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- Defendants Brief in Support of Motion for Partial Summary Judgment

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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,	:	
-vs-	:	Civil Action
THE TOWNSHIP OF BERNARDS, et al.	:	
Defendants	:	

BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This motion seeks to bar the plaintiff, Allan-Deane Corp., from relitigating the issue of the compliance of the Bernards Township land use ordinances with the requirements of So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 153 (1975) (Mt. Laurel) and Oakwood at Madison, Inc. v. Tp. of Madison, 72 N.J. 481 (1977) (Oakwood at Madison).

The issues of compliance of the Bernards Township ordinances with Mt. Laurel and Oakwood at Madison were fully litigated in Lorenc v. The Tp. of Bernards. The Lorenc decision was rendered slightly over a year ago on January 23, 1978. The decision found the Township in compliance with the Supreme Court mandates in all but four respects, and ordered amendments to remedy the failings. The Township amended its ordinances to comply with all but one of the changes. The defendant's appeal of the order to increase densities in the PRN-6 and PRN-8 zones was heard by the Appellate Division. Plaintiffs cross appealed on the court's failure to set aside the one and two acre minimum lot sizes in the PRN-6 and PRN-8 zones and failure to grant plaintiffs a building permit.

In a decision rendered December 11, 1978, the Appellate Division, although affirming the need for change in the densities of the PRN-6 and PRN-8 zones, found insufficient evidence to support the densities ordered by the trial court. The Appellate Court remanded the case to the trial court to supervise the Township's revisions to set appropriate densities in the zones under consideration and reserved decision on plaintiff's claims.

The Appellate Court left unmodified the trial court's holding that the Bernards Township ordinance was basically sound and valid and in compliance with Mt. Laurel and Oakwood at Madison obligations. The Township's land use ordinances have, therefore, been upheld in all but three small respects in a decision rendered within the past four months. The Allan-Deane Corporation is seeking to relitigate the same exact issues in this case.

The doctrines of collateral estoppel and res judicata are designed to prevent needless relitigation of determined issues. The principles of virtual representation and collateral estoppel as now applied should bar relitigation of Bernards Township's compliance with Mt. Laurel and Oakwood at Madison in the Allan-Deane case. The doctrines are intended to prevent a litany of harms to public interests, including: (1) needless waste of court and litigant resources; (2) further burdening of already seriously burdened court calendars; (3) waste of taxpayer dollars; and (4) a danger of inconsistent judgments which erodes public confidence in our legal system and produces serious injustice to successive litigants.

Barring successive challenges to zoning ordinances on Mt. Laurel and Oakwood at Madison grounds can produce more than the usual benefits derived from applying collateral estoppel and res judicata. These cases are exceedingly complex and consume vast amounts of court and litigant time and resources. The number of potential litigants is almost infinite, since the courts have granted standing to not only the landowners in each local governmental unit, but also individuals or groups, within or outside of the community, who have any interest whatsoever in the outcome of a Mt. Laurel action. The current proliferation of lawsuits is a small beginning

in what promises to be an avalanche of similar actions. Multiple suits are, therefore, not merely a threat, but rather a disturbing reality.

Furthermore, these cases consume large amounts of taxpayer funds. Mt. Laurel suits must be defended by local governmental units. They are complex and very expensive, with all parties providing extensive expert testimony. Whereas the expenditure of taxpayer funds may be justified for one lawsuit to effect the remedial purposes envisioned by the New Jersey Supreme Court in its Mt. Laurel and Oakwood at Madison decisions, the relitigation of already determined issues is not necessary and, in fact, produces harmful effects which far outweigh any remedial advantages.

No court has as yet applied the principles of collateral estoppel and res judicata to bar relitigation of Mt. Laurel issues. This court has an opportunity to set a precedent which serves important public interests.

STATEMENT OF FACTS

A. Mt. Laurel and Oakwood at Madison Obligations

The New Jersey Supreme Court established obligations for municipalities categorized as developing in an attempt to increase the opportunity for housing available to low and moderate income families. Bernards Township immediately admitted its obligation to fulfill Mt. Laurel and Oakwood at Madison requirements. (See F, infra).

1. Mt. Laurel

In summary, the Mt. Laurel decision provided that:

> a developing municipality, must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income. It must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like, to meet the full panoply of these needs. Certainly when a municipality zones for industry and commerce for local tax benefit purposes, it without question must zone to permit adequate housing within the means of the employees involved in such uses. (If planned unit developments are authorized, one would assume that each must include a reasonable amount of low and moderate income housing in its residential 'mix', unless opportunity for such housing has already been realistically provided for elsewhere in the municipality.) The amount of land removed from residential use by allocation to industrial and commercial purposes must be reasonably related to the present and future potential for such purposes. In other words, such municipalities must zone primarily for the living welfare of the people and not for the benefit of the local tax rate.
>
> . . . a developing municipality's obligation to afford the opportunity for decent and adequate low and moderate income housing extends at least to

> * * * the municipality's fair share of the present and prospective regional need therefor.

Id. at 187-88.

While mandating the Mt. Laurel obligations, the court noted that there was no reason why developing communities

> may not become and remain attractive, viable communities providing good living and adequate services for all their residents in the kind of atmosphere which a democracy and free institutions demand. They can have industrial sections, commercial sections and sections for every kind of housing from low cost and multi-family to lots of more than an acre with very expensive homes. Proper planning and governmental cooperation can prevent over-intensive and too sudden development, insure against future suburban sprawl and slums and assure the preservation of open space and local beauty. We do not intend that developing municipalities shall be overwhelmed by voracious land speculators and developers if they use the powers which they have intelligently and in the broad public interest.

Id. at 190-91.

In addition, land use regulations should "take due account of ecological and environmental factors or problems." Id. at 186. Environmental factors could be considered though

> . . . the danger and impact must be substantial and very real . . . --- not simply a makeweight to support exclusionary housing measures or preclude growth --- and the regulation adopted must be only that reasonably necessary for public protection of a vital interest.

Id. at 187.

2. Oakwood at Madison

In Oakwood at Madison, the Supreme Court found persuasive evidence that the amount of subsidies available for low income housing was inadequate and that the private market could not economically construct housing needed for lower income persons. Oakwood at Madison at 510-12. The court, therefore, modified the fair share obligation to require a "least cost" obligation. The court held that:

> To the extent that the builders of housing in a developing municipality . . . cannot through publicly assisted means or appropriately legislated incentives . . . provide the municipality's fair share of the regional need for lower income housing, it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the 'least cost' housing, consistent with minimum standards of health and safety, which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share.

Id. at 512.

The meaning of "least cost" housing was further clarified by relating it to state requirements:

> The concept of least cost housing is not to be understood as contemplating construction which could readily deteriorate into slums. We have emphasized the necessity for consistency of such housing with official health and safety requirements. The recently enacted State Uniform Construction Code Act, L.1975, c.217 (N.J.S.A. 52:27D-119 et seq.) states among its purposes 'to encourage innovation and economy in construction * * *' and 'to eliminate * * * construction regulations that tend to unnecessarily increase construction costs * * *', yet be 'consistent with reasonable requirements for the health, safety, and welfare of occupants or users of buildings and structures'.

Id. at 513 n.21.

Specific cost exactions for developers, labeled "undue cost-generating features", id. at 524, were disapproved by the court including: 1) mandated school expenditures, id. at 520-21; 2) road and utilities costs required by zoning for dense development in remote areas, id. at 521-23; and 3) a three stage approval process. Id. at 523.

The Oakwood at Madison court also formulated a suggested approach to the "region" and the definition of a "fair share" obligation. The Court found "a formulaic approach to determination of a particular municipality's fair share" not useful, and room for disagreement among experts as to the pertinent region. Id. at 539. The region should consider, however,

> areas from which the lower income populations of the municipality would substantially be drawn absent exclusionary zoning.

Id. at 540.

The fair share formula should include present and prospective need, and the municipal proportion of need should "correspond at least roughly with the proportion of the appropriate region . . ." Id. at 543.

The decision also suggested the type of affirmative action which would be appropriate for a municipality:

> 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.

Id. at 517.

Other types of affirmative action were not ordered by the court. "Tax concessions and mandatory sponsorship of a membership in public housing projects . . . [were] summarily rejected." Id. at 546.

Justice Conford in Oakwood at Madison further indicated the overall approach for the courts to use in determining whether a township had satisfied its Mt. Laurel and Oakwood at Madison requirements:

> attention by those concerned, whether courts or local governing bodies, 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 represents the best premise for adequate productiveness. . .

Id. at 499.

3. Pascack Association, Ltd. v. Mayor and Council of the Township of Washington

The appropriate scope of an attack by a developer or any other plaintiff on a zoning ordinance on Mt. Laurel and Oakwood at Madison grounds has been further clarified by the Supreme Court in Pascack Association, Ltd. v. Mayor and Council of the Township of Washington, 74 N.J. 470 (1977). The Pascack court made clear that established principles, which rested discretion on the governing body to make decisions about appropriate zoning for a particular property so long as the decision was not arbitrary, capricious or unreasonable, were still operative. The court said:

> But it would be a mistake to interpret Mount Laurel as a comprehensive displacement of sound and long established principles concerning judicial respect for local policy decisions in the zoning field.

Id. at 481.

The court then proceeded to quote from Bow and Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 343 (1973):

> It is fundamental that zoning is a municipal legislative function, beyond the purview of interference by the courts unless an ordinance is seen in whole or in application to any particular property to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute. N.J.S.A. 40:55-31, 32. It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently

> or because the preponderance of the weight of the expert testimony adduced at a trial is at variance with the local legislative judgment. If the latter is at least debatable it is to be sustained. Kozesnik v. Montgomery Twp., 24 N.J. 154, 167 (1957); Vickers v. Tp. Com. of Gloucester Tp., 37 N.J. 232, 242 (1962), cert. den. and app. dism., 371 U.S. 233, 83 S.Ct. 326, 9 L.Ed. 2d 495 (1963).
>
> Id.

In conclusion the court stated that:

> But the overriding point we make is that it is not for the courts to substitute their conception of what the public welfare requires by way of zoning for the views of those in whom the Legislature and the local electorate have vested that responsibility. The judicial role is circumscribed by the limitations stated by this court in such decisions as Bow & Arrow Manor and Kozesnik, both cited above. In short, it is limited to the assessment of a claim that the restrictions of the ordinance are patently arbitrary or unreasonable or violative of the statute, not that they do not match the plaintiff's or the court's conception of the requirements of the general welfare, whether within the town or the region.
>
> Id. at 485.

An individual plaintiff's attack must, therefore, be on the entire zoning scheme as failing to satisfy Mt. Laurel and Oakwood at Madison obligations. The specific location of zones selected to satisfy the obligation is left to the discretion of the municipality, so long as the zones selected can meet the test of reasonableness.

B. Allan-Deane Complaint and Pretrial Memorandum

Counts 1 and 2 of the Allan-Deane complaint request relief against the defendant, Township of Bernards, for violation of Mt. Laurel and Oakwood at Madison obligations. Since Count 2 requests special relief to overcome the effects of alleged delay and recites no additional grounds for violation, Count 1 contains the major grounds for relief relevant to this motion. (See Allan-Deane Second Amended Complaint, attached as Exhibit A).

Paragraphs 1 through 16 and 35 to 44 assert a claim that the Township is a developing municipality, has a substantial fair share obligation, and fails now to supply adequate housing for low and moderate income persons. A discussion of AT&T's facilities in Bernards and Bedminster Townships and the housing obligation they impose is outlined in paragraphs 36 to 44.

Specific failings of the Bernards Township Zoning Ordinance are outlined in paragraphs 30, 31 and 33. In paragraphs 30 and 33, plaintiffs allege that the Zoning Ordinance as a whole fails to satisfy requirements by current provisions controlling: (1) minimum habitable room sizes; (2) permitted types of dwelling units; (3) densities; (4) filing fees; (5) location of multi-family units; (6) alleged prohibition of mobile homes; and (7) open space requirements. Id. ¶30(a)-(g); ¶33.

