~~Round Valley v. Twp of Clinton~~ 1978

MM Clifton

~~Contraction~~ Opinion

~~Opinion~~ Opinion ordering Clifton to create new zoning ordinances which can be adjusted for higher density.

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MM0000220

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON PUBLICATION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, HUNTERDON COUNTY
Docket No. L-29710-74 P.W.

ROUND VALLEY, INC., A Corporation of the State of New Jersey,

Plaintiff,

vs.

TOWNSHIP OF CLINTON, A Municipal Corporation of the State of New Jersey, TOWNSHIP COUNCIL OF CLINTON, and PLANNING BOARD OF THE TOWNSHIP OF CLINTON,

Defendants.

CIVIL ACTION
OPINION

Appearances:

Mr. Joel H. Sterns and Mr. Michael J. Herbert for the Plaintiff. (Messrs. Sterns, Herbert & Weinroth, Attorneys)

Mr. Roger M. Cain for Defendant Township of Clinton and Township Council of Clinton. (Messrs. Felter & Cain, Attorneys)

Mr. Francis P. Sutton for Defendant Planning Board of Clinton Township.

Decided: January 13, 1978

BEETEL, J.C.C. (Temporarily Assigned)

OUTLINE OF OPINION

PROCEDURAL HISTORY:

This is an action in lieu of prerogative writ wherein Plaintiff seeks to have the Clinton Township Zoning Ordinance declared invalid as being generally in variation of the applicable enabling legislation and specifically in violation of Plaintiff's property rights. The

plaintiff contends that the former and present developmental ordinances of the Defendant Municipality violate the mandates of Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975); cert. denied 423 U.S. 808 (1975) (hereinafter cited as Mt. Laurel) and Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977) (hereinafter cited as Madison). The plaintiff, Round Valley, Inc., a wholly owned subsidiary of I.U. International, owns approximately 790 acres of land south of the intersection of Route 78 and Route 31. The Clinton Township tax map indicates that approximately 469 acres are located on the east side of Route 31. The remaining 321 acres are located west of Route 31. This land has a golf course on it and part of the land has difficult topography. Presently, the land west of Route 31 (Beaverbrook tract) is zoned residential (R-3) with a PURD option. The land east of Route 31 (Goble tract) is zoned for research, office and manufacturing (ROM).

On December 7, 1973, the plaintiff requested the Clinton Township Planning Board to recommend an amendment to the then existing Clinton Township Zoning Ordinance which would permit the construction of a PUD on Plaintiff's property. Plaintiff proposed to construct over 3,500 dwelling units, at a density of about 4.5 units per acre. The development would house about 10,000 people over a ten-year period. The Round Valley, Inc. proposal was presented to the Township on January 28, 1974 by members of the corporation's project team. T. E. Moore, the Clinton Township Planner, submitted a report to the Township Planning Board on February 21, 1974 on the proposal. In his report, he stressed its preliminary nature. The report states in part:

> "Following is a preliminary planning evaluation of the Round Valley development proposal, as presented to the Board on January 28, 1974 by members of the project team. I would like to emphasize the preliminary nature of this evaluation report for several reasons.
>
> 1. Due to the size and magnitude of the proposed project, the development raises a multitude of staggering questions and problems that must be resolved. These

questions not only involve the physical planning aspects, but also fiscal, legal, engineering, taxation, water, sewers, schools, roads, police and fire protection.

2. To fully resolve these questions and problems will require the combined efforts of local County and State officials, as well as discussions and negotiations with adjacent communities, agencies and the developer.

3. By necessity, the presentation and material submitted to date has been general in nature, to provide the Board with a broad look at the entire development and proposal. If the broad general concept and plan is basically acceptable, detail studies and plans will then be prepared. In essence, only the basic proposal and general plan is subject to serious consideration, with all other aspects of the proposed development being subject to change or negotiation.

4. Due to the general nature of the presentation and material, certain assumptions were made for estimating purposes. These may change and effect a final evaluation of the project.

For the above reasons, it is suggested that this initial report be considered as preliminary and used for discussion purposes only by members of the Planning Board and Township Council." (Exhibit P-10)

No formal request for rezoning was made at that time.

Subsequently, the Planning Board retained Robert Catlin and Associates as its planning consultant. Robert J. O'Grady of the firm submitted a report on the proposed project, recommending to the Planning Board that action be withheld pending completion of the land use plan. Mr. O'Grady's report states:

"I have examined the subject request for rezoning along with the various maps and other documents submitted by the applicant. No doubt you are familiar with the basic details of the proposal without my repeating them here. Moreover, the proposed project is quite similar to a previous submission in late 1973 which was reported on and described in some detail by Mr. T. E. Moore. Most of Mr. Moore's comments would appear to be valid today in terms of the current submission.

I have not reviewed in detail the proposed P.U.D. Ordinance submitted as part of the rezoning request. Such review would entail considerable time and expense and, in any event, the contents of the ordinance, at this time, are secondary to the basic question of the use of the property for planned unit development.

Because of the magnitude of the proposed project, the request is no simple or ordinary rezoning matter, but is, in fact, a significant departure from present zoning practice. The proposed development would involve an increase in the present population of at least 130 percent over a nine-year period, this to take place in only 3.6 percent of the Township area (4.7 percent if Spruce Run, Round Valley and Reformatory properties are excluded). Obviously, the impact of such development demands very careful assessment in terms of traffic, utilities, schools and other municipal facilities and services. More importantly, a reliable assessment of the impact of this development cannot be made without the knowledge of future planning policy in other, undeveloped areas of the Township.

The Township is presently engaged in studies relating to updating the land use portion of its Master Plan. The purpose of these studies is to determine the most appropriate use of all land within the Township on a comprehensive basis. The studies will make it possible for the Township to determine answers to the following questions:

(a) Should P.U.D. be allowed?

(b) Where should it be permitted?

(c) What uses should P.U.D. include?

(d) What density should be allowed?

(e) What dwelling unit mix should be required?

Without the benefit of these comprehensive studies, I, as a professional planner, am in no position to make a judgment on the merits of the rezoning request and I would urge the Township to take no favorable action on the request until the studies are completed. The land use plan studies will be completed within a year and I consider this to be a reasonable period of time in terms of the magnitude and possible ramifications of the proposed development." (Exhibit P-25, 7/21/75)

Clinton Township revised its zoning ordinance in 1974 but said ordinance contained no PUD provision. Thereafter, on April 15, 1975, the plaintiff commenced the instant suit, challenging the validity of the Clinton Township Zoning Ordinance of 1974 and the refusal of either defendant to consider or approve its proposal to construct a Planned Unit Development (PUD) of approximately 3,500 dwelling units over a ten-year period, on its 790-acre site.

Answers were filed on behalf of all defendants and a Pretrial Order was signed on November 17, 1975. Thereafter the matter remained dormant until November 1976 at which time the Complaint was withdrawn in an attempt to see whether the parties' differences could be reconciled in the development of a new Land Use Ordinance in 1977, pursuant to the mandate of the "Municipal Land Use Law", L. 1975, c. 291, § 1, eff. August 1, 1976; N.J.S.A. 40:55D-1 et seq.

The plaintiff agreed to dismiss its Complaint with the proviso that the action could be reinstated in February 1977 if the plaintiff had not been informed of the proposed zoning for its property under the Zoning Ordinance then under consideration or if, having been informed, it was still dissatisfied with such proposed zoning. The Land Use Plan - Township of Clinton (Exhibit J-3) was adopted by the Clinton Township Planning Board on November 16, 1976. The revised Zoning Ordinance was substantially completed by February 1977 and Plaintiff was advised of the proposed zoning for its lands which was as set forth above. An Amended Complaint in the instant matter was filed on February 7, 1977. An accelerated discovery period followed and the Pretrial Order in the instant matter was signed on March 28, 1977. Clinton Township formally adopted its current zoning ordinance on September 1, 1977 after the trial in the instant matter had already commenced (Ord. 124-77, Exhibit DPB-12). Accordingly, much of the trial focused on this new ordinance, which contained the challenged zoning and subdivision restrictions.

The trial of the instant matter began on May 31, 1977 and was completed on October 12, 1977, consuming a total of 29 trial days. Over 200 exhibits were presented by the parties.

The plaintiff also contended that the defendants had treated it in an unreasonable, arbitrary and capricious manner and alleged that

the challenged municipal ordinances violated the Municipal Land Use Law. The plaintiff seeks declaratory and injunctive relief to compel the defendants to allow for the aforesaid PUD, so long as it complies with applicable state statutes and minimum standards of health and safety.

General Description of Clinton Township

Clinton Township is located in the northeasterly part of Hunterdon County. The Township is bisected by Routes 78 and 31, which are the primary east-west and north-south arteries. The area of the Township is about 34 square miles, or about 21,700 acres. The topography is varied. There is substantial state land. It includes the Round Valley and Spruce Run Reservoirs and the New Jersey Reformatory, Youth correctional Center. It is basically a rural community. The population was about 6,500 as of January 1976. To its west is located the Town of Clinton and Union Township. In a northwesterly direction is the Borough of High Bridge and Lebanon Township. At its northeasterly boundary is Tewksbury Township, and at its easterly boundary is Readington Township. At its southerly boundary is Franklin Township, and at its southwesterly boundary is Franklin Township. Clinton Township surrounds Lebanon Borough.

As of June 1, 1976, 57 (±) percent of the total acreage in the Township was either vacant or in farmland, while another 25 percent consisted of public and semi-public areas, principally the Round Valley Reservoir. Although still sparsely populated, at 170 people per square mile in 1970, the population has been increasing over the last three decades. In 1940, the population was 2,349; 2,926 in 1950; 3,770 in 1960; and 5,119 in 1970. The percentage increase in population from 1940 to 1970 was 35.8 percent. As of June 1, 1976, 3 percent of the entire acreage of the Township was in commercial or industrial usages and there were

approximately five or six multiple dwelling units in the entire Township. The residential growth of the Township has been accelerated by the construction of Interstate 78, which traverses the entire width of the Township, making it readily accessible to the entire New York metropolitan area. The Township is also dissected in a north to south direction by New Jersey Route 31, linking the Township with the greater Trenton and Mercer County area to the south and to northeast Pennsylvania.

The land use plan that was adopted November 1976 continued the ROM zoning on the 469-acre tract,[1] but the zoning on the 321-acre tract was changed to R-3. Under this zoning, about 920 units could be constructed and the golf course retained. In the summer of 1977, the zoning regulations were revised to accord with the land use plan for the Round Valley property.

The Land Use Plan noted the following about Clinton Township:

> "...Moreover, its geographic location and regional highway accessibility, along with its attractive environment, promise substantial development pressure in the future." (J-3, p. 4)

After this plan was published, the Division of State and Regional Planning of the New Jersey Department of Community Affairs, undertook an extensive study of present and future development in the State, entitled "A New Jersey State Development Guide Plan" (Exhibit P-126) which was issued in draft form in July 1977. This Guide Plan identified ten "growth areas", which were most suitable for "future population and industrial growth" in New Jersey. (p. 54) One of these areas identified, in this first State study of its kind, is the "Clinton Corridor", comprising the north central part of Clinton Township, including most of the plaintiff's property. That growth area was described as follows:

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1. See p. 8 hereof for a description of Plaintiff's lands.

CLINTON CORRIDOR

Current Development Character

This corridor extends westward from the northeast metropolitan region along Interstate 78 to Clinton. The area includes older centers such as Somerville, Raritan and Clinton, but much of the land is either open or developed at very low densities. Open developable land comprises approximately 83,500 acres of the total 124,900 acres in this region. Many communities are within easy reach of Northeast New Jersey and New York employment centers by improved highways and interstates.

Transportation

Interstate 78 and Routes 22 and 202 provide east-west access through the region. Interstate Route 287 and Route 202 link the area with locations to the north and west. Routes 206 and 31 provide north-south access through the region.

The region contains both bus and rail transportation facilities. ConRail provides diesel service on the former Main Line of the Central Railroad of New Jersey between Phillipsburg and Newark where commuters can make connections via the Penn Central or PATH for travel to New York City. ConRail service on the Gladstone Branch of the former Erie Lackawanna Railroad also provides rail access to a small portion of the northeastern tip of the corridor.

Bus service consists of regular all-day service along U.S. 22 from Phillipsburg to New York City, and additional express bus service from Raritan and Somerville to Newark and New York City.

Rail freight service also is available in the corridor for the movement of goods.

Public Services

Public water supply and sewerage is available in existing developments. (p. 66, 67)

Description of the Plaintiff's Lands, Chronological and Historical Events in Connection Therewith:

The plaintiff's land consists of a 790-acre tract just south of Interstate 78, which is separated by New Jersey Route 31. The portion of the tract west of Route 31 comprises approximately 320 acres,

including the existing 150-acre Beaverbrook Country Club and Golf Course, hereinafter referred to as the "Beaverbrook" site. The portion of the tract east of Route 31 comprises approximately 470 acres and consists mainly of generally flat farmland, hereinafter referred to as the "Goble" site.

Until 1969, the easterly parcel or "Goble" site had been zoned for "Mixed Use", a category allowing both residential and non-residential usages. In that year, Levitt Corporation, a large land land developer, proposed that this site be developed for high density residential use. Shortly thereafter, the Goble site was rezoned for exclusive use as "Research, Office or Manufacturing", (ROM) (Exhibit J-1). In 1972, general public discussions and meetings were held concerning ROM land, and other Clinton Township properties, zoned for non-residential use. On March 22, 1972, such a meeting was held between the defendants and the local Board of Education, as well as the Township Industrial Committee. At this meeting, the then Township Mayor expressed a concern that the "ghetto" not be allowed to come to Clinton Township. (Exhibit P-123) The zoning for the Goble site has remained as ROM.

From February 1975 until January 1976, the Township Planning Consultant, Robert O'Grady, conducted a study of existing zoning and land use, in the development of a Land Use Plan for Clinton Township. As a result of that study, Mr. O'Grady drafted a proposed land use map, which changed the zoning for the Goble site to "ROM-PUD" option. (Exhibit DPB-3) After that map was presented to the Planning Board in January 1976, Mr. O'Grady presented the seventh and last chapter of what was to become the Land Use Plan of Clinton Township (J-3), as "Interim Report No. 7" (Exhibit P-51g). At pages 7 and 8 of that document, the Planner observed that a continuation of exclusive ROM

designation for the Goble site, and other adjacent (900 acres) land would place "severe restrictions" upon the plaintiff and the other affected landowners, for the "reasonable utilization of their land". Accordingly, he recommended, as he had a month earlier in presenting the proposed land use map, that a "flexible zoning approach" be undertaken to allow for a PUD on the Goble site:

> "R.O.M. - P.U.D. Option. This area corresponds to the present R.O.M.-1 Zone south of Route 22 and east of Route 31. The present zoning classification of this area is considered highly appropriate because of highway accessibility and the favorable physical characteristics which are conducive to R.O.M. uses. However, because of the large size of the area, complete utilization by such uses would appear to be beyond current market demands and beyond foreseeable demands. There are approximately 900 acres involved which when considered in conjunction with other R.O.M. industrial and commercial zones would exceed the probable needs of the Township. This amount of non-residential zoning could place severe restrictions on property owners for reasonable utilization of their land within a reasonable period of time. Therefore, a more flexible zoning approach is recommended."

> "The R.O.M. - P.U.D. option classification is intended to balance the demands within the Township for residential and non-residential growth. First of all, the present basic R.O.M. zoning would be continued since the area is highly suited to R.O.M. uses. Second, on large tracts on land, perhaps 100 acres or more, alternative development of P.U.D.'s (Planned Unit Developments) would be allowed. P.U.D. is similar to P.R.D. (Planned Residential Development), but, in addition, usually includes provision for industrial and commercial uses. In this instance, it is recommended that use of the P.U.D. concept requires use of, or reservation for future use of a minimum of approximately 25 percent of the tract for R.O.M. operations. Commercial uses, primarily intended to serve the residents or the development could also be included. Residential development would be similar to that intended by P.R.D., namely, single family homes, townhouses and apartments at a density of 8 dwelling units per acre of land not devoted to R.O.M. and commercial uses. The purposes of these recommendations can be summarized as follows:

> 1. Provide flexibility of design.
>
> 2. Offer a variety of housing types.

3. Preserve natural amenities of the area.

4. Promote a reasonable balance of residential and non-residential uses."

(emphasis added)

However, the Planning Board did not accept the Planner's recommendation and directed him to redraft Chapter 7 so as to perpetuate the exclusive ROM designation for the Goble tract. This rejection of the ROM-PUD option was made without any further studies and was one of only a few changes made in the entire proposed Land Use Plan of Mr. O'Grady. Thereafter, the ROM designation was incorporated in the 1977 Zoning Ordinance. (Exhibit DPB-12)

The portion of the plaintiff's property west of Route 31 had been zoned as "Farming-1 acre residential" (F-1) until the 1977 Ordinance, when it was redesignated as R-3, with the allowance of "PURD" option". The gross density for this zone is 3 dwelling units per acre (see Sec. 714.2e (1) Ordinance, DPB-12) and the net density is 3, 8 and 12 dwelling units for single family, townhouse and apartment use respectively (supra, 714.2e(2)). Further, in an R-3 PURD zone, not more than 40 percent of the dwelling units shall be apartments and at least 10 percent of the dwelling units shall be single family dwellings. (Supra, 714.2f)

In the Land Use Plan, the defendants described this area as having an "excellent location in terms of highway accessibility and...near existing sanitary sewer facilities". (Exhibit J-3, p. 50) On the other hand, that same Plan described a new "Commercial and Residential" (CR Zone) in the northwest corner of the Township on both sides of Route 31, as being "subject to the adverse effects of heavy traffic", and having difficult terrain. The Plan admonished that "(z)oning and development regulations should be geared toward encouraging a

low-intensity character..." (Exhibit J-3), p. 53, (emphasis added).

