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Appendix to Brief on Notice of Motion for Partial Summary Judgment (Exhibits A-EE)

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THE ALLAN-DEANE CORPORATION, a Delaware corporation, qualified to do business in the State of New Jersey,	:SUPERIOR COURT OF NEW JERSEY LAW DIVISION, SOMERSET COUNTY
Plaintiff,	:DOCKET NO. L 25645-75 P.W.
vs.	: Civil Action
THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, et al.,	:
Defendants.	:

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APPENDIX TO BRIEF ON NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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

THE ALLAN-DEANE CORPORATION, a Delaware corporation, qualified to do business in the State of New Jersey, Plaintiff, vs. THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS, and THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS, and THE SOMERSET COUNTY PLANNING BOARD, Defendants.	Civil Action SECOND AMENDED COMPLAINT IN LIEU OF PREROGATIVE WRIT

Plaintiff, THE ALLAN-DEANE CORPORATION, a Delaware corporation, qualified to do business in the State of New Jersey, and having an office and place of business in the State of New Jersey located at Far Hills Country Mall, Borough of Far Hills, New Jersey, by way of Complaint against the Defendants, says:

FIRST COUNT

BERNARDS TOWNSHIP

1. Defendant, THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET (hereinafter referred to as "BERNARDS TOWNSHIP") is a sprawling rural-suburban community in the north-central portion of Somerset County, with a land area of 24.95 square miles, an amount equal to 8.2 per cent of Somerset County's land area of 305.6 square miles. At the time of the 1970 Census, BERNARDS TOWNSHIP contained a household population of 11,531 persons, or approximately 5.9 per cent of Somerset County's household population. Residential density in BERNARDS TOWNSHIP amounted to 462 persons per square mile as of the 1970 Census, a density substantially below the comparable figures of 635 persons per square mile in Somerset County and 938 persons per square mile in New Jersey.

2. Somerset County, in which BERNARDS TOWNSHIP is located, is the second wealthiest county in New Jersey, with a 1970 Census median family income of $13,433, a level exceeded only by Bergen County with a median family income of $13,597. Morris County, on the northern boundary of Somerset County, ranks third in wealth in New Jersey with a median family income of $13,421, and was the only other county with a 1970 Census median family income over $13,000.

3. BERNARDS TOWNSHIP stands out, even within

this structure of affluence, as one of the wealthiest municipalities in New Jersey. As of the 1970 Census (1969 income), BERNARDS TOWNSHIP was reported to have a median family income of $17,852, and an average (mean) family income of $19,243--income levels of 33 per cent above the County and 57 per cent above the New Jersey median. Of New Jersey's 567 municipalities, BERNARDS TOWNSHIP ranks 35th in family income, a ranking that places it in the 94th percentile in the State. The 531 municipalities in New Jersey with income levels below that of BERNARDS TOWNSHIP contained 95.69 per cent of New Jersey's population.

4. BERNARDS TOWNSHIP is a municipality of sizeable land area outside the central cities and older, built-up suburbs of our North and South Jersey metropolitan areas. It is in the process, due to its own land use decisions and its location with respect to major new interstate highways, of shedding its rural characteristics[1] and would, but for its exclusionary land use practices, experience a great population increase.

5. BERNARDS TOWNSHIP is a "developing municipality" as defined by the New Jersey Supreme Court in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975).

6. Only 10 developing municipalities in New Jersey had 1970 Census median family income levels above

that of BERNARDS TOWNSHIP.

7. The social characteristics of BERNARDS TOWNSHIP furnish further indication of its exclusionary status. Racially, BERNARDS TOWNSHIP is, according to the 1970 Census, 98.14 per cent white, a percentage well above the parallel statistics of 95.85 per cent white in Somerset County and 88.76 per sent white in New Jersey as a whole. Educationally, the median years of school completed by BERNARDS TOWNSHIP residents (excluding inmate population at Lyons Hospital) of 13.5 years is significantly above Somerset County's median of 12.4 years and New Jersey's median of 12.1 years. The median age of the TOWNSHIP'S residents is 34.0 years compared with 29.4 years in Somerset County and 30.1 years in New Jersey, reflecting the necessity of an established income to be able to afford the purchase of housing in BERNARDS TOWNSHIP.

8. Residential housing statistics from the 1970 census also reflect the municipality's affluence. According to the U. S. Census of Housing, 97.2 per cent of the BERNARDS TOWNSHIP'S housing units were one-family structures as compared with a State percentage of 57.9 per cent and a Somerset County percentage of 73.6 per cent. Of the occupied housing units in BERNARDS TOWNSHIP, 90.1 per cent were owner-occupied units as compared with a State percentage of 60.9 per cent and a Somerset County percentage of 73.1 per cent. The median number of rooms per housing unit was 7.2

rooms in BERNARDS TOWNSHIP while the New Jersey median was 5.2 rooms and the Somerset County median was 5.9 rooms.

9. The 1970 Census of Housing reported that the median value of owner-occupied housing units in New Jersey was $23,400. The comparable figure for Somerset County was $29,700, a value 26.9 per cent above the New Jersey median. The median housing value reported for BERNARDS TOWNSHIP in 1970 was $40,000, a level 70.9 per cent above the New Jersey median and 34.6 per cent above the Somerset County value. The median housing values for units for sale in BERNARDS TOWNSHIP as of the 1970 Census were beyond the Census takers scale and were simply reported to be $50,000-plus. Since the 1970 Census, housing values have increased markedly throughout New Jersey, and one survey reported a 1971 sample median value of existing and new homes of $62,500 for Somerset County. Were this value relationship applied to BERNARDS TOWNSHIP, a 1971 median value of $84,125 would be derived (Bernards = 1.346 x Somerset County). Even by conservative standards (assessed valuation) the average housing value in BERNARDS TOWNSHIP had increased to $60,355 by 1974, a figure similar to the average value of $60,854 reported by the Township Committee for all housing units as of August, 1975. New construction in the TOWNSHIP is considerably more expensive, ranging from $80,000 upwards.

10. Although BERNARDS TOWNSHIP'S residents rank

among the most affluent in New Jersey, their property tax burden ranked the TOWNSHIP 226th (60 percentile) in the State in 1973. By 1975, BERNARD TOWNSHIP'S rank relative to property tax rate was 354th from the highest (below the 40th percentile). Similarly, the per capita real estate tax in BERNARDS was $118 in 1960 and $324 in 1970--amounts equal to 96.7 per cent and 126.1 per cent of the respective New Jersey averages. Thus, while income in BERNARDS TOWNSHIP was 57 per cent above the New Jersey median in 1970, the real estate burden was only 26.1 per cent above the State's average cost. Relative to income, BERNARDS TOWNSHIP residents have been paying a substantially lower per cent in property taxes than their New Jersey counterparts.

11. Since 1970, BERNARDS TOWNSHIP residents have enjoyed a particularly favorable tax climate, with the equalized tax rate decreasing--from $3.93 per $100 in 1971 to $3.72 per $100 in 1972 to $3.53 per $100 in 1973 to $3.27 per $100 in 1974 and $2.86 per $100 in 1975. Thus, while local equalized tax rates in New Jersey have generally increased, BERNARDS TOWNSHIP'S equalized tax rates have decreased.

12. The principal reason for the recent decrease of the tax rate in BERNARDS TOWNSHIP is the presence of the American Telephone and Telegraph Company (hereinafter referred to as "A.T.&T.") Worldwide Headquarters in the Basking Ridge section of the TOWNSHIP. This A.T.&T. facil-

ity will be valued at $100 to $110 million (1975 dollars) when completed. At current assessment rates, this A.T.&T. ratable could yield revenues of $3.5 million when completed, an amount equal to 47.3 per cent of the TOWNSHIP'S total tax levy of $7.4 million during 1975.

13. The new A.T.&T. facility, although only partially completed, was assessed at $34.5 million during 1975 and yielded revenues of $1.3 million last year. Approximately $1.8 million in revenues from A.T.& T. are anticipated by the TOWNSHIP during 1976, and revenues of $3.5 million between 1978 and 1980 from A.T. &T. would not appear unreasonable.

14. During 1975 and 1976, the revenues derived from A.T.&T. have enabled BERNARDS TOWNSHIP to lower its equalized tax rate significantly while other municipalities throughout New Jersey are raising general levies by 10 to 20 per cent in order to obtain minimum funds to finance local education. BERNARDS TOWNSHIP will be able, when the A.T.&T. facility is completed, if it continues to succeed in its efforts to exclude lower and middle income housing, to lower its present equalized tax rate at least $1.00 to $1.86 per $100.00 in assessed population.

15. BERNARDS TOWNSHIP is intersected by two major Federal Interstate Highways which, when they are completed, will place it within 35 minutes of Newark, New Jersey's largest city, and 45 minutes of New York City.

16. BERNARDS TOWNSHIP would experience a great population increase because of its own primary employment, its geographic location with respect to other employment centers and its highway system but for its unique and hereinafter described system of exclusionary land use regulations.

THE ALLAN-DEANE APPLICATION

17. Plaintiff, THE ALLAN-DEAN CORPORATION (hereinafter referred to as "ALLAN-DEANE"), is the owner of 1,071 acres of land located in BERNARDS TOWNSHIP and more particularly known as Lots 1, 4, 6, 6-2, 6-3, 6-4, 21-2, 22-2, 23&35, 24, 28-1, and 32-1 in Block 171, and Lot 1 in Block 158, on the tax map of BERNARDS TOWNSHIP.

18. The ALLAN-DEANE property located in BERNARDS TOWNSHIP is contiguous on the west to an additional 461 acres of undeveloped land owned by Plaintiff in the adjoining Township of Bedminster.

19. Plaintiff's property is all undeveloped and is located northeast of the intersection of Federal Interstate Highway 78 and Federal Interstate Highway 287.

20. ALLAN-DEANE'S land is all located, pursuant to Chapter XII of the Revised General Ordinance of the Township of Bernards (hereinafter referred to as the "BERNARDS TOWNSHIP ZONING ORDINANCE") adopted by Defendant, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS (herein-

after referred to as the "COMMITTEE"), in Residential 3A district. Under the use regulations applicable to such district, the only uses therein permitted are single-family detached dwellings on three (3) acre lots.

21. On November 1, 1971, ALLAN-DEANE formally applied to Defendant, THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS (hereinafter referred to as the "BOARD"), for a zoning change after several informal meetings with the BOARD, at which Plaintiff pointed out that the property could be developed at reasonable densities in a responsible manner.

22. By letter dated November 11, 1971, the BOARD acknowledged receipt of this application together with a proposed amendment to the BERNARDS TOWNSHIP ZONING ORDINANCE, and informed ALLAN-DEANE that it agreed that some corrections of the existing zoning were necessary and it was considering the rezoning, not only at the Plaintiff's property, but the entire TOWNSHIP. The BOARD requested ALLAN-DEANE to be patient in view of the magnitude of their concept to allow the BOARD to educate the public concerning this concept and to test their reaction to it.

23. ALLAN-DEANE gave the BOARD the time it had requested to study this application in the context of over-all master plan revisions.

24. On December 18, 1975, the BOARD formally

adopted a new master plan in which the ALLAN-DEANE property was designated for sparse residential development.

25. On February 10, 1976, ALLAN-DEANE submitted a revised plan for the development of the property to the BOARD and again requested the BOARD to recommend the rezoning of this property to the COMMITTEE.

26. During ALLAN-DEANE'S presentation of its plan to the BOARD, Plaintiff demonstrated the following:

(a) the designation of the ALLAN-DEANE property for three-acre, single-family residential development was arbitrary;

(b) the ALLAN-DEANE property could be developed at reasonable densities without adverse environmental impact and is suitable for multi-family development;

(c) the master plan and natural resource inventory, insofar as it purports to support the existing zoning, is contradictory and indefensible;

(d) the existing PRN (Planned Residential Neighborhood) zones, to the extent they purport to be areas in which reasonably priced housing might be constructed, are unrealistic. The environmental and zoning constraints in that area work together to make it doubtful that any housing below the $90,000 price range could be constructed; and

(e) BERNARDS TOWNSHIP has excluded, through its zoning, not only its fair share of the regional need

for low and moderate income housing, but also its fair share of the regional need at all income levels below $40,000 per year.

27. The development of the ALLAN-DEANE property in accordance with the submitted plan would substantially relieve the existing housing shortage in the BERNARDS TOWNSHIP housing region and would enable persons who can not presently afford to buy or rent housing in BERNARDS TOWNSHIP to live there.

28. Because of the size of the ALLAN-DEANE land holdings and the economies of scale, housing could be constructed on the ALLAN-DEANE property in an environmentally responsible manner and at a price range affordable to all categories of people who might desire to live there, including those of low and moderate income, if BERNARDS TOWNSHIP, by its land use regulations, made such development reasonably possible.

29. ALLAN-DEANE is prepared and has offered to work with the TOWNSHIP OF BERNARDS or some other sponsoring agency to assure that a substantial portion of the multi-family homes constructed on the property would be eligible for rent subsidies in order to help BERNARDS TOWNSHIP to provide fully for its fair share of the regional housing need at all income levels.

THE BERNARDS TOWNSHIP EXCLUSIONARY ZONING SCHEME.

30. The BERNARDS TOWNSHIP ZONING ORDINANCE, by its

very terms and provisions, restricts housing uses in BERNARDS TOWNSHIP to persons who can afford to live in single-family dwellings located on valuable lots of considerable size. The effect of the design and structure of the zoning ordinance is to unnecessarily increase housing costs. This ordinance, by way of example, contains the following unique exclusionary provisions, all of which have the effect of driving upward the costs of housing:

(a) efficiency units are not permitted anywhere in BERNARDS TOWNSHIP and the smallest permitted unit is a one bedroom unit with a minimum of 660 square feet;

(b) apartment units are prohibited. (Although the PRN purposes indicate apartments are permitted, no unit may be placed above another unit);

(c) the minimum floor area requirements for one and two bedroom units in the PRN zone are excessive and bear no relationship to health, safety or welfare;

(d) the maximum gross density permitted is extremely low, requiring high-cost private units and precluding subsidized units;

(e) the filing fee required to be paid upon the submission of an environment impact report is excessive and bears no rational relationship to municipal costs in reviewing such reports, and is a patently unlawful revenue measure. The fee which ALLAN-DEANE would be required to pay in order to have its site plan merely re-

viewed would be in excess of $165,000 under the BERNARDS TOWNSHIP fee schedule; and

(f) the only areas zoned for multi-family housing, the PRN zones, are the most environmentally sensitive and inappropriate areas in the entire TOWNSHIP. Both PRN zones have substantial areas in the flood plain. The entire PRN-8 zone and two-thirds of the PRN-6 zone are proposed, because of their unsuitability for development, as open-space in the County Master Plan; the United States Corps of Engineers has proposed that much of this area be a flood control reservoir; and the Upper Passaic River Environmental Counsel has recommended that 110 acres in tnese zones be preserved in open space. Much of the remaining land in the PRN zone is in institutional use and is not reasonably available for development. Because of the physical constraints, the low net density requirement and other exclusionary land use requirements, the actual housing unit yield from these areas should be considerably less than one unit per acre. The average housing unit cost of construction in this area should exceed $90,000 per unit in 1976 dollars; and

(g) the BERNARDS TOWNSHIP ZONING ORDINANCE prohibits mobile homes in the entire TOWNSHIP.

31. The BOARD drafted and the COMMITTEE enacted on May 17, 1977, an Ordinance (Ordinance #425 of the BERNARDS

TOWNSHIP ORDINANCES) to replace Ordinance 385 which had provided on its face for 354 units of low and moderate income housing, but contained provisions which insured that no such housing could be constructed. The new Ordinance #425 purports to comply with the decision of the Supreme Court of New Jersey in Oakwood at Madison, Inc. et al, vs. Township of Madison, et al, in that it allegedly permits the contruction of 385 units of "least cost" housing in Bernards Township. The Ordinance, as amended, remains exclusionary for, inter alia, the following reasons:

(a) the Ordinance provides no controls to insure that the housing constructed thereunder will indeed be "least cost"; nothing in the Ordinance would prevent a developer from constructing and marketing dwelling units approved pursuant to this Ordinance at costs which would render them unaffordable to most of the population within the BERNARDS TOWNSHIP housing region.

(b) there is no requirement in this Ordinance which ensures that any units will be made available to persons of even moderate income;

(c) the requirement in paragraph 1 (c) of the Ordinance, which provides that the distribution of subsidized units in any complex as a whole shall likewise apply within each category of dwelling unit size set forth in paragraph 2 (k), which in turn prescribes a rigid mix of 1, 2, 3 and 4 bedroom units, imposes constraints so inflexible as to virtually

preclude a feasible Section 8 development or other subsidy programs;

(d) the Ordinance in 2 (g) requires a maximum density of 6 dwelling units per acre, a density substantially below customary densities of multi-family development, which combined with the maximum height requirement, found in 2 (l), of 2½ stories results in higher than necessary costs per unit for land and for site improvements;

(e) the Ordinance in paragraph 5 (j) requires one parking lot for each bedroom, a cost generating requirement which is vastly in excess of the standards of any federal or State agency;

(f) the Ordinance contains no safeguards, such as ceiling standards for lot size, floor area, and the like, to prevent development of housing that is clearly not "least cost";

(g) the Ordinance does not provide, as is called for in the Madison decision, a reasonable cushion over the number of contemplated least cost units deemed necessary under even BERNARDS TOWNSHIP'S own ingeniously, understated "fair share" formula;

(h) the 354 units of very low and low income housing provided for in the Ordinance represent only a small fraction of BERNARDS TOWNSHIP'S "fair share" of the regional housing need;

(i) the Ordinance contains the same exclusionary provisions (such as the prohibition of efficiency units, the prohibition of apartments, and an exceedingly low permitted density), found elsewhere in the BERNARDS TOWNSHIP Zoning Ordinance, all of which have the effect of driving upward the cost of housing.

32. The BERNARDS TOWNSHIP LAND SUBDIVISION ORDINANCE, by its very terms and provisions, unnecessarily increases housing and development costs.

33. The effect of these requirements, together with the density and floor area ratio requirements, the open space requirements and the complex and expensive environmental impact statement required, assures that any housing built in BERNARDS TOWNSHIP will be more expensive than housing similarly constructed elsewhere. The governing body of BERNARDS TOWNSHIP has failed 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, in an amount sufficient to satisfy the deficit in the municipality's fair share. This failure is both quantitative and qualitative. Insufficient areas are zoned to permit least cost housing, and the zoning restrictions are such as to prevent production of units at least cost consistent with health and safety requirements.

SOCIAL CONSEQUENCES OF BERNARD TOWNSHIP'S EXCLUSIONARY PRACTICES.

34. The COMMITTEE and the BOARD have deliberately sought to preserve BERNARDS TOWNSHIP as an enclave of affluence and social homogenity by influencing County and State agencies and agencies of the Federal government to adopt policies which make it difficult and expensive for developers to construct housing at reasonable price ranges. In particular, the BOARD and the COMMITTEE have:

(a) influenced the Somerset County Planning Board to designate the ALLAN-DEANE property and other areas suitable for multi-family housing as areas not intended to be sewered; and

(b) influenced the Somerset County Planning Board to include areas suitable for multi-family dwellings, including the ALLAN-DEANE property, in its master plan as an area to be developed in a sparse residential mode.

35. Although BERNARDS TOWNSHIP presently has over 7,000 acres of vacant, residentially zoned land, that land is physically and economically available, because of BERNARD TOWNSHIP'S system of land use regulations, to only the upper 5%, by income, of New Jersey's population.

36. There is a critical housing shortage in New Jersey generally and in the BERNARDS TOWNSHIP housing re-

gion specifically, and that housing need has been added to and increased by the actions of the COMMITTEE which rezoned an area at the request of the American Telephone and Telegraph Company in order to permit it to build a world headquarters in BERNARDS TOWNSHIP.

37. The A.T.&T. complex in BERNARDS TOWNSHIP will employ, when it is completed, an estimated 3,500 people at a broad range of income levels who will require an estimated 2,850 homes.

38. The A.T.&T. office complex in BERNARDS TOWNSHIP will, when it is completed in 1978, pay annual property taxes to BERNARDS TOWNSHIP of approximately three and one-half million dollars. These property taxes will constitute almost one-half of BERNARD TOWNSHIP'S total tax receipts.

39. BERNARDS TOWNSHIP, which already enjoys, in proportioh to their taxpayers incomes, one of the lowest tax rates in New Jersey, will be able, due to the taxes it will receive from A.T.&T., to reduce its tax rates even further.

40. The great majority of the employees of A.T.&T. in BERNARDS TOWNSHIP will be unable to afford housing for their families within BERNARDS TOWNSHIP because of the TOWNSHIP'S land use regulations. Many of these workers will be locked out, because of their financial resources, of the other suburban residential areas

surrounding BERNARDS TOWNSHIP and will have to commute excessive distances to their jobs.

41. A.T.&T.'s Long Lines Division is in the process of constructing their headquarters just north of the ALLAN-DEANE property in neighboring Bedminster Township. That facility will employ an estimated additional 3,500 people who will require an additional 2,850 homes. The majority of these workers will be excluded, because of their financial resources, from BERNARDS TOWNSHIP and the suburban municipalities which surround it, and will have to commute excessive distances by automobile to their jobs.

42. The ALLAN-DEANE property, because of its unique locational relationship to both the Long Lines and the A.T.&T. Headquarters buildings, is in a position to provide a good portion of the housing needs of their proposed 7,000 employees.

43. The COMMITTEE and the BOARD failed to act reasonably and in furtherance of a legitimate comprehensive plan for the zoning of the entire municipality when they rezoned for A.T.&T., but chose to ignore the housing needs of A.T.&T.'s employees as well as the regional housing needs.

44. The BERNARDS TOWNSHIP ZONING ORDINANCE and its entire system of land use regulations is invalid because it has a substantial external impact contrary to the general welfare. BERNARDS TOWNSHIP'S accommodation of large employment generators, coupled with BERNARDS TOWNSHIP'S exclusionary

land use policies have:

(a) imposed an unfair burden on other municipalities within the BERNARDS TOWNSHIP housing region to provide housing for persons in the lower and middle income spectrums employed in BERNARDS TOWNSHIP;

(b) deprived other communities, cities and urban areas already providing more than their fair share of housing for all categories of persons of the ratables they need to create a better balance for their community to pay the educational and governmental costs associated with residential development;

(c) contributed adversely to a national and local energy crisis by creating a physical and economic need for long distance commuting for persons employed within BERNARDS TOWNSHIP;

(d) imposed an unfair burden on workers employed in the BERNARDS TOWNSHIP housing region, most of whom have no access to public mass transit and for whom transportation is both time consuming and prohibitively expensive; and

(e) contributed to the process of urban decay presently afflicting our cities by depriving these cities of tax ratables while requiring them, at the same time, to continue to bear the educational and governmental costs associated with housing.

WHEREFORE, Plaintiff demands judgment as follows:

A. that the BERNARDS TOWNSHIP ZONING ORDINANCE be declared invalid in its entirety;

B. that those portions of the BERNARDS TOWNSHIP LAND SUBDIVISION ORDINANCE, together with any other land use regulations which the Court finds unreasonably increases housing costs, be declared invalid;

C. that the COMMITTEE be ordered to rezone the ALLAN-DEANE property so as to permit the development of housing thereon at reasonable densities and at reasonable costs;

D. that the COMMITTEE and the BOARD be ordered to affirmatively provide for their fair share of the regional housing need at all family income levels, including low and moderate and specifically to:

(1) establish a Housing Authority to sponsor and develop low and moderate income housing in BERNARDS TOWNSHIP;

(2) fund that Housing Authority not only with federal and state housing grants but also with a substantial portion of the taxes paid to BERNARDS TOWNSHIP each year by A.T.&T.;

(3) plan and provide for, out of municipal tax revenues, the extension of sewers, water, roads and other utilities to areas zoned for multi-family development;

(4) cooperate with ALLAN-DEANE to keep housing and development costs down in order to assure the

development on the ALLAN-DEANE tract of an appropriate variety of housing types, including housing units eligible to be taken over by the BERNARDS TOWNSHIP Housing Authority under a federal rent subsidy program;

E. that Defendants pay to Plaintiff the costs of suit;

F. that BERNARDS TOWNSHIP be restrained from permitting further occupancy of the A.T.&T. facility in Basking Ridge until such time as it can provide housing for those employees;

G. that BERNARDS TOWNSHIP be restrained from permitting any further nonresidential development of the TOWNSHIP until it can meet its fair share of the regional housing need;

H. that BERNARDS TOWNSHIP be required to distribute to other municipalities within its housing region an apportioned fair share of its tax revenues; and

I. such other relief which this Court may deem appropriate.

SECOND COUNT

1. Plaintiff repeats the allegations contained in the First Count of the Complaint as if set forth herein at length.

2. BERNARDS TOWNSHIP has been able, because of this low tax rate and because of its unique location with

respect to two major federal interstate highways (paid for by the United States of America), to unfairly compete with and attract valuable tax ratables away from our cities and urban areas to further reduce its tax rate.

3. BERNARDS TOWNSHIP has refused or neglected to provide for any substantial portion of the housing needs of the employees of the company which it has induced to leave an urban area and has left to other municipalities, our cities and urban areas, the responsibility of providing adequate housing at reasonable costs for said employees.

4. The members of the COMMITTEE and the BOARD have conclusively demonstrated through their words and actions that, although they are aware of their legal obligation to affirmatively provide for BERNARD TOWNSHIP'S fair share of the regional housing need, they are prepared, at any cost, to maintain BERNARDS TOWNSHIP as an enclave of affluence and social homogeneity and to use every delaying tactic towards that end.

5. The general welfare of all citizens of New Jersey will be irreparably damaged by any delay in the resolution of this case. While this matter remains in litigation, the employees of A.T.&T. and other employees in the BERNARDS TOWNSHIP housing region will be seeking homes in areas far from their place of employment, other municipalities and cities will be paying educational and governmental ex-

penses associated with housing and irreversible long range patterns of commutation from home to work will be established.

WHEREFORE, Plaintiff demands judgment as follows:

A. that this Court suspend the COMMITTEE'S and the BOARD'S power to plan and zone BERNARDS TOWNSHIP;

B. that this Court appoint a receiver or trustee for BERNARDS TOWNSHIP with the power to appoint planners, housing consultants and consultants in tne field of local finance;

C. that this Court order the COMMITTEE to pay over to the receiver or trustee all tax revenues received from non-residential uses in BERNARDS TOWNSHIP;

D. that the COMMITTEE be required, during the period of receivership, to support its schools and governmental services out of remaining funds;

E. that the receiver or trustee be authorized and directed to undertake comprehensive planning and to rezone BERNARDS TOWNSHIP into a reasonably balanced community, providing for its fair share of the regional housing need at every income level;

F. that the receiver or trustee be authorized to create and fund a HOUSING AUTHORITY and to otherwise spend the funds entrusted to him to affirmatively provide for the regional housing need; and

G. that this Court issue such other orders or relief as may be deemed appropriate.

THIRD COUNT

1. Plaintiff repeats all of the allegations contained in the First and Second Counts of the Complaint as if set forth herein at length.

2. The BERNARDS TOWNSHIP ZONING ORDINANCE, as applied to the Plaintiff's property, is unreasonable, arbitrary and capricious.

3. The BERNARDS TOWNSHIP ZONING ORDINANCE, as applied to Plaintiff's property, is discriminatory and exclusionary.

WHEREFORE, Plaintiff demands the following:

A. that Defendants be directed to permit the Plaintiff to develop its property at a reasonable density for multi-family housing; and

B. that those portions of the ZONING ORDINANCE, LAND SUBDIVISION ORDINANCE, and other building and land use regulations, which the Court finds unnecessarily increase housing costs, be declared invalid as applied to Plaintiff.

FOURTH COUNT

1. Plaintiff repeats the allegations contained in the First, Second and Third Counts of the Complaint, as if set forth herein at length.

2. Plaintiff alleges that the BERNARDS TOWNSHIP

ZONING ORDINANCE requiring a minimum acreage of three acres for residential dwellings is, as applied to Plaintiff's property, in violation of the State and Federal constitution in that it deprives Plaintiff of its property without due process of law and has denied to Plaintiff the equal protection of the laws.

WHEREFORE, Plaintiff demands that Defendants pay Plaintiff just compensation for depriving Plaintiff of its property without due process of law.

FIFTH COUNT

1. Plaintiff repeats the allegations contained in the First, Second, Third and Fourth Counts of the Complaint, as if set forth herein at length.

2. All three branches of State Government, the Legislature, the Judiciary and the Executive, have recognized that there exists a serious shortage of decent living accomodations in New Jersey at rents and prices affordable to a broad spectrum of this State's citizens and, have determined that the general welfare requires that such housing be provided.

3. THE SOMERSET COUNTY PLANNING BOARD (hereinafter referred to as the "COUNTY BOARD") has the duty and is required by basic planning principles, by N.J.S.A. 40:27-2, and by the United States and the New Jersey Constitutions to

promote the general welfare and to encourage all municipalities within the County to affirmatively provide for the regional housing need.

4. The COUNTY BOARD has conspired with BERNARDS TOWNSHIP and other municipalities in the Somerset Hills area to preserve the exclusionary zoning in that area of Somerset County.

5. The COUNTY BOARD has encouraged BERNARDS TOWNSHIP and the BOARD and other municipalities within the Somerset Hills area to adopt land use policies which have a substantial external impact contrary to the general welfare and which:

(a) impose an unfair housing burden on other municipalities, including municipalities in Somerset County, within the BERNARDS TOWNSHIP housing region;

(b) deprive other communities, cities and urban areas, already providing more than their fair share of housing for all categories of persons, of the ratables they need to create a better balance for their communities to pay educational and governmental costs engendered by residential development;

(c) contributed adversely to a national and local energy crisis by creating a physical and economic need for long distance commuting for persons employed within BERNARDS TOWNSHIP, Bedminster Township and Far Hills Borough;

(d) imposed an unfair burden on workers employed in the Somerset Hills area, most of whom have no access to public mass transit and for whom transportation is both time consuming and prohibitively expensive; and

(e) are in clear violation of the existing statutory and case law requirements that each municipality plan comprehensively for a reasonably balanced community and to affirmatively meet its fair share of the regional houing needs of persons employed within the housing region.

6. The COUNTY BOARD has adopted a County Master Plan which mirrors the existing desire of BERNARDS TOWNHIP and of other communities in the Somerset Hills.

7. The County Master Plan, insofar as it includes the ALLAN-DEANE property, is arbitrary and capricious.

8. The COUNTY BOARD has conspired with BERNARDS TOWNSHIP and other municipalities within the Somerset Hills area to hold secret meetings in plain violation of the Open Public Meetings Act for the expressed purpose of preserving BERNARDS TOWNSHIP and other municipalities from residential developments of a density and on a scale which would economically permit housing to be provided to persons of low or moderate incomes.

9. The COUNTY BOARD, in reckless disregard of the public welfare, has:

(a) designated the ALLAN-DEANE property and

other areas suitable for multi-family housing as areas not intended to be sewered;

(b) influenced the New Jersey Department of Transportation to request the redesign of the proposed U.S. 287 interchange constructed for A.T.&T. so that it would be more difficult for that interchange to serve undeveloped areas of BERNARDS TOWNSHIP and Bedminster Township, including the ALLAN-DEANE property, which had applied for rezoning for a multi-family use;

(c) attempted to influence the State Department of Environmental Protection and the Federal Environmental Protection Agency to adopt sewer funding policies inimical to the development of housing in the Somerset Hills area;

(d) totally ignored the housing needs of persons employed in the BERNARDS TOWNSHIP housing region;

(e) encouraged and allowed its employee, the Director of the COUNTY BOARD staff, to publicly attack State housing policy and to discourage municipalities in Somerset County from providing for their fair share of the regional housing need.

WHEREFORE, Plaintiff demands the following:

A. that the COUNTY BOARD be directed to reorder its priorities and affirmatively encourage municipalities in Somerset County to meet the housing needs of persons employed within the Somerset County housing region generally and,

specifically, the need of persons employed in the two A.T.&T. facilities in the Somerset Hills area;

B. that the COUNTY BOARD be directed to adopt a new master plan consistent with the obligaion of all municipalities within Somerset County to provide for their fair share of the regional housing need;

C. that the COUNTY BOARD be directed to cooperate affirmatively with ALLAN-DEANE and other prospective developers of new housing at price ranges below what is now available in the Somerset Hills area to solve the environmental problems associated with larger scale developments and to service such properties with utilities and adequate transportation facilities;

D. that the existing County Master Plan be declared invalid; and

E. such other relief which this Court may deem appropriate.

MASON, GRIFFIN & PIERSON
Attorneys for Plaintiff

By: Henry A. Hill, Jr.
Henry A. Hill, Jr.

Dated: August 16, 1977

B

SUPERIOR COURT, SOMERSET COUNTY, LAW DIVISION

PRETRIAL ORDER

ALLAN - DEANE CORP., et al.,
-v-
BERNARDS TOWNSHIP

Pretried by Judge DAVID C. LUCAS

on January 5, 1978

Superior No. L— 25845-78 SW

County No. C— S-1290 P.W.

The parties to this action, by their attorneys, having appeared before the Court at a pretrial conference on the above date, the following action was taken:

1. NATURE OF ACTION: An action in lieu of prerogative writs by Allan-Deane against Bernards Township and Somerset County Planning Board. Plaintiff challenges the validity of the Township zoning ordinance and the validity of the Master Plan and further alleges a conspiracy between and among the defendants.

2. ADMISSIONS AND STIPULATIONS: None other than those previously set forth in pleadings or in request for admissions.

3 and 4 FACTUAL AND LEGAL CONTENTIONS:

As to Plaintiff Allan-Deane, the factual and legal contentions are spelled out in the pleadings.

As to the defendant Township of Bernards, the factual and legal contentions are spelled out in an addendum, pages one through

thereto, attached hereto, and in the pleadings.

As to the defendant Somerset, as spelled out in the addendum, attached hereto, and as further spelled out in the pleadings.

6. DAMAGES AND INJURY CLAIMS: Plaintiffs' claim for damages is set forth in the count four of their complaint. None of the defendants makes any claim for damages.

COUNTERCLAIMS: The counterclaim answer of the Township is attached as follows: Page 3 30th Separate Defense: "Bernards Township has complied with the requirements of Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 67 N.J. 151 (1975) or Urban League of Greater New Brunswick v. Mayor and Council of Carteret, 71 N.J. 451 (1977) by the enactment of Ordinance No. 77-20 on July 11, 1977, which provides zoning for a fair share housing.

The answer of the defendant Somerset County is limited to incorporate by reference the 30th separate defense of the Township of Bernards, referred to above.

7. LEGAL ISSUES AND EVIDENCE PROBLEMS:

1. For Plaintiff see exhibit B attached hereto, number 7, A through M.

2. For the defendant Bernards Township see number 7 of its pretrial memorandum, page two, number 7.A through E., as attached.

3. For the defendant Somerset County see its pretrial order memorandum, page two, number 7. A through E., as attached.

9 LEGAL ISSUES ABANDONED: none

10 ENABLING: All ordinances, master plans, site plans, regulations or [illegible] governing land use in Bernards Township and Somerset County.

11 EXPERT WITNESSES: No limit. Names and qualifications of expert witnesses not previously supplied are to be exchanged by March 30, 1979. Additional reports if any, are to be furnished by March 30, 1979.

12 BRIEFS: Briefs will be submitted by all parties. Plaintiffs' briefs are to be submitted by April 30, 1979. Briefs of both defendants by May 31, 1979. All briefs not submitted will be deemed abandoned.

13 [illegible] seal.

14 [illegible]: None.

15 TRIAL COUNSEL: For the plaintiff, Henry A. Hill, Jr., and Hannoch, Stern , Weisman & Besser, ~~xxx~~ co-counsel for plaintiff.

For DefendantBernards Township, Alfred L. Ferguson: James Davidson, co-counsel.

For Defendant Somerset County, John Richardson..

16 ESTIMATED LENGTH OF TRIAL: All counsel estimate that the trial will last at least 12 weeks.

FRONT

11 JURY CALL: Trial is to be delayed until the completion of the Allan-Pearce -v- Bedminster Township case presently being tried before Judge Lisby.

12 PROCEDURAL MATTERS CONSIDERED:

1. All motions reasonably related to issues of jurisdiction, strike defenses, res judicata, law of the case are to be heard by written with a view to disposition prior to March 30, 1990.

2. It was discussed by the Court that the trial will be on a continuous basis and counsel generally concurred in that plan.

Judd A. Lucas
PRESIDING JUDGE, U.S.D.J. JSC

[illegible], ESQ.

ALFRED L. FERGUSON, ESQ.

JAMES DAVIDSON, ESQ.

JOHN F. RICHARDSON, ESQ.

C

ORIGINAL [illegible] FORWARDED TO THE SUPERIOR COURT FOR FILING ON 10/18/74
ROBERT E. GAYNOR, J.C.C. t/a

DUPLICATE HEREOF FILED WITH SOMERSET COUNTY CLERK
ROBERT E. GAYNOR, J.C.C.
T/a
"Filed" with me at Somerville, N.J. 10/18/74

Law Offices of
Fuerst and Singer
21 East High Street
Somervilla, New Jersey 08876
(201) 526-3300
Attorney for Plaintiffs

THEODORE Z. LORENC, LOUIS J. HERR, SAM WISHNIE, MARION WISHNIE, Executrix of the Estate of Harry Wishnie, Deceased, ALICE J. HANSEN, Trustee, WILLIS F. SAGE, WILLIAM W. LANIGAN, and MERWIN SAGE,

Plaintiffs

vs.

