RULS-AD-1980-60 29 Jan. 1980

Stenographic Transcript of Proceedings (107)

19 March 1980 : Letter from Rosenberg to Neher
w/ correction to transcript (2)

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SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION : SOMERSET COUNTY
DOCKET NOS. S-8541, S-9153 P.W.

ALLAN-DEANE CORPORATION, et al.,

Plaintiffs,

vs.

TOWNSHIP OF BEDMINSTER,

Defendant.

STENOGRAPHIC TRANSCRIPT
of
PROCEEDINGS

Tuesday, January 29, 1980
Somerset County Courthouse
Somerville, New Jersey

B E F O R E: THE HONORABLE B. THOMAS LEAHY, J.D.R. t/a

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THE COURT: I understand the Public Advocate is going to be delayed.

MR. GORDON: Yes, your Honor, he was under the mistaken notion that he was going to start at ten and not at nine.

THE COURT: That was a marvelous tradition in 1961, I think. We will start without him. I'm sure he has some idea of what you are all going to state.

MR. GAVER: As a moving party, your Honor, I assume we should proceed first.

THE COURT: All right.

MR. GAVER: And, frankly, I wish to take my argument slightly out of the order that I originally contemplated because I think it's incumbent upon me first to comment upon the proposals submitted by Bedminster as to where we should go thereafter. I will deal with the more particulars later in my argument but I must say in all candor that I -- when I received this yesterday I was appalled at the disingenuous proposal proffered by this municipality which only serves to drive home to me the clear point that this town is apparently not the least bit chastened by the Court's subtle decisions in this area because the propositions

offered are merely another round in the same old game. And, the town apparently does not recognize the day of reckoning is upon it.

In effect, the proposal is that the situation should not be remanded to this municipality or perhaps to Mr. Roach whose name appears frequently. The municipality professes -- it is "anticipates there would only be minor" and I take that quote from their papers and there are differences between the parties were this to occur.

Frankly, in light of history of this litigation the attitude that this town has unfailingly shown to the public, to this Court and certainly to the plaintiffs in this case this proposition is incredible and fails ultimately to appreciate the gravity of this situation and the status of these prolonged proceedings. Ten years ago, your Honor, more than ten years ago from this day this plaintiff first approached the town with a concept toward developing this property. It received no response whatsoever. Subsequently, an action was instituted and a variance application was submitted to this municipality. The local officials refused to even hear the variance application. There followed a trial, several appeals and most recently a further

trial by way of a motion for relief to the litigant before this Court.

Each and every time this Court ruled that the conduct of the municipality and its legislative functions constituted sham zoning and was designed to that, what are the realistic developments pursuant to the constitutional mandate. Zoning in this area of this municipality has been studied. It has been restudied, studied again. We have been confronted over the last decade with amendments upon amendments but each time they have been aimed not toward any realistic development of multi-family housing in this community but rather aimed only at preventing development in some legally defensible fashion.

The zoning activities of this community have constituted nothing more than a rear guard action aimed -- enabled it to defend itself in some fashion before the Court but certainly not at encouraging the development of housing. Indeed, the Court must know that in all this time of zoning and rezoning no such development has occurred anywhere.

Frankly, the proffer of the municipality at this point is twelve steps back from, frankly, a moderate position I might have imagined them to be arguing before the Court today. The fact is that

this town cannot and will not deal objectively and fairly with this process, the zoning process to the extent it involves least cost housing and multi-family housing more generally than anywhere in the community. There's ample opportunity to do so and it has ultimately failed at every opportunity. Frankly, I personally consider this proposal an insult to the intelligence of the parties and the Court.

The relief we seek today is simply what we feel this Court can do and should do. We ask the Court to follow the contours of the Madison direction. We proffer no extraordinary relief beyond that point. Indeed, the relief sought is not novel at all. The Madison court laid out the reason for the what and why's, so to speak, of the relief they granted. And the relief in this case was promised upon certain objective criteria, certain findings of historic facts that the Court found compelling in that case. First, the Court identified the time period, noting that there had been on and off some six years of litigation and that regarding the zoning of that municipality, found that to be ample time for a community to bring itself into compliance.

Here we are talking more in the neighborhood of eight and one-half years. Yesterday, longer still,

there were far more trials -- trial dates and a different setting in the history of this case.

Also, the second criteria is more prolonged and yet in a sense narrow because in Madison, which was -- had an opportunity to rezone but once only then during pendency of the appeal and prior to there being what the Court identified as a subtle state of the law; this town has had a much longer period to rezone but has failed to do so effectively.

The Supreme Court said quite explicitly in the Madison decision that it considered that as of 1977, the date of the Madison Supreme Court determination, that the basic law was now settled and it would therefore not give a municipality a further opportunity to rezone. That date is advance -- is well in advance of the time when Bedminster in fact rezoned and rezoned again for the last time before your Honor. So, if the law was settled for Madison, the law was unquestionably settled to the same -- at least the same extent for Bedminster, which further had the benefit of the Madison decision itself. Again, the opportunity to rezone at least on one occasion was an operative factor and there can be no question that Bedminster has had that opportunity, has availed itself of that opportunity but is either incapable,

or unwilling to do so vicariously.

Then, there is the issue of good and bad faith. Madison did not sound its determination for specific corporate relief under any such finding. However, in the concurrence by Justice Pashman he suggested that where the trial Court were to find such bad faith that the situation would be even more compelling here. I don't have to remind the Court that on two occasions this Court has found that the zoning first, some years ago, represented the phantom zone lands, allegedly, assertively zoned for multi-family housing which, in fact, could never be produced as such and in the more recent zoning found that municipality had utilized governmental slight of hand in its rezoning. I presume by that the Court is referring to the odd way the municipality purported to zone for multi-family but only chopped up in little tiny pockets that were unlikely for any substantial development whatsoever. Again, I point out to the Court there still has been no such development under that thesis. Frankly, there is nothing clear to this plaintiff at this point and time and that Bedminster despite the knowledge of the desires and intentions of this developer among others and the fact of little or no concurrent development anywhere else has assiduously avoided

developing, permitting development on any realistic scale whatsoever.

Suggestion was made at one point that the problems with the Bedminster zoning were the result of what I characterize as ineptitude. Had they been more sophisticated they could have come up with sham zoning that would have been harder for the Court to sperse through to see the true intentions.

On the contrary, I would point out that Bedminster has been highly successful. Bedminster has very very successfully, on its repeated occasions, prevented any development whatsoever in this community. We are frankly, this plaintiff and the public interest, plaintiffs as well, are no farther now than they were in 1971 when the suit was first filed, despite the clear demand and clear need established before this Court for this matter of housing; not a stick of housing; that although in very very sharp contradistinction we note that large commercial ratables seem quite able to obtain rezoning on large tracts of land with remarkable speed and no apparent difficulty whatsoever. Housing apparently for Bedminster falls into a somewhat different category to be scrutinized but more carefully to prevent environmental damage in the line. It does not apply to AT&T.

In short, on each and every of the objective criteria recited by the Madison Court, the situation herein is indeed far more extreme than the equities, far more compelling. Frankly, we would urge that the failure to direct very specific relief to this community would be to reward this recalcitrant attitude, indeed the comtemptuous conduct of this municipality, in the face of prior Court orders and have a reasonably subtle state of the law. Now we get to the what after the why. As Madison concluded it is time for the focus "to be transferred from theorizing over zoning to the assurance of the zoning opportunity for production of least cost housing." As can be seen Bedminster is proposing a reversion to this self-same theorizing over zoning, a morphous planning concerns and issues, and the avoidance of housing development. We are going to put off Allan-Deane until we deal with the corridor and for the corridor we are going to concern ourselves with impact and the like, issues which the community has had years to deal with. To the contrary, we propose this Court follow the Madison prescription. That is to say, we urge as a matter of law and on the basis of the very extensive record before this Court, or as may be supplemented in this Court's discretion,

that an Order should be entered directing the approval of the plan subject only to minimum standards of the health and safety code, to be determined by this Court and by some independent master. Moreover, we would point out that we could go forward at this point to prove the adequacy of the plan, to prove that it meets all such minimum standards of health, safety and welfare, but frankly we think that is an exercise in overkill.

The fact of the matter is, your Honor, this proffer has been studied more extensively than any other project I am familiar with from every vantage point. Will not all of these factual bases and studies become a part of the record in this case? They were all transmitted to the defendants for their study in advance of the trial of this case. Moreover, we believe there are no legitimate issues of capacity as has been conceded in the course of this trial. There are engineering solutions to the kinds of problems that apparently are talked about. For these reasons, we feel that for any further proceeding whatsoever Bedminster should bear the burden of going forward. It should be required to identify and specify those health and safety issues that they profess to be concerned about so that they can be

within or out in advance and avoid red herring controversies at a later point. Moreover, we feel we are entitled to this prior to any supplemental proceeding so this Court can rule as to whether these are appropriate issues or not, so that we are not forced in effect to retry the greater portion of this prior case. To retry whether in fact they are non issues at all. Any such concern should be objective concern, engineering concerns and the like, and not subjective concerns. It should be very narrow and concern questions of design, state of the art in various engineering and expert capacities, and of course the parties must be limited to the experts and reports they have already furnished as required by the prior orders of this Court, so we are not forced to start all over again with this community as it seems to be urging, should be the case.

Thereafter, and to the extent necessary perhaps depending on exactly how this Court determines to proceed, simultaneously we should deal further in the town, should be required to deal further with rezoning of the balance of corridor, not the reverse as the town today urges. It now says, well, let's deal with the corridor and see how that comes out and then we will worry about Allan-Deane. This is just another

arrow to their bow of delay, your Honor. The Madison mandate is, to be met by this Court, it must deal first with the real prospect of development not potentialities. If the Bedminster approach were to be adopted by this Court, we would be talking about nothing more than this opportunity to rezone by them and another attenuated process of frustration for the developers.

This town has had many opportunities to exercise its legislative function but has elected in the past to employ those powers merely to roadblock development. Thus, we feel if relief were granted by this Court and was to be meaningful in accordance with the record and in accordance with the directive of the high Court, it must deal with us, it must deal with our project in some specific form and fashion and on a basis of how to make it work, not as suggested by the Bedminster side, on the basis of some vague de novo approach.

We would point out that on the basis of this record, as this Court has so found, that the proposals we have urged are ones of moderation. They are clearly within the density ranges the Court has found appropriate. So there really should be no controversy about that. Quite clearly, Bedminster proposed

to relitigate that very issue again.

Bedminster's proposal, which I want to now deal with in a little more detail because I think it's an excellent object lesson of where we are not, if it were to be adopted. It shows this town to be, if nothing else, consistent. It has adopted for many years a "go slow, do nothing" approach to development. They are perfectly happy and glad to deal with rather generalized issues of zoning and the like. And, they certainly wish to retain the reins as they propose to this Court today.