Indeed the Plan warned that practically all of this area had (extreme) "severe limitations" and that "extensive caution must be exercised in their development..." (Exhibit J-3, p. 16)

However, despite these recommendations, the defendants adopted density restrictions of 3 units per acre on the plaintiff's Beaverbrook "excellent" site and 8 units per acre on the remote "severely limited" CR sites. At trial, Mr. O'Grady's explanation for this contradiction was that the lower density restriction was imposed on the plaintiff's land because it was a large tract. (10/5/77 Tr. p. 129)

OUTLINE OF MAJOR ISSUES

Based upon the pleadings and the testimony adduced at trial, the following issues emerge for this Court:

1. Aside from considerations of the Mt. Laurel and Madison decisions, have the defendants acted unreasonably, arbitrarily or capriciously in the treatment of the plaintiff's land and their application to construct a PUD, so as to violate the plaintiff's constitutional rights; or, does the defendant Clinton Township have any affirmative duty to approve Plaintiff's proposed PUD?

2. Is Clinton Township a "developing community" so as to require it to enact land use regulations which would accommodate an allocation of least cost housing? (See Madison, 72 N.J. 497)

3. If Clinton Township is a "developing community", what is its housing region and what is its allocation of least cost housing units within that region? (See Madison, 72 N.J. 497)

4. If Clinton Township is a developing community, does the 1977 Land Use Ordinance allow it to accommodate its allocation of least cost housing? (See Madison, 72 N.J. 497)

5. Does the current Clinton Township Land Use Ordinance of 1977 comply with the requirements of N.J.S.A. 40:55D-1 et seq. (New Jersey Municipal Land Use Law)?

6. Will the plaintiff's PUD provide appreciable least cost housing without substantial public detriment?

7. Should the Court appoint an independent planning expert?

8. If the 1977 Land Use Ordinance is invalid, according to any of the foregoing tests, what type of relief should be afforded to the corporate plaintiffs herein?; or

If the Municipal Defendants have not complied with existing law, what action should be mandated by this Court?; or

If the Madison Township law is applicable and there is not sufficient compliance, what relief should be granted?

POINT I: DID THE DEFENDANTS HAVE THE DUTY TO ZONE PLAINTIFF'S PROPERTY FOR A PUD DEVELOPMENT, OR WAS THERE A VIOLATION OF THE PLAINTIFF'S CONSTITUTIONAL RIGHTS FOR THE FAILURE OF THE DEFENDANTS TO HAVE SO ACTED, OR WAS THERE ARBITRARY AND CAPRICIOUS ACTION FOR THE FAILURE TO DO SO REQUIRING THE INTERVENTION OF THE COURT.

The plaintiff has contended and presented testimony throughout the trial that "since January 1974 the plaintiff has been attempting to secure the approval of its PUD, without success. The Court has heard voluminous testimony concerning the continuous efforts of Round Valley to have the defendants consider both its application and an appropriate enabling ordinance. The plaintiff's three-year struggle has resulted in a failure by the defendants, by their own admission, to even seriously consider Round Valley's proposal".

"Joseph Therrien, the plaintiff's President, testified about the plaintiff's attempts to obtain approval of the PUD. On November 8, 1973,

he requested an informal meeting with the defendant Planning Board which was held on January 28, 1974, at which time a full presentation of the PUD proposal was made. It is uncontroverted that the Planning Board members and the Township Engineer received copies of this proposal at that time, along with a proposed PUD ordinance. After this full presentation, the Planning Board stated that they would not give further consideration until a public hearing was held on the plan. Soon thereafter, Round Valley urged consideration of its proposal in connection with the revision of the zoning ordinance, which the plaintiff was advised would take place in July 1974. During this period of time, the defendant Township having imposed a building moratorium, in December 1973 preventing any development of the plaintiff's land, continued said moratorium through December 1974."

"On February 21, 1974, T. E. Moore, the then Planning Consultant to the Planning Board, issued a preliminary evaluation report which has been previously set forth" (supra, Procedural History).

"This Planning Consultant recommended a further consideration of such factors as water supply, sewerage systems, school facilities, and financial resources of the plaintiff. The plaintiff had presented material addressing those concerns in January 1974 (Exhibit P-4). The plaintiff supplied further detailed information on June 24, 1975. These extensive materials were submitted without any request for them by the defendants." (Exhibit P-22A to E)

"During the first four months of 1974, the plaintiff presented its plan to the Township Environmental Commission, the South Branch Watershed Association, and the Hunterdon County Planning Board, without any negative reaction. The Planning Board at first said that the PUD would not be considered until the adoption of the 1974 Zoning Ordinance;

that ordinance was thereafter adopted without any PUD ordinance. On April 25, 1974, the plaintiff again appeared before the Planning Board, whose Chairman stated that it would not be until the end of 1974, before the Board would consider the plaintiff's proposal."

"On June 6, 1974, the Township Council extended its building moratorium until December 31, 1974. On June 24, 1974, the plaintiff appeared before the defendant Council to urge unsuccessfully for some action on a PUD ordinance, which the State Department of Community Affairs advised had to be adopted before a PUD proposal could be approved. (Exhibit P-14) On July 5, 1974, Round Valley again met with the members of the Planning Board to urge consideration of its proposal, again without any results. On September 6, 17, and October 1, 1974, Mr. Therrien urged the Planning Board Chairman to take some action. The Chairman responded that the Board could not consider the proposal because it was looking for a new planner."

"On December 16 and 20, 1974, Mr. Therrien called then Mayor Walls to urge some progress in considering the plaintiff's proposal, without any results. On February 6, 1975, a site plan ordinance was approved by the Defendant Township, over the objections of the plaintiff because of the unnecessary impediments which it posed to any PUD. On February 7, 1975, Mr. Therrien wrote to the Clinton Township Mayor, stating that it had been over a year since the proposal and a PUD ordinance had been submitted; outlined all the waiting and delays which had taken place; and again urged some action. Finally, a meeting was arranged on March 12, 1975, between Round Valley and Clinton Township officials, including the Mayor and members of the Planning Board, at which time the Planning Board Chairman stated that it would take at least another year for the new planner, Robert O'Grady, to put together

the necessary information for the Planning Board before it would act on a PUD. After the plaintiff became convinced that the delay would not end, it filed the original Complaint in April 1975."

"The attitude of the defendants was evidenced by the testimony of the Planning Board Chairman and the Mayor of Clinton Township. Neither individual was shown to have read the voluminous material submitted, as early as January 1974, yet they remained adamantly opposed to the plaintiff's PUD. In fact, the present Mayor admitted that even if she had read the material, she would not agree to the development. During the three and a/half years that the proposal was languishing, neither defendant asked the Township Engineer to examine the plaintiff's plans, and Mr. O'Grady only undertook a cursory review, after which he reaffirmed the general favorable comments of his predecessor, Mr. Moore (see Exhibit P-25). The various reasons given by the defendant for not considering the proposal are clearly pretextuous. These reasons did not prevent the Board, in the testimony of its Chairman, from reviewing or approving subdivisions after the plaintiff's submission. All of these subdivisions were expensive, single lot, low density tracts."

"Added to this delay is the fact that the defendant Township itself withdrew from participating in the only two sub-regional sewerage utilities in the area, after the plaintiff had submitted its proposal. That same defendant is now asserting that the plaintiff's PUD should not be approved because of the unavailability of those same utilities."

Notwithstanding the facts to which the plaintiff has offered the above testimony (which was not disputed as far as the time factors were concerned), the defendants have contended as follows:

"Throughout the trial, plaintiff claimed delay. This claim has absolutely no merit. There was no obligation on the part of the Township to construct P.U.D. at the time of the application and it is

not mandatory now. Plaintiff timed every stage of the proceedings to its advantage. The suit was filed shortly after the Mt. Laurel decision. Plaintiff then did nothing to expedite the trial. In November 1976, the case was dismissed with right to reinstitute the case with accelerated trial. As of November 1976, in answer to interrogatories, Plaintiff listed only its planning consultant as a witness. It used the interval to obtain other witnesses and to obtain massive reports. Interestingly, the Amended Complaint was filed shortly after the Madison Township decision. Plaintiff now has had a greatly accelerated trial."

"The Madison Township law is recent law. Clinton Township moved immediately at the time of the Mt. Laurel case to revise its land use plan, and came up with a greater variety of housing than neighboring municipalities, according to defendant Planning Consultant. In its zoning, it has provided opportunity to construct four times the least cost housing that the State Planning Agency says is its obligation. This despite the fact that the Madison Township law is as recent as January 1977. This municipality has not only expeditiously complied with the law, but has provided opportunity in its zoning for far more housing for lower income persons than the law requires."

Looking objectively at these opposing contentions and considering the time web in which the events occurred, it is necessary to mentally review the context in which the PUD proposal of the plaintiff was first spawned upon the defendant Municipality, its reaction thereto and the actions or inactions of both of the parties since that time. The beginning date was January 1974, when the informal presentations were made that the plaintiff wished PUD consideration for its site. The ordinance, at that time, did not allow for PUD development. Additionally, this was a time period when the municipalities throughout the State were

beginning to react to the concept that all municipalities were going to be required to take their "fair share of housing", that concept being articulated by then Governor Cahill in his annual address to the New Jersey Legislature in 1970. It can be seen that the Township was reacting thereto in terms of amendments to its then zoning ordinance to allow cluster housing, and to undertake thereafter with a new planner a land use plan, looking forward to a new zoning ordinance, using the then current device of moratorium, to forestall action in the interim, and then the rumors and then the reality of the new land use law of the State of New Jersey, enacted into law in August of 1976.

Appended to these developments were the decisions of the New Jersey Supreme Court in Mt. Laurel (1975) and thereafter in Madison (1977) before which time it is doubtful that Plaintiff had standing to be heard on these broad concepts for they were not then the policy of the State of New Jersey. In the interim and following Mt. Laurel, Plaintiff instituted suit, to be followed by the "New Municipal Land Use Law" in August of 1976, to be followed by a voluntary dismissal without prejudice of Plaintiff's suit with the right to reinstitute it, if the new municipal zoning ordinance did not offer Plaintiff more than it had before (which it did, by allowing mixed housing on the west or golf course side, but not on the east or Goble tract side), followed by the reinstitution of suit, accelerated discovery, accelerated trial to the exclusion of every other plaintiff with a non-jury matter waiting to be heard in Hunterdon County. Granted that the municipality could have been more diplomatic in its handling of the plaintiff's submission, but that is not the point. The point is that the government of the State of New Jersey offers aggrieved landowners the forum to be heard and remedies of the law therein, which Plaintiff sought in November of 1975,

when it felt aggrieved enough to file suit, as the trend in the law had seemingly changed in the plaintiff's favor. Rather than chastise the municipality, which was caught in the changing flux of the law being developed by the Courts and the Legislature thereafter, it is understandable that the municipality was painstakingly evaluating and analyzing what changes it wished to make. This is legislative, and not necessarily instantaneous. Being legislative, there should be a reasonable time to act and react to social needs. The Courts are reminded to respect local legislative decisions:

> "We have recently reaffirmed and faithfully enforced the principles of Mt. Laurel in an appropriate fact situation. See Oakwood at Madison, supra. But it would be a mistake to interpret Mt. Laurel as a comprehensive displacement of sound and long established principles concerning the judicial respect for local policy decisions in the zoning field." Pascack, Ass'n, Ltd. v. Mayor & Coun. Washington Tp., 74 N.J. 470 at 481 (1977).

Consequently, the time web developmental factor is understandable and does not demonstrate arbitrariness nor capriciousness in the handling of Plaintiff's submission by the government of the State of New Jersey and its municipal subdivision, the defendant herein, since the remedy system of the Courts was available and has been used by Plaintiff, while the law was in a state of flux and new law legislatively created and judicially announced was forthcoming. The wheels of justice grind slowly, which surely is a cliche, of course, and the government by providing for local legislative action and the remedy for any abuses by way of court remedy, hardly seems to be capable of chastising itself, when it is apparent that action was being taken by the governmental subdivision in that interim period. It is equally understandable that the plaintiff landowner could and would feel frustrated with the passage

of time from its original submission, but all life is not instantaneous, nor all resolutions of ongoing social problems with changing concepts being adapted to provide remedies.

More important, however, is that the power to enact PUD ordinances was originally granted to New Jersey municipalities by the municipal "Planned Unit Development Act", L. 1967, c. 61. That statute was subsequently repealed by the "Municipal Land Use Law", L. 1975, c. 291, Sec. 80. Sections 29-29.3 and 52 of the "Municipal Land Use Law" comprise the current enabling legislation providing for municipal ordinances regarding planned development. Neither statute imposes a mandatory duty upon a municipality to enact such legislation.

The Municipal PUD Act provided at N.J.S.A. 40:55-56:

> "The powers granted herein may be exercised by any municipality which enacts an ordinance..." (emphasis ours)

The discretionary nature of this grant of power to New Jersey municipalities was further emphasized at N.J.S.A. 40:55-66 which provided:

> "Any municipality may avail itself of the powers granted herein in whole or in part." (emphasis ours)

The previous enabling act provided at N.J.S.A. 40:55-67 that "(t)his act shall be construed most favorably to municipalities" and in good faith determination by the municipality not to avail itself of the powers granted by the act is therefore entitled to a pr ma facie presumption of validity.

The Municipal Land Use Law, while encouraging the use of planned unit developments (see N.J.S.A. 40:55D-2(k)), still does not mandate the passage of a PUD ordinance. A municipality may or may not include standards for PUDs in its zoning ordinances (N.J.S.A. 40:55D-65(c)) and

subdivision and site plan ordinances (N.J.S.A. 40:55D-39(c)). No statute or judicial determination has yet imposed a duty upon municipalities to zone for PUDs. In the absence of that type of mandate, this Court will not conclude there was such a duty on the defendant Township. Such a determination is properly the province of the Legislature and they have chosen not to impose such duty at this time.

Despite Plaintiff's protestations that the municipality ignored its proposal, the record indicates that planned development has been considered and has been provided for in the current zoning ordinance in various parts of the municipality (including Plaintiff's Beaverbrook tract). It is also worth noting that former Planning Board Chairman Ray Hilliard's undisputed testimony indicated that various members of the Township Planning Board visited a planned community known as Flying Hills in Reading, Pennsylvania at Plaintiff's urging. The record made before this Court does not indicate that the defendants ignored Plaintiff's proposal. The proposal was not adopted but the defendants had no duty to do so.

In concluding the ruling on this point, it has been noted that the plaintiff has indicated:

> "The New Jersey Constitution of 1947, Article I, Paragraph 20 provides that "(p)rivate property shall not be taken for public use without just compensation." Article I, Paragraphs 1 and 5 of the New Jersey Constitution, also afford equal protection and due process of law rights for property owners."

It is the conclusion on this point that there has not been any violation of the plaintiff's constitutional rights from the date of the submission by the plaintiff of its original informal submission (January 1974) to the date of the present Land Use and Zoning Ordinance of Clinton Township,

February 1977, in that private property has not been confiscated, condemned, nor zoned into idleness, especially in light of more use being allowed of Plaintiff's lands thereunder than previously, all according to due process of law, with the safeguard of equal protection being utilized through the court system. (However, see Point X infra.)

The actions and reactions of the municipality do not show any palpably arbitrary and capricious action, rather the opposite by a rural municipality attempting to cope with changing law in a sensitive area!

POINT II. THE CONTROLLING PRECEDENTS OF MT. LAUREL AND MADISON

If the defendants have not acted arbitrarily and capriciously, so as to violate the plaintiff's property rights, the recent decisions in So. Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, supra. (1975) and Oakwood at Madison, Inc. v. The Tp. of Madison, supra. (1977) (hereinafter Madison) make it clear that the municipal ordinances under challenge herein, can be viewed as impermissably exclusionary, requiring the relief sought by the plaintiff to be fully adjudicated.

In Mt. Laurel, the Court considered "...whether a 'developing' municipality...may validly, by its system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it, and thereby, (as Mt. Laurel had), exclude such people from living within its confines because of the limited extent of their income and resources". 67 N.J. at 173. Justice Hall began his analysis of the issues by setting forth some fundamental principles of law:

> "It is elementary theory that all police power enactments (such as land use regulation), no matter at what level of government, must conform to the basic state constitutional requirements of substantive

due process and equal protection of the laws. These are inherent in Art. I, para. 1 of our Constitution, (footnote omitted), the requirements of which may be more demanding than those of the Federal Constitution. (citations omitted.) It is required that, affirmatively, a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare. (The last term seems broad enough to encompass the others.) Conversely, a zoning enactment which is contrary to the general welfare is invalid." (67 N.J. at 174-175)

Justice Hall then noted that those considerations are specifically set forth in the Zoning Enabling Act (N.J.S.A. 40:55-32, since superseded by N.J.S.A. 40:55D-1 et seq; and more particularly N.J.S.A. 40:55D-2 and 62). 67 N.J. at 175.

