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Defendant's Memorandum of Law w/ Counter statement of facts

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MONMOUTH COUNTY

Docket No. L-21114-75 P.W.

HARRY S. POZYCKI, SR., BENJAMIN RICHLAND, THOMAS FRYSTOCK, A. J. BARSHOP, and RICHLAND AGENCY, INC.,

Plaintiffs,

vs.

TOWNSHIP OF MANALAPAN,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW

SONNENBLICK, PARKER & SELVERS, P.A.
100 Craig Road
Freehold, New Jersey 07728
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PROCEDURAL HISTORY

Defendant generally concurs with plaintiffs' Procedural History with the following addition.

On April 18, 1979, the Manalapan Township Committee introduced on first reading an ordinance amending the Zoning Ordinance of January 24, 1979. The public hearing will be held on May 2, 1979 and the defendant's memorandum of law is based on the Ordinance as amended.

STATEMENT OF FACTS

The Manalapan Township Zoning Ordinance as amended ("Ordinance") provides for an appropriate variety of housing to meet the needs of all categories of persons and provides for more than its share of the regional needs for low and moderate income housing. Included in the Ordinance are provisions for rental apartments, rental and fee simple townhouses, two family houses and single family detached houses on small lots. The Ordinance provides for the following districts, the acreage calculations being based on the net acreage available for the permitted types of housing with the exclusion of fully developed lots, isolated vacant lots and areas of floodways.

RC-1 DISTRICT: This district of 165 undeveloped acres, permits the development of single family detached homes on 7500 square feet lots, provided the developer has 50 contiguous acres. This quantity of acreage can easily be assembled in the area of this zone. Clustering is provided for environmental reasons and the developer is permitted to build on 60% of his parcel, with the remaining 40% to be reserved as open space for recreational purposes. More than 450 least cost single family detached houses may be constructed with minimal requirements for habitable floor area.

RC-2 DISTRICT: This district of 132.6 acres of developable vacant land, permits a mix of townhouses, single family houses and open space, provided the developer has a minimum of 40 acres. One-third of the tract may be developed for townhouses, at six dwelling units per acre,

which would result in 261 townhouse units being constructed.

RC-3 DISTRICT: This district, containing approximately 163 acres of vacant and developable land, permits a mix of townhouses and apartments on two-thirds of the site area, reserving one-third for open space or recreational use, provided the developer has 15 contiguous acres of land. In accordance with the development regulations set forth in the Ordinance, 879 least cost residential units (550 apartments and 329 townhouses) may be constructed.

RC-4 DISTRICT: This district of 76 acres of vacant and developable land permits two family dwellings on 15,000 square foot lots and would permit the construction of 190 houses containing 380 dwelling units.

RM DISTRICT: The two remaining RM districts located in the vicinity of Route 33, encompass 551 acres of vacant and developable land. 1390 townhouse units may be constructed within the two zones.

In summary, approximately 1,100 vacant and developable acres are zoned for least cost and moderate housing. More than 3,350 dwelling units are potentially capable of being constructed.

The Ordinance provides for clustering in the RC-1, RC-2, RC-3, RM and, as will be noted on the revised zoning map, in the 40/20 zones in the southern portion of the Township.

Land previously zoned for industry and office research has been drastically reduced. The C-1 zones contiguous to Route 33 have been expanded to permit the uses contained in the I-3 zone as well as permitting commercial, recreational and leisure time uses.

Practically all, if not all, of the vacant land in Manalapan Township is shown as being in an aquifer area and the Ordinance establishes developmental regulations considerate of the constraints in the area.

The New Jersey Division of State and Regional Planning, in a report entitled "A Revised Statewide Housing Allocation Report for New Jersey", dated May 1978, estimates that 1,400 units of low and moderate income housing represents Manalapan Township's fair share through 1990.

The Monmouth County Plan Area V Land Use Report dated November 1978 sets forth: "Southern Manalapan also must concern itself with wetlands and stream encroachment in the Manalapan Brook area. Much of the same area is prime agricultural land and development should be kept to a low density." Further, the report supports a mix of densities in the entire planning area Manalapan, Marlboro, Freehold, Colts Neck, Howell, and the Boroughs of Englishtown, Freehold and Farmingdale, but the report cautions that "...the question of utilities must be settled prior to implementation of such density proposals".

Plaintiffs, in their memorandum of law, on page 8, state that "As in all other new 'RC' zones, the permitted use is for single family detached housing on one acre lots. The other types of housing are available only pursuant to a conditional use permit". In fact, the lot size permitted for single family detached housing is in accordance with the R-20 zone and no conditional use permit is required to develop under the higher densities permitted in the "RC" zones.

It is the Township of Manalapan's intent to promote the construction of a variety of housing including least cost and moderate income hpusing. To that end, the Manalapan Township Planning Board is in the process of hiring a planner to assist and guide the development of Manalapan Township in accordance with the "Municipal Land Use Law" in order to protect the public health and safety and promote the general welfare.

POINT I

DEFENDANT HAS COMPLIED WITH THE COURT'S JUDGMENT

The Court entered a judgment "Requiring the Township to make proper provisions for a variety of housing in light of Mount Laurel and Oakwood with proper consideration given to the concept of least cost and to multi-family housing and with proper consideration given to environmental concerns and with substantially cutting down the amount of land zoned for industrial, office, research and commercial. Clustering must be permitted. Reasonable figures as to the need must be developed by the municipality".

In order to determine whether the Township's Zoning Ordinance complies with the Court's order, it is first necessary to determine the defendant's fair share of the regional need for low and moderate income housing. It appears that both plaintiffs and defendant would agree that the estimate of 1,400 units, as contained in the New Jersey Division of State and Regional Planning report entitled "A Revised Statewide Housing Allocation Report for New Jersey" represents defendant's fair share of the regional need. It should be pointed out that this estimate is through the year 1990.

The Manalapan Township Zoning Ordinance permits more than 3,350 dwelling units of least cost or moderate income type. Even if we were to deduct the 1,390 townhouses that could be constructed in the RM zones, 1,960 least cost units could be constructed.