Ordinance No. 425, designed to satisfy the Township's fair share obligation, is claimed in paragraph 31 to be exclusionary due to: (1) no cost ceiling provisions; (2) mandated bedroom mixes; (3) densities; (4) parking requirements; (5) numbers; and (6) types of dwelling units permitted and excluded.

Paragraphs 17-29 of Count 1 deal with details of the Allan-Deane land and their specific proposals. Id. These details are only relevant if the court finds the Township's zoning plan provides insufficient numbers and types of units to satisfy its obligations. Additional appropriate locations for least cost housing must then be identified to provide a remedy. These paragraphs, however, definitively establish the interests of plaintiffs and their desired outcome on the Mt. Laurel and Oakwood at Madison issues. Plaintiffs are developers who want the Township Zoning Ordinance declared in non-compliance so that additional higher density multi-family housing, without complying with the provisions challenged as cost exactions, can be constructed in the Township and on plaintiff's property.

Plaintiff's plea for relief requests that the entire Zoning Ordinance be declared invalid and the Township ordered to take affirmative action to provide low and moderate income housing.

The Pretrial Memorandum incorporates the factual and legal contentions of Allan-Deane by reference. (See Allan-Deane v. Bernards Township Pretrial Memorandum, attached as Exhibit B).

C. Original Lorenc Complaint

From the time that the original Complaint was filed, the Lorenc plaintiffs attacked the Bernards Township Zoning Ordinance on Mt. Laurel grounds. (See First Lorenc Complaint, attached as Exhibit C). The first Complaint, filed October 22, 1974, four months before the Supreme Court's Mt. Laurel decision, alleged that the Bernards Township Zoning Ordinance contained provisions which both violated plaintiffs' rights under the federal and state constitutions and New Jersey statutes and, in addition, failed to provide for the needs of people of lower income as follows:

> 2. Plaintiffs allege that such zoning ordinance is unreasonable, arbitrary and capricious, and is in violation of plaintiffs' rights under the Federal Constitution, the New Jersey Constitution, and the statutes of the State of New Jersey, in that it denies plaintiffs the use of its property in the respect of the density requirements, minimum habitable floor space, parking space requirements, minimum acreage requirements, a requirement for 'city sewer' storage requirements.
>
> 3. Said ordinance makes no provision whatsoever for mobile or modular homes or multi-family homes of a type and density which would permit the utilization of such land for such purpose.
>
> 4. Said ordinance by its requirements is designed to systematically exclude minorities, and those of a lower economic structure, and effectively precludes the construction of any dwelling, except of a type which would exclude such minorities and lower income individuals.
>
> 5. While defendant has rezoned to permit substantial nonresidential development, it has failed to make any provision whatsoever in its

> zoning ordinances by zoning so as to permit the construction of smaller and less expensive residential dwellings of a type which could be afforded by minorities and by people of lower economic status.
>
> Id. ¶¶2-5.

The relief demanded by plaintiffs was a court ordered revision of the Township's only multi-family ordinance, No. 347, which created PRN-6 and PRN-8. Plaintiffs asked the court to eliminate the "minimal habitable floor space" and "parking space" requirements, "direct the inclusion of a provision. . .for the utilization of modular or mobile-type homes", and modify the sewer and open space requirements. (See Complaint Prayer for Relief, attached as Exhibit C).

D. Lorenc Amended Complaint

An Amended Complaint, filed by the plaintiffs October 29, 1974, also prior to the Mt. Laurel decision, included the Mt. Laurel allegations in Counts 1 and 6, which stated:

> Count 1
>
> 5. The Defendant has rezoned, but has failed to make any provision for the construction of smaller and less expensive residential dwellings of the type which could be afforded by minorities and by people of lower economic status.
>
> Count 6
>
> 2. The Bernards Township Zoning scheme makes no provision whatsoever for mobile or modular homes or multi-family homes of a type and density which would permit the utilization of such land for such purpose.
>
> 3. Said zoning scheme by its requirements is designed to systematically exclude minorities, and those of a lower economic structure, and effectively precludes the construction of any dwelling, except of a type which would exclude such minorities and lower income individuals.
>
> 4. The zoning scheme, by reason of its exclusion of multi-family dwellings as a permissible use, fails to promote a reasonably balanced community and ignores the housing needs of its own population and of the region, and is thereby violative of the general welfare.

(See Amended Complaint, attached as Exhibit D). The relief demanded was court directed rezoning to provide for multi-family dwellings. (See Amended Complaint, attached as Exhibit D, at 3,8).

E. Lorenc Pretrail Order

The Lorenc Pretrial Order of February 7, 1975, incorporated the plaintiffs' Mt. Laurel allegations in the attached factual and legal contentions of plaintiffs. The plaintiffs asserted that the Township's Zoning Ordinance, passed September 3, 1974, was deficient inter alia, in that it failed:

> to provide the construction of less expensive residential dwellings which could be afforded by minorities and people of lower economic status. . .. The Bernards Township Zoning scheme makes no provision whatsoever for mobile or modular homes or multi-family homes of a type and density to permit the utilization of the land for such purpose. This scheme through its exclusion fails to promote a reasonably balanced community and ignores the housing needs of the Township's own population and of the region, and is violative of the general welfare.

(See Pretrial Order, Plaintiff's Factual and Legal Contentions, attached as Exhibit E).

The defenses to the Mt. Laurel issues asserted by defendants in the Pretrial Order included:

> 1. Compliance by the Ordinance 'with the county master plan and with guidelines and standards established by regional planning authorities';
>
> 2. Support for Ordinance densities in 'local and regional environmental considerations. . .air quality, water supply, and waste disposal, all of which would be adversely affected by a higher residential density';
>
> 3. Satisfaction of the test applied to Municipal Zoning Ordinances, that it represents a 'valid and reasonable exercise of the municipal zoning power' under the 'presumption of validity' to which it is entitled.

(See Defendant's Factual and Legal Contentions included in Pretrial Order, attached as Exhibit E).

By letter of January 29, 1976, the defendant supplemented its environmental defense by asserting that the township was obligated, under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. 1251, et seq., to set limits on population growth in order to control point and non-point sources of pollution and satisfy the 1985 water quality goal of the federal legislation that:

> (1) . . . the discharge of pollutants into the navigable waters be eliminated by 1985; and
>
> (2) . . . wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.

(See letter Richard H. Herold to Judge Leahy, attached as Exhibit F).

F. Lorenc Pretrial Delay and Motions; Allan-Deane Motion

Following the New Jersey Supreme Court's Mt. Laurel decision in February, 1975, Bernards Township admitted failure of its zoning ordinance to comply with Mt. Laurel obligations. The Township requested and received from the court on June 5, 1975, a delay in the trial to permit ordinance revision to effect compliance. (See Letter Richard Herold to Judge Leahy, September 4, 1975, attached as Exhibit G). On April 26, 1976, the Township represented to the court that the Mt. Laurel ordinance was still not in place, and the court ordered that the revision be complete by June 18, 1976 so the trial could go forward. (See Transcript of hearing on status of revision and Order of April 26, 1976, attached as Exhibit H).

On Tuesday, May 18, 1976, the Township enacted Ordinance No. 385, designed to fulfill its Mt. Laurel obligations. The Ordinance permitted multi-family housing as balanced residential complexes (BRC). The Court was provided with a copy of the new Ordinance. (See Ordinance No. 385, attached as Exhibit I).

Prior to the start of the trial, defendants moved to separate for purposes of trial the issues relating to the validity of the Ordinance specifically applied to plaintiff's property from the Mt. Laurel issues relating to the validity of the Zoning Ordinance as a whole. Defendants questioned, inter alia, the standing of plaintiff landowners to raise the general public interest issues of compliance with Mt. Laurel

since "[p]laintiffs' real and substantial interest in that question is not apparent." (See Defendants' Brief in Support of the Motion, at 8-9, attached as Exhibit J). The Defendant's motion was denied, the Lorenc plaintiffs, therefore, being allowed to assert Mt. Laurel grounds as a basis for overturning the Bernards Township Ordinance. (See Order Denying Motion to Separate Issues, attached as Exhibit K).

The defendant also challenged the standing of the Allan-Deane Corporation to raise Mt. Laurel issues. The issue of their standing was raised in a motion to dismiss the complaint heard on May 11, 1976. The brief in support of the motion noted the lack of demonstrated stake or interest of the Allan-Deane Corporation in low and moderate income housing in Bernards Township. The motion was dismissed without prejudice, thereby allowing Allan-Dean to continue to raise public interest issues. (See Brief in Support of Defendants' Motion to Dismiss and Order Denying Motion, attached as Exhibit K-1). Their standing is again being challenged in a motion scheduled for hearing on the same day as this motion for partial summary judgment as an alternative ground for removing Mt. Laurel issues from the Allan-Deane-Bernards litigation. (See Brief and Documents filed in support of the Motion to Dismiss for Lack of Standing filed with this court.)

G. Lorenc Trial Issues

The public interest issue of Bernards Township's compliance with Mt. Laurel was immediately put at issue in the trial which began June 30, 1976. In his opening statement at trial, counsel for the plaintiffs asserted that the Township's newly enacted Mt. Laurel ordinance would be litigated since:

> It affects this case and is relevant since plaintiffs' complaint is (sic) alleged that the Township has made no provisions for multi-family use and has made no provision for zone and type and scheme which would permit low and moderate income dwellings of the type to be built.
> . . .so, that Ordinance and issue is attacked at will as not being satisfactory in the sense that it has satisfied any obligation whatsoever either alleged in the complaint or any obligation imposed in the Mount Laurel case. The Ordinance Number 385, it will be demonstrated, is not capable of fulfillment.

(Excerpt from Trial Transcript, June 30, 1976, at 11-12, attached as Exhibit L).

The plaintiffs had not, however, amended their complaint to incorporate allegations of the failure of the newly enacted Ordinance 385 to comply with Mt. Laurel obligations, nor did the Pretrial Order refer specifically to Ordinance 385. When plaintiffs attempted to introduce testimony attacking Ordinance 385, defendants objected that they were not put on notice with regard to the plaintiffs' planned attack on Ordinance 385. The court, faced again with a decision as to trial issues, ruled that the validity of the entire zoning scheme was in

issue, including the Township's Mt. Laurel Ordinance. (See Trial Transcript, July 6, 1976, at 177-20 to 178-13; 187-14 attached as Exhibit M). Plaintiffs were permitted to amend the Complaint during the summer to include the validity of Ordinance 385 more specifically in the issues to be litigated. The court also determined to hold a supplemental Pretrial Conference. (T 293-18 to 298-18, July 7, 1976).

H. Lorenc Second Amended Complaint Compared to Allan-Deane Second Amended Complaint.

1. Second Amended Complaint in Lorenc

Plaintiffs, acting to take advantage of the relief granted by the court, filed a Second Amended Complaint in July of 1976, specifying in detail the Mt. Laurel grounds for objection to the Township's Zoning Ordinance in general and the newly enacted Ordinance 385 in particular. (See Second Amended Complaint, Count 2, attached as Exhibit N). The grounds for the Mt. Laurel attack were all included in Count 2 of the new Lorenc Complaint.

2. Comparison of Lorenc and Allan Deane Complaints

Any uncertainty as to the identity of the Mt. Laurel and Oakwood at Madison Township issues raised in the Lorenc and Allan-Deane actions is totally removed by a paragraph by paragraph comparison of the count in the two second amended complaints which concerns these issues. Even though the Allan-Deane Complaint was filed after the Township revised Ordinance 385 to comply with the Supreme Court's Oakwood at Madison Township decision, enacting the revised ordinance as No. 425, Count 2 of the Second Amended Lorenc Complaint is almost a carbon copy of Count 1 of the Second Amended Complaint filed in Allan-Deane v. The Township of Bernards.

Paragraphs asserting a claim that the Township is a developing municipality, has a substantial fair share obligation, including a burden created by AT&T, and fails to supply adequate housing for low and moderate income groups are virtually identical.

