AM - Far Hills

8/13/82

Trial Brief req by ~~Pltf~~ Pl requesting Ct to invalidate Zoning Ordinance of Far Hills + provide Pls w/ specific relief

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## PRELIMINARY STATEMENT

On August 18, 1981,Plaintiffs, Alois Haueis, Erna Haueis, John Ochs and Priscilla Ochs, filed a complaint in lieu of prerogative writ against the Borough of Far Hills, The Planning Board of Far Hills, the Borough Council and Mayor of Far Hills challenging the validity of the entire zoning ordinance of the Borough of Far Hills and seeking specific relief relating to plaintiffs' property. Plaintiffs also challenged the zoning on the grounds that it was an inverse condemnation of their property entitling them to compensation or rezoning. The complaint challenged the constitutionality of the zoning ordinance under the Mt. Laurel decision and also challenged the definition of the word "families" in the Far Hills Zoning Ordinance under State v. Baker, 81 N.J. 99.

On or about April 13, 1982, defendants filed a Notice of Motion for Summary Judgment on behalf of defendants on the grounds that plaintiffs had allegedly failed to exhaust their administrative remedies. Plaintiffs successfully defended against this motion and the Honorable Robert E. Gaynor ruled that plaintiffs had sufficiently exhausted their administrative remedies and that no further attempts at administrative remedies would be necessary. This issue will not be briefed in this brief and plaintiffs will rely on briefs submitted in opposition to that summary judgment motion if defendants continue raising the defense of failure to exhaust

## STATEMENT OF FACTS

Plaintiffs are the owners of a tract of approximately 19 acres in the Borough of Far Hills. The property is located immediately adjacent to the railroad station in the village section of the Borough of Far Hills and is also adjacent to U.S. Highway 202 and Sunnybranch Road. The property in question is currently vacant and is zoned in the R-10, or 10 acre zone district, of the Zoning Ordinance of the Borough of Far Hills, which would permit the development of one single family house on the tract. Plaintiffs contend that the Zoning Ordinance of Far Hills unconstitutionally fails to provide any opportunity for development of multi-family, low and moderate income or least cost housing to meet the local or regional needs for housing in Far Hills and its region. Plaintiffs also contend that the Borough of Far Hills is clearly a developing municipality as defined in Mt. Laurel and that it is obligated to provide the opportunity for the development of least cost and low and moderate income housing. The Master Plan of the Borough of Far Hills, including the land use element, fails to make any provision for the development of least cost housing or multi-family housing and is therefore violative of the purposes set forth in the Municipal Land Use Law. N.J.S.A. 40:55D-1 and of the New Jersey Constitution Article IV, Section VI, Paragraph II.

Plaintiffs will rely upon the expert report of Richard T. Coppola, Professional Planner, in support of their

allegations in this case. The facts stated in the Coppola report are incorporated herein by reference. See the report of Richard T. Coppola, Appendix I. Plaintiffs will also rely upon the engineering testimony and report of Ernest Heissner of Apgar Associates relating to the unreasonable and unnecessary nature of the R-10 Zoning Regulations of the Borough of Far Hills and the unreasonableness of the application of said R-10 Zoning to the property in question. Said report is incorporated herein by reference. See the Appendix III. Plaintiffs real estate expert, John Brody, will testify regarding the inverse condemnation of the property in question by the R-10 Zoning requirements and the need for housing in Far Hills which can be purchased by persons other than persons with exceedingly high incomes. The expert report of John Brody is incorporated herein by reference. See Appendix II.

The Plaintiffs will establish through expert and factual testimony that their property is ideally suited for the development of least cost housing, partially because of its location directly adjacent to the village section of Far Hills and the major transportation links, including the railroad station and Route 202. Plaintiffs contend that the 10 acre zoning restrictions imposed upon the property are arbitrary, unreasonable and capricious in general and also as applied to the property in question. Plaintiffs have also challenged the definition of "Families" in the Zoning Ordinance of the Borough of Far Hills and contend that the Ordinance is invalid with

respect to this definition. Plaintiffs clearly have standing to pursue this issue since they are not related individuals and since the standing rules of the State of New Jersey are exceedingly broad with respect to the necessary level of interest required for a plaintiff. The definition of "Family" in the ordinance is clearly violative of the Supreme Court's decision on the State v. Baker, 81 N.J. 99 (1979), in that it impermissibly discriminates against married and unrelated individuals who function as a single non-profit housekeeping unit.