I wish to deal with a few of the examples, the issues that are suddenly of great urgency to this municipality which apparently have not been in the past. They first expressed concern over the council letter to the Court. The Pluckemin bypass. The Department of Transportation has no priority interest in this project we are now advised. That's very curious because it certainly was the state of the record before this Court over a year ago that this vote has been on the Master Plan for quite some years, but all of a sudden they proceed now because they could not interest the DOT in this project. Although, again, I point out that was perfectly clear a year ago or more, suddenly we have a major traffic

concern, problem to be addressed. It is simply too late in the game for them to be enabled to wield a new sword that they feel, to pick up before our own traffic expert. Your Honor will recall we have submitted to this piece years ago traffic reports knowing there was no problem whatsoever. They ignored those things but now all of a sudden it is an issue. The sewerage issue is so simplistic that it is non-sensible. In effect, the allegations that this project will use up all the capacity, whatever that means. Such that this plaintiff -- what I've been urging in development, as the Court has said, to the vigilant go the rewards; we have after all mounted this litigation for some ten years but more than that, the propositions factually are in error and represent another attempt to divert this Court from the real issues. The fact is there is no such thing as a capacity issue with respect to the sewerage. Our project, as I am sure the defendant well knows and DEP requires, will deliver water of ambient water quality, of such a level that it will not change the capacity of the requirements whatsoever. It is for the DEP to deal with this issue and no one can say there is a finite capacity as they use the term, what-soever. There is no such thing. The DEP will deal

with all projects on a case-by-case basis and no other way. More importantly, I suppose, we are not a public utility for Bedminster. For years, and this is cut perfectly clear in the record, this town has stuck its head in the sand on its sewer problems in Pluckemin and in the corridor. Generally, it has had a problem. It has ignored it. They made one half-hearted attempt to talk to Bridgewater. Nothing ever came of it. They have done absolutely nothing. Now today they come in and apparently are suggesting that private developers and Allan-Deane are going to have to deal with this municipal problem for them. This is a municipal function. It is for the town to deal with each sewer issue and to deal with them effectively, obviously, along with the developers. But they can hardly use their own inactivity as a defense to development at this point and time. They have ignored the Chambers Brook alternative which their own witnesses testified to.

We are talking about capacity and the like and the ability to supply sewers. The fact remains that it is simply not our function. They should be required to deal with this issue. There is no question about it, but all we heard from them in this long trial is that they are waiting. They are

waiting, they are waiting. Now, other communities around this municipality have dealt with problems, or attempted to deal with these kinds of problems. This town has simply done nothing. That is no defense of any kind whatsoever. Now, further, it is suggested that we should be involved in the Supplemental Proceeding. The Somerset County Planning Board, or Mr. Roach -- his name appears repeatedly in light of his history of this case and for no other reason; that is a preposterous recommendation. Mr. Roach, whatever else may be said about him, has clearly over the years adopted an advocative position with respect to this project, with respect to development in this area generally. He has testified in most of these cases. He testified in the Lorenc case, I believe. I believe he testified in the Austin case and has clearly, for better or worse, made his position known. That is a position that is quite contra to development in this area.

Now, whatever may be his abilities and skills as a planner, Mr. Roach hardly meets the definition of an appropriate impartial objective master to deal with these issues. Whoever the master is to be, it should not be someone who has taken a public position, has in effect become a witness for one party of the

case. Indeed, we would propose a very different kind of master for the Court's consideration. We do not feel that a master or Supplemental Proceeding should be a lawyer, nor do we think that he should be a planner in that sense because the principal function here is development. We are talking about, in the main, about how best and effectively and fairly to provide the development of a project. We frankly think that an appropriate master should be, for instance, an architectural firm with broad-based disciplines that could provide continuity to a case, could bring a variety of skills to the issues that would be independent of either party whatsoever but more importantly would have practical and common sense and a can-do sort of approach to development and zoning. Someone oriented towards making things work rather than, as a Supreme Court says, theorizing over zoning.

Finally, the township urges that we have to concern ourselves very delicately with the capacity of this community to absorb a project of this kind and presumably whatever will happen to the balance of corridor.

This certainly is a remarkable issue to be made at this time. I would remind the Court, they made

this kind of issue during the course of the trial in opposition to our attack on the zoning. The fact is that this town has done everything to prevent the development of that kind of structure, that kind of capacity. This is clear from the long record in this case and now to say that the successful plaintiff should be barred from development because of this self-created hardship, to use a variance term, unilaterally caused by the municipality itself, is a totally circular argument. We certainly cannot reward this municipality for their past inaction and lack of cooperation. They simply are going to have to learn to deal responsibly with the effects of development.

In sum, we are, and I frankly was amused when I read the plaintiffs stand accused of "short circuiting;" that's the term in the brief, "short circuiting" it, or the municipal process. Incidentally, according to Bedminster ten years of trial is a short circuiting of a local administrative process. They complain they have had no opportunity to deal with any specific plan and therefore should at some point have that opportunity. One might think reading counsel's memorandum that one day this plaintiff simply charged into court and obtained a judgment within thirty days before they could even catch their breath. The fact

is as candid, as apparent from this long record. This plaintiff approached this town over ten years ago. They wouldn't talk to us. We applied for a variance. They wouldn't even hear it. We have attended Master Plan and Zoning Ordinance, public meetings to attempt to put forth our position and list even some commentary so we could generate a dialogue. Nothing. They closed their eyes and their ears to this plaintiff for a decade. The off-the record advice from this municipality has been even more pointed and clear to us. To talk about this community not having had an opportunity to deal with this plaintiff is ludicrous. They have had repeated opportunities to deal with us, to negotiate. As Mr. Ferguson urges one cannot negotiate with someone, your Honor, unless that party is willing and truly desires to arrive at some workable solution. Otherwise one is talking to a wall and it is that kind of wall, stone wall that we have confronted for many, many years. If they had this opportunity, they have forfeited it. They have elected quite consciously not to avail themselves of it for all this prior period. It is awfully late in the game to come before this Court and say, well, give us a chance, we are good boys now. They speak as if this opportunity is some manner

of God-given right. It simply isn't. It is granted by statute from the state. It goes -- comes from no other source. This community has been found, during this period, to be in direct and repeated violation of state law, state policy and constitutional mandate. It has been in defiance of the very orders of this Court to the extent it had had an opportunity it did not elect to use.

We have set forth in our papers, your Honor, a very detailed proposal and frankly, while it is long we feel it requires this manner of determination by the Court; we think the Court must make certain findings at this juncture and further corrections either through this Court or through a master. It must be specific and to the point. It must be oriented toward our application. But, the heart of our application here today is specific corporate relief. That is to say that correction for approval of a plan subject to minimum objectiveness for health and safety that that municipality is entitled to. These are, should be determined by an individual arbitrator or by this Court in a subsequent proceeding, but nothing short of that will provide practical relief nor will vindicate the prior directives of this Court found to be ignored.

Thank you.

THE COURT: Mr. Gordon, why don't we hear you and we'll hear the response.

Counsel, would you like to join the other counsel in this matter?

MR. GORDON: Since I didn't afford the Court a written response as did the other party, I might be a little bit more wordy today in presenting my point of view.

A fashionable remedy this Court must keep certain essential points in mind. This litigation has been going on for nine years. No housing for lower income people has been built in Bedminster in that time period. In fact, no multi-family housing has been constructed. Any remedy therefore must be achieved without delay and it must be effective. The goal here is to get housing built. The whole purpose of litigation of this type is so that housing can be constructed for elements of our society for whom the opportunity to live in a decent environment has been foreclosed. Timing is essential. In this area of the law, to delay is indeed to deny.

Quotes from two commentators are particularly appropriate. Mytelka and Mytelka stated that "Where a municipality has engaged in exclusionary practices

particularly where it has done so in the face of precedents like Mount Laurel, the overriding judicial consideration should be to get housing built without delay."

Rubinowitz in his book on low income housing stated that "In exclusionary zoning cases the measure of whether the remedy is working should be actual construction of low and moderate income housing."

We are dealing here with an obviously recalcitrant municipality who has plainly resisted providing the opportunity for housing all segments of our population. Their good faith must not merely be questioned but it is obviously missing and has been so for nine years. They plainly do not want lower income people in their town. This Court must clearly keep that in mind in fashioning the full remedies of specific corporate relief and rezoning. The defendants would have you hold an entire hearing on the issues of Allan-Deane's site plans and its feasibility as far as environmental and other constraints in the corridor where the rezoning will occur. This is an obvious delaying tactic on defendants' part. Delay has also been an ally of the municipality that zones in a collusionary manner to keep out the lower income segment of our society.

Environmental issues have already been addressed in this case. Environmental testimony was presented at length in the first trial. The outcome of which was at the western bulk of the town because of environmental sensitivities, it should remain zoned for low density development, but that the corridor with its present need for sewering, its availability of roads in Interstate 78 and 287, as well as 202 and 206, was the place where growth should occur, and where Bedminster Township's low income housing should be located. This has already been resolved.

As to Allan-Deane's sites specific relief as to the zoning, such testimony as to carrying capacity would be inappropriate. Objective criteria concerning minimum of standards of health and safety can and should be utilized at site plan approval process, not at this time. Carrying capacity is such a vague concept that a full evidentiary hearing will prove little assistance to the Court or to a master and will only serve to lengthen the proceeding and create future delay.

We can all easily envision another trial similar to the one that we have completed dealing with such nebulous concepts as carrying capacity. Given the history of this action and the attitude of this

municipality, a full-blown hearing dealing with specific sites in the corridor and whether or not they are appropriate for more intense development would only serve to facilitate the town's purpose to create more delay. Such sites specific determinations are more appropriate at a later stage. At that time objective criteria will be utilized to determine if a specific development can and should be built as well as the intensity of the development.

In discussing the possible utilization of environmental testimony at this past trial, your Honor stated, I will permit the testimony on the general issue of their constraints that impose a maximum, a reasonable maximum development level within the Bedminster-Pluckemin corridor. If there are proofs that the town has rezoned so far as it could reasonably do within that spot, speaking of the corridor, I will listen to them, weigh them and consider them. Yet no testimony other than Richard Copolla was forthcoming. He basically upheld the reasonableness of the zoning of the town and especially the corridor. But your Honor found otherwise that the zoning in the corridor was clearly not appropriate. The town alleged that they had zoned for maximum development. To allow them to come in now and say, well, if we were

wrong we will now present further testimony to show what a new maximum should be, is ludicrous. They had their chance. To open this up again for a full hearing would be totally inappropriate.

The defendants, through their counsel and through their failure to enter proofs, admit that as far as they are able to determine, there are no environmental limits to the development in the corridor which cannot be served through engineering and development techniques. If there are limits they should be determined by an objective criteria standard to be set forth tracking the municipal and use law by which determination and density on specific sites can be made at the site plan approval process.

I believe, as to specific corporate relief, I believe that the reasons for specific relief have been more than adequately set forth in Allan-Deane's brief and argument. Such relief creates the incentive for the institution of socially beneficial, but costly litigation as well as serves the utilitarian purpose of getting on with the provision of needed housing for at least some moderate income elements of the population. The housing market is so tight in this area that the development of any housing could

only have a positive effect, even if it is merely a filtering down process. However, one thing must be made clear and stressed continually. The principal of that building, multi-family housing, or providing zoning so that multi-family housing can be built, will provide only expensive luxurious multi-family housing given the nature of this area and its history, given the market situation as it exists in this area of Somerset County. Merely allowing multi-family housing will not strike at the central problem and goal, that is providing the opportunity for housing for all segments of the population, especially to the lower income element who have been foreclosed from such housing opportunities.

Therefore, although the Cieswick plaintiffs wholeheartedly agree with the bulk of Allan-Deane's argument for specific corporate relief and feel that any immediate headway into zoning the housing prices will be done by Allan-Deane, one element of their plan as presented in their brief is apparently lacking. That is the provision for housing lower income people. That Allan-Deane's site plan in its present form provided for two hundred senior citizen units, 135-subsidized units and a proposed 50 units for sale that would be entirely subsidized.

Both Allan-Deane's president and counsel have represented to this Court their moral commitment to develop twenty percent of their plan in a low or moderate, at least, cost manner.

Mr. Murar was testifying in offering an option to a non-profit organization to build a senior citizens and subsidized units as well as placing a net on the 50 for sale units on the hill run with the land who indeed said the land will provide least cost units. And that Allan-Deane would in turn subsidize to allow this.