Compare:

Lorenc Complaint	Allan-Deane Complaint
Count 2	Count 1
Paragraphs 1-16, 23-32	Paragraphs 1-16, 35-44

Similarly, paragraphs outlining so-called exclusionary provisions of the Bernards Township Land Use Ordinance raise the same issues, usually with identical wording. Compare:

Lorenc Complaint	Allan-Deane Complaint
19	30
21	32
22	33

Even the relief requested in both complaints is in large part identical. Compare:

Lorenc Complaint	Allan-Deane Complaint
Count 2 Relief ¶ A-F	Count 1 Relief ¶ A-F

The features of Ordinance 385 alleged by the Lorenc plaintiffs to show non-compliance are also essentially similar to the Allan-Deane Complaint's objections to Ordinance 425. Compare:

Lorenc Complaint	Allan-Deane Complaint
Count 2 ¶	Count 1 ¶
20(e)	31 (i),(c),(d)
20(g)	31 (h)
20(b)(c)	31 (c)

The Lorenc Complaint included, in addition, an objection to the permitted location of the units designed to satisfy the Township's Mt. Laurel obligation, which the Madison Township

decision of January, 1977 defined as a major consideration with regard to fulfillment of least cost obligations. (See Preliminary Statement supra at 7; Lorenc Complaint ¶20(f).

The Lorenc Complaint asserted further grounds for the Township's non-compliance with Mt. Laurel obligations in the failure of Ordinance 347 to establish reasonable requirements for permitted multi-family uses due to the density and bedroom restrictions, and the requirement for public sewers in all multi-family zones under Ordinances 347 and 385. (See Lorenc Complaint, Count 3, Exhibit N).

The Lorenc complaint also clarified the interests of plaintiffs and the outcome desired on Mt. Laurel and Oakwood at Madison issues. Just as in the Allan-Deane complaint, paragraphs of the Mt. Laurel count described plaintiffs' position as landowners and potential developers, described in detail plaintiffs' property, and stated their desire that additional numbers of higher density, multi-family housing, without the criticised alleged cost exactions, be mandated in the Township and located on their land. (Id. ¶¶17-18).

Defendant's Answer to the Second Amended Complaint asserted compliance with the previously acknowledged Mt. Laurel "responsibility to make reasonably possible an appropriate variety and choice of housing, at least to the extent of the municipality's fair share of the present and prospective regional need therefor" (see Defendant's Answer to Second Amended Complaint, 3rd Count ¶2, Seventeenth Separate Defense, attached as Exhibit O).The answer also asserted defenses in addition to or expanding those previously asserted in the Pretrial Factual and Legal Contentions including that the Bernards Township Zoning Ordinance:

1. Complied with statutory purposes of the Municipal Land Use Law.(Id. first separate defense).

2. Permitted population growth consistent with the anticipated sewage capability of the Bernards Township Sewage Authority, which limit was necessary to satisfy the goals of the Federal Water Pollution Control Act amendments of 1972, 33 U.S.C. A.§1251, et seq. and preserve the potable water supply of downstream users. (Id. Second through Eighth, Eleventh, Twelfth and Thirteenth separate defenses).

3. Adhered to land use patterns proposed by the Somerset County and Morris County Master Plans, Regional Plan Association, and Tri-State Regional Planning Commission. (Id. Ninth, Thirteenth, Fifteenth Separate Defenses).

4. Considered environmental factors such as water supply and quality, air quality, topography, geological features, soil characteristics, drainage patterns, historic and aesthetic values and community character. (Id. Tenth Separate Defense).

I. Supplemental Pretrial Memorandum

The Supplemental Pretrial Memorandum, prepared August 31,1976, incorporated the allegations of noncompliance with Mt. Laurel obligations defined with greater specificity in the Second Amended Lorenc Complaint. (See Supplemental Pretrial Order, attached as Exhibit P). In particular, the Order specified the issues at trial including:

> challenging validity of Bernards Township Zoning Ordinance, particularly No. 347 and No. 385. ¶1
>
> Whether Bernards Township by its Zoning Ordinance as a whole, with particular reference to Ordinance No. 347 and Ordinance No. 385, and by its grant of a variance to Ridge Oak, Inc.* is in compliance with the Mt. Laurel decision. ¶7b.

*Ridge Oak is a subsidized senior citizen housing project already approved in Bernards Township.

J. Lorenc Trial Testimony

The Lorenc trial testimony during the period from June 30, 1976 to December 3, 1976 dealt with all of the Mt. Laurel and Oakwood at Madison issues raised in the Second Amended Complaint. Plaintiffs and defendant offered twenty three witnesses on direct examination. In addition, plaintiffs called three witnesses on rebuttal. One hundred and thirty five exhibits were introduced by both parties. Testimony concerned general planning principles affecting Mt. Laurel and Oakwood at Madison obligations, approaches to defining the size of the Township's fair share obligation, details of the Township Zoning Ordinance as a whole and Ordinances 347 and 385 in particular, compliance of the Bernards Township Ordinance with the county master plan and regional planning, and the defendant's environmental defenses. The major witnesses were as follows:

William W. Allen, Bernards Township Committeeman and Planning Board member, testified concerning the minimum lot size provisions in the PRN ordinance (T 286-17 to T 292-22, November 7, 1976) and his fair share analysis on which the Township had relied in providing for low and moderate income units under Ordinance No. 385, the Mt. Laurel ordinance. Mr. Allen's testimony described his concept of region, the components of present and future need, and the nature of the mathematical formula he derived for allocating need within the region based on a calculation of the distribution of employee residences around an employment location. (T 14-10 to T 101-12, November 22, 1976; T 3-13 to T 65-21, November 23, 1976).

Robert J. Stahl, management consultant in the field of corporate relocation, testified concerning the housing need created by the new employment at the AT&T facilities in Bernards and Bedminster Townships. Specifically, he discussed the distribution of housing needs which could be anticipated based on the range of employee commuting time preferences; the actual breakdown of the total AT&T employment into the numbers of employees already in the area, number to be hired from the existing local market, and number being transferred and needing new housing; the number of housing units needed in Bernards Township; and the anticipated secondary job impact of the AT&T facilities. (T 68-13 to T 143-7, November 17, 1976).

Mr. Charles Agle, Bernards Township Planning consultant, testified concerning general planning principles, his approach to fair share analysis, specific provisions in the Bernards Township Zoning Ordinance and their effect, and details of Ordinances 347 and 385. General planning testimony included his opinion concerning appropriate densities, factors affecting construction costs, including the relationship of density and construction cost, and housing types appropriate for different groups in the population. Testimony concerning fair share obligations contained his definition of region, population and employment trends as affecting estimates of need, the impact of AT&T on Bernards' fair share obligation, the location of the Township with respect to total employment in northeastern New Jersey, and his opinion of the William Allen fair

share study. The floor area ratio mechanism in the ordinance and the maximum population capacity of the ordinance residence and employment zones were described.

Mr. Agle defended provisions in the Township's Mt. Laurel Ordinance, No. 385, including:1) the permitted locations of least cost units; 2) total number of units; 3) minimum and maximum project size; 4) minimum gross site area; 5) minumum habitable floor areas; 6) maximum density; and 7) mandated bedroom distribution. He also related the standards in Ordinance 385 to federal and state standards for subsidized units.

Mr. Agle's defense of Ordinance No. 347 included an explanation of the number of acres in flood plain and high land, the total permitted number of units and population in the zone, and the justification of specific provisions including: 1) mandated bedroom mixes; 2) minimum habitable floor areas; 3) densities; 4) types of multi-family units; and 5) open space requirements. (T 83-3 to T 221-6, July 1,6, 1976; T 35-24 to T 91-12, November 8, 1976; T 3-19 to T 19-9, November 9, 1976; T 8-5 to 19-10 and T 33-6 to T 90-5, November 29, 1976; T 2-10 to T 95-3, November 30, 1976).

Alan Mallach, offered by plaintiffs as an expert in housing and fair share analysis, provided a section by section critique of the provisions of the Township's Mt. Laurel Ordinance, No. 385, as well as criticism of the Allen fair share formula. He argued that the following provisions of No. 385 were cost increasing features and would not facilitate construction of low and moderate

income housing: 1) the minimum and maximum project size; 2) one mile separation; 3) subsidy requirements; 4) sewer provisions; 5) single or twin house transition zone; 6)maximum density; 7) mandated bedroom distribution; 8) varied setbacks and limited building size; 9) prohibition of shared hallways or stairways; 10) required number of parking spaces; and 11) filing fees. He also argued that the Township failed to satisfy its obligations by not providing affirmative steps to facilitate low and moderate income housing, including tax abatement.

In his testimony on the Allen fair share formula, Mr. Mallach criticised the analysis and themethod of allocating need. He argued that the need computation should include households paying more than 25% of their income for shelter and need generated by additional household formation independent of employment growth. He stated that the allocation formula was inadequate for failing to include vacant land, the Township's financial ability to afford service increments or income redistribution, and a measurement for accessibility to transportation or services. (T 131-4 to 171-14, November 30, 1976).

Leland Stanley Stires, Bernards Township Engineer, provided details concerning the zones created by Ordinances 347 and 387. He testified concerning the flood plain within the Ordinance 347 areas, its delineation, mandated restrictions on development under local ordinances and state law and regulations, and specific characteristics of the land. He also identified locations where least cost units

could be placed. (T 40-1 to 56-4, 64-3 to 80-31, July 1, 1976; T 91-19 to 108-5, November 29, 1976).

Several witnesses testified about property values, availability of multi-family housing in the Bernards Township region, and the marketability of units permitted by the Ordinances.

Harold Heimbach, Bernards Township Tax Assessor, testified about the assessed value of Township property, (T 20-21 to 34-13, June 30, 1976) and the status of new construction in the PRN zone. (T 34-16 to T 38-8, June 30, 1976).

Theodore Fleming, a realtor in Bernards Township, testified about the availability of multi-family housing for low and moderate income and higher income families in Bernards Township and the surrounding communities. He also gave his opinion of the need for multi-family housing in the area. (T 22-18 to 25-14, November 1, 1976).

Marvin B. Davidson, qualified as an expert in the general area of appraisal and property values, testified concerning his interpretation of the permitted density per acre provisions for multi-family and single family development in the zone created by Ordinance 347; the marketability of units constructed at permitted densities; the effect of design and layout requirements of the zoning ordinance on potential for development; appropriateness of residential development in a flood plain; the impact of clustering and density on construction costs; the existing market for and availability of multi-family housing in Somerset County; existing subsidized units and units affordable by low and moderate income

persons in Somerset County; and the effect of Ordinance bedroom restrictions on marketability of units. (T 27-31 to 58-2, November 1, 1976).

Several witnesses testified about the present and future status of sewer treatment in the Township and point and non-point pollution, its effect on land use, and laws and planning in process to control it. Witnesses included: John Ciba, member of the Bernards Township Sewage Authority (T 17-23 to 35-13, November 8, 1976); Paul Kurisko, Basin Manager for the Passaic-Hackensack Rivers Public Waste Water Facilities Element (T 3-7 to T 47-16, November 9, 1976); Richard Schindelar, expert on sewage treatment facility design and construction (T 221-1 to 260-17, July 6, 1976); Harry Ike, Chief of the office of area-wide planning of the Department of Environmental Protection (T 11-15 to T 70-23, November 16, 1976); and General William Whipple, Director of the Water Resources Institute at Rutgers University and expert on non-point pollution, sewage treatment, and potable water supply. (T 78-19 to T 168-14, November 16, 1978; T 4-1 to T 55-5, November 17, 1976).

William E. Roach, Jr., Director of the Somerset County Planning Board, testified concerning the consistency of the overall Bernards Township Ordinance, as well as the specific provisions to preserve flood prone areas, allow a mix of housing types, reduce employment zones and provide low and moderate income housing, with the Somerset County Master Plan. He discussed county population

forecasts and availability of multi-family units in neighboring communities. He also gave his views as a planner with respect to preserving the headwaters of the Raritan and Passaic Rivers, requiring public sewer connections, appropriate densities for multi-family housing, and the advantages of concentrated versus scattered development. (T 96-7 to 128-3, November 30, 1976).