Plaintiffs'property is located immediately adjacent to U.S. Highway 202, which provides access to areas of significant employment concentration such as Morristown, which is within approximately 12 miles of Plaintiffs' property, and such as American Telephone and Telegraph, Bedminister, which is within approximately 3 miles of Plaintiff's property. The property is located within 3 miles of Interstate Highway 287 and within 5 miles of access of Interstate Highway 78, which provide access to areas of significant employment concentration. The property is located adjacent to the Conrail New Jersey Transit Railroad Station in Far Hills, which provides rail services to areas of significant employment concentration such as Summit, Newark, New Jersey, and New York City, New York. Far Hills is a developing municipality within Somerset County and is directly adjacent to the Townships of Bernards and Bedminister. The testimony and report of Richard T. Coppola

indicate that the property in question is located within the growth area of the State Development Guide Plan developed by the New Jersey Department of Community Affairs. This is an area in which growth will be stimulated by state policies, including state fiscal policies relating to transportation and sewage treatment financing. The Somerset County Master Plan of Land Use also indicates that the property is located within an area known as the "Village Neighborhood Area" of Somerset County and recommends that this property be utilized for multi-family development with densities ranging from 5 to 15 units per acre. The Tri-State Commission's Development Guide Plan also includes this property in a growth area and calls for a concentrated development and relatively high densities in this area.

single family houses on 7,500 and 10,000 square foot lots and some half acre lots is a developed municipality and is not obligated to provide for multi-family housing for middle income occupants. See Pascack, supra 74 N.J. at 478 to 489.

In the instant case, Plaintiffs' contend based upon the expert opinion and report of Richard Coppola and the facts relating to the Borough of Far Hills that Far Hills is a developing municipality within the full intent of the Supreme Court in Mt. Laurel. Plaintiffs further contend that defendants' position that Far Hills is non-developing or rural municipality and that it is, therefore, exempt from any requirement to provide the opportunity for development of housing to meet the local or regional needs for low and moderate or least cost housing is not supported by either the facts or the case law. Plaintiffs base this contention partially upon the fact that the 10 acre zoning, which has existed in Far Hills for many years on more than 90% of the property in Far Hills, has had the clear exclusionary effect and, perhaps, intent of preventing the development of any least cost housing, either single family on small lots or multi-family, and has thereby limited the extent of development. This exclusionary practice cannot be supported considering the changing socio-economic needs in the region which completely surrounds Far Hills. It is Plaintiffs' position that the power to zone as established in the Municipal Land Use Law cannot and should not be utilized by a municipality to

perpetuate patently exclusionary techniques and to attempt to preserve "estate-like" characteristics clearly intended to serve only the higher income classes of our population. Defendants have recently attempted to argue, through their planning consultant, that the Borough of Far Hills is not only non-developing municipality but that it is a developed municipality. This incongorous argument is totally unsupported the case law. The application of the Supreme Court's decision in Pascack to the facts relating to the Borough of Far Hills clearly indicates that there are substantial differences between the developed nature of the Bergen County communities in the Pascack decision and the Borough of Far Hills which has 10 acre zoning over 90% the municipality and which has substantial vacant land in the 10 acre "holding zone".

In Mt. Laurel the Supreme Court provided some general criteria relating to the type of developing municipality to which its decision in Mt. Laurel would apply. The Supreme Court stated at page 160:

> "As already intimated, the issue here is not confined to Mt. Laurel. The same question arises with respect to any number of municipalities of sizeable land area outside the central cities and older buildup 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 result in 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."

The report of Richard T. Coppola, Plaintiffs' planning expert, provides a cogent analysis of the six criteria as applied to the Borough of Far Hills. It is Mr. Coppola's opinion and the position of the plaintiffs that the Borough of Far Hills is a developing municipality within the meaning of Mt. Laurel and that the limited growth experienced by the Borough(which is clearly in the path of inevitable development)has resulted from the clearly exclusionary practice of zoning over 90% of the Municipality into a 10 acre single family residential "holding zone". It is clearly impossible for the defendants to deny that 10 acre zoning has an exclusionary effect and totally prevents the development of any housing affordable by persons of low and moderate income or even median income. The report of John Brody, plaintiffs'real estate expert, describes the near total lack of availability of housing in Far Hills for persons making even the Somerset County income of nearly $25,000. per year.

It is absolutely essential under the Mt. Laurel doctrine and the clear meaning of the Mt. Laurel opinion, that the courts review the past and present land use regulations of the municipality in assessing the exclusionary or non-exclusionary nature of the municipality's practices. The Supreme Court in Mt. Laurel was directly concerned with the obvious and admitted land use practices of Mt.Laurel Township which were designed to discriminate against lower and moderate income economic classes. See Mt. Laurel supra at 160 to 161. In discussing the concept of developing municipalities in the context of the Mt. Laurel decision, the Supreme Court pointed out that the Township of Mount Olive conceded that its land use regulations were intended to and resulted in economic discrimination and exclusion of substantial segments of the area population, and that its practices and policies were in the best present and future fiscal interest of the municipality and its inhabitants and were therefore legally permissible and justified. The Supreme Court directly addressed such economic discrimination and fiscal zoning and condemned this type of practice by municipalities. See Mt. Laurel supra at 161 and 187 through 188. The Supreme Court condemned the use of zoning regulations to overzone for uses which would not likely be developed in the present or future. In Mount Olive Township the overzoning was primarily in the industrial and commercial categories whereas in the Borough of Far Hills there is a clear overzoning for the intentionally exclusionary 10 acre

## POINT I

THE ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS IS INVALID UNDER MT. LAUREL AND OAKWOOD AT MADISON IN THAT IT IS PATENTLY EXCLUSIONARY AND FAILS TO PROVIDE ANY OPPORTUNITY FOR THE DEVELOPMENT OF LEAST COST, MULTI-FAMILY OR LOW AND MODERATE INCOME HOUSING.