THE TOWNSHIP OF BERNARDS, in the County of Somerset, a municipal corporation of the State of New Jersey, and THE PLANNING BOARD of the Township of Bernards,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SOMERSET COUNTY
Docket No. L-6237-74 P.W.

Civil Action

COMPLAINT
IN LIEU OF
PREROGATIVE WRITS

Plaintiffs, Theodore Z. Lorenc, residing at 241 New Providence Road, Mountainside, New Jersey; Louis J. Herr, Sam Wishnie, and Marion Wishnie, c/o Sam Wishnie, 24 Wilbur Avenue, Newark, New Jersey; Alice J. Hansen, Trustee, residing at 1600 Kenyon Avenue, Borough of South Plainfield; Willis F. Sage, resid at 1006 Park Avenue, Plainfield, New Jersey; William W. Lanigan,

residing at 35 East Craig Street, Basking Ridge, New Jersey; and Merwin Sage, residing at 9 Indian Rock Road, Warren, New Jersey, by way of complaint against the defendants say:

1. Plaintiffs are the owners or purchasers under option of certain real property located in the Township of Bernards in the County of Somerset, and the State of New Jersey and known more particularly as Lot 3 in Block 178; Lots 5, 6, 7, 8, 12, 13, and 15 in Block 177; and Lots 19, 20, 21, 22, 23, 24, 25, 25-2, and 27 in Block 176; which were the subject matter of a rezoning by the defendants known as Ordinance No. 347 finally adopted on September 3, 1974.

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 sewers", 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.

6. The amendment to the ordinance on September 3, 1974 which changed the zoning from R20 to R40, without notice, publication, referral or public hearing was illegal.

WHEREFORE, plaintiffs demand judgment against defendants setting aside those section of the ordinance to the extent of the reasons complained of herein and further,

respectfully requests of the Court to direct said defendants to permit the construction of residential-type dwelling units at a density of not less than 12 units per acre on a minimum of 5 acres, to eliminate the minimal habitable floor space requirement, to eliminate any requirement for parking spaces in excess of 2 spaces for each residential dwelling, direct the inclusion of a provision in such ordinances for the utilization of modular or mobile-type homes, permit the construction where sewers are constructed by the owner of the land, permit the granting of open space to entities other than the municipality, such as the State of New Jersey, or Somerset County Park Commission, and retain jurisdiction of the within action until this is accomplished in a manner satisfactory to the Court.

Law Offices of
Fuerst and Singer

By _____
Steven B. Fuerst

D

Law Offices of
Fuerst and Singer
21 East High Street
Somerville, New Jersey 08876
(201) 526-3300
Attorney for Plaintiffs

THEODORE Z. LOREBC, LOUIS J. EERR, SAM WISENIS, MARION WISENIS, Executrix of the Estate of Harry Wishnie, Deceased, ALICE J. HANSEN, Trustee, WILLIS F. SAGE, WILLIAM W. LANIGAN, and MERRIN SAGE, Plaintiffs vs. THE TOWNSHIP OF BERNARDS, in the County of Somerset, a municipal corporation of the State of New Jersey, and THE PLANNING BOARD of the Township of Bernards, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, SOMERSET COUNTY Docket No. ~~L-6226-74 PW~~ L-6437-74 PW Civil Action AMENDED COMPLAINT IN LIEU OF PREROGATIVE WRIT

Plaintiffs, Theodore Z. Lorenc, residing at 241 New Providence Road, Mountainside, New Jersey; Louis J. Eerr, Sam Wishnie, and Marion Wishnie, c/o Sam Wishnie, 24 Wilbur Avenue, Newark, New Jersey; Alice J. Hansen, Trustee, residing at 1600 Kenyon Avenue, Borough of South Plainfield; Willis F. Sage, residing at 1006 Park Avenue, Plainfield, New Jersey; William W. Lanigan, residing at 35 East Craig Street, Basking Ridge,

New Jersey; and Marvin Sage, residing at 9 Indian Rock Road, Warren, New Jersey, by way of complaint against the Defendants say:

1. Plaintiffs are the owners or purchasers under option of certain real property located in the Township of Bernards in the County of Somerset, and the State of New Jersey and known more particularly as Lot 3 in Block 178; Lots 5, 6, 7, 8, 12, 13, and 15 in Block 177; and Lots 19, 20, 21, 22, 23, 24, 25, 25-2, and 27 in Block 176.

2. A portion of the Plaintiffs' property was the subject of prior litigation, to wit: Docket No. L 12870-72 P.W. in the Superior Court of New Jersey, Law Division.

3. Pursuant to court order rendered in the former action, the Plaintiffs' property was the subject matter of a rezoning by the Defendants under the title of Ordinance No. 347, Planned Residential Neighborhood zone (hereinafter PRN), which was finally adopted on September 3, 1974.

4. 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 a public sewer rather than sewering the tract, and storage requirements.

5. The Defendant has rezoned, but has failed to make any provision for 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.

WHEREFORE, Plaintiffs demand judgment:

(A) Setting aside those sections of the ordinance to the extent of the reasons complained of herein.

(B) Directing the Township of Bernards to desist from the enforcement of its zoning ordinance.

(C) Directing the Planning Board of the Township of Bernards and the Township Committee of Bernards to promulgate and adopt an amendment to the zoning ordinance providing for multi-family dwellings.

(D) Retaining jurisdiction of this matter with the court pending the adoption of satisfactory ordinances.

(E) For such other relief the court deems appropri and just.

(F) For costs of suit.

SECOND COUNT

1. Plaintiff repeats paragraph 1 through 3 of the first count as if fully set forth herein.

2. The amendment to the ordinance on September 3, 1974 which changed the zoning from R20 to R40 in PBW 8, was done without notice, publication, referral or public hearing.

3. This action denied the Plaintiffs the right to be heard with regard to a substantial and major amendment to the ordinance.

4. The Plaintiffs were thus denied their rights under both the Federal and State Constitutions and the Laws of the State of New Jersey.

WHEREFORE, Plaintiffs demand judgment:

(A) Declaring the amended zoning ordinance illegal and void.

(B) Demanding that part of the ordinance setting forth the R40 classification as illegal and void.

(C) Retaining jurisdiction of this matter with the court pending the adoption of satisfactory ordinances.

(D) For such other relief the court deems appropriate and just.

(E) For costs of suit.

THIRD COUNT

1. Plaintiff repeats paragraphs 1 through 3 of the first count as if fully set forth herein.

2. Section 3(b)(1) of Ordinance No. 347 provides that an owner-applicant may be permitted to develop a planned residential neighborhood. This privilege is to be granted by the Township Committee after recommendation of the Planning Board

3. The zoning ordinance does not create or vest in a property owner the right to invoke such PRN zoning, but makes it at the pleasure of the Planning Board and the Township Committee.

4. This classification is arbitrary, capricious, and unreasonable in derogation of the Plaintiffs' constitutional rights.

WHEREFORE, Plaintiffs demand judgment:

(A) Declaring Ordinance No. 347 void and illegal.

(B) Declaring that the ordinance is invalid as it does not vest the right of PRN to all property owners.

(C) Retaining jurisdiction of this matter with the court pending the adoption of satisfactory ordinances.

(D) For such other relief the court deems appropriate and just.

(E) For costs of suit.

FOURTH COUNT

1. Plaintiff repeats paragraph 1 through 3 of the first count as if fully set forth herein.

2. Ordinance No. 347 apparently requires a minimum of twenty-five acres in order to invoke the PRM zoning although it is not set forth as such.

3. The minimum lot size needed for the zone are so vague and indefinite as to be unenforceable.

WHEREFORE, Plaintiffs demand judgment:

(A) Declaring Ordinance No. 347 void and illegal.

(B) Retaining jurisdiction of this matter with the court pending the adoption of satisfactory ordinances.

(C) For such other relief the court deems appropriate and just.

(D) For costs of suit.

FIFTH COUNT

1. Plaintiff repeats paragraphs 1 through 3 of the first count as if fully set forth herein.

2. Section 4(4)(ii) of Ordinance No. 347 mandates that ". . . approximately equal percentages of one bedroom, two bedroom, three bedroom and four (or more) bedroom facilities be made available in each tract of the PRM zone.

3. There is no underlying factual basis supporting this requirement and thus it is arbitrary, capricious, and unreasonable.

4. This requirement regulating bedrooms is a denial of equal protection under the laws and in contravention of the Plaintiffs' constitutional rights.

WHEREFORE, Plaintiffs demand judgment:

(A) Declaring the zoning ordinance no. 347 void and illegal.

(B) Retaining jurisdiction of this matter with the court pending the adoption of satisfactory ordinances.

(C) For such other relief the court deems appropriate and just.

(D) For costs of suit.

SIXTH COUNT

1. Plaintiffs repeat paragraphs 1 through 3 of the first count as if fully set forth herein.

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.

WHEREFORE, Plaintiffs demand judgment:

(A) Declaring the zoning ordinance of the Township of Bernards to be null and void.

(B) Directing the Township of Bernards to cease and desist from the enforcement of its zoning ordinance.

(C) Directing the PLANNING BOARD OF THE TOWNSHIP OF BERNARDS and the TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS to promulgate and adopt an amendment to the zoning ordinance providing for multi-family dwellings.

(D) For such other relief as the Court deems appropri and just.

(E) For costs of suit.

SEVENTH COUNT

1. Plaintiffs repeat paragraphs 1 through 3 of the first count as if fully set forth herein.

2. A portion of Plaintiffs' property is situated in the immediate vicinity of the interchange of Interstate 78 and King George Road.

3. This property is most suitable for commercial development.

4. The failure to zone this property for commercial uses is arbitrary, capricious, unreasonable and confiscatory.

WHEREFORE, Plaintiffs demand judgment:

(A) Declaring Ordinance No. 347 void and illegal.

(B) Retaining jurisdiction of this matter with the court pending the adoption of satisfactory ordinances.

(C) For such other relief the court deems appropriate and just.

(D) For costs of suit.

EIGHTH COUNT

1. Plaintiffs repeat paragraphs 1 through 3 of the first count as if fully set forth herein.

2. The PRB zone does not permit any neighborhood business zone.

3. Neighborhood businesses are not readily accessible to many portions of the PRN zone.

4. This lack of neighborhood business zone is violative of the general welfare.

WHEREFORE, Plaintiffs demand judgment:

(A) Declaring the zoning ordinance of the Township of Bernards to be null and void.

(B) Directing the Township of Bernards to cease and desist from the enforcement of its zoning ordinance.

(C) Directing the PLANNING BOARD OF THE TOWNSHIP OF BERNARDS and the TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS to provide reasonable neighborhood business uses for residential areas.

(D) For such other relief as the Court deems appropriate and just.

(E) For costs of suit.

Respectfully submitted,

Steven B. Fuerst

E

F

SUPERIOR COURT, SOMERSET COUNTY, LAW DIVISION

Theodore Z. Lorenc, Louis J. Herr, Sam Wishnie, Marion Wishnie, Executrix of the Estate of Harry Wishnie, deceased, Alice J. Hansen, trustee, Willis F. Sage, Wm. W. Lanigan and Merwin Sage

-vs-

Township of Bernards, et al.

PRETRIAL ORDER

Pretried by Judge Wilfred P. Diana ,

on February 7, 1975

Superior No. L— 6237-74 P.W.

County No. C— S11203

The parties to this action, by their attorneys, having appeared before the Court at a pretrial conference on the above date, the following action was taken:

In lieu of prerogative writ to challenge constitutionality of amended zoning ordinance, which provided for planned residential neighborhood zone, in that multi-family dwellings and neighborhood businesses are not provided for and to rezone plaintiffs' property.

2. See Item 9.

3. and 4. See attached.

5. Denial of use of property.

6. None.

7. Constitutionality of zoning ordinance, remedy of mandamus.

7 None

8 Zoning ordinance, Township of Bernards.

10 No limit.

11 Plaintiffs' trial memorandum to be [redacted] submitted 30 days prior to date fixed for trial. Defendants' reply trial memorandum to be submitted 10 days [redacted] thereafter. Additional briefs will be required at conclusion of trial.

12 use 1

13 none

14 Steven B. Tuerpe, Esq., for plaintiffs; Robert O. Drakaw, Esq., for Planning Board, Richard Thiele, Jr., for [redacted] Township Committee.

15 One week.

16 To be fixed by assignment clerk.

17 no other matters agreed upon.

18 All discovery to be completed by March 28, 1975.

19 none

[signature]
JUDGE WILFRED P. DIAN, J.S.C

Steven B. Tuerpe, Esq.

CAL. NO.

FUERST & SINGER, ESQS. 21 EAST HIGH STREET SOMERVILLE, NEW JERSEY 08876 (201) 526-3300 Attorneys for Plaintiff	:	SUPERIOR COURT LAW DIVISION SOMERSET COUNTY
THEODORE C. LORENC, et als, Plaintiff, v. THE TOWNSHIP OF BERNARDS, et als, Defendants.	:	DOCKET NO. L-6237-74-P.W. CIVIL ACTION PRETRIAL MEMORANDUM OF PLAINTIFF

1. NATURE OF ACTION: In lieu of prerogative writ; challenge to constitutionality of amended ordinance in that the ordinance does not provide for multi-family dwellings, was passed without proper notice and publication, does not allow the advantages of certain planned residential neighborhood provisions to all property owners in the challenged zone, is vague and indefinite so as to be unenforceable, denies equal protection of the law, fails to meet with the statutory aims of zoning, systematically excludes minorities and those of lower income, ignores the needs of the general region, fails to provide for adequate commercial use, and fails to allow for a neighborhood business zone.

2. ADMISSIONS AND STIPULATIONS: Counsel for the defendant Township of Bernards is providing the attorney for the plaintiffs with many documents pursuant to discovery. It is hoped that these documents may be reviewed by the attorneys for the parties and as stipulated for admission into evidence at the time of trial.

3-4. FACTUAL AND LEGAL CONTENTIONS: (Annexed hereto).

5. DAMAGE AND INJURY CLAIMS: The plaintiffs claim that defendants' zoning has denied them their Fifth Amendment right to use of their property.

6. AMENDMENTS: None

7. LEGAL ISSUES AND EVIDENCE PROBLEMS: The legal issues are as set forth in Number 1 and 3 Supra. With regard to the evidence problem, a motion is pending regarding depositions which the defendants refuse to answer.

8. LEGAL ISSUES ABANDONED: None

9. EXHIBITS: To be presented and consented to at the time of pre-trial as determined by counsel.

10. EXPERT WITNESSES: No limit.

11. BRIEFS: As ordered by the Court.

12. ORDER OF OPENING AND CLOSING: As usual.

13. ANY OTHER MATTERS AGREED UPON: None.

14. TRIAL COUNSEL: Steven B. Fuerst, Esq.

15. ESTIMATED LENGTH OF TRIAL:

16. WEEKLY CALL OR TRIAL DATE:

17. ATTORNEYS FOR PARTIES CONFERRED ON VARIOUS OCCASIONS. MATTERS THEN AGREED UPON: Various documents could be stipulated and marked into evidence.

18. IT IS HEREBY CERTIFIED THAT ALL PRETRIAL DISCOVERY HAS BEEN COMPLETED, except interrogatories and depositions.

19. PARTIES WHO HAVE NOT BEEN SERVED: None.

Steven B. Fuerst

STEVEN B. FUERST

DATED: Jan 30 1975

THEODORE C. LORENC, et als, Plaintiffs

v.

THE TOWNSHIP OF BERNARDS, et als, Defendants

Docket No. L-6237-74 P.W.

3-4. FACTUAL AND LEGAL CONTENTIONS OF PLAINTIFFS: As set forth in the amended complaint the plaintiffs are owners or purchasers under contract in a certain real property located in the Township of Bernards. A portion of the plaintiffs property was the subject of prior litigation, to wit: Docket # L-12870-72-PW in the Superior Court of New Jersey, Law Division. A Court Order was entered in that action requiring the defendant to rezone the properties in question. The decision was rendered in the earlier matter on March 29, 1974. The said decision required a rezoning by the Township by July 21, 1974. Various postponements and adjournments of this deadline were obtained and the present ordinance was passed on September 3, 1974.

The ordinance provides for a PRN 6 zone as well as a PRN 8 zone. It is the contention of the plaintiffs that this zoning scheme does not comport and satisfy the requirements dictated in the earlier litigation.

The rezoning is deficient in that it is a denial of equal protection under the laws, due process, and fails to provide the construction of less expensive residential dwellings which could be afforded by minorities and people of lower economic status. As further set forth in the complaint, the plaintiff also contests the fact that the PRN zoning is not vested in a property owner but is at the pleasure of the Planning Board and the Township Committee. In order to invoke PRN there is an apparent minimum requirement of 25 acres The minimum lot site needed for this zone is so vague and indefinite as to be unenforceable. The PRN zone sets forth minimal ratios of 1,2,3 and 4 (or more) bedroom facilities. This requirement is a denial of equal protection under the laws and is in contravention of the plaintiff's constitutional rights. 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.

The plaintiffs further contend that the tract in question is best suited for commercial development and that the zoning should provide for such development.

The plaintiffs further contend that even in the event that the PRN zone as presently constituted is enforceable and legal, that it should be rendered void for its failure to provide for any neighborhood business zone with which to service the local community.

The plaintiffs further contend that the act of the Township Committee in changing the alternate use of the PRN 8 zone from an R20 to an R40 use without proper advertisement as required by State statute constitutes a denial of due process under both the federal and state constitutions and the laws of the State of New Jersey.

For all of the reasons set forth above, the plaintiffs seek an order from the Court declaring the ordinance number 347 void and illegal, direct the Township to desist from enforcing said ordinance, direct the Planning Board and Township Committee to promulgate and adopt amendments to the Bernards Township zoning ordinance in accordance with earlier Orders entered in related matters, the relief sought herein, and the state and federal constitutional requirements and to retain jurisdiction of this matter pending enactment of such satisfactory legislation.

Wharton, Stewart & Davis
50 West Main Street
Somerville, New Jersey 08876
201-725-1030
Attorneys for Defendant, Township
of Bernards

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SOMERSET COUNTY
DOCKET NO. L-6237-74-PW

THEODORE E. DORENC, LOUIS J. MEER, SAM WISHNIE, MARION WISHNIE, executrix of the Estate of Harry Wishnie, deceased, ALICE J. NORMAN, trustee, WILLIS F. SACK, WILLIAM W. LANIGAN, and MERWIN SACK	Civil Action
Plaintiffs,	PRETRIAL MEMORANDUM OF DEFENDANT TOWNSHIP OF BERNARDS
v.	
THE TOWNSHIP OF BERNARDS, in the County of Somerset, a municipal corporation of the State of New Jersey, and the PLANNING BOARD OF THE TOWNSHIP OF BERNARDS,	
Defendants.	

1. Nature of action. This is an action in lieu of prerogative writ, challenging the validity of an amendment to the municipal zoning ordinance establishing a planned residential

neighborhood zone, and seeking to compel the municipality to adopt amendments permitting multiple family dwellings and commercial uses in this zone.

2. Admissions and stipulations. No admissions have been made to date. It is anticipated that counsel will enter into a stipulation as to the validity and admissibility of certain documents or copies thereof.

3 and 4. Factual and legal contention of the parties. See factual and legal contentions of defendant Township of Bernards attached hereto.

5. This defendant denies that plaintiffs have suffered any legally cognizable damage or injury by the enactment of the ordinance in question.

6. This defendant does not at this time intend to amend or supplement any of the pleadings filed to date.

7. Legal issues. Presumption of validity of municipal ordinances; substantial alteration of the substance of an ordinance; reasonableness of the ordinance and its particular provisions; whether the ordinance discriminates against minorities and lower income individuals; reasonableness of the failure to zone all or portions of plaintiffs' property for commercial uses; necessity for inclusion of business or commercial uses in a planned residential neighborhood; reasonableness of a

zoning ordinance drawn in conformance with the county master plan and standards and uses advocated for the area by regional planning authorities; and weight to be accorded local and regional environmental factors, water supply resources and waste disposal capabilities in assessing reasonableness of the ordinance.

8. Legal issues abandoned. None.

9. Exhibits marked in evidence by consent. To be stipulated by counsel prior to trial.

10. Limitation on expert witnesses. None.

11. Briefs. As ordered by the Court.

12. Order of opening and closing. As usual.

13. Other matters agreed upon. None.

14. Trial counsel. Richard H. Thiele, Jr.

15. Estimated length of trial. One to two weeks.

16. Weekly call or trial date. This case should be adjourned for a substantial period of time to permit discovery and hopefully allow clarification of the issues by resolution of other pending zoning litigation.

17. Conferences among attorneys. The attorneys have conferred on various dates, including December 17, 1974. No agreements were reached at these conferences except that an attempt would be made to stipulate the admissibility of documents for marking into evidence.

18. Discovery. Discovery has not yet been completed, and it is anticipated that all parties will serve interrogatories in the near future, and that further depositions will be requested.

19. Parties who have not been served. None.

WHARTON, STEWART & DAVIS

Dated: February 4, 1975

By /s/ Daniel J. Matyola
Daniel J. Matyola
The Associate Acting for the Firm
Attorneys for Defendant
Township of Bernards

FACTUAL AND LEGAL CONTENTIONS OF DEFENDANT TOWNSHIP OF BERNARDS

The ordinance in question was duly and legally adopted by the Township Committee of the Township of Bernards, and it represents a valid and reasonable exercise of the municipality's zoning power. The amendment to this ordinance made on September 3, 1974, did not substantially alter the substance of the ordinance, and therefore further notice, publication, referral, and public hearing were not required.

The zoning ordinance in question complies with both the letter and the spirit of the court order in the prior litigation. Furthermore, the ordinance complies with all statutory and constitutional standards and requirements.

The land usage established by this ordinance is reasonable and in conformance with the county master plan and with guidelines and standards established by regional planning authorities. Furthermore, local and regional environmental considerations make it unreasonable to permit a higher density of residential development on this land. Among these local and regional environmental considerations are air quality, water supply, and waste disposal, all of which would be adversely affected by a higher residential density. As enacted, the ordinance represents a reasonable and legitimate balance between the need for new housing in

this area and the need to protect the environment not only of the municipality, but of the entire region.

The township zoning ordinance as a whole makes adequate provision for commercial and business zones, and the present ordinance is not deficient in failing to make specific provisions for these uses.

This ordinance is entitled to the presumption of validity, and has no discriminatory intent or effect. It is a valid and reasonable exercise of the municipal zoning power, and plaintiffs cannot substitute their judgment, or that of the Court, of what benefits the public welfare for that of the duly elected municipal governing body.

Robert O. Brokaw, Esq.
Madison Avenue at Punch Bowl Road
Morristown, New Jersey 07960
(201) 539-6111, Ext. 365
Attorney for Defendant The Planning
Board of the Township of Bernards

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SOMERSET COUNTY
DOCKET NO. L-6237-74-P.W.

THEODORE Z. LORENC, et als.,	:	
		Civil Action
Plaintiffs,	:	
		PRETRIAL MEMORANDUM OF
vs.	:	DEFENDANT THE PLANNING
		BOARD OF THE TOWNSHIP
THE TOWNSHIP OF BERNARDS, et als.,	:	OF BERNARDS
Defendants.	:	

1. NATURE OF ACTION: Action in lieu of prerogative writ against Township Committee and Planning Board to set aside as invalid an amendment to the zoning ordinance permitting Planned Residential Neighborhoods and to compel the Township Committee and the Planning Board to adopt zoning amendments permitting multiple family dwellings, neighborhood business uses in residential areas and to rezone parts of plaintiffs' property for commercial use.

2. ADMISSIONS AND STIPULATIONS: It is admitted that the ordinance mentioned in the complaint was adopted but its interpretation is a matter of law. It is further admitted that the plaintiffs' property situated in the vicinity of King George Road and Interstate Route 78 is not zoned for commercial use and that neighborhood businesses are not permitted in the Planned Residential Neighborhood zone.

3-4. FACTUAL AND LEGAL CONTENTIONS: Defendant Planning Board relies upon the Pretrial Memorandum of the Defendant Township of Bernards with respect to the factual and legal contentions involved in this action, but in addition contends that to the extent that the First, Sixth and Eighth Counts seek an order directing the Planning Board of the Township of Bernards to take particular action to promulgate and adopt amendments to the zoning ordinance providing for multiple family dwellings, neighborhood business uses in residential areas and to rezone plaintiffs' land at Interstate 78 for commercial use, the action is in the nature of an action for a writ of mandamus to compel legislative action and the Court is without power to order such action.

5. DAMAGE AND INJURY CLAIMS: None.

6. AMENDMENTS: To be determined at the pretrial conference.

7. LEGAL ISSUES AND EVIDENCE PROBLEMS: See number 4. Otherwise the Planning Board relies upon the Pretrial Memorandum of the defendant Township of Bernards.

8. LEGAL ISSUES ABANDONED: None.

9. EXHIBITS: To be determined at the pretrial conference.

10. EXPERT WITNESSES: No limit.

11. BRIEFS: As ordered by the Court.

12. ORDER OF OPENING AND CLOSING: As usual.

13. ANY OTHER MATTERS AGREED UPON: None.

14. TRIAL COUNSEL: Since the determination of the issues in the action against the Planning Board will necessarily be decided in the action against the Township of Bernards, it is not anticipated that counsel for the Planning Board will participate in the trial and will rely upon counsel for the Township of Bernards unless the Court otherwise directs.

15. ESTIMATED LENGTH OF TRIAL:

16. WEEKLY CALL OR TRIAL DATE:

17. ATTORNEYS FOR PARTIES CONFERRED ON VARIOUS OCCASIONS. MATTERS THEN AGREED UPON: Various documents could be stipulated and marked into evidence.

18. IT IS HEREBY CERTIFIED THAT ALL PRETRIAL DISCOVERY HAS BEEN COMPLETED, except interrogatories and depositions.

19. PARTIES WHO HAVE NOT BEEN SERVED: None.

DATED: February 3, 1975

Robert O. Brokaw

G

1491

WHARTON, STEWART & DAVIS
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25 CLAREMONT ROAD
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PRINCIPAL OFFICE AT
SOMERVILLE, NEW JERSEY

T. GIRARD WHARTON
WILLIAM T. STEWART, JR.
A. ARTHUR DAVIS, 3RD
LOUIS A. IMFELD
RICHARD H. THIELE, JR.
RICHARD H. HEROLD
ROBERT K. HORNBY
ROBERT B. HAINES
RALPH L. STRAW, JR.

JOAN L. MOTT
FRANCIS X. HERMES
DANIEL J. MATYOLA
DAVID A. SACKS
MILES S. WINDER, III
CYNTHIA A. KASTNER
DAVID A. LAMPEN

September 4, 1975

Honorable B. Thomas Leahy
Somerset County Court
Court House
Somerville, New Jersey 08876

Bernards Township ads. Lorenc, et al.
Docket No. L-6237-74 P.W.

Dear Judge Leahy:

On June 5, 1975, I appeared before you with Mr. English and in the presence of Mr. Lanigan. Based upon representations made to the Court by me, Your Honor adjourned the trial to Monday, September 8, 1975. You indicated at that time that in the interim the Township was to review, reconsider and revise its zoning ordinance as may be mandated by the Mt. Laurel case. You further directed that the Township was to submit a written report to the Court on or before the trial date setting forth its progress toward the achievement of the needed legislative activity. The understanding of Mr. English and I has been that while Your Honor did not necessarily expect the work to be completed by September 8, 1975, you did expect that significant progress would be made, and you were explicit that you did not wish the adjournment to be followed by further unproductive delay. On behalf of the Township and in compliance with the Court's order that a report be made, I enclose an original report from the Mt. Laurel Subcommittee of the Planning Board to the Township Committee dated August 25, 1975, and with all exhibits referred to therein attached. Copies of all of this data, though some are clearly within the attorney/client privilege, are being provided to Mr. Lanigan for his information.

In the interest of completeness and clarity there are two other items which require mention. First, a member of the Mt. Laurel Subcommittee, Mr. William Allen, who is also a member of the Township Committee, submitted a minority report which expressed some of his personal views. Second, the Township Committee is of course still in the process of assimilating material and anticipates that the Court will understand that the enclosed data are not regarded by it as either indicative of the only course it might follow or substantively providing the best avenue for meeting its obligation.

I respectfully submit to the Court that the enclosures demonstrate the very significant amount of work which has been accomplished by the responsible Township officials even over a period interrupted by annual vacations. I submit that the Township's good faith and manifest intentions are well demonstrated by this material. The elected and appointed officials are proceeding in an area where little State or County assistance is available and the local resources work are limited in terms of manpower and expertise. I believe we are well justified in requesting the Court's further indulgence and would accordingly formally ask that this matter be further adjourned to January 5, 1976, in the clear expectation that the needed legislative action will have been completed in that time.

Respectfully yours,

Richard W. Hirsch

RWH:jrm
Enclosure

cc: Nicholas Conover English, Esq.
William W. Lanigan, Esq.

H

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
L-6237-74 P.W.

THEODORE Z. LORENC; LOUIS J. HERR; SAM WISHNIE; MARION WISHNIE, Executrix of the Estate of Harry Wishnie, Deceased; ALICE J. HANSEN, TRUSTEE; WILLIS F. SAGE; WILLIAM W. LANIGAN and MERVIN SAGE,

Plaintiffs,

THE TOWNSHIP OF BERNARDS and THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS,

Defendants.

CIVIL ACTION

TRANSCRIPT OF PROCEEDINGS

April 26, 1976
Courthouse,
Somerville, New Jersey.

BEFORE HONORABLE B. THOMAS LEAHY, J.C.C.

A P P E A R A N C E S:

WILLIAM W. LANIGAN, ESQ.,
For the Plaintiffs.

WHARTON, STEWART & DAVIS, ESQS.,
BY: RICHARD H. HEROLD,
For the Township of Bernards.

ROBERT C. BRUKAW, ESQ.,
For the Planning Board.

ROBERT B. GROSSMAN, C.S.R.,
OFFICIAL COURT REPORTER

MORNING SESSION

SERGEANT AT ARMS: All rise.

Superior Court, Law Division, is now in session. Honorable Judge Leahy presiding.

THE COURT: Be seated, please.

MR. HEROLD: If your Honor please, there are certain preliminary remarks I would like to place on the record as the attorney for the Township of Bernards.

As the Court can recall, last summer on behalf of the Township I acknowledged that the mandate of the Supreme Court of New Jersey, as expressed in the Mt. Laurel case applied to the Township and that the Township accepted the need to enact certain zoning amendments to comply with that mandate.

At that point the Court adjourned the trial in this matter first until September of 1975 and then the matter was further continued to the end of this year.

An ordinance was introduced seeking to provide for the potential of low and moderate income housing within the community, which ordinance came to public hearing before a very, very large audence of community citizens and was, thereafter, withdrawn.

Itwas withdrawn, however, with representations at

the time that were published in the press and stated by members of the Township Committee that the Township Committee continued to accept the obligation to enact and ordinance in compliance with Mr. Laurel decision and that such an ordinance would be enacted; that the withdrawal of the particular ordinance was to be regarded as temporary only.

I, therefore, advised the Court that the representations made before your Honor had not changed. The Township acknowledges that it must enact an ordinance in compliance with the N.A.A.C.P. against Mr. Laurel.

The present status of that matter is that I have personally drafted two revisions of a new ordinance seeking such compliance by establishing a zoning potential for low and moderate income housing in the community. The last such revision is dated April 22, 1975.

There is this very evening scheduled in the Township a meeting to which various interested citizen groups have been invited for the purpose of discussing with them the latest draft of the ordinance.

It is my present belief that an ordinance will be introduced in the month of May.

I put these matters before the Court because one

of the counts in this complaint seeks to invalidate the zoning ordinance for its failure, essentially, to comply with the Mr. Laurel case. The Township acknowledges now, as it has, that to that extent the complaint seeks relief which it does not contest and would submit no testimony at any time to contest.

It is our judgment that based upon these representations a course of action remains appropriate pursuant to which the Township be instructed to conclude its efforts to enact an ordinance in compliance with the Mt. Laurel case.

I recognize that the Court has generously accorded time to the Township heretofore and I say that with all sincerity and that that time has not yet been reponded to by the enactment of an ordinance.

Nevertheless, I am clear that the Township continues to acknowledge its responsibility to do so and I am sure the Court is clear in its right to enter an order to direct the Town to do so.

That would conclude my remarks, sir.

MR. LANIGAN: If the Court pleases, plaintiffs are ready to try the case today. We have waited a long while for this day.

We were ready to try the case last June.

It was adjourned to September and adjourned until January and adjourned until February. Now adjourned until April. The ordinance is clearly invalid. It is just a question of when this Court tells them that they have got to go back and come to their senses and address themselves to their responsibilities as elected officials.

The difficulty is it is invalid for many reasons. It is invalid for its clear noncompliance with the Mt. Laurel decision. The density requirements of the ordinance are clearly not supportable.

It would be my suggestion that this Court not only direct the Township to do something, because I think the Court directed the Township to do something several years ago and they have done nothing. I am urging upon the Court that the ordinance be declared invalid at least with respect to Mt. Laurel and if the Court does not go further without the benefit of proof and I admit that without further proof the Court cannot make an unltimate decision on the density question and those questions related to density; that this Court set down another trial date and give the Township its final opportunity to do something.

It has no more study groups to get together. It has no more factual data to get together; no more citizen committees to appoint. They have run out the

the string. And at this time they have got to be told you must address yourselves to your responsibilities because you have made representations too many, too long and too often.

I don't know whether to argue this morning that we should try the case immediately or not. I am prepared to. I am prepared to bow to your Honor's decision as to what to do next. I am at my wits end.

I cannot do any more than be ready for the trial of the matter and be willing to address myself to the illegalities of the ordinance.

Thank you.

THE COURT: Well, we are left with a position that there is no contest as to the fact that the ordinance as an entity is admittedly not in compliance with the doctrines set forth by the Supreme Court of this State in the Mt. Laurel decision.

Now, that is the law of New Jersey. The highest Court of the State has interpreted the Consitution and statutes of this State and their interpretation controls. It controls lower Courts and it controls public officials. All public officials take the same oath that I took.

"I will uphold the Constitution of the State of New Jersey and the laws of the State of New Jersey."

There will be compliance with the Constitution and the laws of the State of New Jersey no matter what public officials are involved.

However, ifthe ordinance is invalid in light of the Mt. Laurel doctrine, the obvious result after a prolonged trial, which would involve this Court for weeks, denying us an opportunity to reach other matters which must be resolved, would be that the Court would remand the matter for a brief period of time with a direction to the community to bring its ordinance into compliance with law. In effect directing Bernards Township to rejoin, if not the Union, the State.

There is no sense in going into weeks of trial if there is an admission that the ordinance is to be brought into compliance with Mt. Laurel. The Court would not reach the other issues if the ordinance is found not to be complying with State law, because the Court would have no idea what the remedial ordinance would provide. I can't predict what the local planning officials and governing officials would decide would be their method of achieving compliance. So there is no way the Court could rule in advance as to the other aspects of the ordinance which might well disappear.

The charm of a properly prepared, comprehensive

plan is that it is comprehensive and each of its parts recognizes the nature and extent of its other parts. So whatever is done must make a logical, rationalwhole. So in light of the frank -- and I respect the municipality for acknowledging through its counsel that there still remains need to bring the ordinance into compliance with State law and in light of the frank admission of that fact I am left with very little choice but to direct entry of judgment to that effect , keeping open and retaining jurisdiction as to all other untried aspects of the complaint.

I remind the Township through its counsel that the Court has no desire to be Bernards Township Planner. I am not equipped by staff or local knowledge, the way the local offidals are, to do the job that should be done. That is a municipal responsibility and rightfully so. But if the job is not done by those responsible for doing it, the job will be done by the Court. It has been done by a Court in this State before and it probably will be done again. It is hoped that it won't be done in this County that way. It should be done by those charged with responsibility to do it and who have taken an oath, swearing that they will do it.

As a rather respected president once said, if it

is too hot in the kitchen, get out.

Judgment will be entered and I will expect an order from counsel for the Township to this effect:

Directing that the appropriate local bodies take the necessary action to bring the Bernards Township Zoning Ordinance into compliance with State law and that that be done by a date specified.

Now, Mr. Herold, you ask for 60 days. Sixty days, would, of course, bring us to Friday, June 25. That would only leave the week of June 28th and the short week of July 6, because there is the Fourth of July holiday that Monday, for me to hear this case if compliance has not been achieved.

Would June 18 present any excessive burden? It would be seven days less than your requested period.

MR. HEROLD: Your Honor, that is a very tight schedule. In suggesting 60 days I felt I was suggesting as tight a schedule as possible in view of the statutory referrals required and the fact that we don't have an ordinance introduced, as was feasible, and I am anxious both to comply with this Court's order and that the Township have time under which it will comply. I don't want to be back before the Court requesting that that time period be extended. I don't want to appear or have the Township appear

contemptuous of any direction of the Court.

May I answer it this way, your Honor? It is possible, of course, that the Township could have an ordinance enacted by June 18, 1976. That is almost the bottom line in the available time. It would be my hope that that time period if it has not been met might under an appropriate showing be extended to the first of July.

THE COURT: All right.

Then I am going to direct that the order set the date of June 18 and anything beyond that will have to be on extremely good cause shown.

MR. LANIGAN: Your Honor, could it be on motion rather than by letter to you?

THE COURT: Yes. There would have to be proof in open Court as to the basis for the need for further delay.

MR. LANIGAN: Thank you, your Honor.

THE COURT: That would give us, basically, two full weeks and one short week before I will be taking a little time off to recharge my batteries and I will be back in August and I have the responsibility for all four courts other than jury trials for the month of August. Anything beyond that would really mean another two-and-a-half months until mid-September,

which is entirely too much time.

This matter was pretried 13 months ago -- almost 14 months ago in March of 1975. It has to be tried and it has to be decided.

