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- LETTER FROM LEAHY TO HILL, FERGUSON. (1)
- JUDGE'S OPINION, ALLAN-DEANE V. TOWNSHIP (30)

POS - 31

SUPERIOR COURT OF NEW JERSEY

B. THOMAS LEAHY
JUDGE

SOMERSET COUNTY COURT HOUSE
SOMERVILLE, NEW JERSEY 08876
(201) 725-4100

December 14, 1979

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RE: Allan Deane Corp., et al
vs. Township of Bedminster, et al
Docket No.s L - 36896-70 & L-28061-71
(S 8541 & S 9153)

Gentlemen and Madam:

Enclosed please find a copy of my opinion on the initial facet of the Rule 1:10-5 proceeding in the above matter. Mr. Hill is directed to prepare an order reflecting that the matter was heard, that the defendants have not complied with the original order of the court and that the matter will be heard as to the issue of remedy on a blank date which will be filled in by the court.

Very truly yours,

B. Thomas Leahy, J.S.C.

BTL/d
Encl.
cc: Peter A. Buchsbaum, Esq.
Dept. of the Public Advocate

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF
THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY
DOCKET No. L-36896-70 P.W.
& No. L-28061-71 P.W.
(S-8541 & S-9153)

THE ALLAN-DEANE CORPORATION, a Delaware corporation qualified to do business in the State of New Jersey; and LYNN CIESWICK, APRIL DIGGS, W. MILTON KENT, GERALD ROBERTSON, JOSEPHINE ROBERTSON and JAMES RONE,

Plaintiffs,

-vs-

THE TOWNSHIP OF BEDMINSTER, a municipal corporation of the State of New Jersey, its officials employees, and agents, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BEDMINSTER and THE PLANNING BOARD OF THE TOWNSHIP OF BEDMINSTER.

Defendants.

Civil Action

OPINION

DECIDED: December 13, 1979

HENRY A. HILL, for plaintiff, The Allan-Deane Corporation (Mason, Griffin and Pierson, attorneys);

DEAN A. GAVER, for plaintiff, The Allan-Deane Corporation, (Hannock, Weisman, Stern and Besser, attorneys);

ANNE NELSON, for plaintiffs Cieswick, Diggs, Kent, Robertson, Robertson and Rone (American Civil Liberties Union, attorneys);

GARY GORDON, for plaintiffs Cieswick, Diggs Kent, Robertson, Robertson and Rone (American Civil Liberties Union, attorneys);

ALFRED L. FERGUSON, for defendants, (McCarter and English, attorneys);

EDWARD D. BOWLBY, for defendants.

LEAHY, J.S.C.

Plaintiffs, attacking the validity of the land use regulations of Bedminster Township, succeeded in obtaining a

decision by this court in 1975 declaring that the defendant municipality's zoning ordinance was unconstitutional in light of the principles set forth in Southern Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 67 N.J. 151 (1975) (hereinafter "Mt. Laurel"), and directing the defendant to revise its zoning to comply with state law.

Upon appeal the judgment of unconstitutionality was affirmed, per curiam, by the Superior Court, Appellate Division and petition for certification was denied by the Supreme Court. 74 N.J. 272 (1977). The defendant township enacted a new zoning ordinance on December 19, 1977 and amended the same on August 21, 1978 and September 18, 1978.

Plaintiffs now seek Relief to Litigants pursuant to R.1:10-5, asserting that Bedminster has failed to comply with the court's order to rezone in a manner compatible with the requirements of the law of this state. To facilitate hearing this matter has been bifurcated. The court has heard evidence and arguments on the issue of whether the defendant municipality has complied with this court's prior order by enacting a zoning ordinance which complies with the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. and with decisional law. Hearing as to any remedy available and suitable awaits decision on this aspect of the case.

That the defendant township is a "developing municipality" is conceded. It must, therefore, by its land use regulations make realistically possible an appropriate variety and choice of housing, at least to the extent of its fair share of the present and prospective regional need therefor. Mt. Laurel, 67 N.J. at 174. In 1975 this court found that the township zoning ordinance did not allow for reasonable quantities of housing. That prior ordinance and the current ordinance now under review control

density, not by lot size or restrictions on the number of dwelling units per acre, but on the basis of the interrelationship of density per ground area and "minimum net habitable floor areas" per dwelling unit based on the number of bedrooms per unit. Such an approach makes it difficult to compute the maximum dwelling units permitted per acreage, however, it was established that under the 1975 ordinance development was limited to 2.5, 1.88 and .94 two-bedroom dwellings per acre in the respective residential zones. Apartments were authorized at a maximum of 1.5 units per acre and townhouses at 1.2 per acre, based on a mix of one through four bedrooms, in a required ratio, in any multi-family development. It was proved that multi-family housing would never be built at such restrictive densities and the ordinance was declared unconstitutional.

Under the ordinance invalidated in 1975 the two zones in which multi-family dwellings were permitted contained 780 and 131 undeveloped acres. If built on at an average of two-bedroom units they could have been developed for 1,794 dwelling units. Under the provisions of the 1978 ordinance the theoretical maximum number of multi-family dwelling units permissible (if all land zoned for multi-family were cleared, in one ownership and developed to the maximum density permitted) would be 1,374 units; 420 units less than were permitted previously.

