp, the provisions which he claims evidence non-compliance by Bedminster can be found in no other zoning ordinance in any municipality in the State of New Jersey, and, as far as the record shows, nowhere in the world. Defendant's cross-examination of John Rahenkamp amply demonstrated that even the ordinances drafted by him cannot meet the tests which he desires to impose.

In a slight variation of the same theme, where plaintiffs do not criticize ordinance provisions for failing to be ideal, they criticize ordinance provisions on grounds that an

unreasonable Township official could interpret the ordinance in a way that would be damaging to the plaintiffs. Using these arguments, they calculate, for example, that an unreasonable Township could charge a developer twice for inspection of the same identical improvements, since inspection fees are provided for in both the subdivision and site plan ordinances. This clearly would be an absurd and unjust result. But neither this Court nor the Supreme Court in Mt. Laurel or Madison established a requirement that a township must devise a perfect ordinance that an unreasonable township official could never subvert.*

Though this hearing supposedly dealt with the issue of the Township's compliance with Mt. Laurel and Oakwood at Madison obligations, plaintiffs directed their criticisms at the Township's failure to permit a developer to satisfy market demands and provide high density, high cost, and high profit housing. A careful analysis of all of plaintiffs' criticisms of the defendants' inclusionary devices reveals that plaintiffs' objections are based, not on the failure of these provisions to permit least

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* In fact, the Land Development Ordinance specifically removes the possibility of double charges for inspections. D-116, Ch.II, §11.9.1.3 provides:

> If the applicant, pursuant to the provisions of the Land Subdivision Ordinance or Road Construction Ordinance (Chapters II and IV herein), has deposited funds to cover the cost of such review and inspection, then such deposit shall not be required.

cost housing, but on their failure to permit adequate numbers of dense, high cost units which maximize profits for the developer.

* * *

The elaborate numbers game presented to this Court is designed to justify dense, high priced housing for Allan-Deane. The effort is all the more despicable because it tries to ride the coattails of our society's desire to provide decent housing for low and moderate income persons. The charade must fail when evaluated against the Township's good faith and successful effort to comply with this Court's orders.

I

BEDMINSTER TOWNSHIP'S PROVISION FOR LEAST COST AND FAIR SHARE HOUSING

A. Bedminster's Future Growth Should Be Focused In The "Corridor" Rather Than In The Western Portion Of The Township, In Accordance With The Prior Order Of Judge Leahy.

Bedminster Township's fair share provision for least cost housing is reasonable as it considers all relevant comprehensive planning criteria while allowing for the population and housing growth anticipated for its region by State, County and regional planning agencies.

In seeking to comply with Judge Leahy's opinions of February 24, 1975 and October 17, 1975 and the Order of September 28, 1977, the Bedminster Planning Board set as its goals, satisfaction of its full and fair obligation under the Mt. Laurel and Madison decisions, consideration of all relevant planning criteria and the preservation, within these various constraints, of the Township's rural character. The planning board felt that such goals were in keeping with Judge Leahy's opinions. Indeed, Judge Leahy's opinions were considered the "charge" to the planning board which attempted to respond to the Court mandate as fully and as completely as possible (T 10, January 3, 1979). Bedminster saw its obligation as two-fold - to protect the regional water supply and open-space needs of the 500,000 people dependent upon water from the Raritan River as well as to provide for its full and fair regional share of low cost housing.

A review of existing land use patterns in Bedminster Township indicated that the predominence of development was in the eastern portion of the town along the corridors formed by Routes 202-206 and Interstate 287. The villages of Pluckemin and Bedminster had historically been the focal points of growth. The highway network which forms the Bedminster-Pluckemin Corridor assures it of excellent access. However, moving west of this corridor the rural nature of the Town becomes apparent. Roads are sparse, less improved, and much of the area is unserviced by roads at all. Accordingly, the types of services which often follow roadways do not exist in the western portion of Bedminster (T 164-165, March 19, 1979).

Most of Bedminster Township is severely limited by its soil characteristics for septic disposal. Therefore, any high density development contemplated would require sewers. Although there are some lands in the western and northern portion of the Township which may be environmentally suitable (i.e., with spray irrigation) for high densities, the lack of infrastructure in this area makes it unsuitable for suburban development (T 173, March 19, 1979). Future sewer service is likely to emanate from the south and east of the Township where facilities already exist (T 99 to 103, October 26, 1978; Malcolm Pirnie Report, D-50). The Township felt it illogical to plan for high intensity use in an area which was so lacking in existing or planned transportation access, community services, sewer, water and other utilities.

In making decisions as to the future growth of their town, the Bedminster planners were keenly aware of their location in a watershed area and its intendent responsibility to downstream residents. Bedminster Township is located entirely within the Upper Raritan Watershed. In his opinion of February 24, 1975, Judge Leahy carefully noted the relationship between land use and water quality. Referring to the testimony of Dr. Ruth Patrick of the Academy of Natural Sciences in Philadelphia, Judge Leahy found that,

> "it is essential to maintain open space and exercise great care in land planning and development within the Upper Raritan Watershed if the outflow from the North Branch of the Raritan River and the Lamington River are to be satisfactory to serve the confluence reservoir and to be thereafter useable for potable water supplies." (Opinion of Judge Leahy, February 24, 1975 at 18-19).

Judge Leahy also noted the importance of protecting watershed streams from both point and non-point sources of pollution,

> ". . . in addition to pollution from identifiable sources such as sewage treatment plants and industrial waste treatment facilities, there are sources of pollution in populated areas which provide an additional two-thirds of water pollution in the three rivers he [General Whipple] monitored. These pollution runoffs are comparable in nature to discharge from secondary treatment plants and, in the first flush of runoff from a heavy rain, can be as high as one-half the pollution content of untreated sewage.

> . . . there is a direct correlation between population density and stream pollution and any increase of population in a watershed is almost sure to increase pollution coming into streams regardless of sewage treatment." (Opinion of Judge Leahy, February 24, 1975 at 15).

Judge Leahy found three-acre zoning in the western portion of Bedminster Township to be an appropriate means of protecting the watershed at densities conducive to maintaining open space and providing single family home owners with a safe well water supply and septic disposal.

> "The best water supply areas in the watershed are located within Bedminster Township. Most of the area comprising Bedminster Township is severely limited as to ability to accommodate septic tanks successfully. Leaching fields must be larger for soils with such low percolation rates. Since Bedminster's soil is mostly shale, three acres is the minimum lot size for safe well water supply." (Opinion of Judge Leahy, February 24, 1975, P. 16).

The Township believed that it could accomplish a balanced zoning plan which would provide for least cost housing while maintaining three-acre zoning in the western portion of the town. Indeed, as Judge Leahy noted in his February 1975 Opinion

> "this is required if that area is to be retained as low density development to achieve the goals of protecting the watershed, preventing downstream flooding, preserving air quality, preserving some agricultural land and preserving water quality." (Opinion of Judge Leahy, February 24, 1975 at 24).

B. Bedminster's Planning is Consistent with Regional, State and County Planning.

Bedminster Township found support for this planning scheme in the current and recognized planning strategies of the County, State and Region.

The Somerset County Master Plan has designated the portion of Bedminster Township west of Routes 202-206 as "rural settlement" based on its location in a headwaters area which will service the proposed Confluence Reservoir, its lack of infrastructure to accommodate growth, and the need within the County to preserve some open space and to discourage sprawl development (T 130, October 30, 1978).

There is a high degree of consistency between the Somerset County Master Plan and the Tri-State Regional Development Guide of March 1978 (T 130, October 30, 1978). Tri-State has designated the western portion of Bedminster Township as "open land" and recommends a density of 0 to 0.5 dwelling units per acre in this area.* To determine the "open land" designation Tri-State goes through four successive steps to subtract from the vacant land pool: 1) unsuitable soil; 2) prime agricultural soils (Class I, II and III) in large parcels; 3) 50% of buildable land in

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* Indeed, Tri-State recommends that density in the "open land" area be as low as constitutionally permissable (Regional Development Guide, D-51, Page 19).

reservoir catchment areas and 35% of buildable land in intake catchment areas; 4) 30% of buildable land in headwaters. A predominance (or 70%) of critical lands within a given square mile of the Tri-State grid system indicates a candidacy for "open land" designation (Regional Development Guide D-51, Page 14; Interim Technical Reports, D-52, D-53 and D-54; T 31 to 40, October 16, 1978). In deriving the open land designation Tri-State also considered the present predominance of vacant land and the absence of streets, water and sewer lines, schools and other urban services (Regional Development Guide, D-51, Page 17).

The State Development Guide Plan prepared by the New Jersey Department of Community Affairs places much of the western portion of Bedminster Township into its "limited growth area" category. This is in keeping with the DCA goals to preserve agricultural lands, to protect water resources, to make maximum use of existing infrastructure and to avoid the unnecessary spread of new infrastructure to open lands (DCA State Development Guide Plan, P-13, Page 36-37). On the other hand, the eastern portion of Bedminster Township is included among the "growth areas" designated by the Guide Plan as areas sufficient to accommodate expected growth of jobs and housing (T 80, September 18, 1978).

It is not necessary to sacrifice environmentally fragile lands to meet the housing needs of the State while appropriate areas for housing are still available. Bedminster Township deter-

mined that it would be sound and responsible planning to remove the western portion of the Township from the land pool appropriate to provide high density multi-family housing and to focus its growth in the Bedminster-Pluckemin Corridor (T 200, October 30, 1978). The Township considers this to be a staging device and would be willing to extend its multiple family zone to appropriate areas west of 202-206 in response to future housing need (T 27-33, January 3, 1979).

The planning committee determined that the legitimate public purpose of protecting natural resources could best be served by maintaining the western portion of the township in a lightly populated state while allowing for dense development, to satisfy the housing need, in the Bedminster-Pluckemin Corridor. Because the Corridor is most amenable to the provision for transportation, social services and utilities required by dense development the Corridor is the logical and perhaps the only location for least cost housing in Bedminster Township.

C. The Housing Obligation Of Bedminster Township Is Based On Its Employment And Relationship To The Region.

Lacking the guidance of any official fair share plan, Bedminster Township undertook to understand and estimate its housing obligation under the Mt. Laurel and Madison decisions. As a formulaic approach was not deemed necessary under the Madison decision, the Township looked to the factors which it considered most relevant.

The basic generator of its fair share obligation was understood by the Township to be its employment, particularly the approximately 3,500 AT&T jobs. The court in Madison faulted that township for not adequately considering its accessibility to jobs, particularly its relative nearness to heavy employment centers as compared to other municipalities in its region (Madison at 530). Bedminster determined that its fair share obligation would approximate all of the low income households generated by the AT&T employment. As calculated by Charles Agle, this would be the number of households generated by the total AT&T employment factored by the percentage of low income households based on the 1970 Census. (3,500 AT&T employees x 0.7 household x .25 low income = 600) (T 66, January 4, 1979). Such a provision would allow for the regional need, as it was not expected that all of this housing would be occupied by AT&T employees and thus would be available to any low income persons seeking to live in Bedminster Township.

Prior to its move, AT&T had assured Bedminster that

impact on the community would be minimum (T 90, October 18, 1978). Indeed, the AT&T move necessitated the relocation of only 1,034 employees; 1,197 new employees (many of these at the lower end of the pay scale) were hired from the local labor pool who were already living in the area; the remainder of the 3,500 AT&T employees were already residing within a reasonable commute distance of the new AT&T site (T 41, October 18, 1978). Bedminster's fair share estimate is based on the total number of employees at the AT&T site, rather than on the 1,000 who would actually require housing in the area.

The relocation of the AT&T facility brought little "secondary" employment growth to Bedminster Township. This most probably relates to the fact that relatively few changes of employee residences were required. Another factor which limits the traditional "multiplier effect" is the phenomenon of the office campus. The AT&T facility is self-contained in that its employees eat, shop and recreate within the complex. Immediate access to major Interstates such as 287 make it unlikely that employees will venture onto local roads seeking services. Also, as noted in the testimony of Charles Agle, the population and employment trends of the early 1970's, prior to the AT&T move, simply did not continue, thus generally limiting the population and employment concentration in the area (T 156, October 30, 1978; T 126 to 127 and 147, January 10, 1979).

The Township adopted the 600 unit figure as an approximation of their fair share to be utilized as a planning tool over the 6 year period of the Master Plan. This fair share estimate was in no way meant to limit the least cost housing yield. Indeed, an additional 1,000 least cost units may be built in the R-20 Zone.

Bedminster looked to the fair share provisions of other communities in its region and found its fair share estimate to be in keeping with those of its neighbors. The JORD or "job oriented residential distribution" formula is a sophisticated mathematical equation which relates housing obligations to distance from job site. This formula was employed by Bernards Township which determined its fair share to be 531 units. JORD is the mathematical representation of the Agle "ripple region", which he employed to determine Readington Township's fair share to be 124 units. Without incurring the expense of a new study, Mr. Agle was able to relate the graphic presentation of the magnitude and location of covered employment prepared for the Readington study to Bedminster Township. Agle advised the planning board that the computation, if performed for Bedminster, would show larger numbers for Bedminster than for Readington (124) but smaller than for Bernards (531) because of the configuration of employment generators. Based on his Readington and Bernards Township fair share work, Mr. Agle advised the planning board that 600 units was a progressive

determination of fair share for the 6 year period of the Master Plan (T 91 to 102, January 4, 1979).

The Bedminster Township Fair Share Housing Study prepared by Malcolm Kasler gives perspective to the Township's efforts to provide for its least cost obligation. In determining its housing obligation, Bedminster was correct in considering the elements thought to be most relevant - employment, the highway network which crosses the town, the historic pattern of demography and trade in the area, the growth anticipated for it by other planning agencies and its ability to provide for utilities and community services.

The Kasler "journey-to-work" region relates and gives definition to these elements. It is an appropriate methodology by which individual municipalities can rationally determine and plan for their least cost housing obligation.*

> "The technical details of the basis for fair share allocations of regional goals among municipalities, pertaining as they do to an area of considerable complexity and theoretical diversity, are not as important to a reviewing court concerned with effectuating Mt. Laurel objectives as the consideration that the gross regional goal shared by the constituent municipalities be large enough fairly to reflect the full needs of the housing market area of which the subject municipality forms a part.

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*Indeed, the court in Urban League of Essex County v. Mahwah found Mr. Kasler to be "a credible witness, and a competent planner" and noted the specific and extensive nature of his "journey-to-work" region (derived by the same methodology as applied in Bedminster) (Urban League of Essex County v. Mahwah, Law Division, Bergen County, Docket No. L-17112-71 P.W., at 15, 47).

> In broad principle, we believe Judge Furman was correct in conceiving the appropriate region for Madison Township as 'the area from which, in view of available employment and transportation, the population of the township would be drawn, absent invalidly exclusionary zoning'. 128 N.J. Super. at 441. This is essentially like the housing market area concept espoused in the Abeles Report as sound in principle, although not directly employed in the Abeles Fair Share Sutdy. (Madison at 536, 537).

Bedminster's community housing region is defined as that area within a 45 minute drive time of the Township based on existing roads and speed limits. The magnitude of the Bedminster region is significant. It is comprised of 10 counties and 152 communities, including all of Somerset and Union counties and portions of Morris, Sussex, Warren, Hunterdon, Mercer Middlesex, Monmouth and Essex Counties. 2.09 million people live in this region. There are 736,739 jobs and 299,906 vacant developable acres, as defined by the State of New Jersey. The housing need for this region is determined to be 132,825 units (T 68, 92, October 31, 1978).

The "journey-to-work" region accurately takes into account Bedminster's relationship to surrounding areas. As Mr. Kasler points out, "every municipality in the State of New Jersey to some extent is unique just by virtue of its locational factors, and the relationship of transportation network to that town and the remainder of the region" (T 212, November 6, 1978). While

Bedminster may be removed from some of the core cities, it is related by virtue of historic patterns, demography and trade and transportation networks to cities such as Elizabeth, Plainfield and New Brunswick and thus responsible for a portion of their housing need (T 62 to 66, October 31, 1978). Bedminster is also related to the counties to its west, both historically and by virtue of the "Clinton Corridor" phenomenon brought about by increased access to the western counties along Route 78. Thus, the Bedminster region includes both older areas of significant housing need and future areas of significant employment growth (T 153, October 31, 1978).

Both the existing and prospective housing need of the region are estimated and allocated. Kasler found the 1970 housing need within the Bedminster Township region to be 106,940 units based on the DCA Study, An Analysis of Low and Moderate Income Housing Need in New Jersey (1973). The projected multiple family housing need for the 1980 is determined to be 49,708 for the Bedminster region based on the study Modeling State Growth: New Jersey 1980 by James and Hughes (August 1973.) By subtracting the number of multiple family housing units constructed within the 1970-1976 period, Mr. Kasler reaches a total housing need for the Bedminster region of 132,825 units (T 92, October 31, 1978).

The present and prospective housing need in the region is allocated to each community on the basis of its employment,

population and vacant land. These factors may be weighted in different ways to find a range of obligation. Employment is considered the most important of the three factors since it is the job market which, in large measure, determines the housing market; people usually seek to live within a reasonable commute of their job site. Population, as an independent variable, has a lesser, but still important, role in determining housing need in that people beget and attract other people; birth, marriages, divorces and other demographic trends create households and thus generate housing need. Vacant land is a determinant insofar as some communities in the region may or may not have land available for development. Vacant land is a supply factor and does not create a demand for housing in and of itself (T 97 to 103, October 31, 1978).

Employment constitutes the most significant element of each of the alternative allocation formulas. Putting this in terms of the "magnet" or "gravitational" concept, the responsibility for employment is greatest closer to the job site and decreases with distance. In this way, the Kasler methodology relates to the Agle "ripple region" and the JORD formula employed by Bernards Township. Such gravitational theories have been widely used in planning to measure the attraction a particular site will have in terms of commerce, housing or employment (T 203, November 6, 1978). The Bedminster Township Fair Share Housing

Study was updated to consider AT&T employment as of 1977 (D-75). Based 3,597 jobs in the Township, Kasler determined a fair share allocation ranging from 681 to 985 units, with 700 to 800 units considered a reasonable fair share allocation to 1982. In his opinion, this is in keeping with the 600 fair share units and the additional 1,000 least cost units provided for in the current Zoning Ordinance and Master Plan, as well as with the 1,346 units which the DCA suggest that Bedminster should provide by 1990.

D. Mallach Fair Share Strategy.

In contrast to the Kasler Study, the fair share allocation strategy put forth by plaintiff's expert Alan Mallach is totally inappropriate for application by individual municipalities and has no basis in sound community planning.

Allan Mallach is puzzling. He is neither a professional planner nor a licensed planner. He is a self-proclaimed housing expert, admittedly with some experience in the field of housing. But a degree in sociology does not qualify Mr. Mallach to speak authoritatively as to the overall housing planning for the State of New Jersey for the next 25 years. Mallach has been involved in many exclusionary zoning cases. It is most significant, however, that his testimony has been generally rejected. For instance, in Mt. Laurel II, Mallach's fair share number for that township was 3,672 before any "over zoning". 161 N.J. Super at 332. Mt. Laurel's planner, Mr. Glass computed a fair share of 515, based upon planning and demographic factors relevant to the town. (Id. at 329). The Court declined to follow Mallach and upheld the ordinance based upon the Glass calculation of fair share. (Id., at 344). In Mahwah, Mallach's fair share range was 10,000 to 11,000. Mr. Kasler, who undertook the same kind of study for Mahwah as he did for Bedminister, estimated fair share at 1982 to 2261. (Oral Opinion at 15). Once again, the Court rejected Mallach and followed Mr. Kasler. (Oral Opinion at 39-40).

The Mallach "Allocation" is a confused and confusing combination of judgmental factors based on no source other than Alan Mallach. Mallach devines that some 10,000 low and moderate income units should be provided in Bedminster is zoning over the next decade. This is the output of a calculation inflated by many assumptions as to region, where housing need should be met, who can afford housing, what constitutes "vacant developable land" and what constitutes overzoning.

Mallach would have Bedminster Township zone to accommodate some 43,400 new residents by the year 1990. This figure is derived by multiplying the need of his "Group One" category (3,500 units) by 3 (his factor for overzoning) to yield 10,500 low income units, adding this to the need in each of the other categories (5,000 total for the remaining categories) and then multiplying the 15,500 total unit need by a factor of 2.8 to represent persons per household. (Based on Mallach's high estimate of need, P-32). The unrealistic nature of the Mallach figure is obvious when implementation is considered in terms of sound planning such as the provision for water, sewer and other infrastructure improvements and the desire for reasonable and logical growth.

Mallach utilizes a series of factors and assumptions which tend to inflate his allocation for Bedminster Township:

(1) Mallach's choice of regions is "overly agressive" (T 150, October 31, 1978). Admittedly, Bedminster

is included in and has a relation to each of the regions chosen by Mallach. However, it is also true that Bedminster is located on the western-most fringe of each of these regions and, therefore, must be considered to have equal ties with the western areas immediately adjacent to, but not included in, the Mallach region. For example, for purposes of his testimony in the Round Valley case in Hunterdon County, Mallach recognizes the "Clinton Corridor" phenomenon created by Route 78 which is propelling population and employment growth to the west of Bedminster. However, for purposes of his testimony here Mallach would not extend the Bedminster region to its immediate west (T 89 to 96, September 21, 1978). Mallach arbitrarily terminates his region in "fuzziness" at Bedminster and therefore applies to it the full housing need of counties that are distant and unrelated, while ignoring the housing need and available land of other counties which are historically related to Bedminster by trade, commerce and demography (T 155 to 156, October 31, 1978).

If employment growth in the Bedminster area is a housing need demand factor (as to which all experts agree), then it is inescapably true that the land available for housing in the towns in adjacent Hunterdon

County is a significant supply factor. Mallach ignores Hunterdon County completely.

Similarly, according to the Mallach logic, the housing need of a person at the very outer limits of the region is weighted equally to that of persons in neighboring communities. For example, a person living in Pallisades Park would seek housing in Bedminster as readily as would a person in Morristown or even Somerville.

(2) Mallach uses the same figure for "present need" as does the DCA Revised Statewide Housing Allocation Report; however, Mallach manages to put more of these units into the regional pool than does the DCA, thus increasing the allocation to Bedminster. According to Mallach's methodology, less of the present need is met "in-place", or where the need actually arose and more goes to municipalities with vacant land and/or employment (T 69 to 73, September 21, 1978). In Mallach's calculation the percentage of present need going into the regional pool is 50% for "core" areas and 70% for "non-core" areas. According to his testimony, Mallach derived these percentages by looking at the general characteristics of municipalities and grouping them into "general categories." He found that the core

cities "tend" to have 50% low and moderate income population, while non-core municipalities "tend" to have 33% low and moderate income population on the average. He assumed that those same percentages of housing would stay within the low and moderate income housing stock; the remainder went into the regional pool as he considered that these units would not be available because they had been occupied by persons of a higher income bracket and had thus "filtered up" out of the low and moderate income pool (T 73 to 84, September 21, 1978).