All right, I will expect an order to that effect and I will expect compliance with that order.

Thank you all.

(The proceedings are concluded.)

CERTIFICATE

I hereby certify the foregoing to be a true and accurate transcript of the proceedings in the above entitled matter.

DATE: 4/22/76

ROBERT B. GROSSMAN, C.S.R.,
OFFICIAL COURT REPORTER

ORIGINAL HEREOF FORWARDED FOR FILING WITH CLERK OF THE SUPERIOR COURT on 5/17/76
B. THOMAS LEAHY, J.C.C. t/a

Wharton, Stewart & Davis
25 Claremont Road
Bernardsville, New Jersey 07924
(201) 766-3300
Attorneys for Defendant, Township of Bernards

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
Docket No. L-6237-74-PW

THEODORE Z. LORENC, et al.,	:	
Plaintiffs,	:	Civil Action
v.	:	ORDER
THE TOWNSHIP OF BERNARDS, et al.,	:	
Defendants.	:	

This matter having been brought before the Court for trial in the presence of William W. Lanigan, Esq., attorney for plaintiffs, and Richard H. Herold, Esq., attorney for defendant Township of Bernards, and Nicholas Conover English, Esq., of counsel thereto; and said attorney for the Township of Bernards having stipulated in open court that the Township Committee of said municipality acknowledges that its zoning ordinance fails to comply with the mandate of the Supreme Court of New Jersey as expressed in Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975); and the

Court having considered the remarks of counsel and good cause appearing;

It is hereby Ordered on this 17th day of May, 1976, that defendant Township Committee of the Township of Bernards shall enact on or before June 18, 1976, such amendment or amendments to its Zoning Ordinance as shall bring the same into compliance with the mandate of the Supreme Court of New Jersey as set forth in Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975), and, in particular, shall specifically provide therein for its fair share of the regional need for low and moderate income housing;

It is further Ordered that the Court shall reserve jurisdiction over the balance of this proceeding and, following the legislative action directed herein, shall hear and dispose of the remaining issues.

B. Thomas Leahy, J.S.C. (t/a)

We hereby consent to the form of the foregoing.

William W. Lanigan,
Attorney for Plaintiffs

Richard H. Herold,
Attorney for Defendant,
Township of Bernards

I

PUBLIC HEARING - MAY 18, 1976

April 30, 1976

ORD. #385

AN ORDINANCE AMENDING THE ZONING ORDINANCE OF THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET, AND IN THE STATE OF NEW JERSEY, TO PROVIDE FOR LOW AND MODERATE INCOME HOUSING IN SAID TOWNSHIP.

Whereas, the Township of Bernards recognizes its obligation to comply with a mandate of the Supreme Court of New Jersey by presumptively making realistically possible an appropriate variety and choice of housing, including its fair share of the region's need for low and moderate income housing; and

Whereas, the Township has engaged in extensive studies and efforts designed to develop adequate data in order to establish and carry out compliance with the judicial directive; and

Whereas, the Township wishes to provide for low and moderate income housing within standards which will tend to facilitate the unity and absorption of such housing within the Township and not create an isolated addition thereto, by locating the same with a careful regard to the needs of both the prospective and present residents as well as the environmental and aesthetic impacts of particular proposals; and

Whereas, the Township intends that its legislative action herein shall also be consistent with the Municipal Land Use Law, R.S. 40:55D-1 et seq, and comply with the purposes of said act as set forth in R.S. 40:55D-2;

Now, therefore, be it ordained by the Township Committee of the Township of Bernards, in the County of Somerset, in the State of New Jersey, as follows:

1. The Zoning Ordinance of the Township of Bernards is hereby amended to include Balanced Residential Complexes within the R-2A, R-40, R-30 and R-20 Zones as permissible special exception uses subject to the standards set forth herein and approval by the Board of Adjustment pursuant to N.J.S.A. 40:55-39(b). Following the effective date of the Municipal Land Use Law, R.S.

States Department of Housing and Urban Development, the New Jersey Housing Finance Agency or other generally accepted State or Federal Agency. At the time of adoption of this ordinance, an annual income for a family of four of not more than $12,950.00 qualifies such family for admission to moderate income housing.

f. Market Income Housing - Housing which is economically feasible for families whose income level is categorized as market within the standards existing from time to time and promulgated by The United States Department of Housing and Urban Development, the New Jersey Housing Finance Agency or other generally accepted State or Federal Agency. At the time of adoption of this ordinance, an annual family income of not more than $23,000.00 qualifies such family for admission to market income housing.

g. Family - A group of persons related by blood or marriage or otherwise lawfully living together in a dwelling unit. For purposes of this ordinance, family shall also be deemed to include and apply to an individual residing alone.

h. Floor Area Ratio (F.A.R.) - The ratio between the gross floor area and either the gross site area or the net residential site area as applicable.

i. Gross Site Area - The total site area within property lines shown on the Township Tax Map. The area of existing streets, however, is excluded.

j. Gross Floor Area - The plan projection of all roofed areas on a site, whether fixed or temporary, multiplied by the number of habitable stories under each roof section, plus the area of all required parking spaces not under roof. Overhangs of 4 feet or less are not included.

k. Net Residential Site Area - The gross site area less all common open spaces required to be established pursuant to the terms hereof.

the first one half of the total number of units authorized herein shall be, to the extent feasible, so located that no portion of any complex shall be within one mile of any other complex. In no event shall the distance separating complexes be reduced below one-half mile. The presently approved Ridge Oak multi-family project shall be considered a Balanced Residential Complex for purposes of applying the standards set forth in this subparagraph.

c. The applicant shall provide proof that the required rental or purchase subsidies are adequately guaranteed for a minimum of forty years.

d. Each Balanced Residential Complex shall be served by public sewer and public water facilities.

e. Each Balanced Residential Complex shall be reasonably accessible to essential residential and community services and available transportation forms.

f. The perimeter structures within a complex (except for that portion of the perimeter which may be made up of common open space) shall be one family houses on lots of a size not less than sixty by one hundred feet, or twin houses on two such lots. Within the perimeter yards thereof, the applicant shall provide screening plantings of trees and shrubbery of a character which will contribute to an effective transitional area between the particular complex and adjoining areas. It is the intent of these requirements that nearby residential zone property owners shall be afforded as compatible an adjoining use as is consistent

to time. Until superseded by subsequent decennial Census data, the distribution of dwelling units shall conform to the following table which reflects 1970 Census data:

Size of Dwelling Unit	Percentage Within Each Complex
One bedroom units	25 to 30%
Two bedroom units	25 to 30%
Three bedroom units	25 to 20%
Four or more bedroom units	25 to 20%

1. The following "Schedule of Size and Space Regulations" shall apply to Balanced Residential Complexes:

Maximum F.A.R.
On Gross Site Area - 25%
On Net Residential Site Area - 35%

Schedule of Minimum Room Areas
As promulgated from time to time by New Jersey Housing Finance Agency or any successor thereto.

Minimum Set Back
From bounding streets and bounding tract property lines - 50 feet

Maximum Height - 2 1/2 stories

4. Findings for Balanced Residential Complex.

No Balanced Residential Complex shall be approved unless the Approving Authority shall find and determine that the applicatio can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone pla and zoning ordinance.

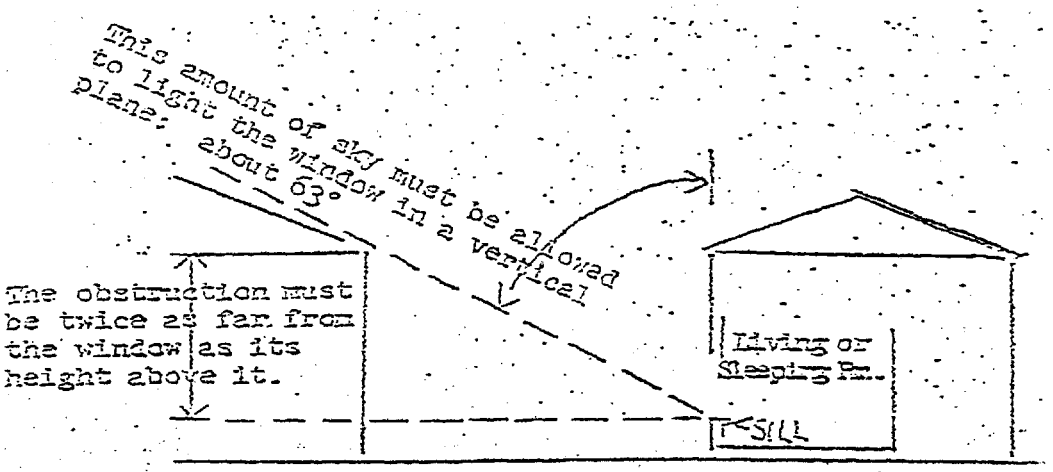
5. Standards for the Establishment of Open Space Organization

a. Unless the common open space is dedicated to the municipality, the applicant shall establish an organization for the ownership and maintenance of such open space for the benefit of residents of the complex. Such organization shall not be dissolved and shall not dispose of any open space, by sale or otherwise except to an organization which is conceived and established to own and maintain the open space for the benefit of the residents of such

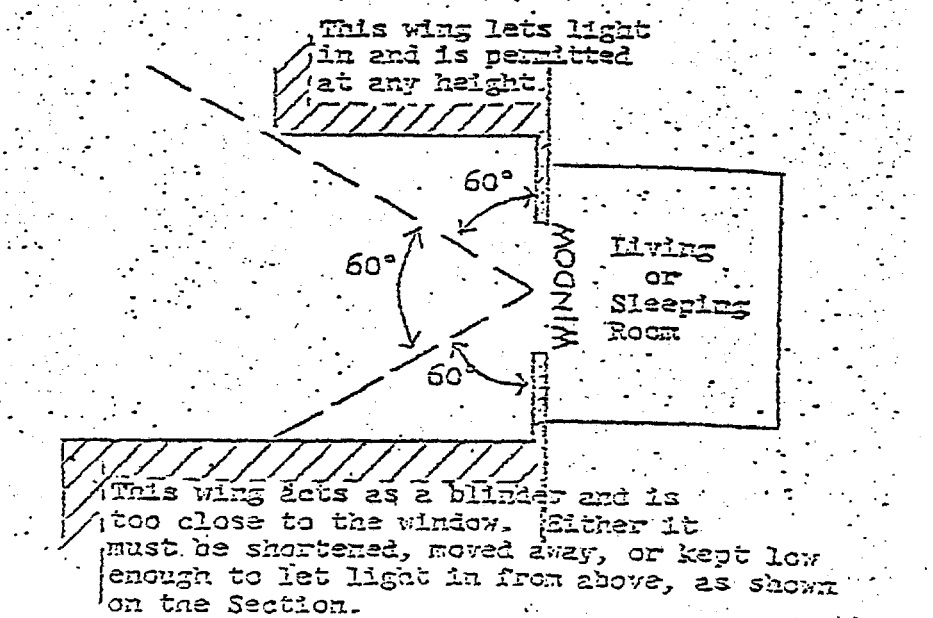
hearing upon 15 days' notice to such organization and to the residents and owners of the complex, to be held by the Township Committee, at which hearing such organization or the residents and owners of the development shall show cause why such maintenance by the municipality shall not, at the discretion of the municipality, continue for a succeeding year. If the Township Committee shall determine that such organization is ready and able to maintain such open space in reasonable condition, the municipality shall cease to maintain said open space at the end of said year. If the Township Committee shall determine such organization is not ready and able to maintain said open space in a reasonable condition, the municipality may, in its discretion, continue to maintain said open space during the next succeeding year, subject to a similar hearing and determination, in each year thereafter. The decision of the Township Committee in any such case shall constitute a final administrative decision subject to judicial review.

c. The cost of such maintenance by the municipality shall be assessed ratably against the properties within the complex that have a right of enjoyment of the open space, and shall become a tax lien on said properties. The municipality, at the time of entering upon said open space for the purpose of maintenance, shall file a notice of such lien in the office of the County Clerk upon the properties affected by such lien within the complex and the same shall be discharged by the municipality upon payment as with other liens.

d. All provisions of other applicable ordinances shall be strictly adhered to. All documents pertaining to any neighborhood association or common open space shall be subject to review of the Township Attorney, shall be countersigned by the Chairman of the Approving Authority and the Mayor and recorded as a covenant running with the land.



SECTION



PLAN

i. Privacy within structures having more than one dwelling unit of 3 bedrooms or larger shall be protected by the following provisions:

(1) Every unit shall have direct access to the ground without sharing a hallway, stairway, elevator or fire e with another unit.

(2) No unit or portion thereof may be placed above another unit or portion thereof.

j. Lateral sound protection between units shall be provided by construction having equivalent value as a sound barrier to that of an 8" masonry wall.

k. One paved or unpaved parking space, indoor or outdoor, 10' x 20' shall be provided for each bedroom, and included as 200 sq. ft. each in F.A.R. computations, if not under roof.

l. Air conditioning equipment shall be screened in such a manner as may be required by the Planning Board.

8. Filing Fee.

Applicants for approval of a Balanced Residential Complex shall pay to the Township of Bernards a filing fee of $50.00 per acre plus $0.02 per square foot of gross floor area, payable upon submission of the application to the Approving Authority.

9. This ordinance shall take effect upon its proper adoption and publication according to law.

J

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SOMERSET COUNTY
Docket No. L6237-74 P.W.

THEODORE Z. LORENC, et al.	:	
Plaintiffs	:	
-vs-	:	Civil Action
THE TOWNSHIP OF BERNARDS, et al.	:	
Defendants	:	

BRIEF IN SUPPORT OF MOTION

RICHARD J. McMANUS and
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This matter comes before the court on defendants' motion, made pursuant to Rule 4:38-2(a), to separate for the purposes of trial, the issues relating to the validity of Ordinance No. 347 from the issues relating to the validity of the zoning ordinance as a whole, including the amendment known as Ordinance No. 385, adopted May 18, 1976.

The purpose of the motion is to enable the court to try the case in two phases. The first phase would be the validity of Ordinance No. 347, which is the Planned Residential Neighborhood (PRN) Ordinance which applies to the area in which plaintiffs' property is situated. The evidence germane to the issues of the validity of Ordinance No. 347 will be very different in nature and scope from the evidence that would be germane to the other issues, such as Bernards Township's "fair share" of the housing needs of the "region".

The trial of this action has been held in abeyance because of the defendants' recognition of the need to adopt an ordinance that would bring the township's zoning into compliance with the mandate of the Supreme Court as expressed in Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975). The township has now met that need by the adoption on May 18, 1976 of Ordinance No. 385. However, as we interpret the last paragraph of Mr. Lanigan's letter to the court dated May 26, 1976, the plaintiffs are

proposing to litigate the sufficiency of Ordinance No. 385 as a fulfillment of the township's obligations under Mt. Laurel.

The court's determination of the validity of Ordinance No. 347 should fully dispose of the entire controversy between the parties.

If the court should hold that Ordinance No. 347 is invalid, plaintiffs would have secured a ruling favorable to them on the issues which affect their real and substantial interests. Accordingly, there would seem to be no sensible reason why plaintiffs would desire to try the remaining issues in the case. On the other hand, if the court should uphold the validity of the PRN Ordinance, such a decision would also settle the real and substantial interests of the plaintiffs. Even if the rest of the zoning ordinance were to be held invalid because of inadequate provision for Bernards Township's fair share of regional housing needs, it would not follow that such a determination by the court would invalidate a decision that the PRN Ordinance was reasonable and valid as applied to the plaintiff's property. In Mt. Laurel, the court's opinion holds as follows, at 67 N.J. 191:

> "As outlined at the outset of this opinion, the trial court invalidated the zoning ordinance in toto and ordered the township to make certain studies and investigations and to present to the court a plan of affirmative public action designed 'to enable and encourage the satisfaction of the indicated needs' for township related low and moderate income housing. * * *
>
> "We are of the view that the trial court's

> judgment should be modified in certain respects. We see no reason why the entire zoning ordinance should be nullified. Therefore, we declare it to be invalid only to the extent and in the particulars set forth in this opinion."

Plaintiffs have come into court as "the owners or purchasers under option of certain real property located in the Township of Bernards" (Amended Complaint, Paragraph 1). Only one of the eight plaintiffs is stated in the complaint as residing in Bernards Township. Plaintiffs do not claim to be persons who have been denied an opportunity to live in Bernards Township because of any allegedly "exclusionary" zoning. In short, plaintiffs do not assert any interests that are directly and adversely affected by any provisions of the Bernards Township zoning ordinance other than those that apply to their property in the PRN zone.

In Crescent Park Tenants Association v. Realty Equities Corp., 58 N.J. 98 (1971), the court said, at p. 107:

> "Unlike the Federal Constitution, there is no express language in New Jersey's Constitution which confines the exercise of our judicial power to actual cases and controversies. U.S. Const. art. III, § 2; N.J. Const. art. VI, § 1. Nevertheless we will not render advisory opinions or function in the abstract (New Jersey Turnpike Authority v. Parsons, 3 N.J. 235, 240 (1949) nor will we entertain proceedings by plaintiffs who are 'mere intermeddlers' (Baxter v. Baxter, 43 N.J.Eq. 82, 86 (Ch. 1887), aff'd, 44 N.J.Eq. 298 (E.& A. 1888)), or are merely interlopers or strangers to the dispute (Bergen County v. Port of New York Authority et al., 32 N.J. 303, 307, 318 (1960)). Without ever becoming enmeshed in the federal complexities and

> technicalities, we have appropriately confined litigation to those situations where the litigant's concern with the subject matter evidenced a sufficient stake and real adverseness. In the overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of 'just and expeditious determinations on the ultimate merits.'" [Emphasis supplied]

The courts do not permit legal and constitutional issues of public concern to be litigated by anyone and everyone. Bergen County v. Port of N.Y. Authority, 32 N.J. 303 (1960), Szamek v. Secretary of State of N.J., 130 N.J.Super. 333 (App. Div. 1974), Edelstein v. Ferrell, 120 N.J.Super. 583 (Law Div. 1972). In Bergen County v. Port of N.Y. Authority, the county sought a declaratory judgment that the Authority had no authority to lease property to an industry, with a consequent loss of tax revenues. In denying the county the standing to litigate these issues, Chief Justice Weintraub said for the court at 32 N.J. 307:

> "The pivotal question is whether the county has an interest sufficient to support this action. * * * In essence, a plaintiff must have an interest in the subject matter in order to maintain a declaratory judgment action. This requirement reflects the wholesome general rule that litigation shall not be maintained by strangers to a controversy. Cf. New Jersey Turnpike Authority v. Parsons, 3 N.J. 235, 240 (1959); New Jersey Bankers Ass'n v. Van Riper, 1 N.J. 193, 196 (1948). The trial court could find no interest in the county either in its own right or as a representative of others. We agree."

In Szamek, the court stated at 130 N.J.Super. 334:

> "Plaintiff purportedly aspired to be an independent candidate for governor at the November 1973 general election. Instead of filing a petition to that end as required by N.J.S.A. 19:13-5, and taking the position that the qualifying provisions of the statute were invalid, plaintiff filed a complaint in Superior Court asserting the act was unconstitutional as violative of his First Amendment and Due Process rights. The nub of his grievance is the combined statutory requirements of a filing date 40 days before the primary election, N.J.S.A. 19:13-9, and that the petition must be signed by 800 signatories who assert, 'I pledge myself to support and vote for the person named in this petition for governor.' N.J.S.A. 19:13-4. The contention is that the exaction of such a pledge violates the right of the signatory to change his mind and vote for another candidate at the election -- a deprivation which plaintiff has the right to assert as impairing his ability to qualify as a candidate for election. Accordingly, plaintiff sought judgment permitting the placement of his name on the ballot of the general election without the filing of a petition."

In affirming dismissal of the complaint, the Appellate Division held at p. 336:

> "That the appeal is moot is obvious. The 1973 election for governor is over. Plaintiff made no bona fide effort to get this litigation resolved by a date which would have permitted him to be a candidate in the 1973 election. Further, this case does not present such a situation of 'sufficient stake' of plaintiff in the litigation and 'real adverseness' of interests of the parties as to warrant rendering a declaratory judgment on the meritorious issues. See Crescent Park Tenants Ass'n v. Realty Eq. Corp. of New York, 58 N.J. 98, 107 (1971)."

In Edelstein, Judge Lane dismissed the complaint of a registered voter which challenged the voter registration procedures being followed by the Superintendant of Elections,

stating at 120 N.J.Super. 592:

> "Since plaintiff is a registered voter, none of her rights are being affected. It is well-settled that one who would raise the constitutional rights of a class must be a member of that class."

In the case at bar plaintiffs are property owners and developers. They are not, nor do they claim to speak for, persons seeking housing in Bernards Township. They do not claim to be the personal victims of allegedly "exclusionary" zoning. Neither in their pleadings, nor in the pretrial order, have plaintiffs asserted any intention or desire to have subsidized low cost housing constructed on their property. Their only real and substantial concern is a pecuniary one in the zoning of their own property.

In Walker v. Stanhope, 23 N.J. 657 (1957) the court held that a non-resident retailer of house trailers had standing to attack on the validity of a zoning ordinance restricting the use of house trailers, so as to cause plaintiff financial loss. Although the court affirmed a broad view of the standing of a citizen and taxpayer to bring an action in lieu of prerogative writ to challenge official action, nevertheless it recognized certain limits on such right to sue; and that the court should balance conflicting considerations and could act to prevent an overtaxing flood of litigation. Thus, the court stated at p. 660:

> "Unlike the Federal Constitution, there is no express language in our State Constitution

> which may be said to confine the exercise of our judicial power to actual cases and controversies. See U.S. Const. Art. III, Sec. II; N.J. Const., Art. VI, Sec. I. Nevertheless, it is clear that we will not render advisory opinions or function in the abstract (New Jersey Turnpike Authority v. Parsons, 3 N.J. 235, 240 (1949) or entertain proceedings by plaintiffs who do not have sufficient legal standing to maintain their actions. See New Jersey Bankers Ass'n v. Van Riper, 1 N.J. 193 (1948). Cf. Greenspan v. Division of Alcoholic Beverage Control, 12 N.J. 456, 459 (1953); Frankfurter, J., in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149, 71 S. Ct. 624, 95 L.Ed. 817, 842 (1951). In passing upon a plaintiff's standing the court is properly required to balance conflicting considerations and weigh questions of remoteness and degree."

And at p. 666:

> "We are satisfied that, under the particular circumstances presented in the instant matter, the plaintiff may fairly be deemed to have a sufficient standing to maintain its action. There has been real and substantial interference with its business and the serious legal questions it has raised should, in the interest of the public as well as the plaintiff be passed upon without undue delay. We are not disturbed by the Borough's spectre that continued logical liberalization of the standing requirement might bring a flood of litigation which would tax our judicial facilities and unduly burden our governmental subdivisions. Justice Holmes long ago pointed out that experience rather than logic is the life of the law -- there should be little doubt as to this court's capacity to deal fairly and effectively with the suggested eventuality."

The "suggested eventuality" has now come to pass in the precise area in which the case at bar falls. Practically every developer who wants to secure a zoning change to permit a more profitable use of his property, now routinely challenges the entire zoning ordinance on the ground that it does not

comply with Mt. Laurel. The issues thus raised are highly complex and involve fiercely contested issues of fact and law, with the result that the trial of such a zoning case is apt to consume several weeks. The current state of the court dockets in New Jersey is now, properly, a matter of public concern and has been repeatedly pointed out by the Chief Justice. The New Jersey Law Journal of May 13, 1976 points out that the backlog of cases in the Appellate Division has increased from 842 in 1966 to 4210 on August 31, 1975 (99 N.J. L.J. 409) an increase of exactly 500%, although there has been no comparable increase in the population or economy of New Jersey during that decade. Between March 31, 1975 and March 31, 1976 the total of cases in all the New Jersey courts increased by more than 8%, or a numerical increase of 10,320 (99 N.J. L.J. 423).

Defendants do not challenge the standing of plaintiffs to attack the zoning restrictions applicable to their own property. Accordingly trial should proceed on the validity of the P.R.N. Ordinance No. 347, but the scope of the trial, in the first instance, should be so limited. The judicial determination of that question may terminate the controversy, and make further proceedings unnecessary.

Defendants do challenge the standing of plaintiffs to attack the zoning ordinance as a whole on "Mt. Laurel" grounds. Plaintiffs' real and substantial interest in that

question is not apparent. The court, in accordance with the doctrine of Walker v. Stanhope, supra, can certainly balance the remoteness and genuineness of plaintiffs' interests in the "Mt. Laurel" issues as against the current state of the court dockets in New Jersey and the legitimate right of the municipality to be relieved of unnecessary litigation expenses.

Splitting the trial, as defendants propose, is certainly within the court's power to control the proceedings before it. Rule 4:38-2(a) provides that "The court, for the convenience of the parties or to avoid prejudice, may order a separate trial of any claim . . . . or separate issue . . . .". And Rule 1:1-2 admonishes that the rules "shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

An initial trial, limited to the issues of the validity of Ordinance No. 347 as applied to plaintiffs' property would have the following advantages:

a. It would adjudicate the real and substantial interests of the plaintiffs.

b. It might obviate the necessity of trying the other issues in the case.

c. It would simplify the procedure and give promise of eliminating unnecessary expense to the parties.

It is respectfully submitted that the defendants' motion should be granted.

RICHARD J. McMANUS and
McCARTER & ENGLISH
Attorneys for Defendants

BY NICHOLAS CONOVER ENGLISH
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K

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NOS. L-6237-74
S-11203 P.W.

THEODORE Z. LORENC, et al.,	:	
Plaintiffs,	:	Civil Action
vs.	:	
THE TOWNSHIP OF BERNARDS, et al.,	:	ORDER
Defendants.	:	

This matter having been brought before the Court on Notice of Motion pursuant to Rule R.4:38-2(a) separating for the purposes of trial the issues relating the validity of Ordinance No. 347, as applied to plaintiff's property from the issues relating to the validity of the Bernards Township

Zoning Ordinance as a whole, and requesting that the trial initially be limited to the issues relating to Ordinance No. 347, in the presence of McCarter & English, Nicholas Conover English, Esq., appearing, and Richard J. McManus, Esq., attorneys for defendant Township of Bernards, and William W. Lanigan, Esq., attorney for plaintiffs; and the Court having considered the remarks of counsel and good cause appearing;

It is hereby Ordered on this day of June, 1976, that such motion be and the same hereby is denied.

B. Thomas Leahy, J.S.C. (t/a)

We hereby consent to the form of the foregoing.

William W. Lanigan, Esq.
Attorney for Plaintiffs

McCARTER & ENGLISH
Attorneys for Defendants

By: Nicholas Conover English
Nicholas Conover English

Richard J. McManus, Esq.
Attorney for Defendants

K-1

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

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

Plaintiff,

-vs-

THE TOWNSHIP OF BERNARDS, et al.,

Defendants.

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

McCarter & English
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PRELIMINARY STATEMENT

Plaintiff brings this action in lieu of prerogative writ to declare the zoning ordinance of Bernards Township invalid under the doctrine of Southern Burlington Co. N.A.A.C.P. v. Mt. Laurel, 67 N.J. 151 (1975). However, plaintiff has made extraordinary allegations and seeks extraordinary relief.

Most of Count I and all of Counts II and III of the complaint do not state a claim upon which relief can be granted. Plaintiff has failed to join parties without whom the action should proceed. Additionally, plaintiff lacks standing to assert any claims under Mt. Laurel.

The sole claim which plaintiff can assert is contained in Count IV: that it has been deprived of the use of its land without due process or equal protection of the law.

POINT I

FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Large portions of plaintiff's complaint must be dismissed, as it fails to state a claim upon which relief can be granted. Upon any reading of the allegations in the complaint, claims C, D, E, F, G and H of the First Count, each and every claim for relief of the Second Count and each and every claim for relief of the Third Count do not state a claim upon which relief can be granted. Plaintiff lacks standing to assert claims A and B of Count I. See Point II, infra.

In its complaint, plaintiff makes certain allegations of facts regarding the demographic composition of defendant Township of Bernards, Somerset County and the State of New Jersey. Other allegations are directed to the housing facilities available within each of these respective political boundaries. Plaintiff alleges that it owns land within Bernards Township and that such land might be developed at reasonable densities without adverse environmental impact. Such development, plaintiff alleges, would relieve defendant Township of Bernards obligations to provide its fair share of regional housing need and help to alleviate a housing shortage throughout New Jersey.

Taking the allegations of the complaint to be true, as is required on motions directed to the pleadings, defendants move to strike various portions of the complaint which, even if they are true, do not support plaintiff's claim for relief.

The following is a brief summary of plaintiff's claimed relief:

Count I,	Claim C:	rezone plaintiff's property to permit its project
	Claim D:	order the Township to establish a housing authority; fund the authority; provide all municipal services; and co-operate with the plaintiff
	Claim E:	costs
	Claim F:	prevent further occupancy of the A T & T facility
	Claim G:	prohibit any further "non-residential" development
	Claim H:	distribute township tax revenue to other municipalities
Count II		suspend to Township Committee's power to govern, appoint a receiver, and order the receiver to do everything demanded in Count I
Count III		allow plaintiff to develop its property according to its plans.

None of the claims for relief have ever been judicially cognigable or recognized by statute. In effect, plaintiff seeks to have this Court strip the duly elected and appointed officials of the Township of their statutory authority to plan and govern the municipality and to represent their

constituents. In view of the constitutional prohibition imposed by the doctrine of separations of powers, the express legislative delegation of authority to municipalities and, in turn, the further delegation to planning boards, municipal governing bodies and local boards of adjustment, it is no surprise that no court has recognized claims of such scope. To the extent that the Court in Pascack Association v. Mayor and Town Council, Twp. of Washington, 131 N.J. Super 195 (Law Div. 1974), recognized that planners might be appointed to serve as masters for the Court, Judge Gelman stated that such extraordinary relief was only a last resort where, for example, the parties refused to comply with a judicial decree and thus defaulted from their legal obligations. Id. at 204.

Count Three alleges the zoning ordinance is arbitrary, capricious and unreasonable. If true, the ordinance is invalid. But plaintiff goes on and seeks affirmative relief and approval of its development proposal. The proper relief is a new ordinance which is reasonable and non-discriminatory. Instead, plaintiff demands that its lands be zoned to permit its desired proposed use and, in addition, that this Court strike any planning regulation to the contrary. Such relief would place plaintiff beyond the laws of not only Bernards Township, but the State of New Jersey as well.

The sole allegation upon which plaintiff may legitimately rely is that its lands have taken without due process of law by the requirement in the Zoning Ordinance

that lands so situated have a minimum acreage of three acres and be used for residential purposes (Count IV).

It is apparent from the complaint as a whole that what plaintiff really seeks is to have all restrictions on the use of its land removed, regardless of any legitimate countervailing planning, zoning, environmental or other goal. Since this is what plaintiff seeks, the other parties to this action and this Court should not have to contend with extraneous demands which are legally insufficient. Accordingly, these demands properly should be dismissed for failure to state a claim against defendants, or any of them, upon which relief can be granted.

POINT II

PLAINTIFF LACKS STANDING TO ASSERT CLAIMS RECOGNIZED BY MT. LAUREL

Plaintiff, in asserting that the zoning ordinance and subdivision ordinance are invalid, relies upon the decision of the New Jersey Supreme Court in Southern Burlington County, N.A.A.C.P. v. Mt. Laurel, 67 N.J. 151 (1975). Such reliance is misplaced, however, since plaintiff lacks standing to attack the zoning ordinance on Mount Laurel grounds for two separate reasons.

First, unlike the plaintiffs in Mt. Laurel, plaintiff here has made no attempt to join as a plaintiff any individual or association representing unnamed individuals as to whom an obligation to provide housing is imposed on Bernards Township by Mt. Laurel, and who are allegedly unable to find housing in the Bernards Township housing region. Since plaintiff cannot assert such allegation in its own behalf, it has no standing to assert the rights of unnamed third-parties. Therefore, its claims must fall and the complaint must be dismissed.

The New Jersey Constitution, unlike its Federal counterpart, contains no express language which limits jurisdiction in the State courts to actual cases or controversies. Compare N.J. Const. art VI, §1, with U.S. Const. III, §2. However, it is clear that the courts of this State will not render advisory opinions, function in the abstract, entertain

proceedings by "mere intermeddlers," interlopers or strangers to the dispute. Cresent Park Tenants Association v. Realty Equities Corp. of New York, 58 N.J. 98 (1971); Bergen County v. Port of New York Authority 32 N.J., 303 (1960) Walker, Inc. vs. Stanhope, 23 N.J. 657 (1957); New Jersey Turnpike Authority v. Parsons, 3 N.J. 235 (1949); Baxter v. Baxter, 44 N.J.Eq. 298 (E&A 1888), aff'g, 43 N.J.Eq. 82 (Ch. 1887). While New Jersey courts have traditionally taken a somewhat less restrictive approach to standing than the federal courts, the federal cases on standing are often cited by our courts with approval and followed. Cresent Park Tenants Association v. Realty Equities Corp. of New York, supra, 58 N.J. 98, 101-07.

In Cresent Park, supra, the Supreme Court reviewed the dismissal of a complaint brought by an association representing tenants in an apartment building. The Court laid down the rule for New Jersey courts to follow where standing has been questioned, at pages 107-08, as follows:

> ...we have appropriately confined litigation to those situations where the litigant's concern with the subject matter evidenced a sufficient stake and real adverseness. In the overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of "just and expeditious determinations on the ultimate merits." (citations omitted)

Applying this rule to the case before it, the Court found that (1) no party questioned the stake and adverseness of the individual tenants, id. at 108; (2) if individual tenants had been joined, no attack on standing

would have been made, id. at 108; (3) that the allegations of the complaint were strictly confined to matters of common interest to the tenants and did not include individualized grievances, id. at 109; and, (4) that the tenants association could assert the rights of its members. Id. at 108-109. Accordingly, sufficient standing to maintain the action existed, and the lower court's dismissal was reversed. Id. at 111.

These standards are not satisfied by plaintiff here. Without a demonstration of a sufficient stake or interest in the outcome of the litigation, plaintiff may not advance its attack on the entire zoning ordinance of Bernards Township. The Mt. Laurel claims are non-justiciable by plaintiff, and it may not assert the rights of any third party who may be aggrieved. Nor has plaintiff attempted to join proper plaintiffs who might have such an interest.

The only harm to itself which plaintiff has alleged appears in Court Four: as applied to its lands, the zoning ordinance is confiscatory and plaintiff has been denied due process and equal protection. This is, however, the kind of individualized grievance which should be litigated by the individual plaintiff and which is not sufficient to support standing to assert the rights of third parties.

More fundamentally, even if plaintiff were to join an individual allegedly aggrieved by the ordinance, the Mt. Laurel decision specifically excludes an entire class of plaintiffs, to which Allan-Deane belongs, from attempting

to cloak themselves in the trappings of Mt. Laurel and advancing the propositions there enunciated by the Supreme Court. On this question, the Supreme Court was very clear. It stated, at page 191, as follows:

> 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.

Justice Pashman emphasizes the holding of the majority that large-scale land developers are not the parties which Mt. Laurel was designed to benefit. In his separate concurrance, Justice Pashman stated, at p. 214:

> A municipality must zone in accordance with a comprehensive plan. N.J.S.A. 40:55-32. Once it has adopted a comprehensive plan which properly provides for the community's fair share of regional housing needs, it is entitled to be able to enforce the plan through its zoning. To permit a developer to come in at a later date and demand, as a matter of right, that a piece of property not presently zoned to permit development of low or moderate cost housing be so zoned, is to undermine the entire premise of land use regulations. (citations omitted)

Justice Pashman differs from the majority on this point only in that he would permit one exception: "Where the developer can show that, as a matter of practical fact, sufficient land is not available for development in the areas zoned for low and moderate income housing." Id. However, in the cases cited by Justice Pashman in support of his position, standing existed independently since individual plaintiffs and associa-

tions were named as plaintiffs along with the developer or, in one case, the developer had sought and been denied a variance. These factors provided a sufficient stake in the outcome of the controversy and adequately insures that the primary beneficiary of any relief granted are those low and moderate income families who lack adequate housing, not land developers and speculators. Mt. Laurel, supra, 67 N.J. 151 214 (1975) (individuals of low and moderate income range who allegedly were unable to find adequate affordable housing within the municipality joined by an association representing their common interests); Kennedy Park Homes Association, Inc. et al. v. City of Lackawanna, 318 F. Supp. 669 (W.D. NY 1970), aff'd. 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971) (nonprofit corporate developer joined by individual plaintiffs and organizations representing residents of the area concerned with housing opportunities); Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971) (unincorporated association composed of persons of Mexican descent sought to obtain low-cost housing in Morgan Hill but were unable to gain municipal variances); Pascack Association v. Mayor and Council, Twp. of Washington, 131 N.J. Super. 195 (Law Div. 1974) (land owner joined by contract purchaser which sought and was denied variance to permit it to build garden apartments on the land in question).

POINT III

THE PLAINTIFF HAS FAILED TO JOIN PARTIES WITHOUT WHOM COMPLETE RELIEF CANNOT BE ACCORDED AMONG THOSE ALREADY PARTIES

The complaint should be dismissed on the further grounds that plaintiff has failed to join as party defendants the American Telephone and Telegraph Company and the Somerset County Planning Board, since both have an interest in the subject matter before this Court and a judgment among the parties hereto will necessarily affect their interests.

Rule 4:28-1(a) sets out the test to be applied in determining when a person shall be joined as a party:

> Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as a party to the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest in the subject of the action and is so situated that the disposition of the action in his absence may either (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or other inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant.

Allen B. Dumont Laboratories, Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959) laid down the judicial test prior to the

adoption of the new rules, but which still largely controls, as follows:

> whether a party is indispensible depends upon the circumstances of the particular case. As a general proposition, it seems accurate to say that a party is not truly indispensible unless he has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest.