The Ordinance permits the development of garden apartments at 10 units to the acre, attached townhouses at six units to the acre, detached single family houses on 7500 square foot lots, and two family houses on 15,000 square foot lots. These units may be rented. There are no excessive requirements which would result in unnecessary in-

creased building costs.

The plaintiffs baldly complain that the Ordinance contains excessive open space requirements. The open space requirements in the Ordinance have been purposely designed to take into account the environmental constraints existing throughout the Township. The cost of raw undeveloped land in Manalapan Township is relatively insignificant in determining the ultimate cost of a dwelling unit. For example, assuming that an acre of raw unimproved land costs $6,000, the cost differential between a density of 10 apartments per acre and 16 per acre would be $225 per apartment. The rental cost of that apartment attributable to the difference of land cost would be meaningless and when compared to the benefit ultimately to the tenant and to the community as a whole, both aesthetically and environmentally. It is obvious that sound planning for the Township of Manalapan dictates the lesser density.

The Ordinance is reasonable and provides for the general welfare of the community. The high density zones have been located in an area contiguous to the Borough of Englishtown which, as previously stated, is a historic, commercial, high density population center.

The newly enacted RC zones are designed to effect a more efficient use of land, lessen the cost of construction and yet conserve as much open space as possible. For the most part, the southern portion of Manalapan Township which is environmentally sensitive and is without water and sanitary sewer facilities, has been zoned to promote the cluster concept of residential development. The developer of the major portion of the RM zone south of Route 33 has previously received preliminary subdivision approval, and the RM zone immediately north of Route 33 is owned by the plaintiffs.

The Ordinance has also taken into account the availability of existing water and sanitary sewer, and the location of existing residential developments and educational and commercial facilities. The fact that certain areas of Manalapan Township are without access to public transportation and the location of job markets have also been considered. The Court should also consider upon presentation of competent evidence that the Borough of Englishtown within the borders of Manalapan Township provides for a considerable number of least cost dwelling units and a variety of housing for persons of low and moderate income.

In Pascack Ass'n. Ltd. v. Mayor & Council of the Township of Washington, 74 N.J. 470 (1977), the Supreme Court, subsequent to Mount Laurel and Oakwood at Madison, affirmed that "...the statutory and constitutional policy of this State [is] to vest basic local zoning policy in local legislative officials. N. J. Constitution 1947, Art.4 §6, Par.2; Art.4§7, par.11 (liberal construction of powers of municipal corporations)" Id at 483. Cautioning that "...it would be a mistake to interpret Mount Laurel as a comprehensive displacement of sound and long established principles concerning judicial respect for local policy decisions in the zoning field", the Supreme Court declared "What we said recently in this regard in Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335, 343 (1973), is worth repeating as continuing sound law:

> "It is fundamental that zoning is a municipal legislative function, beyond the purview of interference by the courts unless an ordinance is seen in whole or in application to any particular property to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute, N.J.S.A. 40:55-31,32. It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts,

boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently or because the preponderance of the weight of the expert testimony adduced at a trial is at variance with the local legislative judgment. If the latter is at least debatable it is to be sustained.

See also Kozesnik v. Montgomery Twp., 24 N.J. 151, 167 (1957); Vickers v. Twp. Com. of Gloucester Tp., 37 N.J. 232, 242 (1962), cert. den. and app. dism. 371 U.S. 233, 83 S.Ct. 326, 9 L.Ed.2d 495 (1963)". Id at 481.

In reviewing municipal zoning ordinances, the Court declared that:

"Beyond the judicial strictures against arbitrariness or patent unreasonableness, it is merely required that there be a substantial relation between the restraints put upon the use of the lands and the public health, safety, morals, or the general good and welfare in one or more of the particulars involved in the exercise of the use-zoning process specified in the statute. Delawanna Iron and Metal Co. v. Albrecht, 9 N.J. 424, 429 (1952)." Id at 483.

Equally significant to the instant matter is the holding of the Court that:

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

It is respectfully submitted that the zoning ordinance adopted by Manalapan Township should be sustained by this Court.

POINT II

PLAINTIFFS' REQUEST FOR SPECIFIC RELIEF SHOULD BE DENIED

Plaintiffs' contention that they should be afforded specific relief is without merit in fact and law. Plaintiffs' reliance on Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481(1977) is mistaken, and inapplicable to the matter at bar. Although specific relief was afforded in Oakwood at Madison, the Court cautioned that "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." Id at 551, FN 50.

The Supreme Court in Oakwood at Madison declared that plaintiffs were not "...entitled to zoning permitting the most profitable development of the property." Id at 549 citing Cobble Close Farm v. Bd. of Adjustment, Middletown Tp., 10 N.J. 442, 452 (1952). The granting of specific relief was predicated on the allocation of at least 20% of the units to low or moderate income families, and was expressly contigent on the trial court's determination that the land was environmentally suited to the degree of density and type of development proposed. Id at 551.

In the matter at bar, as distinguished from Oakwood at Madison, plaintiffs are not builders of housing, but rather real estate speculators. Unlike the plaintiff in Oakwood at Madison, the plaintiffs at bar have never submitted any application to the municipality or its agencies for approval or variance. As a result, plaintiffs will not ultimately decide on or control the type of housing that will be constructed on their property, which will undoubtedly be sold to a

builder-developer.

Significantly, plaintiffs' plan, as noted by this Court in its opinion of February 28, 1977, at page 25, "...was not drawn specifically with the least cost concept in mind, nor does it adequately consider the entire Township." Plaintiffs have offered no proof that demonstrates that their property is more environmentally sound or suited for construction than other areas in the Township.

Plaintiffs admit that sanitary sewer service is required for the development of their property zoned RM under the present zoning ordinance and therefore, it would be required for their entire proposed high density development. Testimony will be adduced at trial establishing the fact that a sewage treatment facility located at or near plaintiffs' property, even if approved by the Department of Environmental Protection, would have a capacity to serve approximately 2,000 housing units. In fact, if the plaintiffs' property and the surrounding area that would be served by this facility were developed under existing zoning, it would produce approximately 2,000 residential units. Moreover, a development known as Forest Trails, located directly to the south of plaintiffs' property across Route 33, has received preliminary subdivision approval for 596 dwelling units, subject to, among other things, the availability of sanitary sewers.