(3) Much of Mallach's calculation of "need" is based on his estimation of who can afford what type of housing. Mallach assumes that people making up to $14,400, or 80% of the median income (by Mallach's definition), require subsidized housing (T 108 to 120, September 20, 1978). Mallach's "least cost" group ranges from those earning $14,500 to $22,500. He describes these people as those not needing direct subsidy, but who cannot be housed without "freedom from exactions and cost generating provisions". However, Mallach's own "minimum house" would cost $44,700 and would only be available to those at the very upper-end of his "least cost" scale. Mallach's estimation of home price includes a $28 per square foot "bricks and mortar"

construction cost for a single family house. To this he adds the cost of septic tank and well, landscaping, financing, closing costs and land thereby pointing out, by his own testimony, that the high cost of housing is a result of many factors not controlled by a municipal zoning ordinance (T 161 to 167, September 21, 1978).

Mr. Kasler pointed out the flaws in assessing "need" in terms of housing price and income. Kasler's fair share report speaks in terms of "least cost" housing; he does not attempt to assess a dollar amount to such housing, nor does he agree with Mallach's determination of what people can afford based on their income. Kasler points out that it is extremely difficult to determine what price housing people can afford and that this often does not relate to income alone. Many people have other assets, such as equity in another home or property which has become inflated over the years and allows them to sell and move up to a much more expensive home than they could afford based on income alone. There is also a growing trend towards multiple wage earner families which greatly increases home buying power (T 157 to 159, October 31, 1978).

It should also be noted that, according to the Mallach methodology, the housing need for each income

group must be satisfied by new structures. This tends to increase the overall numbers and ignores the "trickle down" effect or filtering process which opens up housing units on the lower end of the scale as they are vacated by persons able to afford more expensive new housing.

(4) Mallach's definition of vacant land has a significant effect on his allocation to Bedminster. His computation of vacant land adds back in agriculturally assessed property which is excluded from development by the DCA in both their Allocation Report and Guide Plan. By adding back in the farmland assessed property, Mallach shows his disagreement with the policy goals of the DCA Allocation Report which considers this exemption to be a means of protecting agriculture in New Jersey. Mallach would add back in such farmland because he feels that it is not immune from development, despite the desires of the DCA. Such land, according to Mallach is often suitable for development - although he admits that it may also be the most suitable land for certain agricultural uses. He further justifies his disagreement by noting that not all agriculturally assessed land is prime agricultural soil (T 142 to 146, September 20, 1978). Indeed, Mr. Mallach may be right in these assertions. Agricultural lands are often those most ripe for

development in that they are large, flat and accessible parcels. It is for this very reason that they need the special protection provided by the DCA Allocation Report. It is of course true that not all farmland assessed property is being used for serious agriculture, but whatever serious agriculture is going on in the State of New Jersey is occuring on farmland assessed property. Also much serious and productive farming is done on soil that is not prime agricultural.

Mallach's inflated definition of vacant land not only significantly effects Bedminster's allocation in the first round, but also results in a greater figure in the reallocation process. Mallach calculates the maximum development capacity of a community by taking 1/3 of its vacant acres and multiplying this by a density of 10. He feels that his formula is "conservative" and nobly states that it should be used because the "amount of vacant land is limited and there is no compelling reason to argue [that] it should be allocated in its entirety to low and moderate income housing" (T 142, September 21, 1978). Of course, the result of his "conservative" figure is to increase Bedminster's allocation; because Bedminster has a large amount of vacant land by Mallach's definition, it receives much more of

the reallocated need from other communities which close out more quickly under the Mallach formula.

Throughout his allocation formula, Mallach assumes that the entire Township is open to multi-family development and includes in his vacant acre calculations the western portion of the Township previously found to be inappropriate for dense development by Judge Leahy. (Opinion of Judge Leahy, February 24, 1975, page 24). The Mallach allocation, which places great weight on vacant land, would be greatly reduced if Mr. Mallach were limited to siting low and moderate income units on only that land which was suitable for dense development, such as the Bedminster-Pluckemin Corridor.*

(5) To achieve overzoning, Mallach would multiply his own already over-estimated fair share figure by three. This is the single most inflationary factor of his entire allocation process, and it has no basis in fact or in planning (T 175, October 31, 1978). Mallach admitted in his testimony that this was not a mathematical factor, and he knows of such statistic. In order to come up with this figure, Mallach considered

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*Indeed, the Court in Mahwah found that while 40-45% of the town's acres were "vacant", only 10% were "developable" if parkland, flood plain, slopes in excess of 15%, farmland and inaccessible parcels were subtracted. (Oral Opinion at 5 to 7).

the reasons why overzoning is necessary in the provision for least cost housing, and performed an "intuitive rather than statistical interpretation of empirical findings" (T 169, September 21, 1978). The court in Madison requires a "reasonable cushion over the number of contemplated least cost units deemed necessary" to ensure that enough land will be made available for such housing. (Madison at 519). The Madison court did not define a formula for providing such a cushion, and certainly did not speak in terms of a multiple factor being applied to the initial allocation. Indeed, the availability of land for dense housing cannot be confined to one municipality and is a regional phenomenon; the situation would be greatly relieved, without excessive overzoning, if each municipality in a region were required to meet and maintain its fair share (T 175, October 31, 1978).

While Mallach is of the opinion that the approach of phasing development over time is a very reasonable planning tool which provides features for controlling municipal growth, including planning for infrastructure and the expansion of facilities, services and the like - he gave absolutely no consideration to the infrastructure requirements, cost and impact that would be brought on by his allocation (T 96 to 104, September 21, 1978). Indeed, he assumes that since his allocation covers a long time frame, the infrastructure will be expanded and developed. The testimony of the Somerset County Planners, Bill Roach and Ray

Brown, point out the tragic fallacy of such an assumption. As Mr. Roach points out, the provision of infrastructure for dense development should not be played like a game of "catch up ball." Noting the radical impact of too sudden development in Hillsborough Township, Roach pointed out,

> "...being a planner, I like to plan development, not just let it happen and then try to play catch up. . . . We got residential development, and the State isn't performing. So I think we have to start to get a guarantee of infrastructure before we proceed with massive large-scale development. I don't know what means we'll use, but we have to do it" (T 159 t0 161, October 30, 1978).

Raymond Brown noted the importance of having infrastructure either existing or planned to support anticipated growth (T 85, October 26, 1978).

Mallach also fails to consider the impact of the expansion of infrastructure into areas not already served. He characterizes the region as a "metropolitan" one which has a certain dispersion of infrastructure, and thus sees no problem in the further expansion of such infrastructure throughout the region. This is directly contrary to the DCA State's Development Guide Plan, the Tri-State Regional Development Guide and the Somerset County Master Plan which all call for efficient use of existing infrastructure and well thought-out expansion of such infrastructure only to use areas appropriate for growth. Additionally, the ongoing Section 201 sewer facilities plan will determine where sewers are to be provided in the future.

Mallach has never made an analysis of the infrastructure of Bedminster Township. Despite this, he does not see why it would not be possible for Bedminster to zone for approximately 10,000 low and moderate income housing units and still be in keeping with sound planning principles. Bedminster contains an amount of what Mallach defines as "vacant and developable land" that is sufficient to accommodate this amount of housing. Of course, Mallach's definition of vacant and developable land gives no consideration to the location of such land in a watershed, its suitability or use as agricultural land, the problems and expense of sewering such land or its proximity to roads and services. Mallach does admit that, depending on the nature of the infrastructure, it is generally the municipality which makes the decision as to where infrastructure and housing should be located; he adds that this decision must be made on what is reasonably anticipated based on constraints and decisions which have to be made at all levels - Federal, State, County and Municipal (T 105 to 114, September 21, 1978). Were Mr. Mallach a professional planner, he would perhaps be mindful of the practical problems involved in providing for dense low cost housing-compliance with the Municipal Land Use Law, conformity with State, County and Regional planning, maintaining the character of the community, allowing for orderly growth, providing for infrastructure and the like. If Mallach were a licensed planner, his professional status

would demand that his testimony be more comprehensive and responsive to the real world. This was the context in which the Bedminster planners had to provide for their full and fair share of least cost housing.

Mr. Mallach testififed in this case, as he does in all his exclusionary zoning cases, that there is the housing shortage and that persons of low and moderate income are being priced out of the housing market. While this may well be true, the reason is not exclusionary zoning as Mr. Mallach infers but simply the economy in general and the cost of construction. As Judge Smith stated in Mahwah,

> "Experience leads me to the conclusion that regardless of lot sizes it would be impossible to privately produce a housing unit in northern Bergen County today for much less than the construction taking place in Mahwah right now.
>
> An examination of the town houses in the CED zone indicates that this is indeed no-frill housing, and the units there are selling close to $100,000 today. Land costs and construction costs are astronomical." (Oral Opinion at 45-46).

The same is true of Somerset County in general, and certainly Bedminster in particular. The high cost of housing in Bedminster is not caused by exclusionary land use controls, nor is it caused by low density housing per se. As Mr. Gershen pointed out, the cost of multi-family housing consists largely of construction and maintenance costs; land cost and density are very small factors.

Judge Smith in Mahwah rejected Mr. Mallach's notion that massive over zoning for least cost units would resolve the housing shortage or the problems of economic reality. This Court should do the same.

Professor Mills and Mr. Kasler put concept of fair share in its proper prospective and showed that Bedminster's approach based upon location and employment was sound.

E. Fair Share Must Be Accomplished Within The Framework Of Sound Comprehensive Planning.

The fair share methodology employed by Bedminster Township is more appropriate for an individual municipality than the so-called distributional formulas. The methodology utilized by Mr. Kasler is a combination of both the "need" and "suitability" elements of the Listokin fair share model (Madison at 542, footnote 45). The need element of the model is based on job availability as well as the existence of substandard and overcrowded housing and housing that is too expensive for occupants to afford. The "suitability" element of the model relates to transportation facilities, local fiscal resources, land availability, land cost, environmental suitability, and availability of public and private utilities. Once the "need" is recognized, it must be accommodated in the township on the basis of the many factors which determine "suitability" (T 157 to 158, November 6, 1978). A municipality must provide for its fair share in consideration of all other comprehensive planning criteria. Thus, the need it seeks to meet must relate to its ability to provide land suitable for building, sewer, water, transportation and community services.

The "distribution" model discussed by Listokin is a social reorganization strategy which would be inappropriate for an individual municipality to undertake, whether or not such a plan had merit. Such redistributional strategies do not take into account the conventional problems involved in providing housing.

They are biased strategies designed to achieve a predetermined result and represent social engineering rather than comprehensive planning. Mr. Kasler noted that such broad judgments as to what is good and bad for society are, in his opinion, beyond the capability of the professional planner advising the individual municipality. Indeed, if such methods of relocation were possible, the result would probably be more economic and social dislocation as many of the jobs for low and moderate income individuals are still found in the center cities. Increased dependency on the automobile would add to economic hardship, and the situation in the center cities would not be alleviated (T 160, November 6, 1978). If every municipality were to adopt a fair share plan relative to its need and suitability, such as Bedminster's, some of the redistributional goals would be achieved without massive dislocation or overdevelopment in the rural areas.

Indeed, the Madison Court explicitly recognized that regional fair share plans as described by Listokin

> "... are intended to subserve the actual construction or subsidization of low cost housing. By contrast, a plan for a Mount Laurel type litigation, as the present, is not capable of direct utilization by the affected municipality or by the Court. (Madison at 538, footnote 43).

Allocation formulas such as that proposed by Mr. Mallach are numerical exercises which may promote thought as to housing related decisions but would represent a poor comprehensive plan-

ning program (T 54, March 20, 1978) and are wholly inappropriate for use by a single municipality or by this Court.

In his testimony, Richard Coppola pointed to the magnitude of difference between comprehensive planning and housing allocation exercises. The State Development Guide Plan (P-13) was prepared by the Department of Community Affairs pursuant to §701 of U.S. Housing Act of 1954. Compliance with the Plan will be required for future HUD funding. The Guide Plan is in the public participation or cross acceptance stage with the County Planning Board and the Tri-State Regional Planning Commission (T 66, September 18, 1978). The State Development Guide Plan is an integrated plan which considers such factors as population growth, economic growth, energy availability, conservation of agricultural land and natural resources, and the availability of service facilities - as well as the housing need. Mr. Ginman, the Director of the DCA Division of State and Regional Planning, describes this document as the "broker" among the various competing interests of the different Federal and State agencies such as the Department of Transportation and the Department of Environmental Protection (T 82, September 18, 1978). It is the goal of this Plan to rationally channel growth within the State to the most appropriate areas so as to achieve economies of scale in the provision for infrastructure and road improvements as well as for other services demanding public funds. Such planning will alleviate growth

pressure in inappropriate areas allowing the State to achieve a true diversity of character (T 59, March 20, 1979). Indeed, The State Development Guide Plan will serve as an "investment plan" for the State as it will effect the funding of other State agencies who will be required to heed the goals and objectives of this comprehensive planning document (T 82, September 18, 1978; T 59 to 60, March 20, 1979). As pointed out in the goals of the State Development Guide Plan,

> "Short-sighted planning is both unfortunate and unnecessary. It is unfortunate, because in solving one problem, we often aggravate another, or we miss the opportunity to solve two problems with the same expenditure. Too often in the name of expediency, we fail to consider alternatives adequately. It is unnecessary, because if there were goals and objectives for entire Sate developed by the State government and the citizens, many potential conflicts, overlaps, or less than full use resources could be identified and avoided.
>
> A state comprehensive development plan, providing a framework within which single purpose programs could be viewed for their potential developmental impacts, is clearly needed. Such a plan would suggest areas appropriate for future development, as well as identify those areas in which development should be constrained. This plan would set forth a series of guidelines to assist public officials and the private sector in relating specific proposals to fundamental state goals and objectives." (P-13 at Preface).

The DCA Revised Statewide Housing Allocation Report is such a "single-purpose" document. The Allocation Report is compilation of numbers which result from the playout of the scenario

begun by the issuance of an Executive Order by the Governor. It is not meant to be a comprehensive planning document, but rather the consideration of a single issue - housing.*

The Allocation Report cannot be readily reconciled with The State Development Guide Plan. As Mr. Ginman notes,

> "It's somewhat of a dilemma. However, I think there are a lot of unanswered questions that a land-use planner will have to deal with in an area undergoing a tremendous amount of change as the suburban fringe.
>
> It's a sort of "what if" postulation. Suppose this happens, will this than happen? Will there be a whole series of events that follow that occurrence?
>
> The amount of the base, the data, is not sufficient in order to make accurate predictions in many of these areas; so that you don't know what will happen to the cost of gasoline, what will be the cost of power, what will be the cost - how high will the interest rates go?
>
> There are a wide variety of variables the planner has absolutely no control over. You speculate and try to weigh them and thats all that we are asking for here; that this document be weighed equally with any other document" (T 145, September 18, 1978).

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* Indeed, the initial Allocation Report was not recognized in Madison as an official fair share plan (Madison at 538, footnote 43). Recent statements from the Governor's Office place the Revised Allocation Report in a more uncertain status. Robert Mulchahy, the Governor's Chief of Staff, termed the Allocation Report "simplistic" and added that it was unworkable and would be changed. Any new strategy would be more comprehensive and give greater consideration to local situations, as housing cannot be planned for in a "vacuum" (Remarks of Robert Mulchahy, Fair Share Housing Conference at Rutgers University, April 24, 1979).

The Statewide Housing Allocation Report must be considered as input to the planning process, but community planners are obligated to consider the demands of a variety of other competing and worthy regional state and local needs in determining and providing for fair share (T 69, March 20,1979). The numbers resulting from various allocation formulas differ radically from those which result from a comprehensive planning program. For example, the State Development Guide Plan anticipates an additional 40,000 to 60,000 people in Somerset County by the year 2000; the Allocation Report would result in an increased population of 5 times this figure, and the Mallach study would result in a population of 7.6 times this figure by the year 2000. It is necessary to plan for sewer, water and other facilities to support anticipated population growth as such infrastructure doesn't just "catch-up" to development. (Indeed 280,000 is the population projection for Somerset County for the purpose of §201 Facilities Planning) (T 159, October 20, 1978; T 85, October 26, 1978). Considering population impacts of this magnitude, it would be irresponsible for a community planner to accept these allocation figures at their face value without seeking guidance from State, Regional and County planning documents.

Bedminster's fair share planning is coincident with the population growth and dispersal anticipated by the Somerset County Master Plan, the Tri-State Regional Development Guide, and the DCA

State Development Guide Plan. The growth areas and densities suggested in each of these recognized comprehensive plans allow, more than adequately, for the housing and job growth foreseen for the area. (T 89, September 18, 1978; T 52 to 53, October 16, 1978; T 136, October 30, 1978).

"Least-cost housing" requires careful planning. It would be a waste of resources, a disruption to society, and generally very poor planning to zone large and scattered amounts of open-land for high intensity use in order to satisfy the housing need. Least-cost housing could be achieved throughout the State if each community were to allow for economies of scale on land which was both physically suitable for building and appropriately situated for access to infrastructure and services. By substantially increasing the densities in the Corridor, and by providing for 600 Compact Residential Cluster units, and 1,100 additional multi-family units, Bedminster Township has met its fair share obligation in a way which is in keeping with the recognized State, Regional and local plans.

F. The Testimony of Professor Mills

As the former Chairman of the Princeton Economics Department, Professor Edwin S. Mills, testified, the Mt. Laurel and Madison decisions are concerned with allowing the housing market to respond to housing demand free from the encumbrances of zoning restrictions. Professor Mills characterized these cases as using a "demand" model approach to region and fair share.

A fair reading of Madison shows that Mills is unquestionably right in his assessment:

(1) The Madison court approved Judge Furman's definition of appropriate region as

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

(2) The region should be large enough so that there is no substantial demand for housing coming from outside the region. 72 N.J. 539.

(3) Experts should give weight to areas from which low and moderate income population would be drawn by employment and other factors. 72 N.J. 539-540

(4) Region defined as "housing market area" in which housing units compete and "from which the prospective population would be drawn, in the absence of exclusionary zoning." 72 N.J. 543

The Madison court quite properly indicated that demand* is the most

* The concept of demand for housing includes all factors which influence demand, such as income, transportation, access to services, location, etc. 72 N.J. 540

important factor is approaching the question of region and fair share.

Interpreting Madison as an economist, Mills stated that:

> the basic criterion is that land use controls should not prohibit people from living in a community in which they would live were there no illegal exclusionary zoning, anywhere in some relevant region. (T 16, March 26, 1979)

Relying on Mt. Laurel and Madison's emphasis that individuals should have opportunity to live where they "desire" to live*, Mills concluded that the court had, in effect, defined a demand model for determining fair share:

> it seems to me that both as I read the Madison case and in keeping with my own notion of how land use controls ought to work, that a major consideration in such a calculation, whether one calls it fair share or not, ought to be a careful analysis of who wants to live where, consistent with ordinary market constraints.
>
> That is exactly what is missing, by and large, from most of the fair share kinds of calculations . . . . " (T 33, March 26, 1979)

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* The court stated in Mt. Laurel at 179, that

> The presumptive obligation arises for each municipality affirmatively to plan and provide by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing to meet the needs, desires, and resources of all categories of people who may desire to live within its boundaries." (emphasis added)

Professor Mills' testimony is stark criticism of the DCA Housing Allocation Plan and plaintiff's fair share expert, Alan Mallach, because they made no attempt in their fair share methodology to carefully analyze "who wants to live where, consistent with ordinary market constraints." Their methodology does not address the question of where people would choose to live absent exclusionary zoning. Mallach's methodology speaks not of recognizing factors affecting where people would choose to live as Mt. Laurel and Madison instruct, but speaks of a strategy of of social engineering dictating where people should live, in order to achieve Paul Davidoff's solution of eliminating racism and poverty.

Mr. Davidoff testified that America's two main problems were racial discrimination and a permanent underclass of poor. (T 137, October 12, 1978). Mr. Davidoff then was refreshingly candid in a clear statement of the purpose of the Mallach and DCA geographic dispersion strategy:

> Q In the context of this lawsuit and the testimony you've already given, how does the kind of housing you've been advocating work towards those goals, if they do?
>
> A It is my belief that the suburbs of America's metropolitan areas have grown relatively affluent while the cities have grown relatively poor. In the post-war period, there's been a great migration of relatively affluent whites from the central cities and the migration of very poor blacks from the south, Puerto Ricans from Puerto Rico, increasing migrants from outside the country from Carribean and elsewhere to the nation's older cities, and that the nation's older cities

are fiscally incapable of solving the problems that have been imposed upon them.

> In fact, the area in which major solution to these problems lies are the suburbs surrounding America's older cities, that these areas have taken on new wealth of jobs, have many new jobs. The suburbs have vacant land in beautiful sites such as Bedminster in very great amount, and some of that land can be assigned to the creation of balanced housing to meet the needs of many different classes and to meet the needs of the excluded minorities, and that such housing close to the new jobs will play a very strong role in helping this nation move to a point in which everyone can live decently in a place of their own choice at a reasonable rent.

The words used by Davidoff are significant: he wants to assign land to achieve social goals. This is the language of the ultimate social planner, of social engineering. Madison urges us to reduce restrictions on the operation of housing markets, not to create additional restrictions by assigning land for specific income groups.

The Davidoff/Mallach/DCA strategy for addressing the ills of racism and poverty through geographic dispersal of population is, according to Mills, "naive" (T 58, March 26, 1979) and potentially disastrous. Mills testified that governmental programs which dictate where people should live "tend to make disastrous mistakes" (T 73, March 26, 1970):

> When governments decide where and how people ought to live, they tend to do it on the basis of where the government thinks they ought to live and not on the basis of where they really want to live.
>
> The two can be very different. (T 73, March 26, 1979

According to Mills, moreover, a fair share methodology which does not adequately consider demand "will overprovide for low and moderate-income people in some areas and underprovide for them in other areas." (T 38, March 26, 1979). Mills argued that overproviding for housing in some areas will result in wasted allocations of public and private resources (T 67, March 26, 1979). With respect to public resources, he argued that

> Local governments must plan infrastructure of transportation facilities, water supply, waste disposal, schools and so forth on the basis of forecasts of numbers of people who live in communities. And if the zoning or planning is erroneous, then, of course, too little or too much in the way of this infrastructure will be built.