K. Post Trial Pre Decision Correspondence

Following the conclusion of the trial on December 3, 1976, the Supreme Court decided Oakwood at Madison on January 26, 1977. The plaintiffs advised the court in detail, by letter dated February 8, 1977, of the implications of the Oakwood at Madison decision for the Lorenc case. (See letter, William W. Lanigan to Judge Leahy, February 8, 1977, pp.5-15, attached as Exhibit Q). Specifically, plaintiffs argued that the testimony offered by plaintiffs at trial was sufficient for the Lorenc court to reach the conclusion that the Township failed to comply with the "least cost" obligations newly defined by Madison Township. The Lorenc plaintiffs stated that testimony established that the numbers of units designed to satisfy least cost obligations was inadequate, id. at 6, and the Township's Ordinance contained requirements which were either excessively cost generating or impossible to fulfill because of the lack of available services, thereby rendering the permitted units illusory. Id., at 6-10. The plaintiffs also called to the court's attention the appellate division decision in Allan-Deane v. Bedminster, which involved a neighboring township and was grounded in Mt. Laurel issues, specifically issues of permitted densities, availability of services, and environmental constraints, all raised in Lorenc.

The township responded to the Plaintiff's letter to the Court, critiquing plaintiffs' efforts to draw analogies between the facts of the Lorenc-Bernards Township and Allan-Deane-Bedminster cases. Counsel advised the Court of the intent of the Township to

revise Ordinance 385, the Township's Mt. Laurel Ordinance, to meet the new Madison Township least cost obligations. (See letter Nicholas Conover English to Judge Leahy, February 25, 1977, attached as Exhibit R).

By letter of May 4, 1977, Bernards Township advised Judge Leahy of the passage on first reading of Ordinance 425, revising Ordinance 385, and designed to update the Township's Ordinances to provide compliance with the Madison Township decision. (See letter Richard J. McManus to Judge Leahy, May 4, 1977, attached as Exhibit S). The substance of the revisions was briefly described, including the most important difference between 385 and 425, the elimination in Ordinance 425 of the subsidy requirement. Id. ¶¶2,6.

On May 18, 1977, the defendants submitted a second letter to the court arguing in more detail the manner in which Bernards Township, by the provisions of the Ordinances now allowing multi-family housing, 347 and 425, complied with Madison Township requirements for a"variety and choice"of housing as well as "least cost housing". (See letter Nicholas Conover English to Judge Leahy, May 18, 1977, attached as Exhibit T). Specific provisions asserted to establish compliance included: 1) the permitted option of either privately financed or subsidized units; 2) bedroom requirements; 3) minimum room sizes; 4) densities, and 5) lot sizes for single family and twin houses. Id. at 2-7. In addition, the letter commented on the impact of the new test

of Madison Township designed to evaluate the adequacy of the numbers of fair share units requirements in a municipality and the standard for assigning the burdens in Mt. Laurel litigation. Id. at 8-11.

Responding to the Township's letter to Judge Leahy outlining the content of Ordinance 425, the attorney for the plaintiffs by letter dated May 11, 1977, argued that the Ordinance revisions "should not affect this Court's evaluation of the litigation", and in no way affected his argument of non-compliance with mandated olbigations.

Specifically, he stated

> The densities remain the same; the requirements for a public sewer system which does not exist remain the same; and minimum acreage remains the same; and the same limitations which were argued and reargued have not been modified.

(Letter, William W. Lanigan to Judge Leahy, May 11, 1977, attached as Exhibit U).

L. Trial Court Decision

The Order for Judgment of Judge Leahy of January 23, 1978, incorporated by reference the attached letter opinion of the Court of the same date. (See Order for Judgment and Letter opinion, January 23, 1978, attached as Exhibit V). The opinion, after discussing the background of the litigation, stated that:

> ultimately the trial was held, dealing primarily with the issue of whether the Township's zoning ordinance satisfied the mandate to '. . .make realistically possible an appropriate variety and choice of housing.' Mount Laurel, supra at 187.

Id., letter opinion at 2.

The decision then made findings of fact with respect to the size, location, population, and road network of the community. The court noted that Bernards Township's status as a "developing municipality" had been stipulated by counsel, thus placing it "within the definition of communities governed by the decision in Mount Laurel, supra." Id.

Findings of fact with respect to the Bernards Township Zoning Ordinance and fair share calculation were then recited. The court described the various zones created, including details of the provisions of the Ordinance designed to satisfy the Township's least cost obligation. Id. at 3. The summary outlined: 1) permitted locations, 2) separation provisions, and 3) total permitted numbers. Id. The court then discussed in detail the components of the fair share formula devised by Mr. Allen for the Township, including the size of the obligation which he computed. Id.

The court found that:

> While it can be argued that a number of planning and development factors were not included in Mr. Allen's analysis and computations, it is clear that he engaged in a conscientious effort through a rather sophisticated method to reach what can be argued is a reasonable figure as to the number of low and moderate income housing units for which Bernards Township should currently be expected to provide through its zoning and planning ordinances. [Emphasis added].

Id.

After noting that Oakwood at Madison did not require either the courts or municipalities "to analyze and compute precise quotas in determining fair share", and that multiple factors must be considered in making a fair share determination, id. at 4, the court held as follows:

> Viewing the Bernards Township zoning ordinance broadly and weighing its general principles, this court finds it to be a basically sound and valid enactment reflecting a reasonable resolution by the municipal officials of the various interests and goals which must be accomodated when such a document is drafted and enacted. The ordinance provides for a variety of nonresidential uses; it designates certain portions of the municipality for large lot single family dwelling use; it provides for multi-family housing and for some low and moderate income family housing. The judgment of the responsible municipal officials should be respected and this court has no right to substitute its judgment for theirs in matters that are properly subject to diverse opinions and judgments under the constitution and statutes of this State. Bow and Arrow Manor v. Town of West Orange, 63 N.J. 335, 343 (1973); Vickers v. Tp.Com. of Gloucester Tp., 37 N.J. 232, 242 (1962), cert.den. and app. dism. 371 U.S. 233, 83 S.Ct. 325, 9L.Ed.2d 495(1963); Kozesnik v. Montgomery Tp., 24 N.J. 154, 167 (1957). [Emphasis added]

Id. at 4-5.

Some of the Ordinance provisions were found, however, to "render it impossible" to satisfy Mt. Laurel and Oakwood at Madison obligations. Id. at 5. The court found unacceptable: 1) provisions which required public sewers in multi-family developments; 2) densities permitted by Ordinance 347; and 3) various sections of Ordinances Nos. 347 and 385 which repose discretionary authority without expressing or referring to objective standards for their exercise. Id. at 6-7.

The court then upheld the Bernards Township Zoning Ordinance as complying with Mount Laurel and Oakwood at Madison, subject to four changes, three to correct the above stated deficiencies, plus action to correct a procedural failing in the enactment of revised minimum acreage figures in the PRN zone, as follows:

> These defective provisions of Ordinances #347 and 385 do not require nullification of either of those ordinances in their entirety. Mount Laurel, supra at 191. As stated above, the Bernards Township zone plan and ordinances meet the test of reasonableness when viewed broadly and in light of their general principles. The Township is granted 60 days from the date hereof to amend Ordinances #347 and 385 as follows:
>
> 1. To permit utilization of either public or private sewage treatment and disposal in a manner compatible with applicable State and Federal regulations and requirements.
>
> 2. To permit development of Planned Residential Neighborhoods at densities of six dwelling units per Gross Site Area Acre in the PRN-6 zone and eight dwelling units per Gross Site Area Acre in the PRN-8 zone. The definition of Gross Site Area shall be as set forth in Ordinance #347 as adopted September 3, 1974.

3. To delete discretionary authority granted municipal boards and substitute therefor language granting the right to an applicant to receive necessary permits upon satisfying objective criteria expressly enumerated in the ordinances.

The fourth change required was to reenact the provision of Ordinance No. 347 controlling square foot lot sizes, which had been amended without satisfying the necessary procedures for republication and resubmission to the Planning Board. Id. at 7-8.

M. Motion to Amend the Judgment or in the Alternative for a New Trial

Following the judgment, defendants moved to amend the judgment or in the alternative for a new trial. (See Notice of Motion, attached as Exhibit W). The brief in support of the motion and oral argument questioned the propriety of the second amendment required by the court opinion, to increase the densities in the PRN zone to allow "six dwelling units per gross site area acre in PRN-6 and eight dwelling units per Gross Site Area Acre in the PRN-8 zone." (See Transcript of Motion, February 24, 1978 at 2, Attached as Exhibit X).

The ruling, denying the motion, left no doubt as to the meaning of the court's opinion, as finding the Bernards Township Ordinance in basic compliance with Mt. Laurel and Oakwood at Madison, subject only to the four ordinance changes ordered by the court. Judge Leahy stated:

> It was the combination of the varied treatments of different areas within the community that satisfied the Court that the Township zone plan in its entirety, with all of its facets and features, basically and generally satisfied mandates of Mt. Laurel and Oakwood at Madison.
>
> The most compelling concept behind that decision was the mandate of the Mount Laurel for a 'appropriate variety in choice of housing.' (sic)
>
> I found that a community that provides within its zone plan for three-acre lots, 40,000 square foot lots, 20,000 square foot lots, downtown residential around Basking Ridge, scattered B.R.C. developments and planned residential neighborhoods of two densities, as an entirety, had satisfied that requirement for an appropriate variety and

choice. There was, in effect, something for anyone and everyone.

(Transcript of Motion, February 24, 1978, at 15-16, attached as Exhibit X).

N. Compliance and Appellate Court Decision.

An Ordinance to comply with two orders of the court, to delete discretionary authority in Ordinance No. 347 and the Mt. Laurel Ordinance and to pass provisions controlling square foot lot sizes in Ordinance No. 347 in accordance with required procedures,was approved by Bernards Township March 7, 1978.(See Ordinance No. 453 Amending the Township Land Use Ordinance to Conform to the Opinion of the Court in Lorenc et als. v. Township of Bernards, et als., ¶1(a) Lot sizes, ¶¶2-6 discretionary authority, attached as Exhibit Y).

Defendants appealed from the judgment, challenging two of the four amendments ordered by the court: 1) "to permit utilization of either public or private sewage treatment" and 2) to rezone the PRN zone to permit densities of 6 and 8 dwelling units per acre. (See Lorenc v. The Township of Bernards, A-2718-77, at 2, December 11, 1978, attached as Exhibit Z). Plaintiffs cross appealed from the 1)failure of the court to set aside the single family two acre zoning in PRN-6; 2) remand of the 40,000 square feet PRN-8 minimum lot size for Township reconsideration to remedy the procedural imperfection in its approval; and 3) failure to grant plaintiffs a building permit. Id. at 2. The Appellate Court granted a stay of the two portions of the judgment which defendants appealed. (See Supplemental Order, April 18, 1978, attached as Exhibit A-A). Before oral argument, defendants adopted an ordinance permitting private or public sewage treatment plants and withdrew objection to the first order noted above. (See Ordinance #496, attached as Exhibit B-B).

The Appellate Court, stating that this was "a Mt. Laurel-type zoning case . . . [in which] the judge upheld the validity of the Township's general zoning scheme but specifically directed that said zoning ordinances be amended", id., limited their opinion to the single issue remaining in the defendants' appeal, the appropriateness of the increased densities. (See Exhibit Z at 3). The court upheld the lower court's finding that the existing limits of 1.39 per acre on PRN-6 and 1.86 units per acre on PRN-8 "are too low under the Mt. Laurel and Oakwood at Madison pronouncements." Id. at 3. Unable to find that the record below "sufficiently supports. . .[the mandated densities] or that the court at this stage should usurp the normal powers of the Township's governing body to enact zoning regulations," id., the decision vacated that part of the judgment ordering densities of 6 and 8 dwelling units per acre. Id. at 4.