Plaintiffs have suggested that the most feasible location for a sewage treatment facility with sufficient capacity would have to be at the Manalapan and Monroe Townships' border. However, plaintiffs fail to disclose that the facility and the many miles of interceptor lines would have to be constructed in advance of their proposed development, and that the cost of construction of the plant and lines, including

obtaining of easements, would cost millions of dollars. Even if it were economically or environmentally feasible it would substantially add to the cost of the housing the plaintiffs contemplate for their site.

The plaintiffs' proposal does not take into consideration the needs of Manalapan Township in its entirety, but rather, addresses itself to the economic desires of the plaintiffs. Plaintiffs ignore the fact that the area in question does not have public transportation nor is it located in reasonable proximity to schools or commercial centers. It is also farther from the general job markets to which most of the residents of the area commute. Future residents would undoubtedly require two motor vehicles and be required to spend greater sums of money for fuel, considering the extra distances they would have to travel. Aside from the detrimental effect on energy conservation, it is most unlikely that moderate income families, let alone low income families, would have the economic resources to reside in this location.

Plaintiffs also fail to reveal that the Monmouth County Plan Area V Land Use Report dated November 1978 sets forth: "Southern Manalapan also must concern itself with wetlands and stream encroachment in the Manalapan Brook area. Much of the same area is prime agricultural land and development should be kept to a low density." The Report supports the inclusion of a mix of densities in the entire planning area (Manalapan, Marlboro, Freehold, Colts Neck, Howell, and the Boroughs of Englishtown, Freehold and Farmingdale), but cautions that "...the question of utilities must be settled prior to implementation of such density proposals".

The present Ordinance generally complies with this report, except that to plaintiffs' displeasure, its mix of densities is not located on plaintiffs' property, but rather, in the northwest section of Manalapan where utilities are in existence and are available, where a historic, commercial and high density population center, namely, the Borough of Englishtown, is capable of serving this mixed density area where extensive and expensive offsite road improvements are not required, as well as numerous other factors which all lend themselves to the construction of residential units for low and moderate income families.

It is submitted that the Zoning Ordinance of Manalapan Township complies with the Order of this Court, and provides for the Township's fair share of low and moderate income housing. In accordance with the precedent cited in Point I, supra., the Court should not substitute its judgment for that of the municipal governing body with respect to the zoning provided for the property of the plaintiff. Upon the Court's rendering a final decision in the instant matter, the Township, without delay, adopted a comprehensive Zoning Ordinance to comply with the Order of this Court. To grant plaintiffs' request for a specific remedy, would unjustly punish the Township for seeking appellate review of this Court's decision. This Court's opinion of February 28, 1977, at page 25, noted the plaintiffs' plan "...was not drawn specifically with the least cost concept in mind, nor does it adequately consider the entire Township". Moreover, with respect to ordering a specific remedy for the plaintiff, the Court at 26, declared, "It should be rarely granted, plaintiff here does not present the same circumstances as the plaintiff did in Oakwood".

Since that time, nothing has occurred which has altered plaintiffs' circumstances, to provide for the granting of a specific remedy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Zoning Ordinance enacted by the Township of Manalapan be declared valid and that plaintiffs' request for relief be denied.

Respectfully submitted,

SONNENBLICK, PARKER & SELVERS, P.A.
Attorneys for Defendant.

By: _____
GERALD N. SONNENBLICK

COUNTER STATEMENT OF FACTS

Plaintiff commenced this action on February 2, 1976. The matter was pre-tried on June 4, 1976. Due to adjournments requested by the defendant, the matter was not tried until February 16, 1977. The trial was held on five separate days and concluded on February 28, 1977.

The plaintiff's first witness at the trial was Professor Antone C. Nelessen, of the Graduate School of Urban Planning at Rutgers University. At that time Professor Nelessen held the rank of Assistant Professor, he now holds the rank of Associate Professor with tenure at the Graduate School and is now a registered professional planner. (I T 2: 22-24).

His educational background was extraordinary and extensive. He was an Engineering special student at the University of Wisconsin. He received a Bachelor of Architecture from the University of Minnesota in 1965. (I T 17: 9). In 1968 he received a Masters of Architecture in Urban Design from Harvard University (I T 17: 15). Urban design is a composite of landscape architecture, planning and architecture. (II T 25: 23). Professor Nelessen testified that he did graduate work at the Massachusetts Institute of Technology and was a Research Assistant for the Harvard Research Office at the Graduate School of Design (I T 3: 12). Other academic positions which he held in the planning field included the position of Lecturer at Harvard University for one year, as Assistant Professor at Harvard for two years, as a visiting Professor at M.I.T., as a Lecturer at the Boston Institute of Architecture, as Director of the

Center of Visual Studies at the School of Image Works, as Consultant at the University of Louvain in Belgium, and as Lecturer at several other universities in the northeastern region. (I T 3: 19-4: 5).

Professor Nelessen testified that he had been working in the field as a private planner since before his graduation from the University of Minnesota in 1965. He worked for Victor Gruen Associates in Los Angeles as a Planner. His "particular responsibility" with that firm was to become involved with the preliminary design of a housing type which would be most affordable by low, moderate, middle income, but primarily by moderate income individuals. (I T 4: 18-22). Other work with the Gruen organization included the Calabasas new town in California for the Edison Corporation, the Honolulu Central District Revitalization Plan, and in conjunction with Secretary of the Interior Udall, a major housing project in Prince Georges County near Mount Vernon, Virginia. (I T 5: 1-13). He was a consultant on the Kansas City Hallmark Redevelopment in Kansas City. He was a member of the Gruen planning team for the redevelopment of the City of Tehran, Iran. Because of his wealth of planning background, Harvard University waived the Urban Design degree program requirements and he assumed the position of Research Assistant on a HUD project known as the New Communities Project. (I T 6: 22). The specific charge of that project was to develop alternatives to what the government at that time considered the costly sprawl pattern. (I T 7: 2).