A great deal of testimony and many exhibits were offered to establish the "fair share" of existing and prospective housing needs appropriately attributable to Bedminster and to establish the "region" to be served by such housing opportunity in the township. In this court's opinion it is neither necessary nor appropriate for the court to engage in such mathematical and

geopolitical determinations.

Delineation of housing need regions and computation of a municipality's fair share of responsibility to meet such needs are socio-economic political judgments best left to the legislative and executive branches of government. As was clearly stated in Oakwood at Madison, Inc. v. Madison Tp., 72 N.J. 481 (1977) (hereinafter "Oakwood"):

> We take this occasion to make explicit what we adumbrated in Mount Laurel and have intimated above -- that the governmental-sociological-economic enterprise of seeing to the provision and allocation throughout appropriate regions of adequate and suitable housing for all categories of the population is much more appropriately a legislative and administrative function rather than a judicial function to be exercised in the disposition of isolated cases. [Id. at 534; footnote omitted].
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> ....
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> Of primary significance is the difference between the situation of an administrative planning agency functioning under authorizing legislation and that of a court dealing with an attack by litigation on the adequacy of the zoning ordinance of an isolated municipality. The former is dealing with a comprehensive, predetermined region and can render or delegate the making of allocations with relative fairness to all of the constituent municipalities or other subregions within its jurisdiction. Moreover, it presumably has expertise suited to the task. The correlative disadvantages of a court adjudicating an individual dispute are obvious.
>
> The formulation of a plan for the fixing of the fair share of the regional need for lower income housing attributable to a particular developing municipality, although clearly envisaged in Mount Laurel, 67 N.J. at 162, 189-190, involves highly controversial economic, sociological and policy questions of innate difficulty and complexity. Where predictive responses are called for they are apt to be speculative or conjectural. [Id. at 531-533; footnotes omitted].
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> ....
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> Clearly the legislature or an administrative agency with the necessary expertise would unquestionably be in a far superior position

than the courts to receive all relevant information and data and reach legitimate results using the concepts of "fair share" and "region". [Id. at 621-622; footnote omitted. (Schreiber, J., concurring in part and dissenting in part)].

....

The opinion in Mount Laurel laid upon each developing municipality in the State an obligation to exercise its zoning power in such a way as to provide for its "fair share" of the housing needs of the lower-and moderate-income persons resident within the "region" within which the municipality was found to lie.

....

Quite apart from the uncertain efficacy of this newly formulated rule, there are a number of reasons why courts should abstain from seeking ultimate solutions in this area, but should rather urge a legislative, or legislative-administrative approach. In the first place courts are not equipped for the task. If a court goes beyond a declaration of validity or invalidity with respect to the land use legislation of a particular municipal body, it invites the fairly certain prospect of being required itself to undertake the task of rezoning. Of course it has neither the time, the competence nor the resources to enter upon such an undertaking.

....

On the otherhand a legislatively created body, whether of an administrative nature or otherwise, would have the equipment and resources to study the problem in depth, take objective account of competing interests, avail itself of expert advice and hopefully achieve results not only in the public interest but also acceptable to the public -- results reached by applying legislatively determined standards to particular factual contexts.

A second, and at least equally important reason why courts should not rezone, lies in the fact that in so doing they must inevitably make policy decisions that have traditionally been the prerogative of a democratically selected branch of government. Judicial rezoning, like all other zoning, implicates a choice among competing, often mutually exclusive uses. While a court may rightfully challenge a municipality's parochialism, it may at the same time find that its own activism constituted an intrusion upon a legitimate political debate

> as to how the limited supply of land in a developing municipality is to be regulated. [Id. at 624-628. (Mountain, J., concurring and dissenting)].

The dangers inherent in judicial efforts to resolve political disputes are eloquently summarized in Justice Clifford's concurring opinion in Oakwood. Id. at 631-638.

Fortunately, an examination of state and federal legislation and their interrelationship reveals an acceptance of this very principle by our legislature.

In 1965 the New Jersey Legislature joined in adopting the Tri-State Transportation Committee Compact and in 1971 the Transportation Committee was replaced by the Tri-State Regional Planning Commission. The purposes of Tri-State are to continue regional transportation and related land use studies, to be responsible for comprehensive planning for a region including parts of Connecticut, New York and New Jersey (including Somerset County) and to assure continued qualification for federal grants. N.J.S.A. 32:22B-2. The Commission is to act as an official comprehensive planning agency for the region, is to prepare plans for development of land and housing among other things and is to act as liaison to encourage coordination among governmental and private planning agencies in solving problems connected with land development. N.J.S.A. 32:22B-6.

N.J.S.A. 52:27D-1 et seq., enacted in 1966, effective March 1, 1967, established the New Jersey Department of Community Affairs. The department is charged with the duty of assisting in the coordination of state and federal activities relating to local government, maintaining an inventory of data and acting as a clearing house and referral agency for information on state and federal services and programs. N.J.S.A. 52:27D-9. Through the

Office of Community Services, the department is to collect, collate and disseminate information pertaining to the problems and affairs of local government, including information as to all available state, federal and private programs and services designed to render advice and assistance in furtherance of community development projects and other activities of local government. N.J.S.A. 52:27D-17.