This is precisely what the Madison Court did in granting corporate relief therein. The Court can then leave the determination to the master along with other sites specific decision from the appropriate breakdown of that twenty percent between family and elderly units, the siting of these units within the development, specific provisions as to governmental and various internal subsidized resale provisions, deed restrictions and the pricing of units that are entirely subsidized plus other considerations, plus such conditions must be determined prior to the issuance of the building permits. The twenty percent must be firm as Allan-Deane has initiated this suit in the public interest and has emerged victorious on

the compliant issue by substantiating the allegation that housing for the lower income people have not been possible under the Bedminster ordinances, that they cannot be heard to back down from this twenty percent commitment to the very same lower income people. The Cieswick plaintiffs have even listed the tenants association as an appropriate non-profit corporation. If the Court deems it proper I would suggest that they should be joined in this action as a plaintiff.

As to rezoning, it goes without question that the defendants should not be entitled to rezone again. Their display of bad faith in drafting this now and validated ordinance is eminent. However, unlike the Allan-Deane timetable as presented in their brief, the Cieswick plaintiffs feel that initiation of revision of the zoning ordinance and other land use ordinances should not occur nine months from now. The Court has heard extensive testimony concerning fair share obligations, costs generative provisions and other faulty provisions of these ordinances. The Court has a wealth of information which it can apply along with suggestions that are to follow in providing recommendations for a rezoning, said rezoning or at least certain specifics can be,

could be done by plaintiffs with the costs borne to the Township, but then would present the revisions to the town and the master. The master, along with any other experts he or she requires and with the recommendations of the Court, could then further refine the ordinances. This method would obviate the inherent delay in instituting land use ordinances by initially placing the entire task on a master who is unfamiliar with the facts that have been presented to the Court. The Cieswick plaintiffs are attempting to minimize the delay as much as possible in the utilization of a Court-appointed master.

If, however, the Court chooses to leave the entire task of rezoning to a master, the Court should provide him or her with specific guidelines of necessary provisions and provisions of prior ordinances, which are problematic so that the master would have a precise framework in which to work. The Court clearly has the power to rezone or order a rezoning of the town.

Justice Pashman said that when constitutional rights have been violated and the responsible governmental agencies have failed to create the violation, the Courts will have a duty to provide effective

relief by taking whatever reasonable steps are necessary to right that wrong. I believe, that effective is the operative word.

There is an emergent concept of affirmative judicial action noted by New Jersey Supreme Court in Robinson v. Cahill, and likewise in the U. S. Supreme Court decision in Hills v. Catreaux at 425 U. S. 284, where the Court noted that in the event of a constitutional violation, which is what we have here, all reasonable methods must be available to formulate an effective remedy.

I would also suggest that the Court look at Number 74 Michigan Law Review at 77 on this issue.

As I stated previously a mere rezoning of the corridor to permit multi-family housing will not alleviate the problem of housing lower income people. The affirmative steps in the rezoning are required. As the Court noted in Mount Laurel, he concluded that every such municipality must be within its land use regulations which presumptively makes it realistically possible and appropriately the right choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and its regulations must affirmatively afford that

opportunity at least to the extent of the municipality's fair share of the present and prospective regional need therefor. In addition, the Madison Court held it goes without saying that the zoning in every development municipality must erect no bar or impediment to the correction and administration of public housing projects in appropriate districts. Yet Bedminster has barred such housing. Therefore, the Cieswick plaintiffs request that a rezoning encompass an order for a resolution of need to be drafted by the defendant. The resolution of need is a minimum condition for any New Jersey housing finance agency. The Court made a finding of fact as to this in the first trial. The defendants' witness, Mr. Roach, within supported that and Mr. Graff testified he would support it now, now that he understands its purpose.

As Justice Pashman observed failure to actively cooperate in the implementation of some programs as effectively that words the meaning of regional needs for low-moderate income houses as does outright exclusion.

Allan Mallach testified that in addition to a lack of resolution of need, subsidized housing could not be constructed in Bedminster because of no provisions

for tax abatement. Although Bedminster has a very low tax rate the New Jersey Housing Finance Agency desires top abatement because of potential changing circumstances during the terms of the mortgage whereby tax rates could rise. Five separate housing acts in New Jersey made provisions for top abatement. They are the New Jersey Housing Finance Agency Law, Limited Dividend, Non-Profit Housing Corporation or Associations Law, Urban Renewal Corporation and Associations Law, Urban Renewal Non-Profit Corporation Law and the Senior Citizens Non-Profit Rental Housing Tax Law. The entity of the legislator to provide for tax abatement and probably assisted housing, is clear. Bedminster should not be allowed to flaunt acceptance of this requirement any longer. The Court has the power to order defendant to adopt provisions for tax abatement, otherwise Bedminster will continue to create the bar or impediment to publicly funded housing to which the Madison Court was speaking and expressing admonition.

As to the actual mapping for multi-family housing in the corridor, we reiterate that this should not be the subject of another expensive evidentiary hearing. The Court cited the failure of the town to comply with the provisions of Somerset County Master

Plan. That plan provided for densities of from five to fifteen dwelling units per acre in two village neighborhood areas which comprised 1,150 acres.

The question is whether that five to fifteen requires a gross or net density. The Somerset County Master Plan in speaking of open space in relation to density seems to be utilizing the concept of gross density. Mr. Roach, on the other hand, maintains that net density is considered. However, Mr. Roach's testimony is confused. He argues that net density does not include open space, yet it does include a ball field and recreation area which is what the Bedminster Zoning Order had provided for, its open space. In addition, Mr. Roach agreed that six to ten dwelling units per acre in the R-20 zone so within the range as set forth in Somerset County Master. Yet, that six to ten concern gorss density, your Honor, in the first trial, compared the gross densities in the then zoning ordinance where the five to fifteen stating that the proofs established that this type of use anticipates five to fifteen dwelling units per acre whereas the ordinance as adopted permits no more than three units per acre. We are clearly dealing with gross density here.

John Rahenramp testified that that dense is

useless. They do not act for grade nor are they useful in determining impacts. This factor along with the Court's prior findings as to the appropriate density for garden apartments and townhouses, which by the way were findings of fact made in the first trial, that generally townhouses are developed at a density of eight to twelve dwelling units per acre and garden apartments at ten to fifteen, sometimes as high as eighteen to twenty. All this must be taken into account when rezoning the town.

Mr. Roach testified that those two village neighborhoods lots were flexible and movable and that the concept of the Somerset County Master Plan was to expand the existing village neighborhood within the area delineated. Since the appropriate area for development has been determined to be the corridor area east of Interstate 287, those village neighborhoods should be moved within the corridor. Though Madison says that the Court does not have to determine a fair share figure, it did say that fair share testimony could be helpful to the Court and Justice Pashman said that in forming a remedy fair share should be taken into account.

In this case we have had three fair share numbers thrown into the hopper. The State Housing

Allocation Plan came up with the low and moderate income figure of 1,346 units to be developed in Bedminster by 1990. This is the only regional fair share plan that has been developed and completed. This should be kept in mind in regards to Madison language that a fair share plan is a matter for the legislative or an agency of the state. The defendant's fair share expert derived in 1980, fair share from approximately 700 to 1,000 units, which he said should be doubled for comparison purposes to the 1990 plan. In that event 1,362 to 2,180 units would be warranted by 1990.

As the plaintiffs' fair share figure to the year 1990, 2,300 to 3,500 low and moderate income unites are required. Given these figures this Court can make a reasonable determination that the state's figure of 1,346, well be it a lower number than it should be because AT&T figures and tax ratables for the most part were not included. At least the amount of low and moderate income housing that Bedminster Township should be zoned for this must be a minimum. The Madison Court recognized that the defendant's fair share expert and defendant's fair share expert rejected low zoning for units. One thing is clear; Bedminster has a fair share obligation.

I think too often we recited -- we lose sight of that. It does not mean that the corridor has a fair share obligation. It means that Bedminster Township has a fair share obligation to fair housing of low income housing. The proofs have established that the obligation shall be done within the corridor. However, defendant now claiming further sensitivities in the corridor. Over eighty percent of the town has already been deemed to be off limits to lower income people because of ecological sensitivities but the Court has found that the corridor can and will stand growth.

John Rahenramp testified that the corridor could accommodate in excess of 16,000 units. The Somerset County Master Plan provides for up to and in excess of 15,000 units in its village neighborhood designation there. The corridor and must accommodate more intensive land use. It presently has a sewer problem and needs -- it has transportation accessibility and the fair share must go somewhere. This area needs housing and Bedminster must provide the opportunity therefor.

Mr. Ferguson has argued and will undoubtedly argue today that Bedminster should not have to provide what Madison provided for. That the issuance

of building permits to Allan-Deane for their site plan and a rezone for higher density should be carefully done for fear of too great an ecological shock in Bedminster. He has testified and unlike Madison there has been little growth here. All this indicates though is that history of elitism in this municipality; this is clearly time for a change. We are now into the 1980's. The world is changing around them and they must accept the inevitable growth.

Another fact that must be kept in mind is that a rezoning of the town will not necessarily mean that housing will develop. Much is depending upon the desire of the plan owner and on the standards to be set forth in the revised zoning ordinance as to open space required quantities of land for PUD's, et cetera. Though these standards must closely track municipal land use law.

Mr. Ferguson has expressed fear of too much growth in the corridor. It may simply not come to pass after all; there are three areas of the town that are developed for potential of 7,700 twin units which Mr. Copolla argued coulddefinitely be built under marketing conditions. My understanding, frankly, there are nearly fifty to one hundred units in that

area and it is highly speculative if not plainly doubtful if the 7,700 twin units will be built in the western portion of the township.

As to a rezoning of the corridor, there must be a mechanism developed so that a set portion of future growth will provide the needed housing for lower income persons. This requirement is necessary for a few reasons. Merely rezoning for multi-family housing at a certain density will not guarantee the supply of lower income units to enable Bedminster to effectuate their fair share.

Secondly, the zoning for multi-family will only provide extensive units given the market conditions in the area. Development of extensive multi-family housing without provision for lower income units will use only available land supply and effectively foreclose any possibility of lower income housing units being built there. As the amount of land zoned for multi-family land use dwindles, the price of remaining land so zoned will rise. There are various means to achieve the required amount of lower income housing. The method that is utilized in drafting the ordinance can be determined by imput to any recommendations by the master.

However, the Court must determine that some

means which does guarantee lower income housing be incorporated into the rezoning of the township. The most widely discussed method is the Mandatory Percentage Ordinance. Such ordinances are on the present and various forms and with various provisions around the United States. These ordinances condition future development upon a mandatory percentage of lower income units.

The Cieswick plaintiffs feel that given the history of exclusions by the defendant and the socio-economic makeup of the region, as well as the percentage of Allan-Deane's development for lower income housing, at least twenty percent of prospective housing units should be directed toward lower income persons.

Justice Pashman, in his Madison concurrent noted the potential use of this type of device. In so doing he made sure, is that rift of the supreme court decision of Fairfax Board of Supervisors vs. DeGroff arguing that the holding therein as to exceeding the authority granted by enabling account was restrictive and that the determination therein as to be a constitutional taking within just compensation could be avoided by careful draft membership to ensure a fair and reasonable return to

developers. The DeGroff Court held that such ordinance exceeding the authority granted by the enabling act because it was socio-economic zoning not physical zoning. The Municipal Land Use Law, Provisions and Purposes Section, however, provides for land use which will promote the general welfare, public health, safety and morals. It also provides that a zoning ordinance may regulate the nature and use of the land for residential purposes.

In addition the New Jersey Statutes at 40:48-2 provides for other necessary and other ordinances to promote the general welfare. There is a clear directive as well from Mount Laurel and Madison that a socio-economic zoning is permissible and necessary to provide the much needed housing for lower income persons.

Judge Eynon in Camden County Superior Court recently up held a Cherry Hill zoning ordinance which contained a mandatory percentage requirement for lower income housing. He determined that the ordinance was within the police power and had a presumption of validity which had not been overcome by clear and convincing evidence. In addition, he found socio-economic zoning clearly permissible.