While Mills' testimony highlights the Mallach/DCA methodology as being naive, potentially disastrous and inadequate, his testimony authenticates both Kasler's and Agle's demand methodologies which place emphasis on employment and transportation as the primary demand-creating factors. Mills testifed that an appropriate demand model should place significant emphasis on the location of employment centers and their influence on housing demand:

> how people would like to distribute themselves around the place of employment tends statistically to fall off . . . by a constant percentage for every mile one moves away from the employment center. (T 46, March 26, 1979

Professor Mills summerized what in his view is the proper role of this Court in approaching exclusionary zoning cases:

> I am not a lawyer. I can't comment on the law. Although I have read some of the cases, which I

> find fascinating on this subject. But I am certainly not a lawyer.
>
> But my own view is that the goal of society in reducing the amount of exclusionary zoning ought to be in improving the ability of people to live where they want to, given normal market restraints on their residential location decisions, and if one takes that view, then one has to take into account the demand side in calculating what type of zon[ing] is appropriate for a given community. (T 71, March 26, 1979)

Professor Mills' testimony, based as it is on an objective economic view of fair share methodologies unclouded by an interest in a specific numerical outcome, confirms the testimony of Agle, Kasler, Coppola and others that a consideration of the location of employment centers and other planning factors should be the foundation for a formulation of Bedminister's "fair share" and its implementation in a context of sound comprehensive planning.

G. Least Cost Housing Is Permitted Throughout The R-20 Zone In Numbers Which Satisfy Bedminster Township's Mt. Laurel and Madison Obligation.

Having gauged its fair share obligation, Bedminster then addressed its general deficiency of multiple family units available to all income groups. Zoning was intensified to allow for approximately 1,000 multiple family units, at least cost densities, over and above the fair share obligation.

Bedminster Township established the R-20 zone to satisfy its obligation to provide least-cost housing. The Compact Residential Clusters permitted in the R-20 zone is a density bonus feature to ensure that a sufficient number of fair share or "least, least-cost" units are built. The Ordinance permits immediate construction of 300 unit CRC units. This is a staging mechanism and not an absolute ceiling; when these units have been built successfully and a demand for more is perceived, additional units may be built.

The densities permitted in the entire R-20 provide for least cost housing and thus all of the approximately 1,700 multiple family units meet the test imposed on municipalities by Madison.

Village Neighborhoods may be developed in the R-20 zone at 6.79 units per acre. This density exceeds the 5.5 units per acre suggested by plaintiff's expert planner to be optimum for least cost (T 3 to 4, October 10, 1978). Approximately 1,000

Village Neighborhood units may be built based on a calculation of existing vacant acreage. Since developers often purchase and then demolish existing structures to effect new construction, a higher unit yield is possible (T 213, March 19, 1979).

Twin houses at 5-6 units per acre are also permitted in the R-20 zone, thus providing another 66 potential least cost dwellings.

The R-20 zone further provides for 600 Compact Residential Clusters at densities of 10.19 to the acre. This density not only exceeds plaintiffs' definition of least cost, but also makes subsidized housing feasible by the testimony of the plaintiffs' own fair share witness (T 157 to 158, September 20, 1978).

Through its R-20 zone, the Bedminster Ordinance provides for approximately 1,700 units at densities considered "least cost" by plaintiffs' own expert (T 3 to 4, October 10, 1978). The CRC mechanism is meant to make reasonably certain that a fair share of units will become available to the lowest income groups. However, there is no provision in the zoning ordinance which would impede a developer seeking to build the additional 1,000 Village Neighborhood units for the "least cost" market.

Bedminster Township has met its Mt. Laurel and Madison obligation by substantially increasing densities on land most suitable for multiple family housing and by enacting measures to ensure that least-cost housing is built in numbers which exceed its fair share.

II

BEDMINSTER'S ORDINANCES ARE A POSITIVE AND REASONABLE RESPONSE TO THE OBLIGATIONS OF MT. LAUREL AND MADISON

Within the framework of sound comprehensive planning, responsive to realistic regional planning objectives, Bedminister's ordinances represent a positive, balanced and reasonable response to this Court's Order to rezone to satisfy the Mt. Laurel and Madison obligations. Bedminster's ordinances are not perfect. The plaintiff's contrived criticism of numerous provisions in all ordinances shows that any ordinance which does not give Allen-Deane 1849 units would be subjected to similar attacks.

In short, Bedminster made a good faith effort to comply. In large measure it succeeded. There are between 1500 to 1700 least cost units, consisting of multi-family, twin and single family dwellings on small lots in the R-20 and R-30 zones. There is a wide variety and choice of housing provided for in the corridor by the zoning ordinances. Bedminster utilized many inclusionary devices, not merely to allow least cost housing, but to affirmatively encourage it. The multitudinous provisions of the land development regulations (zoning, subdivision, site planning, road construction ordinances) overwhelmingly are in compliance with the Municipal Land Use Law. Any non-compliance (and indeed, given enough time and money, who cannot find some non-compliance) is de minimis. Indeed, the poverty of the plaintiff's presentation is perhaps best shown by the strident proofs of alleged but unproven non-compliance of minor provisions of the ordinance.

A. Least Cost Obligations

Under the directive of the Supreme Court in Madison, courts are required to direct attention to:

> the substance of a zoning ordinance under challenge and to bona fide efforts toward the elimination or minimization of undue cost-generating requirements in respect of reasonable areas of a developing municipality. . . .

Madison, 72 N.J. at 499.

Both Mt. Laurel and Madison identified some specific provisions which are potentially cost generating:

1) school construction requirements;

2) road and utilities costs to service a remote area;

3) densities;

4) lot sizes for single family units;

5) restrictions to small bedroom units;

6) building sizes; and

7) more than two stage approvals.

Mt. Laurel, 67 N.J. at 182-84; Madison, 72 N.J. at 520-24.

Plaintiffs in this action launched the broadest attack ever made on a municipality's land use ordinances. Their detailed attack dissected section by section not only the zoning ordinance, but also the master plan, subdivision, site plan and road ordinances of the Township. The Allan-Deane site plan was used in an attempt to establish the cost generating provisions of the ordinance. Mr. Murar calculated per unit costs based on linear feet

of roadway, contrasting construction costs under the 1978 ordinance and the Allan-Deane site plan. Mr. Rahenkamp voiced more general objection.

Though the attack was broad, the Township's bona fide effort to minimize undue cost-generating requirements is apparent. The two major cost generating requirements in the Madison Township ordinance, the school construction requirements and high utilities and road improvement costs for bringing services to a remote area, do not exist in Bedminster's Ordinance. There are no school construction requirements. The least cost units were located in the area most accessible to present and future utility and road improvements.

Plaintiff's major objection is centered on the numbers and densities allowed on the Allan-Deane land. Mr. Murar admitted on cross examination that the difference in costs under the proposed Allan-Deane site plan and 1978 Ordinance could be explained by the difference in the number of units permitted, since the total calculated site improvement costs under the Allan-Deane plan was divided by a much larger number than was permitted under the 1978 Ordinance.

This is not an objection to the densities permitted in the Township's least-cost zone. That density complies with court standards. Allan-Deane's actual objection is to the Township's failure to extend densities allowed in its least-cost zone to

their entire site, including the steep slope and high plateau area, for use in construction of high cost units. Of Allan-Deane's entire proposed site plan, only 233 of the 1849 units would be potentially least-cost. By calculating so-called increased costs for the full 1849 units, Allan-Deane has calculated, therefore, costs created by lower densities for high cost units.

To the extent that Allan-Deane's objection to density does involve densities permitted in their R-20 zone, their arguments are based on purposeful misreading of the Ordinance. Plaintiffs insist that the Pluckemin bypass reduces their permitted number of units, though the Township insists that is not so. Plaintiffs calculate permitted numbers of units in all zones by requiring street frontage for every dwelling unit. In fact, the zoning ordinance only requires a 50 foot street frontage for an entire cluster, so savings from clustering are possible. P-21, §10.1.1(1). Allan-Deane's objections do not, therefore, in any way establish failure of Bedminster to satisfy its obligation to allow densities consistent with least cost.

Plaintiff's objections to the other potentially cost generating provisions of Bedminster's ordinance are similarly misplaced. In all respects, the lot and building sizes, bedroom provisions, and approval process satisfy Mt. Laurel and Oakwood tests. In fact, the objections of plaintiffs to these provisions are primarily to their failure to allow Allan-Deane to construct high-density, most cost units, for small families.

The remaining least-cost objections, not previously reached by the N.J. Supreme Court, are also unfounded. Bedminster's P.R.D.'s are permitted not conditional uses. The fees and provisions for handling of improvements are reasonable. The objections to requirements for curbs, storm water controls, and the E.I.S., all within the subdivision and site plan ordinance, are not cost-generating provisions. Faced with this kind of attack in Mt. Laurel, the court found:

> this entire line of criticism an exercise in futility. That authorities may differ on such matters as proper street widths, quality of street paving, need for sidewalks, parking regulations, and a host of other details is, of course, obvious. Even assuming that such standards in the Mount Laurel subdivision ordinance are indeed "greater" than so-called "minimum property standards" (MPS), there is no proof that they are set for any purpose other than to serve the public health, safety and welfare, or that they are by any stretch of the imagination exclusionary. Failure to amend the subdivision ordinance to relax such standards was not, as plaintiffs appear to charge, a breach of an undertaking made to the court. No such modification is required. These are matters properly within the sound discretion of the governing body. The exercise of that discretion will only be set aside if it appears arbitrary, capricious or unreasonable. That is not the case here.

Mt. Laurel II, 262 N.J. Super. at 349-50.

B. Village Neighborhood and Compact Residential Clusters

In response to this court's order, Bedminster Township provided for its fair share and least cost obligations by creating two new residential zones: R-20 and R-30 within the Bedminster-Pluckemin corridor.

(1) Inclusionary Devices: Densities, Bedroom Provisions, Bulk Restrictions, Density Bonus.

The major respect in which the 1973 Bedminster Township Zoning Ordinance was found invalid was the maximum permitted density for multi-family units. The court found that "multi-family housing, subsidized or private, cannot and will not be built at [the maximum permitted] densities of one and one-half to three units per acre." Letter Opinion of Judge Leahy, February 24, 1975, at 40-41.

The New Jersey Supreme Court in Madison defined several specific devices that could be utilized by communities to satisfy their fair share and least cost obligations. The court recommended combining density controls with bedroom and bulk provisions as follows:

> [A] municipality through the zoning power can and should affirmatively act to encourage a reasonable supply of multi-bedroom units affordable by at least some of the lower income population. Such action should include a combination of bulk and density restrictions, utilization of density bonuses, minimum bedroom provisions and expansion of the FAR ratio in the AF zone to encourage and permit larger units.

Madison at 517.

Bedminster Township has adopted all of the suggestions of the Madison Court in its R-20 and R-30 zones, in a manner consistent with the court's findings of fact in this case.

Densities

The R-20 and R-30 zones permit a variety of housing types: "single-family detached dwellings, twin houses, town houses, and/or garden apartments"constructed as Planned Residential Neighborhoods called Village Neighborhoods in R-20 or Compact Residential Clusters in R-30, as well as more conventional clustered development or detached housing. P-21, Bedminster Township Zoning Ordinance, §§10.3.3 Schedule A, 11.2.

Plaintiffs and defendant are agreed on the densities permitted in the R-20 and R-30 zones as follows:

ZONE	HOUSING TYPE	MINIMUM ACREAGE	MAXIMUM DENSITY
R-20	Mixed:Multifamily, twins, single family	9 acres	6.79
	Single family detached on existing street	.23	4.35
	Single family detached in subdivision	.29	3.44
	Single family in open space cluster	.22	4.54
	Twins	.15	6.60

T42-17 to 43-7, T84-15 to 84-22, January 8, 1979; T9-25 to 10-12, September 9, 1978.

Maximum permitted densities in R-30 are as follows:

ZONE	HOUSING TYPE	MINIMUM ACREAGE	MAXIMUM DENSITY
R-30	Mixed: Multifamily, twins, single family	9 acres	10.19

T84-15 to 84-22, January 8, 1979; T9-25 to 10-12, September 9, 1978.

The permitted densities in R-20 and R-30 zones comply with the guidelines for defining densities consistent with least cost obligations and recommendations for corridor densities in the trial testimony. Mr. Rahenkamp, plaintiff's planning expert, testified that a density of 5.5 dwelling units per acre was the least cost housing density. T163, October 3, 1978. The Tri-State Regional Development Guide provides for densities of two to seven dwelling units per acre in the Bedminster Pluckemin corridor. D-51. Mr. Roach recommended development of the Bedminster-Pluckemin corridor at the lower end of the 5 to 15 recommended density in the Somerset County Master Plan, which refers to net density, or density on buildable sites. Mr. Richard Coppola, the Township's planning expert, testified to the following densities for multi-family developments in other more developed New Jersey communities:

1. Eight to ten dwelling units per acre in Lawrence Township, Mercer County.

2. Six dwelling units per acre for townhouses, and eight dwelling units per acre for garden apartments in Montgomery Township, Somerset County.

3. Six to ten dwelling units per acre in Hamilton Township, Mercer County.

4. Four to ten dwelling units per acre in Mantua Township.

T30-3, March 20, 1979.

The permitted densities for single family houses in the R-20 and R-30 zones are also consistent with Mt. Laurel and Madison obligations and planning testimony with regard to least cost construction. Mt. Laurel indicated that lots must be less than 9,375 square feet. Mt. Laurel at 183. Madison indicated that lots less than 7500 square feet would be required. Madison at 516. The minimum lot size in Bedminster Township is 5,625 square feet. P-21, §10.3.3 Schedule A.

The permitted densities for twin houses in R-20 and R-30 also comply with least cost housing standards according to the planning testimony. William Roach recommended densities of 6 to 8 units per acre, with a minimum of 4 units per acre. T162-3, October 30, 1978. John Rahenkamp recommended densities of 5 twin units per acre. T3-4, October 10, 1978. Bedminster Township permits twin units in the R-20 zone at 6.60 units per acre.

* * *

The plaintiff's witnesses have not criticized Bedminster's densities. Indeed, Allan-Deane only wants similar densities on more of its land. And as Mr. Gershen pointed out, cost savings because of increased densities beyond those allowed in the Ordinance would be de minimis.

Bedroom Provisions

The schedule of permitted bedroom sizes in the highest density zones of R-20 and R-30 is also designed to comply with Mt. Laurel and Madison obligations. A municipality "should affirmatively act to encourage a reasonable supply of multi-bedroom units affordable by at least some of the lower income population. Such action should include. . . minimum bedroom provisions . . . to encourage and permit larger units." Madison at 517. The court created the obligation to design minimum bedroom provisions in the light of the Mt. Laurel court's finding that ordinance provisions limiting multi-family units to smaller units for the affluent, precluding provision for lower income families with children, were unacceptable. Mt. Laurel at 182; T58-5 to 58-9, January 8, 1979. The objection to bedroom provisions, therefore, was clearly to those which limit large units, rather than to those which require them. T70-18 to 71-9, January 8, 1979.

The Bedminster Zoning Ordinance creates a permitted distribution of bedrooms for the highest density housing in the

Township, Village Neighborhoods and Compact Residential Clusters, as follows:

D.U. Size by Number of Bedrooms	Percent of Total Number of Dwelling Units
Efficiency or 1 BR	25-40
2BR	25-30
3BR	20-25
4BR	10-25

P-21, Bedminster Zoning Ordinance §11.2. This schedule satisfies the obligation to establish minimum bedroom provisions by requiring that each such development provide a minimum of 20% three bedroom units and 10% four bedroom units. These minimums were established based on the 1970 census, as modified by later data showing decreases in large family sizes. T59-20 to 59-21; T62-17 to T64-16, January 8, 1979.

While satisfying the mandate to establish minimum bedroom provisions, the bedroom schedule also provides flexibility for developers to permit adjustments to market demands. The schedule provides a range of options. A developer has total flexibility in adjusting the distribution of efficiency and one bedroom units within the permitted 25 to 40% range. All of the bedroom requirements allow a range of permissible percentages.

Furthermore, the bedroom schedule allows for flexibility since the range of bedroom sizes is not limited to any specific type of dwelling unit. The schedule applies to the total dwelling units within the Village Neighborhood and Compact Residential

Cluster complex. Each Village Neighborhood or Compact Residential Cluster can include single-family detached dwellings, twin houses, townhouses and/or garden apartments. Id. Therefore, a developer could provide a development with one and two bedroom apartments, three bedroom townhouses, and four bedroom single family detached dwellings. A developer could also omit the single family dwellings, and provide the four bedroom units in townhouses or even garden apartments. The specific choice of dwelling type to satisfy the bedroom requirement is totally up to the builder.

This flexibility also means that specialized market demands can be accommodated within the requirements of the Ordinance. A builder wishing to develop a Village Neighborhood to include efficiency, one and two bedroom senior citizen housing could do so so long as he also provided three and four bedroom units somewhere else within the complex.*

Given the limited land available in Bedminster Township for dense housing development, and the clear mandate of Madison to provide a minimum number of multi-bedroom units affordable by at least some of the low-income population, the Bedminster bedroom provisions are clearly defensible. Plaintiff Allan-Deane's

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* Mr. Coppola's testimony can be construed to state that such specialized housing cannot be provided under the Bedminster Zoning Ordinance. As this discussion makes clear, based on the clear language of the ordinance P-21 in evidence, this is not the case.

protests that these requirements excessively limit a developer's ability to adjust to "market" demands simply mirror the type of developer performance which led the Madison court to impose an obligation to require a minimum number of large bedroom units. The past performance of the market has been to leave the large low income family totally without new housing accommodation. Allan-Deane would like to continue the past tradition. Bedminster Township has tried, in compliance with the Supreme Court's mandate, to reverse this past market practice and provide for unmet needs.

Furthermore, the evidence establishes that the minimum percentage of large bedroom units established by the Bedminster Ordinance is reasonable in the light of the current market. Mr. Roach testified that the P.U.D. development currently being constructed in Hillsborough contains 15% four bedroom and 20% three bedroom units.

Bulk Restrictions: Minimum Habitable Floor Space, Maximum Units Sizes and F.A.R. Controls.

a. Minimum Habitable Floor Space and Maximum Unit Size Provisions

The minimum habitable floor space provisions of the Bedminster Zoning Ordinance are also designed as an inclusionary device. The provisions satisfy the Madison Court's recommendation for bulk restrictions to encourage least cost housing. The stan-

dards also meet the tests for permissible minimum habitable floor space provisions.

Housing costs are acknowledged to relate in large part to unit sizes. Since larger units are more expensive, bulk restrictions attempt to encourage construction of smaller units which are then affordable by lower income members of the population.

Bedminster's bulk restrictions are grounded in minimum habitable floor space standards. The minimum habitable floor space provisions establish minimum dwelling unit sizes based on the number of bedrooms in the dwelling unit, plus additional space for related uses, including storage, utilities, service and recreation as follows:

Dwelling Unit Size	Minimum Net Habitable Floor Space in Sq.Ft.
Efficiency	500
1 BR	600
2 BR	900
3 BR	1200
4 BR	1450

Addition for related space:

Single Family Detached Dwellings	Plus 20%
Multiple Dwellings	Plus 10%

P-21, Bedminster Zoning Ordinance, §§10.3.1, 10.3.2.

Mr. Agle testified that Bedminster's minimum habitable floor space standards are grounded on occupancy based standards in new construction defined by the American Public Health Associa-

tion (APHA). T16-21 to 21-25, January 9, 1979; D-87. The Bedminster standards are lower than the APHA recommended room sizes, except for the efficiency units. T20-12 to 21-2, January 9, 1979. These standards are also consistent with and lower than the New Jersey Housing Finance Agency standards for room sizes for subsidized moderate income housing developments. T22-1 to 27-16, January 9, 1979; D-87, D-88. In Mr. Agle's opinion, these standards permit construction of least-cost housing according to minimum health, safety and welfare requirements. T27-17 to 27-22, January 9, 1979.

Plaintiffs' lengthy efforts to establish that Bedminster's minimum habitable floor space provisions are excessive all failed. Figures introduced by Mr. Rahenkamp were shown to be based on standards for maintenance of old buildings, not new construction, and were recommendations for habitable room sizes which excluded, among other things, bathrooms, laundries, storage space and all corridors. The H.U.D. standards he preferred are considered excessively low by the New Jersey Housing Finance Agency. T6-22 to 9-14; 28-22 to 29-13, January 9, 1979.

Bedminster's minimum habitable floor space standards since they are occupancy-based, and consistent throughout the Township, fully comply with the test recently defined by the courts for such provisions. Home Builders League of South Jersey v. Tp. of Berlin, 157 N.J. Super. 586 (Law Div. 1978). In Home

Builders, an association of developers challenged the Zoning Ordinance provisions establishing minimum floor spaces in four municipalities. The builders sought complete elimination of square foot minimums in the ordinances or reduction of the requirements to the minimum necessary to protect the health, safety and welfare. The court, noting supporting dicta in New Jersey Supreme Court opinions, endorsed uniform occupancy based minimum room size standards as legitimate exercises of the municipal police power under the Municipal Land Use Law. Among the occupancy-based standards cited with approval by the court were those used by Bedminster Township--the APHA standards.

In addition to establishing habitable floor space provisions grounded in minimums consistent with least cost construction, Bedminster Township also provided a lid on unit sizes for the C.R.C. developments as a further bulk restriction to encourage least-cost construction. T203-4 to 204-18, March 19, 1979. Builders taking advantage of the Compact Residential Clusters, or R-30 provisions, may not construct units in excess of 15% over the minimum floor space provisions. P-21, Bedminster Zoning Ordinance, Def. Compact Residential Clusters (c). The Bedminster Master Plan specifically identifies the 15% lid as an effort "to promote the construction of least cost housing. . . ." P-5, Bedminster Master Plan, III, Pluckemin Village Details, #3, p.10.

The minimum habitable floor space provisions and the lid on unit sizes in C.R.C. developments are, therefore, both inclusionary devices.

b. Floor Area Ratio (F.A.R.)

The use of the Floor Area Ratio (F.A.R.) as the basis for the density computation also acts as a bulk restriction and an inclusionary device. The number of units per acre permitted in the R-20 and R-30 zones under the Bedminster Ordinance depends in part on the size of the dwelling units constructed.

The F.A.R. for every zone defines the maximum permitted lot coverage. P-21, Bedminster Zoning Ordinance, §10.3.3 Schedule A. The net habitable floor space provisions define minimum unit sizes in every zone. Id., §§10.3.1, 10.3.2. The bedroom schedule defines the range of bedroom options permitted in the multi-family developments. Id. §11.2. In addition, the F.A.R. coverage calculation takes into account parking space requirements, up to two per unit in R-20 and R-30. Id., definitions, Floor Area Ratio, Floor Area, Gross.