The department includes the Division of State and Regional Planning, N.J.S.A. 52:27D-26, which has the responsibility of promoting programs to insure the orderly development of the State's physical assets by, among other things, stimulating, assisting and coordinating local, county and regional activities. N.J.S.A. 13:1B-15.52. See also N.J.S.A. 52:27C-21, N.J.S.A. 13:1B-6,-7, and N.J.S.A. 40:27-9.

These statutory provisions appear to implement the policy set forth in N.J.S.A. 13:1B-5.1 which reads in part as follows:

> The Legislature hereby finds and determines that:
>
> a. The rapid urbanization and continuing growth and development of the State and its regions ... have created, and are creating a need for continuing assembly and analysis of pertinent facts on a State-wide basis pertaining to existing development conditions and trends in economic growth, population change and distribution, land use, urban, suburban and rural development and redevelopment, resource utilization, transportation facilities, public facilities, housing and other factors, and has created and will continue to create a greater need for the preparation and maintenance of comprehensive State plans and long term development programs for the future improvement and development of the State.
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> ....
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> c. Local, county and regional planning assistance is a function of State Government and a vital aspect of State planning.... There

> is also a vital need for stimulating, assisting and co-ordinating local, county and regional planning activities as an integral part of State development planning to insure a permanent and continuing interaction between and among various governmental activities.

The importance of the comprehensive planning program embodied in these legislative enactments is emphasized when reference is made to the provisions of United States Bureau of the Budget Circular No. A-95, July 24, 1969, which provides for the evaluation, review and coordination of federal assistance programs and projects, pursuant to the provisions of the Demonstration Cities and Metro-politan Development Act of 1966, 80 Stat. 1255, 42 U.S.C.A. §3301 et seq., and the Inter-governmental Cooperation Act of 1968, 82 Stat. 1103, 42 U.S.C.A. §4231 et seq. Circular A-95 imposes the requirement that all projects for which federal assistance is being sought must be reviewed by a designated regional planning agency for comment and recommendations regarding whether the project is consistent with comprehensive planning and regarding the extent to which the project contributes to the fulfillment of such planning. Those comments must then be reviewed by the agency of the federal government to which the application for aid is submitted to determine whether the application satisfies the provisions of federal law which govern the making of the loan or grant requested. Among programs covered by this requirement are open space, hospitals, airports, libraries, water supply and distribution, sewerage facilities and waste treatment, highways, transportation facilities, water development and land conservation, law enforcement facilities and assistance programs in the areas of planning for public works, community renewal, urban mass transportation systems, comprehensive areawide

health, air pollution control, solid waste disposal, and juvenile delinquency prevention and control.

The importance of this integrated federal, state and local planning scheme is demonstrated by the testimony of the Somerset County Planning Director, that:

> The Tri-State Regional Planning Commission is the official regional planning agency for the region, and because it is such a complicated region, the Tri-State Regional Planning Commission -- to comply with their planning requirements -- they require the counties in New York and New Jersey to comply with their planning requirements, and the regions in Connecticut. Tri-State must adopt plans. Counties must adopt plans. And then they must be compatible, and they must be cross-accepted by the respective constituent agencies.... H.U.D. carries a club of rejecting any municipal application for any federal grant, for more than 100 federally funded programs. In other words, if we haven't done what they said we should do, if [a municipality] applies for a storm drainage grant, they would tell [the municipality], "you can't have this storm drainage grant, because Somerset County has not gone through the planning operation as we have required." So it is a big club they carry.

Wherever possible, statutes dealing with the same general subject should be both recognized and harmonized. Loboda v. Clark Tp. 40 N.J. 424 (1963); Henninger v. Bergen Cty. Freeholder Bd., 3 N.J. 68 (1949); Cuprowski v. Jersey City, 101 N.J. Super. 15 (Law Div. 1968). Statutes in pari materia must be viewed together in seeking the legislative intent. They must be considered as a single and complete statutory arrangement. "Such statutes should be considered as if they constituted one act, so that sections of one act may be considered as though they were parts of the other act, as far as this can be reasonably done." Id. at 20.

Prior to the enactment of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., it was recognized that the legislature had required that land use planning be done on a comprehensive

basis, not on a compartmentalized municipal basis.

> This court long ago pointed out "* * * the unreality in dealing with zoning problems on the basis of the territorial limits of a municipality." Duffcon Concrete Products, Inc. v. Borough of Cresskill, supra (1 N.J. at 513). It is now clear that the Legislature accepts the fact that at least land use planning, to be of any value, must be done on a much broader basis than each municipality separately. Note the statutes establishing county planning boards, with the duty to prepare a county master plan and requiring that board's review and approval of certain subdivisions, N.J.S.A. 40:27-1 to 8; authorizing voluntary regional planning boards, N.J.S.A. 40:27-9 to 11; creating state planning and coordinating functions in the Department of Community Affairs and its Division of State and Regional Planning, N.J.S.A. 52:27D-6 and 9 and 13:1B-5.1 and 15.52; and providing for New Jersey to join with New York and Connecticut in the establishment of the Tri-State Regional Planning Commission with extensive area planning functions, N.J.S.A. 32:22-B-1, et seq. (Federal statutes and regulations require many federal grants for local public works and installations to have the approval of regional planning agencies, consistent with comprehensive area plans.) Authorization for regional zoning -- the implementation of planning--, or at least regulation of land uses having a substantial external impact by some agency beyond the local municipality, would seem to be logical and desirable as the next legislative step. [Mt. Laurel, 67 N.J. at 189 n. 22].