As to the issue of taking, Judge Eynon following

Helmsley v. Fort Lee found that there was no taking in an economically deficient developer would be able to take a just and reasonable return and that this developer was not as efficient as he might have been. The validity of a zoning ordinance depends on its ability to promote the general welfare. If it imposes a requirement to provide for a variety of housing choices as determined in Mount Laurel it was stated there that his plan beyond dispute that the proper provision for adequate housing for all categories of people is certainly absolutely essential in promotion of the general welfare required in all land use regulations.

The numerous statutes designed to alleviate the need for housing evidenced a clear legislative intent to deal with the problem. This type of ordinance promotes the general welfare by integrating people of various economic and racial backgrounds by disbursing lower income away from central cities and ending their cycle of poverty and by erradicating the slums and the like. The accute housing for all people is detrimental to the general welfare and must be alleviated. To avoid any challenges to this type of ordinance based on a taking of argument it must be well drafted so that the diminution of value to the

developer. Provisions will be established to assist the developer who is bound by the ordinance. Various provisions and bonuses could be included to provide pluses for the developer.

One scenario of this type of ordinance would zone all the land for single-family uses at one-half acre development or garden apartments at two to three per acre or if the developer chooses to provide the twenty percent for low and moderate, he is allowed ten dwelling units per acre over traditional mandatory uses ordinance require the twenty percent or whatever for the developer. However, the developer is then entitled to build a half or one unit of conventional housing for every required subsidiary unit. Since he is not losing any units he can allocate land and improving costs to only the conventional units. Other incentives that can be utilized are an expedited approval process, flexible site plan of design requirements, waiver of fees, et cetera.

The point in regard to the developer is that when someone wishes to develop his land and maximizes his profits from that land, the general welfare requires that he make a reasonable effort to supply low and moderate income housing. In addition, an

owner is not entitled to have his property zoned for his most probable use.

At this time it is premature to get into the hard core of these types of ordinances and these types of provisions. However, the Court must accept the concept or lower income housing will never be a reality in Bedminster prospectively.

I would direct the Court to an article at 21 U.S.C.L. Law Review at Page 1432, which gives a full picture of nuances.

Another affirmative remedy should be a moratorium on industry and corporate development unless either low income housing is provided for employees or the tax assessment from such ratable is utilized by the Township for provision of lower income housing engendered by such ratable. As an element of the rezoning, plaintiffs could draft this type of mandatory percentage ordinance as well as review the invalidated ordinances for necessary changes again to be funded by defendant municipality and presented the same to the master, or the master can be given the opportunity to hire an individual or however many are necessary with the necessary expertise to draft such an ordinance while revisions to the old ordinances are suggested to it by the Court

and the plaintiffs. In conclusion the Court must be willing to provide effective remedy in this manner. Bedminster has flaunted this Court's order as well as the concept set forth in Mount Laurel and Madison.

After nine years the Court must take the step in providing the affirmative relief which the Cieswick plaintiffs as well as Allan-Deane seek.

Thank you.

THE COURT: Thank you.

As this point we will take a recess for approximately fifteen minutes.

(Whereupon, the court recessed.)

THE COURT: I don't know whether to call on you, sir, or Mr. Ferguson, so you are in somewhat of an objective position. I will hear you and then hear his remarks to every one of those.

MR. MEISER: Your Honor, the public advocate is here as an amicus because the Bedminster, along with the Mount Laurel case have become the two most prolonged and probably notorious cases in the state. Which is why it is the public advocate's feeling that the resolution of those two cases will have a profound impact on the attitudes and conduct of municipalities throughout the state in adopting their land use policies. It is for that reason we are here.

Three years ago the supreme court in the Waymont Township case at 7 N.J. 287 said that the right to decent housing is a preferred status under our New Jersey constitution in any government action which impinges about, upon the subject should have careful judicial scrutiny. That careful judicial scrutiny has happened but I think the next step is to see that the same careful judicial scrutiny comes for remedies to see that the remedy works now.

I think that's the important test. Does the remedy work now to provide decent housing for those people who need it, who have a preferred constitutional right to it?

In the Mount Laurel case in which we are involved, the trial Court on remand ordered but review of the developers interveners application for mobile home park. The Court stated that this development constitutes the only prompt and realistic relief that be given -- that can be given to plaintiffs to make available an actual supply of least-cost housing in the near future. I think here we have precisely the same situation. The only realistic alternative for housing in the near future is that Allan-Deane proposal. With that in mind, I would like to address a few of the questions that

have been raised in this case and give our position on that. The easiest question and the first one is should there be a corporate remedy? Even if we consider as in Madison that that is a rare relief, I think it is conceded that the length, the duration and the expense of this controversy justifies some form of corporate relief. I, indeed, I think that's the only thing that might be disputed at this point.

The second question is, the timing of the remedy. Which should come first, rezoning or review of the Deane application? The township has suggested in its brief that the rezoning should come first then look at the Allan-Deane application. The supreme court in Madison used a different approach in their findings. They directed the trial Court to first make findings of fact as to whether a building permit should be issued and under what circumstances. Then at Page 553 of their decision they said within ninety days thereafter that that finding is made, then the township shall submit a revised ordinance for the judge's review. I think if the question is housing and housing opportunity then that which has to come first is that which has the opportunity to provide the housing for the Allan-Deane proposal. The other housing may come in the future and should come

in the future but I think two things cannot be done simultaneously and I think the first thing needed is that which can produce the housing.

THE COURT: Why do you say it couldn't be done simultaneously?

MR. MEISER: Well, they could be done simultaneously except that the people involved can only devote their efforts to one thing at a time. I think that for example, if either you were to be reviewing this, or a master, the person would have to start somewhere. You know, to simultaneously try to look at zoning ordinances to see what can be done, to simultaneously look at the site plan, the problems with it,is simply asking too much and is going to delay things. I think the easier thing is to do what was done in Madison, to do the decision on the application first and then go to the zoning ordinance second. I think that that procedure by the supreme court was done, wherein to recognize that the goal is to get the housing built first where it can be built. So that would be our recommendation on that point.

Perhaps the most important question is the status of the application of the proposed development. In Madison the Court suggested that the goal was to direct the issuance of the building permit for devel-

opment of the project which the builder proposed. I think what the supreme court was saying was that there would be a presumption that the development as proposed would be built subject to modification where it is necessary to protect the health, safety and welfare but that there was a presumption of validity to the plan in the Mount Laurel case. That same type of rationale was followed. The trial Court in the Mount Laurel case said that if the builder's applications complies with the minimum property standards for mobile home parks of HUD, then it is presumably deemed to be in accorance with the public health and safety. The Court went further and said that if the township wanted any changes they had to specify their reasons why those changes were necessary to protect the public health, safety and welfare. They also had to give an estimate of the additional costs that would be imposed by that change. The goal was two things: (1) to find out if there were real needs to modify that application to protect the public health and safety. And (2) to prevent additional major cost increase and factors to be entered onto the project.

I think that type of approach is appropriate here. The township could and must have the opportun-

ity to make suggestions as to whether changes are needed but I think they should be required to show, one, why these changes are necessary and, two, what the cost impact would be so that the changes don't become so substantial as to make impossible the provision of least-cost housing.

Now, the next question is how should they do this review? In the Madison case the Court suggested that -- it was the duty of the Court and not the planning board to make this review; the review of whether and/or under what circumstances the building permit should be issued was done under the enforcement and supervision of the trial judge. In Madison the Court also recognized that the Court had the power to get the assistance of a master where needed and where appropriated. I think the Court was saying that when there has been a striking down of a zoning ordinance and a finding that the township is nonzoned in good faith, that the need to establish a close careful remedy means that that power has to be thrust onto the Court and if the Court feels it is a matter of judicial economy of its time schedule the needs, the assistance of a master itself is free to get that assistance.

I think the Court in Madison, however, was

suggesting that this role does not belong to the planning board at that time. Now most of the questions that would come before either the Court or a master at this time are really engineering questions, architectural questions about design about the sewerage about water water treatment. They are not questions that you can find the answers in law books and if that master is to be an attorney, I think from the very start that attorney needs the assistance of an architect and needs the assistance of an engineer who is going to be available to provide the assistance and the answers that neither the Court nor an attorney could necessarily provide. So I think essential to a speedy disposition of this is getting that type of technical assistance.

One other fact that has become important to the public advocate is that if this master is created and we feel that it is desirable that he is, he should be retained on hold even after a building permit is issued -- one of our concerns that have developed has been that even after a building permit is issued there can be problems where certificates of occupancy are needed along the way, that can stop and could quickly impede a future development. After the master, even on hold, would be a strong inducement

to either let the parties work this out or get a quick resolution of this matter. So our recommendation would be that if this Court does not have the time to do it and if it does not have the ability and I think realistically a judge does not have the ability to do this or the time that a Master with the technical expertise provided to allow him to answer these technical questions should be set up.

The first question on this subject of the builder's remedy is the question of the least-cost housing. In Madison, the Court suggested without going into details the twenty percent of the housing should be low and moderate income housing. I think, that should be part of the remedy here. I think, also, a Master should have the discretion to see how that is implemented. There are two possible situations that could occur with the Master input could be valuable.

First of all, true least cost low income housing is dependent upon Federal Subsidiaries. No party to this litigation nor can the Court guaranty those subsidiaries are available. In the event that they simply aren't available I think the Master should have the discretion with help of technical assistance to framework whatever type of remedy would then

provide the lowest, least cost housing available and make sure that that's part of the provision.

Secondly, should any problems with municipal interference come up, that would perhaps frustrate this least cost type housing the Master should have the power to resolve that and issue appropriate order. I think that we are saying to the Court is that it should offer the broadest directions to the Master. Though the directions consist of perhaps minimum of three things. First, that housing can environmentally be built and should be built in this area and at a certain minimum density. Secondly, the Master should smooth out any problems as far as site plans, as far as technical details, considering the cost impact of any changes. Third, the Master should be at least on a stand-by basis after the building permit is issued in the case future problems should come up. Fourth and finally the Master should be available to work out any problems as to how the least-cost aspect of the development is implemented.

The final part of the remedy is the Zoning Ordinance. I would offer only two suggestions on that. First of all, the Master should with the assistance of all parties be directed to draw up guidelines for the rezoning of the area which the

Court has designated. I think, a minimum density should be established there but, I think, finally because this is going to be the only other area of the town which least-cost type housing can be built. That this type of high density area should be a conditional use subject to the developer coming in with the least-cost housing proposal to the Township. I think that this is being done in numerous places throughout the State and the country and a developer who wants to build in that area would have two choices. Either he can build traditional low-density single family housing or if he wants the type of high-density zoning that this Court has said is permissible and is environmentally acceptable there he should make provisions to the Planning Board of Bedminster, to see that there will be a least-cost segment there.

Basically, these are our major recommendations. We feel that this Court cannot issue a detailed fifty page order to the Master. We don't feel that this Court is in a position to write the Zoning Ordinance. We feel that this Court by giving that type of general guidance to a Master can carry out the goal of a Madison which means, let's get the housing built. Now, let's get the building permit issued as soon as possible. That is basically our recommenda-

tions and our goal.

Quite honestly to see it in effect remedied for Bedminster, to end this case after years of litigation and also serve as an example to other towns had to comply with the Mount Laurel obligation and what the penalties are if they don't comply.

That would be our presentation, your Honor.

THE COURT: Thank you very much.

I am sure it is food for thought.

Mr. Ferguson, I will hear you.