The number of multi-family units allowed per acre in the R-20 and R-30 zones are computed as follows. First, the maximum coverage per acre is determined by calculating the percentage per acre which may be covered. In R-20, the figure is 20% times 43,560 square feet, or 8,712 square feet. In R-30, the figure is 30% times 43,560 square feet, or 13,068 square feet. D-111, p.5.

Second, the average permitted unit sizes are calculated, including parking. Mr. Coppola computed this average size, based on a hypothetical bedroom mix using minimum permitted percentages of large units, as 1,283 square feet. D-112, p.4. Third, permitted density is calculated by dividing total permitted square foot coverage in each zone by the average permitted unit size. The results of this calculation produce a maximum of 6.79 dwelling units per acre in R-20 and 10.19 dwelling units per acre in R-30. D-111, pgs. 5-6.

It is clear from this calculation that the permitted number of dwelling units per acre is directly proportional to the square footage of each unit. The F.A.R. technique of computing density rewards the developer building the smallest units with the maximum permitted density. Developers building larger units may build fewer dwelling units per acre.

The F.A.R. calculation operates, therefore, as an incentive to developers to build smaller units, which will be lower cost units. The combination of ordinance provisions acts as a density bonus for the builder willing to build the smallest units. The highest density goes to the builder who satisfies all the requirements of the Compact Residential Cluster provisions: the required bedroom mix, and a minimum habitable floor space not in excess of 15% over the minimum.

Maximum C.R.C. Clusters; Half-Mile Separation

The limit of Compact Residential Clusters (C.R.C.) to a maximum of 150 units as well as the initial requirement that C.R.C. clusters be separated by one-half mile or existing roads were also designed as inclusionary devices.

The entire Township of Bedminster currently contains fewer than 1000 dwelling units. All service facilities current and planned must of necessity be limited to a small scale, because of the small amount of land in the total Township appropriate for dense construction. Township officials believed that a development in excess of 150 units would be out of keeping with the small neighborhood feeling of the Township. Officials also believed that some scattering of development could help to preserve the neighborhoods which are among the Township's most valuable assets. The Township was advised that economies of construction could be possible if clusters were permitted of up to 150 dwelling units. The cluster size limit and the half-mile separation were designed, therefore, as inclusionary devices.

The legitimacy of concern about scale of construction in Bedminster Township was expressed in planning testimony of several witnesses. Mr. Roach expressed this concern in his comments that, given the nature of Pluckemin and Bedminster Villages, he would recommend construction at the low end of the recommended Village Neighborhood densities. He further reflected this concern in his

comment that permitting the 1849 units requested by Allan-Deane would be the equivalent of placing the entire Township of South Boundbrook in the center of Pluckemin Village.

Concern about scale was similarly reflected in the testimony of Dr. Carroll, former Executive Director of Tri-State. Dr. Carroll noted that recommended densities are reduced with increased distance from the urban centers. These reduced densities are in harmony with the current low density construction of the outlying areas like Bedminster Township.

Both the maximum limit of 150 dwelling units and the required initial separation are, therefore, justified by totally legitimate planning factors. Just as excessively large developments would be out of harmony with existing construction in Bedminster Township, concentration of all dwelling units in one small area of the corridor would not promote appropriate development.

(2) Allan-Deane's Attacks on Bedminster's Inclusionary Devices All Failed.

The plaintiff Allan-Deane attacks all of the inclusionary devices in the Bedminster Ordinance. Their attack is primarily based, not on grounds that the devices prevent provision of least-cost housing, but rather that they limit the developers' freedom to provide high-cost units for the market.

The bedroom mix is criticized because, by requiring

large bedroom units, Allan-Deane is prevented from supplying specialized needs, such as bachelor flats. Though bachelor flats are indeed needed, they are not the type of housing which the New Jersey Supreme Court found in short supply and for which least-cost obligations were designed.

The maximum unit-size provision for the C.R.C.'s is attacked because it results in construction of small units. Allan-Deane wishes to supply larger units. Larger units are also not the least-cost units which Mt. Laurel and Madison obligations are designed to satisfy.

Allan-Deane also attacks the calculation of permitted density based on the F.A.R., which rewards the developer building smaller units with higher densities. Here again, Allan-Deane attacks the inclusionary devices because they prevent the construction of bigger, more expensive units.

The plaintiffs' attack on the limit of C.R.C. clusters to 150 dwelling units and the half mile separation is similarly suspect. Plaintiffs presented no evidence to establish that the placement of a lid of 150 dwelling units on a cluster prevents construction of least-cost units. In fact, there is testimony that the New Jersey Housing Finance Agency will consider construction of a development if it is in excess of 100 dwelling units. Plaintiffs attempted to attack the required half mile separation by arguing that the required separation would increase the cost of providing utilities to dwelling units in the R-20

zone. Their arguments ignored the fact that the Bedminster Zoning Ordinance permits construction of all of the other options permitted in the R-20 zone between the clusters. The clusters would, therefore, not be separated by open space, but rather by a variety of Village Neighborhood and twin and single family detached developments. The cost of utility lines would, therefore, be shared by all the residential units permitted by the Ordinance.

Plaintiff Allan-Deane's attack on the inclusionary devices reveals the true objectives of their case. Allan Deane has taken up the arguments of the Supreme Court in Mt. Laurel and Madison in a desire to destroy Bedminster's zoning ordinance, not so that they can construct least-cost housing, but rather to get a license to build high cost units at high densities. At the beginning of this compliance hearing, Mr. Hill was quoted in a newspaper story as saying that success in this lawsuit would add 25 million dollars to the profits of the Allan-Deane Corporation over their estimated profits if the zoning is not changed. The Supreme Court arguments are used, therefore, not to effect the intent of the Court, but rather to effect a purpose criticized by the Supreme Court, destruction of the Township ordinance by voracious land speculators and developers. The arguments over inclusionary devices reveal, in fact, that it is the Township of Bedminster, not Allan-Deane, which is attempting to assure that least-cost housing be built.

C. Sites for Least Cost Housing

The land selected for the R-20 and R-30 zones also fulfills the mandates of this court and represents a responsible selection by the Township, in compliance with reasonable planning considerations. Bedminster Township does not contend that these sites are ideal for least cost housing. In fact, there are no sites in the Township which plaintiffs could not find lacking in some respect. The Township merely contends that, given the multiple restraints on its choices, the sites selected were the best possible sites for the designated uses, the total amount of land zoned was reasonable, and the land zoned for R-20 and R-30 was chosen with every expectation that permitted housing would be constructed.

The major restraint on the Township's choice of location was the limitation to the corridor. This court's Order and all planning testimony agree that dense uses in Bedminster Township must be confined to the area of current and proposed public infrastructure, including water, sewer, highways, and community services. The only location in Bedminster Township where such facilities exist or are planned is the corridor.

Restriction of dense construction to the area of present and proposed public services is also consistent with the least cost mandates of Madison. The Supreme Court found that zoning for Planned Unit Developments in an area remote from access to water,

sewer, and roads, imposed undue cost exactions on developers, and did not satisfy least cost obligations. Madison at 522.

The corridor itself , defined by this court as from three thousand feet west of 202 to the eastern boundary of the Township, imposes severe restraints on the Township's selection of appropriate locations for least cost housing. As plaintiff's exhibit P-15 well demonstrates, a large percentage of the land currently contains existing residential, business, office, and community service uses. The built up sites include: 1) AT&T and Research Cortrell; 2) Township property at the intersection of 202-206; 3) housing in Bedminster Village, north of Lamington Road, and southwest of the intersection of 78 and 287; 4) business uses along 202 in Bedminster Village and Pluckemin. Much of the current vacant land is in the floodway and flood plain, or on slopes in excess of 15%. The difficulties are further compounded by the problems created by the interstates themselves. The only access for the lands west of 287 in the Pluckemin Village area is by a small two lane highway, Burnt Mills Road.

Furthermore, current and planned public water supply and sewage treatment facilities are all east of 202-206 and 287. There is a public water line now running along 202-206 in Pluckemin. The Bedminster Sewage Treatment plant has sufficient capacity to service the land in Bedminster Village east of 202-206. All experts agree that the next area in the Township to

receive sewer treatment facilities surrounds the currently developed land in Pluckemin Village. Substantial expense would be incurred by requiring piping under Routes 287 and 202-206.

Given all the constraints on its choices, the Township selected the most appropriate land. Defendant's witness, Richard Coppola, testified that 217.9 acres in Pluckemin Village east of I-287 and 25.1 acres in Bedminster Village North of 202 were zoned for R-20 and R-30 use. Excluding a couple of acres incorrectly computed in this total in the R-20 site in Bedminster Village which are in the critical zone, there are 241 acres in the R-20 and R-30 zones. D-111.

Of the 241 acres zoned for R-20, Mr. Coppola calculated that all but 5.0 acres in Bedminster Village and 14.3 acres in Pluckemin Village, or a total of 19.3 acres, are available for immediate use. D-111, p.3. Mr. Coppola's calculations were based on a consistent and objective methodology which deducted one acre for every existing single family structure and one-half acre for all existing barns and farm structures. In addition,Mr. Coppola deducted one acre for the church in Pluckemin Vllage, the entire cemetery property in Pluckemin Village, and one acre for the municipal court and police station. The remaining area in R-20 and R-30 available for immediate development is, therefore, 221.7 acres.

The plaintiffs did not seriously contest the wisdom of

defendant's decision to restrict the choice of the R-20 and R-30 locations to the land east of 287 and north of 202 in Bedminster Village. Rather, they confined their criticism to questions about the actual availability and suitability of the sites selected. The evidence establishes that not only these 221.7 acres, but probably some of the 19.3 acres considered unavailable are in fact available. Furthermore, though not free of all problems, the selected sites are the most suitable locations in the Township.

Availability of Land with Structures

Both plaintiffs and defendants deducted land with existing structures from zoned acreage in computing land available for development. Actually, developers often purchase land containing existing structures with intent to demolish the structures to effect the desired development. T213-7 to 213-24, March 19, 1979. Rather than being a high estimate of available acreage, therefore, defendants' figures, which removed land with existing structures, are really low.

Loss to Business Zone

Plaintiffs contend that acreage in the R-20 zone is less than computed because abutting business property, which cannot satisfy the 350 foot circle requirement, would somehow reduce available R-20 and R-30 acreage.

As Mr. Coppola made clear, the R-20 lands should not be

reduced because adjoining properties may be non-conforming. Zone locations and boundaries are established in accordance with the Zoning Map. P-21, §3.1. The ordinance permits the continuance of non-conforming uses existing at the time of passage of the ordinance. P-21, §17.1; 17.1.1. The wisdom of creating business zone lot restrictions which render so many existing structures non-conforming may be an open question, but required minimum business lot sizes do not, however, reduce the amount of acreage available for R-20 and R-30 development.

Size of Sites and Problems of Assembly

R-20 and R-30 zones provide a variety of options for construction of least-cost units. The highest density units are permitted as part of two forms of Planned Residential Development, Village Neighborhoods in R-20 and Compact Residential Clusters in R-30. The Compact Residential Clusters require a minimum 9 acre lot. P-21, Def. Compact Residential Cluster. The Village Neighborhood can be constructed on a 9 acre lot, or smaller, if the acreage in R-20 abuts a Compact Residential Cluster. P-21, Def. Village Neighborhoods. The other permitted single family and twin options in R-20, which also allow for low-cost construction, have minimum acreage requirements as low as .23 and .30.

The testimony of Mr. Coppola makes clear that, of all

the sites selected for the R-20 zone, only two blocks, totaling 13.2 acres, contain fewer than 9 acres.* Though not available for a Compact Residenial Cluster or a Village Neighborhood, these two sites can be used for low cost construction of single family or twin houses. Of the remaining R-20 sites, seven lots, totaling 182.4 available acres, currently contain more than 9 acres, including: Block No. 32, Lot 12 in Bedminster Village; and the following sites in Pluckemin Village: Block 59, Lot 10; Block 59, Lot 11; Block 72, Lot 2; Block 72, Lot 3; Block 71, Lot 22; Block 71A, Lots 1 and 1A. The remaining sites, totaling 23.6 available acres, can be used for Village Neighborhood or Compact Residential Cluster construction if assembled under a single ownership.

Despite plaintiffs' protest to the contrary, assemblage of sites to effect required lot sizes is no barrier to least cost construction. Developers regularly buy contiguous parcels to acquire needed acreage.

Plaintiffs' argument that the required minimum 9 acre site is itself a barrier to least cost construction based on language in Madison is similarly ridiculous. The Madison Court did find the Madison Township P.U.D. minimum lot provisions discouraged least cost requirements. Madison Township's Zoning

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* The two R-20 sites with fewer than nine acres are Block 27 in Bedminster Village with seven unused acres, and the YMCA property, Block 72A in Pluckemin Village, with 6.2 acres.

Ordinance required not 9 acres as required in Bedminster for the Compact Residential Clusters, or even the 25 acres required for Open Space Cluters, but rather a minimum of 150 to 300 acres. Id. at 307-308. The court's finding that 150 to 300 acre minimum lot size might provide problems in assembling needed acreage in no way renders excessive the 9 acre or 25 acre minimums required in Bedminster.

Effect of Location Along Interstate

The location of some of the sites abutting the interstates also does not provide a barrier to construction of multi-family housing. The lots were selected because they had the greatest access to available transportation and other community services. There are numerous noise abatement techniques which can be utilized, including walls of concrete, wood or metal, earthen berms, building orientations and various construction techniques. T169-8 to 169-12, March 20, 1979; T54-5 to 54-11, T56-13 to 58-5, April 2, 1979.

Land abutting highways has always been used for residential construction. T170-10 to T170-12, March 20, 1979. There is currently a proposed multiple family development at a location similar to the intersection of interstates in Bedminster Township, namely the intersection of routes 55 and 95 and 92 in Gloucester County. T172-1 to T172-4, March 20, 1979.

The proximity of the R-20 site to the Interstates,

rather than providing a detriment to development, provides an encouragement. Mr. Rahenkamp admitted that

> the majority of our P.U.D.'s have been on interstates. I can't recall one in which we have two interstates on top of one another coming together. Usually they are on an interchange or on an interstate. We look for those locations. T151-8 to 151-12, March 28, 1979).

These locations are selected because of the ready access to transportation. T151-12 to 151-13, March 28, 1979.

Plaintiffs' efforts to establish that noise levels on sites abutting the interstate render them unsuitable for development are not even based on standards used to evaluate suitability of sites for residential development. The plaintiff's expert, Richard Rodgers, used standards utilized by the Department of Transportation to guide the Government as to appropriate alignments and strategies for constructing an interstate highway. T40, 43-23 to 44-4. These standards were then related to standards established by the Department of Housing and Development for approving subsidized housing.

The plaintiffs' own expert, Alan Mallach, testified that there are few subsidy funds currently available. Any proposed project able to get subsidies could be housed on one of the R-20 sites without the noise problems identified by plaintiff. The sites abutting the interstates can be used for unsubsidized, least cost housing, by use of careful siting and noise abatement tech-

niques. Given the Township's limited choices for location of multi-family housing, the sites abutting the highways, though not ideal, can be utilized to provide least cost housing, just as similar sites have been and continue to be used throughout this state and nation. The advantage of ready access to existing and proposed infrastructure far outweighs the disadvantages caused by the purported noise problems.

The court in Mt. Laurel II upheld the siting of multi-family areas in spite of similar criticism from the Public Advocate of high noise levels, 161 N.J. Super. at 334. Instead, the court noted the advantages of a location close to highways with: proximity to jobs, access to transportation to Philadelphia, access to recreation, etc. 161 N.J. Super. at 338-339. Allan-Deane's attack based on anticipated noise levels must also be rejected.

D. Steps in Approval Process

Rather than the six step approval process alleged by plaintiffs, Bedminster Township permits a two stage process for a builder requiring both subdivision and site plan approval for a P.U.D. development.

Both subdivision and site plan ordinances contain mandatory preliminary and final approval stages. D-116, Ch.II, §§4.3,4.4; Ch.III, §§3,7. These two stages, including the time limits for their completion, are fully in compliance with the requirements of the Municipal Land Use Law. Compare N.J.S.A. 40:55D-48 through 50. Developers applying for both subdivision and site plan approval are permitted to file applications simultaneously by the Municipal Land Use Law. N.J.S.A. 40:55D-51c. This provision controls Bedminster's procedures.

Plaintiffs' allegations that an application for both subdivision and site plan approval under the Bedminster Ordinance requires four stages is, therefore, facially erroneous. Furthermore, the two additional stages listed as necessary by plaintiffs are pure invention. No separate application for approval of Open Space Clusters, Village Neighborhoods, or Compact Residential Clusters are required by the Bedminster Zoning Ordinance, since these planned residential developments are permitted as of right. An application to build 300 C.R.C.s following approval of the

initial 200 permitted by the Ordinance also would not require a separate stage of approval as alleged by plaintiffs. There is no reason that this part of the process cannot be part of the preliminary approval stage provided by the land development ordinance and the statute.

E. Variety and Choice

The variety and choice obligations of Bedminster Township are satisfied by the range of options permitted in the three residential zones created in addition to R-20 and R-30: R-8, R-6 and R-3. In all three zones, planned unit developments and twins are permitted so that three development options are provided: single family free standing, single family clusters, and twin clusters. P-21, Bedminster Zoning Ordinance §4.2.7; Open Space Cluster Definition. Plaintiffs and defendant agree that the range of densities permitted is as follows:

DISTRICT	SINGLE FAMILY FREESTANDING DU/Acre	SINGLE FAMILY CLUSTER DU/Acre	TWIN CLUSTER DU/Acre
R-8	1.66	1.86	2.35
R-6	.77	.90	1.33
R-3	.33	.36	.77

T 42-17 to 43-8, January 8, 1979.

All but 9.5% of the R-3 zone is in the land west of the corridor, where the court found a need for low density zoning. D-110; T 200-5 to 200-6, March 19, 1979. In order to allow the maximum possible density consistent with the lack of available infrastructure, the township permits twins as well as single family units in R-3. The twin option provides the opportunity for two units to be built on the minimum R-3 lot size, with a shared septic tank and shared well. "[T]his is the way to have smaller

housing units developed in compatibility with the support of the land." T 46-2 to 46-10, January 8,1979.

The R-8 and R-6 options were created as additional alternatives compatible with existing housing in the Township.* T 53-15 to 54-2, March 19, 1979. Since the permitted densities in R-8 and R-6 require sewer and water services, they had to be located primarily in the corridor where water and sewer facilities exist or are planned. T 53-15 to 54-2, March 19, 1979.

Mr. Agle testified that, in his opinion, a combination of the options permitted in the R-8, R-6 and R-3 zones would be constructed. T 53-5 to T53-10, January 8, 1979. Considering only currently available land, the number of additional residential units permitted in the R-8, R-6 and R-3 zones, therefore, ranges from 4,164 to 9,522 dwelling units. D-82. This permits construction of approximately 3 1/2 to 10 times the current number of dwelling units in the Township. If the total permitted number of dwelling units on currently available land is computed for all the residential zones, the Bedminster Zoning Ordinance permits approximately 6 1/2 to 12 1/2 times the currently existing number of dwelling units.

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*The court in Mahwah approved one-acre residential zones on the ground of compatibility with existing development. Opinion, p.19.

The Bedminster Township Zoning provides yet another means of satisfying its variety and choice obligations: conversions of existing units. The Ordinance provides that all single family detached dwellings existing as of November 1, 1972, conforming to the provisions of the ordinance, "may be converted to Twin Houses or multiple dwellings in accordance with the applicable requirements of this Ordinance." (Zoning Ordinance § 4.2.3). Accordingly, single family dwellings can be converted to twin houses in any of the residential zones of the Township. Existing single family detached dwellings in the R-20 zone could also be converted into multiple dwellings.

The combination of permitted new construction plus conversions provides for a very generous satisfaction of the Township's variety and choice obligations.

F. Pluckemin Bypass

Plaintiffs devoted a significant amount of time and energy to attempting to establish that the proposed Pluckemin Bypass was evidence of exclusionary zoning. In fact, the proposed bypass has nothing to do with issues of exclusionary zoning, and resolution of the propriety of the proposal is dependent on decisions not of this Court, but rather of the New Jersey Department of Transportation.

The bypass is irrelevant to issues of exclusionary zoning for several reasons. The idea, developed due to concerns about increased traffic on 202-206 through Pluckemin Village, first appeared in the Bedminster Master Plan in 1965. That was ten years before the Supreme Court's Mt. Laurel and Madison decisions and four years before Allan-Deane purchased its Bedminster tract. Furthermore, despite Allan-Deane's efforts to relate the bypass to issues of density and numbers, Township witnesses testified that construction of the road would in no way affect the number or densities of units permitted on the Allan-Deane tract. Allan-Deane is permitted to include within its gross residential site area for density and number computations " streets built as part of a development." P-21, Bedminster Zoning Ordinance, site area, Gross Residential definition. The Township witnesses stated that the proposed bypass would be considered part of the Allan-

Deane development. Therefore, the bypass would in no way reduce the permitted number of units or densities on their land.

There is no question that specific details concerning the design of the roadway present potential difficulties, about which the Township and interested parties may differ. Allan-Deane argues that the current roadway design provides inadequate access for Pluckemin Village development traffic. Differences apparently exist even with respect to the need for the bypass at all. Plaintiff's witness, Robert Rodgers, acknowledged that a 40% increase in traffic through the Pluckemin area could be anticipated from traffic not in any way generated by development in Pluckemin Village. T58-14 to 58-15, April 2, 1979. While Mr. Rodgers predicts this increased traffic will use Interstates 287 and 78, the Township's experts, and the Somerset County Planning Board, believe that additional burdens will be placed on 202-206, beyond the capacity of the current two-lane highway. Since widening of the current highway cannot occur without destroying the historic character of the village, the Township officials and the Somerset County Planning Board favor building a bypass.

Since 202-206 is a state road, decision on the propriety of the proposed bypass will be made, not by any of the parties to this case, but by the New Jersey Department of Transportation. Since the proposed bypass is irrelevant to issues of exclusionary zoning, and decisions on its development must rest with another

state government body, the Pluckemin Bypass is not an appropriate issue for this Court.*

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*In Mt. Laurel II, the proposed right of way for a high speed rail line running through a multi-family zone did not diminish the appropriateness of the original siting decision. 161 N.J. Super. at 339.

G. The Ordinance Encourages Low and Moderate Income Housing

In Madison, the New Jersey Supreme Court found that current building costs made it impossible for the private market to construct housing affordable for citizens of low and moderate income. Provision of new housing for lower income citizens is, therefore, dependent on availability of government subsidies. Madison, supra, at 510 to 512. This finding is supported by testimony of witnesses for both plaintiffs and the defendant in this case.