A. THE BOROUGH OF FAR HILLS IS A DEVELOPING MUNICIPALITY UNDER MT. LAUREL AND EVEN IF DEFENDANTS' ARGUMENT THAT FAR HILLS IS EITHER A DEVELOPED OR A NON-DEVELOPING MUNCIPALITY ARE ACCEPTED, DEFENDANTS' ZONING ORDINANCE IS INVALID IN THAT IT FAILS TO PROVIDE THE OPPORTUNITY FOR LEAST COST AND LOW AND MODERATE INCOME HOUSING TO MEET ITS LOCAL NEEDS.

Defendants have raised the argument that the Borough of Far Hills is a non-developing and rural municipality and that it is totally exempt from any requirements to provide any least cost or low and moderate income housing. This position has been consistently stated by defendants in their answers to interrogatories, Defendants admit in their interrogatories that the Zoning Ordinance of the Borough of Far Hills provides absolutely no opportunity for least cost or low and moderate income housing.

On August 11, 1982, approximately 33 days before the date scheduled for trial in this matter, the planning consultant of the Borough of Far Hills, Allen J. Dresdner, forwarded a copy of his expert report to plaintiffs. Said report attempts to establish that the Borough of Far Hills is not a developing municipality and that it is a fully developed and yet somehow non-developed municipality. The arguments of defendant

It is absolutely essential under the Mt. Laurel doctrine and the clear meaning of the Mt. Laurel opinion, that the single family houses on 7,500 and 10,000 square foot lots and some half acre lots is a developed municipality and is not obligated to provide for multi-family housing for middle income occupants. See Pascack, supra 74 N.J. at 478 to 489.

In the instant case, Plaintiffs' contend based upon the expert opinion and report of Richard Coppola and the facts relating to the Borough of Far Hills that Far Hills is a developing municipality within the full intent of the Supreme Court in Mt. Laurel. Plaintiffs further contend that defendants' position that Far Hills is non-developing or rural municipality and that it is, therefore, exempt from any requirement to provide the opportunity for development of housing to meet the local or regional needs for low and moderate or least cost housing is not supported by either the facts or the case law. Plaintiffs base this contention partially upon the fact that the 10 acre zoning, which has existed in Far Hills for many years on more than 90% of the property in Far Hills, has had the clear exclusionary effect and, perhaps, intent of preventing the development of any least cost housing, either single family on small lots or multi-family, and has thereby limited the extent of development. This exclusionary practice cannot be supported considering the

minimum lot size zone. Over 90% of the Borough's approximately 5 square miles is zoned for 10 acre minimum lot size. It is patent that this type of zoning prevents the development on substantial areas of vacant land within the Borough. This is clearly intended to discriminate against low and moderate economic classes in favor of higher income persons capable of purchasing estates in the "estate-like" municipality and to prevent increases in fiscal demands upon the municipality. It is in this context that the Supreme Court discussed the criteria for developing municipalities.

The Coppola report indicates that most of the criteria established in the Mt. Laurel definition of developing municipalities have been met in Far Hills or would be met but for the 10 acre zoning restrictions. It is ludicrous to argue that Far Hills Borough,which is located within five miles of Route 78 and three miles of Route 287 and bordered by Bedminister and Bernards Township, is somehow shielded from the path of inevitable development. Its proximity to Morristown and major employment centers and its location along a commuter rail line with access to Newark and New York City clearly establish its location within the path of inevitable future growth. Nonetheless, the Borough has utilized zoning regulations to impose totally arbitrary and capricious lot sizes on property suitable for much higher density for the clear purpose and effect of preventing development of affordable housing. This unreasonable and exclusionary practice must clearly be

considered in the determination of whether Far Hills is a developing muncipality under Mt. Laurel; considering the Mt. Laurel decision and its progeny and the exclusionary history of the Far Hills it can only be concluded that the Borough of Far Hills is a developing municipality within the meaning of Mt. Laurel.