The test enunciated in Allen B. Dumont, supra, has been followed uniformly since, and virtually the same test has been applied under the revised rules. Compare Stokes v. Township of Laurence, 111 N.J. Super 134 (App. Div. 1970) with Jennings v. M & M Transportation Co., 104 N.J. Super. 265, 272 (Ch. Div. 1969). In Stokes, the Appellate Division held that where a person "had a real and substantial interest in the subject matter of the action, and a judgment could not justly be made without adjudging or necessarily affecting his interest," he must be joined. 111 N.J. Super at 138.

Such is the situation in the instant case. In paragraphs 33(a) and (b) of the complaint, plaintiff alleges that defendants Township Committee and Planning Board have "influenced" the Somerset County Planning Board to designate plaintiff's lands as sparce residential areas, not intended for sewers. Furthermore, plaintiff seeks to have this Court impose a system of land use regulations contrary to the Master Plan of Land Use

of the Somerset County Master Plan.

The Somerset County Planning Board is established pursuant to N.J.S.A. 40:27-1 by the Board of Freeholders. The Somerset County Planning Board has developed the Master Plan for Land Use for Somerset County pursuant to the directives of N.J.S.A. 40:27-2 which provides, in part, as follows:

> The County Planning Board shall make and adopt a master plan for the physical development of the county. The master plan of the county. . . shall show the county planning board's recommendations for the development of the territory covered by the plan, and may include, among other things. . . the general location and extent of forests, agricultural areas, and open-development areas for purposes of conservation, food and water supply, sanitary and drainage facilities, or the protection of urban development, and such other features as may be important to the development of the county.
>
> The county planning board shall encourage the cooperation of the local municipalities within the counties in any matters whatsoever which may concern the integrity of the county master plan . . . .

The relief which plaintiff seeks is contrary not only to the Bernards Township Master Plan and Natural Resources Inventory Plan For Land Use, but the County Master Plan as well. Imposition of a system of land use contrary to the Somerset County Master Plan would result in a significant change in the physical development of the county and undermine the integrity of the county master plan. In the absence of the Somerset County Planning Board as a party, the defendants may be subject to a substantial risk of incurring obligations

inconsistent with the Somerset County Master Plan for Land Use, which defendants are by law obligated to consider, evaluate and in large measure follow. In the absence of the county planning board complete relief cannot be accorded among those already parties. Accordingly, the complaint must be dismissed.

Plaintiff has also failed to join the American Telephone and Telegraph Company as a party. Insofar as plaintiff seeks to restrain further occupancy of the corporate offices of A.T. & T., as sought in Count One, Claim F, the corporation has an interest in the subject of the action and in its absence, A.T. & T. will as a practical matter be unable to protect that interest. Such relief will also subject the present parties to a substantial risk of other inconsistent obligations. Accordingly, the complaint must be dismissed.

CONCLUSION

For the reasons above, the complaint should be dismissed insofar as it fails to state claims upon which relief can be granted, fails to name persons without whom complete relief among the parties cannot be afforded and to the extent that plaintiff's claims rely upon the holding of Mt. Laurel, under which plaintiff lacks standing.

Respectfully submitted,

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Attorneys for Defendants

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

THE ALLAN-DEANE CORPORATION, a Delaware corporation, qualified to do business in the State of New Jersey, Plaintiff, vs. THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, et als, Defendants.	Civil Action ORDER

THIS MATTER having come before the Court on motion by McCarter & English, Attorneys for Defendants, the Township of Bernards, the Township Committee of the Township of Bernards, and the Planning Board of the Township of Bernards, and the Court having reviewed the Complaint, the Briefs submitted by counsel and the argument of counsel;

IT IS on this day of , 1976, ORDERED as follows:

1. The Motion to Dismiss the Complaint on the grounds that the Complaint fails to state a cause of action, the plaintiff has no standing, and plaintiff has failed to join indispensable parties is denied without prejudice to defendants to renew their motion, after discovery, on the grounds that plaintiff lacks standing;

2. Plaintiff will be permitted to amend its Complaint and to include the Somerset County Planning Board as a party, providing such amendment is filed no later than ten (10) days following the Court's oral decision on this motion;

3. Defendants, the Township of Bernards, the Township Committee of the Township of Bernards and the Bernards Township Planning Board, are hereby granted a 30-day extension of time, which 30 days shall begin on April 30, 1976, to file their answer to the Complaint, or if plaintiff files an Amended Complaint, to the Amended Complaint.

_____

J.S.C.

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tions as early as August of 1975, they had absolutely no intention of doing that. The whole thing has been with respect to plaintiffs' allegations. The whole thing has been, wait and maybe they'll have good faith, maybe they'll do something and they haven't. So, with respect to this new ordinance, it did not affect the P.R.N. zone. It affects this case and is relevant since plaintiffs' complaint is 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.

This Ordinance did not do that and in the course of the proofs, we will demonstrate that the Ordinance purports to give with one hand -- and paraphrasing the Court in its opinion of March 29, it's taken away with the other. 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 on it by the decision of the Supreme Court in the Mount Laurel case. The Ordinance Number 385, it will be demonstrated, is not capable of fulfillment. It is, on its face,

an impossibility. And this Court is going to be urged to so determine.

We are taking the position that the present state of the zoning in the Township of Bernards is just the way it has always been. It makes no provision for any multi-family use. Its decision in selecting certain percentages of density P.R.N. zone are arbitrary, not based on fact. Its determination to select the area makes provision on the face of it both in its master plan and in an implementing ordinance over a three-year period is part of a game.

It looks like we're doing something but as we will submit, they're doing nothing.

Now, with respect to plaintiffs' case, we anticipate that the Township is going to take the same tact that the adjacent townships have taken. That although we zoned, although we've had some study, most of which incidentally comes after the fact, it is going to be interesting how you can rely on studying rezoning when the study didn't take place until after the rezoning. But most of the defense is going to be, we got to save the ribbon. I've heard that before. And I guess we're going to hear it again. On the river, not the

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MR. ENGLISH: I might say, if the Court please, that the answers to interrogatories were answered, I think, in January of this year, after the entry of the pretrial order and after the Court had taken appropriate steps to put the Township on notice that the Court expected it to adopt the Mt. Laurel ordinance as a result of the continuation of the trial in this case last June.

THE COURT: I don't see on the answers themselves any date to the certification. I notice they were submitted in February of 1975 but that of course doesn't preclude their having been answered in 1976. No answer should take that long.

MR. ENGLISH: I am not sure of the date but I think Mr. Lanigan will agree it was earlier this year.

MR. LANIGAN: I think that's correct.

THE COURT: The whole thrust, however, of the pleadings and the answers to interrogatory No. 4 puts the township on notice that the plaintiff's assertion include a complaint that the township does not provide multi-family use within its zoning ordinance

provisions and thus precludes lower economic earning-families as well as minorities and I think that's adequate though certainly inartful.

The point is well-argued but I think it is enough for the plaintiff to get in the argument that the zoning ordinance has in its entirety, with its various amendments, does not provide for multi-family use within the framework of the need for multi-family use.

Part of the need-framework is jobs available in the general area including within the township.

MR. ENGLISH: If the Court please, maybe I am anticipating but while we are discussing it, may I say this. A contention by the plaintiff that the ordinance does not make any provision for low and moderate-income housing is refuted by the face of the Ordinance 385 which is the Mt. Laurel ordinance adopted in May.

As I have said a few moments ago, and I repeat, I have no objection to that ordinance going into evidence, but what I do object to is this attack on the efficiency of

case. It is just as simple as that. But for counsel to stand up and say that the ordinance doesn't exist is perfectly silly. Of course it exists.

The question is, are we litigating Ordinance 385 or are we litigating Ordinance 347?

I submit that the complaint, the pretrial order and answers to interrogatories make it clear that we are litigating Ordinance 347 and the extent to which the zoning scheme as a whole is deficient, according to the answers to interrogatories, and that's this case.

THE COURT: The problem is that they are inexorably tied in together. Ordinance 385 came up approximately five weeks before the trial actually began.

MR. ENGLISH: Right.

THE COURT: Generally you are on notice that the plaintiff was attacking the township's overall approach to zoning.

MR. ENGLISH: Only because of what he said was the alleged deficiencies of 347.

THE COURT: Which was the only ordinance that existed at the time vis-a-vis the subject

MR. LANIGAN: Thank you, Mr. Allen.

THE COURT: Thank you, Mr. Allen.

(Witness excused.)

MR. LANIGAN: If your Honor please, that's about as far as we can go on this point. We have requested one other individual and material from the Township with respect to the sales of homes. That too may go to another portion of the case since we had in the discovery processand in the depositions examined extensively with respect to region, a determination of region, regional need, reasons why you had to consider housing apart from Mr. Laurel, and it is my understanding that we will be permitted to pursue that further at some later date.

THE COURT: All right.

I had mentioned to counsel -- and I don't think I mentioned it on the record yet, that having followed this case the latter part of last week and the beginning of this week, that we have somewhat of an unusual situation in that the Ordinance No. 385 which apparently, as I understand the situation, addresses itself to the general welfare

requirements voiced in the Mt. Laurel decision, was adopted in the last half of May and this matter went to trial at the end of June and there had not been amendments to the pleadings to incorporate that legislative occurrence within the pleadings and answers to interrogatories, et cetera.

Thus the Court ended up with a situation where the plaintiff insisted that Ordinance 385 falls within the general thrust of plaintiff's suit on the aspect of the overall zoning of the community being improper and violative of the enabling statutes and the constitution of the State, and the defense taking the position that if plaintiff wanted to attack Ordinance 385 the plaintiff should have let the defense know in the pleadings and answers to interrogatories, et cetera, so that the defense would have the appropriate notice as contemplated by the rules to prepare for that argument.

I strongly suspect that the defense suspected that the plaintiff was not totally delighted with Ordinance 385.

However, the rules are there to serve

a purpose and to officially notify the defendants and give the defense an opportunity to pin plaintiff down as to its position and what the defense is going to have to face.

Since this Court is both finder of fact as well as judge of the law in a case such as this and since the Court in its individual capacity will not be available starting tomorrow for hopefully a minimal period of four weeks, it is going to be necessary for delay anyway, and in August when I come back and sit there are matters scheduled already that do not allow for hearing this case certainly the first week of August and whether it will be heard during August remains to be seen, depending on the calendar situation.

So I have decided that the wisest and most practical thing to do is not deny the plaintiff its day in court merely because Ordinance 385 was passed a month or so before the case started. And yet not to deny the defense all of its legitimate opportunities to respond and limit the plaintiff's suit by holding a supplemental

pretrial conference with a view to preparing a revised pretrial order, I am prepared to cope with that at this time if counsel are.

MR. LANIGAN: Yes, your Honor.

THE COURT: Mr. English, would you be ready to participate in a pretrial conference at this juncture?

MR. ENGLISH: Well, I am here, if the Court please. But I suggest that the more orderly way to proceed would be for the plaintiffs to amend their pleadings if they intent to do so so that we know more precisely what we are talking about at the pretrial conference.

Part of my difficulty is the language, the pleadings, the pretrial order and answers to interrogatories which are so lacking in precision that differences of interpretation have arisen.

THE COURT: And plaintiff's counsel is also burdened with the fact that he has inherited much of the language with which he is bound.

MR. LANIGAN: An alleged violation of the zoning scheme which includes whatever

they've done prior to this morning.

MR. ENGLISH: Well, if the Court please, Mr. Lanigan took over the representations of the plaintiffs in this case a year ago and I submit that that is a reasonable time for him to have come forward with amendments to the pleadings or the pretrial order if he saw fit to do so.

I would also add that it was in January, I believe, of 1976 that the plaintiff furnished defendants with plaintiff's answers to defendant's interrogatories and those were received from Mr. Lanigan's office, so I respectfully suggest that the substitution of counsel in this case should give the plaintiff no comfort or help because there has been ample time for present counsel to do whatever may have seemed necessary.

MR. LANIGAN: The real question, your Honor, well, maybe I can ask him. You want to have an amended pretrial that you keep talking about and you want to have time to answer interrogatories and get more answers and propose more or don't you, and if you're willing to do that, I am here ready, willing

and able to address myself to that.

The Court has indicated for a more orderly continuation of this trial we should get it done now. I don't want to delay another six or eight weeks if it is at all possible, and if your schedule permits perhaps we can do it this morning while we are here, while it is fresh in our minds so that we can have some definite guidelines, some dates, some specific dates within which this is to be accomplished so that the Court would be assurred of an orderly presentation in the fall when it is able to hear us for the continuation of the trial.

THE COURT: Well, very little would be lost if we would have a pretrial conference in chambers on the mechanics of how we can approach this. Would anybody object to this?

MR. LANIGAN: Thank you, your Honor.

MR.ENGLISH: No. But may I put one other statement on the record, if I may.

THE COURT: Certainly.

MR. ENGLISH: I have two things to say, with the Court's permission.

I think the record should reflect the

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
Docket No. L-6237-74 P.W.

THEODORE Z. LORENC, LOUIS J. HERR, SAM WISHNIE, MARION WISHNIE, Executrix of the Estate of Harry Wishnie, Deceased, ALICE J. HANSEN, Trustee, WILLIS F. SAGE, WILLIAM W. LANIGAN, and MERWIN SAGE,	Civil Action
Plaintiffs,	SECOND AMENDED COMPLAINT IN LIEU OF PREROGATIVE WRIT
vs.	
THE TOWNSHIP OF BERNARDS, in the County of Somerset, a municipal corporation of the State of New Jersey, and THE PLANNING BOARD of the Township of Bernards,	
Defendants.	

Plaintiffs, Theodore Z. Lorenc, residing at 241 New Providence Road, Mountainside, New Jersey; Louis J. Herr, Sam Wishnie, and Marion Wishnie, c/o Sam Wishnie, 24 Wilbur Avenue, Newark, New Jersey; Alice J. Hansen, Trustee, residing at 1600 Kenyon Avenue, Borough of South Plainfield, New Jersey; Willis F. Sage, residing at 1006 Park Avenue, Plainfield, New Jersey; William W. Lanigan, residing at 35 East Craig Street, Basking

Ridge, New Jersey; and Merwin Sage, residing at 9 Indian Rock Road, Warren, New Jersey, by way of Second Amended Complaint against the defendants say:

FIRST COUNT

Plaintiffs repeat each paragraph and demands of Counts One through Eight of the First Amended Complaint and incorporate the same herein as if set forth at length.

SECOND COUNT

1. Defendant, the Township of Bernards, in the County of Somerset (hereinafter referred to as "Bernards Township"), is a sprawling rural suburban community in the north-central portion of Somerset County, with a land area of 24.95 square miles, an amount equal to 8.2 percent of Somerset County's land area of 305.6 square miles. At the time of the 1970 Census, Bernards Township contained a household population of 11,531 persons, or approximately 5.9 percent of Somerset County's household population. Residential density in Bernards Township amounted to 462 persons per square mile as of the 1970 Census, a density substantially below the comparable figures of 635 persons per square mile in Somerset County and 938 persons per square mile in New Jersey.

2. Somerset County, in which Bernards Township is located, is the second wealthiest county in New Jersey, with a 1970 Census median family income of $13,433.00, a level exceeded only by Bergen County with a median family income of $13,597.00. Morris County, on the northern boundary of Somerset County, ranks third in wealth in New Jersey with a median family income of $13,421.00 and was the only other county with a 1970 Census median family income over $13,000.00.

3. Bernards Township stands out, even within this structure of affluence, as one of the wealthiest municipalities in New Jersey. As of the 1970 Census (1969 income), Bernards Township was reported to have a median family income of

$17,852.00 and an average (mean) family income of $19,243.00--income levels of 33 percent above the County and 57 percent above the New Jersey median. Of New Jersey's 567 municipalities, Bernards Township ranks 35th in family income, a ranking that places it in the 94th percentile in the State. The 531 municipalities in New Jersey with income levels below that of Bernards Township contained 95.69 percent of New Jersey's population.

4. Bernards Township is a municipality of sizeable land area outside the central cities and older, built-up suburbs of our North and South Jersey metropolitan areas. It is in the process, due to its own land use decisions and its location with respect to major new interstate highways, of shedding its rural characteristics. Although it has granted nonresidential building permits from 1973 to date amounting to an excess of $100 million, the residential building permits for such years are as follows: 1973 - 15; 1974 - 7; 1975 - 27; 1976 through March - 7.

5. Bernards Township is a "developing municipality" as defined by the New Jersey Supreme Court in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975), and is bound by and subject to the parameters set forth in such decision.

6. Only 10 developing municipalities in New Jersey had 1970 Census median family income levels above that of Bernards Township.

7. Racially, Bernards Township is, according to the 1970 Census, 98.14 percent white, a percentage well above the parallel statistics of 95.85 percent white in Somerset County and 88.76 percent white in New Jersey as a whole. Educationally, the median years of school completed by Bernards Township residents (excluding inmate population at Lyons Hospital) of 13.5 years is significantly above Somerset County's median of 12.4 years and New Jersey's median of 12.1 years. The median age of the Township's residents is 34.0 years, compared with

29.4 years in Somerset County and 30.1 years in New Jersey, reflecting the necessity of an established income to be able to afford the purchase of housing in Bernards Township.

8. According to the U.S. Census of Housing, 97.2 percent of the Bernards Township's housing units were one-family structures as compared with a state percentage of 57.9 percent and a Somerset County percentage of 73.6 percent. Of the occupied housing units in Bernards Township, 90.1 percent were owner-occupied units as compared with a state percentage of 60.9 percent and a Somerset County percentage of 73.1 percent. The median number of rooms per housing unit was 7.2 rooms in Bernards Township while the New Jersey median was 5.2 rooms and the Somerset County median was 5.9 rooms.

9. The 1970 Census of Housing reported that the median value of owner-occupied housing units in New Jersey was $23,400.00. The comparable figure for Somerset County was $29.700.00, a value 26.9 percent above the New Jersey median. The median housing value reported for Bernards Township in 1970 was $40,000.00, a level 70.9 percent above the New Jersey median and 34.6 percent above the Somerset County value. The median housing values for units for sale in Bernards Township as of the 1970 Census were beyond the Census takers scale and were simply reported to be $50,000.00-plus. Since the 1970 Census, housing values have increased markedly throughout New Jersey, and one survey reported a 1971 sample median value of existing and new homes of $62,500.00 for Somerset County. Where this value relationship applied to Bernards, a 1971 median value of $84,125.00 would be derived (Bernards = 1.346 x Somerset County). Even by conservative standards (assessed valuation) the average housing value in Bernards Township had increased to $60,355.00 by 1974, a figure similar to the average value

of $60,854.00 reported by the Township Committee for all housing units as of August, 1975. New construction in the Township is considerably more expensive, ranging from $80,000.00 upwards.

In addition, at least 75 percent of each single-family dwelling unit sold in the Township since 1973 has been sold for a sales price in excess of $100,000.00 each.

10. Although Bernards Township's residents rank among the most affluent in New Jersey, their property tax burden ranked the Township 226th (60 percentile) in the state in 1973. By 1975, Bernards Township's rank relative to property tax rate was 354th from the highest (below the 40th percentile). Similarly, the per capita real estate tax in Bernards was $118.00 in 1960 and $324.00 in 1970--amounts equal to 96.7 percent and 126.1 percent of the respective New Jersey averages. Thus, while income in Bernards Township was 57 percent above the New Jersey median in 1970, the real estate burden was only 26.1 percent above the state's average cost. Relative to income, Bernards Township residents have been paying a substantially lower percent in property taxes than their New Jersey counterparts.

11. Since 1970, Bernards Township residents have enjoyed a particularly favorable tax climate, with the equalized tax rate decreasing--from $3.93 per $100.00 in 1971 to $3.72 per $100.00 in 1972 to $3.53 per $100.00 in 1973 to $3.27 per $100.00 in 1974 and $2.86 per $100.00 in 1975. Thus, while local equalized tax rates in New Jersey have generally increased, Bernards Township's equalized tax rates have decreased.

12. The principal reason for the recent decrease of the tax rate in Bernards Township is the presence of the American Telephone and Telegraph Company (hereinafter referred to as "A.T.&T.") Worldwide Headquarters in the Basking Ridge section of the Township. This A.T.&T. facility will be valued at $100 to $110 million (1975 dollars)

when completed. At current assessment rates, this A.T.&T. ratable could yield revenues of $3.5 million when completed, an amount equal to 47.3 percent of the Township's total tax levy of $7.4 million during 1975.

13. The new A.T.&T. facility, although only partially completed, was assessed at $34.5 million during 1975 and yielded revenues of $1.3 million last year. Approximately $1.8 million in revenues from A.T.&T. are anticipated by the Township during 1976, and revenues of $3.5 million between 1978 and 1980 from A.T.& T. would not appear unreasonable.

14. During 1975 and 1976, the revenues derived from A.T.&.T. have enabled Bernards Township to lower its equalized tax rate significantly while other municipalites throughout New Jersey are raising general levies by 10 to 20 percent in order to obtain minimum funds to finance local education. Bernards Township will be able, when the A.T.& T. facility is completed, if it continues to succeed in its efforts to exclude lower and middle income housing, to lower its present equalized tax rate at least $1.00 to $1.86 per $100.00 in assessed population.

15. Bernards Township is intersected by two major Federal Interstate Highways which, when they are completed, will place it within 35 minutes of Newark, New Jersey's largest city, and 45 minutes of New York City.

16. Bernards Township would experience a great population increase because of its own primary employment, its geographic location with respect to other employment centers and its highway system, but for its unique and hereinafter described system of exclusionary land use regulations.

17. Plaintiffs are the owners of certain real property located in Bernards Township consisting of approximately 450 acres of land.

18. Plaintiffs' property is undeveloped except for three single-family residences and is adjacent to Federal Interstate Highway 78.

19. The Bernards Township Zoning Ordinance, by its very terms and provisions, restricts housing uses in Bernards Township to persons who can afford to live in single-family dwellings located on valuable lots of considerable size. The effect of the design and structure of the zoning ordinance is to unnecessarily increase housing costs. This ordinance, by way of example, contains the following unique exclusionary provisions, all of which have the effect of driving upward the costs of housing:

(a) efficiency units are not permitted anywhere in Bernards Township and the smallest permitted unit is a one bedroom unit with a minumum of 660 square feet;

(b) apartment units are prohibited;

(c) the minimum floor area requirements for one and two bedroom units in the PRN zone are excessive and bear no relationship to health, safety or welfare;

(d) the maximum gross density permitted is extremely low, requiring high-cost private units and precluding subsidized units;

(e) the filing fee required to be paid upon the submission of an application under Section 6 of the ordinance is excessive and bears no rational relationship to municipal costs in reviewing such reports, and is discriminatory in that the fees exceed other fees for similar type development in the Township;

(f) approximately equal percentages of one bedroom, two bedroom, three bedroom and four (or more) bedroom facilities are required consistent with the then current demographic requirements of the area but neither the "demographic requirements" or "the area" are otherwise defined;

(g) the Bernards Township Zoning Ordinance prohibits mobile homes in the entire Township.

20. In cynical disregard for their obligation to provide housing for persons of low and moderate income, the Board drafted and the Committee enacted, on May 18, 1976, an

Ordinance (Ordinance No. 385 of the Bernards Township Zoning Ordinances) which provides on its face for 354 units of low and moderate income housing, but contains provisions which ensure that no such housing can be constructed. This Ordinance, by way of example, contains the following provisions which unnecessarily increase housing costs, are inimical with state and federal subsidized housing programs and collectively ensure against the construction of any subsidized housing:

(a) the Ordinance provides for low and moderate income housing as a special exception or (following the effective date of the Municipal Land Use Law) as a conditional use, which mechanism is invalid on its face under New Jersey case law;

(b) the Ordinance requires that proof be provided by the applicant that the required rental or purchase subsidies are guaranteed as a condition precedent to approval, while all federal and state subsidy programs require local land use approvals prior to considering subsidy applications;

(c) the Ordinance requires proof, as a condition precedent to approval, that the "adequate rental or purchase subsidies are adequately guaranteed for a minimum of forty years," which requirement effectively precludes all subsidies under any program of the Farmers Home Administration, the Department of Housing and Urban Development, the New Jersey Mortgage Finance Agency, the New Jersey Housing Finance Agency or the Housing Grant Program of the State of New Jersey. In fact, the only method under which financing for a term of forty years might be provided would require the "piggy-backing" of a HUD, Housing Assistance Payments Program on top of a proposal financed by the New Jersey Housing Finance Agency, and would require the approval of both agencies;

(d) the Ordinance requires an undue concentration of low and moderate income housing in enclaves buffered on the perimeter by single-family houses in contravention of federal housing project selection criteria;

(e) the Ordinance contains the same unique exclusionary provisions (such as the prohibition of efficiency units, the prohibition of apartments, extraordinarily high application fees, and an exceedingly low permitted density) found elsewhere in the Bernards Township Zoning Ordinance, all of which have the effect of driving upward the cost of housing and ensuring that housing in Bernards will not be eligible under any subsidy program of the state or federal governments;

(f) the Ordinance ensures, in contravention of sound planning principles for the location of multi-family housing, that none of the enclaves can be situated within one mile of Basking Ridge, which is the principal retail service area in Bernards Township; and

(g) the 354 units of low and moderate income housing and the 177 units of market income housing provided for in the Ordinance represent only a small fraction of Bernards Township's "fair share" of the regional housing need.

(h) such ordinance has been enacted with the knowledge that such subsidies are not currently available and that certain areas of the Township are unlikely to be serviced by a public sewer in the near future. Certain areas of the Township may never be so serviced if the Township does not contribute towards such cost. There is no present plan or intention by the Township to make such contribution or undertake such service with federal funding.

21. The Bernards Township Land Subdivision Ordinance, by its very terms and provisions, unnecessarily increases housing and development costs.

22. The effect of these requirements, together with the density and floor area ratio requirements, the open space requirements and the complex and expensive environmental impact statement required, assures that any housing built in Bernards Township will be more expensive than housing similarly constructed elsewhere.

23. Although Bernards Township presently has over 7,000 acres of vacant, residentially zoned land, that land is physically and economically unavailable, because of Bernards Township's system of land use regulations, to only the upper 5 percent, by income, of New Jersey's population.

24. There is a critical housing shortage in New Jersey generally. There is a critical housing shortage in Bernards Township. The need for housing has been increased by the actions of the Committee which rezoned an area at the request of the American Telephone and Telegraph Company in order to permit it to build a world headquarters in Bernards Township.

25. The A.T.&T. complex in Bernards Township will employ, when it is completed, an estimated 3,500 people at a broad range of income levels who will require an estimated 2,850 homes. Additional service jobs of 1.5 jobs per primary job will result from such 3,500 people.

26. The A.T.&T. office complex in Bernards Township will, when it is completed in 1978, pay annual property taxes to Bernards Township of approximately 3.5 million dollars. These property taxes will constitute almost one-half of Bernards Township's total tax receipts. A.T.&T. presently pays its taxes at a 1970 level of assessment.

27. Bernards Township, which already enjoys, in proportion to their taxpayers incomes, one of the lowest tax rates in New Jersey, will be able, due to the taxes it will receive from A.T.&T., to reduce its tax rates even further.

28. The great majority of the employees of A.T.&T. in Bernards Township will be unable to afford housing for their families within Bernards Township because of the Township's land use regulations. Many of these workers will be locked out, because of their financial resources, of the other suburban residential areas surrounding Bernards Township and will have to commute excessive distances to their jobs.

29. A.T.&T.'s Long Lines Division is in the process of constructing their headquarters in neighboring Bedminster Township. That facility will employ an estimated additional 3,500 people who will require an additional 2,850 homes. Additional service jobs of 1.5 jobs per primary job will result from such 3,500 people. The majority of these workers will be excluded, because of their financial resources, from Bernards Township and the suburban municipalities which surround it, and will have to commute excessive distances by automobile to their jobs.

30. Plaintiffs' property can, if properly zoned, provide a good portion of the housing needs of the proposed 7,000 employees.

31. The Committee and the Board failed to act reasonably and in furtherance of a legitimate comprehensive plan for the zoning of the entire municipality when they rezoned for A.T.&T., but chose to ignore the housing needs of A.T.&T.'s employees as well as the regional housing needs.

32. The Bernards Township Zoning Ordinance and its entire system of land use regulations is invalid because it has a substantial external impact contrary to the general welfare. Bernards Township's accommodation of large employment generators, coupled with Bernards Township's exclusionary land use policies have:

(a) imposed an unfair burden on other municipalities within the Bernards Township housing region to provide housing for persons in the lower and middle income spectrums employed in Bernards Township;

(b) deprived other communities, cities and urban areas already providing more than their fair share of housing for all categories of persons of the ratables they need to create a better balance for their community to pay the educational and governmental costs associated with residential development;

(c) contributed adversely to a national and local energy crisis by creating a physical and economic need for long distance commuting for persons employed within Bernards Township;

(d) imposed an unfair burden on workers employed in the Bernards Township housing region, most of whom have no access to public mass transit and for whom transportation is both time consuming and prohibitively expensive; and

(e) contributed to the process of urban decay presently afflicting our cities by depriving these cities of tax ratables while requiring them, at the same time, to continue to bear the educational and governmental costs associated with housing.

WHEREFORE, plaintiffs demand judgment as follows:

A. that the Bernards Township Zoning Ordinance be declared invalid in its entirety;

B. that those portions of the Bernards Township Land Subdivision Ordinance, together with any other land use regulations which the Court finds unreasonably increases housing costs, be declared invalid;

C. that the Committee be ordered to rezone plaintiffs' property so as to permit the development of housing thereon at reasonable densitites and at reasonable costs;

D. that the Committee and the Board be ordered to affirmatively provide for their fair share of the regional housing need at all family income levels, including low and moderate and specifically to:

(1) establish a Housing Authority to sponsor and develop low and moderate income housing in Bernards Township;

(2) fund that Housing Authority not only with federal and state housing grants but also with a substantial portion of the taxes paid to Bernards Township each year by A.T.&T.;

(3) plan and provide for, out of municipal tax revenues, the extension of sewers, water, roads and other utilities to areas zoned for multi-family development;

E. that defendants pay to plaintiffs the costs of suit;

F. such other relief which this Court may deem appropriate.

THIRD COUNT

1. Plaintiffs repeat the allegations contained in the First Count and Second Count of the Amended Complaint as if set forth herein at length.

2. Defendants have previously acknowledged a responsibility to provide for all types of housing in the Township.

3. Defendants selected the area covered by the planned residential neighborhood ordinance set forth in Ordinance Number 347 and selected the same area in an amendment to the master plan adopted in 1973 and considered the same area in an ordinance known as Ordinance 320 introduced in July of 1973.

4. The area contained in Ordinance 347 was selected because of its topography, its proximity to major highways and intersections and the availability of sewers and water.

5. Defendants selected such area contained in Ordinance 347 with the knowledge of the flood plain established in Ordinance 265 in December of 1971.

6. Defendants determined as a result of studies made prior to the introduction of Ordinance 347 that the area contained within such ordinance was appropriate for the potentially most dense area for future development in the Township.

7. Defendants had previously approved a density of 12 residential units per acre on a 20 acre site abutting the county park and the national wildlife refuse sometimes known as the Great Swamp. In such approval there was no restriction on the number of bedrooms and no requirement for three and four bedroom units. Such approval was granted

with the knowledge that it is not serviced by any means of public transportation and with the knowledge that it is within walking distance of two liquor stores, a drugstore, three eating establishments, a health food store and a hardware store. The area in proximity to such 20 acre tract is serviced by a grocery store which has a dimension of approximately 35 feet x 50 feet and by a delicatessen which has a dimension of approximately the same size.

8. Defendants at the time of the enactment of Ordinance 347 had no request from any state or federal agencies to restrict the density in the area covered by such ordinance. Defendants had no similar requests from any of the abutting municipalities or any municipality downstream from the Township of Bernards to the City of Newark.

9. Prior to the enactment of such ordinance and subsequent thereto, there has been no request or demand by any governmental agency to restrict the development or density in the area covered by Ordinance 347.

10. Defendants lack standing to raise any issues on behalf of any other municipality or any other governmental agency located downstream from the Township of Bernards either on the Passaic River or the Dead River.

11. The density selected within Ordinance 347 bear no reasonable relationship to the studies which were made or to comparable approvals granted which would permit a higher density in the area covered by Ordinance 347.

12. The selection of the area covered by Ordinance 347 for a higher density of use is inconsistent with the zoning of such tract for two acres minimum for a single-family residential unit.

WHEREFORE, plaintiffs demand judgment as follows:

A. that Ordinance 347 be declared invalid as to the density selected for multi-family use;

B. that the Township be directed to permit a density within such zone of at least five dwelling units per gross acre without restriction on the number of bedrooms or the requirement that three and four bedroom units be constructed;

C. that defendants be ordered to rezone plaintiffs property so as to permit the development of housing thereon at reasonable densities and at reasonable costs;

D. such other relief which this Court may deem appropriate.

FOURTH COUNT

1. Plaintiffs repeat the allegations contained in the First, Second and Third Counts of the Amended Complaint as if set forth at length.

2. Both Ordinance 347 and Ordinance ~~388~~ Ordinance 385 refer to public sewers, which defendants have interpreted to mean sewers owned and operated by the Township of Bernards Sewerage Authority and no other type.

3. Defendant Township created the Sewerage Authority known as the Township of Bernards Sewerage Authority and is limited to one authority within the Township by law.

4. Defendant Township appoints the members of such Sewerage Authority.

5. Defendant Township appropriates monies currently in its budget for the operation and maintenance of such Sewerage Authority in addition to the charges collected directly by the Sewerage Authority.

6. Defendant Township uses its full faith and credit and pledges its credit and borrowing capacity for the purpose of raising capital funds for such Sewerage Authority.

7. If there is no ability to tie in to the lines of the Township of Bernards Sewerage Authority, neither the PRN sections of Ordinance 347 or any portion of Ordinance 385 can be implemented in any respect.

8. The Township of Bernards Sewerage Authority has previously reserved capacity to permit A.T.&T. to construct its facility which will ulitmately employ 3,500 persons.

9. The Township of Bernards Sewerage Authority has previously reserved capacity for the 250 units to be constructed on the 20 acre site known as Ridge Oak.

10. The Township of Bernards Sewerage Authority has not reserved any other capacity for any other purpose.

11. Defendants have previously approved a plan, including a site plan, which permits the construction of the A.T.&T. facility which will ultimately house 3,500 persons directly adjacent to the Osborne Pond which is the central reservoir and main water source for the residents of the Township of Bernards.

12. The defendants have previously approved a plan including a site plan which permits the construction of the A.T.&T. facility within the flood plain designated in Ordinance 265, and has permitted a drainage plan which drains into the upper reach of the Passaic River and into other streams which flow into the Passaic River and the Dead River.

13. The only public sewers located in the Township of Bernards consist of a treatment plant operated by the Township of Bernards Sewerage Authority which has a present capacity of 1.2 million gallons per day.

14. Defendant Township has determined that the total capacity for the Township of Bernards will be 2 million gallons per day.

15. Defendant Township has failed and refused to expand the existing facility and has arbitrarily restricted development by refusing to expand the existing facility beyond the present capacity of 1.2 million gallons per day and has arbitrarily established a ceiling on sewerage capacity at 2 million gallons per day. Such failure to expand the facilities and such ceiling arbitrarily limits the amount of development which may take place in the Township.

16. By requiring a tie-in into public sewers as a prerequisite to development, defendants have effectively precluded plaintiffs from developing the property.

17. Defendants have contended that neither plaintiffs nor others should be permitted to construct any sewerage treatment facilities with any outfall into any of the streams or rivers within the Township.

18. Such refusal has been based upon studies which the Township made prior to its enactment of its zoning ordinances and the revisions to its master plan.

19. Defendants action by refusing to expand the sewerage facilities and by refusing to permit the construction of any other sewerage facility has been in accordance with a plan to preclude all development in such circumstances.

20. Defendants by precluding plaintiffs from constructing their own sewerage facilities in accordance with law and applicable state and federal regulations have confiscated plaintiffs' property causing damage to plaintiffs in that they have confiscated plaintiff's property without just compensation, have deprived plaintiffs of their property without due process of law, and have denied plaintiffs equal protection of the law and have failed to provide any compensation therefor in accordance with the New Jersey State and Federal Constitutions.

WHEREFORE, plaintiffs demand judgment against defendants as follows:

A. that the applicable zoning ordinances which require the tying into public sewers be declared invalid in the respect that such requirement precludes the construction of a private facility.

B. that plaintiffs be permitted to construct a sanitary sewerage treatment plant on its property which plant will flow into the Dead River, provided such plant is constructed in accordance with the Township of Bernards Sewerage Authority, New Jersey State and Federal requirements.

C. that in the event that no sanitary sewer treatment facility may be constructed by plaintiffs, that defendants pay just compensation for the taking of plaintiffs's land without due process of law or in the alternative that the Court direct an order appointing condemnation commissioners to fix the compensation to be paid to plaintiffs for such taking.

D. such other relief as this Court may deem appropriate.

LAW OFFICES OF
LANIGAN AND O'CONNELL, P.A.

By: William W Lanigan
William W. Lanigan
Attorney for Plaintiffs

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SOMERSET COUNTY
DOCKET NO. L-6237-74 P.W.

THEODORE Z. LORENC, LOUIS J. HERR, SAM WISHNIE, MARION WISHNIE, executrix of the Estate of Harry Wishnie, deceased, ALICE J. HANSEN, trustee, WILLIS F. SAGE, WILLIAM W. LANIGAN, and MERWIN SAGE,	
Plaintiffs,	Civil Action
vs.	ANSWER TO SECOND AMENDED COMPLAINT IN LIEU OF PREROGATIVE WRIT
THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, and THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS,	
Defendants.	