The Supreme Court, while finding that new low and moderate income housing would not be built without subsidies, imposed no obligations on municipalities to take affirmative action to make such housing possible. Id. at 486-87. Municipalities were only ordered to "erect no bar or impediment to the creation and administration of public housing projects in appropriate districts." Id. at 546.

Defendant has erected no bar to creation of lower income housing projects, and, in fact, has included provisions in the 1978 zoning ordinance to facilitate provision of such housing. The standards of the New Jersey Housing Finance Agency guided determination of several provisions:

1. Net habitable floor area standards were established to comply with N.J.H.F.A. standards;

2. The maximum number of permitted C.R.C. units in one

project was established at 150 to allow for subsidization, since N.J.H.F.A. will consider subsidies for developments in excess of 100 units;

3. The most advantageous siting options were created for least, least-cost C.R.C. units, including at least one site in Bedminster Village already supplied with public water and sewer;

4. Waiver of net habitable floor area standards is possible for subsidized projects, P-21, §10.3.3;

5. Waiver of parking requirements is possible for subsidized senior citizen housing projects. Id. Article 16.

Plaintiffs indicate only two ways in which defendant's ordinance supposedly impedes the possibility for development of subsidized housing, both of which are invalid. First, plaintiffs stress the requirement of a "resolution of need" prior to approval of subsidized housing, and note that a resolution has not been passed by Bedminster Township. Mr. Graff testified, however, that the Township will be willing to consider passage of such a resolution at the appropriate time, when a body interested in such construction presents a proposal to the Township.

Plaintiffs also claim that the siting of some of the R-20 land along the interstates impedes the possibility for development of subsidized housing because of excess noise. However, there are many techniques available to abate noise impacts. Also, since there are many other sites which even plaintiffs admit do not have noise problems, it is clear that this also imposes no

impediment to the possible development of subsidized housing in Bedminster Township.

In short, the ordinance has affirmatively encouraged the possibility of subsidies.

III

BEDMINSTER'S ORDINANCES COMPLY WITH THE MUNICIPAL LAND USE LAW

During the trial from September 18, 1978, to April 2, 1979, plaintiffs made repeated and detailed allegations that Bedminster Township's ordinances were not in compliance with the Municipal Land Use Law. After mountains of claims and weeks of lengthy testimony, covering in detail the hundreds of provisions in Bedminster's ordinances, Allan-Deane's summation identifies only six provisions in the land use ordinances of Bedminster Township allegedly in violation of the Land Use Law. Even if all of these provisions were in fact in violation, the test of bona fide effort, applied to a municipality, would require a finding that Bedminster Township had essentially complied with the Municipal Land Use Law for the purposes of meeting the Mt. Laurel burden.

Careful analysis of the six remaining allegations reveals, however, that, if reasonably interpreted, these provisions as well are essentially in compliance with the law.

We urge this Court to adjudicate compliance by considering the hundreds of provisions which track the language of the Municipal Land Use Law. Moreover, the defendant has demonstrated that plaintiffs' few remaining allegations are without substance.

A. Standards for Open Space Organizations

The standards for establishment of an open space organization for the three types of planned developments permitted under the Bedminster Zoning Ordinance, Open Space Clusters, Village Neighborhoods, and Compact Residential Clusters, are strictly in compliance with requirements of the Municipal Land Use Law.

The Municipal Land Use Law provides that:

> An ordinance pursuant to this article permitting planned unit development, planned unit residential development or residential cluster may provide that the municipality or other governmental agency may, at any time and from time to time, accept the dedication of land or any interest therein for public use and maintenance, but the ordinance shall not require, as a condition of the approval of a planned development, that land proposed to be set aside for common open space be dedicated or made available to public use.

N.J.S.A. 40:55D-43.

Using language which virtually tracks the Municipal Land Use Law, the Bedminster Zoning ordinance provides two options for handling of "common open space".

> Common open space may be either (a) dedicated to the Township of Bedminster in fee simple in perpetuity, if acceptable to the Township Committee, and/or held in perpetuity by a neighborhood association subject to a neighborhood or public open space easement free of any structures or artificial facilities in or upon such Common Open Space . . . .

P-21, Bedminster Zoning Ordinance, §12.1. This section does not state, as plaintiff contends, that the Planning Board may require

as a condition for approval the dedication of common open space to the Township in fee simple in perpetuity. The Ordinance merely, as permitted by the Land Use Law, grants the option of such dedication to the builder.

The only common open space provision in the Bedminster Zoning Ordinance imposing mandatory conditions on the developer is also strictly in compliance with the Municipal Land Use Law. The law provides that, in the event that the developer decides not to dedicate the common open space to the Township, the developer is obligated to establish an organization for the ownership and maintenance of such residual open space for the benefit of residents of the development. N.J.S.A. 40:55D-43. This requirement is incorporated within the Bedminster Township Zoning Ordinance. P-21, Bedminster Zoning Ordinance, §12.1.1.

B. Requirements for Final Approval of Subdivisions and Site Plans

The provisions for final subdivision and site plan approval, including timing, conditions for approval, and bonding of improvements, are all in compliance with the Municipal Land Use Law and represent efforts of the Township to impose no undue cost exactions on developers.

The Ordinance provides that final subdivision and site plan approval shall be granted after a developer shall have installed or furnished performance guarantees for all "required improvements". D-116, Land Development Ordinance, Ch.II, §§4.3.10, p.14; §6.1,p.26; Ch.III, §10.1, p.46.

The improvements required prior to final approval depend upon the nature of the development. A builder is given the option of seeking final approval for the entire development, or getting approval for a subdivision and site plan in stages. During the process of subdivision approval,

> the applicant may submit for final approval on or before the expiration date of preliminary approval the whole or a section or sections of the preliminary subdivision plat. . . .

D-116, Land Development Ordinance, Ch.II, §4.3.9.2, at 13. A similar option exists in the site plan ordinance which provides:

> The developer may at his option submit a final site plan in stages to include only a portion of the original preliminary site plan . . . .

Id., Ch.III, §7.1.4, p.45.

In the event that a developer seeks approval in stages, it is not necessary to complete or secure performance guarantees for all the improvements required for the entire development prior to gaining final approval of a section. The "required" improvements prior to final approval of a section are then limited to those improvements required for that section and:

> any improvements required for the site plan as a whole, which might have an adverse effect on an approved section if the remaining sections were not completed. . . .

D-116, Land Development Ordinance, Ch.III, §7.1.5 at 45.

The performance guarantee option is provided prior to final approval of the entire subdivision or site plan or approval of a section as follows:

> the approving authority may accept a performance guarantee approved by the Township Attorney in an amount equal to 120% of the estimated cost of the improvement, of which 10% of the total amount shall be in cash or a certified check, for the installation within the time specified by the approving authority of the following improvements. . .the final surface course of the street pavement, sidewalks, monuments, street signs, shade trees.

D-116, Land Development Ordinance, Ch.II §§4.3.10, 4.3.10.1-5 p.14; Ch.III, §10.1, p.46.

All of the above provisions comply with the Municipal Land Use Law as interpreted by the courts.

1. Final Approval After Completion or Bonding of Improvements.

The language in several sections of the Municipal Land

Use Law leaves no doubt that municipalities have the option of providing for final approval only after improvements are completed or bonded. The definition of final approval provides that final approval shall mean:

> the official action of the Planning Board taken on a preliminary approved major subdivision or site plan after all conditions, engineering plans and other requirements have been completed or fulfilled and the required improvements have been installed or guarantees properly posted for their completion, or approval conditioned upon the posting of such guarantees. [emphasis added].

N.J.S.A.40:55D-4 § 3.1. Similar language is included in the mandatory provisions for subdivision and site plan ordinances which shall include:

> provisions governing the standards for grading, improvement and construction of streets or drives and for any required walkways, curbs, gutters, streetlights, shade trees, fire hydrants and water, and drainage and sewer facilities and other improvements as shall be found necessary and provisions insuring that such facilities shall be completed either prior to or subsequent to final approval of the subdivision or site plan. . . . [emphasis supplied].

N.J.S.A. 40:55D-38c.

The argument of plaintiffs that only final approval conditioned upon the posting of performance guarantees is proper under the Municipal Land Use Law is, therefore, clearly wrong. It is also very curious in light of the fact that the Sparta Ordinance, drafted by the firm of Mr. Rahenkamp, contains a provision

for installation of improvements prior to final approval virtually identical to that in the Bedminster Ordinance. T 27-19 to 28-8, March 29, 1979.

2. Staging of Final Approval

The provisions for staging of development, which allow for final approval of a section after completion or bonding of only those improvements necessary for that section, are within the discretionary authority granted municipalities by the Municipal Land Use Law. In choosing to exercise discretion and incorporate these provisions, Bedminster Township acted to encourage development by providing options especially useful to large developers concerned about funding.

Though not requiring that municipal ordinances include staging provisions for development, the Municipal Land Use Law grants discretion to a municipality to include provisions for staging of planned developments within the subdivision and site plan ordinances. N.J.S.A. 40:55D-39(c)(6). Discretion is further granted to incorporate

> Provisions ensuring in the case of a development which proposes construction over a period of years, the protection of the interests of the public and of the residents, occupants and owners of the proposed development in the total completion of the development.

N.J.S.A. 40:55D-39d.

It is the lack of a staging provision which primarily

has been found to constitute an undue cost exaction. Round Valley, Inc. v. Township of Clinton, L-29710-74 at 68. The Clinton Ordinance required construction of on site improvements even in areas not scheduled for development. That was found to prevent selling units in phases, which could "produce new capital to complete the project...." Id.

Bedminster Township's staging provisions satisfy the multiple requirements of the Municipal Land Use Law and avoid the cost-exaction criticised in Round Valley. Bedminster's staging requirements were also approved by plaintiff's witness, Mr. Rahenkamp. T 211-2 to 211-3, March 28, 1979.

3. Bonding of Improvements

A municipality is given the option of requiring completion of improvements or allowing performance guarantees. If deciding to accept performance guarantees, the municipality is permitted to select which improvements can be bonded.

Provisions for acceptance of performance guarantees are not mandatory. The section which provides for mandatory provisions of the subdivision and site plan ordinances includes no reference to provisions providing for performance guarantees. N.J.S.A. 40:55D-38. The section providing for performance guarantees also makes their optional nature clear by providing that:

> Before recording of final subdivision plats or as a condition of final site plan approval or as a condition to the issuance of

> a zoning permit pursuant to subsection 55D of this act, the approving authority may require and shall accept in accordance with the standards adopted by the Ordinance for the purpose of assuring the installation and maintenance of on-tract improvements: [emphasis supplied]
>
> (1) the furnishing of a performance guarantee in favor of the municipality in an amount not to exceed 120% of the cost of installation of improvements it may deem necessary or appropriate. . . .

Any doubts about the permissive nature of the performance guarantee provision have been settled by a decision of Judge Gascoyne interpreting the statutory language. In C.A.P. Enterprises, Inc. v. Mayor and Council of the Township of Montville, L-3859-77 (February 3, 1978), after noting in oral argument the mandate "that we give each and every word within a statute meaning as understood in everyday parlance," Id. at 9, Judge Gascoyne held that:

> may require. . .means that the option is with the municipality. They may require a bond, and if they do, they shall accept it in accordance with standards adopted by the ordinance.

Id. at 37. The only mandatory provisions, therefore, are the "shall accept" language which is designed to insure that any provisions for performance guarantees are uniformly administered for all developers. Id.

It is further clear from the Municipal Land Use Law that a municipality is given discretion as to which improvements may be bonded. N.J.S.A. 40:55D-53 includes a long list of improvements

which a municipality may consider necessary or appropriate and which may be bonded. The law does not require municipalities to provide performance bonding for any of those improvements listed.

The plaintiffs cite no case law which provides that performance bonding, if allowed, must include all the possibilities listed. Round Valley, cited in support of their position, held only that an ordinance which did not allow performance guarantees for any improvements would be cost generating. Round Valley, supra, at 68. C.A.P. Enterprises, also cited by plaintiffs, as already noted, found a municipality had total discretion as to whether to permit performance bonding of any improvements at all.

C. Provision for Planned Residential Developments as Permitted Uses.

Among the purposes of the Municipal Land Use Law is the encouragement of planned unit developments. N.J.S.A. 40:55D-2(k). One of the types of planned developments provided for by the Municipal Land Use Law is a "planned unit residential development" which includes:

> An area with a specified minimum contiguous acreage of five acres or more to be developed as a single entity according to a plan containing one or more residential clusters, which may include appropriate commercial, or public or quasi-public uses all primarily for the benefit of the residential development. N.J.S.A.40:55D-6.

The Bedminster Zoning Ordinance permits three types of planned unit residential developments: the Village Neighborhood, Compact Residential Cluster, and Open Space Cluster. The Village Neighborhoods and Compact Residential Clusters are permitted in the R-20 district; Open Space Clusters are permitted in all residential districts. P-21, Bedminster Zoning Ordinance §§4.2.7, 4.2.8. Builders choosing to develop planned unit residential developments are permitted greater densities than those not selecting these development options.

Contrary to plaintiff's claims, the planned unit residential developments under the Bedminster Zoning Ordinance are all permitted "as of right" rather than "conditional uses." Under the Municipal Land Use Law, "conditional uses" are those uses which

both are "permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards for the location or operation of such use as contained in the zoning ordinance," and those which require an "authorization therefore by the Planning Board." N.J.S.A. 40:55D-3. Even uses "as of right" must comply with "the conditions and standards for the location." Conditional uses are distinguished from those "as of right" in that they require a specific authorization of the Planning Board, and their standards may not be those of the zone in general, but may be specially defined.

Not only does the Bedminster Zoning Ordinance include the specifications for these residential uses within the zones where they are permitted and not require special authorization for their approval, but the Ordinance also specifically lists them as "permitted" rather than " conditional uses. " P-21, Bedminster Zoning Ordinance, §§4.2, 4.2.7, and 4.2.8. All of the conditional uses are included in Section 4.4. The only residential use listed as a conditional use is the "conversion of existing accessory buildings or additional dwelling units to single family residences." P-21, Bedminster Zoning Ordinance, §4.4.4.

Even the additional 300 dwelling units permitted in the staged approval provisions for Compact Residential Clusters are intended as "permitted" rather than "conditional uses". P-21, Bedminster Zoning Ordinance, §11.1 ¶1,2. The Zoning Ordinance

provides for special attention during the review process to questions of infrastructure, environmental constraints, and satisfactions of fair share obligations. The wording of these provisions is intended to assure that the units will be permitted unless the Planning Board sustains a burden of establishing that "adequate infrastructure cannot be provided, environmental constraints dictate such additional units cannot be accommodated, or the Township's regional obligation has been fully satisfied." Id. All the testimony is in agreement that the third limitation is unlikely to impose any restraint on the additional approvals, since the Township witnesses believe that the 600 C.R.C. units are needed to satisfy their fair share obligations. Mr. Coppola testified that he believes the other two concerns are legitimate caveats for the Planning Board review process.

D. Design of Water, Stormwater and Sewer Systems

The required design of stormwater systems in the Bedminster Land Development Ordinance is reasonable and consistent with the requirements of the Municipal Land Use Law.

The Land Development Ordinance provides that installations of water mains, culverts, storm sewers and sanitary sewers "shall be adequate to handle all present and probable future developments." D 116, Land Development Ordinance, Ch.II, §6.1.3, p.27.

The simple answer to Allan-Deane's imagined problem was given by Mr. Rahenkamp:

> The Court: I guess the pending question is, does it make sense, Mr. Rahenkamp, to require that you make allowances for what is likely to happen next door?
>
> The Witness: To the extent that the information is at hand and available and one can make an accurate sizing, it is a legitimate concern.
>
> However, it would have to be done according to the Municipal Land Use Law on the contributions for off site tract development because you are talking about the impacts of off tract provisions on your tract and thereafter you should bear your prorata fair share but shouldn't be expected to over build in anticipation of impacts generated by other areas in the Town.
>
> That would obviously be inequitable and with undefined probable future developments there's no way that you can make an accurate projection of what would be required to size those facilities in any case.
>
> So it is such a catchall that it is a very dangerous one. T215-216, March 28, 1979.

Mr. Rahenkamp then admitted that there is nothing in the ordinance prohibiting the town from following the procedures of the Municipal Land Use Law:

> Is there anything prohibiting the town from doing it on a prorata basis? No, there is nothing in this Ordinance prohibiting them from doing that. T 216-217, March 28, 1979.

In fact, the Bedminster Ordinance specifically provides for pro rata payment for off-site improvements. D 116, Land Development Ordinance, Ch.II, §6.2.2.1, p.27.

Once again, the Allan-Deane complaint is much ado about nothing.

E. Fees for Subdivision and Site Plan Approval

The Allan-Deane site plan would place a town, the size of South Bound Brook, on a cornfield and rocky plateau, separated by a steep slope. This act of creation would require bringing all services, including water, sewer, electricity, and roads where there is now nothing. Plaintiff's criticisms of defendant's fees take no account of the actual magnitude of their proposal.

Their criticisms are primarily invalid, however, because they distort the actual fee structure. The numbers game continues.

The intent of the Township in creating the fee schedules in the Land Development Ordinance, D-116, was to fully comply with the law. The fees are designed merely to defray the cost of services rendered by Township employees. "Inherent in the power to regulate and control is the power to charge. . .fees primarily designed to defray the costs of such control." Daniels v. Point Pleasant, 23 N.J. 357,361 (1957).

The fees charged to developers seeking subdivision and site plan approval are as follows:

SUBDIVISION APPROVAL FEES

Section	Purpose	Fees Minor Subdivision (10 or fewer lots)	Fees Major Subdivision (more than 10lots)
4.5.1	Filing fee-preliminary plat	$50	$100

4.5.1	Filing fee-final plat	$100	$100
4.5.2	Review deposit-preliminary plat	$35/lot	$40/lot
4.5.2	Review deposit-final plat	$15/lot	$15/lot
4.5.3	Inspection cost deposit	5% of estimated improvement cost	5% of estimated improvement cost

SITE PLAN APPROVAL FEES

Section	Purpose	Fees Minor Subdivision (10 or fewer lots)	Fees Major Subdivision (more than 10 lots)
11.9.1.1	Preliminary review of site plan	$50/acre +.02/ sq.ft.gross floor area	$50/acre +.02/ sq.ft. gross floor area
11.9.1.3	Inspection deposit	5% of improvement cost	5% of improvement cost

Review and inspection costs are both paid by a deposit system. Developers are asked to file a deposit to cover the cost of services provided by Township officials. The Ordinance provides that the Township shall initially pay the cost of both the review and inspection services, assuring supervision of the validity of expenses submitted. The Township is then permitted to charge against the deposit fee the disbursements made to the professional consultants. To assure that a developer is charged only for the actual cost of review and inspection services, the

Ordinance further provides that "any unused portion of the deposit shall be returned to the applicant" and that additional fees be collected only "if the cost of . . .services exceed the amount of the deposit. . . . " D-116, Ch.II,§§4.5.2, 4.5.3; Ch.III, §11.9.1.3.

No site plan review or inspection fees are charged for one and two family buildings which are all exempted from site plan approval. T 63-13 to 63-21, March 29, 1979.

Plaintiffs expressed no objections to fees charged for minor subdivisions. Even for major subdivisions, there were no objections to the filing fees. Of the remaining fees, for review and inspection costs, the concept of a deposit fee was also not criticized. T 200-24 to 200-25, March 28, 1979. All of plaintiffs' objections, therefore, were to the anticipated size of the review and inspection fees based on the so-called anticipated cost for the 1,849 units which Allan-Deane wishes to construct on their property.

A careful analysis of Allan-Deane's listing of anticipated fees reveals the groundlessness of the bulk of their objections. (See Allan-Deane brief at 112). Of the total $1,309,195 listed on their anticipated schedule, $1,200,000 covers anticipated inspection costs. The $1,200,000 figure is based on doubling the cost for inspection of their improvements, on the theory that the Township will act in a totally unreasonable manner and charge them twice for the same inspections.

Plaintiffs can only anticipate double charging by ignoring the explicit provision in the Bedminster Land Development Ordinance which makes that impossible. D-116, Ch.III, §11.9.1.3, providing for inspection fees for site plan approval states:

> If the applicant, pursuant to the provisions of the land subdivision ordinance or road construction ordinance (Chs.II and IV herein) has deposited funds to cover the cost of such review and inspection, then such deposit shall not be required.

Their anticipated double fees even ignore the testimony of their own witness, Mr. Rahenkamp, who, asked about the possiblity of double fees for inspection of the same improvements, said it was "so far beyond the realm of probablility, I couldn't imagine that." T 71-1 to 71-4, March 29, 1979.

The remaining large anticipated fees are similarly grossly inflated or misleading. $101,695 fees are listed for preliminary and final plat review. These review costs are based on per lot charges.

Allan-Deane's costs anticipate per lot charges for their full 1,849 units. Allan-Deane's site plan, however, provides for a minimum of 335 apartment units plus townhouse condominiums. The apartment units, designed to satisfy their least cost obligations, would clearly not require individual lot review. Since Allan-Deane is choosing to provide townhouses as condominiums, a reasonable interpretation of this provision would also not require

individual lot review.* Plaintiffs, without consulting Township officials, anticipate that such unreasonable requests will be made. T 203-3 to 203-10, March 28, 1979.

Some of the large costs anticipated by plaintiff result from their intention to build not least cost units, but expensive, large units. Preliminary site plan review fees are based on the square footage of gross floor area. Mr. Coppola testified that an average 1,283 sq.ft. unit could be constructed under the Bedminster Township Ordinance. Plaintiffs' site plan anticipates an average unit size in excess of 1,500 sq. ft. T 31-2 to 31-3, March 29, 1979. It is not the defendant's fees which are cost generative, but rather the plans of the plaintiff.

The only fee which is potentially excessive, therefore, is the $600,000 anticipated fee for inspection of improvements. This fee is large because the improvements required to construct a town on the Allan-Deane site are substantial. Since the land development ordinance permits construction of improvements in stages, and inspection fees are only deposited "prior to the construction of any required improvement", D-116, Ch.II §4.5.3; Ch.III §11.9.1.3, even this cost would not be required in one lump sum.

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* The Zoning Ordinance allows the option of providing townhouses as fee simple, cooperative or condominium property. P-21, def. townhouse. Allan-Deane has selected the condominium option, but is treating it as fee simple property.

Plaintiffs insist that an inspection fee based on 5% of anticipated improvement costs is also unfair because they anticipate that the engineer will commit fraud and pad his bills. Allan-Deane cites case law in support of their position that the possibility of this illegal behavior makes this provision unreasonable. Economy .Ent.,Inc. v. Tp. Com. of Manalapan Tp., 104 N.J. Super. 373 (App.Div. 1969).