The status of the Borough of Far Hills as a developing municipality cannot be viewed in a vacuum without reference to the region of which it is a part. The testimony of Richard Coppola and the expert report of Mr. Coppola will indicate that Far Hills is located in an employment sending and housing region which includes portions of Morris, Somerset and Union Counties. The development in these areas must be taken into account in assessing the developing status of the area and of the Borough and of the likelihood of development of the Borough of Far Hills in the future if exclusionary practices were not utilized. It is also necessary to view the Borough of Far Hills in the context of the state and regional plans developed by statutorily authorized agencies in assessing whether the Borough is a developing municipality and whether portions of the Borough should be utilized to meet regional needs. The Municipal Land Use Law, furthermore, requires that master plans of all municipalities and zoning ordinances of all municipalities be consistent with state and regional plans. The importance of this planning and zoning policy has been outlined by the Honorable Thomas B. Leahy in the case of

Allen Deane v. Bedminister. See the Allen Deane Corporation, et al v. the Township of Bedminister, et al., Docket Nos. L-36896-70 P.W. and L-8061-71 P.W. At least one Law Division case addressing the issue of rural versus developing municipalities has also indicated that the status of a municipality as a developing municipality cannot be viewed in a vacuum but must be considered in the light of regional and state plans, such as the State Development Guide Plan and the objectives of those plans relating to growth in the subject municipality. See Glenview Development Company v. Franklin Township, 164 N.J. Super 563 at 574 through 576 (Law Div.1978). Unlike the Township of Franklin in the Glenview Development case, the Borough of Far Hills is not primarily devoted to agriculture nor does the Department of Community Affairs State Development Guide Plan call for preservation of agricultural land in substantial portions of the Borough of Far Hills. Indeed, the State Development Guide Plan specifically designates plaintiffs' property for inclusion within the growth area of the State which is an area where growth is likely to occur and where the State intends to target growth through expenditure of public funds for public infracture. Considering the clear designation of portions of Far Hills for such growth areas by the Department of Community Affairs it is incumbent upon the Borough of Far Hills to consider itself a developing municipality and to provide an opportunity for

To accept defendants' argument that the Borough of Far Hills is either a developed or a non-developing municipality and totally free of any obligations to provide local or regional least cost or low and moderate income housing would not be supported by the case law or the Constitution. The acceptance of this position would be a statement that a municipality that practices exclusionary zoning should be rewarded for such practices and should be permitted to continue its exclusionary land use regulation practices merely because it has been exclusionary since the beginning of its zoning regulations. It is clearly not the province of the zoning power to promote and foster the development and maintenance of estates for high income individuals. If such estates are preferred by residents of Far Hills they should conduct such practices on their own without the use of the authority of the State to force such practices upon others.

B. THE ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS IS INVALID UNDER THE NEW JERSEY CONSTITUTION AND THE PRINCIPLES ESTABLISHED IN MT. LAUREL IN THAT IT FAILS TO PROVIDE ANY OPPORTUNITY FOR THE DEVELOPMENT OF LEAST COST OR LOW AND MODERATE INCOME HOUSING.

The interrogatories answered by the Borough of Far Hills and the opinion of the planning consultants of the Borough of Far Hills clearly establish that the Borough has not provided any opportunity for the development of least cost or low and moderate income housing. On the contrary, the municipality takes the position that it has no obligation to provide such

housing and therefore has not. The Supreme Court in Mt. Laurel established the principle that developing municipalities must provide the opportunity for the development of low and moderate income housing units. This is an affirmative obligation and it is the burden of the developing municipality to prove that it has complied with this burden. In Oakwood at Madison, the Supreme Court extended this burden to the concept of least cost housing-that is, housing which meets the minimum standards necessary to promote public health, safety and welfare. See Oakwood at Madison, supra 72 N.J. at 510 to 514. As indicated by the Supreme Court in Oakwood at Madison, the concept of least cost housing is concerned with the ability of the private market to provide housing meeting minimum building codes at "least cost". This housing will help by being more affordable to persons of low and moderate income and by allowing for a filtering down process under which less expensive older structures might be purchased by lower and moderate income persons after the vacation of those units by owners purchasing the new least cost housing units. In addition, the Allen Deane v. Bedminister case has indicated that attempts can also be made at making least cost housing affordable to moderate income persons, particularly persons making between 80 and 120% of median income. In Somerset County the median income for a family of four is approximately $25,000. See the report of John Brody. It is clear from the report of plaintiffs' real estate expert, which is uncontradicted by any expert of the

Borough, that few or no houses are available for purchase in Far Hills by persons of median income.