Defendants, the Township of Bernards and the Planning Board of the Township of Bernards, having principal offices at Municipal Building, Collyer Lane, Basking Ridge, New Jersey, in answer to plaintiffs' Second Amended Complaint, say:

AS TO THE FIRST COUNT

Defendants repeat the answers to the allegations contained in Counts One through Eight of the First Amended Complaint and make the same a part hereof as if fully set forth herein.

AS TO THE SECOND COUNT

1. Answering paragraph 1, defendants admit that the Township of Bernards (hereinafter sometimes referred to as "Bernards Township") is a community in the north-central portion of Somerset County and that its land area is approximately 24.95 square miles or 8.2 per cent of the 305.6 square mile land area of Somerset County. Defendants admit that the document entitled "1970 United States Census" indicates that Bernards Township contained a household population of 11,531 persons and that such household population equals approximately 5.9% of Somerset County's total household population as of that date. Defendants admit that the residential density in Bernards Township amounted to 462 persons per square mile as of the 1970 Census and that the comparable figures for Somerset County and the State of New Jersey are 635 persons per square mile and 938 persons per square mile, respectively. With respect to the data contained in the 1970 Census, defendants admit such data to the extent that it fully represents the entirety of such documents. Except as herein specifically admitted, de-

fendants deny the remaining allegations contained in paragraph 1 and further deny any characterization, interpretation, computation or extrapolation contained therein.

2. Answering paragraph 2, defendants admit that Somerset County, in which Bernards Township is located, is a county located in the State of New Jersey. With respect to the data contained in the 1970 Census, defendants admit such data to the extent that it fully represents the entirety of such document. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 2, and further deny any characterization, interpretation or extrapolation contained therein.

3. Answering paragraph 3, with respect to the data contained in the 1970 Census, defendants admit such data to the extent that it fully represents the entirety of such document. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 3 and further deny any characterization, interpretation or extrapolation contained therein.

4. Answering paragraph 4, defendants admit that defendant Township of Bernards is a municipality and that it is outside of the central cities and older built-up suburbs of North and South Jersey metropolitan areas. With respect to the allegations relating to valuation and to residential and nonresidential building permits issued since 1973, defendants are without present

knowledge or information sufficient to admit or deny such allegations and leave plaintiff to their proof. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 4.

5. Answering paragraph 5, defendants neither admit nor deny the allegations contained therein as they call for legal conclusions.

6. Answering paragraph 6, defendants are without knowledge or information sufficient to admit or deny the allegations contained therein.

7. Answering paragraph 7, with respect to the data on racial characteristics contained in the 1970 Census, defendants admit such data to the extent that it fully represents the entirety of such document. With respect to the educational data, defendants admit that the median years in public school completed in Somerset County is 12.4 years and in New Jersey is 12.1 years, respectively, but deny that the median years of school completed by Bernards Township residents is 13.5 years according to the 1970 Census, but rather that the median years of school completed by Bernards Township residents according to the 1970 Census actually equals 12.8 years, which figure is above the median of Somerset County. With respect to the median age data contained in the 1970 Census, defendants admit such data to the extent that it fully represents the entirety of such document. Except as herein specifically

admitted, defendants deny the remaining allegations contained in paragraph 7 and further deny any characterization, interpretation or extrapolation contained therein.

8. The allegations contained in paragraph 8 are denied.

9. Answering paragraph 9, with respect to the data contained in the 1970 Census of Housing, defendants admit such data to the extent that it fully represents the entirety of such document, specifically the median value of owner-occupied housing units in New Jersey as $23,400.00, the comparable figure for Somerset County is $29,700.00, which value is 26.9% above the median value in New Jersey, the median value reported for Bernards Township as $40,000.00 which value is 70.9% above the New Jersey median value and 34.6% above the Somerset County median value and that the median housing values for units for sale within Bernards Township as of the 1970 Census were described as $50,000.00 - plus. Defendants are unable to admit or deny portions of the allegations contained in paragraph 9 because plaintiffs have failed to identify or provide defendants with the surveys referred to therein, and are without present knowledge or information sufficient to admit or deny the allegations with respect to single-family dwellings sold since 1973 and leave plaintiffs to their proof. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 9 and further deny any characterization,

interpretation or extrapolation contained therein.

10. Answering paragraph 10, with respect to the data regarding the comparative property tax burden of property owners in Bernards Township with the burden of other municipalities of the State of New Jersey, defendants admit that in 1975, Bernards Township ranked 354 from the highest property tax burden, or approximately in the 40th percentile, and that in 1973, Bernards Township ranked 226 from the highest property tax rate burden, or approximately in the 60th percentile. Defendants admit that the per capita real estate tax in Bernards Township was $118 in 1960 and $324 in 1970, but defendants are unable to admit or deny the percentage figures relative to the per capita real estate tax in the State of New Jersey. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 10 and further deny any characterization, interpretation or extrapolation contained therein.

11. Answering paragraph 11, defendants admit that the equalized tax rate has decreased from $3.92 (not $3.93 as stated in paragraph 11) per $100.00 in 1971, to $3.72 per $100.00 in 1972, to $3.53 per $100.00 in 1973, to $3.27 per $100.00 in 1974, and $2.86 per $100.00 in 1975. Defendants are without knowledge or information sufficient to admit or deny the allegations contained in the final sentence of paragraph 11, and except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 11 and further

deny any characterization, interpretation or extrapolation contained in the matter of which an admission is requested.

12. Answering paragraph 12, defendants are unable to admit or deny the allegations contained therein since plaintiff does not define the meaning of "recent decrease of the tax rate" in Bernards Township. Plaintiff does not indicate whether this is an equalized tax rate or an actual tax rate. With respect to the allegation regarding the estimated valuation of the American Telephone and Telegraph Company facility when completed, defendants lack information or knowledge sufficient to admit or deny same as this calls for an anticipated valuation at some point in the future. With respect to the allegation regarding the anticipated valuation of the American Telephone and Telegraph Company facility or the amount of revenues which would be yielded if some future valuation of an as yet unfinished facility were hypothetically applied to the present total tax levy of Bernards Township during 1975, defendants lack information or knowledge either to admit or deny the same. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 12 and further deny any characterization, interpretation or extrapolation contained therein, including the hypothesis that a significant increase in the valuation of any present or future facility would have no effect on the tax rate or tax levy of a township.

13. Answering paragraph 13, defendants admit that the American Telephone and Telegraph Company facility is not fully completed, that it yielded approximately $1.3 million in tax revenues last year and that tax revenues from the American Telephone and Telegraph Company facility within Bernards Township for 1976 are anticipated to amount to approximately $1.8 million. Except as herein specifically admitted, defendants deny the remainder of the allegations contained in paragraph 13.

14. Answering paragraph 14, defendants admit that the equalized tax rate in Bernards Township has decreased from $3.27 per $100.00 in 1974 to $2.86 per $100.00 in 1975 and further admit that the actual tax rate in 1975 equalled $3.92 per $100.00 and increased to $4.12 per $100.00 in 1976. Defendants are at this time without knowledge or information sufficient to admit or deny the allegations in paragraph 14 regarding the actions of certain other unnamed municipalities throughout the State of New Jersey, not identified or parties to this action, or the reasons which such actions were taken and leave plaintiffs to their proofs. Defendants deny that any effort has been made to exclude lower and middle income housing from defendant Township of Bernards, and further deny that the tax rate has been significantly lowered in defendant Township of Bernards during 1975 and 1976 as a result of revenues derived from the American Telephone and Telegraph Company.

Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 14 and further deny any characterization, interpretation or extrapolation contained therein.

15. Answering paragraph 15, defendants admit that there are two Federal Interstate Highways which pass through defendant Bernards Township, but deny that those highways intersect within defendant Bernards Township. Defendants admit that Newark is the largest city in the State of New Jersey by population. As to the allegations regarding traveling time in paragraph 15, defendants are at this time without knowledge or information sufficient to admit or deny the accuracy of the estimates contained therein. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 15.

16. The allegations contained in paragraph 16 are denied.

17. The allegations contained in paragraph 17 are admitted.

18. Answering paragraph 18, defendants are without present knowledge or information sufficient to admit or deny the uses to which plaintiffs' property are put or the development thereof, but deny that such property is contiguous with Federal Interstate Highway 78.

19. Answering paragraph 19, as to the terms and pro-

visions of the ordinance and amendments thereof, defendants demand production and proof; and except as herein admitted, the allegations contained in paragraph 19 and its subparagraphs (a) through (g) are denied.

20. Answering paragraph 20, defendants admit that on May 18, 1976, Bernards Township enacted Ordinance No. 385 and they demand production and proof as to the terms and provisions of said ordinance, and except as herein specifically admitted, the allegations contained in paragraph 20 are denied.

21. Answering paragraph 21, defendants demand production and proof of the ordinance referred to therein, and except as herein admitted, the allegations contained in paragraph 21 are denied.

22. The allegations contained in paragraph 22 are denied.

23. Answering paragraph 23, defendants admit that there is vacant, residentially zoned land within the boundaries of defendant Bernards Township, and except as herein admitted the allegations contained in paragraph 23 are denied.

24. Answering paragraph 24, defendants are at this time without knowledge or information sufficient to admit or deny the location and extent of any housing shortage. Defendants admit that the Township Committee of Bernards Township rezoned a very small portion of Bernards Township upon the application of American Telephone and Telegraph after substantial

rezoning of the property on which the American Telephone and Telegraph facility is located had already been effected. Defendants neither admit nor deny the allegations regarding the "housing region" referred to in the Complaint as it calls for a legal conclusion. Defendants make no answer to the allegations directed to the Township Committee which is not a party to this suit. Except as herein specifically admitted, the allegations contained in paragraph 24 are denied.

25. Answering paragraph 25, defendants admit that when completed the American Telephone and Telegraph complex in Bernards Township will employ approximately 3,500 people and that said employees will have various income levels. Defendants are at this time without knowledge or information as to those income levels and their range or the number of "service jobs" which may result from such employment and leave plaintiffs to their proof. Except as herein admitted, defendants deny the remaining allegations of paragraph 25 and further deny any characterization, interpretation, computation or extrapolation contained therein.

26. Answering paragraph 26, defendants admit that upon information known or readily available, the American Telephone and Telegraph Company facility in Bernards Township is expected to be completed in 1978. Except as herein specifically admitted, defendants deny the remaining allegations con-

tained in paragraph 26 and further deny any characterization, interpretation, computation or extrapolation contained therein.

27. The allegations contained in paragraph 27 are denied.

28. Answering paragraph 28, defendants are at this time without knowledge or information sufficient to admit or deny the allegations regarding the effect on employees of the American Telephone and Telegraph Company of policies of suburban residential areas in communities surrounding Bernards Township, not parties to this suit, and except as specifically herein admitted, the remaining allegations contained in paragraph 28 are denied.

29. Answering paragraph 29, defendants admit that American Telephone and Telegraph's Long Lines Division is in the process of constructing their headquarters in Bedminster Township, a municipality contiguous with the Township of Bernards. Defendants are at this time without knowledge or information sufficient to admit or deny the accuracy of the employment levels at that site or the extent of the need for additional housing or location thereof which such employment will generate, what the effect will be on employees at this site as a result of policies of residential suburban municipalities surrounding Bernards Township, not parties to

this action, or the number of "service jobs" which may result from such employment, and leaves plaintiffs to their proofs. Except as are herein specifically admitted, the defendants deny the remaining allegations contained in paragraph 29 and further deny any characterization, interpretation, computation or extrapolation contained therein.

30. The allegations contained in paragraph 30 are denied.

31. The allegations contained in paragraph 31 are denied.

32. The allegations contained in paragraph 32 and subparagraphs (a) through (e) thereof are denied.

AS TO THE THIRD COUNT

1. Answering paragraph 1, defendants repeat the answers to the allegations contained in the First and Second Counts of the Second Amended Complaint and make the same a part hereof as if fully set forth herein.

2. Answering paragraph 2, defendants admit that they have acknowledged a 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, as evidenced by the adoption of Ordinance 347 and Ordinance 385. Except

as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 2.

3. Answering paragraph 3, defendants admit the adoption of Ordinance No. 347 on August 20, 1974 and the amendment of the Bernards Township Master Plan in 1973. As to the terms and provisions of the ordinance and master plan and amendments thereof, defendants demand production and proof. With respect to proposed Ordinance No. 320, defendants admit its introduction on June 19, 1973 and consideration thereof, but deny that it was ever adopted. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 3.

4. Answering paragraph 4, defendants admit that the area designated by Ordinance No. 347 for planned residential development was selected for a variety of valid planning considerations including, but not limited to, those stated in paragraph 4.

5. Answering paragraph 5, defendants admit the adoption of Ordinance No. 265 in December, 1971 and further admit knowledge thereof. As to the terms and provisions of the ordinance and amendments thereof, defendants demand production and proof. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 5.

6. Answering paragraph 6, defendants are without present knowledge or information sufficient to admit or deny

the allegations contained therein, and with respect to the studies referred to therein, demand production and proof thereof. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 6.

7. Answering paragraph 7, defendants admit the grant of a variance from the terms and provisions of the Bernards Township Zoning Ordinance to permit the construction of a non-profit housing development to meet the particular needs of senior citizens and further admit that such development is contiguous with a county park. With respect to the terms and provisions of the variance and the size of such development or the location thereof, defendants demand production and proof. Defendants are without present knowledge or information sufficient to admit or deny the remaining allegations of paragraph 7.

8. Answering paragraph 8, defendants admit that no state or federal agency requested density restrictions on the lands to which Ordinance No. 347 pertains. Except as herein specifically admitted, the remaining allegations contained in paragraph 8 are denied.

9. Defendants deny the allegations contained in paragraph 9.

10. The allegations contained in paragraphs 10, 11 and 12 are denied.

AS TO THE FOURTH COUNT

1. Answering paragraph 1, defendants repeat the

allegations contained in the First, Second and Third Counts of the Second Amended Complaint and make the same a part hereof as if fully set forth herein.

2. Answering paragraph 2, defendants admit that Ordinance No. 347 and Ordinance No. 385 refer to public sewers. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 2.

3. Answering paragraph 3, defendants admit the creation of the Bernards Township Sewerage Authority but are without present knowledge or information sufficient to admit or deny the allegations regarding the limitations imposed by law and demand production and proof thereof.

4. The allegations contained in paragraphs 4 and 5 are admitted.

5. Answering paragraph 6, defendants are without present knowledge or information sufficient to admit or deny the allegations contained therein and leave plaintiffs to their proof.

6. Answering paragraph 7, defendants admit that without the availability of public sewerage facilities, including but not limited to the facilities of the Bernards Township Sewerage Authority, neither the planned residential neighborhood sections of Ordinance 347 nor Ordinance 385 can be imple-

mented. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 7.

7. Answering paragraph 8, defendants admit that the Bernards Township Sewerage Authority has reserved capacity for American Telephone & Telegraph Company and other developments to permit construction of those developments.

8. Answering paragraph 9, defendants admit that the Bernards Township Sewerage Authority has reserved capacity for the senior citizens development known as Ridge Oak and other developments to permit construction of these developments. Except as herein specifically admitted, defendants deny the remaining allegations contained in paragraph 9.

9. The allegations contained in paragraph 10 are denied.

10. Answering paragraph 11, defendants admit that a plan has been approved to permit the construction of the American Telephone & Telegraph Company facility to employ, when completed, approximately 3,500 persons, that the facility is adjacent to Osborne Pond, that Osborne Pond is a reservoir and one of the water sources for the residents of the Township of Bernards. Defendants further admit that the site plan makes elaborate provisions to protect the water quality of Osborne Pond. Except as herein specifically admitted, defendants

deny the remaining allegations contained in paragraph 11.

11. The allegations contained in paragraph 12 are denied.

12. The allegations contained in paragraph 13 are admitted.

13. The allegations contained in paragraphs 14, 15 and 16 are denied.

14. Answering paragraphs 17 and 18, defendants are without present knowledge or information sufficient to admit or deny the allegations contained therein and with respect to the studies referred to therein demand production and proof.

15. The allegations contained in paragraphs 19 and 20 are denied.

FIRST SEPARATE DEFENSE

The zoning ordinance of the Township of Bernards is in accordance with a comprehensive plan designed to achieve the statutory purposes specified (1) in R.S. 40:55-32, including, without limitation, to secure safety from flood, to promote the general welfare, to prevent the overcrowding of land or buildings, to avoid undue concentration of population and to encourage the most appropriate use of land throughout the municipality, and (2) within the statutory purposes of R.S. 40:55D-1, et seq., to promote the establishment of appropriate population

densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment; and further to provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens.

SECOND SEPARATE DEFENSE

The zoning ordinance of the Township of Bernards promotes the general welfare by requiring reasonable protection of the natural environment.

THIRD SEPARATE DEFENSE

The zoning ordinance of the Township of Bernards promotes the general welfare by requiring land uses reasonably necessary to preserve the water quality of the Dead River and its tributaries, including Harrison Brook, all of which are tributaries of the Passaic River and constitute the Upper Passaic Watershed.

FOURTH SEPARATE DEFENSE

1. The Federal Water Pollution Control Act amendments of 1972, 33 U.S.C.A. §1251, et seq. declare that it

is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985. This legislation applies to the Passaic River. The State of New Jersey is required to make plans by the end of 1976 to accomplish the goals set forth in said legislation.

2. According to the County and Municipal Study Commission of the State of New Jersey, the Passaic River is among the ten worst polluted streams in the nation.

3. The Commission has further stated in Water Quality Management: New Jersey's Vanishing Options, a draft report, March, 1973:

> "Water is a basic resource; it is necessary for sustaining life. The use of rivers, streams, and bays as sewers for dilution and transport of wastes negates their use as a source of water supply, as a base of recreational activity, as a habitat for fish and wildlife. In the extreme, it may mean the survival of the State's economic base. In the headwaters of the Passaic River alone, continued degradation of water quality could threaten the potable water for millions of people * * *. In summary, New Jersey's extensive water pollution is probably the most serious problem currently imperiling the quality of our physical environment."

4. Under the present state of technological development, economically feasible sewerage treatment plants inevitably introduce pollutants into the receiving waters.

FIFTH SEPARATE DEFENSE

1. Defendants repeat all of the allegations of the Fourth Separate Defense and make them a part hereof.

2. Treated sewerage effluent can be introduced into the Dead River without degradation of its water quality provided that the total quantity of pollutants in such effluent does not exceed the assimilative capacity of the stream.

3. The standards of water quality in the Passaic River required by Congress and by the State of New Jersey cannot be met unless there are limitations on the amount of treated sewerage effluent which is introduced into the Dead River and the Upper Passaic River by Bernards Township, and there is reasonable likelihood that proper authority may impose waste load allocations of an amount yet to be determined, upon Bernards Township.

SIXTH SEPARATE DEFENSE

1. Defendants repeat all of the allegations of the Fourth and Fifth Separate Defenses and make them a part hereof.

2. Bernards Township Sewerage Authority has applied to the Department of Environmental Protection and funding bodies to permit it to upgrade and enlarge its sewerage treatment plant on Martinsville Road to three million gallons per day.

3. If approved as requested, the upgrading and

construction of the said plant will provide sewerage facility capacity for development under Ordinance No. 347 and Ordinance No. 385.

SEVENTH SEPARATE DEFENSE

1. Defendants repeat all of the allegations of the Fourth, Fifth and Sixth Separate Defenses and make them a part hereof.

2. The effort to maintain and improve the water quality in the Dead River and the Upper Passaic River will require that certain buildings in Bernards Township presently serviced by septic systems will have to be connected with the Bernards Township Sewerage Authority plant on Martinsville Road.

3. The enlargement and upgrading of the existing Bernards Township Sewerage Authority facilities as applied for, give said facilities a capacity which will absorb all, or virtually all, of the remaining portions of the waste load allocation that may be imposed upon Bernards Township.

4. Until such waste load allocations are definitely established, it would be unreasonable for Bernards Township to permit, by the enactment and application of the zoning ordinance or otherwise, land developments that would significantly increase the number of inhabitants serviced by the Bernards Township Sewerage Authority plant.

EIGHTH SEPARATE DEFENSE

1. Defendants repeat all of the allegations of the Second and Third Separate Defenses, and paragraphs 1 and 3 of the Fourth Separate Defense and make them a part hereof.

2. A significant proportion of stream pollution, including that in the Dead River and the Upper Passaic River results from nonpoint sources.

3. The surface water runoff from multi-family housing is a significant source of nonpoint pollution.

NINTH SEPARATE DEFENSE

Although the power to zone rests with municipalities, zoning should be in accordance with sound regional development. Every municipality is not required to permit every kind of use somewhere within its boundaries. The zoning ordinance is reasonable and valid if it is reasonably related to legitimate zoning purposes and a zoning ordinance which establishes a land use pattern consistent with the recommendations of the County Master Plan and other sound plans for regional development is valid. The zoning ordinance of the Township of Bernards closely adheres to the land use patterns proposed by the Master Plan of Land Use of the Somerset County Master Plan, by the Future Land Use Element of the Morris County Master Plan, by the Regional Plan Association and by the Tri-State Regional Planning Commis-

sion in their proposals for regional land use planning. Accordingly, the zoning ordinance of the Township of Bernards is not unreasonable and is valid.

TENTH SEPARATE DEFENSE

Environmental protection is a legitimate purpose of zoning and is a compelling state goal. Protection of the environment requires that land use planning and zoning decisions be based upon considerations of water supply, water quality, air quality, topography, geological features, soil characteristics, existing drainage patterns, historic and aesthetic values and any unique character or culture of the community in question. Sound planning and zoning must reconcile these considerations with the legitimate housing needs of the region and of the state. This cannot be accomplished by urban and suburban sprawl without regulations in the interest of legitimate environmental and other planning goals. The zoning ordinance of the Township of Bernards is consistent with the Master Plan of Land Use of the Somerset County Master Plan, the Future Land Use Element of the Morris County Master Plan, and other regional plans which effectively and equitably reconcile environmental needs and the housing needs of an expanding metropolitan population. Accordingly, the zoning ordinance of the Township of Bernards is not unreasonable and is valid.

ELEVENTH SEPARATE DEFENSE

The density of development in a watershed area is directly related to the quality of water passing down river. The Township of Bernards is situated in part of the headwaters region and watershed of the Passaic River system, which forms a significant part of the northern New Jersey water supply. Accordingly, the provisions of the zoning ordinance of the Township of Bernards in regard to the density of land usage are reasonably related to the general welfare by promoting preservation of the public water supply by requiring low density development in the Township of Bernards.

TWELFTH SEPARATE DEFENSE

As a matter of law, environmental factors may justify a zoning ordinance and underlying Master Plan that are restrictive in the variety and intensity of land use they permit. In view of the relevant environmental factors, the zoning ordinance of the Township of Bernards is valid.

THIRTEENTH SEPARATE DEFENSE

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

FOURTEENTH SEPARATE DEFENSE

Plaintiff has no absolute and unlimited right to

change the essential natural character of its land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The police power may be lawfully utilized to prevent harm to public rights by limiting the use of private property to its natural uses.

FIFTEENTH SEPARATE DEFENSE

1. Recently published studies, including those by Tri-State Regional Planning Commission and The Regional Plan Association, demonstrate that the growth of population in the northeast New Jersey metropolitan area has virtually halted and that national demographic trends are that the nation's population growth will take place in parts of the country other than the northeast.

2. As a result of the aforesaid demographic trends, land use policy in New Jersey should be directed toward improving the quality of life rather than toward the accommodation of ever increasing population and economic growth.

3. In view of the likelihood of a leveling off of population and employment in northern New Jersey, there is no reason to permit the overdevelopment of ecologically sensitive land.

SIXTEENTH SEPARATE DEFENSE

1. At the time when plaintiffs acquired their lands

in Bernards Township most of said lands were located in the 3-A district under the terms of the zoning ordinance.

2. At the time when plaintiffs acquired their lands in Bernards Township, plaintiffs knew that most of said lands were located in the 3-A district under the terms of the zoning ordinance.

3. Plaintiffs have no standing to claim that the Bernards Township zoning ordinance, as applied to plaintiffs' property, deprives plaintiffs of property without due process of law, or has denied plaintiffs the equal protection of the laws.

SEVENTEENTH SEPARATE DEFENSE

Bernards Township Ordinance No. 347 and Ordinance No. 385 comply with the obligations recognized by Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975).

McCarter & English
Attorneys for Defendants

By: Nicholas Conover English
Nicholas Conover English
A Member of the Firm

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

MICHAEL SOZANSKY, being duly sworn according to law, upon his oath deposes and says:

1. I am employed by McCarter & English, attorneys for defendants herein.

2. On July 30, 1976, I personally mailed, by certified mail, return receipt requested, postage prepaid, a copy of the Answer to Second Amended Complaint to Lanigan & O'Connell, Esqs., attorneys for plaintiffs, 59 South Finley Avenue, Basking Ridge, NJ 07920.

Sworn to and subscribed)
before me this 30th day)
of July, 1976.)

/s/ Michael Sozansky
Michael Sozansky

RAE MENKES
A Notary Public of New Jersey
My Commission Expires Jan. 9, 1979

P

SUPERIOR COURT, SOMERSET COUNTY, LAW DIVISION

THEODORE T. LORENC, LOUIS J. HENRY, SAM WISHNIE, MARION WISHNIE, Executrix of the Estate of Harry Wishnie, Deceased, et al,

Plaintiffs,

vs.

THE TOWNSHIP OF BERNARDS, et als,

Defendants.

SUPPLEMENTAL PRETRIAL ORDER

Pretried by Judge D. THOMAS DERBY, J.C.C.

on August 31, 1976

Superior No. L— 5227-74

County No. C— 11203 P.W.

The parties to this action, by their attorneys, having appeared before the Court at a pretrial conference on the above date, the following action was taken:

1. Action in Lieu of Prerogative Writ, challenging validity of Township zoning ordinance, particularly No. 347 and No. 385. Plaintiff seeks higher density, order to rezone, permission to construct sanitary sewerage treatment plant and compensation for alleged taking without due process including appointment of commissioners.) Plaintiff also asserts that Court should rezone the Township.

2. None except as in pleadings, requests for admissions and interrogatories.

3. and 4. See attached.

5. If plaintiff prevail on issue of taking without compensation, supplemental hearing, preceded by a new pretrial order, will be required on issue of damages.

6. None

7. Plaintiff: Just compensation, taking, legality of ordinance no. 385, illegality of entire zoning ordinance by virtue of amendments and other acts of the municipality, unreasonableness of zoning and other related ordinances.

Defendant: Validity of Ordinance No. 347 as applied to plaintiff's lands.

Another township by its zoning ordinance as a whole, with particular reference to Ordinance No. 347 and Ordinance No. 385, the grant of a variance to Bingo Farms, Inc. in connection

with the Mt. Laurel decision.
(c) Reasonableness of Bernards Township controlling the nature, extent and timing of development so as to keep future population growth within the prospective capacity of sewerage treatment facilities plus the capacity of non-sewered areas to accommodate on-site waste disposal.

8. None.

9. As admitted heretofore at inception of trial.
10. No limit.

11. None.

12. Usual

13. Motions directed to interogatories and responses to requests for admissions shall be returnable ~~on~~ not later than September 16, 1976. Parties shall have leave to take depositions through September 24, 1976.

14. Plaintiff-William W. Lanigan and/or Daniel F. O'Connell
Defendant-Nicholas Conover English

15. Additional 8 to 12 trial days.

16. Resumption of trial will be scheduled by the Court.

17.

William W. Lanigan, Attorney
For Plaintiffs

Nicholas Conover English, Attorney
for ~~[illegible]~~ Defendants.

Richard J. McManus, Attorney
for Defendants.

S. Thomas Leahy, J.C.C.

#3-4. FACTUAL AND LEGAL CONTENTIONS:

In addition to the factual and legal contentions previously made, they are supplemented as follows:

Ordinance No. 385 was enacted purportedly by the municipality to satisfy its obligations as a developing municipality within the terms of Mt. Laurel. It, in fact, is illusory in that it does not grant any right to develop under the terms of the ordinance, but such right is predicated on the existence of subsidies which may never be obtained, are impossible to obtain until the plans are developed, cannot be obtained for the length of time required by the ordinance and such requirement has been instituted with full knowledge of this impossibility.

The ordinance further limits the location of the development and precludes any existing development within one mile of Basking Ridge center, and if a pending application under the terms of the ordinance is approved would eliminate the possibility of the utilization of such ordinance with respect to plaintiffs' tract.

Plaintiffs' tract under the existing ordinance is not permitted to utilize the provisions of Ordinance No. 385.

By requiring in Ordinance No. 385 and in Ordinance No. 347 that there must be a tie-in to public sewerage facilities and by not permitting any approved alternate systems of waste disposal, plaintiffs' contend that there has been a taking of their land and on such basis they should be paid just compensation, or in the alternative, commissioners should be appointed to determine the just compensation paid by reason of the taking.

Plaintiffs have permitted the development of other tracts in the Township abutting the public water supply without restriction, have permitted the development of projects within the flood plain without restriction, and have been arbitrary and discriminatory in the zoning of plaintiffs' land in light of their treatment of other landowners within the Township.

Plaintiffs further rely upon the factual and legal contentions made in its seconded amended complaint

are controlled by appropriate limits on further population growth in Bernards Township.

It is the defendants' contention that the determination of where and how such further population growth should be accommodated within the Township is a matter of the proper legislative judgment of the Township Committee in its exercise of the zoning power, and may not be dictated by particular landowners.

The Township Zoning Ordinance as a whole makes adequate provision for commercial and business zones, and Ordinance 347 is not deficient in failing to make specific provisions for these uses.

Ordinance No. 347 is entitled to the presumption of validity, and has no discriminatory intent or effect. It is a valid and reasonable exercise of the municipal zoning power, and plaintiffs cannot substitute their judgment, or that of the Court, of what benefits the public welfare for that of the duly elected municipal governing body.

The Bernards Township Zoning Ordinance as a whole complies with the requirements of the Mt. Laurel decision. Ordinance No. 347, which permits various forms of multi-family housing, has made realistically possible a variety and choice of housing. Ordinance No. 385, enacted on May 18, 1976, has increased the possibilities for multi-family housing, and has specifically required that two-thirds of the dwelling units constructed thereunder up to the number of 354 shall be for subsidized low and moderate income housing. Defendants' readiness to meet a variety of housing needs is evidenced by the grant of a variance in 1973 to Ridge Oak, Inc. to construct apartment units with preference for elderly persons of moderate income.

Bernards Township's fair share of regional housing needs must be considered not only in the light of employment and population projections, but also in the light of the limitations on the ultimate population capacity of the Township made necessary by environmental constraints.

4. The factual and legal contentions of the defendants are as follows:

Ordinance No. 347 was duly and legally adopted by the Township Committee of the Township of Bernards, and it represents a valid and reasonable exercise of the municipality's zoning power. The amendment to this ordinance made on September 3, 1974, did not substantially alter the substance of the ordinance, and therefore further notice, publication, referral, and public hearing were not required.

The zoning ordinance in question complies with both the letter and the spirit of the court order in the prior litigation. Furthermore, the ordinance complies with all statutory and constitutional standards and requirements.

The land usage established by this ordinance is reasonab and in conformance with the Bernards Township Master Plan of 1975, with the county master plan and with guidelines and standards established by regional planning authorities. Furthermore, local and regional environmental considerations make it unreasonable to permit a higher density of residential development on this land. Among these local and regional environmental considerations are air quality, water supply, and waste disposal, all of which would be adversely affected by a higher residential density. As enacted, the ordinance represents a reasonable and legitimate balance between the need for new housing in this area and the need to protect the environment not only of the municipal ity, but of the entire region.

The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. 1251, et seq. (Law 92-500) declares that (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985; (2) It is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shell fish and wildlife and provides for recreation in and on the water be achieved by July 1, 1983. The States are required to make plans to accomplish these goals. New Jersey has not yet completed its plans but studies are under way on which such plans may be based. One such study is being conducted by the Upper Passaic River Basin Wastewater Management Committee, and covers the Passaic River upstream from Summit, including Bernards Township. A draft report of Phase I of this study was issued in March 1975. A draft report of Phase II of this study was issued in February 1976. Another relevant document is the draft report issued in August 1975 of the Section 303(e) Water Quality Management Basin Plan, Fresh Water Passaic River Basin, being conducted for the Department of Environmental Protection. The implications of these studies are that the required water quality standards cannot be met in the Upper Passaic River unless both point and nonpoint sources of pollutio

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OF COUNSEL

February 8, 1977

The Honorable B. Thomas Leahy
Somerset County Court House Annex
Somerville, New Jersey 08876

Re: Theodore Z. Lorenc, et al. v.
The Township of Bernards, et al
Docket No. L-6237-74 P.W.

Dear Judge Leahy:

There are two decisions which have been rendered subsequent to the oral argument in the above-captioned case which may have a bearing upon your decision and, hence, they are being brought to the Court's attention with commentary in the identical manner in which counsel for the Township has brought a similar case to the Court's attention on December 20, 1976, with commentary and argument thereon.

The first case is entitled The Allan Deane Corporation, et al. v. The Township of Bedminster, et al., Superior Court of New Jersey, Appellate Division, Docket No. A-1012-75 (unreported as of this writing) decided on January 21, 1977. A copy of such decision is attached.

In this case, the Appellate Division has affirmed a judgment entered against the Township of Bedminster on an opinion of

October 17, 1975, in which this Court passed upon a "PRN" ordinance which is identical in practically every respect to the ordinance presently under attack in the Township of Bernards, and which has been the subject of the above-captioned litigation.

The similarities in the ordinances and their application are striking. The densities (6 and 8% floor area ratio) are the same, as are the parking requirements and other ordinance language. The planner and draftsman of the basic ordinance are the same. The Court heard the same testimony with respect to dwelling units per acre. As the Court will recall, the tract to which those ratios applied in the Bedminster case was more than half unuseable by reason of an environmental condition, namely the steep slope of the mountain. In addition, the Township similarly urged in the Bedminster case that there could be no disposal by any package treatment plant into the sensitive Raritan River; brought experts to testify to that end, all the while they were approving an 800,000 gallon per day treatment plant for AT&T Longlines. Bernards has made the same arguments while they currently permit The Pingry School to locate in Bernards and tie into the Warren Township Sewage Treatment Plant several hundred feet from plaintiffs' property in the Dead River.

The lower Court in the Allan Deane case, which has now been affirmed by the Appellate Division, concluded that "...proofs clearly establish that multi-family housing, subsidized or private, cannot and will not be built at densities of one and one-half to three units per acre." Allan Deane Corporation, et al. v. The Township of Bedminster, et al., Superior Court

of New Jersey, Law Division, Somerset County, unreported Docket No. L-36896-70 P.W. and L-28061-71 P.W., opinion on February 24, 1975, at page 40.

The interesting thing to note is that the Township Planner in that case, with the identical percentage of floor area ratio, managed to conclude that, by some manner of subsidy, there could be as many as three units per acre. His testimony in the case before the Court, however, on the identical ordinance, was more realistic and more correct mathmatically when he concluded that the ratios were 1.39 and 1.86 dwelling units per acre for the PRN6 and PRN8 zones, respectively. This is even stronger justification that multi-family housing is not going to be built at these densities, much less one and one-half to three units per acre.

The other element of the Appellate Division decision which bears some comment is that the Court was mindful of the amendment to the zoning and planning statutes which had occurred subsequent to the Court's "comprehensive opinion of October 17, 1975", effective August 1, 1976.

Although we do not have access to the transcript of testimony of William E. Roach, Jr., Planning Director, the transcript will show that he felt that the PRN zoning was consistent with the goals of the county master plan and that he was under the mistaken impression that the densities provided in the existing PRN ordinance (and that one might expect in terms of multi-family density,) were not as he supposed and that his understanding and expectation was substantially in excess of the densities actually provided in the ordinance -- nearly four or five times as great.

The new statute, N.J.S.A. 40:5D-62 required that "...the land use plan element of a [municipal] master plan and all the provisions of such zoning ordinance or any amendment or revision thereto shall being be substantially consistent with the land use plan element of the master plan or design to effectuate such plan element", and also provides quite specifically that the governing body may only adopt a zoning ordinance which is inconsistent with such master plan "by affirmative vote of of a majority of the full authorized membership of the governing body with the reasons of the governing body for so acting recorded in its minutes when adopting such a zoning ordinance."

In essence, if the municipality is going to deviate from its own master plan, then it must, not only acknowledge the existence of the plan, but must state specifically why it has deviated. The proofs established in this case show that there was no deviation.

On the other hand, with respect to a county master plan, the legislature having provided a rather detailed procedural direction to the governing body where there was a deviation from a municipal master plan, made no such requirement with respect to the county master plan.

The legislature, in enacting N.J.S.A. 40:55D-28(a) effective the same date, imposed an obligation on a planning board (emphasis supplied) in adopting the municipal master plan to "...include a specific policy statement indicating the relationship of the proposed development of the municipality

as developed in the master plan to...(2) the master plan of the county in which the municipality is located..." The distinction is significant because the legislature has in one section specifically required that the zoning be consistent with the municipal master plan but has only required that there be some specific policy statement indicating the relationship to the county master plan by a planning board in enacting the master plan.

Therefore, there is no legislative requirement that the local municipal ordinance be consistent with or identical with the county master plan. On the other hand, the county planning director seems to feel that the zoning is consistent with the goals of the county planning board but apparently he understands that consistency to be at densities which are far in excess of the densities actually contained in the ordinance.