MR. FERGUSON: Your Honor, I feel humbled by the task presented to me by the opposing counsel. We seem to have litigated the zoning case at length. What I thought was in the zoning case is now in the remedy phase of the proceeding. We are talking about hearing the ills of the world specifically the housing shortage and the nonexistent housing for the low and moderate income groups in the State of New Jersey. I think, one fundamental point we have to bear in mind is that this Court is basically, absolutely powerless to make any real dent in the housing shortage in Somerset County or this State of New Jersey for low-income groups. That's a problem of economics. The world has passed that problem by in terms of making it much more expensive than the

certain segment of our population can afford. I think, under the guise of affirmative action once you establish some kind of failure to conform to a constitutional standard then the ballgame is wide open. Now rules are being written and the Township of Bedminster is expected to solve those things which Mr. Gordon talked about and he, apparently, Allen Mallach, Paul Davenoff said that the problems today are racism and poverty and this zoning suite is in appropriate form to address it; and, I submit to the Court that is simply, is this not a zoning suit?

Now, let's look at Madison Township. Let's look at that case and see what it has to say about zoning suits. Mount Laurel started out and it seemed to say that a developing municipality had an obligation to provide housing. Madison Township said in effect we were wrong on that. The Courts don't provide housing. The Courts can only make a town's policy provide housing opportunity. The least-cost device, the phrase least-cost housing is a tremendously significant phrase. What it means is that we want government to interfere as little as possible in the development process. The reason is that the more government interference where it really doesn't need the higher, the cost of housing that can be built in antitrust

terms, the relevant market is the land in the town and the submarkets are the developable land as appropriate for development. We want the people who control entry to that market and submarket to erect at the least number of barriers possible. That is what least-cost housing is all about.

The evidence in this case is fascinating. We look at it from that economic perspective. Bedminster took the Mount Laurel mandate, provided an opportunity for housing, for a fair share of low and moderate income people and it tried to develop conclusionary mechanism. Some of those mechanisms were found by this Court, at least by inference if not directly, to be cost generating. That is a separation between our thirty in some of the bedroom distribution provisions. They were conceived of by Bedminster to be conclusionary to make a developer build a variety of housing rather than just luxury condominiums in two bedroom modes. If we interfere too much and they are cost generating then obviously they have to go but the attempt was to make a developer actually provide by the controls in the Ordinance. If those controls are thought of as making the developer to do much and making it too expensive and John Rabenkamp contends to deprive the developer of flexibility then

they have to go and we are left with minimum governmental interference. Mr. Graber repeated those minimum interference with minimal standards of health safety and welfare. What Mr. Gordon is talking about is maximum interference. He used the phrase again and again. As long as the landowner, the developer gets a fair and just return. Where does that phrase come from. It comes from the rent control cases and that again is maximum government interference to create -- to achieve some kind of social goal out of an imperfect mechanism when the free market won't do it itself.

I look at Madison Township as a very conservative decision. It is saying the government you have a role and you must fulfill that role but you can't overdo it. And, basically, we think the free market will do its best to supply society's needs if government leaves it alone. The remedies which are being suggested here today really constitute maximum government interference based upon the social theories perceived in 1979 and this is attempted to be wherein into an Ordinance in 1979, 1980 to control development over the next twenty years in Bedminster. I submit to the Court that the history of American society has been at a just and simply will not work. I don't

think the Court in Madison Township thought it was going to work and no history economic or otherwise that I am aware of that says it will work.

We have heard quotes from Justice Pashman in the very case and I would point out to the Court that Pashman is not the author of the majority opinions. Justice Pashman is either in dissent or concurrence position as to remedies and affirmative action in the housing deal and this type of zoning cases have not been adopted by the Supreme Court. I submit to the Court that they will not be.

Mr. Gaver started out by talking about the why and the what. I would ask this Court to look at the why. This litigation has resulted from the failuare of Bedminster to give Allan-Deane his magic number of units, which guaranteed to Allan-Deane a certain profit or the feasibility to build the very expensive waste water treatment plant which would allow them to treat the affluent from their plan development in two townships, not just one but two because don't forget although they ask for 1,849 units in Bedminster they ask for additional 3,000 or so units in Bedminster Township. The sewer plan in Bedminster is the key to the whole development. Bedminster did not think it appropriate to give Allan-Deane that number of units

in 19--well throughout the entire litigation. That is the nub of this whole dispute. Not whether you should have multi-family housing because Bedminster had zoned the corridor for multi-family housing for a long, long time. Allan-Deane's crux had been to the effect that they can't do it because there's no sewers and they had to have enough units to build sewers. As soon as you do that, as soon as you accept that argument then you have to go to a much higher number of units. The problem with sewers is very illustrative of the difficulty of achieving some kind of solution in this area. From 1972 to 1980 we've had the greatest change in water quality, planning and water planning that this country has ever seen. A lot of it has been focused, hasn't been focused yet on Bedminster. That's one of the problems DEP and EAP have not gotten around to telling us what we could do if the Township was wrong in waiting for that type of direction. So be it. I'm not here to argue that point. Again,I might point out to the Court nobody neither this Court nor any administrator nor Master or planner can come up with the answers to those problems overnight. I do submit that this kind of problem must be addressed and addressed in a comprehensive and rationale process which is not an

automatic building permit for Allan-Deane at the number that they propose.

The why of this case is essentially that Allan-Deane didn't perceive it could get what it wanted out of the traditional planning board township committee developmental approval process. The why of this Court suggested--of this case suggested to Allan-Deane that they have a better shot at going to Court. Indeed in Allan-Deane's own statement of procedural history Exhibit A, they set forth that they applied for a variance from Bedminster for their planned development. Contrary to what Mr. Gaver said, Bedminster did hear that variance and they did decide they denied it and they denied it on the ground that the zoning change requested was so great in scope that it could not be the subject of a variance. I think, that decision was eminently corrected immediately thereafter, the law suit was filed. Ever since that time which was 1971 or really 1972 excuse me, I stand corrected. Mr. Bowlby pointed out that Allan-Deane filed the law suit before the variance was denied and since that time they'd been in Court because they were advised that the very concept when they bought the land they would have no problem with the zoning. They'd been in

court trying to use the court mechanism as a super planning board because they knew they could not achieve it at the local level. And, if their remedy today is granted they will have achieved that purpose. They will use this Court as a planning board. They are asking this Court in effect to write a new bankruptcy code. Only it is not a financial bankruptcy. It is a land use planning bankruptcy.

To understand the Allan-Deane proposal you must substitute for the word administrator the word referee or trustee. Now, fortunately for the financial community there is a federal bankruptcy code. Unfortunately for Allan-Deane and the thing that is binding on this Court is that there is no code of administrator procedure. There is no code at all which would authorize this Court to in effect take the entire approval process away from the Township of Bedminster. It cannot be done and it should not be done. More importantly it is unnecessary. The Township of Bedminster has seen only one document evidencing the plan of this community. And that is a book like this and it's dated February 1976 and it was given to the Township Committee. It was shown to the Township Committee sometime after that date as a dress rehearsal for

presentation that Allan-Deane made to the Township of Bernards. I think they took the copies of the book with them when they left. All other documents, expert studies, planning studies, proposal conceptual plans, have been given first to counsel in the litigation process. The Township Committee in some instances, the Planning Board clearly has been shown these documents, but it has all been filtered through counsel. First to counsel for Allan-Deane then to counsel for the Township, then to the Township. They have heard what counsel has had to say about those proposals. Always what counsel says is directed towards the legal issues involved.

Will the Court take jurisdiction? What will the Court do? What is the proper thing to do? In light of the cases it has not been presented to the Township from the point of view of what makes good development on that piece of ground given the fact that Allan-Deane is going to build over there on higher property. What makes the best planning sense? That is what site plan review is all about.

And that's where the Township has never had an opportunity to consider. It is not fair to any township to put them in a litigation process and then complain that they have never responded to a site plan

in a site plan review process. It has never been afforded to the Township and in our judgment it should be. The proposal we make is that they present their site plan to the Township of Bedminster plain and simple. That is not a large proposal. It is not a proposal to let the Township go back to square one and rezone again. We do not make that proposal in our letter to the Court and I frankly don't understand Mr. Gaver and Mr. Morgan when they say that is our proposal. It is not. The problem has been that the whole question of net versus gross and densities has been up in the air since 1971. It was up in the air in the testimony in terms of its not in Somerset County Master Plan.

Mr. Roach when he got on the stand said that the 5150 density figure in the Somerset County Master Plan is a net density. What he was referring to is very simply the problem of the steep slope on the Allan-Deane tract. We are talking about land I think it is helpful to take a look at the specific information on that. This is Allan-Deane's tract here and it is R-20 and R-8 in the present ordinance. This is the steep slope. Allan-Deane itself says that it doesn't want to build on the steep slope and yet it comprises, I think, 100, I'm sorry is it 230

acres on the steep slope on the Allan-Deane tract?

MR. HILL: 170.

MR. FERGUSON: Accepting that figure 170 acres out of400 are in the steep slope and cannot be built upon.

The real question is really that should be counted in nibs, computation of density, of units per acre. I think Mr. Roach was saying our expert clearly said no, Mr. Rahenkamp said yes. Even Mr. Rahenkamp, if you include the steep slope does not advocate anything more than 4.5 per acre. The Somerset County Master Plan says five to fifteen and I think it is absolutely clear that those figures are really different because the assumption is that those fall into those calculations just are not the same. Five to fifteen is perhaps appropriate for a village neighborhood but not if you count in this huge area. We have to establish what we are talking about. The only way to do that is to have somebody and we suggest the Somerset County Planning Board review the problem and make a recommendation to this Court. Once that recommendation is made and a density is established there should be no problem in having the Township of Bedminster process that development application.

The real problem has always been what number of units should Allan-Deane receive. Once that is determined, I think it is all over, but the shouting. I think, the Township and Allan-Deane can get on with the task at hand and that is to plan the development.

Allan-Deane says that this is the most studied development and the most studied town in the history of the State of New Jersey. That is what they say. It hasn't been studied in the application approval process. The experts have given the reports as always been to the issue is infeasible. What bearing does the expert report have upon the legal issues at hand, which is the obligation to zone for a fair share of least-cost housing? We do not raise the environmental issues. Again, we do not suggest another trial or another hearing on environmental issues. That has long past. We do say that in the site plan review process there will be extensive problems with drainage. Why, because Allan-Deane wants to build multi-family housing at the top of the mountain. Mr. Rahenkamp testified about the berms and the quails which he acknowledged are necessary to prevent erosion and pollution. You have 170 acres of slope over 15 percent. You then have

more ground sloping down. That is a specific engineering solution. It has got to be dealt with that kind of environmental evidences, engineering evidences directing to how best some of the problem is presented. Everybody concedes that that must be done.

We are not talking about the carrying capacity of the land. We are not talking about the carrying environmental carrying capacity. We are talking about how should the Allan-Deane Development best get designed at this point. We are talking about the carrying capacity of the town for the number of people proposed by the Allan-Deane proposal and by the rezoning of the corridor, which is going to have to occur as a result of this Court's disposition.

If you look at the map and you take the obvious areas, which are not zoned multi-family and you say, assume for the moment that when rezoned the R-20 or something equivalent, we see that the entire corridor area has the potential of being rezoned R-20. We are talking about the rest of Allan-Deane land. We are talking about Mr. Elsworth's land. We are talking about the top of the mountain. If the compatability zoning problem is solved in Bernards because all experts and indeed Mr. Graff of the Planning Board

said this R-3 at the top of the mountain really goes along with what Bernards does because it is oriented toward that direction, towards the east rather than down toward Pluckemin and Bedminster. We are talking about perhaps about the R-3 here owned by A.T. & T. and that is it. There simply is no more.