With respect to least cost housing, the Borough of Far Hills has made no provision in the zoning ordinance for small lots, such as the 5,000 square foot lots recommended by the Supreme Court in Madison, multi-family housing as recommended in both Madison and Mt. Laurel, townhouses, PUD's, PRD's, trailers, density bonuses, incentive zoning or other important planning mechanisms utilized to promote the development of least cost housing. Plaintiff will establish that a percentage of multi-family units to be developed on their property could be committed to least cost housing units, in the neighborhood of 20%, and that such units could be guaranteed to be affordable by persons making up to 120% of median income. Such guarantees can be imposed upon a developer as outlined in the Oakwood at Madison case and the Allen Deane v.Bedminister. In addition, such techniques are used widely in other parts of the country. The Zoning Ordinance of the Borough of Far Hills makes no provisions for gross densities and unit sizes which could constitute least cost housing types nor does it provide for any types of zones which would accommodate uses generally known in the planning literature as least cost. The Borough of Far Hills has no existing garden apartments or townhouses or condominimums of any cost range and clearly not in the least cost range. Existing older structures do not qualify for consideration as least cost units and are not built to the

current minimum building standards. Furthermore, the Zoning Ordinance does not provide for any vacant land to be developed on small lots or for least cost housing types, and the Madison and Mt. Laurel cases indicate that provision must be made in the Zoning Ordinance for the development of the future development of necessary least cost and low and moderate income housing.

The Somerset County Master Plan calls for village neighborhood development on plaintiffs' property with gross densities of 5 to 15 units per acre. The densities are consistent with the potential for the development of least cost housing. Nonetheless, defendants have failed to adopt a zoning ordinance which is consistent with the Somerset County Master Plan and the State Development Guide Plan. See the expert report of Richard Coppola and the Master Plan and Zoning Ordinance of the Borough of Far Hills.

With respect to low and moderate income housing, the Borough of Far Hills has not provided for any development of any low and moderate income housing. The Borough does not have a housing authority which would be authorized to make applications for federal funds nor has the Borough adopted a "resolution of need" which is a prerequisite for a municipality to qualify for the New Jersey Housing Finance Agency mortgage money and Section 8 subsidies for low and moderate income subsidized housing. This resolution is a basic statement of municipal needs for low and moderate income housing which might

be adopted by the Governing Body at any time. Nonetheless, Far Hills has never adopted such a resolution and is not known to have made any applications to the Department of Housing and Urban Development or the New Jersey Housing Finance Agency for subsidized housing for low and moderate income persons or for senior citizens.

Considering the responses of defendants to plaintiffs' interrogatories relating to the provision of least cost or low and moderate income housing and considering the lack of any such provision in the Borough of Far Hills it is clear that the Borough of Far Hills has failed to meet its burden of providing the opportunity for the development least cost and low and moderate income housing units to meet the current and prospective regional needs.

C. THE ALLEGED ENVIRONMENTAL JUSTIFICATIONS FOR THE ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS, AND PARTICULARLY THE R-10 ZONE, ARE SIMPLY MAKEWEIGHT ARGUMENTS TO SUPPORT EXCLUSIONARY HOUSING MEASURES AND PRECLUDE GROWTH AND ARE NOT REASONABLY NECESSARY FOR PUBLIC PROTECTION OF ANY VITAL INTERESTS AS REQUIRED BY THE SUPREME COURT IN MT. LAUREL.

The Supreme Court in Mt. Laurel and Oakwood at Madison has clearly established that environmental justifications for zoning ordinances must bear a substantial and direct relationship to the zoning regulation and that the environmental constraints must be"substantial and very real." As the Supreme Court states in Mt. Laurel at page 187 with respect to

environmental justifications:

> "...the danger and impact must be substantial and very real (the construction of very building or the improvement of every lot has some environmental impact)-not simply a makeweight to support exclusionary housing measures or preclude growth -and the regulation adopted must be only that reasonably necessary for public protection of a vital interest. Otherwise difficult additional problems relating to a'taking'of a property owners land. See AMG Associates v Township of Springfield, 65 NJ 101, 112, N.(4)(1974)." See Mt. Laurel supra 67 NJ at 187.
> [emphasis supplied]

As will be established by plaintiffs' experts, particularly Ernest Hiesner, Professional Engineer, Apgar Associates and Richard Coppola, Professional Planner, the alleged environmental justifications for the ten acre zoning are purely makeweight arguments and the alleged environmental hazards are not substantial and very real" within the meaning of Mt. Laurel. Furthermore, the R-10 Zoning Regulations lack any relationship to the alleged environmental justifications and the ten acre lot size limitation is not reasonably necessary for public protection of the alleged environmental resources. This is particularly so as applied to plaintiffs' property.