Subsequent to this, Nelessen became an Urban Designer and Planner at the firm of David Crane and Associates in Philadelphia, Pennsylvania. This firm, like the Gruen organization, is a planning and design firm of national and international reputation. One of Nelessen's specific purposes there was to develop as wide a choice and variety of housing for a full range of income types as could be achieved. (I T 8; 11).

Nelessen then rejoined Gruen International as a Chief Consultant to the Belgian government for the purposes of developing a new university and a town surrounding that university with the purpose of making the community as efficient as conceivably possible. That town, Louvain La Neuve, is now two-thirds constructed, having commenced in 1972. The town has a full range of housing types. (I T 10; 6).

Nelessen has been self-employed as a private planner, being a principal of a firm known as Community Alternatives in New Brunswick, New Jersey for more than three and one-half years. (I T 11; 12-16). In New Jersey he has done planning work for theCounty of Sussex, (I T 12; 8) the Township of Hillsborough (I T 13; 5), the City of Highland Park (I T 13; 18), the Township of Randolph (I T 14; 20).

Nelessen currently teaches the Urban Design Studio at the Graduate School of Urban Planning at Rutgers University. The University encourages its Professors to remain in the field so as not to become "totally immersed in academic work" (I T 11; 15). The Urban Design Studio is a course of study for students

have gone through one or two years of planning studies or are at the Master's or Ph..D. level in Planning. Its purpose is to test the synthesis of previous courses in planning methods, planning law, sociology, transportation, ecological analysis for the purpose of most adequatly preparing future planners to accept the role as planners for either municipalities, state institutions or federal agencies. (II T 48; 3-15). The studio involves an actual hands-on design studies where the students are involved with three-dimensional site planning, building configurations, location factors as they relate to physical planning (II T 48; 21-25).

Nelessen's testimony, together with the documentary evidence submitted at the trial, revealed the following about Manalapan Township.

Manalapan Township is a Township of 32.98 square miles or about 20,900 acres, located in central western Monmouth County, about 48 miles southwest of Manhattan. It is 17 miles from the City of New Brunswick, 21 miles from Perth Amboy. It is approximately 19 miles from the Atlantic Ocean to the east. Twenty-three miles west along Route 33 lies the City of Trenton. (I T 40; 9-12; V T 63).

In 1960 Manalapan had a population of three thousand nine hundred ninety (3,990), only 853 more than in 1950. By 1970, the population of the Township had increased to 14,049, a percentage increase of 252.1 per cent. (I T 40; 24-41; 6). In 1960, the Township was essentially rural - agricultural with

no sizeable settlements or commercial or industrial enterprises. By 1970 the density population of Manalapan was 429 persons per square mile. The Township lies within the general New York City - Northeastern New Jersey Metropolitan region. (V T 63: 21-64: 5).

Major and secondary roads traverse the Township. U.S. Route 9 runs north and south, crossing the northwestern section of the Township. The southern half of the Township is bisected by State Highway 33. The New Jersey Turnpike is a few miles to the west of the Township and the Garden State Parkway is a few miles to the east. State Highways 34 and 35 are also nearby. (V T 64: 5-12). In Nelessen's opinion, Manalapan Township is a developing municipality. (I T 45: 20).

EXCLUSIONARY

According to the 1970 United States census, there were 3,107 households in Manalapan Township (III T 2:22). Of this number, 220 households, or 7.1 per cent of the total, were in the family income range of 0 to 6 thousand dollars per year. (III T 3: 23). Three hundred and fifty-eight (358) of these families, or 11.5 per cent of the total, were in the 6 to10 thousand dollars per year income range (III T 4: 12).

The same census revealed that there were 114,097 households in Monmouth County (III T 4:22); of which 19,972, or 17.5 per cent of the total, were in the 0 to 6 thousand dollar per year family income range (III T 5: 4); and 25,319 of which families were in the 6 to 10 thousand dollars per year family income range, which is 22.2 per cent of the total (II T 5: 11).

Nelessen defined "low income" as 50 per cent of the County median income (III T 6:2). He defined "moderate income" as roughly 50 to 80 per cent of the County median income (III T 6: 7). The county median family income, according to the census, was $11,633. per year (III T 7: 1). Thus, while 39.7 per cent of the County families are in the "low" or "moderate" income ranges, only 18.6 per cent of Manalapan Township families are in those categories. (III T 7: 9 - 15).

The Monmouth County Planning Board projects that by the year 2000 the Manalapan Township population will more than triple to 45,189, compared to its 1970 population of 14,049 (III T 9: 6 - 12). Thus, Manalapan Township will absorb more than 8 per cent of the total growth in Monmouth County (III T 14:23).

Zoning in Manalapan dates back to 1954 when the "original" ordinance was adopted. The original ordinance and amendments thereto were introduced into evidence (I T 139 0 164). The evidence revealed that up until the present ordinance, the land use regulations of Manalapan Township permitted only large lot, single family residential units, except with respect to a senior citizens housing development known as Covered Bridge (V T 66: 22 - 25). The evidence further revealed that although 34.6 per cent of the county housing growth between 1960 and 1971 was in multi-family housing, 0 per cent of the housing growth in Manalapan Township was in multi-family housing. This was during a period when Manalapan Township population increased by more than 250 per cent (PA 46).

There are 16,243 zoned developable acres in Manalapan Township, which constitutes 8.55 per cent of the 189,181 zoned developable acres in Monmouth County. (IV T 6; 4-9).

As a result of this evidence, the trial judge found that Manalapan Township had in the past acted affirmatively to control development and to attract a selective type of growth. The effect of the past Manalapan Township zoning ordinances has been to tend to exclude persons of low and moderate income, youths and older persons. (V T 67; 13-21).

THE ZONING ORDINANCE

The most recent amendment to the Manalapan Township zoning ordinance was enacted on April 12, 1976. The ordinance totaly excludes rental units. It required that all residential construction be offered "for sale". There is no provision for apartments or multi-family housing of any kind. There is no provision for two-family or three-family homes of any kind. There is no provision for single-family housing on small lots. (V T 69; 10-.15).