Justice Hall's now famous conclusion is found at 67 N.J. 187, 188:

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

Perhaps most importantly, in reaching this conclusion, the Court shifted the burden of proof to the municipality, by means of what Justice Hall called "altering judicial attitudes".:

> "In sum, we are satisfied beyond any doubt that, by reason of the basic importance of appropriate housing and the long-standing pressing need for it, especially in the low and moderate cost category, and of the exclusonary zoning practices of so many municipalities, conditions have changed, and, ... judicial attitudes must be altered from that espoused in that and other cases cited earlier, to require, ... a broker view of the general welfare and the presumptive obligation on the part of developing municipalities at least to afford the opportunity by land use regulations for appropriate housing for all.
>
> We have spoken of this obligation of such municipalities as "presumptive". The term has two aspects, procedural and substantive. Procedurally, we think the basic importance of appropriate housing for all dictates that, when it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action. Robinson v. Cahill, 62 N.J. at 491-492, and cases cited therein. The substantive aspect of "presumptive" relates to the specifics, on the one hand, of what municipal land use regulation provisions, or the absence thereof, will evidence invalidity and shift the burden of proof and, on the other hand, of what bases and considerations will carry the municipality's burden and sustain what it has done or failed to do. Both kinds of specifics may well vary between municipalities according to particular circumstances." 67 N.J. at 180-181. (Emphasis supplied.)

In concluding that Mt. Laurel's zoning ordinance was presumptively contrary to the general welfare and thus establishing a facial showing of invalidity, 67 N.J. at 185, the Court examined the provisions of the

Mt. Laurel zoning ordinance. That ordinance permitted only one type of housing--single-family detached dwellings, thus prohibiting all multi-family housing. 67 N.J. at 181.

Additionally, the Court examined the minimum lot, lot frontage and building size requirements of Mt. Laurel's zoning ordinance, and found them similarly restrictive. The required lot area was 9,375 square feet in one remaining regular residential zone and 20,000 square feet (almost half an acre) in the other remaining zone, with required frontage of 75 and 100 feet, respectively. 67 N.J. at 183. The township required minimum dwelling floor area of 1,100 square feet for all one-story houses, and 1,300 square feet for all of one and one-half stories or higher, without regard to required minimum lot size or frontage or the number of occupants.

Finally, at 67 N.J. 184 the Court found that Mt. Laurel had an unreasonable amount of land for ROM or industrial and related uses:

> "Akin to large lot, single-family zoning restricting the population is the zoning of very large amounts of land for industrial and related uses. Mt. Laurel has set aside almost 30 percent of its area, over 4,100 acres, for that purpose; the only residential use allowed is for farm dwellings. In almost a decade only about 100 acres have been developed industrially. Despite the township's strategic location for motor transportation purposes, as intimated earlier, it seems plain that the likelihood of anywhere near the whole of the zoned area being used for the intended purpose in the foreseeable future is remote indeed and that an unreasonable amount of land has thereby been removed from possible residential development, again seemingly for local fiscal reasons."

It is small wonder that the Court stated "(t)he conclusion is irresistible that Mt. Laurel permits only such middle and upper income housing as it believes will have sufficient taxable value to come close to paying its own governmental way". 67 N.J. at 184.

Upon examination of these facts of the zoning ordinance of Mt. Laurel, the Court shifted the burden to the municipality to demonstrate and establish valid superseding reasons for its "action and non-action". 67 N.J. at 185.

In the Madison case, the Supreme Court confirmed the mandate of Mt. Laurel, and fine-tuned its broad directives. In addition to the comprehensive instruction to the Bench and Bar and Judge Conford, speaking for the Court, the real significance of the decision is two-fold.

First, the Court explicitly held that, absent subsidies or legislative incentives, developing municipalities must adjust their zoning and land use regulations to accommodate privately financed and constructed "least cost" housing. Madison, 72 N.J. at 510, 511. The Court so held in the context of a contention raised by the defendant municipality in Madison that the faire share housing mandate of Mt. Laurel is impracticable in the current economy, and any litigation to enforce it is futile. The Court identified the problem and specified the solution as follows:

> "A key consideration in this particular case as well as a factor integral to the entire problem, generally, is the well-known fact that, amply corroborated by this record, that private enterprise will not in the current and prospective economy without subsidization or external incentive of some kind construct new housing affordable by the low income population and by a large proportion of those of moderate income. (Footnote omitted.) We recognized this fact in Mt. Laurel. 67 N.J. at 170, n. 8; 188, n. 21. The amount and kind of governmental subsidies available for housing has always been fragmentary, and federal sources have recently been restricted. (Footnote omitted.) What can legally be required of municipalities by way of initiation of public housing programs and provision of zoning incentives for production of

lower income housing will be discussed infra. But it will be apparent that sources extraneous to the unaided private building industry cannot be depended upon to produce any substantial proportion of the housing needed and affordable by most of the lower income population.

In view of the foregoing, Defendant implies that the mandate of Mt. Laurel is impracticable in the current economy and that litigation to enforce it is futile. Thus defendant flatly asserts in a supplemental brief: 'We do not believe that substantial low and moderate income housing can be created by zoning. However, it goes on to make an observation which appears to us to provide the clue to the only acceptable alternative recourse if in fact private enterprise cannot economically construct the housing needed for lower income families. It states:

> Planned Unit Development can help by providing large amounts of additional housing some of which is in the moderate income range. The effect of new construction is also to create filtering whereby families in the moderate income group move into new housing created in the PUD zone making available existing housing for lower income families who cannot afford the new. Without subsidization, this is undoubtedly the most reasonable and certain method of creating housing opportunities for low income families.'

To the extent that the builders of housing in a developing municipality like Madison cannot through publicly assisted means or appropriately legislated incentives (as to which, see infra) provide the municipality's fair share of the regional need for lower income housing, it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the 'least cost' housing, consistent with minimum standards of health and safety, which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share..." 72 N.J. at 510-512.

This concept of least cost housing dealt with exclusionary zoning against moderate income families, as well as low income families. The Court in 72 N.J. 513, 514, reasoned that the provision of least cost housing to a moderate income family, now precluded from sound housing accessible to employment, would directly benefit that

family while at the same time indirectly benefiting a lower income family within the housing region:

> "Nothing less than zoning for least cost housing will, in the indicated circumstances, satisfy the mandate of Mt. Laurel. While compliance with that direction may not provide newly constructed housing for all in the lower income categories mentioned, it will nevertheless through the 'filtering down' process referred to by defendant tend to augment the total supply of available housing in such manner as will indirectly provide additional and better housing for the insufficiency and inadequately housed of the region's lower income population. See also Mt. Laurel, 67 N.J. at 205 (Pashman, J., concurring).

In Footnote 22 at 514 of its Madison opinion, the Court analyzed this "filtering down" theory as follows:

> "Added support for this 'filtering down' theory was adduced at the trial by Peter Abeles, township planner, who acknowledged that the movement of upper moderate or middle income families to newly constructed housing would leave their former housing available for families lower in the income scale. This movement can comprise a chain of families 'moving up'. The shorter the chain, the sooner the needs of the lowest income families are met and presumably the better the facilities made available to them. The shortness of the chain obviously depends on the inexpensiveness of the most recently constructed housing. Lansing, et al., supra, at p. 5, 65."

The requirement for developing communities to provide least cost housing is a mandate to eliminate zoning and subdivision cost exactions which have no constitutional or statutory foundation, and which arbitrarily and unreasonably restrict housing availability to the moderate income and low income families alike. This category of people is expanding each year as more and more of the middle class find it utterly impossible to afford any type of suitable housing in vacant areas which are accessible to their places of employment.

The second significant principle enunciated by the Court in Madison concerned the relief to be afforded to Plaintiffs in exclusionary zoning cases. Instead of remanding the matter to the municipality to adjust its zoning and subdivision ordinances to conform with its holding, the Court actually mandated the approval of the successful developer's project to avoid the danger of further delay and a "pyrrhic victory". Madison, supra, at 549-551.

Based on controlling tests in Mt. Laurel and Madison, this Court must examine Clinton Township and its challenged municipal ordinances in the following manner. First, the Court must determine whether Clinton is a "developing municipality". Second, having concluded that it is or is not such a municipality, the Court must determine the housing region in which Clinton Township is located and what its fair share of low and moderate income housing should be. Third, the Court must measure the present least cost housing available against Clinton Township's fair share housing allocation, and determine whether there is a substantial deficit of such housing. Fourth, the Court must decide whether past and present zoning and land use restrictions prevent the realization of Clinton Township's fair share. Consistent with the holding in Mt. Laurel, supra, at 18, this Court denied the defendant's motion to dismiss and concluded that they had the "heavy burden to establish a valid basis" for their possibly exclusionary enactments. Therefore, this opinion proceeds to examine those relevant elements recited above as criteria.

POINT III. CLINTON TOWNSHIP AS A DEVELOPING MUNICIPALITY

The plaintiff charged that Clinton Township has fostered exclusionary zoning through its current zoning and other land use ordinances, relying primarily upon the decisions in the Mt. Laurel and Madison

cases. Both of those cases deal with what are characterized as "developing municipalities" and their obligation to provide for their fair share of moderate and low cost housing for the applicable housing region. Although the principles enunciated in those cases apparently apply to Clinton Township, there are certain differences between Clinton Township and the other two municipalities which must be taken into account before evaluating Clinton Township's effort to provide its fair share of moderate and low cost housing.

The Mt. Laurel case explained the concept of a developing municipality.

> "As already intimated, the issue here is not confined to Mt. Laurel. The same question arises with respect to any number of other municipalities of sizeable land area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas (and surrounding some of the smaller cities outside those areas as well) which, like Mt. Laurel, have substantially shed rural characteristics and have undergone great population increase since World War II, or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth. Most such municipalities, with but relatively insignificant variation in details, present generally comparable physical situations, courses of municipal policies, practices, enactments and results and human, governmental and legal problems arising therefrom. It is in the context of communities now of this type or which become so in the future, rather than with central cities or older built-up suburbs or areas still rural and likely to continue to be for some time yet, that we deal with the question raised." 67 N.J. at 160.

That case and Madison went on to elaborate the responsibilities of such developing municipalities with regard to moderate and low cost housing, culminating with Madison's mandate for "least cost housing".

72 N.J. at 513. This affirmative duty has been defined in terms of "housing regions".

> "We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in 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." 67 N.J. at 174.

A further examination of the concepts of "developing municipality" and "housing region" as set forth in the above named two cases provides some guidance for their application to Clinton Township.

Mt. Laurel Township consisted of 22 square miles (14,000 acres) in Burlington County, 65 percent of which was vacant or in agricultural use. It is approximately seven miles from Camden and only ten miles from the Benjamin Franklin Bridge which crosses into Philadelphia. In 1950 its population was only 2,817 but by 1970 it had been substantially quadrupled to 11,221. The Court went on to define the "housing region":

> "...the township is now definitely a part of the outer ring of the South Jersey metropolitan area, which area we define as those portions of Camden, Burlington and Gloucester Counties within a semi-circle having a radius of 20 miles or so from the heart of Camden City. And 65% of the township is still vacant land or in agricultural use." 67 N.J. at 162.

In this framework the Court saw a developing municipality.

Madison Township (now called Old Bridge), located in the southeast corner of Middlesex County, contains almost 40 percent vacant developable land. It is within 20 miles of Newark and Elizabeth. The Court felt that

the municipality was part of the "Atlantic urban region" because of its strategic location between New York City and Philadelphia. Significantly, Tri-State Regional Planning Association studies (for counties in New York, New Jersey and Connecticut, including Middlesex) indicate that Middlesex County will be one of the four counties in those states experiencing the greatest growth rate between 1970-2000. Madison, 72 N.J. at 500. The Court characterized Madison Township as an "achetypal 'developing' municipality within the contemplation of the Mt. Laurel specifications". 72 N.J. 501. Its population increased from 7,366 in 1950 to 48,715 in 1970 and to 55,000 in 1974.

On March 23, 1977, the New Jersey Supreme Court held that the Boroughs of Demarest and Washington in Bergen County were not "developing communities", subject to the mandates of Mt. Laurel and Madison, see Fobe Associates v. Mayor & Council of Demarest, 74 N.J. 519 (1977) and Pascack Ass'n, Ltd. v. Mayor & Coun. Washington Tp., 74 N.J. 470 (1977). An examination of the facts in those cases, with Mt. Laurel and Madison, provides a clear insight as to what the Court considered a "developing municipality".

The Borough of Demarest is less than two and one-half square miles in area, with a population of 5,133 in 1970. (74 N.J. at 526). Demarest was 97.5 percent developed and the property which was the subject of the plaintiff's application was a parcel of approximately 8.15 acres in a borough of 1,345 acres. (74 N.J. at 524). In fact, it was not even disputed in Fobe that the Borough of Demarest was a developed or almost completely developed municipality.

A similar situation was present in Pascack. The Township of Washington was 97.7 percent developed, and the entire township comprised only 1,984 acres, 3 1/4 square miles. (74 N.J. at 477). The Township of Washington was obviously a fully developed municipality, in great

distinction to both Mt. Laurel and Madison Townships. See Urban League of New Bruns. v. Mayor and Coun. Carteret, 142 N.J. Super. 11, 27-28 (Ch. Div. 1976) (holding that eleven municipalities in Middlesex County are "developing municipalities" because there is "ample vacant land...suitable for 2,000 or more units of low and moderate income housing at densities of five to ten units an acre"). Also, one should see Segal Const. Co. v. Zoning Bd. of Adj. Wenonah, 134 N.J. Super. 421, 423 (App. Div. 1975), certif. denied, 68 N.J. 496 (1975) (holding Mt. Laurel inapplicable to a Borough of one square mile, 660 acres, with only 109 acres yet to be developed, because the Borough is not of "sizeable land area"); Nigito v. Borough of Closter, 142 N.J. Super. 1, 5-8 (App. Div. 1976) (holding that an application to construct Garden Apartments on the plaintiffs' 14.7 acres was properly denied because Mt. Laurel was inapplicable, where the Borough of 3.2 square miles was approximately 94 percent developed).

One can readily see that the situations dealt with in the Mt. Laurel and Madison decisions are easily distinguishable from the situations presented to the Supreme Court in Fobe and Pascack.

The question arises as to whether Clinton Township is a "developing municipality" under Mt. Laurel and Madison. Certainly the Township has a large amount of developable land since 12 percent of its acreage is currently vacant, developable land. (Another 44.4 percent of the Township's acreage is used for agricultural purposes. However, Richard Ginman, Director of State and Regional Planning, testified that land used for agricultural purposes is not generally considered as vacant developable land.) There has been a population increase from 2,926 in 1950 to 5,119 in 1970.

Clinton Township falls into a pattern similar to Mt. Laurel and Madison rather than a pattern such as Demarest and Washington. In fact,

Clinton Township fits the Court's description of a "developing community" in many respects. Excluding the public and semi-public areas of the Township, approximately 56.4 percent of the private acreage in this community is either vacant or in farmland. Although the community still had a low density of 170 people per square mile in 1970, population more than doubled from 1940 to 1970, and increased by 35.8 percent from 1960 to 1970. (See Exhibit J-3.) Clinton Township is the fastest growing part of Hunterdon County, which is one of the four New Jersey counties in the outer ring of the New York metropolitan area. (Ocean, Sussex, Warren, Hunterdon) These four counties have experienced a rapid population increase during the period 1970-1975. Certainly the Township has a large amount of developable land since 12 percent of its acreage is currently vacant, developable land, while another 44.4 percent is currently used as farmland.

As noted previously, Clinton Township, and more particularly the area around Route 78 and Highway 31, where the plaintiff's land is situate, has been designated as part of the "Clinton Corridor", by the "Development Guide Plan" of the New Jersey Department of Community Affairs. (Exhibit P-126). As such, it has been recognized as an area where future growth will and should occur. That Guide Plan was specifically designed to adhere to the decisions of the Supreme Court in Mt. Laurel and Madison (see Exhibit P-126, p. 109). This first document or Master Plan of its kind recommended that local governments with county and state support, "should encourage new development which is consistent with basic development objectives", within the "Clinton Corridor" and other growth areas, with "a variety of housing opportunity, readily accessible to employment and commercial centers, and at densities

which will result in savings in energy use and land consumption". (Exhibit P-126, p. 110).

It is apparent, however, that Clinton Township's population increase is not as explosive as was that of Mt. Laurel or Madison Townships for the same period of time. Studies of future growth by the Hunterdon County Planning Board indicate that Clinton Township will experience relatively constant population expansion reaching approximately 14,000 persons by the year 2000. As a result, it is fair to say that Clinton Township is a "developing municipality" but it is hardly an "archetypal developing municipality" characterized by explosive growth such as Mt. Laurel or Madison Townships. The difference is significant and while the principles enumerated in Mt. Laurel and Madison are valid in the instant situation, they will require less in quantitative terms from a municipality like Clinton Township to meet its obligations as set forth in the above named cases. The Courts have already recognized the logic of this proposition.