Clearly the legislature recognized the wisdom of that suggestion and took the logical and desirable next step. It enacted the Municipal Land Use Law. Since 1976 it has been required that the municipalities must adopt land use elements of their master plans before a zoning ordinance may be adopted and such ordinances must be "substantially consistent" with the master plan. Any inconsistency must be justified. N.J.S.A. 40:55D-62a.

The municipal master plan must indicate its relationship to the master plan of contiguous municipalities, to the county master plan and to any comprehensive guide plan adopted pursuant

to N.J.S.A. 13:1B-15.52. N.J.S.A. 40:55D-28d.

If municipal zoning provisions must comply with municipal master plans and the master plans must be consistent with county plans, it follows with indisputable syllogistic logic that municipal zoning must be consistent with county, and thus state and regional, planning.

By enacting this requirement the legislature has provided the courts with an objective standard against which to measure the provisions of a municipal zoning ordinance. The courts need no longer attempt to resolve the complex political issues inherent in zoning and planning. So long as the general legislative program is effectuated through county, state and regional planning which adheres to the general constitutional principles recognized and elucidated in judicial decisions such as Mt. Laurel and Oakwood, the courts can confidently judge the constitutional legitimacy of municipal zoning and planning by measuring it against applicable county, state and regional planning. The efforts and work product of the legislative and executive branches are thus respected and decisions made by municipal officials which comply with legislative intent will be sustained.

The courts have long recognized that zoning is not a judicial function. The judicial role was aptly described in Kozesnik v. Montgomery Tp., 24 N.J. 154, 167 (1957), where it was declared, regarding the zoning power, that "[t]he judiciary of course cannot exercise that power directly, nor indirectly by measuring the policy determination by a judge's private view. The wisdom of legislative action is reviewable only at the polls."

The logic of the legislature in providing that municipal zoning ordinances must be consistent with municipal master plans

and that the latter must be in reasonable harmony with county master plans can be appreciated better if key language from the Somerset County Master Plan of Land Use (1971) is considered:

> Considerable attention has been devoted to the impact of regional pressures on Somerset County and to the importance of the transportation network that is stimulating and channeling much of the growth of Somerset County. The relationship and the role of Somerset County within the metropolitan region has been a decisive factor in many of the considerations and planned accommodations. At the same time this Master Plan represents an effort to coordinate local and county planning requirements so as to achieve a coherent overall plan for the physical development of the County.
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> The primary goal of the Somerset County Planning Board since its inception in 1955 has been to plan for and guide the development of Somerset County in order to provide the optimum environment for its residents, the wise use of natural resources, the preservation of open space, the preservation of flood plain areas, the provision of needed residences, utilities and facilities, and the proper coordination of regional facilities within the framework of local planning goals. The County Planning Board in the development of a comprehensive land use plan is busily endeavoring to delineate areas for more intensive development to accommodate the host of facilities that are required by a civilized society. The plan provides for an interrelationship and interaction between a scale of greater or lesser intensive development and areas of conservation to achieve a balance between natural resources and urbanization. [Id. at 7].
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> The Land Use Plan of Somerset County must take cognizance of national and regional trends that indicate development pressures.
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> The concatenation of economic, political, social, and governmental forces are now channeling increased population growth to the out-lying, low density suburbs of metropolitan areas.
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> ....

The spread of continuous urbanization between Trenton and Newark, between the Allentown-Bethlehem Metropolitan Area and the Somerville-Plainfield-Newark-Route 22 axis of urban development is complemented by new development along the interstate freeways and by pressures from urbanized Jersey Shore and the Wilmington-Philadelphia metropolitan region. Despite the pressures of development that we know must be accommodated in a rational manner, the question remains whether the complete urbanization of thousands of square miles is not a prescription for disaster.

....

The County Planning Board in advocating nodes or centers of development is not unaware of the forces accentuating dispersion and strip development along every linear foot of state highway and county road. This focus on regional, community, and neighborhood centers is indicated where an interaction and a complementary relationship with a variety of land uses can be attained. The Land Use Plan, in order to gain enactment, must be realistic enough to gain substantial acceptance of the citizenry, the marketplace, and the municipal authorities.

Aside from a comprehensive plan for the proper allocation and coordination of land development and the balance between ecological requirements and urbanization, the most critical component of development at this stage is housing.

....

On the local level, the County Planning Board has advocated greater attention be given to providing a variety of community development and of housing types, including a range of housing to meet needs of all sectors of the population.... Community design should include all densities of housing and allow for clustering of residential and community facilities. Community facilities and easy accessibility to available jobs are essential especially to lower income groups, black and white.

The design of housing in relation to various age groups is also of critical importance.... [A] basic postulate of the Master Plan of Land Use [is] that the stages of the life cycle require a variety of housing types--apartments, townhouses, and single family houses. Another major postulate is that the arrangement of dwellings should also exhibit a wide choice of types of settlement, from high density clusters of apartments to isolated rural homesteads in low density settings. While

> some aspects of the implementation of the Somerset County Master Plan of Land Use are dependent upon the Federal and State government there is considerable latitude for local action in determining the location, as well as the type and quality of development. [Id. at 37-39; emphasis supplied].