The case was remanded to the trial court to direct expeditious action by the Township to rezone the PRN zones "to appropriately increase the number of dwelling units per site-acre, and to enter a final judgment," on or before March 15, 1979. The Appellate Division retained jurisdiction and withheld disposition of the plaintiffs' cross-appeal pending a final determination. Id. at 4-5.

Defendants filed a motion for leave to appeal and petition for certification. (See Motion and Petition, attached as Exhibit C-C). Judge Leahy, pursuant to the remand, ordered revision of the densities in the PRN zones

prior to a hearing scheduled March 12, 1979. (See Order Pursuant to Remand of Appellate Division, attached as Exhibit D-D). The Motion for Leave to Appeal and Petition for Certification were denied February 27, 1979. (See Order Denying Motion for Leave to Appeal, attached as Exhibit E-E).

ARGUMENT

RELITIGATION OF THE ISSUE OF COMPLIANCE OF THE BERNARDS TOWNSHIP ZONING ORDINANCE WITH THE MANDATE OF MT. LAUREL AND OAKWOOD AT MADISON IS BARRED BY THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA

Summary of Argument

Relitigation of the facts and law concerning the issue of compliance of the Bernards Township Zoning Ordinance with the requirements of Mt. Laurel and Oakwood at Madison is barred by the doctrines of collateral estoppel and res judicata.

The issue of the compliance of the Bernards Township Zoning Ordinance with the mandates of Mt. Laurel and Oakwood at Madison has been fully litigated in the Lorenc suit, brought by landowners against the same defendant Bernards Township. The matter was decided by the Superior Court and determined on appeal within the past year. The Allan-Deane Corporation, another landowner, is attempting to relitigate the same exact issues of compliance in this second action.

The doctrine of collateral estoppel, a branch of the broader law of res judicata,

> bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action. [citations omitted]. However, its applicability also extends to questions of law where the claims arise from the same transaction, or 'if injustice would result'.

State v. Gonzalez, 75 N.J. 181,186 (1977), citing e.g. Mazzilli v. Accident and Casualty Ins. Co., etc.,26 N.J. 307, 313-14 (1958); Kelley v. Curtiss, 16 N.J. 265,273 (1954); United States v. Moser, 266 U.S. 236, 241-42 (1924); Cromwell v. Sac County, 94 U.S. 351 (1876); Restatement, Judgments, §68 at 293 (1942); Scott, Collateral Estoppel by Judgment, 56 Harv.L.Rev. 1 (1942); Developments in the Law - Res Judicata, 65 Harv. L. Rev. 818 (1952).

> The doctrine of res judicata provides that:
>
> in any action on a cause previously litigated . . . a general judgment in the prior action is considered a finding against the party affected. . . .

Miraglia v. Miraglia, 106 N.J. Super. 266, 271 (App.Div. 1969), citing Kelley v. Curtiss, 16 N.J. 265 (1954); Middlesex Concrete, etc., Corp. v. Borough of Carteret, 35 N.J. Super. 226 (App.Div. 1955), certif. denied 19 N.J. 383 (1955); 30 Am.Jur. Judgments, §§161-177. The doctrines of collateral estoppel and res judicata, therefore, bar the relitigation of facts, issues of mixed law and fact or law and the general judgment with respect to issues already determined.

Relitigation of the issue of the compliance of the Bernards Township Zoning Ordinance with Mt. Laurel and Oakwood at Madison obligations is res judicata under the longstanding doctrine of "virtual representation". See, e.g., Harker v. McKissock, 12 N.J. 310, 217 (1953); In re Petition of Gardiner, 67 N.J. Super. 435, 448-49 (App.Div. 1961); Collins v. International Alliance, etc., Operators, 136 N.J. Eq. 395, 399-400 (E.&A. 1945);

Commercial Trust Co. of N.J. v. Kohl, 140 N.J. Eq. 294 (Ch. 1947); Hudson Transit Corp. v. Antonucci, 137 N.J.L. 704, 706-08 (E.&A. 1948); Bd. of Directors, Ajax, etc; v. First Nat. Bank of Princeton, 33 N.J. 456, 462-65 (1960); N.J.R. 4:26-1 and comment at 686. The doctrine of virtual representation has specifically been applied to bar relitigation of the same issue by a similarly situated plaintiff following a judgment for or against a public body. In re Petition of Gardiner, supra; Brunetti v. Borough of New Milford, 68 N.J. 576, 587-88 (1975); N.J.R.4:26-1 and comment at 686. See also 74 Am.Jur.2d Taxpayers' Actions §62; 56 Am.Jur. 2d Municipal Corporations §873.

Allan Deane is also barred from relitigating the issue of compliance of the Bernards Township Ordinance with Mt. Laurel and Oakwood at Madison under the current expansive doctrine of collateral estoppel. As defined by the New Jersey Supreme Court in 1977,

> Whether collateral estoppel should apply depends . . .on many factors, all of which are considered because they contribute to the greatest good for the greatest number so long as fairness is not sacrificed on that altar.

State v. Gonzalez, 75 N.J. at 191, quoting Continental Can Co. v. Hudson Foam Latex Prod., 129 N.J. Super. 426, 430 (App.Div. 1974). Accord, Desmond v. Kraemer, 96 N.J. Super. 96, 108 (Cty.Ct. 1967). Collateral estoppel can act to bar relitigation by a party not in the former suit so long as that party's interests were adequately represented in the former action. State v. Gonzalez,

75 N.J. at 186-192 (1977); United Central Equipment Co. v. Aetna Life & Cas. Ins. Co., 74 N.J. 92, 101 (1977); Brunetti v. Borough of New Milford, 68 N.J. at 587-88 (1975); New Jersey Manufacturers Insurance Co. v. Brower, 161 N.J. Super. 293 (App. Div. 1978); Desmond v. Kramer, 96 N.J. Super. 96 (Cty. Ct. 1967). Cf. Parklane Hosiery Co., Inc. v. Shore, 47 U.S.L.W. 4079, 4080-82 (1979).

Collateral estoppel and res judicata serve the essential purpose of preserving court and litigant resources, avoiding the danger of contradictory verdicts, and problems of harassment and uncertainty. State v. Gonzalez, 75 N.J. at 190, 193. Accord, Parklane Hosiery Co., Inc. v. Shore, 47 U.S.L.W. at 4081; Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-29 (1971). Relitigation of issues previously adjudicated is particularly wasteful in complex litigation, where the time and expense of trial can be exceedingly burdensome to the courts and parties. Parklane Hosiery Co., Inc. v. Shore, 47 U.S.L.W. at 408.

Collateral estoppel and res judicata have not yet been applied to bar relitigation of Mt. Laurel issues in this state, but the need is great. This case presents the opportunity for a necessary application of established doctrines.

A. Same Right, Question or Fact Put in Issue and Conclusively Determined.

The doctrines of collateral estoppel and res judicata both apply only to issues actually determined in a prior action and not reversed on appeal.

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit. . .; and even if the second suit is for a different cause of action, the right, question or facts once so determined must. . .be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

New Jersey Highway Authority v. Renner, 18 N.J. 485, 494 (1955), citing Southern Pacific R. Co. v. United States, 168 U.S. 1, 48 (1887).

The doctrines also apply to preclude relitigation of a legal obligation only if there have been no changes in the facts at issue and in the applicable legal principles which would require a contrary legal conclusion.

> An estoppel by way of res judicata or collateral estoppel cannot be raised in a subsequent action if the later action arises on a new state of facts not in issue in the first action.

Bd. of Directors, Ajax, etc. v. First National Bank of Princeton, 33 N.J. 456, 465 (1960).

Where the second action rests on the same claim or cause of action, and res judicata, therefore, applies, parties are concluded:

> not only as to every matter which was offered and received to sustain or defeat the claim or demand but as to any other admissible matter which might have been offered for that purpose.

Hudson Transit Corp. v. Antonucci, 137 N.J.L. 704,707 (E.&A. 1948), quoting Paterson v. Baker, 51 N.J. Eq. 49, 53 (Ch. 1893).

A determination as to whether or not a matter was actually put in issue and determined is made following a review of the entire record of the case. Robinson-Shore Development Co. v. Gallagher, 26 N.J. 59 (1958). In Robinson-Shore plaintiff brought an action to quiet title. The application of collateral estoppel or res judicata depended upon whether the title to the property had been previously litigated. The decision that the matter was actually put in issue and determined:

> cannot be decided in vacuo, but must be predicated upon a careful study of the entire record of the proceedings in order to ascertain the issues projected therein and the applicable legal principles involved.

Id. at 68.

* * *

The review of the entire record of the Lorenc case, summarized in the Statement of Facts, reveals conclusively that the Lorenc case involved a cause of action for violation of Mt. Laurel obligations. (See Statement of Facts, supra at 13-25). Following the decision in Oakwood at Madison, the gloss placed on the Mt. Laurel obligations by the Oakwood at Madison decision and its application to the evidence before the court, were placed before the court by letters of counsel. (Id. at 34-36). The

grounds of the attack on the land use regulations of the Township were wide ranging, including, inter alia, permitted numbers, densities, minimum habitable room sizes, dwelling types, location and specific cost exactions. (Id. at 22-24).

Analysis of the evidence of the principal witnesses in the Lorenc trial shows that all the issues raised in the complaint and pretrial order were before the Lorenc court. (Id. at 27-33). In fact, additional alleged grounds for violation of Mt. Laurel obligations were offered in testimony as well. (Compare summary of provisions attacked in Mallach testimony, id. at 29-30, with Lorenc Second Amended Complaint Count 2 ¶¶20-22). Witnesses presented detailed descriptions and evaluations of fair share approaches and provisions of the Zoning Ordinance, especially Ordinances 347 and 385 which permit multi-family housing. Mr. Mallach's testimony alone included a point by point critique of the Township's Mt. Laurel ordinance, as well as a detailed criticism of the fair share analysis on which the Township's assessment of its obligations rested. (Id. at 29-30). In addition, plaintiffs offered detailed criticisms of the other multi-family ordinance, No. 347, and of facts which they claimed established an obligation in excess of the numbers provided for by the Township. (Id. at 27-33).

The record also reveals that the Mt. Laurel and Oakwood at Madison issues were directly determined by a court of competent jurisdiction. The decision of Judge Leahy made specific findings of fact with regard to the Township's land use ordinances and fair

share analysis. (Id. at 37). The court held that the figure computed as constituting the Township's fair share obligation was reasonable, and the land use ordinance "a basically sound and valid document" which complied with the Township's obligations except in four specific respects. Id. Judge Leahy ordered amendment of the Township's ordinances to correct these deficiencies. (Id. at 38-40).

Bernards Township amended its ordinances to comply with three of the four objections raised by Judge Leahy. (Id. at 43). The fourth objection, involving the appropriate densities in the PRN-6 and PRN-8 zone, was challenged on appeal. (Id. at 43). Plaintiffs appealed the finding of compliance with respect to only two of the Ordinance provisions, those affecting minimum lot sizes for single family dwelling units in the PRN-6 and PRN-8 zones. (Id.)

The Appellate Division reserved judgment on the two issues raised by the plaintiffs, and remanded the case to the trial court to supervise the revision of the permitted densities in the PRN-6 and PRN-8 zones. (Id. at 43-4). A petition for certification and Motion for Leave to Appeal were denied.

Compliance of the Township's ordinances with Mt. Laurel and Oakwood at Madison obligations has, therefore, been conclusively and finally determined except with respect to three provisions of the two PRN zones, controlled by Ordinance No. 347.

There have been no changes in the facts or legal doctrines which materially affect the Township's fair share and least cost obligations. The Lorenc decision was rendered just slightly over a year ago and confirmed on appeal within the past four months. (Id. at 43-44). No decisions have been rendered by the New Jersey Supreme Court redefining Mt. Laurel obligations. Factors of future population and employment, which determine obligations, have not changed in the past year in any way which would increase the Township's obligations.