> "It may be that the rate at which a particular municipality is developing, a reflection of the need for housing in the area, should govern to some extent the amount of housing for which provision should be made in its zoning ordinance. A municipality undergoing development of less than explosive proportions, although considered developing in the Mt. Laurel context, may be required to make provision for fewer units of "least cost" housing than would a municipality resisting strong pressures for population influx by the exclusionary features of its zoning ordinance. Rate of development, and the need it reflects, may well be considered in the equation determining "fair share". The requirement for "least cost" housing may alter as rate of development changes; an ordinance is not immutable but must respond to changing needs and circumstances, need for housing being one of these circumstances." Middle Union Associates v. Holmdel Tp., Dkt. No. L-1149-72 P.W. (Law Div. 1975) (unreported).

Moreover, the nature of Clinton Township as a "developing municipality" has been virtually admitted by Robert J. O'Grady, the defendant

Clinton Township's Planning Consultant. This admission can be readily seen from Mr. O'Grady's direct testimony in response to Mr. Sutton's questioning:

BY MR. SUTTON:

Q. Mr. O'Grady, my question was, in preparing the land use plan and the revised zoning provisions, did you and did the Planning Board consider this, what is designated as the Clinton Corridor as a growth area?

A. Yes. I would say that there was a very clear impression and agreement that by virtue, primarily of Route 78, that Clinton Township was a growth area in a growth corridor, a westward movement of present and future growth along the Route 78 corridor. I think that agreement or recognition, that Clinton Township was in an area--or a growth corridor, had a great deal to do with the land use decisions that were made by the Planning Board, in terms of the location of zones and to a degree, higher density housing. (Tr. p. 15, lines 10-25, October 5, 1977.) (Emphasis added.)

And again:

BY MR. HERBERT:

Q. Mr. O'Grady, do I take it that one of the bases for the land use and zoning decisions made was that Clinton Township is an ideal location for industrial and manufacturing and other growth of that kind in the future?

A. Yes. I think when I made those statements before, we were discussing the Route 78 corridor and the Clinton corridor, I think as was referred to in that State map that was presented to me. I was just going to say that this again was recognized by the Planning Board and in the strong belief that Clinton Township was in the path of a developing corridor, and with its confluence at 78 and 31, it was in a

prime area for attracting non-residential and residential development. (Tr. p. 46-47, lines 24-25, 1-12, October 5, 1977) (Emphasis added.)

Accordingly, the Court holds that Clinton Township is a developing municipality under Mt. Laurel and Madison. The testimony indicates that its growth cannot be characterized as explosive at this time and a determination of its fair share of low cost housing for its region should reflect that fact.

POINT IV. FAIR SHARE AND REGION

After having determined that the Township of Clinton is a "developing municipality", this Court must now determine whether or not the Township's zoning ordinance provides an opportunity to meet or supply a "fair share" of the region's need for present and prospective (see Mt. Laurel, 67 N.J. at 188) low and moderate income housing (see Madison, 72 N.J. at 498-500; 524-544).

In reaching this determination, the Court must consider the concepts of "region" and "fair share". In Madison, the Court examined these two concepts earlier utilized in Mt. Laurel and observed that the:

> "...harm to the objective of securing adequate opportunity for lower income housing is less likely from imperfect allocation ["fair share"] models than from undue restriction of the pertinent region. The essential thing from that standpoint is that the true regional need be adequately qualified." 72 N.J. at 541.

However, before analyzing the pertinent language from the Madison opinion, it is well to note that the Court stated directly that it is not necessary for a court to make specific findings regarding the precise fair share of the low or moderate income housing needs of a

specifically demarcated region. The Court stated:

> "However, we deem it well to establish at the outset that we do not regard it as mandatory for developing municipalities whose ordinances are challenged as exclusionary to devise specific formulae for estimating their precise fair share of the lower income [meaning lower and moderate income, collectively] housing needs of a specifically demarcated region. Nor do we conceive it as necessary for a trial court to make findings of that nature in a contested case. Firstly, numerical housing goals are not realistically translatable into specific substantive changes in a zoning ordinance by any technique revealed to us by our study of the data before us. There are too many imponderables between a zone change and the actual production of housing on sites as zoned, not to mention the production of a specific number of lower cost units in a given period of time... Secondly, the breadth of approach by the experts to the factor of the appropriate region and to the criteria for allocation of regional housing goals to municipal "sub-regions" is so great and the pertinent economic and sociological considerations so diverse as to preclude judicial dictation or acceptance of any solution as authoratative. For the same reasons, we would not mandate the formula approach as obligatory on any municipality seeking to correct a fair share deficiency." 72 N.J. at 498, 499.

In Madison, the Supreme Court adopted Judge Furman's definition of a housing region for purposes of determining a fair share allocation, as:

> "(T)he area from which, in view of available employment and transportation, the population of the township would be drawn, absent invalidly exclusionary zoning." 72 N.J. at 537.

In this case, the defendants relied upon a preliminary draft document released by the State of New Jersey, Division of State and Regional Planning in November 1976 entitled "A Statewide Housing Allocation Plan for New Jersey". (Exhibit P-99). That document was

intended to stimulate public discussion, but on orders of Governor Byrne, was quickly withdrawn from consideration. (See Executive Order No. 35; Exhibit DPB-28). This document establishes only two multi-county regions: one in the northeast consisting of the counties of Passaic, Bergen, Morris, Sussex, Hudson, Somerset, Union, and Middlesex (described as Region 11) and a three-county region in the Philadelphia area, consisting of the counties of Burlington, Camden and Gloucester (Region 12). This preliminary draft report computed fair share housing estimates for all the remaining ten counties in New Jersey within their own county boundaries. Thus, such counties as Monmouth and Ocean, with large work forces commuting to New York and Northern New Jersey, are established as separate regions unto themselves. Among these ten self-contained counties is Hunterdon, in which the Township of Clinton is located (Region 4). Since this tentative report classifies Hunterdon as a region by itself, the allocation of low and moderate income housing for this artificial region does not take into consideration the needs of any population outside of this once rural county. This analysis not only defies reality but the expressed admonition of Justice Hall in Mt. Laurel, at 67 N.J. 189, 190 that, "...(c)onfinement to or within a certain county appears not to be realistic..."

The Court's rejection of a single county housing region was reinforced by the acceptance of Judge Furman's view of a region, as one focusing upon available employment, rather than county lines. See 72 N.J. at 71.

At trial, the Director of the Division of State and Regional Planning, Richard Ginman, acknowledged that this document did not reflect the Court's decision in Madison, which was subsequent to its issuance. He further testified that his Division never analyzed the relationship

between Hunterdon and other counties. He stated that the region for North Jersey was arrived at by determining the amount of housing necessary for three "housing deficient" counties of Hudson, Essex and Union, and drawing a region from contiguous counties until land was calculated as sufficiently available to accommodate this deficiency. He stated that the final allocation plan would take into consideration the findings of the "State Development Guide" (Exhibit P-126). As noted, that Guide projects a strong link between Hunterdon and the counties to the east (Somerset, Essex, Union and Morris) in a growth corridor region.

At trial, the plaintiff presented a detailed report by George Akahoshi, a housing expert, dealing with the issue of the appropriate housing market area and housing allocation for Clinton Township. (Exhibit P-94) That report painstakingly conformed with the specific tests handed down by the Court in both Mt. Laurel and Madison. Both Mr. Akahoshi's report and his testimony established a growing interdependence between Hunterdon County, particularly the Clinton Township area, and the New Jersey counties to the east, particularly Somerset, Morris, Union and Essex. Among the materials provided were traveling times between various distances in the New York metropolitan area and the four other counties (supra. II-III).* Extensive demographic statistics about the population changes which conform with those presented by the defendants (supra. Charts 2-6).* As the defendants' own experts, Richard Ginman and Arthur Bernard, were to later verify, one of the critical criteria in determining a housing market region is commutation patterns. Approximately 43 percent of the residents of Clinton Township with jobs commute out of county (supra, Chart 6).* The defendants' expert, Mr. Bernard, testified that the "journey to work"

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* Exhibit P-94.

had actually expanded, and his own report shows that more and more Hunterdon County residents are commuting out of county, particularly to the east, as time passes. (Exhibit DPB-25) His report shows that the Hunterdon County residents commuting out of county increased three-fold from 1960 to 1970 (3,641 to 11,563). On the other hand, county residents working in Hunterdon increased at approximately one-sixth that rate during the same period, from 10,155 to 16,159. The growing interpendence of Hunterdon County with other regions of the State was further demonstrated by the fact that the amount of out-of-county residents commuting into Hunterdon County during the same period of time increased almost two and one-half times (from 2,360 to 5,672). As the State Development Guide clearly demonstrates, the Hunterdon County of the 70's is no longer a generally remote, rural area of the State, but is, rather, a part of the overall Northern New Jersey metropolitan area.

The multi-county housing region suggested by the plaintiff, for purposes of determining a fair share housing allocation, conforms not only with the criteria set forth in both the Mt. Laurel and Madison decisions, but the examples of regions given by the Court in Madison as well. 72 N.J. at 539, 540. Specific reference was made by the Madison Court to the Miami Valley Regional Planning Commission (in Dayton, Ohio) which included five counties and 31 municipalities in an area as far as 60 miles from the center of Dayton, Ohio. The Metropolitan Washington Council of Governments was also cited by the Court. That region consists of 15 counties and local governmental jurisdictions, including the District of Columbia. Further reference was made to the Metropolitan Council of the Twin Cities of Minneapolis-St. Paul, Minnesota, which covers seven counties, including almost 300 jurisdictions

with a total population of 1.9 million. 72 N.J. at 539. Indeed, one of the very documents which the defendant relied upon, entitled "Housing Allocation Regions", prepared by the Division of State and Regional Planning, details the many multi-county regions which have been relied upon in determining a variety of housing, development, transportation, economic and conservation considerations.

After referring to all of these housing market areas as examples of "regions", the Court in Madison concluded that:

> "...In general, there is no specific geographical area which is necessarily the authoritative region as to any single municipality in litigation. Different experts may quite reasonably differ in their concepts of the pertinent region...but in evaluating any expert testimony in terms of the Mt. Laurel rational, weight should be given to the degree to which the expert gives consideration to the areas from which the lower income population of the municipality would substantially be drawn absent exclusionary zoning... This is broadly comparable to the concept of the relevant housing market area, to which there has been prior reference herein.
>
> The factors which draw most candidates for residence to a municipality include not only, for employed persons and those seeking employment, reasonable proximity thereto of jobs and availability of transportation to jobs, as mentioned by Judge Furman and stressed by most of the experts, (footnote omitted), but proximity to and convenience of shopping, schools and other amenities. Retired people, who represent a substantial part of the lower to moderate income population, might be attracted from a greater distance than employed people." 72 N.J. at 539-541.

Clearly, the most appropriate region, which would fit the descriptions sanctioned by the Court in both Mt. Laurel and Madison, would be one consisting of Clinton Township and its neighboring Hunterdon County communities with the major employment and population centers to the east in New Jersey. Although there is no absolute certainty about the boundaries of this region, for purposes of determining an allocation of fair share housing, given the data available,

the most appropriate region appears to be one consisting of the five - county region of Morris, Somerset, Essex, Union and Hunterdon.

At Footnote 45 on page 542 of its opinion in Madison, the Court made the following observation:

> "The most important single criterion emerging from fair share literature is the amount of vacant developable land, as "access to land is the basic issue in exclusionary zoning". (Emphasis supplied.) Rubinowitz, "Exclusionary Zoning: A Wrong in Search of a Remedy", 6 Mich. J.L. Reform 625, 661 (1973). Other basic criteria include employment opportunity, fiscal measures (including per capita income, equalized assessed valuation per pupil, degree of underutilization of classrooms) and existing housing or population density. See generally, Brooks, supra; Listokin, supra; Kelly, "Will the Housing Market Evaluation Model be the Solution to Exclusionary Zoning?", 3 Real Estate L.J. 373 (1975); Rubinowitz, supra; authorities cited supra note 39.
>
> It has been emphasized that many of the potential fair share criteria measure the same factors, Rubinowitz, supra, 6 Mich. J.L. Reform at 660-661, and the effort should be made to keep the formula factors simple to avoid duplication and the "statistical welfare" which may otherwise result from over-sophisticated formulae. Cf. Rose, "The Mt. Laurel Decision: Is it based on Wishful Thinking?", 4 Real Estate L.J. 61, 67 (1975).
>
> The Delaware Valley Regional Planning Board adopted a formula equally weighing only three criteria: relative wealth (based upon the market value of all taxable real estate in the county compared to the region total); equalization criteria (would give each county the same proportion of income groups); and projected employment opportunities. See Moskowitz, "Regional Housing Allocation Plans; A Case History of the Delaware Valley Regional Plan", 7 Urban Lawyer 292 (1975)." (Emphasis supplied.)

In Mr. Akahoshi's study, based upon 1975 Bureau of the Census data, he calculated that the median income for families in the five-county area was approximately $17,500 (Exhibit P-94; pp. IV-13 to 16). He also calculated that over 75 percent of the families in this same region had annual incomes of less than $25,000 a year. As the experts had done in

the Madison case, Mr. Akahoshi then measured the housing needs within the region against the present availability and concluded that the vast majority of residents of the housing market region could not hope to purchase homes in the Clinton Township area. In 1976 for example, according to the multiple listing service, over 65 percent of all housing units reported sold in Hunterdon County, were sold for $50,000 or more. According to that same listing service, 67.5 percent of all houses sold in Clinton Township were sold for over $50,000. (Exhibit P-94, Charts XXVII and XXVIII). He then analyzed the prices of single-family houses for sale in Clinton Township and neighboring communities which revealed that only three of 57 houses listed for sale were priced below $50,000 and only one below $40,000. There were no homes for sale below $30,000. This same listing service showed that the average home listed for sale during December 1976 in Clinton Township was priced at $70,400. (Exhibit P-94, Chart XXIX). This data was supplemented by an analysis conducted of Clarence C. Blazure, who reviewed the official filings of all sales throughout Hunterdon County, as contained on the official "SR-1A Forms", whether those sales be multiple listing or otherwise. This data is even more revealing of the spiralling cost of housing in Clinton Township and the surrounding area. (Exhibit P-92). Of 160 sales, of all types, in Clinton Township during 1976, 78.8 percent were for $50,000 or more. There was only one dwelling unit sold for less than $30,000 and ten sold for between $30,000 and $39,999.

Utilizing the various housing market formulae (supra, V-5 to 10),* Mr. Akahoshi's report estimated that 39 percent of the housing region population required housing under $30,000 a year and only one percent was available in Clinton Township and the surrounding areas; 36.3 percent of the region required housing between $30,000 and $50,000 per year, and yet only 7.3 percent of the Clinton Township area of housing was priced

* Exhibit P-94.

at that level. At the other end of the spectrum, only 24.6 percent of the housing market area families could afford houses $50,000 or above, yet 94.7 percent of Clinton Township's housing is in that area, and has probably risen since the data was collected in December 1976.

After establishing this enormous gap between the present high costs of housing in Clinton Township and the income of families who would logically want to locate in this community, Mr. Akahoshi prepared a detailed allocation formula based upon the single criterion of vacant developable land, which the Madison Court deemed to be the most critical consideration. The importance of this criteria was also acknowledged in the documents presented by the defendants' expert (Exhibit DPB-31). Based upon this analysis, Mr. Akahoshi concluded that Clinton Township's allocation of housing need would be in the range of 2,833 to 3,457 units depending on which set of criteria prepared by the Division of State and Regional Planning was used (Exhibit P-94; p. VI-4).

The defendants relied upon the preliminary draft of the "Statewide Housing Allocation Plan for New Jersey" (Exhibit P-99), which as noted, had already been withdrawn by Governor Byrne and was in the process of revision. The defendants argued that the calculations in that draft supported their position that a total of only 6,016 least cost housing units would have to be provided in the county and only 518 of those units in Clinton Township itself. (See Exhibit P-99, pp. 1-5, 6). However, even if the tentative nature of this document was set aside, it would appear to the Court to be still fatally defective. First, as Mr. Ginman acknowledged in his testimony, it does not acknowledge the Madison decision, with its elaborate discussion of appropriate regions and fair share housing allocations and "least cost" rather than simply low and middle income housing. Second, the document does not deal with

"least cost housing" but only housing for low and moderate incomes. The Court notes that the draft calculated such incomes as those below $8,567, which even to a casual observer, is far below the 1975 census data relied upon by the plaintiff (median income in the housing market region of approximately $17,500). Third, the entire calculation is predicated upon Hunterdon County as a region unto itself. Since the amount of dilapidated, overcrowded, and non-extant rental units in this county is below that in other parts of New Jersey, the resulting housing need figure is substantially lower than it would be, had the County been combined with other Northern New Jersey counties as the Department of Community Affairs suggests in its "State Development Guide". If Hunterdon County is to be considered as self-contained with respect to determining future housing, it would defy all recent growth and migration figures. Fifth, this plan chooses the most conservative estimates in calculating future population (see DPB-30). While the County Planning Board estimates that the population will increase from 1970 to 1990 at the rate of 46.4 percent to a total population of 102,460, the State chooses to project that increase at only 28.3 percent to a total population of 89,835. The Court takes judicial notice of the fact that, since the conclusion of testimony in this case, the Bureau of Census has released data which show that the County figures are far more accurate. Indeed, Hunterdon County is one of only a few counties in the entire state which is now gaining in population. Sixth, the criteria used in this tentative draft for an allocation within a particular housing market region is highly suspect. For example, vacant developable land is properly considered an important criteria in determining which municipality should accommodate future housing growth. However, "qualified farmland" is removed from such calculations. As

Mr. Ginman acknowledged, this would mean that even the wealthiest communities, with vacant land which happened to be under farmland assessment would have their fair share housing allocation reduced accordingly. For example, if this criteria were to be applied to Clinton Township, it would drastically alter its normal fair share housing allocation, since according to that municipality's own land use plan, approximately 60 percent of all privately held lands in Clinton Township were listed as farmland (see Exhibit J-3, Table 1).