The zoning ordinance does provide some 842 acres in the so-called "M - R zone". The ordinance permits that 40 per cent of this sum, or 337 acres may be developed in accordance with strict, regulated and unnecessarily costly guidelines, at net density no greater than 6 dwelling units per acre. All of these units must be offered for sale, and the maximum aggregate average floor space of the units must not exceed 1250 square feet. The ordinance goes on to provide, however, that if the developer

elects to build under this so-called "variable lot size adjustment", that the maximum number of residential building lots shall be such that the resulting net lot density of the area to be sub-divided shall be no greater than the net lot density of the sub-divided area without regard to the provisions of the variable lot size provisions. (P -2 evidence, section 21 - 7.3 a.) (2). This has been interpreted by the Township to mean that the maximum density which will be permitted to be constructed in these "M - R zones" shall be 1.7 dwelling units per acre (PA 4: 7-10). The trial judge characterized this as a "small provision for expensive town houses" (V T 83: 19-20).

The zoning ordinance zones 1024 acres in the "R-40" zone (40,000 square feet minimum lot size); 1172 acres in the "R-30-40" zone (40,000 square foot minimum lot size, which may be clustered into 30,000 square foot lots); 9524 acres in the "R-20" zone (20,000 square foot minimum lot size);; 842 acres in the "M-R zone" (60 per cent according to R-20 guidelines, 40 per cent townhouses). In that there are 20,900 acres in the entire township, the R-40 zone comprises 5.1 per cent of the total; the R-30/40 comprises 5.94 per cent of the total; the R-20 comprises48.24 per cent plus an additional 2.55 per cent within the M-R zones; and the M-R zones for townhouses, which total 337 acres equals 1.7 per cent of the total land area in the Township (V T 68: 20-69: 5).

In contrast, the zoning ordinance zones 3,312 acres, or 16.74 per cent of the total, for industry and office

research. It zones 2,553 acres, or 14.66 per cent of the total, for commercial uses. (V T 64; 14-18).

Minimum gross habitable floor areas are established in all residential zones. They range from 1200 to 1600 square feet in the R-20 zone to 1500 to 2000 square feet in the R-40 zone. Street frontage requirements range from 100 feet in the R-20 zone to 200 feet in the R-40 zone. (II T 85; 85-92). Molessan testified that these zones were directed to provide housing to the middle and upper-middle income groups of the general population. (II T 101; 7).

The M-R zones have extensive and cost generating developing guidelines and regulations. (See P2 in evidence, the April 12, 1976 zoning amendment). According to the ordinance, all townhouses must be conveyed in fee simple. (Section 21-3.84 (a). All proposed lots within 200 feet of any existing lot used for residential purposes shall meet the area, width and other zoning requirements equal to the abutting lot or lots. (Section 21 - 5.7). There shall be no more than six townhouse dwellings units per gross acre. (Section 7; Section 21 - 7 (3) (e)). No townhouse shall exceed 30 feet in height and shall be limited to two habitable stories and an uninhabitable attic. (Section 7; Section 21 - 7 (3) (i)). 1.8 parking spaces for each townhouse must be provided. Maximum building coverage is 20 per cent. Portions of any development complex not used for townhouses shall be devoted for uses such as parks, playgrounds, golf courses, country clubs, swimming pools, swimming clubs,

tennis courts, and privately maintained conservation areas. (Section 7; Section 21 - 7 (3) (k), (p) (q)). Sidewalks must be cleared of snow within 24 hours after snowfall. Streets must be cleared within 6 hours after snowfall. Garbage must be stored in underground containers. No individual wells or individual sewer disposal systems shall be permitted. (Section 7; Section 21 - 7 (B) 1, 2 and 3).

Based on the evidence and the testimony, the Trial Judge found this ordinance to be invalid and unreasonable as not providing for the general welfare and for failure to make provision for the township's fair share of the region's housing needs. (V T 84; 8 - 13).

LEAST COST HOUSING

Nolessen testified that in order to achieve least cost housing a certain variety of housing types had to be provided for in the zoning ordinance. He said that single family houses on small lots at a density of 8 units to the acre should be provided. (II T 119: 2) Zero - lot - line houses should also be included. These were described as single family houses without sideyard setbacks. Townhouses are one example of this type of housing. (II T 120: 5). Patio houses are another form of this type of housing. Patio houses include a private exterior space to be enclosed by a wall, shrubbery or hedge. This permits higher levels of density but also private exterior space and semi-public space. Each of these housing types should be accompanied by provisions for "clustering". (II T 120: 10-20).

Twin houses should be provided. This type of housing is similar to a townhouse, but with only one abutting wall, which is a common wall between two units. This type of housing can be constructed to begin as a two-bedroom house with room for expansion (II T 121: 5-20). Triplex housing should be permitted, which is three attached units, each having its own semi-public and its private space in the rear. The more units to be attached, the more density that can be achieved while retaining the principle of each unit having its own private space (II T 121: 25). The higher density "townhouse mix" should be provided. These should be provided at greater densities than eight units to the acre. This townhouse mix would include individual two-story units, individual one-story units with these basic units "mixed" to create one, two, three and four-story configurations. Nelessen testified that this would be the optimum level of mix that he would recommend for Manalapan Township. He testified that he would not recommend the traditional garden apartment residential units because this type of unit does not provide for an exterior private space and is accompanied by problems of noise (II T 125: 1-5). On questioning from the Court, Nelessen testified that the low costs of a garden apartment unit could be achieved with the "townhouse mix" units, if similar densities were provided for (II T 25: 8 - 25).

In defining least cost, Nelessen included initial development costs, the least cost to the municipality to maintain it, and thirdly, and most importantly, the least cost to

the people who would live in the units. (II T 125: 20 - 25) Nelessen testified that density was a major factor in cost. He testified that two years of study of these particular housing types led to the conclusion that eight dwelling units per acre was the optimum density. This gross density, accompanied by clustering provisions, would permit higher densities on those pieces of land which are most suitable for development. (II T 125: 21).

The other major factors of "least cost" development included first, the zoning of the highest residential densities on those areas found to have minimum development constraints (II T 128: 5); and secondly, provisions for the proximities of these units to the basic level of community facilities including shopping, schools and recreational facilities (II T 128: 12 - 14); and thirdly, certain design provisions including provisions for the clustering of these units (II T 128: 15).