The Allan-Deane complaint includes a cause of action for violation of Mt. Laurel and Oakwood at Madison obligations. In fact, the claim for relief on these issues is almost identical with the comparable count of the Lorenc Second Amended Complaint which defined the Lorenc trial issues. (Id. at 11-12, 22-23). Allan-Deane is attempting to relitigate all the provisions of the ordinances already put in issue and conclusively determined, in a situation in which the facts controlling the Township's legal duty have not changed.

The tests of conclusive determination of the same issue, under essentially identical circumstances, apply to this case. Collateral estoppel and res judicata are, therefore, applicable to the Mt. Laurel and Oakwood at Madison issues raised in the Allan-Deane complaint. Since the Allan-Deane complaint raises the same cause of action, the doctrines operate to preclude:

> not only. . .every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Hudson Transit Co. v. Antonucci, 137 N.J.L.at 707.

B. Virtual Representation

The doctrine of virtual representation provides that:

> if persons constituting a class are so numerous as to make it impracticable to bring them all before the court, 'such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.' Harker v. McKissock, 12 N.J. 310, 317 (1953).

The equitable rule also allows for representation by the few "where there is a common interest in the subject matter of the litigation. . . ." Id. at 316.

Where a party is recognized to have standing to sue on behalf of class interests under the doctrine of virtual representation there can be no relitigation of determined issues. Harker v. McKissock, 12 N.J. at 317-18; In re Petition of Gardiner, 67 N.J. Super. 435, 448-49 (App.Div. 1961); Collins v. International Alliance, etc., Operators, 136 N.J. Eq. 395, 399-400 (E.&A. 1945).

The doctrine of virtual representation has been applied to representation of both private and public interests. Prior to 1961, the doctrine of virtual representation was only applied in New Jersey, however, to representatives of private class interests. In re Petition of Gardiner, supra at 449. See, e.g., Harker v. McKissock, supra (officers and members of a union act to represent union interests); Commercial Trust Co. of N.J. v. Kohl, 140 N.J. Eq. 294(Ch.1947) (contingent corporate beneficiaries of will adequate representatives of unborn issue of testator's daughter).

The application of virtual representation to representatives of private interests is incorporated in part within N.J.R.4:26. Section 4:26-1 provides:

> Every action may be prosecuted in the name of the real party in interest . . . .

but then identifies specific parties who can bring actions in their own name for the benefit of another:

> an executor, administrator, guardian of a person or his property, trustee of an express trust or a party with whom or in whose name a contract has been made for the benefit of another may sue in his own name without joining with him the person for whose benefit the suit is brought.

N.J.R.4:26-1. Additional representative parties are identified in sections 4:26-2 to 4:26-7.

1. Taxpayer Actions

In 1961, the doctrine of virtual representation was applied to public interest litigation in New Jersey, specifically a suit by a taxpayer against a municipal corporation. In re Petition of Gardiner, 67 N.J. Super. at 448-49. See 74 Am.Jur. 2d Taxpayers' Actions §62; 56 Am.Jur. 2d Municipal Corporations §873.

In Gardiner, a taxpayer had brought suit against Jersey City attacking a budget item for non-compliance with New Jersey statutes. The defendant's motion for summary judgment was granted and no appeal taken. A second taxpayer attacked the same item on identical grounds, appealing

the order of the Local Government Board affirming the budget item. The prior court decision was res judicata against the second taxpayer since the same subject matter had been fully litigated, although by a different taxpayer.

> Nor will it avail petitioner that the taxpayer in the earlier action was one other than herself. A taxpayer attacking governmental action in which he has no peculiar personal or special interest is taken to be suing as a representative of all taxpayers as a class. The general rule is that in the absence of fraud or collusion a judgment for or against a governmental body in such an action is binding and conclusive on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest.

Petition of Gardiner, supra, at 448.

The application of the doctrine of virtual representation to foreclose relitigation of taxpayer actions has been broadly followed in other jurisdictions. See, e.g., Smith v. City of Los Angeles, 190 Cal. App. 2d 112, 11 Cal.Rptr. 898 (Ct.App. 1961); Johnson v. City of Alma, 222 Ga. 272, 149 S.E.2d 66 (1966); Greenberg v. City of Chicago, 256 Ill. 213, 99 N.E. 1039 (Sup.Ct. 1912); VanZandt v. Braxton, 149 Miss. 461, 115 So. 557 (1928); Siercle v. Reynolds, 4845 S.W. 2d 675 (Mo.Ct.App. 1972); Murphy v. Erie County, 34 App.Div. 295, 310 N.Y.S. 2d 959 (1970), See 74 Am.Jur. 2d 562. In fact, virtual representation as a bar to relitigation of judgments in taxpayer suits is the generally accepted legal doctrine. See 74 Am.Jur. 2d 562.

In deciding to apply the doctrine of virtual representation to taxpayer suits, the Gardiner court emphasized that

> the rule of virtual representation to bar relitigation of issues decided in other kinds of class suits has frequently been applied in situations where policy implications were not as strong as those obtaining here [citations omitted].
>
> . . . strong considerations of public policy dictate that after a bona fide and well-contested litigation by a taxpayer of a specific question asserted to affect the validity of municipal action in respect of an important and well-known public enterprise, the judgment should conclude all other taxpayers. . . .

In re Petition of Gardiner, supra at 449.

Though not defined by the Gardiner court the strong considerations of public policy are obvious. Actions against public bodies require expenditure of substantial public funds. The number of potential litigants is enormous. The uncertainty that attends an opportunity for relitigation affects all citizens within that jurisdiction. These are only a few of the considerations of public policy which argue for preventing endless relitigation of public interest issues.

Actions brought by individuals and representatives of groups to challenge validity of zoning ordinances on Mt. Laurel and Oakwood at Madison grounds are not strictly "taxpayer"actions. Neither the Lorenc nor the Allan Deane plaintiffs have specifically sought certification as taxpayer representatives as required by N.J.S.A. 2A:15-18. Other taxpayers are not free to intervene if they choose in the litigation as permitted in taxpayer suits. N.J.S.A. 2A:15-19.

In every other essential respect, however, the Lorenc and Allan-Deane plaintiffs, when they attack the Ordinance on Mt. Laurel grounds, are acting like taxpayer plaintiffs. In a taxpayer action, plaintiffs challenge an action of a public body, which applies to all similarly situated taxpayers, not to secure a special benefit for themselves, but to secure relief for all taxpayers similarly situated. 74 Am. Jur. 2d Taxpayer Actions §34 at 244. Plaintiffs challenging an Ordinance on Mt. Laurel and Oakwood at Madison grounds are attacking the entire Zoning Ordinance, not merely that portion applicable to them. The grounds alleged for overturning the Ordinance are not harm to the individual interests of the plaintiff, but harm to the general public welfare, by failure of the Ordinance to abide by the general welfare mandates of Mt. Laurel and Oakwood at Madison. The Lorenc and Allan-Deane actions, therefore, are in essential respects taxpayer actions.

In fact, all challenges to Zoning Ordinances in this state have been allowed to take on the essential quality of a taxpayer action. Litigants, as in taxpayer actions, are permitted to attack ordinance provisions which apply to all other landowners in that district. No proof of special injury is required.

> Although it is a rule of general acceptance that the constitutionality of a legislative act is open to attack only by a person whose rights would be infringed by its enforcement, Koons v. Board of Com'rs of Atlantic City, 134 N.J.L. 329, 338 (Sup. Ct. 1946), affirmed per curiam, 135 N.J.L. 204 (E.& A. 1947), we have recognized a broad right in taxpayers and citizens of a municipality to seek review of local legislative action without proof of unique financial detriment to them and, on the premise, to maintain an attack which goes to the validity of an entire district created under the zoning power. Kozesnik v. Montgomery Township, 24 N.J. 154, 177-78 (1957).

Van Itallie v. Franklin Lakes, 28 N.J. 258, 276 (1958). It is recognized, in fact, that whenever a zoning scheme is attacked, the interests of all the public are affected:

> The community-at-large as well as individual landowners in the particular use district has an interest in the security of the zone plan that may not be arbitrarily set at naught.

Beirn v. Morris, 14 N.J. 529, 536 (1954).

2. Non-taxpayer Public Interest Litigation

A finding of virtual representation in the Lorenc and Allan-Deane actions need not rest alone, however, on the similarity between these suits and taxpayer actions. The New Jersey Supreme Court has already found that a landowner challenging a municipal ordinance will be barred by the doctrine of virtual representation if a prior landowner, representing similar interests, already litigated the same issue. Brunetti v. Borough of New Milford, 68 N.J. 576 (1975).

In Brunetti, landlords brought an action against the borough challenging the validity of a rent control ordinance. The same ordinance had been challenged and upheld in a previous action. Plaintiffs raised additional issues in the second suit, thereby barring the application of res judicata to the prior judgment in its entirety. Justice Pashman found the plaintiffs had a right to bring the second suit and submit proof on the new issues, subject, however, to the accepted principle that

> collateral estoppel prevents relitigation of any issue actually determined in the original suit.

Id. at ~~558~~ 588.

The application of collateral estoppel eliminated "the danger of multiple suits by landlords . . ." Id. at 587. Virtual representation, therefore, barred the second landlord from relitigating the issues already decided.

Application of the doctrine of virtual representation in public interest litigation in addition to taxpayer suits is also an accepted practice in other jurisdictions. See, e.g., Stevens v. Shull, 179 Ark. 766, 19 S.W.2d 1018 (Sup. Ct. 1929) (decision in landowner suit sustaining validity of street improvement district and assessment of benefits therein res judicata with respect to subsequent landowners suit).

See also 56 Am. Jur. 2d §873 which states that:

> a judgment in favor of a defendant upon the merits by an individual plaintiff or relator acting in the public interest against a municipality or its legal representatives, relative to a matter of public concern, is a bar to subsequent proceedings by other individual parties or relators, acting in the same capacity, to effect the same result as the first suit or proceeding.

Although no New Jersey court has specifically reached the question of whether virtual representation bars the relitigation of Mt. Laurel issues, Sylvia Pressler, in her comment to the virtual representation rule 4:26-1, includes a Mt. Laurel case as fitting the requirements of the rule. The comment identifies the broad sweep of cases involving private and public issues in which individuals and groups have been granted standing to represent interests of others. The expansion is traced to the liberal standing

doctrine adopted by the New Jersey Supreme Court in Crescent Park Tenants Association v. Realty Eq. Corp. of N.Y., 58 N.J. 98 (1971). Standing is granted so long as "the litigant's concern with the subject matter evidences a sufficient stake and real adverseness." Id. at 107. Since standing has been granted to sue as a representative party, even though the specific question of the finding barring subsequent relitigation has not been determined, Ms. Pressler identifies these cases as fitting within the doctrine of virtual representation.

The Comment to 4:26-1 gives particular attention to cases involving public interest issues, where Ms. Pressler notes that:

> The issue of standing, particularly since Crescent Park, is liberally approached, particularly in public interest and group litigation.

Comment, R.4:26-1. Cases cited involving public interest issues include challenges to actions by municipalities. See, e.g., Silverman v. Bd. of Ed., Tp. of Millburn, 139 N.J.Super. 253 (Law Div. 1975) (bondholders and residents of a municipality have standing to challenge the school board's proposed change of use in that municipality's school building). The cited cases include the decision in Urban League of Essex County v. Tp. of Mahwah, 147 N.J. Super. (App. Div. 1977), certif. den. 74 N.J. 278 (1978), in which an association representing disadvantaged citizens and persons employed in the township unable to secure housing were found to have standing to challenge the Mahwah Ordinance on Mt. Laurel grounds.

In Lorenc and Allan-Deane, the plaintiffs are landowners. In both instances, defendants challenged their standing to raise the Mt. Laurel public interest questions. In both cases, the court upheld the standing of the landowners to raise the issue, though the motion in Allan-Deane was denied without prejudice. (See Preliminary Statement supra pps. 18-19; Exhibits K and K-1).