There are many other deficiencies in the plan, which Mr. Ginman acknowledged in his testimony, which do not support the defendants' position that its fair share of "least cost housing" be limited to 518 units as of 1990, as it suggests.

The conclusions of Mr. Akahoshi were verified by an additional plaintiff's witness, Allan Mallach, who had conducted several fair share allocation studies in other communities and who had been quoted extensively by the Supreme Court in the Madison decision (see Footnote 3, 72 N.J. at 496, Footnote 29 at 519, Footnote 42 at 535, 550, 557, Footnote 3 at 560, 561, Footnote 10 at 571, 589, 590). Thus, he concluded that the region comprised of Hunterdon, Morris, Somerset, Union and Essex County was an appropriate housing region and that the allocation of 2,833 to 3,457 units of housing was an appropriate estimate for Clinton Township to assume. (Exhibit P-119). Mr. Mallach also testified about the State Development Guide Plan, which he characterized as completely supporting the region and allocation figures assigned by Mr. Akahoshi.

Turning to the thesis advanced by the defendants, Robert O'Grady, the planner for the defendant Township, testified in detail as to the methods employed by the defendant Township in order to arrive at what

it considered its "fair share" of low and moderate cost housing units (10/4/77 Tr., p. 81-84). The statistical studies he used were from the State and the County of Hunterdon. He reviewed these and inferred projections of county population for the year 2000, using 1970 U.S. Census data. After determining median income of both county and municipal residents, he believed it was possible by using HUD criteria to determine what proportion of the projected population of the county and the municipality would require moderate or low cost housing by the year 2000. The number of dwelling units of low and moderate cost housing needed in Clinton Township by the year 2000 projected out to 1,423 (using Clinton Township income figures) and 1,706 (using Hunterdon County income figures). Mr. O'Grady's testimony indicates that State and County estimates were much lower.

In order to meet this need, the municipality allegedly selected areas which it felt were suitable for least cost housing and allowed densities which it determined was the highest reasonable density that could be allowed. (10/4/77 Tr., p. 80). By using this method, the municipality apparently had made provision for 2,120 units of least cost housing in the R-5, CR-1 and CR-2 zones (10/4/77 Tr., p. 76-80). It was alleged that the municipality made provisions for more units than will likely be needed and have, in effect, "overzoned" for least cost housing, a practice approved by the Court in Madison.

> "It seems useful to point out, in connection with the revision of the ordinance which will be required by our judgment herein, that sound planning calls for providing for a reasonable cushion over the number of contemplated least cost units deemed necessary and believed theoretically possible under a particular revision. Plaintiff adduced testimony that a reasonable margin over any formulaic quota was necessary in order to produce any likelihood of achievement of the quota. The reasons are evident. Many owners of land zoned for least cost housing may not choose to use it for that purpose. And developers of least cost housing may not select all of the zoned land available therefor, or at

least not within the anticipated period of need. Thus overzoning for the category desired tends to solve the problem." 72 N.J. at 517.

When the R-5, CR-1 and CR-2 Zones were examined, however, it became readily apparent that these zones are not readily suited to least cost housing because of topographical constraints, lack of immediate water and sewerage connections in the present and in the foreseeable future, and gave all the appearance of being "camouflage" zones, designed to appear to conform to the requirements of the changing social needs of the New Jersey population's need of present and future "least cost" housing as that term has been defined. More will be said of these zones hereafter, but it is apparent that Mr. O'Grady used statistics and doubtful areas of development to reach the conclusions that he did. In light of the fact that he originally believed the east side of the plaintiff's lands should have a PUD option in connection with ROM, and the doubtful validity of his statistics and the nebulous defense he gave of the R-5, CR-1 and CR-2 Zones, his testimony overall failed to sustain his conclusions, and therefore the alleged bottom line of his testimony, that the Township had "overzoned" for future use was also an erroneous conclusion, having been originally premised on a false or at least highly doubtful major premises.

In addition, the defendants have provided no evidence to dispute the fact that least cost housing is virtually non-existent in Clinton Township. Their own land use plan reveals that there are only five or six multi-family dwelling units in existence and there are no mobile homes (Exhibit J-3). Since the Township has withdrawn as a participant from both the Clinton Town utility and the Lebanon-Readington utility, only substantial developers can afford to pay for appropriate transmission lines. Thus, there are no multi-family dwellings approved,

and there is no construction of single lot homes on lots less than one acre, both of which would require offsite sewage treatment.

In fact, aside from the "Oak Knoll" development with housing selling in excess of $65,000, there is no appreciable housing being constructed in the Township[2] (see Neighbor testimony). But even this development was made possible because the developer contracted with the Clinton utility for sewerage treatment.

Although the defendants assert that they have provided in the future for least cost housing, the present situation in Clinton Township is that only the most affluent can afford to move there. As noted in the Akahoshi report, approximately 95 percent of the Township's housing available for sale is priced beyond the financial resources of 75 percent of the population of Northern New Jerseyans. Indeed, accepting the median family income of $17,500 in the region, housing is not only unavailable in Clinton Township for low income families but for families with average income as well.

Therefore, the testimony and evidence from Plaintiff's case demonstrates that the issue of region and fair share must be resolved in favor of Plaintiff's as the more acceptable, reasonable, logical and proved thesis!

POINT V. THE ZONING AND LAND USE ORDINANCES OF CLINTON TOWNSHIP

In 1962 Clinton Township adopted its first master plan and zoning ordinance. The earliest zoning provisions designated 6505.48 acres for F2 (farming, but residential use permitted at 2 acres or larger); 8,616.12 acres designated as F1 (farming and residential of one acre minimum) and 1280.34 residential acres, with a minimum of 30,000 square feet. Also, in 1962, 1536.35 acres were designated for commercial use, 2638.54 acres for mixed use (commercial, research, office, manufacturing

2. There are only 212 units approved for this development, 76 of which have been constructed to date, since 1975.

and residential), and 232.86 acres for industrial usage. (Exhibits J-1; P-68, P-69).

In October 1969, the zoning ordinance was amended to totally eliminate the "mixed use" designation and substituted ROM (research, office and manufacturing) to exclude any residential usage in the previously designatee "mixed use" district. This occurred after the Planning Board had denied the request of Levitt & Sons on January 22, 1969 for a reduction in residential lot size on the Goble or east portion of the Round Valley site.

In 1974 the Township adopted a zoning ordinance which greatly restricted any increased housing in the Township. (Ord. 66-74; Exh. J-2). The F2 or 2-acre minimum classification was increased from 6505.48 acres to 10,421.05 acres, and the smaller 30,000 square foot residential districts were reduced from 1280.34 to 403.69 acres. The ROM designation was continued, but the ordinance incorporated a cluster provision, which required a minimum 40-acre site, with public water and sewer facilities, and one single detached dwelling unit for each multi-family unit.

While the Land Use Plan (Exhibit J-3) was being developed in 1976, the Township adopted a new subdivision ordinance, with the standard requirements for processing of subdivision and site plan applications, standardized curb, gutter, street and other restrictions. (Ordinance 95-76). Both this ordinance and the 1974 zoning ordinance were readopted by the Township Council, with minor changes, as an "Interim Land Use Ordinance", on December 30, 1976. (Ordinance 109-76; Exhibit J-4). For the first time, in this ordinance, the Township made an allusion to a "Planned Development" plan, but provided that such plans should be treated in the same manner as a normal subdivision or site plan (see Section 602.5 and 602.8).

On July 7, 1977, upon recommendation by the defendant Planning Board, the new "Land Use Ordinance of the Township of Clinton" was introduced and thereafter finally adopted by the Township Council on September 1, 1977. (Ordinance 121-77; Exhibit DPB-12). That ordinance re-enacted the pre-existing subdivision and site plan restrictions and created a number of new zones such as Office and Business (OB), Commercial and Industrial (CI), and Commercial and Residential (CR). Further, Planned Unit Developments (PUD) and Planned Unit Residential Development (PURD) were allowed in certain areas if public water and sewers were available.

Of the 12,029 residential acres in the new ordinance, 7,411 acres were designated for minimum lot sizes of 2 acres or more. In fact, the majority of that acreage (4,717 acres) was expanded from 2 to 3 1/2 acre minimum lot size. (Exhibit DPB-41, p. 2).

As noted previously, the Court recognizes that every municipality is different. However, even conceding the defendants' argument that Clinton Township neither has, nor will, grow as fast as either Mt. Laurel or Madison; a comparison of the 1977 ordinance in this case with those held to be exclusionary in Mt. Laurel and Madison, is most enlightening. That comparison unquestionably reveals Clinton's ordinance to be even more restrictive than the enactments found unconstitutionally repugnant in these controlling decisions.

In Madison, 12 percent of its acreage was zoned for 2-acre minimum lot sizes while 30 percent was zoned for 1-acre lots, 72 N.J. at 504; while Mt. Laurel's lowest density lot was 1/2 acre, which comprised 50 percent of that community's total acreage. 67 N.J. 164, 165. In fact, Mt. Laurel's minimum lot sizes ranged from 1/2 acre down to less than

1/4 acre; yet the Court found them so restrictive "as to preclude single family housing for even moderate income families". 67 N.J. 183. By comparison, 47.5 percent of Clinton's non-public lands are now zoned for 2 to 3 1/2 acre minimum lots, or almost five times the proportion of such zoning in Madison (Exhibit DPB-41). Further, an additional 22 percent of Clinton's acreage is zoned for 1-acre lots. The smallest residential lot districts, allowing development on lots between 30,000 and 9,000 square feet, was further reduced to 350 acres or 54 acres less than the 1974 ordinance, and almost one-quarter of the smaller residential acreage (1,280.34 acres) allowed in 1962. However, a comparison of the 1977 Zoning Map (Exhibit P-54) with the analysis of "Existing Development" in the Land Use Plan shows that all but a few of the 9,000 minimum lot acreage (R-5, consisting of 85 acres or a .5 percent of Clinton's private land) and the vast majority of the 30,000 minimum lot acreage (R-4, consisting of 265 acres, or 1.7 percent of Clinton's private land), is developed. Thus, except for a very small (less than one percent of Clinton's private land) the minimum lot size for houses in the Township's residential zones, is one acre. But even if the small 3/4 acre lot is considered, it is once again evident that Clinton's zoning is far more exclusive than the zoning in Mt. Laurel and Madison, held to be invalid by the Court. In fact, the largest minimum lot size in Mt. Laurel was 1/2 acre. 67 N.J. 163-165. In Madison, the percentage of private land zoned for residential use on lots of below 1/2 acre was 20 times greater than that allowed by Clinton. (10.8 percent of Madison's land was zoned for residential lots of 15,000, 10,000 or 7,500 square feet; 72 N.J. 505).

In Madison, there were 3,700 apartment units or 27.4 percent of the 13,499 housing units in that Township, Madison (see slip opinion,

p. 21),[3] while in Mt. Laurel and Clinton, such units were virtually non-existent. Both Mt. Laurel and Clinton theoretically permitted such units, but they had not been built because of requirements of public water and sewerage to mostly remote sites, density and subdivision restrictions, which made such developments economically prohibitive. See 67 N.J. 167-170; (Exhibit J-3).

To close the door even tighter on residential growth, all three communities placed large portions of their acreage in industrial or office use (ROM) even though there had been little, if any, actual ROM development in these districts. In Madison, 16 percent of its acreage was zoned for industry or office use, yet only 600 of the 4,000 acres so designated had been developed as such. 72 N.J. at 503, 504. In Mt. Laurel, 29.2 percent of that municipality's acreage was zoned for industry or office use, yet 100 of the 4,121 acres so designated had actually been developed as ROM. 67 N.J. 162, 163.

In Clinton Township, only a little more than 100 acres of the 2,297 acres zoned exclusive for ROM or related uses* (CI, without PUD, and OB zoning districts) has actually been developed for such purposes. This lopsided zoning for industrial land was condemned by the Court as noted in Mt. Laurel, 67 N.J. at 163:

> "...as happens in the case of so many municipalities, much more land has been so zoned than the reasonable potential for industrial movement or expansion warrants. At the same time, however, the land cannot be used for residential development under the general ordinance."

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3. Cited to the slip opinion because this page of the Madison opinion was deleted from the advance sheets.

* See explanation p. 55.

This tactic was expressly condemned by the Court in both Mt. Laurel and Madison. As Justice Hall stated in the earlier case:

> "...Certainly when a municipality zones for industry and commerce for local tax benefit purposes, it without question must zone to permit adequate housing within the means of the employees involved in such uses. ...The amount of land removed from residential use by allocation to industrial and commercial purposes must be reasonably related to the present and future potential for such purposes. In other words, such municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate." 67 N.J. at 187, 188.

Relative to the extent of R.O.M. zoning, and in defense thereof, Mr. O'Grady said, in his report dated August 11, 1977 on pages 7 and 8, Exhibit DPB-42:

> "The proposed R.O.M. zoning incorporates approximately 1,454 acres* or 9.4 percent of the Township, excluding public land, compared to existing R.O.M. zones which total 1,771 acres or 9.8 percent of the Township, excluding public land. If we exclude areas that might be used for residential purposes under PUD and multi-family options, total non-residential zoning under both existing and proposed zoning is about equal, amounting to about 21 percent of the Township, again excluding existing public lands. (*Difference due to mixture formula used)
>
> These percentages of non-residential zoning are by no means unusual. In my experience, they are quite standard and many municipalities have zoned far greater percentages of their areas for non-residential use.
>
> Obivously, there is no immediate future market for developing the amount of non-residential acreage indicated by these percentages. This is usually the case in the vast majority of instances. It is also true that the vast majority of municipalities have far more land zoned for residential than can reasonably be expected to be developed in the near future. It should go without saying that a municipality should have an unused balance of non-residential zone to meet future needs just as it has an unused balance of land to meet future demands for residential development.

In the case of Clinton Township, there is additional, more specific justification for the amount of non-residential zoning including the following:

1. Extensive highway frontage and existing lot arrangement along this frontage which precludes, discourages or makes impractical development for residential use.

2. The Township's location in terms of transportation which places it in a unique position for attracting non-residential development and in the path of the natural movement of land demand pressure for non-residential development. A simple look at the highway system indicates that the Clinton area, more than any other area of the County, will be subject to growing pressures for industrial and commercial sites.

3. One non-residential use alone (N.Y. Life Insurance Co.) represents 110 acres or 10 percent of the entire R.O.M.-1 Zone, the largest non-residential zone. This suggests that it could take relatively few industries to greatly reduce the amount of available non-residential acreage."

According to Mr. O'Grady's own calculations, the new ordinance continued the pre-existing scheme of zoning a substantial portion of Clinton Township for non-residential usage. In fact, non-residential acreage actually increased by 382 acres over the 1974 allocations. This increase occurred even though only three percent of the Township's land was actually devoted to commerce and industry (J-3). While the new ordinance does permit residential usage in 415 of these acres, either the remoteness or the topography of these areas preclude full development (see Point VI, infra.). While the ROM acreage is reduced from 1,771 to 1,454 acres, the new OB District consumes 136 acres and the pre-existing industrial acreage is expanded from 599 acres to 934 acres in CI districts, only 236 of which can be used for residential purposes as a conditional use.

At the trial, Planner O'Grady acknowledged that the new ordinance did indeed "overzone" for non-residential usages and that some of the ROM land would probably not be developed within the next decade. (10/5/77, Tr. p. 53). In fact, in preparing the Land Use Plan, Mr. O'Grady had warned that the excessive amount of ROM land would indeed be unfair to property owners, such as the plaintiff. (P-51g)

The large lot residential, as well as the ROM, Industrial and OB acreage, is considerably in excess of that recommended by the Hunterdon County Planning Board. For example, the 1969 County Plan recommended 3,778.61 acres for 2-acre and above residential zoning for Clinton Township or 50 percent of what is now provided in the 1977 Land Use Ordinance (Exhibit P-64). On the other hand, the 1975 County Plan recommended that only 2,100 acres of the entire county be devoted to "major employment centers" by the year 2000. (Exhibit P-65). Yet, if the ROM, Commercial, Industrial and OB Districts in the Township computed, even without considering commercial zones or industrial zones, which could allow residential usages (CI - PUD and CR), these zones comprise 3,161 acres alone. (Exhibit DPB-41 and DPB-9). Thus, even though Clinton Township comprises less than 8 percent of the land area of Hunterdon County, it has designated more of its acreage for non-residential use than was projected for the entire county over two decades from the present.

