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Madison

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Memo by NS Dept. of Pub. Advocate analyzing the "Madison case" in depth from P's perspective

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State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY
P. O. BOX 141
TRENTON, NEW JERSEY 08601

STANLEY C. VAN NESS
PUBLIC ADVOCATE

ARTHUR PENN
DIRECTOR
TEL. 609-292-1692

MEMORANDUM

TO: Kenneth Meiser, Peter Buchsbaum, Peter Abeles, Alan Mallach, Mary Brooks and Peter O'Connor

FROM: Carl S. Bisgaier

DATE: March 24, 1977

RE: Mount Laurel Trial Brief: Notes on Madison Township

The Mount Laurel trial is now scheduled for May 9, 1977. Judge Wood is permitting, in our discretion, trial briefs to be filed. The date for submission of trial briefs is April 22, 1977. I would like to submit a brief analyzing the Madison case and its impact on this trial. The following are extensive notes which I took upon a careful reading of the Madison decision. Please review them. I will keep sending you drafts of the work that I am doing on this for comment.

(1) On pages 4 and 5 of the decision the court reviews who the plaintiffs are. A distinction can be drawn between Mount Laurel and Madison in that there were no resident plaintiffs in the latter case. We should emphasize this as to the inapplicability of Madison to the relief that we are seeking with regard to the residents and their neighborhoods, citing Judge Martino's statement that the Township discriminated in the use of

local, county, state and federal resources.

(2) Page 7 reviews the lower courts' findings as to the new Madison ordinance and present demographic trends in Madison. The court notes that presently 12 percent of the Madison population is low income and 19 percent moderate income. The new ordinance provides for approximately 20,000 to 30,000 units of which 12 percent to 17 percent would be for persons whose income's range amount to $10,000 and nonefor persons whose incomes were $9,000 or less. The lower court ultimately required Madison to project future development at basically the same percentage for each income group. It found that Madison's overall annaul housing needs into the 1980's would be 750 to 1,000 units of which 500 to 600 should be low and moderate. A similar analysis should be made of Mount Laurel for the upcoming trial.

(3) Page 8 offers a definition of low and moderate: "Those low and moderate people of the region economically unable to afford suitable housing in developing municipalities of the region because of their highly cost-generating zoning restrictions." This is a satisfactory definition for our purposes. An analysis must be done of the least expensive housing which can be built under present Mount Laurel zoning restrictions. The excluded class, therefore, would be all those persons unable to afford that housing.

(4) On page 12 the court states that it is unnecessary to demarcate a specific region and to fix a specific number (as opposed to estimated percentage?) of lower cost housing units as the "fair share" of the regional need to be made by the Madison ordinance. This must be read in

the context of later statements in the opinion as to the proper role of the trial court in evaulating fair share testimony.

(5) On page 13 the court reviews the trial court's definition of region as "that area from which the population of the township would be drawn, absent exclusionary zoning." I am not sure that we have to worry about "region" at all in this case in light of the Supreme Court's demarcation of the 20 mile radius.

(6) On pages 14 and 15 the court states that it is not mandatory for developing municipalities "to devise specific formulae for estimating their precise fair share" and that the trial court need not either because "numerical housing goals are not realistically translatable into specific substantive changes in a zoning ordinance". I believe the emphasis here is on the words "specific" and "precise". With the courts approval of Judge Furman's analysis, I believe that the court is looking for "ballpark" numerical figures or percentages as opposed to opting for a sophisticated fair share plan. However, as will be seen later, the role of the court in the face of such plans is to analyze their credibility and extract from them the realistic housing needs.

(7) On page 15 the court reiterated its statement in Mount Laurel that: "municipalities do not themselves have the duty to build or subsidize housing." This is reinforced later in the decision where the court speaks of non-zoning affirmative action.

(8) Pages 15 and 16 contain the basic holding of the court in terms of the standard to be used by a trial court, which is that the trial Judge must look to the substance of the zoning ordinance and determine whether bona fide efforts have been made toward eliminating or minimizing undue cost-generating requirements in respect of reasonable areas of a developing municipality. Thus, the emphasis is on good faith efforts, elimination or minimization of cost-generating zoning restrictions, and the size of areas zoned in the town.

