

RULS-AD-1979-140

5/29/1979

- LETTER TO JUDGE FROM FERGUSON (2)
- NOTICE OF MOTION (2)
- AFFIDAVIT OF FERGUSON (4)
- ORDER FOR SUPPLEMENTAL JUDGEMENT (7)
- LETTER FROM HILL TO FERGUSON (3)
- LETTER FROM MALLACH TO HILL (2)

PGS-20

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JUN - 5 1979

Robert E. Gaynor

07102

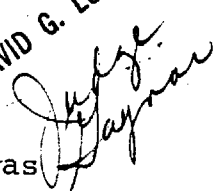
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RULS - AD - 1979 - 140

RECEIVED  
AT CHAMBERS  
MAY 30 1979

HON. DAVID G. LUCAS



May 29, 1979

Hon. David G. Lucas  
Court House  
Somerville, New Jersey 08876

Re: Bernards Township advs. Allan-Deane  
Docket No. L-25645-P.W.

My dear Judge Lucas:

We enclose a copy of a Notice of Motion returnable June 15, 1979 to modify the briefing and trial schedule set forth in the Pretrial Order.

The primary reason for the modification is the Order entered by Judge Leahy in Lorenc v. Bernards Township. Under this Order the Township will be making drastic revisions in what used to be the PRN-6 and PRN-8 zone. Under Judge Leahy's prior Orders in the Lorenc case, the Bernards zoning plan was found to be in compliance with Mt. Laurel and Madison Township, provided that certain changes were made in the PRN-6 and PRN-8 zone. The latest Order of Judge Leahy dated May 10, 1979 approves changes to those zones negotiated by and between the Township and the Lorenc plaintiffs.

These zones, together with the floating zone for balanced residential complex, constitute the least-cost housing response of the Township to the Madison Township obligation. Accordingly, they form a vital part of the Township's defense to Allan-Deane's cause of action. The entire thrust of plaintiff's Complaint is directed against the existing multi-family provisions in the Ordinance; these will be revised by the new Ordinance. Thus, plaintiff points out that the PRN-6 zoning provided for a maximum of 1-1/2 units per acre and the PRN-8 zoning permitted

2 units per acre; the new Ordinance will permit 5.5 units per dry acre. with a transfer development right for construction purposes of 1 unit per wetland acre as defined by specified elevations. By the Order of Judge Leahy dated May 10, 1979 a development plan for the lands of plaintiff, Sage, will be prepared to provide for 1222 units.

In addition, the plaintiffs are significantly changing some of the testimony of their trial witnesses from that which was presented in discovery. For instance, Allan Mallach in discovery was a witness about the availability of subsidy housing and a witness as to certain socioeconomic facts and the housing market. Carl Lindbloom was the fair share expert and presented a report on his fair share calculations. Allan Mallach is now presented as the fair share expert. See Mr. Mallach's letter attached to my Affidavit. See also page 24 of the plaintiff's brief, where the Mallach procedure is summarized.

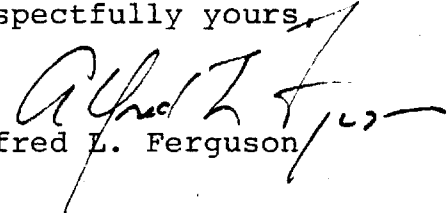
Allan Mallach's testimony on direct and cross consumed many days of trial in the Bedminster case. Hours were spent going over his work and calculations because they have never been reduced to written form and given in discovery. While this is in light of the fact that the Bedminster case was a Rule 1:10-5 compliance proceeding, the Bernards case is not, and full discovery should be allowed.

As set forth in the Notice of Motion and Affidavit, other witnesses will testify as to new issues, and one witness, George Sternlieb, is brand new.

Accordingly, Bernards Township requests an opportunity to receive and study the reports of the experts and to depose them. We request this Court to so Order.

Discovery should not delay the trial, since the new Ordinance which Judge Leahy Ordered will not be ready until August; the discovery can proceed this summer.

Respectfully yours,

  
Alfred L. Ferguson

ALF/cc

Enclosures

cc: Henry A. Hill, Jr., Esq.  
James E. Davidson, Esq.  
John F. Richardson, Esq.  
Dean A. Gaver, Esq.