POINT VI. INCAPACITY OF THE 1977 ORDINANCE TO AFFECT ADEQUATE LEAST COST HOUSING[4]

Defendants' Planner, Mr. O'Grady, undertook his work on the master plan in February 1975, or one month prior to the Supreme Court's decision in the Mt. Laurel case. He testified that he undertook a thorough study of the community and began to submit interim drafts of the Land Use Plan between September 1975 and February 1976 (P-51a-g) which documents formed the basis for the final Land Use Plan (Exhibit J-3), finally adopted by the Planning Board in July 1976 and the Township Council in November 1976. Throughout that entire document, there is no reference whatsoever to the provision of "least cost housing" or providing low or moderate income housing. Only after the Complaint in this case was filed, alleging a lack of such housing in February 1977 did the defendants present any plans for future least cost or low or moderate income housing in the community. In his August 11, 1977 report, Mr. O'Grady contended that 2,120 least cost units could be constructed in four individual zones, including: 76 two-family units in the R-5 (9,000 square feet) zone (permitting eight units per acre); 612 mobile homes in the CI-2 district (four units per acre); 680 multi-family units in the CR-1

4. As to the concept of least cost housing, the Court in Madison, 72 N.J., stated at 513 in Footnote 21:

> "The concept of least cost housing is not to be understood as contemplating construction which could readily deteriorate into slums. We have emphasized the necessity for consistency of such housing with official health and safety requirements. The recently enacted State Uniform Construction Code Act, L. 1975, c. 217 (N.J.S.A. 52:27D-119 et seq.) states among its purposes "to encourage innovation and economy in construction * * *" and "to eliminate * * * construction regulations that tend to unnecessarily increase construction costs * * *", yet be "consistent with reasonable requirements for the health, safety, and welfare of occupants or users of buildings and structures". Sec. 2.
>
> We envisage zoning provisions which will permit construction of housing, in reasonable amounts, at the least cost consistent with such standards. Observation in many areas of the State confirms that low cost housing can be maintained without becoming a slum. See also Mount Laurel, 67 N.J. at 191."

Robert O'Grady, the defendant Township's Planning Consultant, set a dollar figure for what he deems to be least cost housing. That figure was in the area of $30,000. (See trial transcript of 10/5/77, p. 146, lines 23-25.)

district (eight units per acre); and 752 multi-family units in the CR-2 district (eight units per acre).

Aside from the 38 two-family homes which may be accommodated in the R-5 district, which comprise less than 4 percent of the least cost housing projected by the defendants, the remainder of the least cost units have no relationship or justification to the Land Use Plan. Thus, in an attempt to justify their rejection of the plaintiff's PUD, the defendants have adopted a zoning ordinance which largely contradicts their own Land Use Plan. In doing so, they have violated the provisions of Section 49 of the Municipal Land Use Act (N.J.S.A. 40:55D-62) requiring that the zoning ordinance comply with the Land Use Plan element of a master plan. (See Point VIII, infra.)

The final zoning map (Exhibit DPB-4; Exhibit DPB-12) places the CI-2 district between the Township of Readington on the east, and the Borough of Lebanon on the west, in the northeastern portion of the Township, between Route 22 on the north, and the Rockaway Creek on the south. In the Land Use Plan, there is no reference whatsoever to any CI district, and the area in question is lumped with a larger area south of the Rockaway Creek and identified as "mixed use". There is no reference to mobile homes, which are now provided for in the zoning ordinance, and the Land Use Plan identifies this area as being environmentally sensitive, and not conducive to its present designation for industrial use:

> Mixed Use. Included here is the present industrial zone lying east of Lebanon Borough between Route 22 and the Central Railroad. The varying topography of this zone, including some steep slope areas, is not conducive to industrial development and such development would probably necessitate considerable alteration to the existing terrain with resultant adverse impact on the

natural environment. Also the area is bisected by Rockaway Creek which restricts access to the southerly portion. Without sufficient demand for industrial land, the present zoning is expected to create a limiting impact on its development. (Exhibit J-3, p. 54).

While the Land Use Plan does contain a reference to "Commercial and Residential" districts, the description of this area defines the eight per unit density now given to it in the zoning ordinance:

> Commercial and Residential. This classification applies to properties on both sides of Route 31 lying north of County Road 23. Like other sections of Route 31, this area is subject to the adverse effects of heavy traffic, but because of the terrain it does not lend itself to the usual type of highway commercial development. A separate category of land use, and one which is oriented to the area's unique location in terms of Spruce Run Reservoir, is therefore recommended. Uses that would be appropriate in this location include motels, office buildings, mobile home parks and multi - family housing. Zoning and development regulations should be geared towards encouraging a low-intensity character and preserving natural terrain and views. (Exhibit J-3, p. 53).

In the Land Use Plan, the Planner provides a map of "composite limitations". An examination of that map, with the districts now designated as CR-1 and 2 and CI-2, where approximately 96 percent of the least cost housing will allegedly be provided by Clinton Township, shows that the great majority of that land has been designated as having "severe limitations".[5] That plan, which is supposed to form the legal basis for the various zoning district categorizations, pursuant to N.J.S.A. 40:55D-62, warns that extreme caution should be utilized in the development of these areas.

> The fact that a given area is dominated by severe limitations does not mean that it cannot or should not be developed, although many of these areas might best be left undisturbed. It does mean, however, that extreme caution must be exercised in their development and that development measures which recognize the specific limitations be employed. (Exhibit J-3, p. 16).

5. The selection of these severely limited sites for development at almost twice the density sought by the plaintiff, also contradicts the environmental data presented by another defendant's witness, Sean Reilly.

Defendants' planner testified that the present zoning provides for the construction of 2,120 least cost units (10/4/77, Tr. p. 76-80). The R-5 (one and two-family residential) zone, located in the heavily developed Annandale section, can accommodate 76 dwelling units or 38 two-family structures. Additional housing units, not included in Defendants' computation, may become available as existing large one-family residences in Annandale are converted for two-family use, a practice allowable under current zoning.

This area is not remote, but is already built up. It is worth noting that plans are allegedly underway to provide for the sewering of the Annandale area (see Land Use Plan, Exhibit J-3, p. 34), but Mayor Smith of Clinton has indicated that Clinton Township has withdrawn from reserving capacity at the Clinton sewer plant to fulfill these plans.

Further testimony indicated that 612 mobile units could be accommodated in the CI-2 (Commercial-Industrial) zone, a tract which fronts on County Road No. 33 and the U.S. Highway 22. Mobile homes can certainly provide least cost housing and have the added advantage of providing more bedroom space than the conventional apartment (O'Grady 10/4/77 Tr. p. 78) This zone is located between the Borough of Lebanon and the Township of Readington, which two municipalities have created a joint sewerage authority and should shortly begin the actual sewering of the area. It is logical to believe that the CI-2 zone once developed will be able to use the facilities of the aforementioned sewer authority as customers.

O'Grady testified that 1,432 multi-family units could become available with the development of the two CR (Commercial-Residential) zones (10/4/77 Tr. pp. 78-79).

If the figures contained in Mr. O'Grady's report (Exhibit DPB-42, p. 5) are assumed as correct, the zoning ordinance would allow for a

virtual doubling of the population of Clinton Township on 2.1 percent of the privately held land (Exhibit DPB-41) which the Land Use Plan itself describes as having "severe limitations", which should be developed only with "extreme caution". The differences between the earlier Land Use Plan and the challenged zoning ordinance not only demonstrate a violation of N.J.S.A. 40:55D-62 (see Point VIII, infra.), but conclusively demonstrate to the Court that the defendants do not seriously expect any appreciable least cost housing to be built in these areas.

All of the 2,120 least cost units require off-site treatment of sewerage. Yet, the testimony of various witnesses, including Mayor Robert Smith of the Town of Clinton, showed that the Township of Clinton withdrew from participation from the only two present or proposed sewerage utilities, which could have serviced such housing. Any such least cost housing in the R-5, or either CR district would require participation with the Town of Clinton utility. On the other hand, the CI-2 units could only be serviced by the Lebanon-Readington utility which is now being developed. In both instances, the Township of Clinton withdrew from these two regional efforts.

It is also significant that the mobile homes calculated for the CI-2 district can only be constructed as a "conditional use", and not as a matter of right. When confronted at trial, Mr. O'Grady stated that he calculated the least cost units by simply multiplying the permissible units per acre times the acreage available, and in the case of the CI-2 zone, he stated that the large flood plain area running on the entire southerly perimeter of that zone would not be developed, and the mobile homes could be "clustered". However, the zoning ordinance forbids such clustering of mobile homes. (10/5/77 Tr. p. 116, 117).

Extensive testimony was elicited concerning the remaining "least cost" zoning districts, the CR-1 and CR-2 zones located on either side of Route 31, in the northwestern portion of Clinton Township. John Rahenkamp, the plaintiff's Planner, testified that both zones were environmentally sensitive, contained steep slopes and existing buildings and was adjacent to a "force main" in Route 31, which could not be directly utilized. (6/8/77 Tr. p. 39-40). In its initial estimate, the defendants actually had included state lands in their calculations of the CR-1 district. Mr. Rahenkamp analyzed the proposed land use and concluded that only 46.8 acres of this 170-acre area might be useable for any type of development, but even at that, this land contained a grouting easement. (Exhibit P-75). A grouting easement is a concrete curtain, which was constructed to prevent seepage from the adjacent Spruce Run Reservoir, and cannot be built upon. Mr. Rahenkamp also testified that the setbacks of 200 feet were excessive for this area and would further prevent least cost housing, by the assumption of greater land development costs. The defendants contended that mobile homes could be constructed in the CR zones but Mr. O'Grady conceded that, if that were done, it would reduce the overall density from eight units per acre to half that amount, since mobile homes cannot be constructed at a density higher than four units per acre. Mr. O'Grady also testified that severe topographical restrictions would prevent development in large segments of the area and that the steep slopes and lack of sewers, other than "force mains",[6] would necessitate higher costs

6. The two Civil Engineers presented by the plaintiff, Jim Dishner and Joseph Salvatorelli, as well as the Township Engineer, all testified that, unlike a gravity line, a force main could not be utilized by other properties unless the latter intercepted the main at high pressure, an extremely costly venture.

for any development in this area. (10/5/77, Tr. p. 121-131). He admitted that the cost generating limitations of the land were in excess of those present on the plaintiff's land (10/5/77 Tr. p. 131-137) and finally acknowledged that mobile homes could not be clustered to accommodate the severe limitations in this CR area. (10/5/77 Tr. p. 139, 130).

Clinton Township's own engineer, Robert C. Bogart, testified that the CR-1 and CR-2 site restrictions, including sewer availability, were solvable but would increase the total development costs. Further, Mr. O'Grady testified that, even though sewer availability played a large part in the assignment of densities in the final zoning map, he did not discuss sewer availability with Mr. Bogart until two months prior to his testimony or after the various districts had already been determined. In addition to no engineering studies to support these "least cost" districts, there were no traffic studies or other supporting technical data, which would justify the contradiction between the final land use ordinance and the land use plan prepared a year earlier.

This tactic of creating artificial low or moderate income zones or "least cost zones" was extensively dealt with in the Madison decision. There, as here, the defendants attempted to justify their generally exclusionary zones on the grounds that they had created districts which allowed for greater density (in Madison, 3 PUD zones).

In addition to "clustering" provisions, similar to those adopted by the defendant herein, the Court found that the unavailability of utilities, and the general remoteness of the PUD districts, with the cost exactions of the subdivision and zoning restrictions, refutted the defendants' argument that these zones would accommodate a fair share of low and moderate income housing. See 72 N.J. at 508, 509, 521-523. So

too here, the Court has concluded that, rather than allowing least cost housing to be constructed on a site much more suitable for such housing, as the plaintiff's property, the defendants instead arbitrarily chose sites, which either because of their location or their topography, cannot possibly be developed for least cost housing. The defendants cite Montgomery Associates v. Township of Montgomery, 149 N.J. Super. 536 (Law Div. 1977) to support their contention that they had satisfied the mandates of Madison by the creation of these "least cost housing" zones. The Court cannot agree. In that case, the plaintiffs acknowledged that the defendants had adequately zoned for least cost housing but were arguing that such least cost housing should be decentralized throughout the community. Here, the plaintiff has not only contested the defendants' assertion that they have zoned for least cost housing, but in the judgment of the Court, has adequately refuted the defendants' claim, as had been done in the Madison decision.

POINT VII. COST EXACTIONS AND FEES

Aside from exclusionary zoning, the Court in Madison held that municipalities could not adopt subdivision regulations or ordinances which imposed "cost exactions". These exactions were viewed by the Court as impediments to least cost housing, in excess of minimum standards of health, safety and welfare. At 72 N.J. 520, the Court explained:

> "...In any event, it is a corollary of Mt. Laurel that when municipal exactions from developers reach such proportions as to exert an exclusionary influence, whether in a PUD or any other context, they offend the constitutional precept of Mt. Laurel and must be remedied.
>
> As pointed out by Heyman and Gilhool in their penetrating study of the rationals for upholding subdivision requirements: 'But such exactions raise the spectre of exclusion: arguably they will add so to the cost of suburban housing as to exclude an even larger portion of lower income and non-white population

> than is presently relegated to life in the central cities by the higher suburban costs.' 'The Constitutionality of Imposing Community Costs of New Suburban Residents Through Subdivision Exactions', 73 Yale L.J. 1119, 1155 (1964). The authors conclude, however, that the exclusionary impact of such exactions 'will be strikingly slight because legislative and judicial pressures will tend to require the establishment of reasonable ceilings'. Ibid. Cf. Berger, Land Ownership and Use 786, 787 (2d Ed. 1975)."

The requirement for developing communities to provide least cost housing is a mandate to eliminate zoning and subdivision cost exactions which have no constitutional or statutory foundation, and which arbitrarily and unreasonably restrict housing availability to the moderate income and low income families alike. This category of people is expanding each year as more and more of the middle class find it utterly impossible to afford any type of suitable housing in vacant areas which are accessible to their places of employment.

At trial, the plaintiff's Planner, John Rahenkamp, reviewed the 1977 land use ordinance and outlined how that enactment contained numerous "exactions" which would impede any least cost housing in the Township. (See generally 6/9/77 Tr. p. 7-35). In Madison, 72 N.J. at 521-523, the Court viewed the location of the proposed PUD zones as being located in remote areas and therefore the provisions for sewers, public water and other utilities were viewed as an exaction. All of the least cost housing that could be constructed under Clinton Township's present zoning according to the defendants, requires public water and sewer, and approximately 94 percent of such housing is located in remote areas. Therefore, an "exaction" is present. (6/9/77 Tr. p. 15-17). In contrast, the plaintiff's land lies directly east and south of the existing Clinton utility and its transmission lines. As a matter of fact,

tentative plans had already been drawn by the Township Engineer to sewer that general area. (See Exhibit DPB-46).

In Madison, the Court held that the protracted three-stage approval process constituted an exaction and was contrary to the enabling PUD legislation (then N.J.S.A. 40:55-54 to 67, now contained in N.J.S.A. 40:55D-39, 45). The Court stated that this "protracted approval process" was "unduly cost generating" and should be eliminated, to accomplish the review of PUDs in a shortened length of time through a two-stage process contained in the PUD act. The Clinton land use ordinance contains the very same three-stage procedure (two stages for site plan review and three stages for subdivisions, actually five stages in all, although the defendants testified that the stages could be undertaken simultaneously) which was voided by the Court in Madison. The enormity of this exaction can be realized by the fact that for this plaintiff alone, it cost $1,000 a day to carry the land, prior to the sale of any houses. (6/9/77 Tr. p. 9-11).

The counter point of view of the defendant was most succinctly stated at trial when the Municipal Engineer, Robert Bogart, as well as the Planning Board Chairman, Mrs. Neighbor, and Planner, Mr. O'Grady, all testified that the site plan review, which would apply for the non-single family residence portion of a PRD would require only two steps. The single-family lots would require the sketch plat stage; however, the developer could combine it with the preliminary plat, if he wished, and there would not be an additional 45 days. Mr. Bogart testified that the sketch plat or concept plan, even for a PRD, would be beneficial to the developer. Mr. Bogart also testified that the preliminary and final stages of the site plan aspects of the development

would run concurrently with the preliminary and final plats of the single-family lots. Thus there would be no more than three steps, not five as Rahenkamp testified.

Even if the Court accepts Mr. Bogart's testimony concerning this conflict, the fact remains that the plaintiff must proceed through three steps rather than one. This unwarranted procedure is unreasonable and violates the spirit of the Madison decision.

Another major exaction testified to by Mr. Rahenkamp was the requirement in the land use ordinance that all onsite improvements must be constructed before final subdivision approval is given. While this precondition might make sense for very small scale subdivisions, its impact upon any larger scale developments geared toward providing least cost housing, is devastating. In essence, a literal reading of the document would require the commitment of possibly several million dollars of onsite improvements prior to the sale of any houses. Although the plaintiff's PUD is scheduled to be developed over a ten-year time period, the ordinance would require that onsite improvements be constructed even for areas which will not have any housing units built for years to come. Since the only way that a large scale development can be constructed is to sell units in phases and thereby produce new capital to complete an overall project, this requirement constitutes a clear, unreasonable subdivision "exaction". (6/9/77 Tr. p. 18, 19).