This court finds that the provisions of the Somerset County Master Plan of Land Use do, in fact, further the principles and goals enunciated in that language. Provision is made for a broad variety of housing types in harmony with industrial and commercial development to service and support them. There is provision for a Regional Center with highest density development designed to be the retail and commercial center of the county. Eleven Community Development areas with potential for five to fifty thousand residents each at densities of five to fifteen families per acre are anticipated in the county plan. The next type of residential area provided for, in order of density, is the Village Neighborhood. The plan anticipates that these villages will vary in density. Open space is deemed important near and around compact areas of development in these villages but the plan calls for five to fifteen families per acre in these areas with private homes on small lots, town houses and small clusters of apartments.

Other types of residence areas planned for are Residential Neighborhoods of low density residential development and Rural Settlements of very low density. Industrial Development areas and Open Space areas are also planned for.

The county plan anticipates and allows for doubling the county population to 400,000 persons within the next twenty years and provides for an increase in the population of Bedminster Township to 7,000 persons by the year 2000 compared to its 1970 census population of 2,597 persons. The provisions of the Somerset

County Master Plan of Land Use, if followed, make realistically possible an appropriate variety and choice of housing for persons from any reasonably conceivable region.

The question to be answered, therefore, is whether the Bedminster zoning and related ordinances are reasonably consistent with the county master plan.

The county master plan provides for the development of the major portion of Bedminster as a Rural Settlement area with two nearly abutting Village Neighborhoods stradling Route 202-206 at Pluckemin and Bedminster villages and with a small area of Residential Neighborhood development in the northern portion of Bedminster village.

The zoning ordinance under review also provides that the overwhelming bulk of the township shall remain in very low density single-family home use. Based on the proofs submitted as to the ecological sensitivity of that area as a major watershed site with relatively impervious geological sub-soil conditions and accepting the testimony that it is inadvisable to introduce a sewer system into that area to encourage development when other areas in the county and region should more logically be developed sooner, as provided in the county master plan and the Tri-State Regional Planning Commission Regional Development Guide, 1977-2000, this court accepts the decision of the municipal officials as to the provisions, location and extent of the R-3 zone.

The zoning within the corridor on the eastern edge of the township through which Routes 202-206 pass is not as easily justified. Where the county master plan anticipates village neighborhood development with the possibility of carefully designed projects of five to fifteen families (dwelling units) per

acre in relatively sizeable zones on both sides of Routes 202-206 in the Pluckemin and Bedminster village areas, the 1978 zoning restricts the Bedminster village area to R-6 (.77 and .90, if clustered, dwelling units per acre) and R-8 (1.67 and 1.86, if clustered, dwelling units per acre) and two small R-20 (multi-family) zones of seven and nearly nine acres respectively. Neither .90 nor 1.86 dwelling units per acre amount to five to fifteen families per acre and two small multi-family tracts do not remotely approach the level of development envisioned in the county master plan.

Rather than reflect the county master plan for the Pluckemin village area, the municipal officials have chosen to eliminate all but R-3 (.33 or .36, if clustered, dwelling units per acre) uses west of Interstate Highway 287. This removes approximately one-third of the county plan's village neighborhood around Pluckemin. No corresponding expansion of greater density areas was introduced east of Route I-287 to compensate for this shrinkage. The court accepts the planning and zoning decision to treat I-287 similarly to a river or other natural topographical zone district line but cannot accept the violence done to the county and regional plans by the failure to reasonably compensate for this restriction on population influx by an enlarged authorization for development east of I-287 in the Pluckemin area. Indeed the township eliminated from realistic use approximately one-fourth of the area between I-287 and the eastern municipal boundary by zoning that portion a Critical Area zone (steep slope) wherein no structures are allowed and no transfer of density credits to adjacent parcels are permitted. In addition,another one-third of the Pluckemin area between I-287 and the municipal

boundary is zoned R-3. The balance is divided among business, research and office, R-8 and R-20 zoning. Only the R-20 area permits any type of multi-family development or single family lot sizes of less than one-half an acre.

Of the 17,088 acres comprising the township, 280 are zoned for R-20 use, the only zone permitting either multi-family development or less than one-half acre lot sizes for one-family homes. Many of those 280 acres are already developed and would require demolition or subdivision to be utilized in conformity with the applicable zoning. It is debatable whether, realistically, more than sixteen acres are available in the Bedminster village area and more than 171.5 acres are available for development in the Pluckemin village area.

Since the zoning ordinance under review requires a minimum of nine acres as a site for construction of multi-family developments, and since only a limited number of parcels in the R-20 zone qualify, the need for voluntary compliance with an assemblage effort renders use of much of the R-20 zone for multi-family purposes rather unlikely and certainly cost generating. Since such uses are conditional uses under the ordinance, relief by variance is not available. Brown Boveri, Inc. v. North Brunswick Tp. Comm., 160 N.J. Super. 179 (App. Div. 1978).