It is interesting to note that the Borough of Far Hills attempts to support this 10 acre zoning and particularly the application of 10 acre zoning to the property in question with the argument that seasonal high water table of 0 to 3.5 feet

creates difficulties for conventional septic systems. The Borough also attempts to argue that water and sewer facilities are not currently available for any property in the Borough of Far Hills. This contention is disputed by plaintiff, nonetheless the Mt. Laurel decision makes it very clear that the lack of water and sewer and the problems associated with septic suitability are not justifications for large lot zoning. Indeed, in Mt. Laurel the Court struck down a minimum lot size of one-half acre lots which were based allegedly upon environmental or ecological reasons. In so doing the Court pointed out as follows:

> "The propriety of zoning ordinance limitations on housing for ecological or environmental reasons seems also to be suggested by Mt. Laurel in support of the one-half acre minimum lot size in that very considerable portion of the Township still available for residential development. It is said that the area is without sewer or water utilities and that the soil is such that this plot size is required for safe individual lot sewage disposal and water supply. The short answer is that, this being flat land and readily amenable to such utility installations, the Township could require them as improvements by developers or install them under the special assessment or other appropriate statutory procedure. procedure. The present environmental situation of the area is, therefore, no sufficient excuse in itself of limiting housing therein to single family dwellings on large lots." See National Land and Investment Company v. Kohns, 419 P.A. 504, 215 A.2nd 597 (1965).

A review of the expert report of plaintiffs' engineering expert, Ernest Hiesner, which was totally unrebutted by any

testimony of any experts of defendants, clearly indicates that ten acre lot sizes are not necessary to protect any environmental resources and do not bear any direct relationship to the environmental justifications raised by the Borough in its Master Plan in the defense of this law suit. The aforementioned words of the Supreme Court in Mt. Laurel in striking down a one-half acre lot size clearly indicate that the alleged environmental justifications of the Borough of Far Hills are totally without merit and are intentionally exclusionary. It is also noteworthy that the Borough of Far Hills has not taken any effort in its zoning ordinance or in its practices to require developers to extend sewage treatment to the allegedly constrained areas of the R-10 Zone. These areas have been permitted to develop with septic tanks on steep slopes and on allegedly unsuitable soil conditions to the detriment of the ground water and the persons living in that area. Such contradictory land use regulatory practices indicate that the clear motivation of the R-10 Zone is an exclusionary one. No professional expertise has been utilized to support the environmental justifications of the R-10 Zone other than the prior planning consultant of the Borough, Mr. Charles Agle, who admitted in depositions that it would be possible to sewer the plaintiffs' property, provided their gallonage was available at the Bedminister plant and that other areas of the Township could be developed at higher densities without direct detriment to the four environmental constraints

mentioned in the Master Plan. It was his opinion that such development should not occur for other non-environmental reasons, specifically to help maintain the current estate-like character of the Borough of Far Hills.

For the above reasons, the alleged environmental justifications of the Zoning Ordinance of the Borough of Far Hills as set forth in the Master Plan and as presented by defendant in this litigation should be rejected under the principles established in Mt. Laurel in favor of reasonable regulations designed to directly protect the actual and existing very real and substantial environmental constraints, if any.

## POINT II

THE ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS, PARTICULARLY THE R-10 ZONING DISTRICT, IS AN UNAUTHORIZED, UNREASONABLE AND ARBITRARY EXCERISE OF THE ZONING POWER AND HAS A CONFISCATORY AFFECT IN VIOLATION OF THE CONSTITUTION.

### A. THE R-10 ZONING DISTRICT OF THE ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS IS AN UNAUTHORIZED EXERCISE OF THE ZONING POWER AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE.

It is unassailable principle of zoning law that land use regulations of real property must be justified by the police power, must be reasonably related to the public welfare and must not be arbitrary, capricious or unreasonable. See Katobimar Realty Co. v. Webster, 20 N.J. 114, 122 (1955), So. Burlington Cty. NAACP v. Township of Mt. Laurel, 67 NJ 151, Oakwood at Madison v. Township of Madison, 72 N.J. 481. Arbitrary or unreasonable zoning ordinances cannot stand. Pascack Association Limited v. Mayor of Washington Township, 74 N.J. 470, 483 (1977). The purposes sought to be accomplished must justify the restrictions placed on the use of ones land. Gruber v. Mayor of Raritan Township, 39 N.J. 1,12 1962. The means used to attain the ends must be reasonably related to those ends. State v. Baker, 81 N.J. 99, 105-106 (1979). It is clear that these general principles apply to all municipalities in the State of New Jersey. The Mt. Laurel case merely adjusted the procedural and substitive presumptions relating to the municipalities. It is also well established that the

regulation must have a real and substantial relation to the object sought to be obtained; the regulation must be reasonably calculated to meet the evil and not exceed the public need. J.D. Construction v. Bd. of Adj.,Township of Freehold, 119 N.J. Super 140, 145 (1972); Kirsch Holding Company v. Borough of Manasquan, 59 N.J. 241, 251 (1971); Schmidt v. Bd. of Adj., Newark, 9 N.J. 405, 412 (1952); Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super 341, 346 (App.Div.1970). If regulations impresses unnecessary and excessive restrictions on the use of private property, they are confiscatory regardless of the magnitude of deprivation imposed on the private property owner. J.D. Construction v. Bd. of Adj.,Township of Freehold, supra at 145 (Law Div.1972); Katobimar Realty Co. v. Webster, 20 N.J. 114, 122-123 (1955); Kent v. Borough of Mendham, 111 N.J.Super 67, 77 (App.Div.1970).