Nelessen further testified that many of these objectives had been achieved in a New Jersey community known as "Radburn" in Fair Lawn, Bergen County, New Jersey.

Nelessen testified extensively to the effect that it was possible to achieve least cost housing, without environmental damage, in Manalapan Township. He described in great detail an alternative plan for the Township which would include a concentrated retail commercial center, a great variety of housing types in close proximity to that center, while preserving and protecting all of the known and observed natural

resources in the Township (II T 133:- 145).

ENVIRONMENTAL FACTORS

Professor Nelessen testified that he did an environmental analysis of the southern portion of Manalapan Township, which comprises almost sixty percent of the entire Township. The reason for limiting his study to the southern portion of Manalapan Township was that the preliminary analysis revealed that the northern portion of the Township had undergone extensive development in the ten year period from 1960 to 1970. The Township's own environmental analysis, entitled "Natural Resource Inventory" by Dames and Moore (P-3 in evidence) indicated that there is little prime developable land left in the northern portion of the Township, and that the vast majority of remaining developable land is in the southern portion of the Township. It was therefore appropriate to concentrate the studies in the southern portion of the Township. (I T 80: 2 - 19.) In any event, the Dames and Moore study dealt with the entire Township and was put in evidence. Nelessen testified that his own environmental study, which was performed before the publication of the Dames and Moore study, coincided in all pertinent points and all essential matters with the Dames and Moore study. (I T 86: 19). The sources of the environmental information were put into evidence. They consisted of soils maps published by the U. S. Department of Agriculture (II T 4: 24); topographic maps published by the New Jersey Department of Environmental Protection (II T 11: 14);

A soil study of Monmouth County soils, New Jersey Agricultural Experiment Station, Rutgers University (II T 15: 15); natural feature study for Monmouth County, by the Monmouth County Environmental Council (II T 16: 7); and a flood hazard report by the New Jersey Department of Environmental Protection, delineating flood hazard areas (II T 16: 23).

The information from these maps was then separated into categories, each dealing with a potential "development constraint". These categories included the following: flood plains, depth to seasonal high water, aquifer recharge areas, slopes, depth to bedrock, permeability, erodibility of soils, and septic suitability. Each of these analyses was projected on an individual transparent plastic map. A composite map could then be produced, which was entitled " Development Suitability Map" (II T 48: 13). The first three of these characteristics, aquifer recharge, high water tables, and flood prone areas, were considered major characteristics in the analysis. (III T 107: 1-4).

The entire environmental analysis was demonstrated in the courtroom and was subject to extensive cross-examination by the defense. The transcripts revealed that this analysis and the demonstration of its methodology consumed about two full days of the trial. The study revealed that the Manalapan Township zoning ordinance was completely irrational in its response to the environmental conditions in the southern half of Manalapan Township. (II T 77: 5). Some of the most intense

forms of development - including high density residential, industrial and commercial uses - were located over the most sensitive environmental areas. This included the location of an industrial zone in the northwest corner of the southerly half of the township, which had been located directly over the major aquifer for the area. (II T 79: 1 - 8). The adjacent M-R zone, permitting townhouses, was in an area that was 90 to 95 per cent unsuitable for development. The largest M-R zone, lying south of Route 33, was comprised of land more than 50 per cent of which was rated "most unsuitable for development".

In contrast, the plaintiff's land, comprising some 400 acres immediately north of Route 33, bounded by Woodward Road and Millhurst Road was comprised of some 90 per cent of suitable land for development. (II T 81: 24). Nelessen testified that those areas revealed by the environmental analysis to be most environmentally sensitive, and therefore "most unsuitable" for development should be zoned for the least intense and lowest densities of uses.

This environmental information dealt with two separate aspects of the plaintiff's case. It demonstrated that the ordinance was not designed to promote "least cost" housing. Nelessen testified that by zoning the highest residential densities over areas with major development constraints, the Township had unnecessarily increased the cost of that development, not only in terms of its initial construction costs, but also in terms of its long-term maintenance costs.

For example, Nelessen testified that the largest M-R zone was [illegible] an area more than 50 per cent rated "most unsuitable" due to seasonal high water. On cross-examination he was asked by [illegible] defense counsel about methods for dealing with this development constraint. He responded that either filling with top soil or extensive drainage systems were the typical responses or, in other cases, digging huge lakes filled with absorbent chemicals. Asked if these techniques would involve substantial expenditures, he responded in the affirmative: "Well that's the argument towards these costs. We would definitely want to avoid those areas where you'd have to put in high development costs initially and have to continue to maintain it." (III T 20: 21 - 24). Nelessen testified affirmatively that "All housing must be put on land which has least development constraints to provide for least cost housing." (II T 138: 22 - 24).

Aside from the "least cost" aspect of the case, Nelessen testified that a municipal zoning ordinance should respond to environmental conditions in all aspects. Thus the area over the Englishtown Sands, the major aquifer in the region should not have been zoned for high intensity industrial development without adequate protections. (II T 79: 21 - 80: 21). The R-20 zones have no provisions for clustering which would preserve open space or natural resources. (III T 71: 10-21). This failure to provide for clustering is consistent throughout all residential zones except the small R-40/30 zone.

The extensive frontage requirements will require massive amounts of new asphalt roadway, curbing and pavements. There is too much one-half acre to one acre single family residential zoning. The zoning ordinance calls for a massive grid-type sub-division to cover virtually the entire southern portion of the Township, without provisions for the saving of open space or the protection of environmental quality.