6/30/79

*6/21/79 Order to be submitted - C. G. Gryn*

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

THE ALLAN-DEANE CORPORATION, :  
a Delaware Corporation, :  
qualified to do business in :  
the State of New Jersey, :

Plaintiff, :

Civil Action

vs. :

NOTICE OF MOTION

THE TOWNSHIP OF BERNARDS, :  
IN THE COUNTY OF SOMERSET, :  
a municipal corporation of :  
the State of New Jersey, :  
et al., :

Defendant. :

TO: HENRY A. HILL, JR., ESQ.  
Mason, Griffin & Pierson  
201 Nassau Street  
Princeton, New Jersey 08540  
Attorneys for Plaintiff

DEAN A. GAVER, ESQ.  
Hannoch, Weisman, Stern & Besser  
744 Broad Street  
Newark, New Jersey 07102

SIRS:

PLEASE TAKE NOTICE that on Friday, June 15, 1979, at  
9:00 o'clock in the forenoon, or as soon thereafter as counsel  
may be heard, we shall apply for an Order:

A. Setting such briefing and trial schedule as may  
be appropriate in light of the Order of Judge Leahy dated  
May 10, 1979, entered in Lorenc v. Bernards Township;

6 B. Ordering plaintiff to supply to defendant forthwith all expert reports received from Messrs. Mallach, Lindbloom, Murar, Sternlieb, Apgar Associates, and all of plaintiff's experts whose reports have not heretofore been furnished to defendant;

C. Allowing defendant to take the deposition upon oral examination of Messrs. Mallach, Lindbloom, Murar, Sternlieb, and Apgar Associates;

D. In the alternative to (B) and (C), ordering that Messrs. Mallach, Lindbloom, Murar, Sternlieb, and Apgar Associates be prohibited from testifying as to any fact or issue which has not been disclosed and/or discussed in experts' reports furnished to defendants or in prior deposition testimony in this action; and

TAKE FURTHER NOTICE that we shall rely upon the Affidavit of Alfred L. Ferguson, Esq., annexed hereto and letter brief submitted herewith.

McCARTER & ENGLISH  
Attorneys for Defendant  
The Township of Bernards

By: 

Alfred L. Ferguson  
A Member of the Firm

Dated: May 29, 1979.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - SOMERSET COUNTY  
DOCKET DO. L-25645-P.W.

THE ALLAN-DEANE CORPORATION, :  
a Delaware Corporation, :  
qualified to do business in :  
the State of New Jersey, :

Plaintiff, :

Civil Action

vs. :

AFFIDAVIT

THE TOWNSHIP OF BERNARDS, :  
IN THE COUNTY OF SOMERSET, :  
a municipal corporation of :  
the State of New Jersey, :  
et al., :

Defendant. :

STATE OF NEW JERSEY )  
COUNTY OF ESSEX ) SS.:

ALFRED L. FERGUSON, of full age, being duly sworn  
according to law, upon his oath deposes and says:

1. I am a member of the firm of McCarter & English,  
attorneys for defendant Bernards Township.

2. In the Pretrial Order of January 5, 1979, Judge  
David G. Lucas ordered that plaintiffs' briefs would be  
submitted by April 30, 1979 and defendants' briefs by May 30,  
1979.

3. On May 10, 1979, Judge Thomas E. Leahy entered  
an Order for Supplemental Judgment in Theodore Z. Lorenc v.

The Township of Bernards, et al., Docket No. L-6237-74 P.W.

A copy of that order is attached hereto as Exhibit A. The order provides that Bernards Township must propose an ordinance in compliance with the substance of the judgment within 60 days from the date of the order. Within 45 days from the date of the order the township planning consultants must prepare a development plan for the plaintiff incorporating specified numbers of units and other described factors.

4. Judge Leahy's order requires that a new zoning ordinance be prepared and adopted. Defendant Bernards Township's current zoning ordinance will be superseded within 60 days from this date by an ordinance which will of necessity be in compliance with Mount Laurel and Madison.

5. Accordingly, the current briefing schedule which calls for defendant's trial brief cannot be met, since the ordinance which will be the subject of the brief does not exist. There would be much wasted effort if defendant's brief were to deal only with the current ordinance which has been ordered changed. Bernards cannot prepare its pretrial brief until the new ordinance is adopted.

6. The pretrial order of January 5, 1979 provided that all expert reports were to be furnished by March 30, 1979.

7. On March 26, 1979, plaintiff advised defendant by letter (Exhibit B) that it had requested additional work from four of its proposed expert witnesses. Carl Lindbloom, Jim Murar, George Sternlieb and Alan Mallach. Defendant has not

received additional written reports or summaries of oral reports from Carl Lindbloom, Jim Murar, or George Sternlieb. Defendant is entitled to receive those reports and to depose those witnesses.