Mr. Rahenkamp also provided a detailed analysis of other subdivision exactions, which clearly violated the broad condemnation of such impediments to least cost housing in Madison, which were detailed in a report presented to the Court. (See Exhibit P-68). The ordinance's requirement that bonding for offsite improvements at the rate of

150 percent was the highest that he had ever seen. In addition to this bonding, the ordinance requires cash payments by the developer, again unreasonable exactions preventing least cost housing. See Madison, supra, at 521; Divan Builders v. Planning Board Township of Wayne, 66 N.J. 582 (1975); see also Longridge Builders, Inc. v. Planning Board of Princeton Township, 52 N.J. 348 (1968) (6/9/77 Tr. p. 19). Other exactions contained in the ordinance were the requirement that two percolation tests be made for each lot before preliminary subdivision approval, rather than before final subdivision approval, without any recognition that multi-family units would have to have public water and sewer anyway. (6/9/77 Tr. p. 19, 20). The maintenance guarantee requiring that there be a two-year guarantee for roads, rather than the standard one-year guarantee, was also an exaction (supra, p. 20). So too the absence of any vesting, as would be allowed under the PUD act (N.J.S.A. 40:55D-1 et seq.). Thus, neither the developer nor homeowners would ever be assured that all stages of the PUD could be completed until the final subdivision approval is granted for the entire project. Thus, no developer could be assured that the municipality would grant approval for later stages of a development after approving earlier stages. Therefore no assurance could be given to banks, investors, contractors, and homeowners during the early stages, making financing of a large scale project impossible. (supra, pp. 20-33).

Other exactions included unreasonable road widths, for even the most minor interior subdivision roads, curbing and sidewalks, even though such would be contrary to retaining ground water on site, setback requirements, including 200 feet in the case of a commercial-recreational area, which the defendants assert would provide for least cost housing. (Exhibit P-68).

Bogart testified that the improvements required for the high density zones were consistent with the minimum required for health and safety. In his report dated August 15, 1977 (DPB-45) at page 4, he states: "In our experience in representing many local municipalities over a span of a dozen years or so, we see your improvement requirements as essential, but by no means excessive."

However, Mr. Bogart's thinking reflects the development of housing other than the type involved here. These improvements required by the Township do not fit or apply to Plaintiff's proposed PUD and therefore are palpably in the nature of "exaction".

In Section C of his report (P-68), Mr. Rahenkamp analyzed the costs of the various exactions, contained in the land use ordinance, with those found allowable in the Madison decision. In Madison, 72 N.J. at 520, the Court stated that subdivision exactions ranging from $37.50 to $325 per lot were reasonable. The latest estimates provided by Mr. Rahenkamp show that the increased cost per unit could be as high as $586 per unit. The plaintiff calculated that the various subdivision exactions would impose an additional cost of $1,390,200 in onsite development costs alone. (Exhibit P-68).

Mr. Rahenkamp also provided a detailed analysis of the fees imposed by the Clinton ordinance for the processing of subdivision applications, with five comparable New Jersey communities, including Madison and Mt. Laurel (Exhibit P-88). The ordinance imposed a $10 per lot fee for the filing of a sketch plat, which was higher than any other community, and since that stage was held to be an unreasonable exaction by the Madison decision, 72 N.J. at 523, a totally unnecessary cost of $35,000 alone (predicated upon 3,500 units to be constructed). The $50 per lot

filing fee for preliminary subdivision approval was also higher than that existing for the other communities. This would impose an exaction of $175,000 upon the developer. A third fee of $10 per lot is also required by the Clinton ordinance, amounting to $10 per lot or $35,000 for this PUD. While this amount is the same as the other communities examined, when it is added to the earlier processing fees, a total cost of $245,000 is imposed upon the plaintiff, simply for processing. By assessing fees on a "per lot basis", this processing schedule gives no recognition to the fact that essentially the same plans will be reviewed for all of the housing units. Further, these processing fees are in addition to the inspection fees imposed on the developer by the ordinance at the rate of $3,700 plus 2 1/2 percent of the developing costs, or in the case of the plaintiff, at today's dollars, over $400,000 alone. (6/9/77 Tr.p. 26-28).

With respect to fees, Township Engineer Bogart testified that unused portions of fees are returned to the developer. He states in his report (DPB-45), p. 5, that he "...cannot see how your fees could be termed an 'exaction' if they are calculated properly and if unused amounts are returned".

If Mr. Bogart anticipated the return of unused amounts, the Court cannot but wonder whether the fees were excessive to begin with. Surely the Township could require lower fees which better reflect anticipated amounts. Further, there are no such assurances in the ordinances for the return of excess amounts.

Thus, the land use ordinance of Clinton Township, in simply readopting the pre-existing subdivision requirements, imposes exactions which clearly violate the principles enunciated in Madison and when

combined with the exclusionary zoning components of that ordinance, make it impossible to construct any least cost housing in this community.

POINT VIII. INCOMPATIBILITY OF THE 1977 ORDINANCE WITH THE MUNICIPAL LAND USE STATUTE

The 1977 land use ordinance of Clinton Township was adopted pursuant to the mandates of the Municipal Land Use Act (see 291, 1975; N.J.S.A. 40:55D-1 et seq.) (Exhibit DPB-12). That land use ordinance incorporates the subdivision ordinance and other land use enactments, which have been synthesized by the plaintiff at trial as Exhibit P-91. However, as the testimony of Mr. Rahenkamp revealed, the ordinance violates a number of that Act's provisions. See Madison, 72 N.J. at 547, 548, Footnote 47. The differences between the controlling Act and the ordinance were enumerated by Mr. Rahenkamp at trial (see 6/28/77 Tr. p. 9-73).

Section 102.5 states that one of the ordinance's purposes is to "contribute to the well-being of persons, neighborhoods, the Township and preservation of the environment". This section eliminates any reference to "region" as required by N.J.S.A. 40:55D-2(e). Section 102.7 of the ordinance refers to meeting the needs of all Township residents, while the statute requires that such a provision meet the needs of "all New Jersey citizens". Section 102.11 of the ordinance refers to "planned developments", without any reference to "residential, commercial, industrial and recreational" usages, as is set forth in N.J.S.A. 40:55D-2(1). The significance of these distinctions can be shown by the fact that the language of Article I of the ordinance is identical to that used in N.J.S.A. 40:55D-2, except that the ordinance does not incorporate any language about regional or statewide concerns, or planned

developments that would incorporate non-residential usages. In Madison, the Court held that this statutory provision, which the defendants have chosen to limit to parochial concerns, demonstrated that the Municipal Land Use Law was consistent with the Mt. Laurel decision, 72 N.J. at 496, 497.

Further, as noted previously, both the Land Use Plan and the zoning ordinance conflict with both county master plans and the tentative statewide master plan adopted by the Department of Community Affairs (Exhibit P-63, 64A, 64B, 65A, 65B, 126) and thereby violate the provisions of N.J.S.A. 40:55D-2(c), mandating that the development of a municipality shall not conflict with the development of neighboring municipalities, the county or the state as a whole.

Further, N.J.S.A. 40:55D-2(k) and (m) state that a municipal ordinance should encourage PUDs to "incorporate the best features of design" and relate the layout of a development to a particular site, and encourage coordination of procedures and activities to lessen the cost of development, and facilitate efficient use of land. Clearly, as has been reviewed in Points V and VI, supra, little, if any, effort has been made to accomplish either objective. The ordinance simply imposes standard subdivision requirements, which may be appropriate for traditional grid developments, but have no application whatsoever to PUDs. The result is that the statutory objectives of conforming development to the peculiar features of individual sites, while reducing unnecessary costs, are not realized. N.J.S.A. 40:55D-28 sets forth the various elements of a master plan, including a land use plan element, supra, Section b(2). Section b(9) requires that there be appendices or separate reports containing the technical foundation for the land use element and other

elements of the master plan. The master plan adopted by Clinton Township on November 16, 1976 is devoid of any such technical support to guide the Planning Board in the zoning or rezoning of properties. This was acknowledged in the land use plan itself (see Exhibit J-3, p. 64). Other than recommending low density in the areas where the Township has now chosen to have the most intense density in the entire Township (the CR zones and the CI-2 zones; see Point IV, supra.), the land use element of the master plan does not specify the "extent and intensity of development of land to be used in the future", as required by N.J.S.A. 40:55D-28b(2).

While the ordinance lists a "Planned Development" (PUD or PURD) as a discretionary content for a municipal land use ordinance, it is important to point out that, once a municipality does provide for such planned developments, it must comply with the provisions of the statute. See Niccollai v. Planning Board of the Township of Wayne, 148 N.J. Super. 150 (App. Div. 1977). Yet, Clinton's ordinance concerning planned developments does not set forth any procedure for findings by a Planning Board with respect to such developments, as required by N.J.S.A. 40:55D-45. Thus, there are no standards to allow for departures from zoning regulations which would otherwise apply, and no provisions for findings to protect both the residents and owners of the proposed development until completion of the development (the "right of vesting" referred to in Point VII, supra.), as required by N.J.S.A. 40:55D-45. Further, the PUD ordinance does not set forth variations from ordinary standards for the preliminary and final approval of PUDs, as required by N.J.S.A. 40:55D-39.

The defendants' lack of any desire to have PUDs in Clinton Township is demonstrated further in the very definition of PUDs and PURDs in

Article II of the ordinance. While N.J.S.A. 40:55D-6 defines a PUD as an area with a minimum of ten acres, the ordinance expands that minimum acreage to five times that amount, or 50 acres. Also, while that same statutory section defines a PURD as having five acres, Article II of the ordinance would again impose a 50-acre minimum requirement.

N.J.S.A. 40:55D-8(b) allows a municipality to provide by ordinance for "reasonable fees" for the administration of municipal functions in relationship to zoning and planning. As is indicated, the fees contained in the ordinance (Section 308) clearly are in excess of any reasonable standard (see Point VII, supra.).

Consistent with the decision in Madison, 72 N.J. at 523, the three-stage subdivision procedure has been eliminated by N.J.S.A. 40:55D-46. Thus, the requirement for sketch plat submission, in addition to preliminary and final subdivision applications, is violative of that provision.

To protect the developers of subdivisions, N.J.S.A. 40:55D-50 provides that final approval of site plans and major subdivisions will be granted if the submission complies with the standards established in the ordinance, and the conditions for preliminary subdivision approval are statisfied. Section 6027, however, would expose a subdivision or a site plan approval to a public hearing prior to such approval, even if there has been full compliance by the developer.

N.J.S.A. 40:55D-42 states that the proportion of allocated costs for improvements cannot change after preliminary approval and that an applicant can pay under protest and proceed to court to challenge the development cost allocation. Under Section 605.3 and 4 of the ordinance, however, the Planning Board is given authority to alter the allocation and there is no provision that a developer can begin construction in the event that he challenges a municipally imposed allocation in court.

Finally, as noted in Point VI, supra, the zoning ordinance must be "either...substantially consistent with the land use plan element of the master plan or designed to effectuate such plan element" and drawn "with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land". The eventual zoning, particularly as it relates to the plaintiff's property and the vast majority of the land which has belatedly been categorized for intensive development (CR and CI-2 districts) is not just inconsistent with the land use element, but is rather a contradiction of it. Further, based on all the testimony in this case, there is no question but that the plaintiff's land would be more appropriately suited for such residential development. Consequently, the zoning ordinance violates this key provision of the Municipal Land Use Law.

POINT IX. PLAINTIFF'S PUD

At trial, Round Valley's Planner, John Rahenkamp, testified at length about every aspect of the proposed PUD, including layout, environmental considerations, phasing, economies, utilities and onsite and offsite improvements. He also presented detailed maps, studies, and narrative descriptions, all of which had been submitted to the defendants years before trial, These materials consisted of the basic PUD proposal (Exhibit P-1) and Community Support Facilities (P-4), a Proposed PUD Ordinance (Exhibit P-5) and analyses of tax impact (Exhibit P-86) and school population (Exhibit P-87), all of which were submitted to the defendants in January 1974. Blown-up charts of these same material were presented (Exhibits P-78 to P-85) as well as the June 24, 1975 application (Exhibit P-22A) and support ordinance (Exhibit P-22B) covenants and restrictions (Exhibit P-22C), supporting

data (Exhibit P-22D) and engineering drawings (Exhibit P-22E).

The proposed 790-acre PUD site is described on pages 8-12, supra. It is located on both sides of State Highway No. 31, just south of the intersection of said highway with Interstate Highway No. 78 within the "Clinton Corridor" extending from Northeastern New Jersey. (Exhibit P-126) Neither of the two successive Clinton Township Planning Consultants, T. E. Moore and Robert O'Grady, ever studied these materials in other than a cursory manner. However, they both concluded that the area in which the plaintiff's property is situated is an ideal location for multi-family housing. (Exhibit P-10 and Exhibit P-51g).

After exhaustive studies of this property and its potential for development, Plaintiff's planning consultants concluded that the highest and best use of this property would be as a planned unit development (PUD) allowing for a mix of residential and commercial uses. A detailed plan for the development of this property was thereafter drawn up and presented to each member of the Clinton Township Planning Board in January 1974. (P-1 and P-4). That plan provided for approximately 3,500 new dwelling units and a small commercial area, phased over a ten-year period. In addition, the plan envisioned the preservation of large open areas, including the existing 150-acre Beaverbrook Country Club Golf Course. The overall density for the entire project would be 4.5 units per acre.

Approximately 90 percent of the PUD housing would consist of townhouses and garden apartments intended for moderate income, or with subsidization, lower income residents. Both Mr. Rahenkamp and the corporate officers of the plaintiff testified that the original January 1974 average prices of these units was $27,600 to $38,500, but because of the delay in approving this proposal, there has been an increase in

these same units to a minimum unit price of $29,900. (See P-6 and P-77). However, based on the market estimates discussed in Point IV, supra, moderate income families in the region could be accommodated in housing priced at $35,000 or below. Therefore, the multi-family units could largely accommodate this demand, and would also have a "filtering down" effect on lower-income groups.

These witnesses testified that the housing costs for these units would be kept substantially below the prevailing housing costs through "economies of scale" by the spreading of land costs over increased units and the purchasing of large quantities of building materials and the execution of long-range building contracts. Also, the proposed PUD would eliminate many cost impediments normally associated with traditional zoning and subdivision restrictions, such as unnecessary curbing, excessive street widths, excessive setback requirements, construction of onsite and offsite improvements unrelated to the phasing of actual construction. Through all these techniques, the plaintiff asserted that "least cost housing" could be realized.

In addition to presenting the basic planning documents, as well as the supporting materials which had been submitted to the defendants in attempting to gain approval of its PUD, the plaintiff produced extensive expert testimony, demonstrating that the PUD would not have an adverse effect upon the community or the region. George Akahoshi, housing expert, provided detailed testimony about the marketability of the project, as well as its suitability to accommodate least cost housing. (Exhibit P-94). Dr. Robert Hordon, a geologist at Rutgers University, conducted two studies (Exhibit P-102, 103) and concluded that the proposed PUD would not have any adverse environmental impact upon the

South Branch of the Raritan River. Dr. Hordon also studied the available water supply for the proposed PUD and concluded that it was adequate. A Civil Engineer, William Taylor, conducted a study of storm water control and concluded that the various safeguards developed by the plaintiff were adequate to prevent any adverse storm water runoff from the site. (Exhibit P-110). Joseph Salvatorelli, a second Civil Engineer, conducted an extensive study of the Clinton sewer utility and concluded that it was an extremely efficient facility, which could accommodate effluent from the PUD, as that project was developed over its proposed ten-year schedule. He also conducted a review of the public water supply in the Clinton area and made similar findings. (Exhibit P-112). Mr. Robert Pearson, a Traffic Engineer, completely reviewed traffic reports that he conducted in 1973 and in 1977, concerning the impact on traffic of the PUD. He recommended certain improvements, to which the plaintiff had committed itself, and concluded that with such improvements, there would not be a deleterious impact on traffic circulation in the area.

In addition to these experts, the defendants themselves produced Mayor Robert Smith, of the Town of Clinton, an Engineer who has been actively involved in every phase of the development of that town's sewage utility. Mayor Smith corroborated the expert conclusions by Mr. Salvatorelli concerning sewerage, and concluded that that utility has the present capacity to handle all of the anticipated sewerage produced over the first several years of the PUD's development. In addition, Mayor Smith testified that the expected expansion of the plant would accommodate the sewerage generated by the PUD after it had reached its full completion on the ten-year development schedule.

The defendants did not produce any evidence to rebut the thorough and comprehensive reports supplied by these various technical experts.

The Township Engineer, Mr. Bogart, testified about several engineering issues related to the planned PUD (see Exhibit DPB-44, 45) but verified that all of these concerns could be solved with adequate financial commitments.

It is clear to the Court that the plaintiff's PUD is a vehicle for satisfying Clinton's fair share of least cost housing. It adheres to the purposes expressed by the Legislature in the Municipal Land Use Law, specifically N.J.S.A. 40:55D-2. It embodies flexibility, it contains standards in excess of minimum levels of health, safety, morals and general welfare, it encourages the appropriate and efficient usage of land and public expenditures, it utilizes creative development techniques, promotes the conservation of open space and valuable resources and prevents urban sprawl and degradation of the environment. The defendants have contested the environmental concerns the PUD may raise especially as concerns the New Jersey water supply, sewer plant capacity, water capacity, highway dualization, etc. Facing these issues as both relevant and necessary to consider, this Court has examined the testimony of hydrologists, engineers, traffic court experts, etc.; however, it is apparent from the testimony of the experts on both sides that a project such as the one proposed by Plaintiff would have a tremendous impact upon the ecology of the land developed as well as surrounding land.

The testimony which is not in conflict or not controverted shows that Northern New Jersey has a critical water shortage or at least a critical distribution or "plumbing" problem. The utilization of surface water sources for water supply for the Township, such as Round Valley or Spruce Run Reservoirs on the South Branch of the Raritan is not contemplated by the State for the reasonably foreseeable future, if at all.