There is no way that a township can design its ordinances to prevent criminal actions by township officials. The court in Economy Enterprises anticipated, not such criminal behavior, but unsupervised inspections by township professionals which could far exceed those required. The Bedminster Township Ordinance is drafted to remove this possibility by providing that the Township Committee directly approve all disbursements. The lack of supervision anticipated by the Economy Enterprises court, where the developer in effect pays the engineer directly, is not possible under the Bedminster provisions.

Once again, plaintiff's objections are without merit.

F. The Business Zone Provisions

The Municipal Land Use Law imposes multiple obligations on municipalities. The law encourages municipal action:

> To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;...
>
> To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;...
>
> To promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through improper use of the land . . . .

N.J.S.A. 40:55D-2. The court order in the first Bedminster trial found, consistent with these multiple regional obligations, that Bedminster Township had an obligation to provide open space, potable water, and its fair share of housing needs for the region. The court also found that, due to the restraints on dense construction west of the corridor, zoning to satisfy the Township's fair share housing obligations should be restricted to the corridor.

The regulations controlling business districts in Bedminster Township are designed in light of these multiple regional obligations. As previously noted, the amount of available land in

the corridor where denser uses, including business uses, can be serviced is limited. The regulations controlling business districts are all designed to assure that the limited land available for business purposes in the Township will serve the required needs of the housing zone to satisfy the Township's Mt. Laurel and Madison obligations.

> The zoning ordinance permits:
>
> neighborhood retail shops and food stores, small business and professional offices, personal service facilities, retail dry cleaning services, and carpentry, electrical, masonry, plumbing and plumbing services.

P-21, Bedminster Zoning Ordinance, §5.2.

If the limited land available for business uses in the Township were not confined to these limited neighborhood service establishments, the Township would have failed to satisfy its Madison obligations to provide for housing convenient to service facilities.*

Evidence that these restrictions are designed to satisfy the Township's obligations, rather than to avoid them, was presented in testimony in this case. In the fall of 1978, Allan-Deane granted an option to the Beneficial Finance Corporation, contingent on their ability to effect a zoning change to permit them to construct their corporate headquarters on the Allan-Deane site at issue in this case. If the Township had agreed to the rezoning, they could have avoided this entire compliance proceed-

*Contrary to Allen-Deane's contention, there are no restrictions on ownership, only use.

ing. Because the Township was committed to assuming its obligation to provide its share of least-cost housing, the Township refused to modify its zoning to permit a corporate headquarters on the Allan-Deane site. The Township recognized that if that parcel were used for a corporate headquarters, there might be insufficient land in the corridor to satisfy their obligation to provide least-cost housing.

Indeed, Mr. Rahenkamp admitted that a regional shopping center will require 100 acres and 1,000,000 sq. ft. of building space. T 55, October 5, 1978. Such a use would seriously deplete the supply of developable land in the corridor.

Rather than being evidence of the Township's desire to avoid its regional obligations, the regulations controlling business districts in the Township of Bedminster are, in reality, designed to fulfill the Township's regional obligations as defined by the Municipal Land Use Law and this Court.

More significantly, limitations on business uses does not restrict housing opportunities and are therefore irrelevant to this case.

IV

THE LAND USE REGULATIONS OF BEDMINSTER TOWNSHIP MEET THE TEST OF REASONABLE SPECIFICITY

Bedminster Township agrees that land use regulations must establish "adequate standards to prevent arbitrary and indiscriminate interpretation and application by local officials." J.D. Const. v. Bd. of Adjust. Tp. Freehold, 119 N.J. Super. 140, 149 (Law Div. 1972). What constitute "adequate standards" depends, however, on the nature of the standard at issue.

The adequacy of standards must be considered in light of "the problem to be solved by the municipality." J.D. Const. v. Bd. of Adjust. Tp. Freehold, supra, at 145. Furthermore, "zoning ordinances must be given a reasonable construction and application. They are to be liberally construed in favor of the municipality." Id.

Even a casual glance at the provisions of the Bedminster Land Development Ordinance reveals multiple examples of detailed standards controlling development. Specific design specifications are provided for the most costly improvements, including roads and streets, curbs, sidewalks, drainage systems, and shade trees. See, e.g., D-116, Ch.II, Art.7, p.33; Ch. IV, p.61. The Ordinance also includes frequent references to standards specified by outside authorities. See, e.g., D-116, Soil Erosion and Sedimentation Control, Ch.IV,¶4,p.26; Utilities Standards, Ch.II, §7.2.7.2, p.39. In some instances, reference is made to approval

by the Municipal Engineer or other experts. See, e.g., D-116, Ch.II, §7.2.3.7, p.35A.

Where design is considered technical in nature, courts have upheld the decision to leave the determination of standards to experts. Lionel's Appliance Center, Inc. v. Citta, 156 N.J. Super. 257,270 (Law Div. 1978). A Planning Board "must rely upon the expertise of professionals such as engineers and attorneys, which they have the power to employ under N.J.S.A. 40:55D-24." Id.

As with their allegations of violation of the Municipal Land Use Law, plaintiffs, after launching a broad based attack on Bedminster's Ordinances for lack of specificity, list few offending provisions in their summation. Of those attacked, only those specifying architectural design standards may be impermissibly vague based on court-defined standards. P-21, §§7.4.1, 7.4.2, 7.4.3; D-116, Ch.III, §11.12.1. Morristown Road Associates v. Mayor of Bernardsville, 163 N.J. Super. 58 (Law Div. 1978). The decision in Morristown Road Associates, decided August 31, 1978 and reported in December, 1978, also throws into question the architectural design provisions in the Galloway and Sparta ordinances drafted by plaintiffs' planner, Mr. Rahenkamp. T 52-14 to 52-24, 61-19 to 61-25, March 29, 1979.

Of the other provisions criticized, some represent provisions for which more detailed standards exist and which plain-

tiffs have chosen to ignore. See, e.g., P-21, §11.4.4 (screening "so that nearby public streets or the ground floor of neighboring units shall be protected from headlight glare"); P-21, §11.4.6 (sewer and water connections recommended by experts); D-116, Ch.III, §7.1.2 (surface water drainage standards specified in Ch.IV, §2.5, including minimum design standards of five year or fifteen year storm); D-116, Ch.II, §712.3.7 (catch basin, curb, culvert and storm water standards specified at Ch.IV, §§2.3.4, 2.4, 2.5). The remaining standards to which plaintiffs object deal with E.I.S. guidelines, landscaping, and the mandate given the Planning Board to consider unspecified additional matters.

Plaintiffs' criticisms of all provisions for lack of specificity were presented by John Rahenkamp, all grounded in his preference for the P.U.D. ordinances created by his firm which use impact zoning. Mr. Rahenkamp stated that only two New Jersey communities, those which hired his firm, have acceptable P.U.D. ordinances. New Jersey municipalities typically do not spell out specific standards in their land use codes, but refer plans to the Township Engineer to apply accepted standards in the field. T 117-4 to 117-6, 115-11 to 115-18, March 28, 1979. If Mr. Rahenkamp's standards are applied, therefore, not only Bedminster Township, but all but two communities in New Jersey would be in violation of the specificity requirement.

Furthermore, Mr. Rahenkamp admitted on cross examination

that, not only are his ordinances extremely expensive to administer requiring use of a computer only available in Rahenkamp's office, but they also lack the very specificity which he advocates. For example, the Sparta Ordinance, like the Bedminster Ordinance, permits the Planning Board to consider unspecified additional matters by providing that:

> the Board shall give consideration to such other elements or aspects of the site plan or proposed use as may relate to the design of the plan, the general environment of the area or the health, safety and general welfare of the public and, in so doing, may refer the application to such other agencies as may be desirable for report and recommendation.

T 53-15 to 54-1; 56-17 to 56-25, March 29, 1979. Sparta also has an E.I.S. checklist identical with Bedminster's. T 173 to 173-11, March 28, 1979. Mr. Rahenkamp has seen no New Jersey ordinances with E.I.S. requirements satisfying his specificity test. T 168-2 to 168-6, March 29. 1979.

In addition, Mr. Rahenkamp acknowledged that the so-called specific standards in his ordinances in no way restrict the options available to the Planning Board in approving a P.U.D. A builder proposing any development is required to negotiate all of the requirements with the Planning Board. Mr. Rahenkamp's Sparta Ordinance allows for this negotiation process in a general waiver provision as follows:

> if it can be demonstrated to the satisfaction of the Board that because of some peculiar conditions relating to the property or pro-

> posed construction such details are not necessary to properly evaluate the site plan, the Board may modify or waive any of the specific site plan details. (Emphasis added)

T 58-18 to 58-24, March 29, 1979. Mr. Rahenkamp stated that this "negotiation" is the very essence of the process of approval of a P.U.D. under one of his ordinances. T 127-10 to 127-14, March 28, 1979.

Mr. Rahenkamp's free negotiation technique offers far more opportunity for cost-generating delay than does Bedminster. If Bedminster adopted it, Rahenkamp would criticize it. Plaintiffs have presented no alternatives which can remove the opportunities for discretion which they so vehemently criticize in the Bedminster Zoning Ordinance. Bedminster's land use regulations therefore meet any reasonable test of specificity.

V

THE ALLAN-DEANE SITE PLAN AND THE ALLAN-DEANE LAND

Allan-Deane pretended throughout this trial that the Township's least cost obligations could be satisfied by the court's approval of their site plan. Nothing is further from the truth.

Of the total 1849 dwelling units included in the Allan-Deane site plan, only 335 would be designed to satisfy least-cost requirements. Those 335 units would consist of 135 family apartments and 200 senior citizen housing units. There is no provision in the Allan-Deane site plan for single family houses on small lots. Furthermore, even the family apartments and senior citizen housing would not be constructed as part of the Allan-Deane development. Allan-Deane agrees only to make land available for "non-profit or limited dividend corporations" to provide for these needs.*

Not only is the Allan-Deane Corporation not intending itself to build the least-cost housing, it also includes in its site plan some of the design provisions for least-cost units criticized in the Township's ordinance. Although Allan-Deane has claimed that the limitation of project size to 150 units renders

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* As Mr. Gershen made clear, land cost is only a very minor part of total cost. Allan-Deane's generosity is not expensive at all.

it impossible to provide for subsidization, the subsidized apartments provided in their own site plan would be limited to 135 units. Although Allan-Deane claims that the half-mile separation required by the ordinance excessively restricts flexibility in construction of least-cost housing, their own least-cost units would be separated by approximately one-half mile.

The Allan-Deane site plan also placed the least-cost apartment units in an alleyway, totally isolated from the rest of the development. This violates the intent of the requirement for least-cost units mandated by Mt. Laurel and Oakwood at Madison.

The Allan-Deane site plan also provides justification for the Township's decision to provide multiple locations for least-cost units rather than restricting them to a few owners' land. Had the Township chosen to place all the R-20 zone on the Allan-Deane property, the eventuality warned of by plaintiffs' planner in the second Mt. Laurel action would have occurred: least-cost units would be built at the whim of a single owner, who, like Allan-Deane, will opt for high-cost/high-profit units. Mt. Laurel II, at 336.

Even if the site plan appeared to satisfy reasonable design standards, its scale should defeat it. The plan proposes placement of 1849 units, or two times the current number of dwelling units in the entire township, in 220 buildable acres. As Mr. Roach noted, it would be the equivalent of placing South Bound

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Brook on the edge of Bedminster Township, T159-9 to 159-14, October 25, 1978. This severe distortion of reasonable growth is not required by New Jersey law.

Stripped of its pretense, the Allan-Deane site plan is for most cost housing and will not help to satisfy the Township's least-cost housing needs, but will provide the extra $25 million profit which will be possible if they achieve the rezoning desires. In addition, the site plan's use of steep slope as the only common open space is a serious design flaw. See Ex. D-39, DCA Residential Design Review, pp. 57-58, and discussion infra.

The rezoning of the Allan-Deane site complied with guidelines provided by the findings of fact incorporated within the court order of September 28, 1977. The court found: 1) the Allan-Deane site contained land appropriate for multi family housing; 2) the Allan-Deane land also contained 240 acres of steep slopes, inappropriate for construction; 3) the maximum permitted densities under the 1973 Ordinance of three dwelling units per acre were unsuitable for private or public multi-family housing; 4) five hundred and forty (540) dwelling units would be a reasonable number for the Allan Deane site. The court also noted that the Somerset County Master Plan generally recommended densities of 5-15 dwelling units per acre for the land at the foot of the slopes and densities of approximately one dwelling unit per three acres on the plateau.

Bedminster Township's rezoning of the Allan-Deane land followed this Court's guidelines. A substantial portion of the Allan-Deane lowlands, or a total of 74.5 acres, were rezoned R-20, permitting multi-family housing at densities of 6.79 and 10.19 dwelling units per acre. These gross densities are suitable for least-cost multi-family housing. The size of the Allan-Deane land entitles them to use the two densest options available in the R-20 zone: (1) a Compact Residential Cluster of up to 150 units at densities of 10.19 dwelling units per acre; and (2) Village Neighborhoods throughout the remaining land at densities of 6.79 dwelling units per acre. These options allow for a full range of dwelling unit types: apartments, townhouses, twin houses, and single-family units. If all the Allan-Deane R-20 land were developed at the maximum permitted densities the result would be as follows:

Housing Type	R-20 Zone Required Acres	Dwelling Units
C.R.C.	15	150
V.N.	59.5	404
	74.5	554 total (D-112)

In the R-20 zone alone, therefore, the 1978 zoning ordinance permits the number of units found reasonable for the entire site under the 1973 ordinance.

The 106.36 acres of land between the R-20 land and the bottom of the steep slope were zoned R-8, permitting single family housing in clusters at densities of 1.85 dwelling units per acre,

and twins in clusters at densities of 2.35 per acre. P-20. These units provide a variety and choice of housing at densities compatible with the housing on the opposite side of Washington Valley Road, and as a transition to the density of one dwelling per three acres permitted on the abutting land north of the Allan-Deane tract. P-24.

"The two family house is considered an excellent device for least-cost shelter by almost all experts today." Urban League of Essex County v. Township of Mahwah, L-17112-71 at 20-1 (March 8, 1979). Defendant's experts agreed this R-8 twin option is viable. T 88, October 30, 1978. If half this zone were developed as twins and half as single family units, the maximum permitted number of dwelling units using these R-8 options would be as follows:

Housing Type	R-8 Acres	Dwelling Units
Twins	53.36	125
Single Family	53.00	98
	106.56	123

The land on the plateau at the top of the slope, 93.56 acres, was rezoned R-3. Thirty dwelling units can be constructed in that zone.

The R-3 zone complies with the court order for several reasons. The Municipal Land Use Law, N.J.S.A. 40:55D-2B, requires

that the "development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole . . . ." The R-3 zoning complies with that of Bernards Township, which has 3 acre zoning on the adjoining plateau land. Due to the topography of the site, especially the steep slope, the land on the plateau shares the characteristics of its neighboring parcel in Bernards Township, rather than that of the Allan-Deane lowlands. T45, March 20, 1979.

The zoning complies with recommended density in the Somerset County Master Plan of approximately one dwelling unit per three acres. P-3, p.51. Mr. Roach reaffirmed his support for low density use on the plateau. T 168, October 25, 1978.

The R-3 zone avoids destruction of the ridge line, which is an asset not only of Bedminster Township, but of the region as a whole. Preservation of the ridge line is recommended by the Department of Community Affairs' guidelines for planning boards, co-authored by plaintiff's witness, Carl Lindbloom. D-39 at 40-1.

The R-3 zoning also avoids the high cost in dollars and environmental damage of construction on the plateau. Blasting

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* Tri-State's placement of the plateau area in a development grid is being challenged by Somerset County. The designation was apparently based on the location of AT&T Long Lines in that mile square rather than its appropriateness for dense residential construction. T126, October 25, 1978.

will be necessary for any construction below ground level. T 13-16, October 30, 1978. The wide cuts required for the roadways alone to service the dense Allan-Deane construction will deface the land. Pipes to provide water, sewer, gas and electric service must all be laid through the steep slopes, causing irreparable injury. T 188, October 4, 1978. Only high cost, not least cost, housing can be built on that plateau. T 168, October 30, 1978. Mr. Rahenkamp admitted that such construction must be done "very carefully."

Allan-Deane's major criticism of the R-3 zoning is that it is not cost or environment saving because on-site disposal is really not possible on the 3-acre lots permitted. Mr. Rahenkamp's opinion was expressed with no real corroborating evidence. On-site percolation tests are required to determine suitability of land for septics. Moreover, the Somerset County soil survey (Ex. D-6) shows the plateau land with only moderate limitation for septic disposal, which would ordinarily permit on-site septic disposal.

VI

THE CRITICAL AREA DISTRICT AS ZONED BY BEDMINSTER IS REQUIRED BY LAW AND BY THE NATURE OF THE LAND ITSELF.

Bedminster zoned critical lands as critical lands. The physical characteristics of those lands determine their use. Bedminster's Zoning Ordinance does not artificially restrict the reasonable use of critical lands. It merely states obvious reality. You can do on a mountain or a lake what you can do on a mountain or a lake. You cannot walk on a lake and you cannot swim in a mountain. Zoning is not going to change that, it can only respect the natural qualities of the land.

Interestingly, in Allan-Deane's furious attack upon Bedminster's Zoning Ordinance it does not question the validity of Bedminster's regulation of flood plains in the critical zone. The magnitude of Allan-Deane's attack upon the Bedminster Zoning Ordinance makes it certain that if Allan-Deane found anything objectionable about the critical zone as it applies to flood plains, Allan-Deane would have pointed it out. Bedminster's zoning of critical areas is reasonable and required by law. It is in accordance with recognized planning authorities. Allan-Deane cannot make a molehill out of a mountain.

A. ALLAN-DEANE'S ATTACK IS BASED UPON OLD LAW AND THE SUPERCEDED HOLDING OF PARSIPPANY-TROY HILLS.

Plaintiff relies almost exclusively upon the language and holding of Morris County Land Co. v. Parsippany-Troy Hills, 40 N.J. 539 (1963).* That reliance is not well-founded. Parsippany-Troy Hills has been severely limited if not overruled sub rosa by the relatively recent flurry of cases stressing the importance of environmental protection. See, e.g., Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority, 68 N.J. 451 (1975) reversed on other grounds sub. nom., City of Philadelphia v. New Jersey, 98 S. Ct. 2531 (1978). In Hackensack Meadowlands the challenged regulations restricted the use of solid waste land fills for environmental reasons. The New Jersey Supreme Court emphatically espoused the new critical importance to be given to environmental protection. The United States Supreme Court did not reverse that holding. The case was reversed not because of the scope, basis or severity of the use restriction but because it operated to discriminate against interstate commerce. 98 S.Ct. 2531. It was within the police power to regulate the land use for environmental purposes so long as there was no discrimination against interstate commerce.

* Plaintiff also relies upon Odabash v. Mayor and Council of Dumont, 65 N.J. 115 (1974). Odabash bears no relationship to the instant case. Its holding is limited to a situation where a small is land of land otherwise identical to the adjacent parcels is rezoned to a more restricted use than those parcels surrounding it. The court directed that a variance be granted.

The holding in Parsippany-Troy Hills was specifically and strictly limited by the New Jersey Supreme Court in AMG Associates v. Township of Springfield, 65 N.J. 101 (1974). The plaintiff in AMG Associates owned four contiguous lots. Under the zoning ordinance the front sections of two of the lots were zoned for business uses, while the smaller rear portions of the lots were zoned for residential uses. These residential areas were too small to allow the plaintiff to construct a home legally. The court held that the ordinance was unconstitutional as applied to the plaintiff because it amounted to a taking without compensation. In AMG Associates, Justice Hall, the author of Parsippany-Troy Hills, distinguished Parsippany-Troy Hills as he limited its holding:

> It is to be emphasized that we deal in this case only with the split lot situation where there is a deprivation of all practical use of the smaller portion thereof. The approach to the taking problem, and the result, may be different where vital ecological and environmental considerations of recent cognizance have brought about rather drastic land use restriction in furtherance of a policy designed to protect important public interests wide in scope and territory, as for example, the coastal wetlands act. N.J.S.A. 13:9A-1 et seq., and various kinds of flood plain use regulation. Cases arising in such a context may properly call for a reexamination of some of the statements 10 years ago in the largely locally limited Morris County Land case, supra (40 N.J. 539). See generally, Bosselman, et al., The Taking Issue (Council on Environmental Quality, 1973). 65 N.J. at 112 n. 4. (Emphasis added.)

Justice Hall here deviated from the subject of the case under consideration to pointedly acknowledge the recent revolutionary growth in environmental awareness and its interaction with land use regulation. Parsippany-Troy Hills is now sixteen years old in a field of law and knowledge that has largely developed in the last eight years. Its death knell has sounded. As Justice Hall wrote, it must be considered to be severely limited if not entirely superseded.*

The demise of Parsippany-Troy Hills is evident when it is considered in light of the Municipal Land Use Law, 40:55D-1, et seq., Hackensack Meadowlands, supra, American Dredging Co. v. New Jersey, 161 N.J. Super 504 (Ch. 1978), Just v. Marinette County, 56 Wis. 2d 7, 201 N.W. 2d 761 (S. Ct. 1972) and other recent law. There has been enormous growth in environmental awareness and knowledge in the past few years. This growth has had great impact in our law and in our thinking. See e.g.Joseph L. Sax, "Takings, Private Property and Public Rights," 81 Yale Law Journal, 49, 157-158, discussed infra.

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* Plaintiff attempts to undermine the language of AMG Associates by claiming that it limits its approval of environmental constraints to those authorized by the Coastal Wetlands Act. That is a misrepresentation. Plaintiff ignores the language cited above which lists the Coastal Wetlands Act and "various kinds of flood plan use regulation" as examples of valid environmentally based land use regulation. Plaintiff goes on to cite at length a law review article which deals only with broad development restrictions of the entire otherwise developable watershed area in contrast to particular restrictions of a critical zone. Bedminster does not severely restrict use of the entire watershed area.

To really appreciate how wrong Allan-Deane is, one must first examine the state of the law today.

B. ENVIRONMENTAL ZONING IS ABSOLUTELY REQUIRED

1. The Municipal Land Use Law

The Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq., is the source of a municipality's power to zone. Any zoning must be done in accordance with the purposes and guidelines set forth in that law. Those purposes in pertinent part are:

* * *

c. To provide adequate light, air and open space;

* * *

e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;

* * *

g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;

* * *

j. To promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through improper use of land.

N.J.S.A. 40:55D-2

The significance of the Municipal Land Use Law's repeated emphasis of environmental protection should not be underestimated. Environmental protection was not recognized as a purpose of zoning in the

statute which the Municipal Land Use Law repealed and replaced. N.J.S.A. 40:55-1 et seq.