8. Bernards Township has received a report dated March 1979 by Alan Mallach entitled "Bernards Township Zoning Analysis." Attached to that report is a letter dated March 29, 1979 from Alan Mallach to Henry A. Hill, Jr., Esq., in which Mr. Mallach outlines his proposed area of testimony. (Exhibit C)

9. Mr. Mallach's expert report of his fair share analysis is contained in Paragraph (1) of that letter.

I will present a fair share analysis for the Township of Bernards, largely in keeping with the material previously submitted and the analysis and testimony in the related Bedminster case. Specifically, I will present data and conclusions regarding (a) housing need for different income levels in the population; (b) region; (c) fair share allocation factors; and (d) a reasonable fair share for the Township of Bernards. Rather than be limited to a single 'formulaic' fair share, I will show how the fair share will vary on the basis of use of other factors, and will establish a reasonable range for fair share allocation.

10. Bernards has not received an expert report from plaintiff setting out that fair share analysis by Alan Mallach.

11. In its pretrial brief, plaintiff relies heavily upon the "Mallach Fair Share Plan." See Plaintiff's Pretrial Brief, pp. 24-26.

12. It is necessary that defendant be provided with an expert report by Alan Mallach detailing his fair share

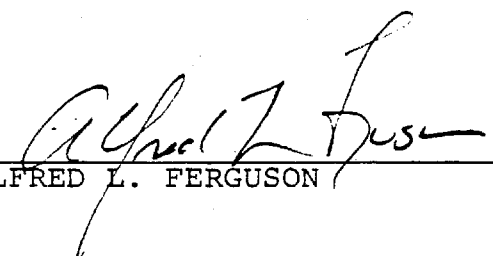


analysis for Bernards Township. It is also necessary that Bernards Township depose Mr. Mallach with regard to that report to avoid taking discovery through cross-examination at trial. The testimony and cross-examination of Mr. Mallach consumed many days in the Bedminster case, largely because there had been no discovery. This should not be allowed to happen again.

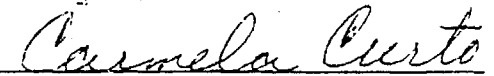
13. We also request that defendant be given the report of and be allowed to depose those of plaintiff's experts who apparently have new studies, such as Apgar Associates, who says that minimum lot sizes should be ten acres for water supply purposes. (Pg. 61, at footnote, plaintiff's brief.)

14. The pretrial order of January 5, 1979 provided that the trial would be on weekly call.

15. The trial date and briefing schedule as set out in the pretrial order of January 5, 1979 should be modified to take account of the Order of Supplemental Judgment issued by Judge Leahy on May 10, 1979 and to provide for the necessary additional discovery.

  
ALFRED L. FERGUSON

Sworn to and subscribed  
before me this *29th* day  
of May 1979.

  
CARMELA CURTO  
A Notary Public of New Jersey  
My Commission Expires July 24, 1979

5/10/79  
B. THOMAS LEAHY, J.S.C.

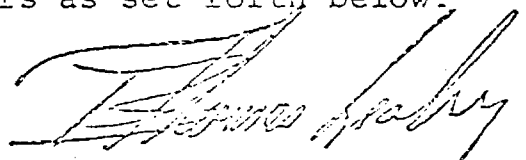
LAW OFFICES OF  
LANIGAN, O'CONNELL AND HIRSH  
A PROFESSIONAL CORPORATION  
150 NORTH FINLEY AVENUE  
BASKING RIDGE, NEW JERSEY 07920  
(201) 766-5270  
ATTORNEYS FOR Plaintiffs

THEODORE Z. LORENC,	:	SUPERIOR COURT OF NEW JERSEY
et als.,	:	LAW DIVISION : SOMERSET COUNTY
	:	DOCKET NO. L-6237-74 P.W.
Plaintiffs,	:	
- v -	:	CIVIL ACTION
THE TOWNSHIP OF BERNARDS,	:	ORDER FOR SUPPLEMENTAL JUDGMENT
et al.,	:	
Defendants.	:	

The matter having come before the Court on remand from the Superior Court Appellate Division and the Court having heard and considered the argument of the attorneys for the respective parties; and the parties hereto having consented

It is, therefore, on this 10<sup>th</sup> day of May, 1979,

ORDERED that a supplemental judgment be entered to the extent and in the particulars as set forth below:



B. THOMAS LEAHY, J.S.C.

The Court having considered the agreement of the parties and for the purposes of bringing this litigation to a conclusion, the following Judgment will be entered by the Court, which judgment will be effective immediately.