(9) On page 16, footnote 5, the court specifically recognized the role to be played by the analysis of expert fair share studies and official fair share plans. It is important that there is repeated reference in the case to the DVRPC fair share plan and the Burlington County plan. This would seem to indicate that the Burlington County plan must be evaluated.

(10) There follows an extensive analysis between pages 19 and 33 of Madison zoning and demographics which give some indication of what the Supreme Court saw as significant in reviewing good faith efforts.

A. On page 19, footnote 6, the court states: "The fact and extent of anticipated growth are circumstantial material to the need for housing all segments of the population." Madison population in 1970 was 48,715 persons and was estimated in 1974 at 55,000 persons (page 18).

B. Page 21 recites the 1970 income spectrum by Quintile for Madison Township:

12 percent	--	under $6,627
19 percent	--	$6,627-$9,936
27 percent	--	$9,936-$13,088
24 percent	--	$13,088-$19,236
18 percent	--	$19,236 and over

C. Page 23 discusses the industrial-commercial zoning. The new ordinance provides for 16.7 percent of the land to be used for this purpose (down from 19.8 percent). Thus, 4,000 acres are so zoned despite the fact that only 600 acres had then been developed for that use. The court compared this to Mount Laurel's 4,100 acres with 100 in use. Trimble has indicated his intention to introduce new evidence as to the extent of commercial-industrial development in Mount Laurel since 1970. Regardless, there will no doubt be serious overzoning still in Mount Laurel for industry and commerce. I think that we might be able to argue that they should overzone for least cost housing by the same percentage that they chose to overzone for industrial and commercial.

D. Pages 24 through 26 discuss the single-family residence zones. There are five or six such zones in Madison ranging from 7,500 square foot lots (2 percent of the vacant developable land), to two acre lots. The basic standard is found on page 26 where the court states "Justice Hall noted that minimum size lots of 9,375 to 20,000 square feet 'cannot be called small lots and amounts to low density zoning." 67 N.J. at 183. Yet only 70 percent of Madison Township is zoned at such lower densities.'" The court seemed influenced by this percentage analysis of land zoned for various residential uses. We must do an update for Mount Laurel comparing its zones in gross figures and also as to vacant developable land.

E. On page 26 and 27, footnote 11, the court discusses the provisions in the ordinance relative to bedroom size and claims that it is discriminatory in that economic realities will result in the production of efficiency units.

F. On pages 29 through 31 the court discusses the planned unit development zoning. These range in densities from 3.5 percent to 5.0 percent. The court notes that the densities allowed are 20 percent lower than those proposed by the planner. This would result in a maximum of 6.25 percent which is still lower than the 7.0 percent originally permitted in Mount Laurel.

G. The court notes that the housing under the new ordinance was projected by the plaintiff's planner at $29,000 and by the defendant's at $52,000.

(11) On page 32 to 33 the impact of this analysis becomes clear when the court states: "The distribution of vacant and developable acreage (by the total acreage) among the various zones under the ordinance shows that low density, middle and high income residential uses are strongly favored." The court quotes that this involves 82 percent of the land and 50 percent of the units. A similar analysis for Mount Laurel should be devastating in light of the extraordinarily limited land zoned for the R-5, R-6 and R-7 zones.

(12) Pages 36 and 37 give the holding of the case in terms of zoning remedies. The court states that Madison must "adjust its regulations so as to render possible and feasible the "least cost" housing, consistent with minimal standards of health and safety . . . and in amounts sufficient to satisfy the deficit in the hypothetical fair share."

On the next page, the court cites our brief with approval which refers to accommodating the three classes of low, moderate-subsidized and moderate-conventional.

The court on page 37, footnote 21, then signals what could be the judicial remedy for a recalcitrant municipality. It states: "We have emphasized the necessity for consistency of such housing with official health and safety regulations . . . we envisage zoning provisions which will permit construction of housing, in reasonable amounts, at the least cost consistent with such standards." This leads to the finding for Madison on page 39, where the court states: "insufficient areas are zoned to permit such housing, and the zoning restrictions are such as to prevent production of units at least cost consistent with health and safety requirements." Several things can be gleaned from the above: first, the definition of least cost housing is that housing consistent with minimal official health and safety requirements. Thus, we will be able to seek a remedy permitting housing to be built which is consistent with any recognized official standard. This can be used both as a test of reasonableness of Mount Laurel's ordinance and for a simple judicial remedy. Second, the court is looking for reasonable land and housing to satisfy the fair share which the court refers to as hypothetical.