The second case which we wish to bring to the Court's attention was decided by the Supreme Court of New Jersey on January 26, 1977, entitled Oakwood at Madison, Inc., et al. v. The Township of Madison, et al., N.J. (1977), known colloquially as the Madison Township case. This is unquestionably the case which was referred to in the Allan Deane Appellate Division decision and which has been incorporated by reference in the last paragraph in terms of direction to the Township of Bedminster when they rezone in accordance with the Appellate Division decision.

The Supreme Court's opinion offers guidance to trial courts and would be especially relevant in the case under consideration by the Court in several respects.

Madison Township now obviates the necessity for a municipality "...to devise specific formulae for estimating their precise fair share of the lower income housing needs of a specifically demarcated region," supra at 14. The Court has further stated "Nor do we conceive it as necessary for a trial court to make findings of that nature in a contested case." supra at 15.

The thrust of the plaintiffs' attack with respect to the "fair share" and Mount Laurel aspects of the case was merely to represent to the Court that the Township, by any stretch of the imagination, had not made any move towards satisfying its obligation. This became quite apparent from the proofs and from the manner and means in which they had contrived to sustain their admitted burden.

Plaintiff did not, as a matter of design, offer specific expert testimony as to what Bernards share should be. It offered only testimony that the fair share proposed by the Township was unrealistic, unsupported by any background, documentation or experience, relied on faulty data, took credit for units which, by definition are not going to be available to the general public (Ridge Oak) and effectively precluded the construction of any such type of housing by the requirements of specific type subsidies and the installation of public sewers, which by its own testimony, was not likely to occur except in five to ten years. The Madison Township case is now a clear direction, if the Court so finds, to rezone to provide for "available housing in the developing municipalities for a goodly number of the various categories of low and moderate income who desire to live therein and now cannot.", supra at 16.

As the Supreme Court commented with respect to the 1970 Madison Township ordinance,

> "[t]he patent intent and effect of the ordinance was to prevent construction of a substantial number of homes or apartments, particularly at low cost. Most of the land area was zoned for one-or two-acre single family homes -- uses not only beyond the reach of 90% of the general population but also responsive to little if any existing market. It goes without saying that the ordinance was clearly violative of the principles later enunciated in Mount Laurel.", supra at 22.

The Court might as well have been commenting upon the Bernards Township ordinance.

The commentary of the Madison Township Zoning as it existed before the Supreme Court is worth reviewing in particular as it could be applied to the Bernards Township ordinance.

> "These three zones (R-20, R-40 and R-80) may be compared with the zones considered exclusionary in Mount Laurel. There more than half the township was zoned R-3, requiring single family homes on half acre lots; in the instant case, over 50% of the township is zoned for half acre lots or larger, and 42% for one-or two-acre lots. Considering only vacant developable acreage, the total for the three zones is over 65%, 58% comprising R-40 and R-80.
>
> "The R-15 zone and R-10 zones, requiring 15,000 and 10,000 square foot lots respectively, account for another 5% of the land. Both are more restrictive than the R-1 zone (9,375 square foot, 75' wide lots) involved in Mount Laurel. Calling for some 'very small lot' zoning in a developing municipality, 67 N.J. at 170, n. 8, 187, Justice Hall noted that minimum size lots of 9,375 to 20,000 square feet 'cannot be called small lots and

> amounts to low density zoning.' 67 N.J. at 183. Yet almost 70% of Madison Township is zoned at such or lower densities (including the RP and RR zones).", supra at 25, 26. (footnotes omitted).

The proofs in the within action demonstrate that the figure is nearly 100% in Bernards, supra at 26.

With respect to the required subsidy provision of the Bernards ordinance, ample proof was offered that this was unrealistic and the testimony of both the Township planner and the plaintiffs' experts rendered such provision a nullity. The Supreme Court commented "[but] it will be apparent that sources extraneous to the unaided private building industry cannot be depended upon to produce any substantial proportion of the housing needed and affordable by most of the lower income population.", supra at 35. The Court then stated what is probably the salient holding of this portion of the case:

> "To the extent that the builders of housing in a developing municipality like Madison cannot through publicly assisted means or appropriately legislated incentives (as to which, see infra) provide the municipality's fair share of the regional need for lower income housing, it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the 'least cost' housing, consistent with minimun standards of health and safety, which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share.", supra at 36.

and finally concluded:

> "Nothing less than zoning for least cost housing will, in the indicated circumstances, satisfy the mandate of Mount Laurel....", supra at 37.

The Township's existing ordinance will only permit developments which are tied in to the public sewer system. That system admittedly may not even be ready for five to ten years. Then, by virtue of proofs offered by the Township, all of the allocation has already been committed. This effectively eliminates any possibility of a package treatment plant under advanced treatment, capable within the existing state of the art. The Supreme Court's conclusion in Madison Township as to these kind of restrictions is relevant.

> "The potential impact of the water and sewer line requirements is shown by the conclusion of the Middlesex County Planning Board, in reviewing the PUD ordinance, that the two remote PUD areas would probably not be developed at all within the next ten years. Under the totality of the stated circumstances, it must be concluded that a prima facie case of exclusion has been made out with respect to the road and facility requirements, and the burden shifts to the municipality to justify those provisions of the ordinance. Cf. Mount Laurel, supra, 67 N.J. at 181. As the municipality has not met its burden, the municipality will be directed on remand to do one or more of the following in the course of revision of the ordinance (if it continues in its position that the PUD provisions partly meet its obligation to zone for least cost housing): (1) eliminate these requirements or revise them to render them not exclusionary; (2) require proportionate donation by other property holders; or (3) relocate these or other PUD tracts nearer to utility hookups.", supra at 51.

Applying this reasoning to the case under consideration, the Court's request that it be provided with some authority to permit a provision for package treatment facilities for use by others, seems to have anticipated the Supreme Court's decision

some two months before it was even written. This Supreme Court statement provides justification for mandating that the plaintiffs are to be permitted to construct a package treatment plant and make the same available to others consistent with applicable state and federal regulations and that municipal approval be granted for the construction of such a system.

In light of the fact that two separate municipal master plans (the latest adopted several months ago), one proposed ordinance, and two enacted ordinances have selected the area encompassed by plaintiffs' property for apparent multi-family densities as being, in the language of the Township Planner, "the most suitable location in the Township", and the admitted municipality's unwillingness to expand its municipal sewerage treatment facilities only if it gets state and federal aid, it would appear that the third suggestion by the Supreme Court, to relocate the PRN zone nearer to a utility hookup would not be a viable alternative in this particular instance. Rather, this would be a case to require the Township to grant approval to permit plaintiffs to make application to the state for a package treatment facility constructed in accordance with state and federal standards to service development at realistic multi-family densities, consistent with the proofs.

The Court's comments with respect to a direction to the Township to rezone for its fair share in an applicable region are adequately summarized at page 80 of the opinion. Needless to say, the defect in the Madison Township case (that the trial court did not receive in evidence and give consideration to the

environmental depositions, supra at 83) cannot be applicable to the instant case where the Township was permitted, at times over objection, to provide whatever and any environmental evidence and testimony it could muster.

Finally, the relief accorded the corporate plaintiffs in Madison Township is identical to the relief which has been requested in the instant case almost two and one-half years ago. Plaintiffs in Madison Township had approximately 400 acres of land which, by the way, abutted the Englishtown acquifer. As in the instant case, Madison Township offered no proof to substantiate that there would be any flood or surface drainage problems or that the acquifer would be reasonably advanced by the low density zoning. Oakwood at Madison, Inc., et al. v. The Township of Madison, 117 N.J. Super. 11, 22. With all the other proofs offered, we can only assume that flood and surface drainage problems were not real concerns in light of the topography and location of plaintiffs' land. Indeed, they are not. Interestingly enough, with all of the ecological proofs offered, the only testimony relates to the potential quality of the tersiary treated effluent into a stream or potential non-point source pollution which is part of a water course which flows by some 180 municipalities. Even this fear is all predicated on a regulation which (1) has not even been completed; (2) has not been proposed for public hearing; (3) has not been adopted; (4) will require further implementation by other governmental authorities and (5) will not stop treatment facilities on every river in New Jersey.

Furthermore, there is no testimony that no new treatment facilities will be allowed in six months. It has now been almost three months and despite repeated requests, the Township's witness, a State employee, still cannot find the letter establishing the informal coalition of municipalities upon which the Township bases its whole expectation.

In granting the remedy in Madison Township, the Supreme Court stated that:

> "A consideration pertinent to the interests of justice in this situation, however, is the fact that corporate plaintiffs have borne the stress and expense of this public-interest litigation, albeit for private purposes, for six years and have prevailed in two trials and on this extended appeal, yet stand in danger of having won but a pyrrhic victory. A mere invalidation of the ordinance, if followed by only more zoning for multi-family or lower income housing elsewhere in the township, could well leave corporate plaintiffs unable to execute their project. There is a respectable point of view that in such circumstances a successful litigant like the corporate plaintiffs should be awarded specific relief. [cases cited].
>
> "There is also judicial precedent for such action." supra at 91-92.

This Court is well aware of the history of plaintiffs' attempt to have its land zoned so that it could be utilized, commencing nearly four and a half years ago, when plaintiffs asked the Township pointedly and in an attempt at intervention of the settlement of the Loft case set forth in this Court's unreported opinion, Hansen v. Township of Bernards, Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-12870-72

P.W. dated March 24, 1974. At that time, plaintiffs asked to be treated as the Township was treating Loft which is similarly situate in the PRN zone complete with the Dead River, flood plain, etc., and which was rezoned by the Township to 40,000 square feet. The Hansen opinion recounts in detail the action of the governing body which transpired from 1967 and "its open and flagrant course of conduct." supra at 4.

Six times the Township was attacked and six times they were proven wrong. It is now ten years later and, by the testimony of the assessor, no one in ten years has ever been able to obtain a building permit in the PRN zone. The Township's expert knew of no transfer of title (other than plaintiffs' purchases) as far back as his records disclosed. The activity over those years was deemed to be in the disregard of plaintiffs' rights. Add to this a documented delay of over a year by the Township so that it could be prepared to defend its zoning and it totals up to a period of frustration, denial of rights and expense in the hundreds of thousands of dollars.

This injustice should cease.

The posture of this case presently before the Court is not unlike the factual situation presented to the Supreme Court in Madison Township and it is for that reason that it is respectfully submitted that the same direction by the Court should obtain.

The Supreme Court directed the issuance of a permit to corporate plaintiffs for the development of the property subject

to the direction, enforcement and supervision of the trial judge. The plan presented, incidentally, by the corporate plaintiffs in Madison Township and referred to by the Supreme Court was not an application before the Township Committee, the Planning Board or Board of Adjustment but a map entered into evidence at the trial outlining a density on their tract of land. It was developed in a most unorthodox manner as part of the oral argument before Judge Conford and is not unlike the plan which was submitted by plaintiffs in the instant case as part of the sewer feasibility study and report for the development of the property.

Hence, there is ample legal precedent and justification based on an almost identical factual situation for the Court to grant the remedy which was requested in the complaint and as part of the pleadings.

This Court has already admonished the Township Committee and the governing officials in Bernards in firm language in the Hansen opinion as to what its responsibilities were. It did so on the basis of what may be characterized as an inexcusable disregard of rights, acting outside the law. That was nearly three years ago. Now, instead of 3-acre zoning, it is 2-acre zoning, all the while proclaiming that this is the logical place for multi-family use and the proposed highest density in the Township, but you cannot have it without a public sewer which we do not have, probably will not get in the near future, and when we do, the capacity is committed.

This Township has proved in the past ten years upon six previous occasions in the same zone and in three lawsuits with

the same plaintiffs that it will not act by itself even in the face of a court order to do so. With the Supreme Court decision in Madison Township, this Court now has the tools to mandate the zoning in accordance with the parameters of that case.

This case presents the ideal vehicle for the first implementation of the parameters and new powers afforded the trial court under the terms of the Supreme Court opinion, both in terms of enforcement, supervision and direction, supra at 93. The previous notification which was afforded in this case in Hansen, similar to Madison Township, supra at 95, and the specific direction for the rezoning contained in the last two paragraphs of the decision provide ample authority for the Court to act. As the Supreme Court said in Madison Township "[c]onsideration bearing upon the public interest, justice to plaintiffs and efficient judicial administration preclude another generalized remand for another unsupervised effort by the defendant to produce a satisfactory ordinance.", supra at 95.

In the language of Madison Township, the interests of justice in this situation require nothing less.

Respectfully submitted,

William W. Lanigan

WWL/lyn
Enclosure

cc: Richard J. McManus
Nicholas Conover English, Esq.

R

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ATTORNEYS AT LAW
550 BROAD STREET
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07102

AREA CODE 201
622-4444

February 25, 1977

Re. Theodore Z. Lorenc, et al. v.
The Township of Bernards, et al.
Docket No. L-6237-74 P.W.

Hon. B. Thomas Leahy
Somerset County Court House Annex
Somerville, NJ 08876

Dear Judge Leahy:

I am replying substantively to Mr. Lanigan's letter to you dated February 8, 1977.

In that letter Mr. Lanigan calls your attention to the opinion of the Appellate Division in The Allan-Deane Corporation v. The Township of Bedminster, and to the opinions of the Supreme Court in Oakwood at Madison, Inc. v. The Township of Madison (Supreme Court, January 27, 1977).

With respect to the Madison Township case, I am authorized to advise your Honor that the Bernards Township Committee intends to consider forthwith amendment of the zoning ordinance that may bring it into closer conformity with the Madison Township decision. It would seem appropriate, therefore, to defer any consideration of the applicability of the Madison Township case to the Bernards Township zoning ordinance until the Bernards Township Committee has had a reasonable time to act.

On pages 2 to 5 of his letter, Mr. Lanigan refers to the case of The Allan-Deane Corporation v. Bedminster. At the moment, that case should be used as a precedent with great caution since a petition for certification has been filed in the New Jersey Supreme Court.

Plaintiffs argue that the conclusion reached in the Bedminster case, -- that the proofs establish that multi-family housing would not be built at densities of 1-1/2 to 3 units per acre, -- compels an identical finding in the case at bar. In making this argument, plaintiffs conveniently forget that at the trial, the court declined to decide the case at bar on the basis of the Bedminster case (11/9/76, Tr. 92-11 to 93-14). Plaintiffs' argument overlooks the fact that the evidence in the two cases is not the same. Unlike the Bedminster case, the record in the case at bar includes Exhibit D-32, the Agle-Meadows study entitled "Housing Density and Land Cost". That study was the subject of testimony by Mr. Agle (11/8/76, Tr. 36-20 to 45-23; and 11/9/76, Tr. 38-3 to 68-17), and by Mr. Meadows (11/9/76, Tr. 19-12 to 32-23); see also defendant's summation (12/2/76, Tr. 30-3 to 36-6). That document, and the supporting testimony, were not controverted in any way by the plaintiffs' proofs and establish, without contradiction, that it is economically feasible to construct multi-family housing at the densities permitted by the PRN Ordinance.

On page 3, plaintiffs misinterpret the evidence respecting the densities permitted in the PRN 6 and PRN 8 zones. The cited figures of 1.39 and 1.86 dwelling units per acre relate to the entire PRN 6 and PRN 8 zones, approximately half of which are unbuildable floodplain. Since only half of the land can be built upon at all, the actual construction can take place at double the rate of overall densities. Therefore, in terms of site preparation and construction costs, the practical densities are on the order of 2.86 and 3.27 dwelling units per acre (Ex. D-34, p. 12) or even 3.5 dwelling units per acre (Agle, 7/1/76, Tr. 110-22), and, as Ex. D-32 and the supporting testimony show, development on that basis is economically feasible.

The density figures cited by plaintiffs relate to both the unbuildable and buildable land are therefore economically significant only in terms of land cost. In the case at bar, it is admitted that plaintiffs acquired their land at an average price of about $4,280 per acre (Ex. D-51, ¶8, Ex. D-52, ¶3), and that they bought it knowing that it was then zoned for single family houses on 3-acre lots (Sage, 11/30/76, Tr. 175-7). Even at a land cost of $10,000 per acre, the difference in the cost of producing PRN housing at 3 dwelling units per acre and at 7.09 dwelling units per acre is less than 7% (Ex. D-32; 12/2/76, Tr. 34-12 to 36-6), a difference far too slight to establish a case of economic infeasibility at 3 dwelling units per acre.

Plaintiffs' objections to density cannot rationally be based upon economic infeasibility. They obviously rest on

plaintiffs' exaggerated expectations of profit, which are not a legal basis for invalidating the zoning. Oakwood at Madison, Inc. v. Township of Madison (Supreme Court, January 26, 1977, slip op. p. 90).

At the bottom of page 3, and again in the middle of page 5 of their letter, plaintiffs refer to the testimony of Mr. Roach. We have reread Mr. Roach's testimony in its entirety (11/30/76, Tr. 96-7 to 128-3) and do not find in the transcript anything to support the contention or conclusion that Mr. Roach was under any mistaken impression as to the densities provided in the PRN Ordinance.

On pages 9 to 12 and 14 of his letter, Mr. Lanigan complains about the requirement in the ordinance that any PRN project, to be approved, must have public sewerage, -- i.e. sewerage service through the Bernards Township Sewerage Authority. He asks this court (p. 10 of his letter) to order the Township to approve an application by plaintiffs to the State authorities for a package plant.

It should be pointed out that plaintiffs have never requested defendants to approve any such application, nor is there any evidence that plaintiffs have actual plans for a package plant which could form a basis for such application. Mr. Schindelar's testimony and report go no further than to explore various alternatives, and that while he concluded that a package plant was technically feasible, he stated that the preferred method was to service plaintiffs' property through the Bernards Township Sewerage Authority (as the ordinance requires). No doubt, every existing sewerage treatment plant in the State was once solemnly declared by some engineer to be technically feasible, and the result is that New Jersey today has badly polluted rivers (see the reports of various State Commissions quoted at pp. 14 to 16 and 20 to 22 of defendants' trial brief), and now faces major corrective action costing hundreds of millions of dollars. There is no existing plan for a package plant which could be approved even if defendants were requested to do so.

In this proceeding, the question of whether plaintiffs should receive approval for a package plant at the hands of the court, the State or the Township, is a totally false issue. The issue before the court framed by the pleadings and pre-trial order is whether the PRN Ordinance is reasonable, and in the present posture of the case, the only question is whether plaintiffs have sustained their burden of proving that it is unreasonable for the Township to require a public sewerage hook-up for a PRN development. Manifestly, plaintiffs have not sustained such burden of proof.

Plaintiffs treat the matter of permitting plaintiffs to dispose of the sewerage from their development by means of a privately run package plant as if it were a private controversy between plaintiffs and the Township, as if their alleged mistreatment by defendants somehow justified the court in ordering that plaintiffs be allowed to install their own package plant. This is a totally wrong approach. The question of sewerage treatment and water quality in the Passaic River are matters of public importance, involving the public health and the general welfare, and not matters of private controversy. This is made clear, we submit, by pages 1 to 22, inclusive, of the trial brief for defendants.

In any event, regardless of whatever action Bernards Township might take, plaintiffs could not lawfully operate a package plant without a permit from the United States Environmental Protection Agency, the issuance of which is governed by the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C.A. 1251, et seq.

FWPCA is an exceedingly complex statute. However, most of the provisions thereof which are relevant to present considerations have been discussed in a paper written by Professor Nicholas L. White of the University of Indiana Law School entitled "Effect of Waste Discharge Regulations on Real Property Development" which recently appeared in Volume 11, No. 3 of Real Property, Probate and Trust Journal, published by the Section of Real Property, Probate and Trust Law of the American Bar Association. A Xerox copy of that article is enclosed herewith and will be referred to from time to time as "White".

33 U.S.C.A. § 1311 provides that "the discharge of any pollutant by any person shall be unlawful" except in compliance with the requirements of FWPCA. For present purposes this means that the operation of plaintiffs' package plant would be unlawful unless it had been issued an NPDES permit by EPA; 33 U.S.C.A. § 1342; White, p. 494; see also testimony of Kurisko, 11/9/76, Tr. 29-12 to 30-7; and Ike, 11/16/76, Tr. 50-10.

FWPCA calls for three kinds of studies or plans, and no NPDES permit may be issued which will conflict with these approved plans; White, p. 494. The three kinds of plans may be summarized as follows:

> Section 303e Basin Plan (33 U.S.C.A. § 1313(e)) is designed to provide water quality standards and goals; to define critical water quality conditions, and to provide waste load constraints; White, p. 495. Harry Ike testified

that the purpose of a 303(e) basin plan is to set waste load allocations for point source dischargers such as sewage treatment plants; to "set the total maximum load that that facility could discharge to the river without violating water quality standards." 11/16/76, Tr. 22-3. See also Whipple, 11/17/76, Tr. 51-3; Exhibit D-37, at VI, "Wasteload Allocations and Effluent Limitations".

Section 208, Area Water Quality Management Plan (33 U.S.C.A. § 1288) is to provide a basis for regulating the location of waste water treatment plants and to control other sources of pollution, including nonpoint sources. The 208 Management Agency has authority to seek appropriate changes in land use plans and controls from the agencies possessing land use jurisdiction in the area covered by the 208 study; White, p. 492, p. 493, p. 494, p. 499. Harry Ike testified that the primary emphasis of a 208 study would be to evaluate nonpoint sources of pollution; 11/16/76, Tr. 46-19. See also Whipple, 11/16/76, Tr. 140-17.

Section 201 Waste Treatment Management Plan (33 U.S.C.A. § 1281) provides a basis for a construction grant; White, p. 498, p. 499. Paul Kurisko testified that a 201 study is a prerequisite to DEP approving any treatment facilities; 11/9/76, Tr. 12-7 to 24; 15-10 to 16-2; 36-3 to 37-8.

White's article makes clear the interrelationship of the plans and the permit system. On p. 494, White quotes EPA: "No permit may be issued for point sources which are in conflict with approved 208 plans since they automatically become part of the overall 303(e) basin plans." See also Ike, 11/16/76, Tr. 50-4. White's article also makes clear that the purpose of the plans is to control not only point source discharges from sewerage treatment plants, but also nonpoint sources of pollution which, it is recognized, can be controlled only by land use regulations.

We have, then, a statutory scheme of comprehensive scope for promoting and securing the public health and the general welfare by restoring the requisite water quality standards in the rivers of the United States, including the Passaic River. Obviously, the scheme did not become fully operative immediately upon enactment by Congress. Even though the studies and plans called for by FWPCA have not yet been completed and officially approved for the Upper Passaic River, that does not mean that the data assembled in those studies and set forth in the evidence in this case, should be ignored.

The evidence establishes without dispute that the water quality problems in Bernards Township are real and severe, and that the mandated water quality standards will not be achieved unless care is given to, and the necessary costs incurred for, the location, size and level of treatment of sewerage treatment facilities, and the control, through land use regulations, of nonpoint sources of pollution.

General Whipple's testimony makes it clear that an increase in population causes an increase in nonpoint pollution; Whipple, 11/16/76, Tr. 83-2 to 84-22; 112-18 to 115-6.

Exhibit D-36, p. IV-23 (read into the record by Ike, 11/16/76, Tr. 40-9) says:

> "Most of the Upper Passaic does not presently meet stream DO [dissolved oxygen] standard of 5 milligrams per liter. Future development within the basin will make it very difficult to meet the standards. Assuming no additional levels of treatment, the BOD loading on the stream is projected to increase 61%. A preliminary computer run indicated that if nonpoint source BOD loads could be maintained at their present level, all treatment plants in 1990 would have to provide level 5 treatment (approximately 97.5% BOD removal) in order for the stream standards to be met * * *."

Obviously, nonpoint source BOD loads cannot be maintained at their present level if any increase in population occurs in the Upper Passaic Basin. Whipple, 11/16/76, Tr. 140-2 to 141-17. Paul Kurisko testified that at level 4 and level 5 treatment, "you are approaching the best practicable waste water treatment technology available. * * * Beyond level 5 treatment, I doubt very much it would be economically feasible to go beyond 97.5% removal." Kurisko, 11/9/76, Tr. 18-2.

Exhibit D-37 (the executive summary of the 303(e) basin plan for the fresh water Passaic River) denominates the Upper Passaic River Basin (which includes Bernards Township) as the segment of the entire fresh water Passaic area which has the highest priority for pollution abatement.

As against this factual background, the issue is whether plaintiffs have sustained their burden of proving that Bernards Township has acted unreasonably in requiring that a PRN development be connected into the Bernards Township Sewerage Authority sewer system. Plaintiffs claim to have met this issue by contending that it is unreasonable to deny them a

package plant, but the evidence does not support such a contention. It is not disputed that sewerage through the Township Sewerage Authority is preferable to a package plant; Schindelar, 7/6/76, Tr. 256-5; Ike, 11/16/76, Tr. 69-22 to 70-17. The 303(e) basin plan is being geared to phase out smaller treatment plants whether public or private; Ike, 11/16/76, Tr. 51-6 to 24. The executive summary of the 303(e) basin plan, Exhibit D-37, says:

> "All of the existing facilities in the Upper Passaic will be expanded and upgraded to treatment level 4 with the following exceptions. The two Warren treatment plants will be phased out to the Passaic Township (Stirling) facility. * * * The Lyons Hospital plant will be phased out to the Bernards Sewerage Authority plant. * * *."

The plan for expansion of the Bernards Township Sewerage Authority plant, as submitted by the Authority to DEP in 1973, contemplated elimination of the Lyons Hospital plant; Ciba, 11/8/76, Tr. 28-24 to 32-23.

Incidentally, quite apart from the effect of FWPCA, since 1965 it has been the public policy of New Jersey, as declared by the legislature, to encourage regional sewerage systems rather than small privately-owned treatment plants, N.J.S.A. 26:2E-2; Bayshore Sewerage Company v. Department of Environmental Protection, 122 N.J.Super. 184, 201, 203 (Ch. Div. 1973), aff'd on op. 131 N.J.Super. 37 (App. Div. 1974).

Further, on the question of state policy, on February 17, 1977 the Legislature enacted, and sent to the Governor, Senate Bill 1222, the "Water Pollution Control Act". The essential purpose and effect of the statute is for the state to take over and administer the NPDES system and to issue permits under the New Jersey Pollutant Discharge Elimination System "NJPDES".

The Act provides:

> "6. a. It shall be unlawful for any person to discharge any pollutant, except in conformity with a valid New Jersey Pollutant Discharge Elimination System permit that has been issued by the commissioner pursuant to this act or a valid National Pollution Discharge Elimination System permit issued by the administrator pursuant to the Federal Act, as the case may be.

"b. It shall be unlawful for any person to build, install, modify or operate any facility for the collection, treatment or discharge of any pollutant, except after approval by the department pursuant to regulations adopted by the commissioner. * * *

"j. In reviewing permits submitted in compliance with this act and in determining conditions under which such permits may be approved, the commissioner shall encourage the development of comprehensive regional sewerage facilities which serve the needs of the regional community and which conform to the adopted areawide water quality management plan for that region.

"7. a. All permits issued under this act shall be for fixed terms not to exceed 5 years."

In general, the statute follows the guidelines set forth in Sec. 402 of FWPCA, 33 U.S.C.A. § 1342.

On February 17, 1977 the Legislature enacted Senate Bill 1223, the "Water Quality Planning Act". This legislation creates a system for carrying on planning in this state of the sort required by Sec. 208 of FWPCA, 33 U.S.C.A. § 1288(b)(2) [Sec. 5 of the Act].

Sec. 7 of the Act requires the Commissioner of Environmental Protection to conduct a continuing planning process essentially along the same lines as those prescribed in Sec. 303e of FWPCA, 33 U.S.C.A. § 1313(e)(3).

Sec. 2.a of the Act provides:

"The Legislature finds that * * * water quality is dependent upon factors of topography, hydrology, population concentration, industrial and commercial development, agricultural uses, transportation and other such factors which vary among and within watersheds of other regions of the state, and that pollution abatement programs should consider these natural and man-made conditions that influence water quality."

In Sec. 2.b of the Act, it is provided:

"The Legislature further declares * * * that the Department of Environmental Protection through the continuing planning process, and the planning agencies through the areawide planning

> process shall coordinate and integrate water quality management plans with related Federal, State, regional and local comprehensive land use, functional and other relevant planning activities, programs and policies; * * *."

Sec. 10 of the Act provides:

> "All projects and activities affecting water quality in any planning area shall be developed and conducted in a manner consistent with the adopted areawide plan. * * * The commissioner shall not grant any permit which is in conflict with an adopted areawide plan."

The court, from the undisputed evidence, can easily discern the shape of the scheme being developed for carrying out the statutory mandate to achieve the water quality standards in the Upper Passaic River which the public health and general welfare require. That scheme calls for the elimination of existing small plants, including the Lyons Hospital plant and the Warren Township plant at the Dead River. It would be totally inconsistent with that scheme to permit plaintiffs' proposed package plant, and it would be equally inconsistent with state legislative policy.

It is true that the scheme as thus outlined has not yet been approved or become official, although that may well occur before the end of 1977. So the practical question is, does this circumstance entitle plaintiffs to be allowed their package plant? In other words, should plaintiffs be allowed to beat the deadline and get away with something not in the public interest simply because the statutory studies have not yet been officially approved? Putting the question with more legal precision, does this circumstance make it unreasonable for Bernards Township to require sewer arrangements for a PRN development which will follow the indisputably preferable method and which will avoid the probable risk of violating and frustrating in advance the carefully prepared plans for meeting the water quality standards which the statute and the general welfare require?

The issue, therefore, being one of the exercise of the police power, and such exercise being demonstrably not unreasonable, plaintiffs' contention that the ordinance is invalid because it amounts to the confiscation or taking of their property without due process of law, is totally without merit. Welsh v. Morristown, 98 N.J.L. 630, 634 (S.Ct. 1923); aff'd on op. 99 N.J.L. 528 (E.& A. 1924); State v. Mundet Cork Corp., 8 N.J. 359, 370-371 (1952); cert. den. 344 U.S. 819 (1952); Bayshore Sewerage Co. v. Department of Environmental Protection, 122 N.J.Super. 184, 204 (Ch. Div. 1973); aff'd on op. 131 N.J.Super. 37 (App. Div. 1974).

Nor is there merit to plaintiffs' argument that delay in the availability of public sewerage amounts to confiscation of their property. There is every reason to believe that the capacity of the Bernards Township Sewerage Authority plant will be enlarged so as to accommodate a PRN development on plaintiffs' property. The statement on page 14 of Mr. Lanigan's letter to the court, dated February 8, 1977, that the capacity of the enlarged sewerage plant is committed (so that, by plaintiffs' inference, their development could not be accommodated) is incorrect; it is refuted by Exhibit D-30 and by the testimony of Mr. Ciba, 11/8/76, Tr. 28-24 to 32-23; the capacity is available. The delay in accomplishing the enlargement is not due to any action of defendants, nor to the fault of anybody, but results from the desire of EPA and DEP to administer FWPCA in accordance with its terms and intent in order to fulfill the legislative directions of Congress; Kurisko 11/9/76, Tr. 10-12 to 12-24; 36-10. The delay resulting from these procedures does not effectuate the confiscation or taking of plaintiffs' property without due process of law. It is well settled that there is no confiscation or taking where, as here, there are valid reasons for a moratorium on building permits pending the completion of land use regulations, Monmouth Lumber Company v. Ocean Township, 9 N.J. 64, 74 (1952); Rockaway Estates, Inc. v. Rockaway Township, 38 N.J.Super. 468, 472, 478 (App. Div. 1955), or pending the completion of a flood control project, Cappture Realty Corp. v. Board of Adjustment of Elmwood Park, 126 N.J.Super. 200, 210-217 (Law Div. 1973), aff'd. 133 N.J.Super. 216, 221 (App. Div. 1975), or pending the completion of sewerage treatment facilities, Smoke Rise, Inc. v. Washington Suburban Sanitary Commission, 400 F.Supp. 359 (D. Md. 1975). The validity of ordinances that postpone the development of private property until a process of phased growth permits provision of the utility infrastructure has been upheld in Golden v. Planning Board of the Town of Ramapo, 334 N.Y.S.2d 138, 30 N.Y.2d 359, 285 N.E.2d 291 (Ct. of App. 1972), and Construction Industry Association v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. den. 96 Supreme Court 1148.

Yours respectfully,

Nicholas Conover English

Nicholas Conover English

NCE:hk

cc: William W. Lanigan, Esq.
Richard J. McManus, Esq.

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TOWNSHIP OF BERNARDS

COLLYER LANE
BASKING RIDGE, NEW JERSEY 07920
201--766-2510

May 4, 1977

The Honorable B. Thomas Leahy
Somerset County Court
Somerville, New Jersey 08876

Re: Lorenc et als. v.
Township of Bernards et al.

Dear Judge Leahy:

Enclosed please find a copy of Ordinance Number 425 which was introduced at last night's Township Committee meeting and passed on first reading. Public hearing and final consideration are scheduled for May 17, 1977.

This ordinance amends those portions of the Township's zoning ordinance which provide for low-cost, multi-family housing. During the course of the trial on this matter, these provisions were usually referred to as "Ordinance 385," which ordinance you may recall was adopted on May 18, 1976 in order to bring the Township's zoning into conformity with the guidelines set down in the Mt. Laurel decision.

The current amendment updates Ordinance 385 in the light of Oakwood at Madison, Inc. et als. v. Madison Township et al., N.J. (1977). It is the result of weeks of discussion by a task force specially appointed for this purpose and consisting of the Mayor, a Township Committeeman, a member of the Planning Board, a member of the Environmental Commission, three citizens of the Township, the Township Administrator and myself.

Specifically, Ordinance 425 amends Ordinance 385 as follows:

1. A sentence has been added to Section 11-5.4n to indicate that the purpose of the provisions for Balanced Residential Complexes is in compliance with the Supreme Court's mandate for "least-cost" housing in the Madison Township case.

2. The definition of BRC in paragraph 1(c) has been amended to permit the non-subsidized housing. In addition the second sentence now provides that if the development is subsidized 1/3rd of the units may be in the "very low" (formerly "low") category. In the current ordinance there is no specification as to the distribution between "very low" and "low" (formerly "moderate") categories. The intent of this restriction is to promote socio-economic integration and avoid instant "slums." (See Madison Township slip opinion p. 37.) Finally a sentence has been added mandating the same distribution of subsidized units within each category of dwelling type as within the development as a whole. (See Madison Township slip opinion at p. 42.)

3. The definitions of "low" and "moderate" income housing have been modified to reflect the new HUD terminology of "very low" and "low."

4. The definition of "market" housing has been deleted.

5. The reference to regional low and moderate income housing needs in Section 2(a) has been changed to "least-cost" housing needs.

6. In the General Requirements section of the ordinance the requirement that proof of subsidy be shown, former paragraph (c) has been deleted. This is the most significant change and one indisputably required by the definition of least-cost housing in the Madison Township decision. (See discussion of least-cost housing, Section V, pp. 33-39 of slip opinion.

7. Former paragraph (f) which provided for perimeter housing and buffer has been deleted and replaced by new paragraphs (e) and (f). While the opportunity for small lot housing remains, the requirement that it be on the perimeter has been deleted. A deliberate effort was made to avoid quantification of the buffer, an "effective transition" being different from site to site. The requirement that existing topography and vegetation be incorporated comports with the Madison Township court's concern for environmental factors.

8. New paragraph (h) modifies the common open space requirement so that it must now be devoted to active recreational uses. This requirement follows federal housing guidelines and was the original intent of the Committee.

9. The word "golf" has been deleted from paragraph (i).

10. The word "decennial" has been deleted from paragraph (k).

11. The minimum set back has been deleted from paragraph (l) since it was related to former perimeter housing.

12. A paragraph (m) has been added clarifying the Planning Board's power to grant variances with respect to bedroom mix and FAR. The Board has the latter power under the new land use law. (See N.J.S.A. 40:55D-70(c) and N.J.S.A. 40:55-D-65(b).) The variation in bedroom mix would require a showing of new census data under paragraph (k).

13. The last sentence from paragraph (a) in the design standards has been deleted since this information is now contained in paragraph (e) under General Requirements.

14. Two typographical errors with respect to paragraph designations have been corrected in Sections 4 and 5 (g).

In the course of its deliberations, the task force examined each of the general requirements for Balanced Residential Complexes. The changes which have been incorporated in Ordinance 425 are those which appear to be most clearly required by the Madison Township decision. Overall the applicant has been permitted much greater flexibility in his proposal. The Court will be informed of final passage of Ordinance 425.

Also please find enclosed a copy of an award given to the Township by New Jersey Federation of Planning Officials for its development of its JORD "fair share" analysis.

Sincerely yours,

Richard J. McManus

Richard J. McManus, Esq.
Township Attorney

RJM/ir

enc.

cc: William W. Lanigan, Esq.
Nicholas Conover English, Esq.

NEW JERSEY FEDERATION OF PLANNING OFFICIALS

Thomas A. Hyde, Exec. Vice President
1308 Wood Valley Road
Mountainside, N. J. 07092
(201) 232 0240 (201) 755 0242

Federation Awards Committee for Annual Meeting, May 18, 1977

CITATION OF MERIT CERTIFICATE AWARD

Category I: A municipality making a new contribution to Planning

TOWNSHIP OF BERNARDS

Mayor: Hon. Robert M. Deane
Collyer Lane
Basking Ridge, N. J. 07920

Township Administrator: Frederick C. Conley
Collyer Lane
Basking Ridge, N. J. 07920

Nominator: Godfrey K. Preiser, Chairman
Bernards Township Planning Board
6 Archgate Road
Basking Ridge, N. J. 07920

Citation: For, in this twonship's solution to the Mount Laurel decision, the use of a Fair Share Analysis for Bernards Township Low And Moderate Income Housing by. Mr. William W. Allen, member of the Township Committee and the Township Planning Board. This analysis is based on the "commutershed" of residence related to place of work, with the use of "Job oriented residential distribution" as a model.