The imposition of a 150 unit maximum on the extent of any least-cost developments in the R-20 zone, coupled with a requirement of sewer service, coupled with the township's avowed intention not to provide municipal sewer services until regional water quality studies are completed in years to come, all discourage multi-family development, if they do not preclude it entirely.

The mandate that there be one-half mile between least-cost

multi-family developments further burdens such development when the cost generating impact of one-half mile of sewer line is considered. The limitation of least-cost housing to a total of 300 units with a possibility of authorization of an additional 300 units unless "review should indicate that adequate infrastructure cannot be provided, environmental constraints dictate such additional units cannot be accommodated, or the Township's regional obligation has been fully satisfied," (Bedminster Zoning Ordinance, §11.1 (1978)), further precludes development of multi-family housing.

There are other unjustifiably restrictive and unreasonably cost generative provisions in the ordinance but those enumerated above are sufficient to demonstrate that the 1978 township zoning ordinance does not permit, in fact actively discourages, the type of development envisioned by the county master plan and the regional development guide. Though justified in preserving the bulk of its area for large lot, single-family use, the township is not justified in failing to provide substantial areas where small lot and multi-family uses could be developed. It has failed to reflect county and regional planning and, though a developing municipality, has failed to "make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income." Mt. Laurel, 67 N.J. at 187.

In responding to this court's order to revise its zoning the municipality's conduct has verged on legislative prestidigitation. By creating an R-20 zone, on the one hand, and so restricting its development as to render it a nullity, on the other hand, the

local officials have engaged in governmental "sleight of hand." They have not complied with this court's order. The plaintiffs are entitled to relief under R. 1:10-5.

II

Review of some exhibits and the testimony of some planning board and governing body members (and this court's experience in similar cases), compels comment on a concept which seems to be misunderstood by many local officials. The power and authority to regulate land use does not flow from the few thousand residents of any municipality; it flows from the more than seven million residents of New Jersey -- and is to be exercised on their behalf and with their collective best interests in mind.

This principle was clearly enunciated in Mt. Laurel:

> However, it is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.
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> ....
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> It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. [67 N.J. at 177,179].

In other words,the people of New Jersey by adopting our 1947 Constitution, Art. IV, sec VI, par. 2, granted to the legislature the authority to delegate to municipalities that portion of the police power of the state involving land use

regulation. The legislature has done so most recently through the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. Thus, though the legislature, acting on behalf of the citizens of the entire state, has established a system whereby municipal governing officials are elected at the municipal level and have the responsibility of appointing planning and zoning board members, the power and authority to enact and enforce land use regulations do not flow from the local municipal residents to be exercised primarily or exclusively on their behalf. That power and authority to exercise a portion of the state police power flows from the people of the state as a whole and must, of necessity, be exercised on their behalf if the "general welfare" is to be served. See Village of Euclid v. Amber Realty Co., 272 U.S. 365, 390 (1926); Mt. Laurel, 151 N.J. at 177-178; Cresskill v. Dumont, 15 N.J. 238, 247-249 (1954); Duffcon Concrete Products, Inc. v. Cresskill, 1 N.J. 509, 513 (1949).

This constitutional "general welfare" requirement that state and regional needs be recognized when municipal planning and zoning decisions are made is reflected and implemented by the legislative adoption of the network of statutes referred to earlier. Those statutes require that municipal zoning enactments must accord with the municipal master plan which must reasonably accord with both the county master plan and multi-state regional planning.

III

Allan-Deane claims a confiscation of that part of its property located in the Critical area zone. The zone is comprised of 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 of

15% or greater. Allan-Deane has property meeting the steep slope criteria which is thereby included in the critical zone.

The proofs established that the critical zone consists of 2,749.48 acres or 16.09% of Bedminster's total area or 15.63% of the town's total undeveloped acres. Thus, this zone plays an integral part in Bedminster's environmentally based zoning.

The environmental protection plan of Bedminster's master plan has as an objective the protection of critical areas from ecological damage, namely the dangers of pollution, erosion and flooding. The plan states that "land areas exhibiting steep slopes in excess of 15% grade should be left wild, devoted to timber stand improvement to prevent soil erosion."

The zoning ordinance permits the following uses in the critical areas:

> 8.2 PRINCIPAL USES AND STRUCTURES PERMITTED
>
> 8.2.1 Agricultural Uses
> 8.2.2 Sod Farms
> 8.2.3 Floriculture, horticulture, silviculture and forestry supervised by the State
> 8.2.4 Any other uses found eligible by the Farmland Assessment Act of 1964 or succeeding legislation.
> 8.2.5 Golf courses, pervious tennis courts and other open air sports not affecting flood storage or water absorption.
> 8.2.6. Pervious parking areas for vehicles.

The master plan states, however, that "[w]ild forestry and tree farming under the supervision of the State are the only feasible land uses" to be allowed on slopes in excess of 15%.