You get up to Bedminster, you can see by the lot lines drawn on the map that there is very little undeveloped acreage left to what either has been zoned R-20 or is not -- it is available to be zoned R-20. It is not difficult to implement what the Court stated in its opinion. You don't need a special Master to do it. If the three or four changes occurred it will be zoned for all multi-family. I submit to the Court that that doesn't need an administrator or it doesn't need a planner. It needs proposals to be made to this Court and we suggest that Somerset County Planning Board make the parties react to it and then the Court can order it or can make whatever changes it feels appropriate. Once that is determined, then we address what kind of inferred structure of planning Bedminster must make in terms of schools and roads, plus plan for over the future lands to accommodate not only the Allan-Deane development but the other development.

This is a very hard piece of ground to plan for. Why? You have 287, you have 78, you have 202/206 and you have the mountainside. Those topographical features are tremendously significant in what you can and cannot do. We think the corridor must be planned first. Once we get an idea of the total development which is going to be planned for the corridor for the next twenty-five years, we can then make sure that Allan-Deane development fits into it. The Allan-Deane development first is to put the cart before the horse because the input which is necessary in terms of inferred structure planning will not be there and, we won't know of what was to be reserved for land, for schools. How to design traffic access, et cetera.

Now, the problem with the bypass, I must correct Mr. Gaver who -- the record was not clear during the trial about the position of the Department of Transportation. The DOT's position came clear only after that trial. I think, within the last two months, when they did inform the Township officially that it was a low priority item. Therefore, it looks realistically impossible that the bypass will be funded and the access problems and the traffic problems will have to be solved through some other

mechanism. The Somerset County Planning Board is the author of the Somerset County Master Plan, which formed the basis of this Court's trial, Court's opinion. Mr. Gaver objects to Mr. Roach on the grounds that he was a witness for Bedminster. If the Court will recall he was subpoenaed. Indeed, other Somerset County officials were called by the plaintiff, Allan-Deane. The Somerset County Master Plan itself is impartial. It is there. It is a planning document. Its consistency with Tri-State and other regional studies is a matter of objective determination. Mr. Roach and his staff can best from Somerset County's point of view tell this Court what they believe is the proper development of the corridor. They can then recommend a density or basic perameters to the Court for Allan-Deane development. And, the corridor because there is no reason why Allan-Deane should be different than the rest of the corridor. Then, the town and Allan-Deane can get on with their work of planning the development.

Mr. Gaver used the phrase can do. We must get into a phase of this proceeding where people can do things. His suggestion that is, "can do person" his administrator is going to be an architect. Simply

put, they will want this Court to order and make the Township in part pay for a clerk of the works to build their development. That's not what this kind of a zoning process -- that's not what zoning litigation ought to be about. The zoning case should decide what the appropriate zoning is. Once that is done let the plaintiff, Allan-Deane build. There's been no question but that they should be multi-family housing. The question has always been how much and how do you solve the problems that get there. Allan-Deane order, Exhibit C to their belief, all of a sudden, comes up with the figure 2,000. Nobody has seen a figure of 2,000 units. Indeed, their order contemplates the submission of their site plan in thirty days. The thirty days for what one must ask? Thirty days for their experts to prepare it. Their site plan has never been available for anybody. We are talking about concepts, P-40 in evidence in the closet. It is a conceptual plan. It is not a site plan because this Court ruled in admitting that in would not admit a site plan but only a concept plan as an example of the kind of thing that might be done. That was 1,849 units plus subsidized, plus a conference center.

Now, I hear the figure 2,000. We don't know what

that plan is going to be. I submit it would be a sham. It would be worse than that. It would be an abuse of the judicial process to ask for an approval in advance of a site plan that nobody has seen. That's what Allan-Deane is asking this Court to do.

Mr. Gordon talked about the resolution of need. Mr. Graff on the stand indicated that the town had never considered a resolution of need. It never had been presented as something the town had to do to further the prospects of any particular proposal. If that situation should arise, I submit, that the town would then consider a resolution of need and it would have to process it and do whatever is appropriate at that time. There is no need for this Court to order the town to adopt a resolution of need. Indeed, I have grave doubts that this Court has the jurisdiction to do any such thing.

Also, the tax abatement. I don't understand what Mr. Gordon is really asking. Can this Court order Bedminster Township to give tax abatement infuturo? I don't think so. All the statutes are designed for tax abating specific proposal with a specific piece of ground. I don't read the five statutes that way at all. I think this Court has no jurisdiction to enter any such kind of order. I

agree with all counsel when they say that we do not want further evidentiary hearings of the kind that consume forty-two days of trial. I don't think we need them. The procedure outlined to our letter of the Court, the January 24 does not request them and it contemplates they in fact will not be heard. This trial has gone on much too long and has been needlessly complicated by the expense of submission of expert reports. Namely, by the plaintiffs and then once the plaintiffs do it we are under an obligation to counter that because it might be an issue and the Court might base findings upon.

The Court has wisely declined in my judgment to get into the battle of the experts. It has made its findings that the Township did not comply and it is now in the position of having to devise a process so that the zoning can be brought into compliance. It is a very difficult process but what we don't need is a whole lot of experts testifying again before this Court. We submit that the rationale way to do it is to ask for a recommendation by the Somerset County Planning Board, let the parties comment upon it and if there is a disagreement, the Court will have to resolve those disagreements. I don't think that it would be burdensome on the Court. The main

thing is going to be the number of units to which Allan is entitled on its land. Keeping that in mind that a substantial portion of it is too steep for anything to be built upon, keeping in mind that the corridor itself is bounded by Interstates and cut by 202/206, keeping in mind the problems associated with that, with geology and the building of structures on that ground. I don't think this Court has to get into anything other than the rezoning of the corridor. Letting the Township look at the Allan-Deane application, once they decide what it is going to be, I think Allan-Deane made an expeditious decision many many years ago that it would stand to get better treatment. They would get their number through the judicial litigation process than they ever would by going to Bedminster Township. And, they have stuck to that course ever since. I think, they should be called on that. I think the Township should be given an opportunity to go through the standard Site Plan Review Process and I think this Court should use the available expertise of Somerset County's Master Plan and the Somerset County Planning Board for a recommendation as to what Allan-Deane can build in terms of the number of units. Once that is determined, I see no problem whatsoever in the town and Allan-Deane going

through the regular application process. I don't think this Court has the jurisdiction or any basis to enter an order about a mandatory percentage type of ordinance. I haven't reviewed the Cherry Hill Ordinance that Mr. Meiser talked about.

I must comment that I think the technique of equating, of judging whether zoning litigation is affective by seeing if anything is actually getting built that can be afforded by low income groups is totally false. There are assumptions which are going into that equasion which are not warranted. That is the old dichotomy between housing opportunity and housing itself.

In Madison Township the Supreme Court said zoning is about housing opportunity and least-cost means least judicial interference as possible. The minute you begin to judge any of the results of litigation processes by what actually gets built you have to bring in the state of economy, the cost of housing, the availability of subsidiary. That whole range of economic and social problems which the judicial branch of government is to deal with. That is the function of administrative executive and the legislative side of government. I do not think and I submit to this Court it should find that it is

the province now to get into that kind of problem. We have outlined ou position in our letter to the Court. It is simple. It does the least violence to the legislative and constitutional scheme in our State. It lets the parties get on and do what they should do with the least interference with this Court. I submit in the long run that the development process will be quicker and more effective if the parties are not in this very complicated and very technical mechanism proposed by Allan-Deane of a mini court which the administrator would have to be hiring experts on his own, getting everybody involved. I think this Court has been thrust with a few recommendations from Somerset County's Master Plan and then proposal by the plaintiff and comments by the Town. I think a resolution can be had effectively and speedily.

THE COURT: Do you want to be heard briefly?

MR. GAVER: Excuse me?

THE COURT: You wanted to be heard briefly?

MR. GAVER: Yes, I shall try.

First, your Honor, to Clarify the record and to satisfy Mr. Gordon, it should be quite clear that in our papers we have made a commitment to our twenty percent least-cost housing. It is in the very order

to show cause that started this run of the proceedings. It is shown in that fashion on P-40. It is a commitment we stand by. Mr. Ferguson first suggested that the Court really can't maybe do anything about the housing problem. And, apparently suggest, therefore, shouldn't do anything about the housing problem. The fact is the Court can make inroads at this point and time. That's what Madison is all about and that's what we've been here for all these many days and weeks, or about the Court can do something but can't do anything but surely if it can get started somewhere.

Mr. Ferguson suggested that Bedminster tried but failed to be inclusionary to make provision for housing. It has tried over and over again. It hasn't provided anything, your Honor. Not a thing. This is multi-family housing and after years at one variety of a kind or type and there is nothing this day as long as this town is permitted to go its own route there will never be anything there. It is suggested that we shouldn't interpose governmental interference. I find that a very, very curious bit of philosophizing about free enterprise versus governmental interference. This Court is not the interfering body. It is the Township of Bedminster

that has interfered repeatedly, regularly and with malice aforethought with free enterprise. It is the Township of Bedminster that has prevented development here.

The suggestion that this Court to taking some steps to undo that, to remedy that is interfering is another layer of governmental authority laid upon the existing level. It is simply preposterous. The Court can best undo what has been done by this town. Nothing more.

Mr. Ferguson is surely right when he talks about us having to have a plan of sufficient size and scale to justify a sewer treatment plant. Again, as we urged earlier that is because this town has failed to exercise its proper function to make any provision to entry, to make provisions for public sewering whatsoever. It has ducked into the bushes every time the issue of sewering has come up in the past decade and it is because it has failed. What many and most towns around this State are doing on their own is that we have to have a project of this size and we have to build a sewerage treatment plant. That happens not to be the common phenomena in the State of New Jersey, your Honor. It happens to be true out here because this is a nice, quiet

town who knows that without sewers multi-family projects are highly unlikely. There is a sewerage issue and we must satisfy the Department of Environmental and we shall do it. We will see what we have already done and we shall do so.

Finally, but not satisfy the Township of Bedminster nor Mr. Ferguson as to our project. That's for the DEP to determine. It is further suggested that they ought to have the opportunity for site plan reivew. You can't have site plan review without zoning. You have to establish the numbers, then you can talk about the nuts and bolts details. But you can't simply remand a matter for site plan review when there is no underlying zoning determination, the rough contours that can be built. Implications seems to be there is something magic about the local administrator process. These are not professionals, your Honor, these are not like taking the review authority from the Department of Environmental Protection or the Department of Community Affairs, a professional organization staffed by experts in carrying out state policy. These are local part-timers so to speak, who have very little experience in this town and in anykind of development whatsoever other than single family

because there isn't anything else. Certainly, it is not magic about remanding this in part to the tune they simply don't have any established expertise whatsoever.

Mr. Ferguson comments, with surprise on the number 2,000 that appears in our order and certainly does. Why he is surprised I don't know. Since, he's been advised of this and indeed we discussed this in chambers with your Honor some weeks ago. The reason is very simple. There is a small corner of P-40 that shows a commercial use. Frankly we are concerned about the power at this Court, this point to rezoning commercial use under a Mount Laurel propsoal. We are, therefore, proposing to review that for a development, a small corner of the project and nothing else is changing. It is true that a full site plan must be prepared which requires more detail than P-40 but you heard Mr. Ferguson today concede there is no capacity in issue. There is no physical limitations. That's what the site plan document deals with are those engineering details. There is no capacity issue. It doesn't matter that P-40 is fully adequate for them to arrive at the decision. They have arrived at their own issues of capacity. There are issues now we hear of impacts.

Well, that's much more of a nonqualifable subjective and nonobjective. It is exactly the type of thing in this late stage in the game that we had to start back to reinvent the wheel on them. The proposal is so still to me, it is a rather vague piecemeal proceeding. We are going to ask the Somerset County Planning Board for some advice. What we are to do with that advice, presuming this Court is going to rezone our property. That's the way I read this which is a remarkable proposition but certainly durable. The problem is with the proposed adviser. The issue at this juncture is not the global planning concepts it is not the big picture, big map kind of plan issue at this juncture as have been very clear throughout this trial are the details, does it work or does it not work? This Court has already determined that the general nature of the density to be effective throughout the corridor. There is no question about that.