The Lorenc plaintiffs were given standing to raise the public interest issues. Under the analogy to the Gardiner taxpayer action, the Brunetti landowner action, or the application of the doctrine to the Mahwah case incorporated in the comment to Rule 4:26-1, virtual representation should apply to bar the relitigation of Mt. Laurel issues in this case if the essential tests of virtual representation are met.

3. Same Interest and Same outcome Tests for Virtual Representation.

Whether equated with a taxpayer action, as in Gardiner, or a landowner, non-taxpayer action, as in Brunetti, or applied under R:26-1, the doctrine of virtual representation requires that relitigation can only be barred if two tests are met:

1) the parties in both actions had sufficiently similar interests with respect to the litigation of the issues being barred; and

2) the parties in both actions were trying to effect the same result.

The requirement of similar interests relates to the

specific matter at issue in the lawsuit. In Bd. of Directors, Ajax, etc. v. First Nat. Bank of Princeton, 33 N.J. 456 (1960), virtual representation did not exist and res judicata could not, therefore, apply because res judicata would not operate to bar litigation of interests that had never been represented.

The question at issue in successive lawsuits against the trustee, First National Bank of Princeton, was whether or not a trust could be accelerated and terminated. The trust was created by the will of the deceased Edwin Northrop. The trust provided that, upon the death of his wife, the net income would be divided, paying his sister, Edith Northrop, a monthly income, the remainder to go to the Ajax Corporation for the benefit of the corporation officials and employees. Upon the death of his sister, the trust would terminate and the balance would be paid to the Ajax Corporation for use of current officials and employees. In the first case, the Ajax Corporation was found to substantially represent interests of current but not future employees. Interests of the two employee groups were conflicting since current employees would benefit from acceleration since they would receive trust proceeds; future employees would be harmed since their prospective rights would be lost. The court in the first action refused to accelerate the trust.

Following a change in the Ajax corporate structure, and another agreement of the sister to accept a life annuity, Ajax brought a second action to terminate the trust. The question arose whether the bar to acceleration in the first action would be

res judicata in the second. The court found res judicata could not operate. Ajax employees in the second action included those not employed at the time of the first suit. The interests of the "future employees" had not been represented in the first action. Therefore, the first decision could not operate to preclude previously unrepresented interests of future employees. Id. at 461.

The limitation of a finding of virtual representation to actions where plaintiffs seek the same outcome has been demonstrated in two recent taxpayer actions. In Gardiner, res judicata operated in the second taxpayer action because the taxpayers in both actions were trying to produce the same essential result. In both cases, plaintiffs desired to have an agreement between the city and a college of medicine and dentistry for affiliation with a public hospital declared illegal for failure to comply with state mandated budgeting procedures. In re Petition of Gardiner, 67 N.J. Super. at 447-48.

Where taxpayers in successive actions wanted different results, there was no virtual representation, and res judicata did not operate to bar the second lawsuit. In Edelstein v. Asbury Park, 51 N.J. Super. 368, 387 (App.Div. 1958), a landowner, Vaccaro, instituted an action to void the sale by the City of Asbury Park of a parcel adjoining his own. Vaccaro wanted to purchase the land himself and had submitted a bid which the city rejected.

Id. at 373. Vaccaro's suit ended in a consent judgment rescinding the sale. The same day the consent judgment was filed, Edelstein brought a taxpayer action against the city to set aside the rescission of the sale. The defendant City of Asbury Park argued that the plaintiff was barred by the doctrine of res judicata, since the issues had been previously disposed of by a consent judgment to which the plaintiff, Vaccaro, a taxpayer, was a party. Justice Hall found res judicata inapplicable in this case because the interests of the plaintiffs in the two actions were not identical.

> Nor did the judgment acquire any greater sanctity because a taxpayer, Vaccaro, was a party to the litigation . . . for, his private interest in the outcome deprived his presence as being considered adequate representation of taxpayers generally and the public interest.

Id. at 388-89. Vaccaro wished to rescind the sale; Edelstein represented taxpayers wishing to reinstate it. Id.

There is no question that the Lorenc and Allan-Deane plaintiffs represent the same interests and desire the same outcome with regard to the Mt. Laurel and Oakwood at Madison issues in this lawsuit. All plaintiffs are landowners and developers wanting to construct higher density, multi-family housing without the provisions attacked as unnecessary cost exactions. (See Statement of Facts, supra at12,24). Both the Lorenc and Allan-Deane plaintiffs can succeed in their purpose only by establishing that the Ordinance now permits an inadequate number of units, at excessively low densities, with needless

cost generating requirements. Among the so-called cost generating factors is the selection of a location for multi-family units excessively distant from available utilities and services. (See Statement of Facts, supra at 7). The Lorenc plaintiffs attempted to attack the Bernards Ordinance on these grounds.

The only way in which the Lorenc and Allan-Deane plaintiffs differ is that both prefer that, if additional multi-family units are required, they be permitted on their own land and not the land of the other plaintiff. That preference, however, cannot affect the evidence offered to establish non-compliance. Both plaintiffs can only show non-compliance by similar proofs, attacking permitted number, densities, and location. In the event that the locations where Bernards Township permits multi-family units were found inadequate, the issue of a more appropriate place could be raised. Any difference, therefore, would be limited to evidence to establish remedy not non-compliance.

This case, therefore, is not like the Ajax case in which these interests were not previously represented. This is also not like the Edelstein case, where the second plaintiff wanted a different outcome. In every respect the tests of virtual representation are met. This is the type of public interest litigation to which virtual representation applies. The plaintiffs have the same interests and desire the same outcome on the issues of compliance. Important public interests are served by applying the doctrine here. Virtual representation should apply to bar the relitigation of Mt. Laurel and Oakwood at Madison issues in Allan-Deane v. The Township of Bernards.

C. Collateral Estoppel

Allan-Deane is also foreclosed from relitigating the findings of fact and conclusions of law in this new action by New Jersey's current expansive definition of the doctrine of collateral estoppel. The expanded doctrine bars relitigation of issues which have been fully and fairly determined not only by the original parties to the action or their privies, but also by any parties similarly situated. State v. Gonzalez, 75 N.J. 181 (1977); Brunetti v. Borough of New Milford, 68 N.J. 576 (1975); New Jersey Manufacturers Insurance Co. v. Brower, 161 N.J. Super. 293 (App. Div. 1978); Desmond v. Kramer, 96 N.J. Super. 96 (Cty. Ct. 1967).

The old doctrine of collateral estoppel required mutuality, or identity of parties or their privies, as a strict prerequisite to giving conclusive effect to a prior determination of a matter. State v. Gonzalez, 75 N.J. at 188, citing Miller v. Stieglitz, 133 N.J.L. 40,44 (E&A 1934).

> This traditional insistence on mutuality was based on the notion that it was unfair to provide a right or remedy to a party if it was unavailable to his adversary. Additional support for this rule of mutuality may have stemmed from the desire to confine the effects of litigation to parties themselves, allowing easy calculation of liabilities without regard to the claims of non-parties.

State v. Gonzalez, 75 N.J. at 188, citing Seavey, "Res Judicata with Reference to Persons Neither Parties Nor Privies," 57 Harv. L.Rev.96 (1943); Semmel, "Collateral Estoppel, Mutuality and Joinder of Parties," 68 Colum.L.Rev. 1457 (1968).

Under the traditional collateral estoppel doctrine:

> privity. . .ordinarily means identity of interest through succession to the same rights of property involved in the prior litigation.

Hudson Transit Corp. v. Antonucci, 137 N.J.L. 704, 706 (E.&A. 1948).

The modern view embraced by the New Jersey Supreme Court abandons mutuality in favor of "a flexible approach closely tied to the practicalities of certain types of litigation and to the details of the prior adjudication, rather than an indiscriminate application of collateral estoppel whenever a party may be said to have had a 'day in court.'" State v. Gonzalez, 75 NJ at 191.

The full sweep of the current expansive application of collateral estoppel in civil litigation has been outlined by the New Jersey Supreme Court in a recent case considering the application of the new doctrine, previously applied in civil litigation, to criminal litigation. State v. Gonzalez, 75 N.J. 181 (1977).

In Gonzalez, the car in which defendant and a companion had been riding and both riders were completely searched after the car had been stopped by a state trooper for a speeding violation. As a result of the discovery of a loaded pistol under the floor mat, both men were charged with unlawful possession of an automatic pistol. Discovery of cocaine on Gonzalez resulted in his indictment in addition for possession of a controlled dangerous substance. Both defendants brought motions to suppress the evidence obtained in the search, alleging absence of probable cause for the search. The co-defendant's motion was heard first and granted; Gonzalez'

motion was denied. Following Gonzalez' conviction on both counts, he appealed, arguing that the doctrine of collateral estoppel should have applied to suppress the fruits of the search of his person.

The Supreme Court decided that collateral estoppel did apply in Gonzalez. The determination made in the action involving the state and co-defendant was applicable even though Gonzalez was neither a party nor in privity with the party in the first action. Because of the special public interest concerns involved in criminal litigation, collateral estoppel was limited to the situation in which the defendant was unable to participate in the prior hearing. Id. at 196.

The Gonzalez court was careful to distinguish civil cases, however, as situations in which collateral estoppel was more liberally applied. Id. at 192-93. In doing so, the court traced the current outlines of the doctrine in civil litigation.

The Gonzalez court traced the development away from the old mutuality requirement to Justice Traynor's opinion in Bernhard v. Bank of America Nat. Trust & Sav.Ass'n, 19 Cal 2d 807, 122 P.2d 892 (1942). State v. Gonzalez, 75 N.J. at 189. In Bernhard, a woman authorized an agent to deposit money in the defendant bank. The agent did so, but subsequently withdrew it and used it for his own purposes. After the woman died, appointing the agent as her executor, the present plaintiff contested the efforts of

the executor to be discharged before the administration of the estate was completed, claiming that the agent-executor had embezzled money from the testatrix. The court found that the money was a gift and discharged the executor. When the plaintiff later sued the bank to recover the money paid to the agent executor, the court held that collateral estoppel applied to the question of whether the money had been a gift or had been embezzled, allowing the defendant bank to claim the benefit of the former judgment although it was not a party or in privity with any party to the prior proceeding.

The Bernhard court outlined a new test to replace the mutuality requirement and determine whether collateral estoppel applied. As summarized in Gonzalez, supra at 189,

> . . .Justice Traynor suggested a distinction between those who may assert a plea of collateral estoppel and those against whom such a plea may be asserted. He proposed that estoppel be allowed where (1) the issue decided in the prior adjudication was identical with the one presented in the subsequent action, (2) the prior action was a judgment on the merits, and (3) the party against whom it was asserted had been a party or in privity with a party to the earlier adjudication.

Bernhard v. Bank of America Nat. Trust & Sav.Ass'n., 19 Cal. 2d at 809 , 122 P.2d at 895. A non party, therefore, could receive the benefits of collateral estoppel, so long as it was asserted against one who had been a party or in privity with the prior party.

The Bernhard doctrine allowed for non party defendants or plaintiffs to now claim the benefits of collateral estoppel.

The United States Supreme Court has recently commented on the various uses of the doctrine: "When a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant," the doctrine is termed "defensive estoppel". Parklane Hosiery Co., Inc. v. Shore, 47 U.S.L.W. at 4080 n.4. A companion application, or "offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." Id.

The new flexible approach of the New Jersey Supreme Court goes beyond the Bernhard guidelines. Defensive or offensive uses of collateral estoppel are permitted even when the party against whom the doctrines were asserted was not a party to the first lawsuit, so long as the interests represented by the prior parties are sufficiently identical to those in the subsequent action. Brunetti v. Borough of New Milford, 68 N.J. 576 (1975); New Jersey Manufacturers Insurance Co. v. Brower, 161 N.J.Super. 301 (App. Div. 1978).