As discussed above in the Mt. Laurel cases the Supreme Court of New Jersey has served clear notice that it will cast a wary eye on environmental defenses. In Mt. Laurel, the high court advised that development restrictions must premise on ecological concerns can be upheld only where the danger is"substantial and very real". This critical language was adopted an reaffirmed in Madison Township, where the court further observed that

> "...the answer to the ecological problem posed was not prohibition of or regulation of the density of development per se but careful use

> of land, with adequate controls in respect of construction, sewerage water control and treatment, sufficient open space per structure and other services." 72 N.J. at 544-545.

Defendants in this action have attempted to assert that the ten acre zoning of the Borough of Far Hills is reasonable and is supported by environmental objectives; namely, depth of bedrock of less than 1 foot in certain sections of the R-10 Zone, slopes in excess of 15% on certain sections of the R-10 Zone, depth to seasonal high water table of 0 to 3.5 feet in certain sections of the R-10 Zone and floodways and flood fringe areas in certain limited portions of the R-10 Zone. It is noteworthy that these alleged natural constraints do not apply to each particular lot or property located within the R-10 Zone. Indeed, the Master Plan indicates that substantial portions of the property on both sides of Route 202 and Route 287 do not exist any of the alleged environmental natural constraints. Nonetheless, these properties are included within the R-10 Zone without any relief for density or provision for increasing of density on these lots in exchange for reduction of density on the alleged naturally constrained properties. Furthermore, many properties exhibit only one of the alleged natural constraints; the property in question supposedly exhibits problems of seasonal high water table of 0 to 3.5 feet. The Master Plan does not indicate that the property in question has any flood plane difficulties or steep slope difficulties.

Nonetheless, the property has been zoned into inutility with an R-10 zoning requirement even though it is located directly adjacent to sewer lines and water lines in the village neighborhood section of the Borough. The expert report of Ernest Hiesner, plaintiffs' engineering consultant, clearly establishes that the alleged natural constraints mentioned in the Master Plan bear no relationship to the land use regulation requiring minimum 10 acre lot sizes.

It is noteworthy in this context, that even Bedminister Township, which has recently rezoned to accommodate least cost and low and moderate income housing in accordance with judicial mandates, has adopted a zoning ordinance which attempts to address the same natural constraints and does not provide for minimum lot sizes anywhere approaching 10 acres. It is also noteworthy that a review of the case law in New Jersey does not provide any cases upholding the imposition of 10 acre minimum lot size by zoning ordinance. Indeed, the recent case law clearly establishes the principle that large minimum lot sizes are not supported by the Municipal Land Use Law and are not reasonable considering current building, engineering and planning technics. For example, in Mt. Laurel, the Supreme Court struck down minimum lot sizes of 9,375 square feet, less than one quarter acre, and 20,000 square feet, almost one-half and acre, with required frontage of 75 and 100 feet, respectively, on the grounds that these lots were not small lots and amounted to "low density zoning". See So. Burlington Cty. NAACP v.

Township of Mt. Laurel, 67 N.J. at 183. As discussed above, the Supreme Court in the Mt. Laurel decision clearly established that the problem of safety of individual lot sewage disposal and water supply did not justify plot sizes of one-half acre lot size, the Court pointed out that:

> "It is said that the area is without sewer and water utilities and that the soil is such that the plot sizes required for safe individual lot sewage disposal and water supply. The short answer, this being flat land and readily amenable to such utilities installations, the Township could require them as improvements by developers or install them under the Special Assessment or other appropriate statutory procedure. The present environmental situation of the area is, therefore, no sufficient excuse in itself for limiting housing therein to single family dwellings on large lots." C.F. National Land and Investment Company v. Kohn, 419 P.A. 504, 215 A.2d. 597(1965).

There is no reason why this finding should not be equally as applicable to non-developing municipalities as to developing municipalities.

Moreover, the Master Plan and Zoning Ordinance of the Borough of Far Hills provide absolutely no reasonable basis for the ten acre lot size on 90% of the Municipality. Indeed, the Township consultant who had prepared the Master Plan, Mr. Charles Agle, indicated that he was not aware of any studies in the Somerset Hills area indicating the necessity of 10 acre lot sizes for individual septic tanks and well systems.

The testimony and expert reports of Ernest Hiesner and Richard Coppola will clearly indicate that the development of portions of the Borough of Far Hills with densities greater than one per 10 acre are clearly appropriate and can be done in a manner that is consistent with/environmental objectives. reasonable Indeed, the Somerset County Master Plan and the State Development Guide Plan have recognized the suitability of various portions of the Borough of Far Hills, particularly the plaintiffs' property, for development at greater densities than currently allowed in the zoning ordinance.