The uniqueness of Mr. Allen's analysis is that it has calculated a quota of future needs in accordance with the Mount Laurel decision, but the quota is derived from empirical data, rather than a theory of justice in physical quantity ignoring empirical data. Mr. Frederick C. Conley has produced an excellent summary of Mr. Allen's Analysis.

April 25, 1977

Citation Award
Bernards Township

Mr.Robert M. Deane, Mayor
Township of Bernards
Collyer Lane
Basking Ridge, N. J. 07920

Dear Mayor Deane:

Mr. Henry L. Tomkinson, Federation President, has just communicated to me that Bernards Township will be awarded a 1977 Federation Citation of Merit Certificate as a municipality which has made a new contribution to Planning.

This award certificate will be presented to you or to your representative at our Annual Meeting on May 18th at the Molly Pitcher Inn in Red Bank. Enclosed is one of our regular announcements on this meetings with directions as to its location and so forth; it includes a for for reservation for the dinner and conference. First announcement of the award will be made at the business meeting, the actual presentation at the State Dinner. We hope you will be with us at that time.

We are forwarding a copy of this letter to Mr. Conley, Township Administrator, to Mr. Allen (who's Analysis is the greater reason for the award) and to Mr. Freiser, who is the nominator of the award. I felt sure you would wish to notify your people concerned.

Cordially,

Thomas A. Hyde
Executive Vice President

c: Mr. Conley
Mr. Allen
Mr. Freiser
Mr. Tomkinson

T

McCARTER & ENGLISH
ATTORNEYS AT LAW
550 BROAD STREET
NEWARK, N.J.
07102

AREA CODE 201
622-4444

May 18, 1977

Re. Theodore Z. Lorenc, et al.
v. The Township of Bernards, et al.
Docket No. L-6237-74 P.W.

Hon. B. Thomas Leahy
Somerset County Court House Annex
Somerville, NJ 08876

Dear Judge Leahy:

On May 17, 1977, Bernards Township enacted Ordinance 425, a copy of which was sent to the court by Mr. McManus under date of May 4, 1977. The court is respectfully referred to his comments on said ordinance which will not be repeated here.

It is submitted that with the adoption of Ordinance 425, the Bernards Township zoning ordinance is now in full compliance with the law of this state as declared in Oakwood at Madison, Inc. v. Township of Madison (N.J. Supreme Court, January 26, 1977).

Pursuant to the new municipal land use law, Bernards Township enacted Ordinance 411, which took effect February 1, 1977, and which represents a codification without substantial change in the municipal zoning ordinance. A copy of Ordinance 411 was sent to the court by Mr. McManus, the Township Attorney, under date of January 20, 1977.

For reasons hereinafter set forth, the Bernards Township zoning ordinance, as presently amended, should be upheld by this court as valid under the criteria laid down in Oakwood at Madison and Pascack Association, Limited v. Mayor and Council of the Township of Washington, (March 23, 1977).

Oakwood at Madison requires a developing municipality, such as Bernards Township, in effect, to make reasonably

possible its regional fair share of least cost housing.

Ordinance 411, Sec. 11-5.4n "Balanced Residential Complexes", [formerly Ordinance 385], as now amended by Ordinance 425, deals with least cost housing. Ordinance 411, Sec. 11-5.4(1) contains the substance of Ordinance 347 and deals with planned residential neighborhoods. While Sec. 11-5.4(1) does make possible hundreds of multi-family dwelling units of varying sizes and types, and therefore fulfills in some part the broad purpose of Mount Laurel to "make realistically possible an appropriate variety and choice of housing", 67 N.J. at 174, the Township relies on balanced residential complexes to provide the requisite "least cost housing" mandated by Oakwood at Madison (slip op. Sec. V, pp. 33-39).

In Oakwood at Madison, the court rejected publicly subsidized low and moderate income housing (slip op. p. 34), rent skewing (slip op. pp. 44-45), tax concessions (slip op. p. 85), and municipal sponsorship of public housing (slip op. p. 85), as required ways to fulfill a municipality's Mount Laurel obligations. Hence, the fact that Ordinance 425 does not require any of these things furnishes no reason to strike it down as invalid. At the same time, Ordinance 425 provides flexibility, and increases the likelihood of the construction of housing for low income persons, by expressly permitting either publicly subsidized, or privately financed least cost, housing.

In Oakwood at Madison, the Supreme Court struck down the ordinance for not providing an adequate variety and choice of housing (slip op. pp. 39-43, 86, 93). At p. 42, the court specifically condemned developments "on an 80% one bedroom, 20% two bedroom mix" and went on to say:

> " * * * 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 explanation of the FAR ratio in the AF zone to encourage and permit larger units." (slip op. p. 42)

The latter statement was made in the context of the Madison Township zoning ordinance. It is submitted that the goal which the Supreme Court was seeking to have fulfilled has been met in Bernards Township through a slightly different technique by the requirements in Ordinance 425, Sec. 2(k) that within each

balanced residential complex 25% to 30% of the dwelling units shall be one bedroom units, 25% to 30% shall be two bedroom units, 25% to 20% shall be three bedroom units and 25% to 20% shall be four or more bedroom units. This requirement obviates the necessity of a density bonus as a stimulus to the provision of an "adequate number of three or four bedroom units."

With respect to least cost housing, Oakwood at Madison says:

> "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. (slip op. p. 36)
>
> "Nothing less than zoning for least cost housing will, in the indicated circumstances, satisfy the mandate of Mount Laurel. While compliance with that direction may not provide newly constructed housing for all in the lower income categories mentioned, it will nevertheless through the 'filtering down' process referred to by defendant tend to augment the total supply of available housing in such manner as will indirectly provide additional and better housing for the insufficiently and inadequately housed of the region's lower income population." (slip op. p. 37)

Footnote 21 on p. 37 of the slip opinion says:

> "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 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 building and structures'. Sec. 2.
>
> "We envisage zoning provisions which will permit construction of housing, in reasonable amounts, at the least cost consistent with such standards."

Ordinance 425 does provide for least cost housing as thus described.

Sec. 2(k) provides that minimum room areas shall be "promulgated from time to time by New Jersey Housing Finance Agency or any successor thereto." In other words, minimum room size shall conform to the applicable standard for publicly subsidized housing. This is tantamount to "minimum standards of health and safety" -- and hence is consistent with the concept of least cost housing, -- insofar as minimum square footage is concerned.

The land use density requirements as set forth in Sec. 2(l) are also consistent with "least cost". Density is controlled by a floor area ratio of 25% of the gross site area and of 35% of the net residential site area. Sec. 2(g) requires 25 contiguous acres for a 150 unit balanced residential complex, or 6 dwelling units per gross site acre. Sec. 2(h) requires that 25% of the gross site area be in common open space, so the net residential site area consists of 75% of 25 acres or 18.75 acres. Locating 150 dwelling units on 18.75 acres equals 8 dwelling units per net residential site area.

Exhibit D-32 is the Agle-Meadows study entitled "Housing Density and Land Cost". It postulates a planned residential neighborhood at the 30-30 - 20-20 ratio or an average of 2.3 bedrooms per dwelling unit. Graph B (p. 21) shows that substituting a 4 bedroom duplex or twin house for a 4 bedroom single family residence, as is permitted by Sec. 2(e), reduces costs slightly. The concept of least cost housing, as developed in Oakwood at Madison (slip op. pp. 36-38) does not embrace land costs. Chart B on p. 21 of Exhibit D-32 compares construction and site improvement costs without regard to land costs. As shown on that chart, if one takes a configuration of 1 bedroom garden apartments, 2 bedroom townhouses, 3 bedroom townhouses and 4 bedroom duplex houses, the difference between 6.78 dwelling units per acre with an FAR of 28.2% and 11.61 dwelling units per acre or an FAR of 46.5% is only $105, or 0.4%. The same chart shows that with a configuration of 1 bedroom garden apartments, 2 bedroom townhouses, 3 bedroom townhouses and 4 bedroom single family houses, the construction and site improvement costs are the same whether there are 4, 5, 6 or 7.09 dwelling units per acre, or a floor area ratio ranging from 16% to 28.4%. Beyond all argument, the densities provided for in Ordinance 425 are consistent with least cost housing.

These de minimis cost differences are more than offset by loss of amenities resulting from increased density. After all, "least cost" housing is not simply the lowest dollar

cost regardless of non-monetary considerations as the Supreme Court said in Oakwood at Madison, Footnote 21, quoted supra.

Public and subsidized housing for low income groups has never been thought of as being divorced from requiring decent or adequate housing. In Mount Laurel, the court defined the need as being for "adequate and sufficient housing * * * decent low and moderate income housing * * * adequate housing for all categories of people" as being "an absolute essential in promotion of the general welfare required in all land use regulations." (67 N.J. at 178-179) (Emphasis supplied). Again, at 67 N.J. 188, the court in Mount Laurel referred to "a developing municipality's obligation to afford the opportunity for decent and adequate low and moderate income housing". (Emphasis supplied)

Since the provision of least cost housing in appropriate circumstances is a required exercize of the zoning power, it should be noted that the zoning power has been construed in New Jersey to include aesthetic considerations. Vickers v. Township Committee of Gloucester Township, 37 N.J. 232, 248 (1962, United Advertising Corp. v. Metuchen, 42 N.J. 1, 6 (1964), Livingston Township v. Marchev, 85 N.J.Super. 428, 433 (App. Div. 1964), Westfield Motor Sales Company v. Westfield, 129 N.J.Super. 528, 535 (L.Div. 1974).

Moreover, the United States Supreme Court has recognized that the legitimate exercise of the police power may involve non-monetary values. In Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98 (1954), the court upheld the validity of a redevelopment project which was to require at least one-third of the dwelling units to be "low-rent housing with a maximum rental of $17 per room per month" (p. 30) and held at 348 U.S. 33, 75 S.Ct. 102:

> "The concept of the public welfare is broad and inclusive. See Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421, 424, 72 S.Ct. 405, 407, 96 L.Ed. 469. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

In Village of Belle Terre v. Boraas, 416 U.S. 9, 94 S.Ct. 1541 (1974), the court laid it down at 416 U.S. 9, 94 S.Ct. 1541:

> "The police power is not confined to elimination of filth, stench, and unhealthy places.

> It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

Congress, in the National Housing Act of 1949, made the following policy declaration (42 U.S.C.A. § 1441):

> "The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require * * * the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, * * *. The policy to be followed in attaining the national housing objective established shall be: * * * (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the development of well-planned, integrated residential neighborhoods, * * *. The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist (1) the production of housing of sound standards of design, construction, livability, and size for adequate family life; (2) the reduction of the costs of housing without sacrifice of such sound standards; * * * (4) the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities; * * *."

In 1968, the National Commission on Urban Problems reported to the President:

> "And we should not think so narrowly that, when we agree on a standard of decency, we become satisfied with a decent home in an unsuitable environment. We now have no standards for a suitable living environment -- no codes which say how much open space there should be, what parks and playgrounds are necessary, the maximum levels of noise, air pollution or odors which can be

> tolerated, or whether factories, freeways, lack of police protection, or potholes in the pavement make the neighborhood undesirable. An 'environmental code', with standards for these matters vitally affecting how people live, should be tied in with all efforts to upgrade our cities and our housing . . ."

In short, if housing for anyone, including low income groups is to be "decent" and "adequate" as Mount Laurel requires, then it is necessary that the density of dwelling units should not be so high as to work contrary to the decency and adequacy of the living environment. The contrary argument is, of course, quite simple: It is to the best financial interest of the landowner to have the density as high as possible. The land cost can then be divided among a lot of people so he can get rich without pricing himself out of the market. The question of "economic feasibility" and "highest and best use" is always pleaded by realtors whose only source of living is based upon constantly increasing increment of land cost. On the other hand, high density tends to create slum conditions which are not acceptable.

In short, Ordinance 425 does make provision for "least cost" housing.

The court will also observe that Ordinance 425, Sec. 2(e) permits 6000 square foot lots for either single family or twin houses. This meets the requirement in Oakwood at Madison for "single family dwellings on very small lots." The opinion does not define "very small lots", but does refer (slip op. p. 26) to Mount Laurel as indicating that a very small lot is something less than 9375 square feet (see 67 N.J. 183). Justice Pashman, in his dissent in Mount Laurel seems to adopt the recommendation of the American Public Health Association of "6000 square feet as a suitable minimum lot size based upon health considerations" (67 N.J. 199).

We will now, as a supplement to our letter to your Honor dated February 25, 1977, discuss the significance of Oakwood at Madison to the case at bar. But first, we will refer to the decision of the New Jersey Supreme Court in Pascack Association, Limited v. Mayor and Council of the Township of Washington, decided March 23, 1977. Copies of the opinions in Pascack are enclosed herewith.

The precise holding in Pascack, -- that Washington Township was a small municipality "developed substantially fully upon detached single family dwellings" and therefore had no obligation to provide multi-family housing for low and moderate income persons, -- is not applicable to Bernards Township.

However, the decision is significant as it reiterated firmly established principles which seemed to have been overlooked in the furor caused by Mount Laurel as to the scope of judicial review of zoning ordinances. At p. 13 of the slip opinion, 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."

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)."

Again, at slip op. p. 15, the court held:

> "It is obvious that among the 567 municipalities in the State there is an infinite variety of circumstances and conditions, including kinds and degrees of development of all sorts, germane to the advisability and suitability of any particular zoning scheme and plan in the general interest. There must

> necessarily be corresponding breadth in the legitimate range of discretionary decision by local legislative bodies as to regulation and restriction of uses by zoning."

Again, the court said at p. 19 of the slip opinion:

> "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."

In Oakwood at Madison, the court held that neither the municipality nor the court need devise a specific formula for estimating fair share of regional housing needs (slip op. pp. 14-15, 54, 96). Instead, the court held that the criterion for determining the validity of the zoning ordinance in a Mount Laurel context, is "the substance of a zoning ordinance under challenge and * * * bona fide efforts toward the elimination or minimization of undue cost-generating requirements in respect of reasonable areas of a developing municipality * * *" (slip op. p. 15).

Under this test, and in the light of the doctrine of Pascack, the Bernards Township zoning ordinance, as amended by Ordinance 425, must be upheld by the court. As has already been shown, least cost housing, whether publicly subsidized or developed by private capital, is now realistically possible in Bernards Township. The limitation on the number of dwelling units in balanced residential complexes to 534 cannot properly be set aside by the court. The court is not required to make a finding as to the validity of the JORD formula developed by William W. Allen, which supports the figure, but the court can set it aside only if the validity of the figure of 534 is so patently unreasonable as to be not even debatable. No

such conclusion can be rationally arrived at in the light of Mr. Allen's testimony.*

Nor is there any reasonable doubt as to the good faith of Bernards Township in enacting its zoning ordinance as it now stands. Even before the Supreme Court's decision in Mount Laurel, the Township had adopted Ordinance 347, which permits the development of hundreds of multi-family units in the PRN zone. By variance, the Township has permitted the construction of Ridge Oak, a 240 unit senior citizen multi-family housing project; this was not done in response to any initiative by the plaintiffs, but on the contrary, the plaintiffs sued the Township (unsuccessfully) in an effort to frustrate the Ridge Oak development. The initiative of the Township in acting promptly after the Supreme Court's decision in Oakwood at Madison to make changes in the ordinance which would facilitate least cost housing, as mandated by that opinion, is another indication of good faith. The performance of Bernards Township over the last three years stands in marked contrast to that of officials in Madison Township, whose second effort at zoning, in the face of an adverse lower court decision, was technically deficient and manifestly not conducive to the construction of least cost housing.

In the case at bar, plaintiffs' real grievance is that least cost housing has not been located on plaintiffs' lands. There is no merit to that position. Oakwood at Madison (slip op. p. 83) lays it down that "the municipal fathers should have the widest latitude of judgment" in determining where to locate least cost housing within the municipality, and "the municipality has the option of zoning areas for such housing anywhere within its borders consistent with all relevant considerations as to suitability." The determination by Bernards Township to avoid a potential ghetto by scattering least cost housing in complexes small enough to minimize impact on established neighborhoods is patently not unreasonable, and it is so stated in Oakwood at Madison.

It should be noted in passing that in Oakwood at Madison, the court expressly held that zoning for housing should be done in the light of established environmental facts. The

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* Nor in the light of the recognition of the New Jersey Federation of Planning Officials in making an award to Bernards Township with the JORD analysis as a new significant contribution to planning; see Mr. McManus's letter to the court dated May 4, 1977.

Supreme Court held that Judge Furman had erred in declining to consider proffered environmental evidence, and it remanded the case so that the trial court should make findings "as to exactly which of the allegedly environmentally sensitive areas, if any, are in fact not susceptible of housing development at all; which, of only low density development; and which are free of any environmental constraints in respect of density or type of housing" (slip op. p. 83).

In the light of both Oakwood at Madison and Pascack, it should be clear that, in the case at bar, the burden of proving the invalidity of the zoning ordinance, including specifically Ordinance 385 as amended by Ordinance 425, rests on the plaintiff, and that the burden has not shifted to the Township to sustain the burden of proving the reasonableness and validity of the zoning ordinance.

One final point. If, contrary to what we believe the law and the facts require, this court should hold that Ordinance 425 is invalid, that circumstance furnishes no reason whatever for striking down the rest of the zoning ordinance, including specifically the zoning of the PRN zone. In Mount Laurel, the Supreme Court held at 67 N.J. 191:

> "We see no reason why the entire zoning ordinance should be nullified. Therefore, we declare it to be invalid only to the extent and in the particulars set forth in this opinion."

The ruling was reiterated in Oakwood at Madison:

> "We herewith modify the judgment entered in the Law Division to hold as we did in Mount Laurel as to the ordinance there involved that the 1973 zoning ordinance is invalid, not in toto, but only 'to the extent and in the particulars set forth in this opinion.' Mount Laurel, 67 N.J. at 191." (Slip opinion, p. 94).

Yours respectfully,

Nicholas Conover English

NCE:hk
Enc.

cc: William W. Lanigan, Esq.
Richard J. McManus, Esq.

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WILLIAM W. LANIGAN
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CABLE ADDRESS
LANLAW

JOSEPH I. BEDELL
OF COUNSEL

May 11, 1977

The Honorable B. Thomas Leahy
Somerset County Court House Annex
Somerville, New Jersey 08876

Re: Theodore Z. Lorenc, et al., v.
The Township of Bernards, et al.,
Docket No. L-6237-74 P.W.

Dear Judge Leahy:

I am in receipt of a letter from the Township Attorney dated May 4, 1977, in which he encloses a copy of Ordinance No. 425, which was introduced on May 3, 1977. It purports to amend "those portions of the Township's zoning ordinance which provide for low-cost, multi-family housing."

The ordinance is more significant in what it did not do, since this is the second comprehensive revision to the ordinance following the close of the litigation in early December. You were previously furnished by the Township on January 20, 1977, the Township's land use ordinance amendment of some 150 pages.

This ordinance does not purport to affect the PRN zone in any respect, and in the words of the Township Attorney quoted in the newspaper, it provides for three major changes in the existing ordinance. The Township Attorney is quoted as saying, "under the proposed revisions, there would be no subsidy requirement for multi-family housing, no single family houses or townhouses would be required on the periphery of the Balanced Residential Complex (BRC) and the federally-mandated open space in the development would have to be made available for active recreation use, rather than calling unused swampland or steep slopes open space."

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

They eliminated the subsidy requirement because, by their own testimony in the litigation, it was a nullity. The elimination of the requirement of single family houses and townhouses on the periphery of this low-cost and least-cost housing is simply a realistic evaluation that the town does not want this type of housing in the first place and no one is likely to build abutting it. Finally, the requirement that swampland and steep slopes cannot be considered as open space, but it must be for active rather than passive recreation, will simply run up the cost to an undetermined amount.

These changes should not affect this Court's evaluation of the litigation, and it is respectfully submitted that the delay which they asked for over 3 months ago has been granted and there has been no modification whatsoever in any other respect.

It is interesting that having had the opportunity now on two occasions to revise or reconsider the location of multi-family use, they have chosen not to do so, and they continue to select the PRN zone as the place for greater density housing to the exclusion of anywhere else. That puts us exactly where we were before and in spite of their various studies, arguments, etc., they have not deviated from this selection.

It is a little incongruous to suggest that there is a desire and need to preserve open space for whatever reason, and then turn around and mandate that it must be for active recreation use and that, in the words of the Township Attorney, unused swampland or steep slope do not count.

There are two items which in the passage of time must be updated. First, in McCarter & English's letter to you dated February 25, 1977, they commented that with respect to the case of The Allan-Deane Corporation v. Township of Bedminster, "that case should be used as precedent with great caution since a petition for certification has been filed in the New Jersey Supreme Court." It is respectfully submitted that the Court need not proceed with caution any longer in view of the fact that the petition for certification was denied on May 3, 1977. A copy of such denial is attached.

All of the testimony by the state officials with respect to water and plans and adoption and hearings, has turned out to be a fabrication of expectancies which may not, in the words of some individuals who are knowledgeable, occur even within the next several years.

Finally, in view of counsel's argument that multi-family density at the levels contained in the existing ordinance is proper, the opinion by McCarter & English with respect to the density for townhouses and garden apartments in the Chester Township ordinance makes interesting reading. A copy of such letter is attached. The Montgomery ordinance which has been upheld calls for a density of 8 units per acre. It supports the testimony of the plaintiffs completely.

Incidentally, on the basis of such candor, Judge Muir in Morris County is about to order the rezoning in Chester without a trial.

Despite the opportunity of further examination, all of their studies, etc., there will be no change in the PRN ordinance or the densities applicable to any kind of multi-family use in the Township until the Court orders it, not by a mere remand to redo the ordinance, for they have had that opportunity about four or five times. If nothing else, this most recent delay is conclusive evidence that the governing officials will not do it except when they are ordered to.

Respectfully submitted,

LAW OFFICES OF
LANIGAN, O'CONNELL AND HIRSH, P.A.

By: _____
William W. Lanigan

WWL:ch
Enclosures

cc (w/enc.): Nicholas Conover English, Esq.
Richard J. McManus, Esq.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SOMERSET COUNTY
DOCKET NO. L-6237-74-PW

THEODORE Z. LORENC, LOUIS J. HERR, SAM WISHNIE, MARION WISHNIE, executrix of the Estate of Harry Wishnie, deceased, ALICE J. HANSEN, trustee, WILLIS F. SAGE, WILLIAM W. LANIGAN, and MERWIN SAGE	:	
Plaintiffs,	:	ORDER FOR JUDGMENT
v.	:	
THE TOWNSHIP OF BERNARDS, in the County of Somerset, a municipal corporation of the State of New Jersey, and the PLANNING BOARD OF THE TOWNSHIP OF BERNARDS,	:	
Defendants.	:	

10 days = Feb 2

The matter having come on for trial before the Court sitting without a jury, and the Court having heard the evidence and the argument of the attorneys for the respective parties:

It is therefor on this 23 rd day of January, 1978, ORDERED that judgment be entered in favor of the plaintiffs to the extent and in the particulars as set forth in the attached letter opinion of this Court dated January 23, 1978.

B. THOMAS LEAHY, J.C.C. t/a

NOT FOR PUBLICATION WITHOUT APPROVAL OF THE COMMITTEE ON OPINIONS
SOMERSET COUNTY COURT

B. THOMAS LEAHY
JUDGE

SOMERVILLE, NEW JERSEY
08876

January 23, 1978

Lanigan, O'Connell & Hirsch, Esqs.
150 North Finley Avenue
Baskinh Ridge, New Jersey 07920

McCarter & English, Esqs.
550 Broad Street
Newark, New Jersey 07102

Re: Theodore Z. Lorenc, et als. v.
Township of Bernards, et als.
Docket No. L-6237-74 P.W.

Gentlemen:

This suit by the owners of approximately 411 acres of land in Bernards Township attacking the zoning ordinance of the Township is a successor action to litigation brought by one of the plaintiffs' predecessors in title and decided on March 29, 1974. In that prior case this court ruled that the municipality's three acre minimum lot size zoning in the southeastern quadrant of the Township was invalid.

That determination of invalidity resulted from the fact that during the years between the passage of the ordinance establishing the three acre zoning in 1967 and that suit in 1974, five other lawsuits were brought against the Township challenging the ordinance. Four of those suits were settled by the municipality agreeing to relieve the involved property from compliance with the three acre zone requirements and the fifth was decided against the Township. This court found a close analogy to the practice condemned in Wilson v. Mountainside, 42 N.J. 426 (1964) and held that there had been a recognition by Bernards Township that "***blanket ordinance restrictions cannot be justified." Id. at 443.

The local officials were ordered to revise the zoning by July 1, 1974. Following a series of postponements of that deadline, an amendment to the zoning ordinance was passed on September 3, 1974, in which two Planned Residential Neighborhood (PRN) zones

(PRN-6 and PRN-8) were delineated and defined.

Plaintiff herein found fault with that ordinance and instituted this suit. Before a trial date was reached, So. Burlington N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, app. dism. and cert. den. 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 2028 (1975) (hereinafter Mount Laurel) was decided and the defendant Township advised the court of its intention to revise its zoning to comply with the requirements of that decision. A number of successive adjournments were granted to enable adoption of that revision.

A series of procedural steps ensued which need not be enumerated and 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.

Bernards Township consists of 23.5 square miles. It is located in the north central area of the state, 28 miles due west of New York City. It is nestled between the Watchung Mountains to the south and southwest and the Mine Mountain Ridge to the northwest. On the east it is bordered by the Great Swamp. In 1970 it had a population of 13,305. Current population is estimated to be approximately 14,000. Both Interstate 287 and Interstate 78 intersect the community.

Counsel stipulated, quite appropriately, that Bernards "is a developing municipality" and thus within the definition of communities governed by the decision in Mount Laurel, supra.

The Township zone plan divides the community into various business, industrial, laboratory and office zones and eight residential zones. The latter range from three acre and two acre minimum lot sizes through 40,000, 30,000 and 20,000 square foot minimum lot size zones. Recent amendments added the previously mentioned PRN-6 and PRN-8 zones and a Balanced Residential Complex (BRC) special exception/conditional use. BRC developments are permitted within any residential zone except the three acre and PRN zones, provided they are located at least one mile apart until 266 units are built and at least one-half mile apart thereafter until a maximum of 531 units are built. BRC development is limited to a maximum of 531 units in the Township and is defined as multi-family or mixed multi-family and one family units, two-thirds of which units must be for governmentally subsidized low and moderate income family housing.

In their efforts to revise the zone plan for the municipality, the Township governing officials involved a broad

cross-section of the community in the planning process. Local churches, service organizations, the League of Women Voters, municipal political groups, neighborhood associations and others were all solicited as to their views with regard to the proposed changes in the zoning ordinance. Based on the reports, correspondence, and minutes of meetings contained in the files admitted into evidence, it is obvious that an effort was made to see that all in the community were given an opportunity to express their views and opinions on this issue. It would appear that many, if not most, residents who had any interest took that opportunity.

One member of the Township Committee, Committeeman Allen, undertook an extensive study of housing needs in a six-county area based on census figures regarding dilapidated and deteriorating housing and on employment. He correlated this data with information he compiled reflecting the commuting time of employees at two major industries in the general Bernards Township area and projected his figures based on the New Jersey Department of Labor and Industry employment projections. The result of his computations and analysis was a Job Oriented Residential Distribution (JORD) formula which he applied to the six-county region and from which he derived what he argues is Bernards Township's "fair share" toward meeting the needs for low and moderate income housing in that region surrounding the Township.

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.

Mr. Allen's study resulted in a conclusion on his part that Bernards Township had an obligation to authorize 468 units of low and moderate income housing. Since the municipality had granted a variance for a subsidized senior citizen housing project sponsored by a group of local churches, a credit was taken for that project. Three hundred fifty units was determined by him to be Bernards fair share obligation for low and moderate income housing in the ensuing six years before the statutory obligation arose under N.J.S.A. 40:55D-89 to review the Township Master Plan.

The problem with applying a precise mathematical approach to a socioeconomic problem such as housing needs and land development is that it fails to take into account myriad factors.

> The formulation of a plan for the fixing of the fair share of the regional need for lower income housing attributable to a particular developing municipality *** involves highly controversial, economic, sociological and policy questions of innate difficulty and complexity. Oakwood at Madison, Inc. v. Tp. of Madison, 72 N.J. 481, 533 (1977) (hereinafter Oakwood at Madison).

Furthermore, "***it would not generally be serviceable to employ a formulaic approach to determination of a particular municipality's fair share." Id. at 539. Any attempt to determine a given municipality's fair share obligation involves a conscientious, sophisticated and subtle balancing of a number of planning considerations and factors in addition to regional housing needs, employment trends and locations and commuting distances. Availability of suitable land, highway sizes and locations, availability of mass transportation, location of service facilities such as hospitals, schools and stores, impact on existing development and likelihood of utilization for the zoned purposes are only some of the factors that must be considered.

Fortunately, it has been recognized that neither courts nor municipalities are required to analyze and compute precise quotas in determining fair share.

> However, we deem it well to establish at the outset that we do not regard it as mandatory for developing municipalities whose ordinances are challenged as exclusionary to devise specific formulae for estimating their precise fair share of the lower income housing needs of a specifically demarcated region. Nor do we conceive it as necessary for a trial court to make findings of that nature in a contested case. Id. at 498-499.

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. 326, 9 L. Ed. 2d 495 (1963); Kozesnik v. Montgomery Tp., 24 N.J. 154, 167 (1957).

However, when some particulars of the ordinance are carefully examined, it is clear that the generally sound and acceptable broad provisions of the ordinance are fatally undermined by specific requirements and restrictions which render it impossible to introduce into the Township that appropriate variety and choice of housing mandated by Mount Laurel and "least cost" housing mandated by Oakwood at Madison.

> ***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. Oakwood at Madison, supra at 512.
>
> Nothing less than zoning for least cost housing will, in the indicated circumstances, satisfy the mandate of Mount Laurel. While compliance with that direction may not provide newly constructed housing for all in the lower income categories mentioned, it will nevertheless through the 'filtering down' process referred to by defendant tend to augment the total supply of available housing in such a manner as will indirectly provide additional and better housing for the insufficiently and inadequately housed of the region's lower income population. Id. at 513-514 (emphasis original).

The PRN ordinance #347 and the BRC ordinance #385 both require that multi-family development must be served by public sewers. The present capacity of the municipal sewage treatment plant is totally committed and though an application is pending for Federal and State approval and financial assistance in connection with an improved and enlarged plant, even that greater capacity would not be sufficient to handle the sewage that full development of the PRN and BRC zones could reasonably be expected to generate. The requirement that only public sewers be used constitutes a substantial restriction on development of multi-family housing.

All expert witnesses agreed that the use of public sewage treatment is preferable to use of private treatment plants but all

also agreed that private treatment could be provided in a manner that would be satisfactory ecologically and in compliance with requirements of the New Jersey State Department of Environmental Protection and the United States Environmental Protection Agency. Because of the importance of the Dead River (which abuts the PRN zones) as a drinking water source downstream, it may be necessary that sewage and storm drainage runoff be treated by advanced means including lagooning, surface spraying and drainage basins if the goal of meeting housing needs is to be met without threat to the equally important social need for usable water. Fortunately, the proofs clearly establish that it is possible to satisfy both the public need for suitable housing and for clean water and State and Federal agencies exist to safeguard the water supply when development occurs to augment the housing supply.

The minimum floor areas required by the PRN ordinance #347 combined with the Schedule of Size and Space Regulations limit the number of dwelling units to 1.86 per acre in the PRN-8 zone and to 1.39 units per acre in the PRN-6 zone. Mount Laurel and Oakwood at Madison clearly and unequivocally prohibit such low density restrictions. Less than seven dwelling units per every ten acres is not "least cost" or low and moderate income housing, especially when applied to multi-family housing such as apartments and town houses.

The Township planning consultant presented detailed studies in an effort to establish that there is minimal variation in land cost per dwelling unit in a mixed multi-family development between complexes built at low density and those built at relatively higher densities. His proofs did not persuade, especially in light of the express holdings of Mount Laurel and Oakwood at Madison.

Various sections of Ordinances #347 and #385 repose dicretionary authority without expressing or referring to any objective standards against which the exercise of such discretion may be tested in the approving authority. In the PRN Ordinance #347 § 3 (b) (1), it states that an applicant "may be permitted to develop a Planned Residential Neighborhood" subject to specified provisions; §3 (b) (4) (vi) states that "landscaping shall be provided satisfactory to the Planning Board"; § 3 (b) (4) (xv) states that air conditioning shall be screened in such a manner "as may be required by the Planning Board"; and § 5 calls for a "performance guarantee in an amount to be fixed by the Township Engineer" for maintenance of open space. In the BRC Ordinance #385, §§ 5 (a), 7 (e) and 7 (l) utilize the same language regarding open space maintenance, performance guarantee, landscaping and screening of air conditioning equipment respectively.

An applicant is entitled to be apprised of the nature of the ordinance requirements in advance by language setting forth

now in effect shall be complied with.

The enacting process shall be commenced forthwith and be completed within 60 days from date hereof.

Review of the minutes of various meetings and public hearings of the municipal governing body which were introduced into evidence reveals a number of statements which reflect an underlying misunderstanding by some local officials and Bernards Township residents of the zoning law of this State. It may well be that this misunderstanding constitutes a factor contributing to the difficulty being encountered in many communities in the effectuation of the zoning principles expressed in Mount Laurel and Oakwood at Madison and other court rulings. The situation is serious enough to warrant comment.

On March 5, 1974, the then Mayor of Bernards Township stated "No amount of suits and pressures will push the Township into anything we don't want to do and we will not do anything until we are ready." Committeeman Allen declared on July 2, 1974, "I am philosophically opposed to the expansion of government and government regulation into areas of our lives where there is no clearly defined need." On August 20, 1974, a resident suggested "***joining with other municipalities to fight the State from imposing zoning." Another resident is quoted as saying on September 3, 1974, that "The Township should fight the courts and have the type of zoning we want, not what is dictated...The Township ought to have a fund to hire full time attorneys to fight the courts." Finally, on October 8, 1974, a resident declared, "The court does not belong in our Township and should not tell us how to run our town." Apparently, the belief is loose in the land that any action by State officials in the area of zoning, whether by the executive, legislative or judicial branch of government, is some sort of "outside interference" in the affairs of the community. Nothing could be further from the truth.

Sovereignty, the ultimate repository of the power to make law, rests in the people. Gangemi v. Berry, 25 N.J. 1, 9 (1957).

By adopting the 1947 Constitution, the people of New Jersey, by referendum - by general election - delegated to the State government the right to exercise that law making power on their behalf. N.J. Const. (1947) Art. IV, §1, par. 1.

N.J. Const. (1947) Art. IV, §6, par. 2 provides, with regard to the zoning power, that:

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances *** the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.

objective standards and criteria. Moyant v. Parnmus, 30 N.J. 528, 553 (1959); Weiner v. Bor. Stratford, Cty. Camden, 15 N.J. 295, 299 (1954); J. D. Land Corp. v. Allen, 114 N. J. Super. 503, 512 (App. Div. 1971).

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.

One other problem remains concerning Ordinance #347. When the draft of the ordinance was referred to the Planning Board for review pursuant to N.J.S.A. 40:55-35 (then in effect and controlling), the ordinance provided that a landowner could elect to develop property in the PRN zone, not for multi-family use but for single family homes, in accordance with the provisions controlling the R-20 zone which calls for 20,000 square foot lot sizes. Open space clustering was declared allowable. The Planning Board "strongly" recommended adoption "without delay." The ordinance was published in the same form, pursuant to N.J.S.A. 40:49-2.

At the final public hearing on the proposed ordinance an amendment was adopted deleting a reference to the R-20 zone and substituting a reference to the R-40 zone. This resulted in reducing by half the number of houses which may be built if the property owner chooses not to develop a Planned Residential Neighborhood with multi-family uses.

N.J.S.A. 40:49-2 provides, in part, that:

> If any amendment be adopted, substantially altering the the substance of the ordinance, the ordinance as so amended shall not be finally adopted until at least 1 week thereafter, and the ordinance as amended shall be read at a meeting of the governing body, which reading may be by title, and shall be published, together with a notice of the introduction, and the time and place when and where the amended ordinance will be further considered for final passage, at least 2 days prior to the time so fixed.

N.J.S.A. 40:55-35 provided that:

> ***no amendment or change shall become effective unless the ordinance proposing such amendment or change shall first have been submitted to the planning board, when such board exists, for approval, disapproval or suggestions, and the planning board shall have a reasonable time, not less than thirty days, for consideration and report, and in the case of an unfavorable report by the planning board such amendment shall not become effective except by a favorable vote of two-thirds of the governing body.

The amended ordinance was not republished and resubmitted to the Planning Board.

A determination as to the presence of "substantial" alteration is a mixed question of law and fact, with the amendatory words to be assessed within the context of the provision of which they are a part and the basic policy of the statute. Wollen v. Fort Lee, 27 N.J. 408, 420 (1958). Only where the amendment is "***of such legally consequential materiality, in [its] contributive relation to the substantive body of the ordinance, that [its] inclusion therein ought to be regarded as a change which essentially alters the manifest objective intent and materiality of the ordinance" is its publication as amended required. Manning v. Bor. of Paramus, 37 N.J. Super. 574, 581 (App. Div. 1955); Gilman v. Newark, 73 N.J. Super. 562, 570 (Law Div. 1962). The Township Committee's action in amending the ordinance to effectively double the acreage required for one family development was a substantial alteration thereof. Accordingly, in the absence of the statutorily required republication and rereading, this amendment is invalid and of no effect. The Township Committee is therefor directed to determine what provision it deems proper as an alternative to PRN development in the PRN-8 zone and begin the adoption of that provision anew as an ordinance. Statutory requirements for enactment of a zoning ordinance

"A municipal corporation is a government created by the Legislature. It possesses enumerated powers only and therefor it must act within the bounds of its delegated authority." Apt. House Coun. v. Mayor and Coun., Ridgefield, 123 N.J. Super. 87, 93 (Law Div. 1973), aff'd. 128 N.J. Super. 192 (App. Div. 1974).