The physical characteristics of a township's land should be described in the land use plan element of the master plan, and the ordinance must be substantially consistent with the land use plan element. N.J.S.A. 40:55D-62(a).

The land use element of a master plan must take into account

> natural conditions, including, but not necessarily limited to, topography, soil conditions, water supply, drainage, floodplain areas, marshes, and woodlands.

The master plan must also include

> a conservation plan element providing for the preservation, conservation, and utilization of natural resources, including, to the extent appropriate, open space, water, forests, soil, marshes, wetlands, harbors, rivers and other waters, fisheries, wildlife and other natural resources.
>
> N.J.S.A. 40:55D-286(2),(8)

The aim of the Municipal Land Use Law and the regulation which it empowers is carefully planned land use. Planning and zoning are the determination of where different kinds of land use should be permitted. There is no opportunity for planning if any and every kind of land use is to be permitted wherever a property owner desires and wherever engineering technology makes it possible. Housing and places of employment can be built on a wide variety of locations but important natural features or critical zones must be respected where they are.

Environmental concerns cannot be treated lightly in planning decisions. The land use pressures in New Jersey, the

most densely populated state, are intense. Some balance must be maintained between land devoted to jobs, to housing, to recreational and open space, and to the maintenance of necessary life support systems such as the production of food, the public water supply, and the disposal of waste, including sewerage. There are great profits to be reaped by land developers. This motivates the developers to forcefully seek zoning for large development to be located on whatever land the developer owns in that township. As pressure builds up for development, there must be a corresponding increase in pressure in the other areas to maintain the balance. Our environment is not indestructible.

> What the sages once said is now what the nature of the planet exposes. Its fragile mechanisms cannot stand too much pressure. Violent misuse of its life-support system -- in the great cities, in the fields and farms -- destroys the life of rivers and soils and undermines the integrity of human existence. Violent consumption of its resources will leave nothing to consume.

Barbara Ward in "The Home of Man," p. 293, W. W. Norton, N.Y. 1976.

As was stated by the Governor's Commission to Evaluate the Capital Needs of New Jersey in its Research Report of April 1975 at p. 19:

> Land is our most precious natural resource, yet in New Jersey it has often been wasted, ignored, and ruined. To many outsiders, New Jersey is well known for the total abuse of its land. In fact, it is often cited as a perfect laboratory in which social scientists can study what ought not to be done, and where one can see the price that mankind has paid for its misuse and neglect of land.
>
> If allowed to continue, the decay will surely spread, along with the urban sprawl, until it is too late. * * *

People leave the cities and move out to the country, bringing along with them many of the problems they wanted to leave behind, and new land is destroyed in the process. If this trend continues, the nightmare of a paved and sewered parking lot stretching from the Atlantic to the Poconos and from the Catskills to Cape May may someday be a reality.

In short, the Municipal Land Use Law has required that zoning must be environmentally based.

2. New Jersey Case and Statute Law

The change in judicial attitude over the span of two decades is as dramatic as the change the Municipal Land Use Law initiated and may be observed by comparing Parsippany-Troy Hills with more recent cases such as Hackensack Meadowlands.*

In Parsippany-Troy Hills the plaintiff owned swampland which it desired to fill with unusable material it culled from its sand and gravel pit operations on adjoining high land located in a different municipality. The swampland was zoned within the Meadows Development Zone because of its high water table and marshy nature. Some of the uses permitted in the Meadows Development Zone were: agriculture, raising of aquatic plants, fish and fish food, commercial greenhouses, wildlife sanctuaries, hunting and fishing preserves, recreation if operated by a governmental body, transmitting stations and antenna towers and township sewage treatment plants and water supply facilities. The Court held that most of the permitted uses were not possible without filling which was highly restricted. The Court held that the environmental characteristics of the swamp could not support the zoning and that therefore, there was a taking.

Parsippany-Troy Hills was decided thirteen years before the Municipal Land Use Law required and empowered environmental zoning. The Municipal Land Use Law significantly

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* See also N.J. Sports & Exposition Authority v. McCrane, 61 N.J. 1, 62 (1972) per Hall, J.; Sands Point Harbor Inc. v. Sullivan 136 N.J. Super. 436 (A.D. 1975).

undermines the holding of Parsippany-Troy Hills as it incorporates the environmental awareness which has evolved. This revolution in land use was repeatedly foreshadowed.

The New Jersey Supreme Court in Hackensack Meadowlands Development Commission, supra, speaking unanimously through Justice Mountain, said at 68 N.J. 473:

> The Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid, and indeed primary, objective of the police power. Huron Portland Cement Co. v. Detroit 362 U.S. 440, 442, 4 L.Ed. 2d 852, 855 (1960). Today it cannot possibly be questioned that the preservation of the environment, and the protection of ecological values are, without more, sufficient to warrant an exercise of this power. See, for example, Adams v. Shannon, 7 Cal. App. 3d 427, 432, 86 Cal. Rptr. 641, 644 (Ct. App. 1970); Garton, Ecology and the Police Power, 16 S.D.L. Rev. 26 (1971).

And at 68 N.J. 476:

> We know too and are constantly becoming more acutely aware that the environmental resources as well as ecological and human values that have become so endangered upon this 'plundered planet,' insistently demand every reasonable protection that can possibly be recruited.

Indeed, in a brief filed in the initial trial of this case on behalf of the Commissioner of Environmental Protection, amicus curiae, the Attorney General contended:

> * * * any zoning ordinance that is not firmly rooted in local and regional environmental considerations does not promote the general welfare and is arbitrary.

The Attorney General even discounted the significance of the intersection of Interstates 78 and 287 in Bedminster Township:

> The course of development and proper land use planning in a region should not depend wholly, or even substantially, upon such factors as

> the chance crossing of two major highways built without consideration of the environmental constraints of the surrounding area.

The Court in Madison Township recognized that the environmental characteristics of a Municipality's vacant land may determine its zoning. 72 N.J. 481, 544. Even where the Court directed the issuance of a building permit to the plaintiff, that relief was contingent upon a determination that the specific land was environmentally suited for the desired densities. 72 N.J. 481, 551.

Parsippany-Troy Hills has not survived the onslaught of environmental law. In 1971, Parsippany-Troy Hills was seriously questioned. In his article "Takings, Private Property and Public Rights," 81 Yale Law Journal 49 (1971) Professor Joseph L. Sax, a highly respected authority in this field, notes the evolution of his thinking and the law in his evaluation of Parsippany-Troy Hills. He concedes error in his 1964 conclusion that the land use restriction in that case was a taking and indistinguishable from a situation where the township purchased title. He goes on to reason at pp. 157-158:

> The land company in the Parsippany-Troy Hills case ought to have no more right, as such, to fill and develop its marshy land than any private landowner has to collect the water draining over his land in a diffuse fashion, and to dump it in concentrated form on the owner below. The regulation should not be viewed as a governmental acquisition. To be sure, the public benefits from the restriction imposed, but the beneficiary class threatened by the proposed development need not be viewed as "taking" something they did not previously have by right. Rather, whether the compelling owners are a small concentrated group of landowners or a diffuse public, they too should be viewed as having rights entitled to compete equally in a benefit analysis of the resource network at issue.

In 1974, the Supreme Court in AMG Associates v. Township of Springfield, supra, gave notice that it was time to re-examine Parsippany-Troy Hills, supra, at p. 134 . That was the beginning of the end for Parsippany-Troy Hills. The Municipal Land Use Law dealt the fatal blow.

New Jersey has adopted the reasoning of Just v. Marinette County, 56 Wis. 2d 7, 201 N.W. 2d 761 (S. Ct. 1972). See e.g., American Dredging Co. v. New Jersey 161 N.J. Super. 504, 511 (Ch. 1978).. In Just v. Marinette County, supra, the court upheld the validity of a shoreland zoning ordinance which prohibited plaintiff from filling in marshland. In overruling a contention that the ordinance virtually confiscated plaintiff's property so as to amount to a taking for which compensation had to be paid, the court stated, at p. 770:

> It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public.

And at p. 771:

> The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right. The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans. [emphasis added].

In upholding the ordinance, the court distinguished between reasonable control of property and the taking of it at 201 N.W. 2d 767:

> Many years ago, Professor Freund stated in his work on the Police Power, sec. 511, at 546-547, 'It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . From this results the difference between the power from eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.' Thus the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm. [citation omitted]. [Accord, Vartelas v. Water Resources Com., 146 Conn. 650, 153 A.2d 822 (1959); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85-86 (1851)].

The court asserted that the purpose of the ordinance was

> not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizens' property. Ibid. at 767-768.

In American Dredging Co. v. New Jersey, the plaintiff challenged a restriction by the Department of Environmental Protection which prohibited the placing of dredged materials on portions of plaintiff's land to protect the natural nature and wildlife of a nearby rehandling basin. The court in American Dredging adopted the reasoning of Just v. Marinette Co. to deny plaintiff's claim that the regulation of its land resulted in a taking.

> It is clear that an owner's use of property may be lessened or diminished by governmental order. And that governmental act does not in every instance require payment.
>
> * * *
>
> The uncontrolled use of land, if unchecked, is harmful to the public interest, and government may within the scope of the police power regulate that use.
>
> 161 N.J. Super at p. 513.

The Superior Court in American Dredging declined to follow Parsippany-Troy Hills as it strained to factually distinguish the outdated Supreme Court opinion it could not overrule. This distinction was based upon whether the challenged restriction was designed to secure a benefit for the public or to prevent harm to the public that would result from a change in the natural character of the land. 161 N.J. 504, 509. It held that there is no taking when land use restriction is to prevent harm to the public. That is the basis of the critical zone regulation which faces the court here.

Plaintiff keys off the language in Parsippany-Troy Hills to claim that zoning which benefits the public interest is a taking. That is absurd. Zoning for private benefit is void. Valid zoning must always promote the general welfare. N.J.S.A. 40:55D-2(a), Mount Laurel 67 N.J. 174, 175.

The Court in American Dredging also adopted the reasoning and holding of Sibson v. State, 336 A.2d 239 N.H. (1975). In Sibson, the Supreme Court of New Hampshire has held that drastic restrictions of the filling of wetlands are valid exercises of the police power and that property owners need not be compensated for the impact of such restrictions on their land.

The court questioned the property owners' assumption that they had the right to develop their land in any way they saw fit. The court held there was no right to compensation.

> . . . The denial of the permit by the board did not depreciate the value of the marshland or cause it to become 'of practically no pecunary value.' Its value was the same after the denial of the permit as before and it remained as it had been for

> milleniums. The referee correctly found that the action of the board denied plaintiffs none of the normal traditional uses of the marshland including wildlife observation, hunting, haying of marshgrass, clam and shell-fish harvesting, and aesthetic purposes. The board has not denied plaintiffs' current uses of their marsh but prevented a major change in the marsh that plaintiffs seek to make for speculative profit . . . 336 A.2d 243.

Other cases throughout the country also hold that zoning for critical environmental areas is valid and that property is not taken where its use is restricted for environmental reasons. See, e.g., Confederacion de la Raza Unida, 32 4 F. Supp. 895 (N. D. Cal. 1971) (ordinance regulating housing density in mountainous and hilly areas upheld against challenge by group wanting to build low-cost, higher density housing in areas); Nattin Realty, Inc. v. Ludewig, 324 N.Y.S. 2d 668 (Supreme Court 1971) (permissable for town to rezone land so it can no longer be used for apartments where expert testimony showed that grave problems of adequate water supply and sewage disposal would arise if apartments were built there); Moviematic Inc. v. Board of County Commissioners, 349 So.2d 667 (Fla. App. 1977) (preservation of the ecological balance of a given area is a valid goal of a zoning ordinance).

Clearly, Parsippany-Troy Hills no longer embodies the test for validity of environmentally based land use restrictions. In the sixteen years since it was written, it has been seriously questioned by courts and commentators. It no longer reflects the current statutory law in New Jersey. It cannot be considered to be controlling here.

The New Jersey Legislature has imposed restrictions on land use in environmentally sensitive areas. See, for example,

PL 1970, c. 272, N.J.S.A. 13:9A-1 et seq. - Coastal Wetlands; PL 1971, c. 417, N.J.S.A. 13:18-1 et seq. - Pinelands Environmental Council; PL 1972, c. 185, N.J.S.A. 58:16A-50, et seq. - Flood Hazard Areas; PL 1973, c. 185, N.J.S.A. 13:19-1 et seq. - Coastal Areas Facility Review Act. It has also authorized municipalities to create Environmental Commissions, having power to recommend "plans and programs for inclusion in a municipal master plan" and "to study and make recommendations concerning open space preservations, water resources management, air pollution control, solid waste management, noise control, soil and landscape protection, environmental appearance, marine resources and protection of flora and fauna." N.J.S.A. 40:56A-1, et seq. State aid for these activities has been authorized. N.J.S.A. 13:1H-1, et seq.

Courts have upheld drastic land use restrictions in order to protect natural environmental features in a variety of situations:

Dune Ordinance. Spiegle v. Beach Haven, 46 N.J. 479, 492 (1966); cert. den. 385 U.S. 831.

Preventing the filling in of wetlands. Dooley v. Town Plan etc. Com'n of Fairfield, 151 Conn. 304, 197 A. 2d 770 (S. Ct. 1964); Zabel v. Tabb, 430 F.2d 199 (5 Cir. 1970), cert. den. 401 U.S. 910; Golden v. Board of Selectmen of Falmouth, 358 Mass. 519, 265 N.E. 2d 573 (S. Ct. Mass. 1970); Potomac Sand & Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241

(C. of A. 1972); Just v. Marinette County, supra; Sibson v. State, supra.

Prohibiting building in floodplains. Turnpike Realty Co. v. Dedham, 284 N.E. 2d 891 (S.Jud. Ct. Mass. 1972); cert. den. 409 U.S. 1108; Turner v. County of Del Norte, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (Cal. App. 1972).

Restricting density of residential development in order to prevent water pollution. Salamar Builders Corp. v. Tuttle, 29 N.Y. 2d 221, 275 N.E. 2d 585, 325 N.Y.S. 2d 933 (C. of A. 1971) (upheld change from 1 acre to 1-1/2 acre lots to reduce number and proximity of septic systems); Nattin Realty, Inc. v. Ludewig, 67 Misc. 2d 828, 324 N.Y.S. 2d 668 (S. Ct. 1971); aff'd without op. 40 A.D. 2d 535, 334 N.Y.S. 2d 483 (A.D. 1972); aff'd 32 N.Y. 2d 681, 296 N.E. 2d 257, 343 N.Y.S. 2d 360 (C. of A. 1973) (upheld rezoning for single family houses after Planning Board approval of 342 garden apartments); Walsh v. Spadaccia, 73 Misc. 2d 866, 343 N.Y.S. 2d 45 (S. Ct. 1973) (reversed approval of site plan for apartment houses for failure to consider effect upon water quality of nearby Lake Mohegan); Zygmont v. Planning & Zoning Com'n of Greenwich, 152 Conn. 550, 210 A. 2d 172 (S. Ct. Err. 1965) (affirmed denial of zoning change from 4 acres to

1/2 acre lots in area not served by water or sewer lines); Wilson v. Town of Sherborn, 326 N.E. 2d 922 (Mass. App. 1975) (Upheld 2 acre lots where individual wells and septic systems were necessary).

Enacting a moratorium on development pending preparation of zoning regulations designed to protect the environment. Cappture Realty Corp. v. Board of Adjustment, Elmwood Park, 133 N.J. Super. 216 A.D. 1975); State v. Superior Court of Orange County, 12 Cal. 3d 237, 115 Cal. Rptr. 497, 524 P. 2d 1281 (S. Ct. 1974); CEEED v. California Coastal Zone Conservation Com'n., 118 Cal. Rptr. 315, 43 Cal. App. 3rd 306 (Cal. App. 1974); cf. Silva v. Romney, 473 F.2d 287 (1 Cir. 1973).

* * *

The mandate is clear. Bedminster zoned land use in accordance with the current authority of the Municipal Land Use Law, Mount Laurel and Madison and the balance of the body of zoning law. The law has changed substantially and required a new evaluation of Bedminster's land use plan. Bedminster did not volunteer to zone land for uses for which it was environmentally suited. Bedminster had to. Any zoning not consistent with the physical, environmental characteristics of the land would be void as not promoting the general welfare. N.J.S.A. 40: 55D-2(a), Mount Laurel, 67 N.J. 174, 175,. 186.

C. BEDMINSTER'S REGULATIONS OF CRITICAL AREAS ARE REASONABLE AND SUPPORTED BY THE EVIDENCE

Bedminster was empowered and required to evaluate environmental factors in order to zone for appropriate uses on appropriate land. It did so. It recognized that those areas within a critical area district as defined in Article 8 of the Bedminster Township Zoning Ordinance by their nature require careful regulation. The Ordinance states the purpose of such regulation:

> Development in Critical Areas, those areas delineated by the New Jersey Department of Environmental Protection or by the Department of Housing and Urban Development, as floodway areas and those areas having slopes 15% or greater, increase the risk of flooding and erosion both on and off-site. Therefore, development in these areas must be minimized and carefully regulated to protect the public safety and welfare. (P-21, §8.1.)

Those are clearly legitimate purposes for land use regulation.

The uses and structures allowed in critical districts are:

> agricultural uses; sod farms; floriculture, horticulture, silviculture and forestry supervised by the State; any other uses found eligible by the Farmland Assessment Act of 1964 or succeeding legislation; golf courses, pervious tennis courts and other open air sports not affecting flood storage or water absorption; pervious parking areas for vehicles; any public uses approved by the State Department of Environmental Protection. (P-21, §§8.21-8.27.)

These uses pertain to both floodway areas and critical slopes.

In this regulation Bedminster is acknowledging the well-recognized limitations for development of critical areas. In the State Development Guide Plan (P-13) it was noted at p.21:

> Unencumbered by development, steeply sloped areas will continue to retard storm water runoff and thus reduce the probability of floods.

Richard A. Ginman, the director of the Division of State and Regional Planning, testified that land with a slope of greater than 12 per cent is generally recognized in the technical field of planning to be environmentally critical such that it should be excluded from future development and growth. (T 54-15-23, September 18, 1978). Indeed, critical slopes in excess of 12 per cent are excluded from the definition of vacant developable land for purposes of the allocations made in the State Development Guide Plan (P-13), and the Revised Statewide Housing Allocation Report (P-12) (T 54-9, September 18, 1978). Mr. Ginman testified that this land with a slope in excess of 12 per cent was excluded because of its environmentally critical nature and not because development would be impossible with current engineering technology. There is no reason in New Jersey at this time to develop environmentally critical land, since ample supplies of land appropriate for development are still available. (T 56-5, September 18, 1978)

In Urban League of Essex County et. al. v. Township of Mahwah et. al. the court excluded the township's 1200 acres

with a slope in excess of 15 per cent from the acreage held to be developable land. The court also excluded 8000 acres in flood plain areas from the developable land. The court recognized no dispute about those exclusions. (Oral Opinion, March 8, 1979, 6-3, 6-9, 6-14) Land with a slope in excess of 15 per cent was conclusively presumed to be not practicably developable.

The issue for determination is not so much whether critical slope land can be developed, but whether it should be developed. William E. Roach, Jr., the Somerset County Planning Director, testified that development of steep slopes is improper use of that land:

> You have to construct streets. You have to blast out, however, you do it, it's very destructive to the character of the land.
>
> * * *
>
> It is just no place to put development. (T 185-24 to 186-9, October 30, 1978)

Charles Agle, the planner for Bedminster, also testified that the critical area was unsuited for development. (T 114, January 8, 1979).

Even plaintiff's witness, Dr. John C. F. Tedrow, a soil morphologist, testified that it would be critical from the standpoint of soils and conservation that there be as much protection as possible of the critical area steep slopes. (T 168-20 to 169-24, September 19, 1978)

> I would like to see nearly all of it, the bulk of it, as much as possible, retained

> with forest cover. I think this is a wise use and I think unless there is a wise use, I think we can have disaster down below in this area.

In its Regional Development Guide (D-51) of March, 1978, the Tri-State Regional Planning Commission recognized

> that it is necessary to conserve what has been built and respect and protect the natural environs. Likewise, much of our past urban growth was based on using land and labor extravagantly, without adequate thought of tomorrow. (D-51 at p. 1)

The Tri-State Regional Planning Commission recommended careful conservation of the region's critical lands. The Commission defined critical lands as:

> inventoried vacant lands where environmental characteristics make it desirable either to prevent development or provide special safeguards if development must occur. (Emphasis added.) (D-51 at p. 15)

The implication is clear that development of critical lands with special safeguards should be allowed only under compelling circumstances. There are no such compelling circumstances in Bedminster.

The Commission described the undesirable effects of developing several types of critical lands. The undesirable effects of the development of "lands unsuitable for construction by reason of slope, excessive rockiness, thin soil cover, poorly drained soil and flooding" are:

> Construction and maintenance will be costly, nuisances will be created, flooding, runoff, erosion and sedimentation will be excessive unless expensive measures are taken, and whole stream systems will be altered. (D-51 at p. 15, 17)

The opinions put forth by these experts and confirmed in the authoritative publications support the Township's delineation of the critical area zone. These environmental factors are within the purview of health, safety and general welfare which the Township is mandated to protect through its zoning. Mount Laurel, 67 N.J. 186

By its very nature, a critical slope is not suited for many uses. Bedminster has reasonably regulated this critical area.* Controlled forestry is a legitimate use for this critical slope. Plaintiff's witness estimated that 600,000 board feet of timbers could be harvested. (T 64-5, September 25, 1978). Allan-Deane has harvested some of the trees within its critical zone, (T 60-12, September 25, 1978) and received a record high price for it. (T64-13, September 25, 1978). The rocky soil is "excellent for growing wood". (T 72-25, September 25, 1978).

Plaintiff's tract is zoned for those different uses for which it is physically suited. As plaintiff's land tract varies, so must the zoning vary. As discussed above, the the physical characteristics of the land in interaction with

* Plaintiff contends that Bedminster's critical zone must be voided as unreasonable because the boundaries as shown on the zoning map encompass lands of a slope less than 15 per cent. This is another example of plaintiff's distortion of the fact of this case. Bedminster's zoning map must conform to the ordinance. Plaintiff has never submitted a survey to Bedminster. If a survey substantiates plaintiff's representations about the boundaries of the critical zone, Bedminster must amend the zoning map accordingly.

the needs of the municipality and region determine the appropriate zoning. It is the critical nature of the steeply sloped areas within plaintiff's tract which restricts the uses for which it is appropriate. Bedminster's Zoning Ordinance did not build a mountain on Allan-Deane's land. The ordinance must recognize the critical nature of that land as it exists and protect it from degradation.