Allan-Deane first argues that the creation of the critical zone is an unauthorized exercise of the zoning power under the municipal land use law. N.J.S.A. 40:55D-62a states that a municipality's zoning ordinance shall be adopted after the planning board has adopted the land use plan element of a master plan and

all of the provisions of such zoning ordinance shall either be substantially consistent with the land use plan element of the master plan or designed to effectuate such plan element. Allan-Deane argues that the zoning ordinance is not substantially consistent with the environmental protection element of the master plan. The environmental plan states that since it is not possble for Bedminster to purchase all the acres in the critical zone, "in fairness to private [land]owners, two approaches to such land areas should be taken." In addition to restricting the possible uses allowed in the zone, the plan recommends "the possible inclusion of minimal credit in the gross Floor Area Ratio calculations for the usable (noncritical) land on the same parcel or on one immediately adjacent to the critical parcel." The Bedminster zoning ordinance does not, however, give any credit to the owners of land in the critical zone.

Allan-Deane argues that since it is the announced purpose of Bedminster to continue environmentally-based zoning, the environmental protection plan of the Bedminster master plan should also be substantially consistent with the town's zoning ordinance.

This argument is without merit. First, a land use plan element and a environmental protection or conservation plan element are not equivalent. A land use element considers existing and proposed development, taking into account other master plan elements and the natural conditions of the municipality. N.J.S.A. 40:55D-28b (2). A conservation plan element must show the conservation and utilization of the municipality's resources. N.J.S.A. 40:55D-28b(8).

Second, the language in question cannot be construed as mandating that owners of critical land be given development credit

under the zoning ordinance. Rather, the language contains a possible solution of how to severely regulate the critical areas in fairness to land owners.

Allan-Deane next argues that its land in the critical zone is so restricted in use that a taking has occurred. It is fundamental that when government takes by direct acquisition the property owner must be paid just compensation. U.S. Const., Amend. XIV; N.J. Const. (1947), Art. I, par. 20. On the other hand no compensation is required for restrictions on the use of land imposed through reasonable exercise of the police power. Cappture Realty Corp. v.Elmwood Park Bd. of Adj., 126 N.J.Super. 200 (Law Div. 1973), aff'd, 133 N.J.Super. 216 (App. Div. 1975). Regulations imposed under the police power may become so onerous that the landowner is deprived of all reasonable use and his property rendered virtually valueless. Such an exessive use of the police power amounts to an invalid taking of private property. Lom-Ran Corp. v. Dept. of Environmental Protection, 163 N.J.Super. 376 (App. Div. 1978). Courts in analyzing this problem have started with the observation of Justice Holmes that:

> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking .... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. [Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-416 (1922)].

The determination of the point at which regulation "goes too far" is not susceptible to a set formula. Spiegle v. Beach Haven Bor., 46 N.J. 479, cert. den., 385 U.S. 831 (1966).

Allan-Deane relies primarily on Morris Cty. Land Improve. Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539 (1963). In that case,

the municipality's zoning ordinance greatly restricted the use of land located in a designated swamp area, requiring the retention of the land in its natural state to serve as a water detention basin in the aid of flood control and to preserve the land as open space for public benefit as a natural refuge for wildlife. The court found the effect of the ordinance was to prevent the exercise by a private landowner of any worthwhile rights or benefits in the land. Justice Hall remarked that "[w]hile the issue of regulation as against taking is always a matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention or open space." Id. at 555. The court held that public acquisition was required.

Allan-Deane's argument is that the effect of Bedminster's critical zone is to keep slopes in excess of 15% in their natural state for the express public purpose of preventing soil erosion and flooding. Therefore, a simple reading of Troy Hills, ibid., would support invalidating the critical zone restrictions.

Bedminster's response is that the restrictions on use are reasonable and made necessary by the effect development of the land would have on the regional environment, particularly the watershed of the upper branch of the Raritan River. It argues further that changes in public policy and corresponding expressions in case law have limited if not overruled Troy Hills, when a zoning ordinance restricts the use of land for environmental reasons, citing AMG Assoc. v. Springfield Tp., 65 N.J. 101, 112 n.4 (1974).

AMG dealt with a split lot situation where the rear portion of the plaintiff's property classified residential was rendered

practically valueless because it was not of a sufficient size to allow any permitted uses. After citing Troy Hills, supra, for the general proposition that zoning of property into idleness by restraint against all reasonable use is an invalid taking, Justice Hall made the following observation in a footnote:

> 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 restrictions 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.... [65 N.J. at 112 n.4].

A different approach is found in American Dredging Co. v. State, 161 N.J.Super. 504 (Ch. Div. 1978), aff'd, 169 N.J.Super. 18 (App. Div. 1979), which considered the validity of an order of the Department of Environmental Protection, authorized by the Coastal Wetlands Act, prohibiting the placing of dredged material on a portion of the plaintiff's land. The court distinguished Troy Hills supra, on the ground that "[w]here the effect of the governmental prohibition against use is not in the furtherance of a governmental activity, such as flood control or preservation of land for a park or recreational area, but rather to preserve the land for ecological reasons in its natural environment without change, the consideration of the reasonableness of the exercise of the police power must be redetermined." 161 N.J.Super. at 509. The new issue becomes what interest prevails, the public interest in protecting the environment or the private interest in the unrestricted use of property.

This court is not convinced that Morris Cty. Land Improve.