(13) Page 40 contains another definition of low and moderate. The court states that in 1974 a low income family of four would be earning less that $8,150 and moderate income family between $8,150 to $13,050.

(14) On page 41 the court returns to its analysis of Madison residential zoning and refers to the disparity of land zoned at minimum lots for single-family homes and multi-family zoning compared to high cost zones. The court states: "Madison has provided for no home ownership at all on 'very small lots'". This is significant in light of the fact that Madison did provide a zone for homes on 7,500 square foot lots. The court contended the multi-family zoning is too small in area and reiterated its concern on bedroom issue. This was further analyzed on pages 42 through 43 where the court said that bedroom restrictions could only be done if combined with bulk and density restrictions, density bonuses and minimum bedroom provisions.

On page 44 the court went even further saying that density bonus "is a necessary implement in the encouragement of builders to provide multi-family housing for those of lower income."

(15) Page 46 contains a crucial analysis with regard to the amount of land which must be zoned for least cost housing. The court starts by saying "sound planning calls for providing a reasonable cushion over the number of contemplated least cost units deemed necessary and believed hypothetically possible under a particular revision." The court noted that the reason for this was that "many owners of land zoned for least cost housing may not chose to use it for that purpose" and that many persons who are not lower income may live in units built at least cost. In footnote 29 the court notes that in fact only one-half of the moderately priced units in Madison are occupied by moderate income persons. This might indicate a standard of overzoning by a factor of two. The court states "since not all

inexpensive dwellings will be inhabited by households economically requiring such accommodation a municipality should overzone to meet the requirements of those who do." In the body of page 46 the court sums up by saying that: "Thus overzoning for the category desired tends to solve the problem." This analysis can also be used by us to attack Mount Laurel's decision to zone the R-5, R-6 and R-7 zones for one owner in every zone.

(16) Pages 47 through 53 discuss planned unit developments and establishes the standards to be used in evaluating specific provisions in PUD ordinances and agreements from the point of view of illegality. The court on page 47 states: "when municipal exaction from developers reach such proportions as to exert an exclusionary influence, whether in PUD or any other context, they offend the constitutional precept of Mount Laurel and must be remedied." On page 48 they seem to be establishing the parameters of burdensome exactions. There is some indication that exactions which reach $350 per unit would be acceptable whereas, a per unit exaction of $1,275 would be unreasonable. On page 48 through 51 there is a discussion of the impact of utility and street off-site improvements. On pages 51 through 53, there is a discussion of the approval process which may not be relevant to us now since Mount Laurel's PUD ordinance has been rescinded.

(17) On pages 53 through 80 the court discusses the concepts of fair share and region. On page 54 it reiterates its position that although it adheres to the general principles in Mount Laurel, it does so without requiring the delineation of specific regions or numerical fair shares. As

an aside on page 66, footnote 40, it refers to Mary Brooks' article as "the leading theoretical analysis of the fair share plans. The court next opens the analysis of the role of the judiciary with regard to fair share plans and regions. On page 68, footnote 41, the court cites an article by Haar, quotes from it and underscores that sentence which states that if other governmental agencies default, there is a need for the court to act. This is picked up again on pages 69 through 70 where the court says, "courts have no choice but to act" when confronted with particular cases . On page 71 the court accepts Judge Furman's definition of a region as a "housing market area". It should be noted that throughout, the court seems to be approving of the kind of analysis undertaken by Judge Furman.

On pages 72 through 73 the court talks about official fair share plans and distinguishes the Madison case from one where a municipality is subject to an official plan citing as examples DVRPC and Burlington County. The court states "we conceivably might accept it as prima facie." On page 75 the court goes back to the notion of region and says that they would accept in an ad hoc approach a region as the housing market area or the area that a population would be drawn from absent exclusionary zoning. On pages 78 and 79, especially footnote 45 on page 78, the court reviews the criteria which are used for fair share plans and cites approximately nine: equal share, need, distribution, suitability of sites, vacant developable land (which the court considers most important), employment, fiscal considerations, existing housing or density. The indication by the court that vacant developable land is the most important factor should caution us in depricating Lou Glass' approach with the Mount Laurel fair share plan. That is, while we can attack

him vigorously for using this criterion exclusively, I do not think that we should disparage the criteria itself.