D. BEDMINSTER'S REGULATIONS OF CRITICAL AREAS DO NOT CONSTITUTE A TAKING

Plaintiff contends that the critical area zone as applied to its tract of land constitutes a taking. Plaintiff's argument is based primarily upon a supposed unreasonable regulation of use, discussed supra, and a claimed diminution in the value of the property as result of the critical zone.

The validity of zoning is not determined solely on the basis of the economics of the market place. Whereas N.J.S.A. 40:55-32 provided that zoning regulations were to be made "with a view of conserving the value of property", that statute has been repealed. N.J.S.A. 40:55D-80. There is no corresponding language in the Municipal Land Use Law, N.J.S.A. 40:55D-2. Conservation of property value is no longer a recognized purpose of zoning. The Municipal Land Use Law focuses on zoning to meet local and regional needs with due weight to be given to environmental factors.

Plaintiff did not prove the drastic reduction in value which it claims should support a finding of confiscation. The facts do not support a claim of confiscation. Plaintiff's witness, Mr. Marvin B. Davidson, a real estate appraiser, was unable to give any reliable estimate of any change in value of the critical zone land resulting from the Bedminster Zoning Ordinance. Indeed,

it is obvious from a review of the transcript that Mr. Davidson's attempted appraisal was so ill-founded as to have no reliability at all. Mr. Davidson took his flawed data base* and calculated unrelated values which could not be compared or evaluated. Mr. Davidson did not consider the changes to the value of the tract as a whole as effected by the 1978 Zoning Ordinance. Mr. Davidson's exercise also did not take into account the fact that the critical slope area could not have been developed under the prior ordinance either. Tracts must be considered as a whole. American Dredging Co. v. New Jersey, 161 N.J. Super. 504 (Ch. 1978).

Mr. Davidson appraised only the value of a building permit for multifamily construction under the cluster provision of an ordinance which this court invalidated ($7,500 per unit X number of units per acre). He then compared this result to the residual value of steep slope lands ($1,000 per acre), and subtracted. He neglected to compare the value of the whole tract before and after.

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* Mr. Davidson's appraisal was based upon sales of land which he treated as comparable, but none of that land was in Bedminster and sewer and water service were easily available to those parcels. (T57-2, September 20, 1978.) Although Mr. Davidson recognized that Allan-Deane's land does not have access to sewer and water service and the negative impact that has on the value of the land, he made no adjustment to his appraisal. (T.61-12, September 20, 1978.) Mr. Davidson did not use the available data for sales of land in Bedminster. (T68-20, September 20, 1978.) There was no testimony that any of the land Mr. Davidson considered to be comparable in value had similar physical characteristics to that of Allan-Deane.

The undeniable fact is that the critical zone presents a great many obstacles to development which it is beyond the power of a zoning ordinance to eliminate. Plaintiffs concede the difficulties of developing their property. The assumption implicit in plaintiffs' argument is that the Township must zone their lands in such a way as to guarantee them a profit. The mere fact that plaintiffs may have made an unwise speculative purchase of land which is inherently difficult to develop furnishes no reason to bail them out.

It is firmly established in New Jersey and elsewhere that zoning regulations are not invalid merely because they do not permit a more profitable use of the property. See, e.g., Guaclides v. Englewood Cliffs, 11 N.J. Super. 405, 414 (App. Div. 1951); Cobble Close Farm v. Bd. of Adj. Middletown, 10 N.J. 442, 452 (1952); Rockaway Estates v. Rockaway Township, 38 N.J. Super. 468, 478 (App. Div. 1956); Clary v. Borough of Eatontown, 41 N.J. Super. 47, 65 (App. Div. 1956). In Beirn v. Morris, 14 N.J. 529 (1954), Justice Heher, speaking for the Supreme Court held at 14 N.J. 534:

> The landowners acquired the property fully cognizant of the use restrictions, avowedly to make a more profitable use of the lands than conformance to the use regulation would permit, if that could be accomplished - - such as would serve their own private business interests at the time; and the profit motive is not an adequate ground for a variance.

In Rockaway Estates v. Rockaway Township, supra, Judge Francis, speaking for the Appellate Division, stated at 38 N.J. Super. 478:

> The core of plaintiff's opposition is really that the lot size requirement prevents the most profitable use of his land. But the welfare of the community for all time cannot be subordinated to the profit motive of an individual landowner.

In Clary v. Borough of Eatontown, supra, Judge Conford said for the Appellate Division at 41 N.J. Super. 65:

> It is not sufficient for the plaintiff to show that it would be more profitable for him to use his property in a manner prohibited by the ordinance; he must show an abuse of discretion resulting in an unreasonable exercise of the zoning power.

See also: Mount Laurel, 67 N.J. at 191.

That the profit expectations of voracious developers should not be allowed to undermine protective land use regulation was emphasized by "The Use of Land: A Citizens' Policy Guide to Urban Growth", Thomas Y. Crowell Company, 1973, a Task Force Report sponsored by the Rockefeller Brothers Fund, at p. 124:

> Forceful policy measures supporting protective regulations are the key to modifying the profit expectations that now so fundamentally influence the thinking not only of landowners but of legislators and judges as well, for it is expectations of profit that ultimately break down protective regulations. (Ironically, the very absence of such measures in the past encourages profit expectations for the future, even for land whose natural physical characteristics make it more suitable for open space than for development.) Owners expect less of land that physically cannot be developed (quicksand, for example). What is needed is a comparable modification of expectations for land that should not be developed.

The Task Force urged that development should be restricted where such developments would be dangerous or where it would destroy the natural character of the land.

> Land whose development would be hazardous may be the place to begin. Surely it should be possible to develop a national consensus that profits from the residential development of a floodway are the moral equivalent of profits from selling tainted meat. Beyond this, though more slowly, it should be possible to develop an equivalent consensus with respect to land where development would damage valuable and irreplaceable resources or significantly interfere with natural processes.

It recognized that steep slopes and wetlands require special regulation of development.

> The owner of steep slopes or important wetlands must come to accept these features as a speculative 'bad break' much as he resigns himself to the decision to build a proposed expressway interchange 15 miles away instead of next door. The speculative buyer must be persuaded to avoid important open spaces by the knowledge that development permission will be especially hard, if not impossible to obtain.

The report urged local adoption of open space regulations:

> How are these modifications in expectations to be created? Local regulations have not created them in the past. Speculative expectations are so widely shared that the regulations, not the expectations, have tended to give way. Nevertheless, we believe that more widespread adoption of local open space for such regulations, the more commonplace they will become, and the more widespread their acceptance by all concerned.

The traditional doctrine that excessive land use regulation amounts to a "taking" for which compensation must be made has been seriously questioned; see "Zoning - Areas of Critical Environmental Concern", by James C. Pitney, Jr., 65 N.J. State Bar Journal, Nov. 1973, p. 34.

The drastic diminution of property value by the valid exercise of the police power does not constitute a taking of property for which compensation must be paid. State v. North Jersey District Water Supply Commission, 127 N.J. Super. 251, (App. Div. 1974). Bayshore Sewerage Co. v. Dept. of Environmental Protection, 122 N.J. Super. 184 (Ch. Div. 1973).

In Lom-Ran v. Dept. of Environmental Protection, 163 N.J. Super. 376 (A.D. 1978) the plaintiff challenged the application of a sewer connection ban to its property. The Appellate Division held that there was no taking even though plaintiff's land was rendered practically worthless by the ban and plaintiff was incurring great expense. It wrote at p. 385:

> It is settled law that a proper exercise of the police power is without the limitations and restrictions of the constitutional provisions applying to the exercize of eminent domain.

The court held that this severe restriction which caused plaintiff great expense was a valid exercise of the police power even though to exempt the property from the sewer ban would have "infinitesimal impact."

In the leading case of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the validity of a zoning ordinance was upheld even though its effect was to reduce the value of plaintiff's property from about $680,000 to $170,000.

In Hadachek v. Los Angeles, 239 U.S. 394 (1915), the validity of an ordinance forbidding the operation of a brick yard was upheld even though plaintiff had bought the property and developed the business before its land had been annexed by the City and the value of the property was diminished from $800,000 to $60,000.

In Goldblatt vs. Hempstead, 369 U.S. 590 (1962), an ordinance regulating the operation of defendants' sand and gravel pit was held valid even though defendants could not, as a practical matter, comply with its requirements. The defendant's property was assessed at $66,000, represented a capital investment of $241,000 and grossed $200,000 per year. (These figures come from the opinion of the New York Court of Appeals reported at 9 N.Y.2d 101, 172 N.E.2d 562.)

In Turnpike Realty Company v. Town of Dedham, Mass., 284 N.E.2d 891 (S.Jud.Ct. 1972), cert. den. 409 U.S. 1108, the court upheld the validity of a zoning ordinance amendment which was found to have brought about a substantial diminution in value of plaintiff's property. The evidence indicated that the effect of the amendment was to reduce the value of plaintiff's property from $431,000 to $53,000.

In Consolidated Rock Products Co. v. City of Los Angeles, 20 Cal. Rptr. 638, 370 P.2d 342, (S.Ct. 1962); app. dism. 371 U.S. 36, the court upheld the validity of a zoning ordinance. Plaintiffs' property was located in a water course known as Tujunga Wash and upstream from the Hansen Dam. As the court stated at 20 Cal. Rptr. 640:

> Plaintiffs' property--348 acres--is zoned for agricultural and residential use; and rock, sand and gravel operations are prohibited thereon.* * *
>
> The trial court found that the subject property has great value if used for rock, sand and gravel excavation but 'no appreciable economic value' for any other purpose, and in view of the 'continuing flood hazard and the nature of the soil,' any suggestion that the property has economic value for any other use, including those uses for which it was zoned, 'is preposterous.'

The court further stated at p. 647:

> There was testimony before the legislative body that the property could be successfully devoted to certain other uses, i.e., for stabling horses, cattle feeding and grazing, chicken raising, dog kennels, fish hatcheries, golf courses, certain types of horti-

culture, and recreation. It must be conceded that in relation to its value for the extraction of rock, sand and gravel the value of the property for any of the described uses is relatively small if not minimal, and that as to a considerable part of its seasonal flooding might prevent its continuous use for any purpose.

The court concluded, at p. 649:

> We are satisfied that the zoning law is consistent with the obvious legislative policy in municipal planning and development of this area in furtherance of the best interests and general welfare of the community as a whole: To confine rock and gravel operations in the Tujunga Wash to the area downstream from the Hansen Dam, and to encourage and protect the welfare and growth of the residential communities of Sunland and Tujunga by preventing the extension of rock and gravel operations upstream from the dam.

South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646 (1st Cir.1974), involved the validity of the Environmental Protection Agency's plan to improve air quality in the Boston area by reducing and regulating the number of on-street and off-street parking spaces to discourage the use of motor vehicles. In holding that there had been no taking without compensation, the court held, at p. 678:

> The airport petitioners and all parking operators in the Boston core area seek to convince us that the regulations constitute a taking without just compensation. The regulations as applied to Logan exterminate some 1,100 planned-upon spaces and arguably confiscate the revenues that otherwise would have accrued from them. The 40 percent vacancy rate rule in the Boston core area compels building space to stand idle; the situation is arguably most disadvantageous to garage owners, for their space is least likely to have a reasonable alternative use. The garage owners may argue that it is as if the Government had taken title to 40 percent of their spaces; it would matter little if thereafter the Government kept the space idle, devoted it to some other non-remunerative end, or found some other use for it.
>
> However, the Government has not taken title to the spaces, and the decision about alternative uses of the space has been left to the owner. The

> takings clause is ordinarily not offended by regulation of uses, even though the regulation may severely or even drastically affect the value of the land or real property. If the highest-valued use of the property is forbidden by regulations of general applicability, no taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner. Goldblatt v. Town of Hempstead, 369 U.S. 590, 592, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); Turnpike Realty Co. v. Town of Dedham, 1972 Mass. Adv. Sh. 1303, 284 N.E.2d 891, cert. denied, 409 U. S. 1108, 93 S.Ct. 908, 34 L. Ed.2d 689 (1973).
>
> Three situations must be distinguished. First, a particular use of a parcel of property may be regulated or forbidden. Second, all uses of a parcel may be forbidden. Third, a right to use or burden property in a particular and permitted way may be transferred from the original owner to another person, or to a governmental body. Only the second and the third situations are thought of as takings today. * * * Our situation fits within the boundaries of the first type.

In American Dredging Co. the plaintiff introduced evidence that the order which restricted the use of its land for the deposit of dredge spoils drastically reduced the value of that land from $10,000 per acre to $1,000 per acre. The court did not consider that 90 percent diminution in value to show a taking, citing Just v. Marinette County, where it was held that a diminution in value did not determine whether there was a taking.

> The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling. * * * 201 N.W.2d 761 at p. 771.

Indeed, where the claimed diminution in value is based upon value the land would have if its essential character were changed, it is of little impact. As the court noted at p. 768:

> An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.

The court in American Dredging stressed that the entire tract owned by the plaintiff must be considered to evaluate the overall effect of a land use restriction.

> The court must look at both the character of the action and the nature and extent of the interference with the rights in the parcel as a whole. 161 N.J. Super. 504, 514.

The court held that the use restrictions validly applied only to those portions of plaintiff's land where restriction was necessary to adequately protect the rehandling basin.

The reasonable restriction of the critical slope area on plaintiff's tract of land does not interfere with its ability to use the balance of the tract for its appropriate uses. Bedminster designated only those portions of plaintiff's land in excess of 15 percent slope to be within the critical slope area. Plaintiff should not have bought mountainous areas that are naturally undevelopable if it really wanted a cornfield that could easily have been built into one homogeneous development.

E. NO TRANSFER DEVELOPMENT CREDIT SHOULD BE GIVEN TO ALLAN-DEANE

1. In the absence of a taking Allan-Deane is not entitled to compensation.

Allan-Deane contends that it is entitled to increased development density on the flat areas of its tract to compensate it for the limitations on its use of the steep slope. Transfer development rights would be a novel and totally inappropriate form of compensation. Compensation is only required where there is a taking. There has been no taking. Therefore, Allan-Deane is not entitled to transfer development rights as compensation. Even if there was a taking, awarding transfer development rights would not be appropriate. Allan-Deane is only attempting to avoid providing adequate and usable open space for its developments as required by good planning principles.

2. This critical zone is not usable open space for a planned development.

Allan-Deane's approach is to demand transfer development credit because the steep slope area satisfies the open space requirements for its planned development. To adopt that as a general land use principle would be outrageous. Under that reasoning, a developer owning Pike's Peak would be entitled to build the World Trade Center at the bottom. While the Allan-Deane mountain is not as dramatic as Pike's Peak, its slope is equally as unusable for open space purposes in a planned

development.

A planned unit development is by definition a planned development with different types of buildings connected and integrated into a whole by usable open space. Open space is of critical importance to the success of a planned development. This was recognized by the Department of Community Affairs in its Guide for Residential Design Review, authored by Mr. Lindbloom, the plaintiff's expert:

> Well designed open space is an important factor in providing quality residential environments of lasting value. (D-39 at p. 133).

In this case Allan-Deane plans to place the highest density housing next to the steep slope. (T 22-4, October 3, 1978).

In some instances it might be true that critical areas could be usable open space. For example, a flood plain area might be usable for play, tennis courts, golf courses, or parking lots. In that situation where the critical area can be used to satisfy some of the needs of the planned development, it might be appropriate to give some transfer credit for that usable space. This could be determined only by a case by case evaluation of the particular critical zone area. Any such credit would necessarily be minimal because of the critical nature of the land.

A Guide for Residential Design Review (D-39) suggested that as a general rule steep slopes in excess of 20 per cent should be excluded for density computations. (D-39 at p. 57). Further, because such land is not suitable for development and cannot be considered to be usable open space, no more than two-fifths of the common open space should ever consist of steep

slope or floodway. (D-39, at 57.) The purpose is to ensure that the residents will have necessary recreation without overcrowding. (D-39 at p.58)

Bedminster in its Conservation Element of its Master Plan anticipates the situation where critical area contributes to usable open space. It suggests consideration of:

> possible inclusion of minimal credit in the gross FAR Ratio calculations for the usable (non-critical) land on the same parcel or one immediately adjacent to the critical parcel. (p-54) (Emphasis added.)

Allan-Deane characterized this language as a mandate that Bedminster must always give such credit. (P6-82) That is a flagrant misinterpretation of the language.* Any credit would be appropriate only where the critical land makes a significant contribution for open space and recreation. Allan-Deane's steeply sloped land does not do so. Here, Allan-Deane wants to build on every inch of its flat land holdings at the bottom and top of the mountain and count the steep slope between those densely developed areas as its required open space.

William E. Roach, the Somerset County Planner, testified that he would favor some availability of transfer development credit depending upon the extent and nature of

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*Plaintiff strains to construe Bedminster's Zoning Ordinance to be inconsistent with the Land Use Plan Element of its Master Plan. They are clearly consistent. Plaintiff's convoluted analysis of the Conservation Element and its effect is incorrect. The Conservation Element is separate and distinct in the Master Plan and in the Municipal Land Use Law. N.J.S.A. 40:55D28b.(2),(8).

the critical area. (T 60-8, October 30, 1978). Here, because of the substantial nature of the steep slope and its relationship to the remainder of Allan-Deane's land, Mr. Roach testified that any transfer development credit would be inappropriate. (T 156-1, October 30, 1978).

The steeply sloped land owned by Allan-Deane cannot satisfy the open space needs of a planned development. In many areas the slope exceeds 25 percent. (T 182-11, March 19, 1979.) The critical land is an effective barrier between the development at the base and that at the top, not green space holding the development together as claimed by Mr. Rahenkamp. (T 142-24, March 29, 1979).

Mr. Rahenkamp planned bicycle and pedestrian paths up the mountain to connect the developed areas. (T 140-3, March 28, 1979). Mr. Rahenkamp's suggested bicycle paths would be a six to eight percent slope "down." (T 140-9, March 28, 1979). The pedestrian paths he testified could be steeper and contain steps. (T 140-12, March 28, 1979).*

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* Mr. Rahenkamp continued:

> It's not improper or impossible to think that someone could go down fairly quickly. (T140-12, March 28, 1979).

Mr. Rahenkamp forgets that going down a mountain is rarely as much of a problem as going up a mountain.

Mr. Rahenkamp did not calculate how long bicycle and pedestrian paths would have to be to span the steep slope at a reasonable grade. (T 140-20, March 28, 1979)

Charles Agle testified that for the steeply sloped land owned by Allan-Deane the only appropriate and probable recreational uses of the land would be rock climbing and an occasional walk. The slope is so steep that:

> its usefulness for walking would be confined to a limited sector of the population. (T 118-19, January 8, 1979.)

Mr. Agle presented testimony supported by the authoritative publications contained in D-86 that the recommended sustained grade for a bicycle path is a maximum of two percent. (T 125-17, T 129-19, January 8, 1979.) In short distances a grade of eight percent may be possible. (T 125-24, January 8, 1979.) This critical slope is so steep that to build a path of an acceptable grade would be inappropriate

> because the distance that that path would have to stretch out going back and forth to get that amount of altitude would be an excessive length. It would be extremely difficult to construct, and it would be extremely expensive. (T 137-21 to 138-1, January 8, 1979.)

A path of that nature would necessarily greatly disrupt the critical land.

Even assuming that a usable path could be built at the recognized maximum grade of two percent, Mr. Agle calculated a path from the top of the mountain to the bottom would be 2.367 miles. (T 130-19, January 8, 1979.) A normal, healthy person would walk that path in a minimum of one hour and twelve

minutes. (T132-9, January 8, 1979.)* At the 2 per cent maximum grade a path from the top of the critical slope to the nearest commercial area at the bottom of the mountain would span 3 1/3 miles. (T 142-8 January 8, 1979.)

Allan-Deane's proposed use of this steeply sloped land as an umbilical cord of green space connecting the lower and upper developments is a sham. Mr. Rahenkamp suggested that senior citizen housing should be placed at the top of the mountain near the pedestrianways so they could walk down to the bottom of the mountain to shop. (T 159-16, March 28, 1979.) It is incredible that senior citizens, who planners say should live in housing without stairs because of their reduced physical abilities, could be expected to walk six and two-third miles up and down a mountain to shop. Indeed, very few people could be expected to use such paths even occasionally. Allan-Deane has two separate developments which require usable open space for each. The steep slope cannot serve those purposes.

Transfer development credit would not always be appropriate even where the critical space is substantially

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* If the path were steeper the amount of time necessary to walk it might be reduced somewhat, although:

> the continuous grade of that amount if [sic] such an amount of lifting work that it would hardly be enjoyable to try to maintain any kind of speed going up the six per cent slope regardless of what age you are or what sex. (T 133-3 to 133-7, January 8, 1979)

usable. The density of the developable land is ultimately determined by the nature of that land. If it is already zoned to the highest density it should reasonably support, the nature of the adjacent land cannot justify increasing that density. Any benefit of use of that adjacent critical land must then be considered to have been contemplated and built into the zoning of the developable land.

Allan-Deane's land is zoned appropriately for those uses and densities which the land can support. The density already allowed on the developable land is related to whether density credit should be given for the unbuildable land. As Mr. Roach testified about Allan-Deane's land:

> Well, I think that by allowing the densities they have in that zone, they have already credited for the remaining land that can't be built on. I don't think that you should impose severe densities in that village area just because there happens to be a steep mountainside adjacent to it. (T 156-5 to 156-10, October 30, 1978)

In short, Allan-Deane is not entitled to any transfer development credit for the steep slopes it owns. There has been no taking so Allan-Deane has no claim for compensation. The steep slopes are not usable open space. To allow Allan-Deane to avoid its open space requirements would leave streets to serve the development's open space needs. There are purposes which open space in a development must serve. This steep slope cannot serve those purposes. What limited value the critical slopes does have as open space has been accounted for in the zoning of the balance of Allan-Deane's land.

CONCLUSION

Bedminster Township has provided for least-cost housing in numbers which adequately satisfy its fair share. Bedminster has done so with ordinances fully in compliance with the Municipal Land Use Law and court-defined standards. Bedminster has zoned consistent with natural limitations and the imperatives of sound regional planning.

The exterior smoothness and sheer volume of plaintiffs' attack must not be allowed to hide the emptiness of their case. Plaintiffs' massive case against Bedminster Township has no substance. It is as overinflated as their site plan, which aims to put a town the size of South Bound Brook on a cornfield and a plateau separated by a steep slope.

We respectfully ask this court to find, consistent with the weight of the evidence, that the Township of Bedminster has complied with this court's orders to rezone to meet the Mt. Laurel and Madison obligations, and end Allan-Deane's quest for the pot of gold at the end of the Mt. Laurel rainbow.

Respectfully submitted,

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