Whether collateral estoppel applies is now determined by examining a variety of factors outlined in the Restatement Judgments 2d to determine whether use in a particular case is "either unjust or counterproductive". State v. Gonzalez, 75 N.J. at 190, 190 n.5, and at 197 (J. Conford concurring), citing Restatement Judgments 2d §88 at 88-91 (Tent. Dr. No. 2, 1975), §68.1 at 27-48 (Tent. Dr. No. 4, 1977) [hereinafter cited as Restatement Judgments 2d §§88 and 68.1]. Evaluation of the factors

listed in the Gonzalez test requires a conclusion that collateral estoppel must apply to relitigation of the Mt. Laurel issues against Bernards Township in this case.

1. Major Factors Considered in Gonzalez.

The Gonzalez court described two cases, Reardon v. Allen, 88 N.J. Super. 560 (Law Div. 1965) and Desmond v. Kramer, 96 N.J. Super. 96 (Cty. Ct. 1967) to clarify the new test. The two cases, both personal injury litigation, and examples of offensive collateral estoppel, deal with only three of the factors listed in the Restatement Judgments 2d, illustrating the special concern given to these considerations. The three factors identified were: (1) the similarity of the interests and claims of the prior and subsequent parties; (2) the vigor of the prior contest; and (3) the similarity of the prior and subsequent judicial forum. Restatement Judgments 2d §88 (2)(5); §68.1 e(iii).

In the first case cited, Desmond, the application of collateral estoppel is appropriate.

> In Desmond, supra, the plaintiff was one of a number of passengers who had been injured in an accident involving the defendant bus company. The bus company had been found negligent in a prior suit brought by other injured parties, and the plaintiff sought to assert a plea of collateral estoppel on the issue of liability. In granting plaintiff's motion for partial summary judment, the court emphasized that the prior suit had involved a number of claims, virtually taking on the character of a class action, and that the issues had been vigorously contested, ultimately being confirmed on appeal, 96 N.J. Super. at 108.

State v. Gonzalez, 75 N.J. at 190-91. In Desmond, the parties were similarly situated, the prior suit vigorously contested, and the forum similar.

Reardon illustrates a situation in which collateral estoppel should not apply.

> In Reardon, supra, there was a finding of negligence in a prior suit between the same parties but the claim had been limited to property damage. The court observed that property damage claims are often tried by insurance carriers in courts of limited jurisdiction. To give such adjudications binding effect in subsequent personal injury actions would raise the stakes, actually resulting in more protracted litigation with attendant judicial diseconomies, 88 N.J. Super. at 570. See also, Reilly v. Dziamba, 90 N.J. Super. 325. (App. Div. 1966).

In Reardon, therefore, collateral estoppel was inapplicable because the interests of the prior and current party plaintiffs were not identical, the stakes of the law suits were dissimilar, and the forums not comparable.

The application of collateral estoppel when the three major factors identified in Gonzalez are met, regardless of whether or not either party was a party in the original action, is illustrated by New Jersey Manufacturers Insurance Co. v. Brower, 161 N.J. Super. 293 (App.Div. 1978). In Brower, neither the party asserting collateral estoppel nor the party against whom it was asserted were parties to the prior action. The plaintiff insurer instituted a declaratory judgment action seeking an adjudication that the defendant was not entitled to coverage under the company's homeowners policy. The policy included an exclusion for bodily

injury intentionally caused by the insured. Manufacturers contended that, as a result of the conviction of the insured for assault with intent to kill the defendant in a prior criminal action, the fact that defendant's injuries were caused by an intentional act had been conclusively established.

In reaching the decision that collateral estoppel applied, the court analyzed the current status of the collateral estoppel doctrine. Though mentioning the old privity doctrine as applicable to the current defendant, the holding rested primarily on the identity of interest of the parties, and the intensity of the prior contest.

> The doctrine of collateral estoppel is not rendered inapplicable by virtue of the fact that the parties in the civil action are not the same as those in the criminal proceeding. Complete identity of parties is no longer required. . . .
>
> As a result of the virtual abandonment of the principle of rigid mutuality Manufacturers did not have to be a party to the prior criminal proceedings to benefit from collateral estoppel. While Geschke also was not a party to those proceedings, he was in privity with Brower. Therefore, he is barred from relitigating any issue necessarily decided against Brower in the earlier criminal action. Geschke's rights under the insurance policy are derivative from those of Brower. In effect, Geschke stands in the shoes of Brower with respect to the liability policy involved. See Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 397 (1970). Moreover, there was an identity of interest between Geschke and Brower at the time of the criminal proceedings. Brower, who was charged with, among other crimes, assault with intent to kill, was afforded a full opportunity to litigate the issue of his guilt. He had every reason to make as vigorous and effective a defense as possible. His personal interests would have been served by establishing that he did not intend to assault Geschke because he would have avoided criminal responsibility

> for the assault and retained his liability coverage. Geschke had a similar interest in the outcome of the trial because coverage would not be precluded if Brower did not intentionally assault him.
>
> The conviction of Brower for assault with intent to kill stamps the assault upon Geschke as an intentional one. The jury could not have returned such a verdict without making a determination that the assault was intentional, not accidental as now claimed by Geschke. Thus, the finding of guilt conclusively established that Geschke's injuries were intentionally caused by Brower and collaterally estopped Geschke from relitigating that same issue with Manufacturers.

Id. at 298-99.

The lipservice given by the Brower court to the old privity doctrine was not given in an earlier decision of the New Jersey Supreme Court involving a suit against a municipality. Brunetti v. Borough of New Milford, 68 N.J. 576 (1976). The New Jersey Supreme Court, prior to the Gonzalez and Brower opinions, applied collateral estoppel asserted by the defendant municipality against a landlord in the second suit, not a party to the prior action and not in privity with prior parties. Previously described as an example of virtual representation, Brunetti can also be understood as an application of the new expanded collateral estoppel doctrine.

Brunetti was a landlord challenging the validity of the same rent control ordinance previously challenged. The court held that collateral estoppel applied to prevent relitigation of issues actually determined in the prior action. Id. at 588. No effort was made to determine whether or not privity existed between the plaintiffs

in the two actions,and there was no privity. The plaintiffs in the two actions shared similar interests, however, and attacked the ordinance to effect the same result. Sufficient grounds to apply collateral estoppel, therefore, existed under the expanded collateral estoppel doctrine for a former party to assert estoppel against a non party to the former action.

The three major considerations identified by the Gonzalez court to bar relitigation of issues, followed and applied in Brower and Brunetti, clearly bar relitigation of the Mt. Laurel and Oakwood at Madison issues in the Allan Deane v. Bernards Township action. The plaintiffs in both actions are landowners, challenging the same provisions of the Bernards Township zoning ordinances. In fact,the grounds asserted for overturning the zoning ordinances as violating Mt. Laurel and Oakwood at Madison in Allan Deane are virtually identical. (See Statement of Facts, Comparison of Complaints, supra pps. 22-4). The Mt. Laurel and Oakwood at Madison issues were fully litigated in the prior action. (See Statement of Facts, Summary of Pretrial Order, motions, testimony and correspondence, supra, pps. 22-4). The decision was rendered in a forum identical in all essential respects with the current forum. A final judgment was rendered, including findings of fact and conclusions of law on the Mt. Laurel and Oakwood at Madison issues. (See Statement of Facts, summary of trial and appellate court decisions, supra pps. 37-45). Allan Deane

is, therefore, collaterally estopped from relitigating the issue of Bernards Township's compliance with Mt. Laurel and Oakwood at Madison.

2. Additional factors in the Gonzalez test

Consideration of the seven additional factors listed in the Restatement Judgments 2d, which the Gonzalez court established as the test for application of collateral estoppel, also argues for the application of the doctrine in this case. State v. Gonzalez, 75 N.J. at 190, n.5, 197. The seven factors are: 1) effect on prior remedy; 2) existence of inconsistent judgments; 3) appealability of prior findings; 4) effect on unforeseen rights to relief; 5) similarity of facts and law; 6) complication of second trial issues; and 7) effect on the public interest. Id. None of these factors preclude its application here. In fact, their analysis produces further support for the importance of the use of collateral estoppel in this case.

A description of each factor and its bearing on this case is as follows:

(1) Treating the issue as conclusively determined would not affect any applicable scheme of administering remedies in the actions involved. Restatement, Judgments 2d §88 (1) at 88-91. This consideration refers to situations in which the remedy granted in the first action is specifically limited to that action alone. Id. Comment at 92. The remedy granted in Lorenc was not so limited. (See Exhibit V at 4-8 ; Exhibit Z at 4-5).

(2) There have been no inconsistent judgments. Id. §88 (4); §68.1(b)ii. In fact, there have been no other decisions thus far with regard to the issue of compliance of the Bernards Township

Zoning Ordinance with Mt. Laurel and Oakwood at Madison.

(3) The findings with respect to compliance of the Bernards Township Ordinance with Mt. Laurel and Oakwood at Madison were appealable as a matter of law by the Lorenc plaintiffs. Restatement Judgments 2d §68.1(a). In fact, the plaintiffs appealed the court's failure to issue them a building permit for non-compliance with Mt. Laurel as well as failure of the court to require revision of some of the zoning. (See Preliminary Statement, supra p. 43 and Appellate Court decision Exhibit Z at 2).

(4) This case does not present the situation of being an unforeseeable second action, in which rights to relief are foreclosed or limited by applying the results of the prior action. Restatement, Judgments 2d. §68.1(b)ii, (e)ii,Comment p.96. The Allan Deane suit raises the identical issues of compliance with Mt. Laurel raised by the Lorenc plaintiffs. No unforeseen legal rights or obligations are at issue. (See Preliminary Statement supra at 43 ; Point I A supra at 51-4).

(5) The applicable legal context has not changed since the Lorenc decision, nor have the underlying facts on which a determination of compliance of Bernards Township must lie. Restatement Judgments 2d §68.1(b)(ii). It is this very identity of legal context and factual circumstances which argues so forcibly for application of collateral estoppel and res judicata in this case to avoid needless relitigation of identical issues and the possibility of inconsistent judgments in identical legal disputes.

(6) Treating the issue as conclusively determined will not complicate the determination of issues in the Allan-Deane action. Restatement Judgments 2d. §88(6). Rather, the application of collateral estoppel will significantly simplify the issues in the Allan Deane action, confining them to whether or not the current zoning represents a taking in violation of the plaintiff's due process rights. (See, Allan Deane complaint, Exhibit A).

(7) A broad concern for "the potential adverse impact on the public interest or the interests of persons not themselves parties in the initial action," Restatement, Judgments 2d.,§68.1 (e)(i), the factor which permits the widest discretion also argues for application of collateral estoppel in this case. The Restatement comment on this factor as a potential limitation states:

> There are instances in which the interests supporting a new determination of an issue already determined outweigh the resulting burden on the other party and on the courts. But such instances must be the rare exception, and litigation to establish an exception in a particular case should not be encouraged. Thus it is important to admit an exception only when the need for a redetermination of the issue is a compelling one. (Emphasis added.)

Id.,Comment at 39.

It is difficult to imagine any compelling interest which can justify relitigation of this issue of Mt. Laurel compliance within the year that a decision was rendered. The burden on the Township and the courts is substantial. The compelling interest is to put an end to the needlessly protracted relitigation

of a matter conclusively determined.

None of the additional factors which must be considered under the Gonzalez test provide any rationale for refusing to apply collateral estoppel in this case. In most instances, the circumstances simply do not exist. The last two factors provide strong arguments for the need to apply the doctrine here.

This case fits all the current requirements to apply collateral estoppel. Application of the doctrine can prevent relitigation of all the details of the Bernards Township Ordinance and the fair share formula developed by the Township. There already are detailed findings of fact and law on these issues. Collateral estoppel should be applied to bar relitigation of the issues of compliance with Mt. Laurel and Oakwood at Madison in the Allan-Deane case.

CONCLUSION

For the foregoing reasons, the motion of defendants for partial summary judgment as to Counts 1 and 2 of the second amended Allan-Deane complaint, to bar plaintiff from relitigating claims of non-compliance of the Bernards Township Land Use Ordinances with Mt. Laurel and Oakwood at Madison obligations, should be granted.

Respectfully submitted,

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