URBAN SPRAWL

Nelessen further testified that the Manalapan Township zoning ordinace was irrational for reasons other than the fact that it failed to respond to environmental conditions. He testified that the Manalapan Township zoning ordinance, as it presently stands, characterizes in every respect a pattern of development referred to in the planning field as "urban sprawl". (III T 20: 15 - 18). He testified that the urban sprawl pattern has six major characteristics, which are (1) the predominance of single family housing units on lots of 15,000 square feet or larger, typically in what is called a grid pattern, as opposed to a cluster pattern, and in non-contiguous housing developments; (2) these developments have as their major commercial support commercial facilities strung along major arterials and secondary roads and not in a higher architectural form; (3) isolated pockets of higher density developments, most typical garden apartments, with very little or no relation between them and commercial facilities or them and any larger community created by the single family

housing developments; (4) no green or open space linkages between the housing facilities; only isolated, left-over pockets of land; (5) visually it appears spread out, consuming vast links of roads, monotonous, repetitive and lacking variety; (6) because of the pattern, these developments have no inherent identity, making it difficult if not impossible to tell one from the other, no sense of focus, identity, or community. (III T 16: 22 - 18: 15). Nelessen testified that the northern portion of Manalapan Township had already been developed in the sprawl pattern. He testified from his own personal visual inspection of the area, accomplished by flying over the area in an airplane and driving into many of the sub-divisions along the Route 9 area. (III T 21: 24 - 22: 6). Monmouth County Planning Director, Robert Halsey, also testified that the Manalapan Township zoning ordinance encouraged the development of strip commercial facilities and "urban sprawl". (IV T 55: 24).

THE PLAINTIFFS

The plaintiffs herein are the owners of four hundred acres (400) in Manalapan Township located near the northwest corner of the intersection of Route 33 and Route 527. The properties were acquired between 1961 and 1965. (IV T 94: 3-13). One of the individual plaintiffs testified that the zoning ordinances adopted since the acquisition of the property have prevented any reasonable development of the property. The property had originally been zoned for one-half acre single

family residences. In March of 1966, the lot sizes were increased to one acre in connection with an announced "two-year moratorium". (IV T 97: 1-9). In August of 1967 an ordinance was adopted which increased the commercial and industrial zoning in the Township, including parts of the plaintiffs property. (IV T 97: 14 - 16). In December of 1967 a building code amendment was adopted increasing the minimum square footage of homes. (IV T 97: 24). The plaintiff further testified that in 1967 he had made a request to the Township committee for an amendment to the zoning ordinance which would permit the development of the property. (IV T 100: 8). The trial judge refused to permit the plaintiff to testify as to the specifics of the requested amendment on the grounds that the Township committee minutes would be required. (IV T 101: 23 - 25). In January of 1968 the one acre "moratorium" ordinance was extended for another nine months. (IV T 102: 13). It was subsequently extended again to December 31, 1968. (IV T 103: 4). On December 11, 1968 an ordinance was adopted increasing the zoning on the plaintiff's property to single-family residential use on lots of a minimum size of one and one-half acres or approximately 60,000 square feet. In May of 1968 the Township hired Herbert H. Smith Associates, Planner of Trenton, New Jersey to develop a plan for the southern section of Manalapan Township. (IV T 104: 6 - 12). No master plan was adopted in this time period and the planner's recommendations were not made public. On January 8, 1970 the Township hired Robert

Strong & Associates of Princeton, Planners, for one year to develop a plan for the southern section of Manalapan Township. No master plan was adopted in this period of time and the planners' recommendations were not made public. (IV T 105: 12 - 17.) On March 24, 1971, the Township Committee hired Kendree & Shepard, planning consultants, of Philadelphia, Pa. to do zoning and planning recommendations in the southern half of Manalapan Township. (IV T 107: 15 - 21.) No master plan was adopted pursuant to this planner's employment.

On July 25, 1973, a building moratorium was adopted by the Township Committee and it was decreed that there would be no more subdivision approvals until January 31, 1974. On January 23, 1974, the building moratorium was extended until May 31, 1974. The building moratorium was again extended to August 31, 1974. On August 28, 1974, the building moratorium was extended to November 30, 1974. (IV T 109: 20 - 110: 7.) In January of 1974, the Planning Board hired Planning & Design Associates, Inc., of Somerset, New Jersey, at a fee of $34,000.00 to develop a complete master plan for the southern portion of Manalapan Township. This firm produced a proposed master plan for Manalapan Township. This master plan proposed a balanced residential district in the southern portion of Manalapan Township, centrally located and covering much of the plaintiff's property, which for the first time would permit the erection of multi-family housing in Manalapan Township. This master plan was never adopted by the Township (IV T 112:14).

The document was marked P-5 in evidence.

In July of 1975, in a case entitled Woodward Associates v. Zoning Board of Adjustment of the Township of Manalapan et als, the same trial court, Superior Court, Chancery Division, Monmouth County, ordered the Township of Manalapan to amend its zoning ordinance to provide for an appropriate variety and choice of housing. The Township was given three months at that time. No ordinance was introduced within that time. No resolution was adopted retaining the services of a municipal planner within that time. The Planning Board did not recommend any amendments to the zoning ordinance within that time. On October 22, 1975, the Appellate Division granted a stay of the judgment until February 1, 1976. (V T 67: 23 - 68:14.)

It was not until April 12, 1976 that an amendment to the zoning ordinance was adopted. The minutes of that April 12, 1976 meeting of the Township Committee were put in evidence and are reproduced in the plaintiff's appendix (PA 1 - PA 45). The minutes of that meeting make it clear that this zoning ordinance was adopted in direct response to the judicial mandate in July of 1975 (PA 2: 13 - 16). The minutes also make it clear that it was the Township's position that the maximum residential densities to be permitted by this ordinance were 1.7 units per acre, because, although townhouses could be built at a net density of six units per acre, the gross density was limited to that applicable to the R-20 zone, or 1.7 units per acre (PA 4: 1 - 13). The minutes also make it clear that the