For the purposes of this judgment, the Court has found and the parties have agreed as follows:

1. By the decision of this Court dated March 13, 1979, a judgment was entered which indicated that this Court would appoint an impartial zoning and planning expert who would be directed to file a report and testify as to a recommendation for the achievement by defendant, Bernards Township, of compliance with the Court's direction to appropriately increase the number of dwelling units per site acre.

2. Since the date of such decision, the Township of Bernards has considered various alternatives to comply with the Court's previous decision and has arrived at an alternative method of complying with the dictates of the earlier decisions of this Court and the Appellate Division, which opinions indicated that the Township should appropriately increase the dwelling units per site acre in the PRN zones in order to comply with the decisions of Mount Laurel and Madison Township cases.

3. The Township intends to adopt an amendment to its zoning ordinance which shall incorporate the specifications and criteria hereinafter set forth in order to meet the earlier decision. Plaintiffs, Willis F. Sage, Merwin Sage and William W. Lanigan have reviewed the proposed zoning amendment and find it satisfactory to them as hereinafter set forth.

4. The Court has reviewed the specifications and criteria proposed to be included in such zoning amendment, which amendment permits a substantial number of multi-family dwellings and single-family dwellings on small lots and which amendment meets the requirements of the earlier decisions of the Appellate Division and this Court in providing for an appropriate increase in the dwelling units per site acre consistent with the decisions of Mount Laurel and Madison Township cases.

5. The proposed zoning amendment shall include the following provisions and considerations which shall affect the land included in Ordinance #505 and in addition thereto, the property owned by Bonnie Brae Farm (being Lots 3, 4, 5, 17, 18 and 19 in Block 175) but excluding therefrom approximately 100 acres located as part of Lot 17 which is currently part of and surrounding the school.

(a) With respect to the property located within the new zone, all properties located below elevation 219 (for properties west of Acken Road), elevation 218 (for properties between Acken Road and King George Road) and elevation 216 (for properties east of King George Road) shall be considered wet-land and all properties located at or above such elevations respectively shall be considered dry land.

(b) All construction on dry land shall be permitted at a density of 5.5 units per acre.

(c) All wet-land will have a transferable development right for construction purposes of one unit per acre.

(d) A maximum of 65% of all dry lands may be developed as multi-family units.

(e) The balance of the lands developed will be in single-family units.

(f) Multi-family dwellings shall mean studio apartments, one-or-more bedroom garden apartments and townhouses as well as duplex units and twinhouses.

(g) The proposed ordinance shall contain development regulations relating to transition zones, open space, parking and other normal development regulations, none of which shall be unduly cost generating nor result in the reduction of the number or type of units otherwise permitted

(h) Such proposed ordinance shall be presented to this Court within 60 days from the date hereof for its

review prior to adoption to ascertain that said ordinance complies with the Court's earlier decision and this judgment.

6. As to the lands of plaintiff Sages, the parties have agreed and stipulated and the Court so finds the following:

(a) With respect to the Sage property, it is agreed that they are the owners of 326 acres, 127 of which are referred to as wet-land and 199 of which are referred to as dry land.

(b) All construction will take place on lands located above elevation 218.

(c) Within <sup>45</sup> days of the entry of this judgment, the Township Planning Consultant or Consultants, Marshall Frost and Peter Abeles will prepare a development plan for the Sage property incorporating the following factors:

(1) The Plan will consist of 1,222 units, 1,016 of which will be multi-family, 206 of which will be single-family residences.

(2) The development plan will provide access from the site to both Acken Road and King George Road and will include but not be limited to road and parking layout; drainage pattern and detention requirements; utility plan;

provision for recreation; multi-family dwelling unit - types and location; single-family lot lines; transition zones; general grading and landscaping.

(3) The plaintiff shall have the right to have a planner of their choice consult with the Township Consultant in the preparation of this development plan. Upon completion of the development plan, plaintiffs (as to the Sage property) shall have the right to construct the number of units as set forth herein and as shown on such plan. Prior to construction, plaintiff shall submit to the Planning Board all necessary documents for site plan review, the submission and review of such documents shall be accomplished without undue delay, shall not be inconsistent with the said development plan and shall not result in the reduction of the number of units to be permitted as shown on said approved development plan.

(d) The Township will approve the construction of a package treatment plan for the development plan which shall be consistent with Ordinance # 495 relating to individual sewage systems.