With respect to sewers, the § 208 basin study has not been completed and its completion date is unknown. The § 207 facilities study likewise is not completed although it is expected that the Clinton Town Plant can ultimately be expanded to 3.5 MGD (million gallons per day). There is a question as to what Clinton Township's share of this capacity would be considering that the Plant is part of a nine or ten municipality sewer (geographic) region.

The plaintiff's and defendants' engineers are in agreement that dualization of Route No. 31 would be necessary to accommodate the traffic generated by such a project.

Specifically, it is apparent that the project could not be served by ground water but would require a large commitment for public water. By plaintiff's experts, Robert Hordon and Joseph Salvatorelli's testimony, there would have to be an expansion of the Clinton Treatment Plant to handle waste material generated by the project. Although it appears that that plant capacity could eventually increase to accommodate up to 3.5 million GPD, the testimony of Mayor Robert Smith and Harry Ike indicates that any expansion of the Clinton Treatment Plant beyond 2 million GPD would require very advanced and very expensive facilities. Thus, the testimony presented does not persuade this Court that the plaintiff and all other developers and users seeking water and sewer facilities in the near future could be accommodated.

It is evidently apparent that the studies which have been done, while extensive, are preliminary in nature as was pointed out in Township Engineer Robert Bogart's letter report dated May 6, 1977 (Exhibit DPB-44). As a result, the Court is not in a position at this time to determine whether or not all the problems of this nature which

would be posed by Plaintiff's PUD can be solved. The Court is not free to disregard environmental considerations. (See Madison, 72 N.J. at 545). As a result, even though the resolution of prior issues in Plaintiff's behalf favors the relief sought by Plaintiff, this Court would have no alternative but condition any relief granted to Plaintiff upon a showing* that its land is environmentally suited to the degree of density and type of development that Plaintiff proposes. It is possible that Plaintiff's land is in an environmentally sensitive area and that all development of same must be in conformity with the regulations of all local, state and federal environmental agencies having jurisdiction. Such a ruling would be in conformity with previous holdings of our courts. Madison, 72 N.J. at 551.

POINT X. REMEDY AND RELIEF FOR CORPORATE PLAINTIFF

In Madison, the Court made it clear that trial courts should not hesitate in issuing direct and meaningful judgments, to allow for least cost housing, unhampered by dilatory and unnecessary cost generating tactics by defendant municipalities. (See 72 N.J. at 552 and 553.)

The Court finds that this ordinance is unconstitutionally exclusionary and at variance with the principles enunciated by the New Jersey Supreme Court in its Mt. Laurel and Madison decisions. The

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* Such a showing would be to the Board of Health of the local municipality, the County Board of Health, the Department of Environmental Protection, and the various State Agencies having jurisdiction, as it is contemplated these "showings" would be necessary to obtaining approvals to construct or to continue to construct, as these safeguards have been designed to protect the public, but not to obstruct legitimately needed construction of "least cost housing" by a local municipality seeking to perpetuate its rural atmosphere by a parochial zoning ordinance with the devices previously described, and not in conformity with the legislative intent of the New Municipal Land Law (supra.), one of which goals was a regional approach to "fair share".

Court directs the defendants to immediately develop a new land use ordinance, which complies with the principles enunciated in this opinion. The Court will appoint a planning expert within 30 days after the issuance of this opinion, to oversee the development of the new ordinances comtemplated herein, in accordance with the cases cited.

To assist the defendants in that endeavor, and to insure prompt and complete compliance, the Court directs the defendants to submit such a new proposed planning ordinance to the planning expert appointed hereby, within 90 days of the issuance of this opinion. That planning expert will thereafter have responsibility for approving the same, to assure that it complies with the directives contained in this opinion, for eventual confirmation by the Court 30 days thereafter. In the new ordinance to be drafted, the expert should recommend and the Township should accept standards for a PUD in the new ordinance as there are no standards for an ROM with a PUD option in the present ordinance. Upon confirmation of the new zoning ordinance by the Court, the defendants will thereafter be directed to adopt it as an official enactment of the municipality.

Each side shall submit the names, addresses and qualifications of such experts within ten days of the date of this opinion, and the Court will choose one of such persons on two days notice to all sides so that any party may have the opportunity to be heard on any objection to the expert's qualifications to so serve.

There is no question that courts of this State possess the inherent power to appoint experts to aid them in rendering judgments. See eg. State v. Lanza, 74 N.J. Super. 362, 374-375 (App. Div. 1962), aff'd 39 N.J. 595 (1963), appeal dismissal and cert. denied 375 U.S. 451, 84 S.Ct. 525, 11 L. Ed. 2d 477 (1964); see also Polulich v. J.G. Schmidt Tool Die & Stamping Co., 46 N.J. Super. 135, 146-49 (Essex Cty. Ct. 1957).

See generally, II Wigmore, § 563 at 648-49 (3rd Ed. 1940); McCormick's, Handbook of the Law of Evidence, § 17 at 38-39 (1972); Note, Judicial Authority to Call Expert Witnesses, 12 Rutgers Law Rev. 375 (1957). The discretionary power to appoint an independent expert is, however, not unlimited. Concepts of fairness dictate that at a minimum, the parties be appraised of the expert's identity and be given an opportunity to object to his qualifications. Furthermore, the parties must be afforded the full opportunity to cross-examine the expert after being advised of his findings, (74 N.J. Super. at 374-75. Cf. Fed. R. Evid. 706), which findings shall be in written report form within 60 days of the date of appointment, so as to assist the drafting of the new ordinances, and each side shall have the opportunity to cross-examine such expert, on motion to fix a date made within 20 days thereafter.

There is, however, a clear distinction between the appointment of an expert to aid the Court in rendering a judgment and the appointment of an expert or master to aid the Court in implementing its judgment. The former would lead to delay whereas the latter would expedite matters. The relevant decisions reviewed by the Court recognize this basic difference. See e.g., Mt. Laurel, 67 N.J. at 157-58, 215; Madison, 72 N.J. at 553-54; Pascack Ass'n, Ltd. v. Mayor & Coun. Washington Tp., 131 N.J. Super. 195, 201 (Law Div. 1974), aff'd, 74 N.J. 470 (1977); Oakwood at Madison, Inc. v. Tp. of Madison, 128 N.J. Super. 438, 447 (Law Div. 1974), aff'd, 72 N.J. 481 (1977). Furthermore, the conclusion that appointment of a post-judgment expert is appropriate and desirable in "exclusionary" cases appears to be unanimously accepted by the members of the Supreme Court. See Madison, 72 N.J. at 553-54 (majority opinion); 583, 585, 592, 594-95, 617 (Pashman, J., concerning and

dissenting); cf. 621-23 (Schreiber, J., concurring in part and dissenting in part); 625-27, 630 (Mountain, J., concurring and dissenting) 631 (Clifford, J., concurring). Therefore, the Court is of the opinion that further expert testimony in this case would not have been of aid in determining the legal issues before it. However, it is equally convinced that a court-appointed expert will be of great aid in rapidly implementing the judgment rendered herein.

By declaring the ordinances herein exclusionary and therefore unconstitutional for the reasons cited in all of the points previously discussed, it is meant that the ordinances are held to be so only as to the plaintiff's property (to whom specific relief is hereafter given) but that the ordinances shall remain in full force and effect as to subdivision, site plan and zoning in all other respects in the interim, except possibly for others similarly situate as Plaintiff has made itself out to be in a legal sense. In this way, there will be no disruption in the municipality, nor its agents in continuing to administer planning and zoning matters, about which this opinion is not concerned, as it is neither the province nor wish of the Court system to disrupt the legislative and administrative functions of a duly constituted political subdivision of the State of New Jersey.

RELIEF FOR CORPORATE PLAINTIFF

The second most important principle enunciated by the Court in Madison concerned the relief to be afforded to Plaintiffs in exclusionary zoning cases. The Court in Madison was requested by the corporate plaintiffs to specifically grant them a permit to build the kind of moderate-to-middle income housing they had in mind. 72 N.J. at 548, 549.

The Court analyzed their request and ruled as follows:

> "A consideration pertinent to the interests of justice in this situation, however, is the fact that corporate plaintiffs have borne the stress and expense of this public - interest litigation, albeit for private purposes, for six years and have prevailed in two trials and on this extended appeal, yet stand in danger of having won but a pyrrhic victory. A mere invalidation of the ordinance, if followed only by more zoning for multi-family or lower income housing elsewhere in the township, could well leave corporate plaintiffs unable to execute their project. There is a respectable point of view that in such circumstances a successful litigant like the corporate plaintiffs should be awarded specific relief. (Citations omitted.)
>
> There is also judicial precedent for such action. (Citations omitted.)
>
> Such judicial action, moreover, creates an incentive for the institution of socially beneficial but costly litigation such as this and Mt. Laurel, and serves the utilitarian purpose of getting on with the provision of needed housing for at least some portion of the moderate income elements of the population. We have hereinabove referred to the indirect housing benefits to low income families from the ample provision of new moderate and middle income housing. (Reference omitted.)
>
> The foregoing considerations have persuaded us of the appropriateness in this case of directing the issuance to the corporate plaintiffs, subject to the conditions stated infra, of a permit for the development on their property of the housing project they proposed to the township prior to or during the pendance of the action, pursuant to plans which, as they originally represented, will guarantee the allocation of at least 20 percent of the units to low or moderate income families (footnote omitted). This direction will be executed under the enforcement and supervision of the trial judge in such manner as to assure compliance with reasonable building code, site plan, water, sewerage and other requirements and considerations of health and safety. (Citations omitted.)" 72 N.J. at 549-551.

This action by the Court was necessary if the plaintiffs in Madison were to be awarded any meaningful relief. A municipality may delay a developer interminably so as to preclude any ultimate development. See generally Mytelka & Mytelka, "Exclusionary Zoning: A Consideration of

Remedies", 7 Seton Hall Law Rev. 1 (1975). The insight of our Supreme Court in recognizing this fact and in molding a judgment is consistent with a growing judicial trend toward more specific relief in such a way as to preclude its occurrence. See Kavanewsky v. Zoning Board of Appeals, 160 Conn. 397, 279 A. 2d 567, 571 (Sup. Ct. 1971), Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370; 167 N.E. 2d 406, 411 (Sup. Ct. 1960); Fiore v. City of Highland Park, 76 Ill. App. 2d 62, 221 N.E. 2d 323 (1966); Appeal of Girsh, 437 Pa. 237, 263 A. 2d 395 (Sup. Ct. 1970); Tp. of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445 341 A. 2d 466 (1975). See also Deal Gardens, Inc. v. Board of Trustees of Loch Arbor, 48 N.J. 492 (1967).

In his separate opinion, Justice Pashman concurred with the majority of the Madison Court, in holding that specific, immediate relief should be given to the corporate plaintiff. That opinion recognized that the builder or developer represents a population which has no voice in the community because of their exclusion by those who do not want them in their midst. Accordingly, the courts had to take clear and direct action to assist both the builder and those whose future homes he is attempting to provide:

> "...Town officials who believe that courts will equivocate in enforcing municipal obligations to meet regional housing needs have no reason to act voluntarily in satisfying the mandate of Mt. Laurel, especially where such action faces strong local opposition. Under these circumstances, judicial timidity merely encourages municipal officials to yield to local prejudices and await the filing of law suits by low income persons and frustrated developers. In order to furnish a real incentive to good faith efforts on the part of municipal government, our legal pronouncements must guarantee prospective litigants effective relief for the vindication and enforcement of their constitutional rights." 72 N.J. at 563. (Emphasis supplied)

The plaintiff has cited Madison as the precedent for this extraordinary relief. Although the plaintiff in Madison was granted specific relief, the Court specifically indicated that the situation therein was extraordinary and that such relief in this type of case would rarely be justified.

> "This determination is not to be taken as a precedent for an automatic right to a permit on the part of any builder-plaintiff who is successful in having a zoning ordinance declared unconstitutional. Such relief will ordinarily be rare, and will generally rest in the discretion of the Court, to be exercised in the light of all attendant circumstances." 72 N.J. at 551, Footnote 50.

Since Madison, subsequent cases have uniformly heeded that directive. See Middle Union, supra, at 22.

It is clear that a plaintiff who prevails in such an action is not entitled to approval of his plan and issuance of building permits as a matter of right. Therefore, the Court does not direct the appropriate local government officials to issue all necessary approvals and permits, including building permits, so that the plaintiff can begin to develop the site, even on the condition that the plaintiff adhere to all of the covenants, conditions, and various specifications of its proposal and application, which have already been filed with the Court.

Rather, this Court finds that the rejection of Planner O'Grady's original recommendation that the east side of Plaintiff s lands should have been classified as ROM with a PUD option became arbitrary and capricious action the moment that recommendation based on the planner's studies was officially rejected and not put into the Land Use Ordinance; and thereafter the zoning plans. This is so, because the testimony has revealed it was rejected out of hand and without further study. This

is not in conflict with the original point of this opinion which held that the municipality in reacting to the concept and the changing law and times was not arbitrary, but it did so become arbitrary when it rejected the planner's professional opinion based upon his studies, and enacted into law by virtue of the ordinance making power, the severely constrictive use of the plaintiff's lands on the easterly side thereof. This action was done willfully and deliberately as the plaintiff's proposal was fully upon the municipal table of problems to be approached and solved. The action taken was done without further study, and the testimony when reviewed objectively cannot lead to any other conclusion, but that the municipal planner did what he was ordered to do, by the township authorities, who no doubt believed they were doing their best by their community.

Therefore, this Court finds that the specific relief to which the corporate plaintiff is entitled is that ROM-PUD option as originally recommended by Planner O'Grady should be the controlling land use for the plaintiff's sites, both the Beaverbrook side and the Goble side, but with the density that Mr. O'Grady recommended for the current allowable use on the Beaverbrook side, which was 3 units per acre. This figure was based on O'Grady's studies and was not contradicted by the plaintiffs, presumably due to the fact that the arguments of the defendants were directed to the east or Goble tract, not the west or Beaverbrook tract where a PURD was allowed under the Township's new ordinance.

Of course, if the expert appointed to oversee the new ordinances should believe and recommend that the density be higher or more intensive or if the municipality should allow for more, then the Court would be controlled thereby, but the remedy awarded to Plaintiff in

this specific relief is due, and anything less would be a "pyrrhic victory"; however, with this relief the plaintiff can proceed to final studies, seek its necessary permits and the municipality and the State and its various agencies will be in control to see that there is compliance.

This Court has undertaken an exhaustive study of the testimony and the exhibits as they were received and has reviewed the testimony from its notes and the transcripts provided, and has undertaken to note fully the points it and the parties felt were necessary to resolve the problem. Regardless of the outcome, it is apparent that a project of this dimension cannot be taken lightly; hence the 29 days of trial and the time since when the Court has been completing its opinion. However, that very expenditure of trial court time leads this Court to wonder whether or not legislative intervention is not necessary to have this type of case hereafter processed by an administrative agency, such as the County Planning Board, where much like the Public Utilities Authority (or any administrative agency for that matter) there could be immediate expert input, and then the matter appealed directly to the Appellate Division of this Court system, were an appeal necessary. Then, of course, the test would be whether the fact findings are supported by "substantial evidence", that is, such evidence as a reasonable mind might accept as adequate to support the conclusions of the administrative agency. Benedetti v. Bd. of Com'rs of the City of Trenton, 35 N.J. Super. 30 (App. Div. 1955) and In Re Application of Hackensack Water Co., 41 N.J. Super. 408 (App. Div. 1956). That test differs from the test which this Court must apply in the traditional law fact finding process.

Specifically, this case relied much upon the Hunterdon County Planning Board reports, its master plan for the County (Exhibit P-64, 65

but the Court was unable to use the testimony of the County Planners, because one of their employees sat upon the Municipal Planning Board, and objection was voiced that there might be a tainted view presented. As an aside to this result, it is highly recommended that County Planning Board employees not sit as members of local planning or zoning boards, and additionally that the County Planning Boards not prepare ordinances of either planning or subdivisions for municipalities, as has been the practice in Hunterdon County, so as to avoid future conflicts of the type reached in this case.

This Court should like it understood that it does not seek to shirk its duty, but it has taken considerable time to develop the record in this matter, so that a trial judge might appreciate the nuances of the factual and expert material being presented, which would already be in hand, were an administrative agency with trained planners and perhaps a trained hearer prepared with that background to hear the matter. Thus, notwithstanding that this judge has been a municipal attorney, planning board attorney, etc. in the past, a case of this dimension humbles anyone approaching the dynamic results that can be appreciated as Hunterdon County changes from a rural to a regionalized corridor county which it has become.

The Court wishes to express its gratitude to counsel for the time and effort given to this matter, since it became an accelerated matter, for it is appreciated that counsel for both sides have devoted themselves almost exclusively to this matter for many months, as a real controversy of social dimension was so demanding that any part-time approach was impossible under the circumstances. Because it was such a controversy, there will be no allowance of counsel fees as requested by either side,

even if it is believed that the Rules of Court would so allow, (which I doubt (vide R. 4:42)), but an application for reasonable expert fees on behalf of the successful plaintiff will be entertained for the time and effort spent by Plaintiff's experts during the time depositions were taken of them by the defendants' attorneys. A Judgment should be submitted in accordance therewith!