Township Committee was aware that this zoning ordinance permitted only single family dwellings, that the townhouses permitted by the ordinance were single family units, and that no multi-family housing units were permitted anywhere within Manalapan Township by this ordinance. (PA 44: 25 - 45: 2.) The minutes further demonstrate that the plaintiffs in this case appeared at the April 12, 1976 meeting for the purpose of making substantive and rational input into the decision making process. An alternative to the proposed zoning ordinance was presented by Professor Anton Nelessen at that meeting. The alternative recommended that the highway sprawl strip commercial developments be replaced by a concentrated commercial development located at the intersection of Route 33 and Woodward Road (not on plaintiff's property). Mixed residential zones, including multi-family housing, would be located near this concentrated commercial area, minimizing the need for a second family car to do shopping and also minimizing the need for additional road networks and sewer facilities. (PA 16: 24 - 20: 4.) This alternative plan would permit the construction of multi-family housing on the plaintiff's property. This least cost housing could be constructed, and a village center commercial area could be built, giving the Township its own identity, while preserving the environmental quality of the area (PA 19: 19 - 22). More remote areas of the Township, removed from highway access and utilities, and especially those found to be "most unsuitable" for development, could be pre-

served by largely single family zoning. (PA 20: 20.) It should be noted that this plan was presented at the public meeting over the objection of the Township Mayor (PA 16: 27 - 17: 2). The Mayor said, "I would hope that you are not going to use this forum to present your own personal plan. That is not the purpose of this meeting." The minutes also reveal that there is overwhelming public opposition to multi-family housing in Manalapan Township. The minutes further make it clear that it is the announced intention of the Township Committee of the Township of Manalapan to prevent the construction of multi-family housing in Manalapan Township at all cost and forever if possible. (PA 4: 5 - 13; PA 40: 18 - 21; PA 44: 25 - 45: 1.) The minutes also reveal that the Township Committee had been informed that single family building lots of less than 8,000 square feet should be permitted (PA 26: 7).

THE DEFENSE

The Township presented six witnesses in defense. The first was Anthony Arbach, the Tax Assessor of Manalapan Township. He produced evidence as to the amount of real estate in Manalapan Township which has been found to be in entitled to farmland assessments under the Farmland Assessment Act. On examination by the trial Judge, however, it was revealed that this information does not reveal how much of the assessed land is actually used for farming. So long as a lot was at least five (5) acres in area and produced a gross revenue of five hundred dollars ($500.00), the entire lot, regardless of its

size would be assessed as farmland. (IV T 135: 1 - 19). He testified that there is some general farming in the southerly portion of Manalapan Township, "which is grain mostly. There is a few cattle farms. A few horse farms also." (IV T 140: 25 - 141: 1). Previously, on cross-examination by the Township, Antone Nelessen had been asked whether it was fair to say that the balance of the southerly portion was used primarily for farmland. He answered:

> "No. I would not say that it is used primarily for farmland, not at least that I could envision it. It looks like all the land is in a holding state to be used for something. Nobody's really quite sure what. There are few farms where land looks like its being cultivated. But the majority of the farms there, tool equipment looks rusty. Buildings look unkempt. And I would not say that it was prime farmland, particularly from, you know, having been a farm boy all my life. I wouldn't say that there were - looked like they were viable farms down there." (IV T 42: 9 - 23).

The next defense witness was Shirley Mattei, Clerk of the Planning Board. She put evidence in the records indicating that there is substantial development occurring pursuant to the ordinance under attack in the southerly portion of Manalapan Township. (IV T 152 - 153). She testified that she had paid twenty thousand dollars ($20,000.00) for her house in 1965, that she knew of no apartments in her area of the Township, and in the past twelve years, since she had moved to the Township, all development had been on at least half acre lots. (IV T 170 - 171).

The next defense witness was Thaddeus Isaacks, the Building Inspector. He produced a development plan for the Covered Bridge complex. Over objection, he testified that the units at Covered Bridge sell for prices ranging from $25,000.00 to $39,000.00 per unit. He testified that the Township did not permit any of these units to be offered for rent. (IV T 175: 17 - 176: 14). Although the Covered Bridge condominium complex is a well-known retirement community, (V T 66: 25 - 67: 1), the Building Inspector professed no knowledge of this fact. (IV T 182: 1 - 13). The witness further testified that in addition to the purchase price of the unit, there was a maintenance charge that covers maintenance of the grounds and the streets and the sidewalks and the community clubhouse. When asked the approximate maintenance charge per unit, he responded "I wouldn't even try to take a guess what it would be." (V T 183: 4). Plaintiff's attorney objected to the materiality of the testimony concerning the purchase price on the grounds that it had no probative value unless the monthly per unit maintenance charge was also in evidence. This objection was overruled. (IV T 183: 19 - 184: 6).

James P. Kovacs, a professional engineer, testified for the Township that he had been employed privately by a developer to do plans for a 997 unit project in the southerly portion of Manalapan Township, (the same property which had been owned by the plaintiffs in the Woodward Associates vs. Zoning Board of Adjustment of the Township of Manalapan). The property would have water and sewerage facilities. (V T 7). Kovacs had

previously served as Township Engineer and testified on cross-examination that the main trunk of the sewer line in the Township's sewer master plan would run generally down Manalapan Brook. (V T 15: 23).

The Township then produced John T. Chadwick, IV., a licensed planner from New Brunswick, New Jersey. He testified that he has an undergraduate degree from Rutgers University and an unidentified graduate degree from Pratt Institute in Brooklyn, New York in urban planning and architectural design. Employed in New Brunswick since 1967, Chadwick is in charge of the "technical aspects of the planning processes" at Eugene Oross Associates. He testified that according to his anaylsis, the Township population in 1985 would be 18,630 persons (V T 23: 9). He rendered no opinion as to the reasonableness of the Manalapan zoning ordinance, either in the context of its response to environmental conditions or its response to a regional need for the least cost housing. Other than the population analysis, he offered no rebuttal to any of the testimony rendered by Professor Nelessen. On cross-examination, he testified that he was not aware that the Township's natural resource study by Larsen and Moore had indicated that the 1976 population of Manalapan Township is 18,070 people. (V T 33: 19).

The last defense witness, County Planning Director Robert Halsey testified to the effect that the Supreme Court's Mount Laurel opinion did not permit good planning. (V T 44: 11). because it did not recognize county planning and other planning

and required that municipal planning be carried out in a vacuum by itself. (V T 44: 16 - 45: 1). After Halsey's testimony, the defense rested.

At the conclusion of the testimony, the trial Judge rendered an opinion from the bench, holding that the Manalapan Township zoning ordinance, as amended, was invalid and unreasonable. (V T 59 - 86). The court declined to order a specific remedy for the plaintiffs. (V T 85: 22 - 24).