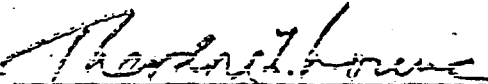
(e) This judgment as it affects the development of the Sage properties will run with the land and may not be changed or modified by any future ordinance of the Township until completion of development.

We hereby consent to the making and entry of the within Judgment.

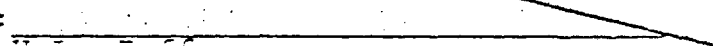
LANIGAN, O'CONNELL, HIRSH & JACOBS  
Attorneys for Plaintiffs Alice J.  
Hansen, trustee, Willis F. Sage,  
William W. Lanigan and Merwin Sage.

By:   
Daniel F. O'Connell

Theodore Z. Lorenc, Plaintiff

By:   
Theodore Z. Lorenc, pro se

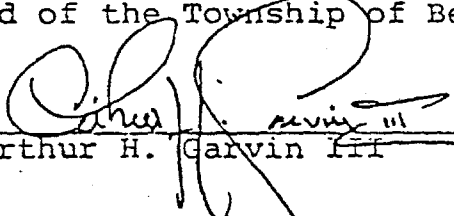
~~Louis J. Herr, Sam Wishnie, Marion  
Wishnie, executrix of the Estate of  
Harry Wishnie, deceased, Plaintiffs~~

By:   
~~H.B. Saffee~~

FARRELL, CURTIS, CARLIN, DAVIDSON & MAHR  
Attorneys for Defendant Township of  
Bernards

By:   
James E. Davidson

KERBY, COOPER, SCHAUL & GARVIN  
Attorneys for Defendant The Planning  
Board of the Township of Bernards

By:   
Arthur H. Garvin III



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KESTER R. PIERSON  
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HENRY A. HILL, JR.  
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BARBARA ULRICHSEN  
BENJAMIN N. CITTADINO  
ALAN G. KELLEY  
EDWIN W. SCHMIERER  
RALPH S. MASON, III

March 26, 1979

TELEPHONE  
921-6543  
587-2224  
AREA CODE 609

McCarter & English  
550 Broad Street  
Newark, New Jersey 07102

Attention: Alfred L. Ferguson, Esquire

Re: Allan-Deane vs. Township of Bernards  
Docket No. L-25645-75 P.W.

Dear Mr. Ferguson:

Pursuant to the Pretrial Order of Judge Lucas, please be advised that the Allan-Deane Corporation may use the following expert witnesses: Carl Lindbloom; Alan Mallach; John Rahenkamp; Jim Murar; Richard Reading; Marvin Davidson; Billing B. Bready of Clinton Bogert Associates, Dr. Robert M. Hordon; Drs. Ferrera, Marks and Reardon of Resource Analysis; Dr. Soper; Apgar Associates and Dr. George Sternlieb. You have already received reports from Carl Lindbloom; Alan Mallach; John Rahenkamp; Richard Reading and Marvin Davidson. You have also received the engineering and environmental reports prepared by Resource Analysis; Robert Hordon; Apgar Associates and Dr. Soper. You have taken the depositions of Carl Lindbloom; Alan Mallach; John Rahenkamp; Jim Murar and Richard Reading. We may also call the following economists, all of whom were discussed by Professor Mills during the Bedminster trial: Drs. Apgar, Grigsby and Kane.

For your information, we have requested additional work from the following experts which, to date, has not yet been received:

1. Carl Lindbloom - We have asked him to update his land use and zoning analysis to include the PRN Zone enacted in February, 1979.
2. Alan Mallach - We have requested him to update his fair share analysis of Bernards Township taking into account new demographic and development trends and any modifications of his models and to look at Bernards' Land Use Ordinances with respect to their ability to provide least-cost housing.

McCarter & English  
March 26, 1979  
Page 2

3. Jim Murar - We have asked him to do some illustrative site plans to compare the literal provisions with Bernards' Ordinances with a "reasonable plan" for the development of the Allan-Deane property.
4. George Sternlieb - We have requested Dr. Sternlieb to furnish us with a proposal for a study to be undertaken by the Center for Urban Policy Research regarding regional pressures on Bernards Township. This proposal has not yet been received by Allan-Deane.

In addition to the expert witnesses mentioned above, we expect to call witnesses from the Department of Community Affairs, Division of State and Regional Planning; the Tristate Regional Planning Commission and the Department of Environmental Protection to explain the State Development Guide Plan; the Housing Allocation Report; Regional Development Guide and the conceptual approval granted to Allan-Deane. You should also be aware that our engineers and environmental experts are preparing data for the Department of Environmental Protection in connection with our application for a tertiary treatment plant in Bedminster. This data may or may not be relevant to the Bernards litigation.