The most significant aspect of the entire opinion with regard to fair share is the standard which the court seems to adopt on page 80 of the opinion. This standard is suggested as an acceptable one for the trial court to use in evaluating the acceptability of a numerical effort in this regard. The court states, "if the existing municipal proportion (of income groups) correspond at least roughly with the proportion of the appropriate region, the formula (fair share) would appear prima facie fair." We should use this test in evaluating Lou Glass' plan. I am sure the result would be devastating. For example, if we can show that approximately 15 percent of the regional population is low income we can compare that to Mount Laurel's present low income population, which would show an existing deficit as well as the projection for Mount Laurel's future population growth which would show an enormous deficit. This is essentially what Judge Furman did in Madison and, with the above quoted modification, was accepted by the Supreme Court.

(18) The next portion of the opinion tackles the question of affirmative action beyond zoning. I reemphasize strongly the fact that in Madison there were no resident plaintiffs and the Shaw issue was not before the court. The court did, address two aspects of affirmative action and seems to have discarded them as appropriate for judicial relief. On page 85 the court states: "tax concessions and mandatory sponsorship of or membership in public housing projects must be summarily rejected". However, on pages 85 to 86 the court states that zoning can not bar the creation or administration of public housing projects in appropriate districts. The court here seems to be extremely confused

as to what it is doing. For example, with regard to tax concessions the court suggests that this could not be permitted without enabling legislation. Thus, it seems clear that the court is not talking about payment in lieu of tax agreements which are now authorized by the legislature. I believe what the court had in mind was tax concessions as incentives to developers to lower the cost of housing as opposed to the payment in lieu of tax agreements. With regard to public housing there seems to be even greater confusion. I am not sure exactly what the court meant by it. On pages 85 through 86 it seems to be somewhat confused as to how housing authorities operate as opposed to public housing projects. In any event, the court does not seem to be addressing at all the issues of the existing housing program which requires a local public agency, as opposed to a housing authority.

(19) Mount Laurel seems to be throwing up a defense that if it had known about the Madison decision, it might have acted differently in terms of its own response to the Mount Laurel decision. This argument can be summarily rejected on the basis of Madison itself. It is obvious that Madison Township did not have the benefit of the Madison decision when drafting its ordinance. However, the court in condemning that ordinance says that the Township has had enough time. Judicial intervention is now appropriate because "the basic law is by now settled", (page 95). Furthermore, Madison was given 90 days to comply with the decision and by the time of our trial, May 9, the 90 days will have passed and, I am sure that Mount Laurel will have done nothing.

(20) On page 96 the court discusses the minimal requirements for the new Madison ordinance and specifically: (a) single family homes on small lots (suggesting that the present ordinance contains no such zoning, but see 7,500 square foot zone); (b) enlarging area for moderate size lots; (c) enlarging multi-family zones; (d) reducing large lot zones; (e) eliminating bedroom restrictions; (f) modifying PUD restrictions to eliminate cost-generating requirements; and (h) eliminating cost-generating requirements in low and moderate income zones.

Conclusion

I think it is clear from the above that the basic structure of our presentation in the second Mount Laurel trial should be very carefully in line with the approach suggested by the court in Madison. This is attractive for two reasons: first, it will be easier for Judge Wood to accept our presentation if we can key it into specific language in Madison and Mount Laurel, and second, the structure of Madison is extremely good for our presentation,and we would, therefore, have nothing to gain by taking a novel appraoch with regard to our proofs. From the point of view of our fair share analysis, the one thing that we will have to seriously consider is a detailed evaluation of the DVRPC and Burlington County fair share plans and proofs as to their legitimacy, especially the latter. Peter O'Connor should accummulate any information he has which would indicate the political nature of that plan.

With regard to our zoning analysis, this must be geared to an analysis of cost-generating provisions and comparing those provisions to officially recognized state, federal or nationally accepted standards. Peter Abeles should carefully go over ordinanceswhich he has proposed to determine whether he is vulnerable to cross-examination on this point and should be prepared to indicate to me where he thinks his vulnerability may be. The only novel approach we will be taking is our emphasis on the Shaw approach with regard to the resident plaintiffs and their neighborhoods. At this time, I am thinking of having Yale Rabin do that testimony for us, since he did it in the Shaw case itself, and that alone will lend significant authority to our position. Please let me know immediately any reactions or thoughts that you have to this memo.