What we need at this point are the nuts and bolts analysis. How does it work? How can the Allan-Deane project be made to work? How can zoning in the balance of the corridor be made to work?

If you recall, your Honor, that in both of these trials they had so-called multi-family zones

but they didn't work. Both of them were supported by the Somerset County Planning Board. In a global sense they may be attractive to them. I don't know. What we need is somebody who knows how to make things work. I suppose we have a good example in this case, I really, I don't know Mr. Roach's background when he had Mr. Copolla, a very capable young municipal planner, he came out on cross-examination he has never site planned a built project. That is the general problem with using a general global planner.

At this point they don't deal with nuts and bolts issues of making it work. The details of an Ordinance they deal with the picture. I think we are way past the big picture in this juncture. The time for abstraction is long since past. We have been here for ten years and believe me if it satisfied Mr. Ferguson it was not an easy choice for this client to make and it was not an attractive choice whatsoever and after ten years of litigation it still isn't very attractive. It happened to be it only after where we could get a hearing, an impartial arbiter ruling on the fact of the situation.

Thank you, your Honor.

THE COURT: Thank you.

MR. GORDON" I will be infinitely briefer than Mr. Gaver.

Mr. Ferguson argued that there should be minimum governmental control here, that the free market will supply society's needs for lower income housing. I just think that the total fallacy in the Somerset Hills area, if you allow free market to develop, to occur, you are going to have expensive luxurious housing built. I don't know where Mr. Ferguson is coming from when he expresses this.

As to letting Somerset County Planning Board make a review and present it to the Court, he's alleging that Mr. Roach should do this, Mr. Roach has already testified in the two trials here that both Bedminster Zone Ordinances were a major breakthrough in zoning in this county. Yet, this Court invalidated both ordinances of being too restrictive. I do appreciate Mr. Ferguson's acknowledgement that the corridor should be rezoned totally for multi-family housing.

In addition, assuming the Court has no authority to make, to order the resolution of need and tax abatement in the future I am just wondering if Mr. Ferguson is representing that the defendants will definitely adopt them when it is presented to

them by the proper party.

I don't have anything further your Honor.

THE COURT: Thank you.

MR. MEISER: We have made our recommendations, your Honor.

THE COURT: All right. Thank you, gentlemen.

Do you have a final word?

MR. FERGUSON: No, except that I obviously can't represent anything in municipal body that it takes action at the time by its elected representatives. It would be totally improper for an attorney to do that. I don't recommend by the way, Mr. Gordon, that the entire corridor be zoned multi-family. I think, that's a very complicated planning problem to what you do with the corridor to comply with the Court's decision so that you don't have wall to wall multi-family. There obviously has to be controls, some kind of buffering and separation and all the many things that planners and site planners talk about. That is a complicated process to go through and I submit that the Somerset County Planning Board has the body that put in the two village neighborhood and the Master Plan use is in the best position to tell the Court what they think appropriate.

A density range of fifteen throughout the corridor might lead to ultimate disaster. Certainly, if that is taken as a close density figure which I don't think it is.

THE COURT: Well, what's left that isn't far the points deep slope or corridor headquarters?

MR. FERGUSON: Not much.

THE COURT: If you cope with the plaintiff you got it. It is done for the next thirty years.

MR. FERGUSON: If there's a real probability that might happen that's true. That's why I said the problem here isn't very difficult at all. Once you get through the rhetoric and dripping sarcasm from Mr. Gaver, what is there to do? You come right down to it, you make that R-20, you treat Ellsworth the same only the testimony in the R-3 owned by A.T. & T. is deeply sloped and the probability of that going into residential is very, very slim. Besides that is next to 286 and the plaintiff's own expert said that's no good because of the noise level. You have flood plain because of the north branch. You can't build on that. There's really not much left in Bedminster and won't be much left in Pluckemin that we haven't already zoned R-20. I think my suggestion that the plaintiff be made to

come up with its proposals to change the ordinance, to eliminate those things which it claims are cost generating provisions, make eminent good sense, they can bring it if we don't object. That's it. If we do object we will either work it out in a short -- not another trial.

Mr. Hill, we don't need another trial. Nobody wants another trial.

THE COURT: You don't need another trial.

MR. FERGUSON: There is no practical problem to the procedure that we propose at all. Instead of a long -- indeed there are going to be not one more trial but many more trials if we go to this administrative procedure proposed by Allan-Deane.

THE COURT: All right. Thank you all.

I would like to decide this while your words are fresh in my mind. So, I'm going to make an effort, not a promise, but an effort. I will release you for lunch until 2:30. Hopefully I may have an answer by then at your course.

MR. GORDON: Thank you, your Honor.

MR. HILL: Thank you.

(Whereupon the Court took a recess.)

THE COURT: A few preliminary rulings are in order before I recite the relief that I have chosen.

First of all the Court deems the use of the county planning board, its staff, as being improper in light of the fact that the planning board is a defendant in a pending suit by the corporate plaintiff against an adjacent township, that being Bernards Township. It would place the planning board in, and its staff, I believe, in an awkward position, possible charges of having conflicting interest while they are parties to litigation. So the Court rejects the idea of using the personnel of either the planning board or its staff to assist the Court. I am not in any way however rejecting the individual documents known as the county master plan.

Secondly, it is clear that the corporate plaintiff is definitely entitled to prompt and specific relief. The history of this litigation is much too prolonged and involved to permit anything which in the Court's opinion could result in further litigation or delay. Concommitantly, however, the township is entitled to an opportunity to contribute to a determination of its own zoning and planning design within and under strict control while precluding delay or deviation from the principles enunciated in this Court's opinion. It is equally clear that the Court cannot set aside its own responsibilities and over-

see the process required to effectuate this Court's decision. There are other things that we have to get done here in this building other than resolve the dispute between these parties. Now, there are weeks that it doesn't look that way. The history of this litigation, however, clearly establishes that a continued presence of some sort by the Court in the effectuation of the remedy is needed to avoid delay and further litigation. However, the ultimate decision must be made by the Court. It cannot be made by anyone else.

Now, in light of those general concepts, the township is ordered to (1) review and redefine if necessary the geographic boundaries of the R-3 zone in accordance with this Court's opinion; (2) to review and redefine if necessary the geographic boundaries of the business office commercial zones in accordance with this Court's opinion; (3) review and redefine if necessary the geographic limits of the critical area zones in accordance with this Court's opinion; (4) review and revise the control provisions of the critical area zones in accordance with this Court's opinion; (5) provide zoning ordinance provisions for the remainder of the Routes 202/206 corridor, which

includes the village of Pluckemin and the village of Bedminster and the area between them, (a) to provide for some moderate and many very small lot detached one-family home zones including if and when appropriate a provision for two-family homes on small lots and, (5b) to include a PUD or PRD that is a planned unit development or planned residential development floating zone within that corridor which will include but is not limited to provision for minimum lot or tract size for planned unit developments or planned residential developments, density controls, percentage of subsidized or least-cost units, bedroom ratio ranges, performance standards including but not limited to roads, curbs, utilities, drainage, sewerage disposal, the latter to be couched in very broad terms in recognition of state and federal law control, and other such performance and standards as may be appropriate; the floating zone also to include provisions for staging of construction and open space control; (6) the township is ordered to review its subdivision site plan, and other pertinent ordinances to eliminate all subjective provisions, couching those ordinances in objective terms.

The Court is intending by that ruling to

indicate that any applicant can read the ordinance, prepare a plan, present it and all who read it will know whether that plan does or does not comply with the terms of the ordinance without having to use any discretion or discretion on the part of the municipal officials.

Now, the six provisions just ordered are designed, in their entirety, to result ultimately in not less than five units per gross acre and not more than fifteen units per gross acre throughout the corridor area development. In other words, the ordinance as finally revised will permit, in light of the existing residential uses, any planned residential development that might occur from place to place and the moderate and very small lots one and two-family areas in not necessarily more than fifteen units per gross acre within the corridor but not less than five units per acre throughout the corridor area.

In order to insure that the relief just ordered will occur promptly, the Court directs that counsel for all parties will suggest names to the Court for appointment as a master to act on the Court's behalf. As a planning expert. If they cannot agree upon the identity of such on or before February 11, 1980,

on or before February 25, 1980 the Court will appoint a planning expert to act as a master in this matter, providing two days notice of such appointment to counsel for all parties. The master is to attend, and, if he chooses, to participate in discussions, preliminary to the preparation of the draft of the revised ordinances, and, shall attend any public hearings that may be held thereon to afford an opportunity for the public to contribute to the process.

On or before April 30, 1980 the township's proposed revised ordinances will be presented to the Court by the township for consideration.

On or before May 9, 1980 the master appointed by the Court will submit a report to the Court on the proposed revised ordinances and their substantial conformity or lack thereof with the county master plan, Tri-State Plan and this Court's opinion of December, 1979.

On or before May 16, 1980 the parties shall submit comments on the revised ordinances to the Court and on or before May 29, the Court will decide on the acceptability of the revised ordinances after a hearing if the Court deems that a hearing is warranted.

The master will continue to observe the

application process by the corporate plaintiff for a planned unit development or planned residential development and be available to report to the Court if dispute arises involving that proceeding. He will act in effect as an objective observer at that proceeding.

The cost of the master's time and services and the cost of the time and services of those necessarily retained by him will be borne equally by the corporate plaintiff Allan-Deane and the defendant township.

The Court is recognizing that the individual plaintiffs do not have the means to participate in contribution, and feeling -- it would not certainly feel proper to ask amicus to contribute to that.

All right, I will hear questions or requests for amplification of course. Anybody want to digest for a few minutes what I just ordered?

MR. HILL: Could we have five minutes, your Honor?

THE COURT: Surely.

(Whereupon, the Court took a short recess.)

THE COURT: All right. Are there any questions as to apparent ambiguities? I will be happy to try to resolve them.

MR. HILL: Your Honor, the first question has to do with the corridor. When your Honor said that Bedminster was to rezone the corridor at a gross density of not less than five units per acre and no more than fifteen units per acre was your Honor speaking about the corridor as defined in your original opinion as that area 3,000 feet west of Route 202/206 to the eastern boundary of Bedminster Township?

THE COURT: No. My December opinion, I think, modified that position. I believe I found that I would not overrule the municipality's decisions as to the appropriate area to be retained in three-acre zoning. I believe there's language in that opinion to that effect.

MR. HILL: So, is there a definite --

THE COURT: Basically, just a mild modification. I expect them to review and make sure that all the boundary lines of the three acres are proper and then what's left east of that from north to south along the easterly edge of the township will be rezoned according to the county and Tri-State Planning concept.

MR. HILL: Second question was, you have deadlines. Would the Court contemplate an order

which would have sanctions in it if Bedminster does not meet deadlines?

THE COURT: Sanctions are far more effective when people worry about how large they are than when they know in advance. We will leave that open.

MR. HILL: So that --

THE COURT: The Court always has the inherent power to employ sanctions as necessary.

MR. HILL: Will the process that Your Honor envisoned enable Allan-Deane to submit sample ordinances? What we were thinking of was submitting ordinances along with Bedminster ordinances if Bedminster didn't get their ordinances in on the date in question having the option of arguing before Your Honor that our ordinances be adopted?

THE COURT: That almost anticipates a lack of good faith and the Court is not ready to anticipate that. We may prepare for it. We are not going to anticipate it. I assume they would have the opportunity to --

MR. FERGUSON: I would like to see what Allan-Deane would propose as an ordinance for the corridor as soon as possible. Frankly, I think it would be a mistake to have the two parties go charging off in different directions. I would like to see us work

in the same direction. So, I would welcome a submission of a proposed ordinance or a specimen ordinance or a sample ordinance as soon as possible.