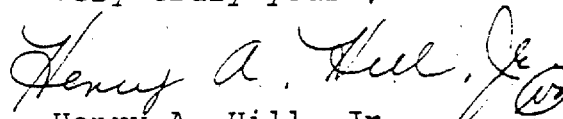
Finally, I am enclosing pursuant to our continuing obligation to you to provide discovery material and the Pretrial Order the following reports:

1. Report of Rahenkamp, Sachs, Wells and Associates entitled "Bernards Township Zoning Analysis", dated March, 1979.
2. The following reports from Dr. Robert M. Hordon:
  - a. "Upper Raritan Watershed", March, 1974;
  - b. "Environmental Assessment of the Water Related Impacts of the Beaverbrook PUD", March 11, 1977;
  - c. "Regional Water Supply Issues in New Jersey and Their Relationship to the Allan-Deane Proposal", July 28, 1978;
  - d. "Residential Water Conservation for the Allan-Deane Proposal", September 7, 1978;
  - e. "Regional Water Quality Issues in the North Branch Raritan Basin and their Relationship to the Proposed Allan-Deane Corp. Development in Bedminster Township, New Jersey", September 7, 1978;

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March 26, 1979  
Page 3

- f. "A Report of the Water Quality at Selected Sites of the North Branch of the Raritan River and India Brook", October, 1978;
  - g. "Nitrification Studies on the Upper Raritan River", November 20, 1978;
  - h. "Water Quality Index", November 27, 1978;
  - i. "Low Flow Values for the North Branch Raritan", January 16, 1979; and
  - j. Letter dated January 19, 1979 - MA7CD10 values for the North Branch Raritan.
3. Draft Copy of Resource Analysis Report entitled: "Evaluation of the Water Quality Impacts of the Proposed Wastewater Discharge from the Allan Deane Development", March, 1979.

Very truly yours,

  
Henry A. Hill, Jr.

HAH/vwa  
Enclosures

cc: Dean Gaver, Esq. (w/encls.)  
Mr. John H. Kerwin  
Mr. Jim Murar

1427 Vine Street  
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19102  
215-563-3714

194 S Broad Street  
Trenton  
New Jersey  
08608  
609-393-5979

March 29, 1979

Henry A. Hill, Jr., Esq.  
Mason, Griffin & Pierson  
201 Nassau Street  
Princeton, New Jersey 08540

Dear Henry:

As per your request, I am hereby providing you with a report outlining the scope of my proposed testimony in the matter of Allan-Deane v. Township of Bernards. I believe that the following includes all of the issues that we discussed.

(1) fair share: I will present a fair share analysis for the Township of Bernards, largely in keeping with the material previously submitted and the analysis and testimony in the related Bedminster case. Specifically, I will present data and conclusions regarding (a) housing need for different income levels in the population; (b) region; (c) fair share allocation factors; and (d) a reasonable fair share for the Township of Bernards. Rather than be limited to a single 'formulaic' fair share, I will show how the fair share will vary on the basis of use of other factors, and will establish a reasonable range for fair share allocation.

(2) zoning ordinance: I will analyze the provisions of the Bernards Township zoning ordinance to determine whether they provide for least cost housing; and if so, in a proportion adequate to meet their fair share, including the overzoning called for in the Madison decision. In addition to the general provisions of the ordinance, I will place emphasis on (a) the ordinance provisions for 'Balanced Residential Communities' and (b) the ordinance provisions for PRNs; i.e., the R6M2 zone.

(3) R-3 zone housing market: subject to final approval, I will conduct a study and present testimony on the housing demand for units constructed under the constraints of the R-3 zone, and evaluate the implications of this level of demand for the Allan-Deane holdings.

(4) low and moderate income housing: I will provide testimony on the issues around low and moderate income housing, including the following areas: (a) the relevant governmental programs, their requirements, restrictions, and funding availability and conditions; (b) the feasibility

Henry A. Hill, Jr., Esq. (2)

March 29, 1979

of constructing housing under various governmental programs in the zones of Bernards Township under the ordinance; (c) the feasibility of constructing housing under these programs on the Allan-Deane holdings.

I believe that this summarizes the scope of my testimony as we have discussed it. Please let me know if you need any additional information on any of the points above.

Sincerely,



Alan Mallach

AM:ms

cc: D. Gaver, Esq.