> The power to zone is an exercise of police power which the State has granted to all municipalities. This power must be exercised in a reasonable manner and not arbitrarily, discriminatorily or capriciously; and it must be exercised so as to secure the public health, safety, morals and welfare of the public.
> A municipality, in exercising the power delegated to it must act within such delegated power and cannot go beyond it. Midtown Properties, Inc. v. Madison Tp., 68 N.J. Super.197, 207 (Law Div. 1961), aff'd. 78 N.J. Super. 471 (App. Div. 1963).

"It is well established that municipalities in our State have no powers other than those delegated to them by the Legislature and by our State Constitution." Ringlieb v. Tp. of Parsippany-Troy Hills, 59 N.J. 348, 351 (1971); Toms River Pub. Co. v. Manasquan, 127 N.J. Super. 176, 179 (Ch. Div. 1974).

The most explicit statement of municipal subservience to state authority was enunciated by Chief Justice Vanderbilt:

> It is fundamental in our law that there is no inherent right to self government beyond the control of the State, and that municipalities are but creations of the State, limited in their power and capable of exercising only those powers of government granted to them by the Legislature. Wagner v. Newark, 24 N.J. 467, 474 (1957); Sussex Woodlands , Inc. v. Tp. of West Milford, 109 N.J. Super. 432, 434-5 (Law Div. 1970). See West Point Island Civic Ass'n. v. 54 N.J. 339, 345 (1969).

A municipal corporation is "***an agency of the State, established by legislative authority to regulate and administer the local or internal affairs of the territory which is incorporated." Loch Arbour v. Ocean Tp., 55 N.J. Super. 250, 256 (Law Div. 1959), aff'd. 31 N.J. 539 (1960). It is obvious that with ultimate sovereignty resting with the people of the State, not a given municipality, those local governments are mere administrative units of the State, possessing only those powers delegated therefrom. In re Public Service Electric and Gas Co., 35 N.J. 358, 370 (1961). See Gangemi v. Berry, supra.

There exists no inherent power in a municipality to adopt zoning or land use ordinances except by virtue of a statutory grant of authority from the Legislature. Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., 71 N.J. 249, 263 (1976); Dresner v. Carrara, 69 N.J. 237, 241 (1976); J.D. Const. v. Bd. of Adjust. Tp. Freehold, 119 N.J. Super. 140, 144 (Law Div. 1972).

The basic principles of law can be briefly restated as follows. Sovereignty rests in the people. The people of the State of New Jersey have delegated the law-making power to the State Legislature. The Legislature has decided to delegate the exercise of some governmental power to municipal governments. This delegation includes the power to exercise the zoning power within the area constituting the municipality.

Thus, municipal officials, when they exercise zoning authority , do so as agents of the State government and do so on behalf of all the people in the State. The authority of municipal officials regarding zoning flows, not from the residents of the municipality, but from the people of the State of New Jersey. When any municipality zones, it does so, not on behalf of its residents only, but on behalf of the local residents, the residents of Newark and Mount Holly, the residents of Newton and Millville and the residents of each and every community in the State. Zoning authority flows from more than 7,000,000 people, not from 14,000 and it must be used for the "general welfare" of 7,000,000, not 14,000.

Every local official must, by law, N.J.S.A. 41:1-1, swear as follows:

> I,_____, do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will bear true faith and allegiance to the same and to the Governments established in the United States and in this State, under the authority of the people; So help me God.

He or she must also swear to "***faithfully, impartially and justly perform all the duties***" of the office to be occupied.

When the courts, the legislative or the executive require that zoning be performed pursuant to the Constitution of the State of

New Jersey, for the general welfare of all the people of New Jersey, they are merely calling upon local officials to adhere to their oaths - no more and no less.

Very truly yours,

B. Thomas Leahy, J.C.C.

BTL/sph
Original to County Clerk
cc: Assignment Clerk

W

McCARTER & ENGLISH, ESQS.
550 Broad Street
Newark, New Jersey 07102
(201)622-4444
Attorneys for Defendants,
The Township of Bernards

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY
DOCKET NO. L-6237-74 PW

THEODORE Z. LORENC, LOUIS J. HERR, SAM WISHNIE, MARION WISHNIE, executrix of the Estate of Harry Wishnie, deceased, ALICE J. HANSEN, trustee, WILLIS F. SAGE, WILLIAM W. LANIGAN, and MERWIN SAGE,

Plaintiffs,

v.

THE TOWNSHIP OF BERNARDS, in the County of Somerset, a municipal corporation of the State of New Jersey, and the PLANNING BOARD OF THE TOWNSHIP OF BERNARDS,

Defendants.

Civil Action

NOTICE OF MOTION TO AMEND JUDGMENT OR IN THE ALTERNATIVE FOR A NEW TRIAL

TO: WILLIAM W. LANIGAN, ESQ.
Lanigan, O'Connell & Hirsch
150 North Finley Avenue
Basking Ridge, New Jersey 07920

SIR:

PLEASE TAKE NOTICE that the undersigned shall move before the Superior Court of New Jersey, Law Division, Somerset County, Court House, North Bridge and East High Streets, Somerville, New Jersey, on Friday, February 24, 1978, at 9:00 in the forenoon or as soon thereafter as counsel may be heard, for an Order pursuant to R.4:49, amending the Order for Judgment dated January 23, 1978, and the letter opinion of this Court dated January 23, 1978, by deleting in its entirety Paragraph Number Two on Page Seven of said letter opinion and substituting in its place the following:

> 2. To permit development of Balanced Residential Complexes, pursuant to Ordinance No. 385 as amended by Ordinance No. 425, in Planned Residential Neighborhood Zones 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 set forth in Ordinance No. 347 as adopted September 3, 1974.

PLEASE TAKE FURTHER NOTICE that in the alternative plaintiff shall move for an Order to reopen said judgment and opinion, to take testimony and make such additional findings of fact and conclusions of law as may be appropriate on the ground that said Order for Judgment, and in particular, Paragraph Two on Page Seven of said opinion, if read literally

and strictly followed, would result in a miscarriage of justice, would be against the weight of the evidence, and would be manifestly inequitable and otherwise contrary to law, pursuant to R.4:49 and R.1:7-4.

PLEASE TAKE FURTHER NOTICE that we shall rely upon the Brief submitted herewith.

McCARTER & ENGLISH, ESQS.
Attorneys for Defendants
The Township of Bernards

By: _____
ALFRED L. FERGUSON
A Member of the Firm

CERTIFICATE OF SERVICE

ALFRED L. FERGUSON, ESQ. an attorney-at-law of the State of New Jersey, does hereby certify that:

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

2. On February 1, 1978 I caused a copy of the within Notice of Motion to be served upon William W. Lanigan, Esq., of Lanigan, O'Connell & Hirsch, Esqs., by depositing same in the U. S. Mail, regular mail, addressed to him at his office at 150 North Finley Avenue, Basking Ridge, New Jersey 07920.

ALFRED L. FERGUSON

xyz

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-SOMERSET COUNTY
DOCKET NO. L-6237-74 P.W.

THEODORE Z. LORENC, et als,
Plaintiffs,

vs.

TOWNSHIP OF BERNARDS, et als,
Defendants.

Stenographic Transcript
of
Motion

Place: Somerset County Courthouse
Somerville, New Jersey

Date: February 24, 1978

BEFORE: THE HONORABLE B. THOMAS LEAHY, J.C.C.

TRANSCRIPT ORDERED BY:

NICHOLAS CONOVER ENGLISH, ESQ.

A P P E A R A N C E S:

LANIGAN & O'CONNELL, ESQS.
BY: WILLIAM W. LANIGAN, ESQ.
Attorney for the Plaintiffs.

MC CARTER & ENGLISH, ESQS.
BY: NICHOLAS CONOVER ENGLISH, ESQ.
Attorney for the Defendants.

RICHARD J. MC MANUS, ESQ.
Attorney for the Defendants.

Charles R. Senders, C.S.R.
Somerset County Courthouse
Somerville, New Jersey 08876

THE COURT: All right. Gentlemen, I will be happy to hear you.

MR. ENGLISH: Thank you, Your Honor. It seems like an old home week reunion.

THE COURT: It does indeed. I haven't seen you two in ages.

MR. ENGLISH: If the Court please, this is a motion by the defendants to amend the judgment, or amend the alternative for a new trial.

Avoiding formalities of procedures proscribed by the rules, I think I can say that the purpose and thrust of the motion is to try to secure a clarification of the meaning of paragraph number two on page 7 of the Court's opinion which directs the Township to amend its ordinance in this respect.

> "2, to permit development of planned residential neighborhoods at densities of six dwelling units per gross site area acre in the P.R.N. 6 zone and eight dwelling units per gross site area acre in the P.R.N. 8 zone."

Now, if the Court please, the confusion in the minds of the defendant as to what that means derives as follows: The Court in its opinion has

held that the Township ordinances generally, this includes, of course, ordinance 385 which is the B.R.C. ordinance, that the town already has fulfilled the Township's obligations under the Mount Laurel and Madison Township cases for lower- and moderate-income housing, or least-cost housing. I will use those terms somewhat interchangeably.

I think simply for the record it might be stated that at the time of the trial, the B.R.C. ordinance was number 385 which provided specifically for publicly-subsidized housing to meet the obligations under Mount Laurel.

After the trial had ended and before the decision was rendered, the Supreme Court came down in Oakwood at Madison versus Madison Township, which appeared to change the concept a little bit from subsidized housing to least-cost housing. But I think the purpose of those two approaches was essentially the same, to meet the public need for certain types of housing.

In any event, as we read the opinion, the Court has upheld the ordinance generally and specifically has held that the Township ordinances have fulfilled its obligations under Mount Laurel and Oakwood at Madison.

Then on page 6 of the Court's opinion is what starts me off on the path to confusion. Perhaps I should read the paragraph I am referring to on page 6: "The minimum floor areas required by the P.R.N. ordinance or number 347 combined with the schedule of size and space regulations, limit the number of dwelling units to 1.86 per acre in the P.R.N. 8 zone and to 1.39 units per acre in the P.R.N. 6 zone.

"Mount Laurel and Oakwood at Madison clearly, unequivocally prohibits such low-density restrictions. Less than 7 dwelling units for every 10 acres is not least-cost or low- and moderate-income housing, especially when applied to multi-family housing such as apartments and townhouses."

Now, I pass over, without particular emphasis, what I think is an unintended mathematical error on the Court which I tried to develop in the brief. That if there are 1.86 dwelling units per acre, on 10 acres there would be 18 or so. If there were 1.39 dwelling units per acre, on 10 acres there would be about 14, not the 7 dwelling units per 10.

Be that as it may, the Mount Laurel and

Madison Township requirements for least-cost do not apply to the P.R.N. zone. It was recognized by the Court, it is conceded in the plaintiff's brief on this motion that the obligations under Mount Laurel and Oakwood at Madison were sought to be fulfilled by the B.R.C. ordinance or number 385 and the Court has upheld that.

Now, the P.R.N. ordinance number 347 was not designed to meet the least-cost or low- and moderate-income housing obligation, but was an effort to zone a considerable part of the Township consistently with the prior decision of this Court. In a way, that would reflect the fact that approximately half of the area of that zone is a flood plain and unbuildable and also with the recommendations of the Somerset County Master Plan in mind.

Now, the paragraph on page 6 that I just quoted appears to me to apply to the P.R.N. ordinance, the concept of Mount Laurel and Oakwood which, I submit, are not applicable.

If, as this Court has held, the Township has in some other part of this ordinance, some other part of its Township other than the P.R.N. zone, made adequate provision for its low- and moderate-

income, least-cost housing obligations, then legally and under the cited cases, there is no objection to large-lot zoning.

My authority for that statement is footnote number 9 in the Supreme Court's opinion in Oakwood at Madison versus Madison Township, which appears on page 505 of 72 New Jersey Reports.

The footnote says, "We have no intent to impune large-lot zoning per se if a developing municipality adequately provides, by zoning, for lower-income housing. It may zone otherwise for large lots to the extent that the owners of properties so zoned have no other legitimate grievance therewith."

Now, the Court has held that Bernards Township has adequately provided by zoning for lower-income housing. Therefore, I respectfully submit that the requirements of Mount Laurel and Oakwood at Madison cannot properly be used to mandate an increase in the density in the P.R.N. zone.

So as against that background, there seems to us, at least, to be a kind of internal inconsistency in so much of the Court's opinion has focused this on paragraph number 2, page 7,

which in effect is part of the order of this Court.

To sum up, the Court has held that the B.R.C. ordinance is valid and the provisions for least-cost housing are sufficient. The Court has further held that the Township zoning plan, which on its face provides for P.R.N. in the flood plain areas, is valid. But then it says that the Mount Laurel and Madison Township opinions which are applicable to the B.R.C., but not the P.R.N., somehow invalidates the P.R.N. zoning.

Now, as our motion points out, we may not construe paragraph two correctly. It is interesting to observe that when the Court's opinion was initially considered by the officials of the Township, some of them construed paragraph two, as to require six and eight dwelling units per gross site area throughout the entire P.R.N. zone. Others construed that to mean that the Court was saying you should simply permit a balanced residential complex of least-cost housing to be included in the planned residential neighborhood zone.

Now, if the latter interpretation, namely that the ordinance, the zoning ordinance in the Township in effect is to be amended so as to permit

B.R.C. in any zone except the three-acre zone, that is one situation to deal with.

If the Court's ruling is that six and eight dwelling units per gross site area must be permitted throughout the entire P.R.N. zone, then I respectfully submit that serious questions as to the validity of the Court's judgment come into question and they are set forth in our brief.

Also, if Your Honor wants me to do so, I will not repeat in detail the argument there, but essentially the population which would result if six and eight dwelling units per acre were required throughout the P.R.N. zone, were to come, it would completely change the whole zoning plan which the Court has said is valid. It would require a volume of sewage which, under the evidence, cannot possibly be handled by the Dead River, by any circumstances. Moreover, it would mandate a zoning plan which is totally inconsistent with the Somerset County Master Plan.

This would seem to be illegal, because the new municipal land use law says, in effect, that a zoning ordinance ought as far as possible to be consistent with the Somerset County Master Plan.

The evidence in this case from Mr. Roach is to the effect that in substance the P.R.N. zoning as it now stands is generally consistent with the County Master Plan.

There is also evidence from one of the plaintiffs' own witnesses in reports that the soils in the P.R.N. zone do not lend themselves to such an intensive development.

There is, I believe, a principle of statutory construction that if the statute is ambiguous, one interpretation would make it unconstitutional and another interpretation would have it end up being valid, why, the interpretation which sustains the validity of the legislation is the one to be preferred.

By a rough sort of analogy, I would suggest that if, as it appears to us, there is an ambiguity in paragraph two on page 7 of this Court's decision, the decision or the interpretation of it that would mandate six and eight dwelling units per acre throughout the P.R.N. zone would, I submit, be unreasonable and invalidate the ordinance.

The alternate interpretation of extending permission to construct a B.R.C. zone

in the P.R.N. is, therefore, the one to be preferred.

I don't know what Your Honor had in mind, but our motion is essentially for clarification.

THE COURT: All right, thank you.

Mr. Lanigan?

MR. LANIGAN: If the Court please, if we were to acknowledge Mr. English's argument that what he really wants is a clarification, I suppose he is saying we don't understand English, we don't understand what you said. We are poor people that don't read well and because of our inadequacy we want you to clarify it. Except, that is not what they said.

The day after Your Honor's decision, they got together in an illegal meeting, no notice, in violation of the Sunshine Law and promulgated a release to the press. This is government by press release, castigation of the judiciary by press release.

While the litigation has, I guess, concluded, at least for the time being, there they said, not that we don't understand, not that we really don't read the Judge right, but the Township officials who have studied the opinion

believe that Judge Leahy has grossly misunderstood the intent and purpose of the P.R.N. ordinance. You don't know what you are talking about, is what they are saying.

I respectfully suggest that add to that, we are confident, in their brief, that no Courts would enforce such a result by bullying, if you can say that, to the appellate division, that Judge Leahy is wrong.

I happen to think that Judge Leahy was right. He was clear, he knows what he said. He did not take the time he did to flounder, to write ambiguous opinions. He is not known for that and I don't think you did it this time. Under the guise of some more time, I guess another bite at the apple, something other than appeal, they come in and they say, we really want a clarification, we really want to argue it, we want to talk about density again, we want to talk about sewage, we want to talk about things that we talk about every time we write a brief and we want to do it again.

I suggest, Your Honor, the remedy is, if you don't like the decision, appeal it, but don't come into this Court and tell the Court you don't understand it when you have already told the

Court in the press that he has misunderstood it, he is wrong.

Are they wrong or are you wrong?

I respectfully suggest that we have a remedy and it is not before this Court.

It is clear to the plaintiffs that the Court could not have made it more clear. That is the problem, they now understand and realize the impact of what the decision will mean.

You would think in light of what the Court has done for them in upholding a certain portion of their ordinance, in giving them some blessing, so to speak, on certain portions of their ordinance plan, that they would have said, well, we have practically everything we want. We have been upheld, we must be doing something right. The Judge really finds fault with density, which is unrealistic, which cannot be supported by any testimony, which was not supported by any testimony. What we really should do is say, thank goodness that is the result and go on their merry way.

No, they are not satisfied. Their press release is that the Judge has upheld the ordinance, the Judge has done this, we are right, committeeman

Allen did this, but the Judge really misunderstood the P.R.N. zone.

You couldn't write that decision the way you did with respect to the manner in which certain portions of the ordinance have been upheld and misunderstand the ordinance. To suggest that the B.R.C. concept must be injected into the P.R.N. zone is ludicrous, I never heard of such a thing. It isn't even supported by the evidence, much less by the logic that we are listening to now.

The plain and simple fact is that the densities in the P.R.N., in the area that they selected for multi-family use, the area that on the face of it looks like multi-family use can exist, is not really multi-family use, the densities are unrealistic. The densities are supportable and this Court has mandated them and that would seem to be the end of it.

Now, plaintiffs did not get everything they wanted. Plaintiffs, in fact, did not get any commercial zone, they did not get the elimination or the revamping of the least-cost housing concept, the number of units of least-cost housing. There were many areas in which the

plaintiffs were not successful.

But they were successful in one, in having a reasonable and realistic density, a density, I respectfully suggest, that can be supported on appeal.

On that basis, I am asking that this Court deny the motion and leave the defendants to whatever remedies they choose, whatever remedies they have under the rules.

Thank you.

THE COURT: Thank you.

All right, let me take ten minutes. I want to give you my ruling in relatively careful tones, but I don't want to delay things any further. So I want to try and do it within the next half hour.

(Whereupon, a short recess takes place.)

THE COURT: The alternative phrasing of the motion leaves me somewhat confused at this point. If I intend to deny the motion to clarify my opinion as the plaintiff would want me to phrase it, do you wish to be heard on the issue of a new trial or will you pursue that on another date, or does the decision on the motion to clarify decide the request for a new trial?

MR. ENGLISH: I think your decision on the

motion to clarify it would accomplish everything that we hope to by the motion. We are trying to bring ourselves within the rule. It was not inconceivable that one of the possibilities the Court might want to follow would be to reopen it, but we don't have any new evidence to present.

THE COURT: Well, I feel satisfied that I have enough information in this record upon which to decide this motion, no particular order or importance of order.

Let me state first, it was deliberate on my part to consider the B.R.C. and P.R.N. zones together and together with the treatment of the Community Center of Basking Ridge and the treatment of the large lot, three-acre zoning, in the western portion of the Township.

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 Mount 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."

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.

I, therefore, meant on page 7 when I said in the P.R.N. 6 and P.R.N. 8 zones, "in" in the sense of throughout, not "in" in the sense of within, to some extent.

I do not find and am not persuaded that such densities on the gross acreage of those zones would be unreasonable.

To give some concrete example to what I am talking about, I would call the attention of the parties and their counsel to what might be considered by some to be an example of a community, I speak of the Borough of Bound Brook, which, within a few years will have enjoyed 300 years of history. It is composed of 808 acres. It has approximately 3,500 dwelling units. That works out to approximately 4.3 dwelling units per acre.

If you consider the community as an entirety, the community has a large cemetary, it has a 90 or more acre flood plain between the railroad and the river on which nothing exists other than shrub growth, brush, things of that nature. It has some very expensive, large lot development and it has some rather dense residential development in parts.

I do not consider that such a community is unrealistically jammed or overly dense within the meaning of Mount Laurel. I doubt that the author of Mount Laurel thought so, he being a resident of the community of Bound Brook, as is this Court. Which tends to give some indication that it is not too unpleasant a place in which to live.

As to whether or not such zoning would be misleading to potential developers or purchasers of land because there is no possibility that such development would ever be possible in light of the need to protect the river and the water quality, I am satisfied that the Department of Environmental Protection and the Environmental Protection Agency can and will appropriately and adequately protect the water quality of the river and that zoning is

not needed for that purpose.

Again, parenthetically, it occurs to this Court that it will probably require a very expensive and very elaborate system of waste water and storm water disposal to satisfy those agencies. A system of such expense that probably only very dense development will permit construction of such a system at a cost that can be appropriately spread at a reasonable level per dwelling unit.

I am satisfied by the plaintiffs that there is need to protect the river and its water quality and, certainly, that houses would cost far beyond the means of all but a very few, if added to their other costs would be the cost of sharing the construction and operation expense of such an elaborate disposal system.

However, for the purposes of this case I am satisfied that the D.E.P. and E.P.A. can and will protect the river and that the zoning need not be designed to do so.

Since the river and the ecology will be otherwise protected, the principal impact of the Court's decision will most likely be on the social mix of the community. The social homogeneity is no longer, if it ever was, a valid

purpose of zoning, so we need not concern ourselves with that.

I am not persuaded that there is any inconsistency between the zoning ordered by this Court and that type and the development anticipated by the County master plan of land use.

I recall the County planning director acknowledging during his testimony that he did not believe, when he reviewed the P.R.N. ordinance, that it called for zoning at a 1-1/2 or 2 units per acre basis. I am not as certain of my recollection, but I believe that either the Planning Board's master plan of land use or his own thoughts were that 5 to 7 units certainly is reasonable in a village or neighborhood development within this County.

Finally, on page 6 where I said less than 7 units per acre, per 10 acres, I thank Counsel for calling that to my attention. I had mis-calculated, because I thought that the 1.39 units per acre applied to usable acres when I did that calculation.

A review of Mr. Engel's exhibit indicates that 1.39 units per acre referred to total acreage within the P.R.N. 6 zone. Therefore, that should

read "Less than 14 units per 10 acres is not least-cost or low- and moderate-income housing," etc.

I believe that answers all of the points raised in the oral argument and in the brief.

I would appreciate it ff counsel for the defense would submit an order denying the motion.

Any clarification can be obtained by a transcript of my oral remarks.

MR. ENGLISH: If the Court please, for the defense or the plaintiffs?

THE COURT: For the plaintiffs.

MR. LANIGAN: If the Court please, I would like to submit an order at this time for your consideration denying the motions.

THE COURT: Is there any objection to the form of the order as reflecting my decision?

MR. ENGLISH: My only comment, Your Honor, is that in some fashion, I think you indicated a moment ago, I think the oral remarks which Your Honor just made somehow ought to be incorporated or by reference, or otherwise, into the record?

THE COURT: Under the unlikely assumption

that this decision should be reviewed, I am sure a transcript will serve that purpose.

MR. ENGLISH: All right.

THE COURT: So that if that be the only objection, I find the order to reflect my decision and I will sign the same.

MR. LANIGAN: Thank you, Your Honor.

THE COURT: All right.

(Whereupon, the matter is concluded.)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-SOMERSET COUNTY
DOCKET NO. L-6237-74 P.W.

THEODORE Z. LORENC, et als, :
Plaintiffs,
:
vs.
:
TOWNSHIP OF BERNARDS, et als,
Defendants. :

C E R T I F I C A T E

I, CHARLES R. SENDERS, C.S.R., one of the Official Court Reporters in and for the State of New Jersey, certify that the foregoing is a true and accurate transcript of my original stenographic notes to the best of my knowledge and ability.

CHARLES R. SENDERS, C.S.R.

Dated: March 6, 1974

ORDINANCE NO. 453

AN ORDINANCE AMENDING THE TOWNSHIP LAND USE ORDINANCE TO COMFORM TO THE OPINION OF THE COURT IN **LORENC ET ALS. V. TOWNSHIP OF BERNARDS ET ALS.**

Be it Ordained by the Township Committee of the Township of Bernards that Chapter 11 of the Revised General Ordinances of the Township of Bernards (1968) be amended and supplemented as follows:

1. Section 11-5.4l.2(a) shall be amended to read:

(a) In the PRN-6 and the PRN-8 districts either the provisions of the R-2A or R-40 districts, respectively, with or without the provisions of open space clusters, may be followed, or an owner-applicant may develop a Planned Residential Neighborhood to serve the foregoing purposes, subject to the following provisions:

(1) The aggregate gross floor area permitted on the total tract, (i.e. the Gross Site Area of the tract, not including pre-existing streets, times the Floor Area Ratio) may be concentrated on portions of the tract so as to provide permanent unoccupied open space on the remainder of the tract. Gross Floor Area as used herein shall be the plan projection of all various roofed areas on a lot, whether fixed or temporary, multiplied by the number of actual stories under each roof section (plus the area of all required parking spaces not under roof.) Basements are included only in non-residential buildings or when used for parking. The Floor *Area Ratio for each Zone District is set forth* in the Schedule of Size and Space Regulations.

(2) Such floor area shall be used in a variety of types of dwelling units, including free-standing single-family houses, twin houses (side by side two-family), town houses and other multiple types.

2. Section 11-5.4l.2(d) (6) shall be amended to read:

(6) The Planned Residential Neighborhood shall be landscaped so as to create an aesthetically attractive environment. Such landscaping may include trees, shrubs or fencing or a combination thereof and replacement of same shall be guaranteed by the owner-applicant for two years by a cash deposit in the maount of 10% of *the replacement value and a bond for the* remainder.

3. Section 11-5.4n.5(d) shall be amended to read:

(d) The Balanced Residential Complex shall be landscaped so as to create an aesthetically attractive environment. Such landscaping may include trees, shrubs or fencing or a combination thereof and replacement of same shall be guaranteed by the owner-applicant for two years by a cash deposit in the amount of 10% of the replacement value and a bond for the remainder.

4. Section 11-5.4l.2(d) (15) shall be *amended to read:*

(15) Air conditioning equipment shall be screened.

5. Section 11-5.4n.5(k) shall be amended to read:

(k) Air conditioning equipment shall be screened.

6. Section 11-5.4l.4(a) shall be amended to read:

(a) The developer shall establish an organization for the ownership and maintenance of any residual open space for the benefit of residents of the development. Such organization shall not be dissolved, and shall not dispose of any open space, by sale or otherwise, except to an organization which is conceived and established to own and maintain the open space for the benefit *of the residents of such development, and* which thereafter shall not be dissolved or dispose of any of its open space except by dedicating the same to the municipality wherein the land is located. The developer shall be responsible for the maintenance of any such open space until such time as an organization established for its ownership and maintenance shall be formed and functioning and shall be required to furnish a performance guarantee for the estimated costs of maintenance for a period of two years after the acceptance of all public streets in the development. The term maintenance as used herein shall include but not be limited to the mowing, fertilizing and reseeding of grassed areas, the care of trees and shrubs, the removal of leaves and litter, and the *repair* of walkways or structures shown on the site plan. The estimated costs shall be based on Dodge's Construction Estimate Guide, most recent edition, and the guarantee shall consist of a cash deposit of 10% of the estimated costs and a bond for the remainder. The guarantee shall not exceed 15% of the cost of the applicable improvements.

Be It Further Ordained that all other portions of Chapter XI shall remain in full force and effect.

And Be It Further Ordained that this ordinance shall take effect upon passage and publication according to law.

Passed on first reading 3-7-78

PUBLIC NOTICE

Notice is hereby given that the above ordinance was duly read and passed on final reading and adopted at a meeting of the Township Committee of the Township of Bernards in the County of Somerset, held on the 21st day of March, one thousand nine hundred and seventy-eight.

Bernards Township Committee
Joanne Howell, Mayor

Attest:
James T. Hart
Township Clerk

3/30t1

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

Z

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2718-77

THEODORE Z. LORENC; LOUIS J. HERR; SAM WISHNIE; MARION WISHNIE, executrix of the estate of Harry Wishnie, deceased; ALICE J. HANSEN, trustee; WILLIS F. SAGE; WILLIAM W. LANIGAN, and MERWIN SAGE,

Plaintiffs-Respondents/
Cross-Appellants,

v.

THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET, a municipal coporation of the State of New Jersey, and THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS,

Defendants-Appellants/
Cross-Respondents.

Argued: Oct. 24, 1978 - Decided: DEC 11 1978

Before Judges Lynch, Crane and Horn.

On appeal from Superior Court, Law Division, Somerset County.

Mr. Nicholas Conover English argued the cause for appellants/cross-respondents (Mr. Richard J. McManus and Messrs. Mc Carter & English, attorneys; Mr. Richard J. McManus, on the brief).

Mr. William W. Lanigan argued the cause for respondents/cross-appellants (Messrs. Lanigan, O'Connell and Hirsh, attorneys; Mr. Daniel F. O'Connell, on the reply brief).

PER CURIAM

This is a Mount Laurel-type zoning case.[1] At the conclusion of the trial resulting from plaintiffs'-landowners' in-lieu action challenging two ordinances of defendant Township of Bernards (township), #347 and #358, the judge upheld the validity of the township's general zoning scheme but specifically directed that said zoning ordinances be amended within 60 days (1) to permit densities of six and eight dwelling units per gross site-acre[2] in the Planned Residential Neighborhood (PRN) zones and (2) to eliminate the requirement of public sewering for multi-family housing projects. Defendant township and its planning board duly appealed from the judgment embodying these rulings. Plaintiffs cross-appealed to "preserve the right to argue" that the judge erred because he:

> 1. Failed to set aside the underlying 2-acre zoning in the PRN-6 zone.
>
> 2. Failed to order a zoning of 20,000 square feet in the PRN-8 zone as underlying zoning rather than remand such matter to the Township Committee.
>
> 3. Failed to grant plaintiffs the relief they requested of directing the issuance of building permits to plaintiffs upon application and provided the same is in compliance with State and Federal regulations.

Before we heard oral argument defendants withdrew as a ground of appeal the second issue mentioned above, relating to the elimination of public sewering, because after the notice of appeal was filed the township adopted an ordinance which appears to satisfy the terms of the trial court's directive as to same. On the principal appeal,

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[1] So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975), app. dism. and cert. den. 423 U.S. 808 (1975). The parties have stipulated that Bernards Township was a "developing municipality" within the scope of Mt. Laurel.

[2] As defined in said ordinance #347.

validity of the
therefore, there remains before us the single issue - the court's mandate that the ordinances be amended to permit six and eight dwelling units per gross site-acre in the PRN zones.

We have no difficulty in agreeing with Judge Leahy's findings that the minimum floor area required by Ordinance #347 combined with the schedule of size and space regulations limits the number of dwelling units to 1.39 per acre in the PRN-6 zone and 1.86 per acre in the PRN-8 zone, and that these density restrictions are too low under the Mount Laurel and Oakwood at Madison pronouncements.[3]

We are unable to conclude, however, that the record sufficiently supports the judge's mandate that the township should permit densities of six and eight dwelling units per gross site-acre in the PRN zones or that the court at this stage should usurp the normal powers of the township's governing body to enact zoning regulations.[4] Pascack Ass'n Ltd. v. Mayor & Counc. Washington Tp., 74 N.J. 470, 485 (1977), held:

> *** [I]t 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 [v. Town of West Orange, 63 N. J. 335, 343 (1973)] and Kozesnik [v. Montgomery Twp., 24 N. J. 154, 167 (1957)] ***. 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.

---

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

[4] We desire to make it eminently clear that in so stating we do not hold that it may not ultimately be determined that six and eight dwelling units per gross site-acre in these zones are reasonable and appropriate.

But we perceive that judicial respect for the governing body's discretion does not mean that governing bodies may unduly obstruct, impede or delay the required action.

Where there has been undue "foot-dragging" on the part of municipal officials, a court may take such action as will preclude its continuance. In the present case the judge did not posit his determination upon a finding of procrastination on the part of defendants' officials, although there is evidence in the record of utterances of defiance of the courts by some of defendant township's officials which would indicate a tendency to unnecessarily delay the adoption of appropriate density regulations.

This matter should now be concluded expeditiously. Accordingly, we vacate that part of the judgment from which appellants appeal. We remand the case to the trial court for the purpose of directing defendant township to review the PRN zones to appropriately increase the number of dwelling units per site-acre and to enter a final judgment, a copy of which to be supplied to us on or before March 15, 1979. If defendant municipality fails to follow said directive to be made by the trial court, the latter may then invoke the alternative suggested in Oakwood at Madison, supra at 553-554 - the appointment of an impartial zoning and planning expert or experts, who shall be directed "to file a report or to testify, as the court may deem appropriate, as to a recommendation for the achievement by defendant[s] of compliance with [the court's] opinion or with any further directions by the court pursuant thereto." We retain jurisdiction for the purpose of aiding the

court and the parties to reach a final determination.

We will hold determination of plaintiffs' cross-appeal in abeyance until the final disposition of defendants' appeal. We conceive that if defendants shall fail to observe the spirit and intention of Mount Laurel and Oakwood at Madison the effective action of this court will remove all improper barriers to a final disposition.

A TRUE COPY

Elizabeth M. Langhin

Clerk

AA

A-2718-77

AMENDED ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2718-77
MOTION NO. M-2428-77 (a)
BEFORE PART A

THEODORE Z. LORENC

v.

TOWNSHIP OF BERNARDS, et al.

JUDGES LYNCH
KOLE
PETRELLA

ORIGINAL FILED
APR 20 1978
ELIZABETH McLAUGHLIN
Clerk

MOVING PAPERS FILED MARCH 23, 1978
ANSWERING PAPERS FILED APRIL 6, 1978
DATE SUBMITTED TO COURT APRIL 5, 1978
DATE ARGUED
DATE DECIDED AMENDED: APRIL 18, 1978

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION/~~RETXXXXMXROR~~ TO STAY PORTIONS OF JUDGMENT OF JANUARY 23, 1978 PENDING APPEAL.			X

SUPPLEMENTAL: SEE ATTACHED SUPPLEMENTAL.

I hereby certify that the foregoing is a true copy of the original on file in my office.
Elizabeth McLaughlin
Clerk

FOR THE COURT:
John F Lynch
JOHN F. LYNCH P.J.A.D.

WITNESS, THE HONORABLE JOHN F. LYNCH, PRESIDING JUDGE OF PART A, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 18th DAY OF APRIL 1978.

Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

421

THEODORE Z. LORENC

v.

TOWNSHIP OF BERNARDS, et al.

AMENDED ORDER - SUPPLEMENTAL

MOTION NO. M-2428-77

The court has reconsidered its order of April 6, 1978 granting a stay in this matter. Said order is hereby confirmed granting the stay from so much of the judgment of the court entered January 23, 1978 as required the defendants to do the following:

> 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.

BB

ORDINANCE NO. 496

AN ORDINANCE ELIMINATING THE REQUIREMENT FOR CONNECTION TO PUBLIC SEWER AND WATER SUPPLY IN BALANCED RESIDENTIAL COMPLEXES AND PLANNED RESIDENTIAL NEIGHBORHOODS

Be It Ordained by the Township Committee of the Township of Bernards that Chapter XI of the Revised General Ordinances of the Township of Bernards be amended as follows:

1. Section 11-5.41.2(d) shall be amended to delete the following sentence:

"(7) Connections shall be made to public sewer and water supply."

2. Section 11-5.4n. 2 shall be amended to delete the following sentence:

"(c) Each Balanced Residential Complex shall be served by public sewer and public water facilities."

Be It Further Ordained that this ordinance shall take effect upon passage and publication.

Passed on first reading 10-3-78.

PUBLIC NOTICE

Notice is hereby given that the above ordinance was duly read and passed on final reading and adopted at a meeting of the Township Committee of the Township of Bernards in the County of Somerset, held on the 17 day of Oct. one thousand nine hundred and 78.

Bernards Township Committee
Joanne L. Howell
Mayor

Attest:
James T. Hart,
Township Clerk

10/26t1

CC

Exhibit CC

Motion for Leave to Appeal and
Petition for Certification

To Be Supplied

DD

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SOMERSET COUNTY
DOCKET NO. L 6237-74-P.W.

THEODORE Z. LORENC, et als., Plaintiffs,	)	Civil Action
vs.	)	ORDER PURSUANT TO REMAND OF APPELLATE DIVISION
THE TOWNSHIP OF BERNARDS, et al, Defendants.	)	

The Court having reviewed the decision of the Appellate Division in this matter, dated December 11, 1978, and having had opportunity to confer with counsel for plaintiffs and defendant township and defendant planning board, the defendant township is hereby directed to review the PRN zones to appropriately increase the number of dwelling units per site acre. Such increase in the number of permissible units is to be reflected in the municipal zoning ordinance prior to a hearing which is hereby scheduled before this court for March 12, 1979.

Dated: January 4, 1979.

B. THOMAS LEAHY, J.S.C.

Original hereof filed with the Clerk of the Superior Court on

1/4/79

B. THOMAS LEAHY, J.S.C.

EE

Exhibit EE

Order Denying Motion for Leave to Appeal

To Be Supplied