Co. v. Parsippany-Troy Hills Tp., supra, has been overruled sub rosa. The case still has vitality as a check against the excessive exercise of the police power which deprives a landowner of all reasonable use of this land without payment of just compensation. It has been recently cited in Lom-Ran v. Dept. of Environmental Protection, 163 N.J.Super. 376, 386 (App.Div. 1978), and Schnack v. State, 160 N.J.Super. 343, 349 (App. Div.), certif. den.,78 N.J. 401 (1978). It is equally clear that environmental or ecological factors can provide powerful support for land use regulation which is designed to prevent environmental harm. Hackensack Meadowlands Dev. Comm v. Municipal Sanitary Landfill Auth. 68 N.J. 451 (1975), rev'd on other grounds, 437 U.S. 617 (1978).

The new municipal land use law delegated to the municipalities the power to zone. Four of the purposes of this enabling legislation include a consideration of environmental needs. N.J.S.A. 40:55D-2c, e, g, j.

While there can be no doubt that environmentally based zoning is permissible and laudatory, a bald assertion that a municipal zoning ordinance is designed to protect the regional environment does not preclude judicial scrutiny.

Like any exercise of the police power, a zoning ordinance must at minimum impose regulations that are reasonable, and not arbitrary. Davidow v. South Brunswick Tp. Bd. of Adj. 123 N.J. Super. 162 (App. Div. 1973); American Dredging Co. v. State, supra.

This approach is supported by Mt. Laurel, where the court stated that, while environmental factors should always be considered, generally only a small portion of a developing municipality will be involved, since "to have a valid effect, the

danger and impact must be substantial and very real ... and the regulation adopted must be only that reasonably necessary for the public protection of a vital interest. Otherwise, difficult additional problems relating to a 'taking' of a property owners' land may arise." 67 N.J. at 187. [Citation omitted; emphasis supplied].

Bedminster must do more than allege that 15.63% of its developable acres should remain in their natural state because development would cause severe environmental problems.

The evidence in this case establishes that 240 acres of Allan-Deane's property, approximately 52% of the entire tract, is in the critical zone. No persuasive evidence at trial showed that any use was practical in the critical zone beyond tree farming or forestry.

The record does establish that dwelling construction on steep slopes should be avoided. Development on steep slopes causes environmental harm principally by removing the vegetative covering of the slopes. This increases surfact water runoff which causes soil erosion. The washed away soil causes sedimentation problems and aggravates the problem of flood control. Many other results occur ranging from deliterious effects on climate to the removal of wildlife habitat.

Accordingly, the State Development Guide Plan promulgated by the Department of Community Affairs states that, generally, land in excess of 12% steep slope is unsuitable for development. While construction is possible in areas of steep slope, such development should not be encouraged by state policy. A Guide for Residential Design Review authored by the Local Planning Assistance Unit of the Department of Community Affairs advises that when slopes are

in excess of 15% only very low density housing should be permitted after every lot is reviewed for possible drainage, erosion or sewage problems.

The Tri-State Planning Commission's Regional Development Guide states that development should not occur on critical lands. Critical lands are defined as "vacant lands where environmental characteristics make it desirable either to prevent development or provide special safeguards if development must occur." The guide offers a number of tools available to municipalities to protect their critical land. One suggestion is the outright acquisition of the landowner's property interests from fee simple to deed restrictions. Others include the use of clustering and planned unit developments and environmental performance standards.

In short, careful scrutiny of the record shows that while a legitimate goal of a municipality may be to discourage development on slopes in excess of 15%, no support is found for the technique of prohibiting all development on such land. Testimony at trial established, and the planning guides mentioned above reflect, the fact that careful development is possible involving slopes in excess of 15%. So long as sensitive conservation techniques are utilized, the environmental impact can be minimized. Bedminster has chosen to totally bar development without showing that all development would be harmful.

Testimony established the effect on the market value of approximately one-half of Allan-Deane's property by its having been placed in the critical zone. A regulation causing mere dimunition in economic value by the governmental restrictions on the permitted uses does not mandate a conclusion that a taking has occurred. Washington Market Enterprises v. Trenton, 68 N.J. 107

(1975). However, the magnitude of any loss in market value has always been considered in determining whether a landowner has been deprived of all reasonable uses of his land.

The testimony of the real estate appraiser at trial was that the steep slope transfer credits under the prior ordinance were worth $3,384,000. The same area under the 1978 ordinance was estimated at having a market value of $240,000. While the methodology is susceptible to criticism as yielding too speculative figures, the testimony did establish that there had been a substantial decrease in market value caused by the provisions of the 1978 ordinance.

In conclusion, the court finds that while development on slopes in excess of 15% can legitimately be discouraged and extensively regulated there is no justification for the excessive regulations of the critical zone provisions found here. There are too many alternative techniques available which would have less deleterious effects on the property owner's interests while still serving to keep the slopes in their natural condition. The path of outright prohibition of all reasonable use amounts to a short cut which violates the constitutional prohibition against taking without paying just compensation.

IV

Plaintiffs raised a number of objections to various provisions in township ordinances which allegedly violate the Municipal Land Use Law, are impermissably vague and indefinite and unlawfully attempt to exercise control over effluent discharge when such control has been pre-empted by state law. Since the conclusions reached above effectively dispose of the central issue of whether plaintiffs are, in fact, entitled to relief and some

action will necessarily be required after the "remedy" hearing, the court will not further extend this opinion to rule on each and every subordinate issue presented.

Any remedy afforded plaintiffs will have to be designed to include assurance that such issues will be resolved.