MR. HILL: Your Honor, there seems to be some lack of clarity on what the corridor is. I'm looking at D-110 which is the blowup of the corridor area, at least. Your Honor originally defined it as an area 3,000 feet west of 202/206 and east of it to the boundaries. So it would be approximately this area of the township, almost the entire blowup.

Your Honor indicated in the more recent opinion that you would not require Bedminster to zone the areas west of 287 for multi-family housing providing they zoned at correspondingly sized area east of 287 for multi-family housing. Can your Honor give us a more specific definition than that of what the corridor area is? We think that's critical and it might --

THE COURT: I really -- I don't want to. I think that's a legitimate function of the interplay of the township officials, the individual plaintiff and the planning expert that will be acting for the Court. There is no cut and dried answer. I have not heard anything before me that would mandate that I draw a particular line. Even the original decision years

ago, it was that they reconsider the area within, not that they change the zoning throughout the area within the defined corridor. So anything reasonable and founded in proper factual basis would be acceptable.

MR. HILL: Thank you.

One other question, your Honor. There were a number of outstanding legal issues which were raised in the earlier trial and not decided, and your Honor said in the opinion of December 13 that any remedy would have to be fashioned so that those issues should be decided. I think, for instance, of the issue which places a ten-employee limit on uses within the commercial area; now that's not strictly a planning decision and it is not one that perhaps a planner --

THE COURT: Do any of the plaintiffs have any interest in any business area? I was under the impression that your client had sold this business zoned property and that that would be moot as far as you were concerned.

MR. HILL: We have an interest because we represented that there are certain warranties as to the zoning permitted under that property but we no longer have it simply in the commercial area.

THE COURT: So, what is your interest?

MR. HILL: Well we think there are contractual ramifications as to what -- we have a note to collect, we have a mortgage on the commercial property. The property -- we are also substantial property owner in the area and have the general planning interest and how the area develops. We think that that issue is a legal one and one --

THE COURT: All right. I am going to leave it untouched at the moment. I'm not certain that that business zone will stay that size when reconsideration is given to the impact of what I have ordered. It may well be that the point will become moot. If it doesn't and if it isn't resolved by the planners and the Court's planning expert then I will tackle it.

MR. HILL: Yes, Your Honor.

One other concern is that as developers we be protected from this municipality which we have some question that doubts good faith through the construction period up until we are issued certificates of occupancy.

Does Your Honor envision appointing this Master to administer our site plan planning and the inspection of our job? We do not feel confident in view of the history of this case that we will be fairly dealt with by this municipality and we would

like to see after these ordinances are adopted an administrative process under the supervision of the Court which would avoid us coming into court six months from now saying, funny thing, your Honor, they won't approve our site plan which conforms exactly to their zoning and site plan and subdivision ordinances.

THE COURT: Well, I will deem that the master will continue to function through the application for a planned residential development or planned unit development stage up until approval. We will see what kind of conduct is manifested by the municipality authorities during that period -- if that warrants application to the Court to renew his services through construction and certificate of occupancy stage. We will cross that when we get to it. I just want to see what kind of cooperation is granted through approval of the application.

MR. HILL: So your Honor will hold that open pending your observations as to the municipality's good faith up to that time?

THE COURT: Right. Technically we have directed that the master will serve through the approval of an application stage without prejudice to what happens after that.

MR. HILL: Your Honor specifically asked Bedminster to look at the critical areas and the business areas and the R-3 areas but not specifically the R-8 and the R-20. We --

THE COURT: I expect we may never see the numbers R-8 and R-20 again. I said, rezone everything but R-3, business, and, obviously the entire chart had to be reviewed.

MR. HILL: Thank you, your Honor.

MR. GORDON: I am a little bit curious as to the time frame for specific relief. Your Honor suggested that Allan-Deane is entitled to prompt and specific relief. Does that mean it is immediate or is it conditioned upon the rezoning?

THE COURT: It has to meet conditions upon the rezoning. I expect their application to be in conformity with the standards of the PRD or PUD floating zone. I certainly don't expect that with the facts that have been presented to me over the years that any ordinance will be proposed to the Court that requires a tract larger than this owned by the corporate plaintiff. We would then again have illusory results.

MR. GORDON: Thank you.

THE COURT: Mr. Ferguson?

MR. FERGUSON: The last one first. The R-3 -- the Court mentioned was not the subject of this order of this rezoning. Would the Court care to comment on the two R-3's within the corridor?

THE COURT: Those are subject to consideration. I was indicating the R-3 west of the corridor.

MR. FERGUSON: That was my impression. I just wanted to clarify that.

Secondly, the five to fifteen per gross acre. I thought I caught the words, not less than five nor more than fifteen, and my concern is what acres are we talking about?

THE COURT: We are talking about using this little device that we enjoyed during the trial some ampter --

MR. FERGUSON: Planimeter.

THE COURT: Running it around the spot from where the southeasterly boundary of the township touches the east side of 287 all the way around. No, lower, lower. There. Running to the east, to the easterly boundary up to the northerly boundary up and west to the edge of the R-6 and down and then down 206 and back to the intersection. That whole area there will be developed, considering its current development, any planned residential development

and any two-family zones on forty foot lots, any one-family zones on forty or fifty foot lots, et cetera. So that the ultimate development capacity would be not less than five nor more than fifteen units per acre. There are discretionary decisions that went into the size and extent of the critical areas. That is why I ordered a review of that. The larger the critical area is, the more dense the habitable area, the smaller the critical area is, the less dense the habitable areas. There are considerations within considerations. The only thing that can't be shrunk, I guess, are the federal interstates.

MR. FERGUSON: I suspect that that's going to result in a tremendous number of units. I just don't know what the outcome of that one is going to be.

THE COURT: That happens in part because you see if you take the regional and county planning concept which was on both sides of 202/206 and you eliminate that which is to the west, basically then you must condense the totality in the remaining half. And you take as many people in half as much space. You do decrease it. That is a local decision with which I will not interfere. You can get a lot of people in one of those Hudson County highrisers.

MR. FERGUSON: I started off the trial with the World Trade Center analogy and indeed --

THE COURT: You kept shrinking the area in which people -- that's what you ended up with.

MR. FERGUSON: Okay.

The floating P.R.D. or P.U.D. did the Court have any specific thought as to why it should float?

THE COURT: Yes. It may well be that in their wisdom the municipal officials will decide that a true village atmosphere can be maintained if you permit a certain number of units per acre in townhouse development on a six acre tract. There are a number of six acre parcels that belong to parties not even involved in this litigation. So, it may be that they will say P.U.D. is possible on anything not less than five acres.

MR. FERGUSON: So, I take it that's a direction then to a zone as much as possible in the planned development mode giving different parameters. Would that be consistent with what the Court --

THE COURT: I don't want to be that specific. Again, there are planning techniques that will allow -- with proper legitimate controls putting very much interesting things next to other things that people aren't used to them. They find out they

are very compatible. It can be done on a small scale and you can accomplish a great deal and find some very attractive items in among existing structures and uses. Maybe the town would choose not to do that and meet its entire obligation under the constitution on the Allan-Deane tract. I assume you get very little argument from Allan-Deane plaintiffs if you made that decision but then again the town might want to parcel some of its uses throughout the corridor. I have seen eight or ten-unit buildings that look like they belong in northern Bernardsville or across the line in Far Hills driving by them at thirty miles an hour. When you think they were one-family homes. Perhaps the township would like to do something of that nature. I don't know. Time will prove --

MR. FERGUSON: The Court spoke about the master attending. Now, certainly that would go for a meeting of the planning board held pursuant to the open public meetings on municipal land use law.

THE COURT: Also to include luncheon meetings and chats after church on Sunday mornings.

MR. FERGUSON: That was exactly my question, your Honor. Are we to gather that the master will attend all the planning process in the township?

THE COURT: Yes. Though, I will grant him a certain amount of elasticity if he deems something not worth attending. He is to be given the opportunity.

MR. FERGUSON: Is he to give the township the benefit of his opinion? In other words rather than just observe, I would hope that he would be free to talk with the township and say, I think that's a good idea, or I think that's a lousy idea.

THE COURT: The master is to attend and, if he chooses, participate in discussions.

MR. HILL: That raises a question. Can Allan-Deane attend and observe? The Open Public Meeting Act provides that if the case is in litigation you can go into those closed sessions and plan litigation strategy. We were interested in knowing how Bedminster intends to implement your Honor's order and would like to at least observe and attend their discussions.

THE COURT: Common sense would indicate that you will find yourself invited. I'm not going to interfere.

MR. FERGUSON: I would think there would have to be one meeting when I try to explain to the planning board what happened today and certainly that

township committee.

THE COURT: That's very possible. After that, I think we all have to think about that, but I think the sense of the Court's directive is to make it as open as possible.

Familiarity sometimes breeds cooperation.

MR. FERGUSON: It has been my position that that might occur. I have said so in papers and I will say so again. I would hope it would.

THE COURT: All right.

Mr. Ferguson, I'm going to ask you to draw the order.

MR. FERGUSON: Yes, sir.

THE COURT: I guess as far as remedy goes that you did well enough so that since the plaintiff drew the order on whether there was the right to any relief, you can draw the order on the nature of the relief.

MR. FERGUSON: One question: We perhaps ought to ask should we provide in the order that the Court is retaining jurisdiction?

THE COURT: Yes.

MR. FERGUSON: I would think that would be in the nature of interlocutory order, and not a final judgment.

THE COURT: That one fortunately is not my responsibility to decide.

MR. FERGUSON: Well, then providing that the order that the Court will retain jurisdiction to oversee the compliance with the terms of the order?

THE COURT: I think that's inescapable because of the things I listed would be happening within the next few months.

MR. FERGUSON: Thank you, Your Honor.

MR. GAVER: Thank you, Your Honor.

* * *

The foregoing is a true and accurate transcript of my stenographic notes of the proceedings.

_____

Date:_____

C E R T I F I C A T E

I, Sandra Prasnal,

a Shorthand Reporter of the State of New Jersey, do hereby state that the foregoing is a true and accurate transcript of my stenographic notes of the within proceedings, to the best of my ability.

Sandra Prasnal
LAD

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March 19, 1980

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744 Broad Street
Newark, New Jersey 07102

Att: Lawrence T. Neher, Esq.

Re: Allan-Deane Corp. v. Twp. of Bedminster
Docket Nos. S-8541, S-9153 P.W.

Dear Sir:

In response to your letter of February 21, 1980 and the [redacted] from Judge Leahy of February 22, 1980, regarding certain inaccuracies in the transcript of the above mentioned matter taken on January 29, 1980 by the reporter, Sandra Prasnal, please be advised that she has rechecked her stenographic notes and finds all corrections to be valid with the exception of the following, which were noted in Judge Leahy's letter:

Page 86, line 2; page 88, line 18; page 98, line 8 - correct as originally transcribed.

Enclosed are retyped corrected copies of the pertinent pages which should be substituted for the existing pages in your transcript. We have also filed a corrected original with the Clerk of the Court.

We would like to take this opportunity to extend our apologies to you and to all counsel concerned for any inconvenience this may have caused you in this matter and to thank you for your kind courtesy and patience.

If we can be of any further assistance to you, please do not hesitate to communicate with us.

Very truly yours,

ROSENBERG & ASSOCIATES

Linda R. Rosenberg
for: Sandra Prassel

/jp
enc.

cc: Messrs. McCarter & English
Att: Alfred Ferguson, Esq.

Messrs. Mason, Griffin & Pierson
Att: Henry A. Hill, Esq.

American Civil Liberties Union
Att: Gary D. Gordon, Esq.

Edward Bowlby, Esq.

Mattson, Madden & Polito, Esqs.
Att: Francis Guiliano, Esq.

Honorable B. Thomas Leahy