In view of the clear unreasonableness of the R-10 Zoning District of the Borough of Far Hills, plaintiffs are entitled to a declaratory judgment voiding the R-10 Zoning District in general and particularly as applied to plaintiffs' property.

B. THE TEN ACRE MINIMUM LOT SIZE PROVISION OF THE R-10 ZONE OF THE ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS IS CONFISCATORY.

The Fourteenth Amendment, as well as the New Jersey Constitution, (Article I Paragraph 20), prohibit the effective appropriation of private property rights without due process of law and the payment of just compensation therefor. The Supreme Court in the Mt. Laurel decision has further elaborated on this concept of inverse condemnation in the land use regulation context in striking down the one-half acre/lot size minimum provision of the Mt. Laurel Zoning Ordinance. The Court in rejecting the alleged environmental justifications for the one-half acre minimum lot size states at page 186 to 187:

> "Generally only a relatively small portion of a developing municipality will be involved, for, to have a valid effect, the danger and impact must be substantial and very real. (the construction of every building or the improvement of every lot has some environmental impact) - not simply a makeweight to support exclusionary housing measures or preclude - and the regulation adopted must be only that reasonably necessary for public protection of a vital interest. Otherwise difficult additional problems relating to a 'taking' of a property owners' land may arise." See AMG Associates v. Township of Springfield, 65 N.J. 101, 112, N.(4) 1974).

Although taking may be more readily found when interference is characterized as a physical possession of the property by the government, it is well established in the decisional law of New Jersey, and throughout the nation, that a taking may occur indirectly through excessive regulatory restriction under the police power. In Morris County Land, etc. v. Parsippany-Troy Hills Township, 40 N.J. 539 (1963), the New Jersey Supreme Court embraced what it described as the "universal truth of the pithy observation of Mr. Justice Holmes in Pennsylvania Coal v. Mahon, 260 U.S.393,415,43 S.Ct.158, 160, 67 L.Ed.322,326 (1922)":

> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking...***We are in a danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by shorter cuts than the constitutional way of paying for the change." 40 N.J. at 555. Accord. See Yarra Engineering Corp. v. City of

Newark, 132 NJL 370 (S.Ct.1945); Kozesnik v. Montgomery Township, 24 N.J.154, 182 (1957); Spiegle v. Borough of Beach Haven, 46 NJ 479 (1966), cert.den'd. 385 U.S. 831,87 S.Ct.63, 17 L.Ed.2d.64 1966; Washington Market Enterprises v. City of Trenton, 68 NJ 107 (1975).

In Parsippany-Troy Hills, plaintiff challenged the constitutional validity of zoning ordinance provisions which restricted the use of a 1,500 acre tract of swamp land known as Troy Meadows. Plaintiff's property in issue consisted of a 66 acre tract which was contiguous to its more substantial holdings in an adjacent township. The character of this land was typical swamp land, of low elevation, very high water table, with a surface and underlying soil formation which made it marginal for building. There was little existing development in Troy Meadows, which served as a "sponge" or natural detention basin protecting the municipalities further downstream in the Passaic River Valley. The zoning classification applied to the property was extremely restrictive (although variances were possible), and allowed only for the following uses:

> Agriculture, woody and herbaceous plant raising, green houses, aquatic plant and fish food raising, recreational, public conservation, utility or water supply.

Justice Hall found such regulations blatantly unconstitutional:

> "While the issue of regulation as against taking is always a matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water

> detention basin or open space. Nor is the situation saved because the owner of most of the land in the zone, justifiably desirous of preserving appropriate area in its natural state, supports the regulation. Both public uses are necessarily so all encompassing as practically to prevent the exercise by a private owner of any worthwhile rights or benefits in the land, so public acquisition rather than that regulation is required." 40 NJ at 555-556. [emp.supplied]

Justice Hall also stated at Page 553:

> "It is generally obvious from the proofs, and legally of the highest significance, that the main purpose of enacting regulations...was for a public benefit." Id. at 553. [emp. supplied] See also Fred French Investing Company, Inc. v. City of New York, 39 NY 2d.587, 38 NYS 2d.5 350 NE 2d 381(1976) Appeal dismisssed, 429 U.S.90, 97 S.Ct.515, 50 L.Ed.2d 602(1976); Grimpel Associates v. Cohalan, 41 NY 2d431, 361 NE 2d 1022(1977); MacGibbon v. Bd.of Appeals of Ducksbury, 356 Mass.635,255 NE 2d 347(1970); Dooley v. Town Plan and Zoning Commission of Fairfield, 151 Conn.304,197 A.2d.770(1964); State v. Johnson, 265 A.2d 711(Me.1970).

Thus, one of the major factors focused upon in analyzing the taking question is whether the challenged regulation has the purpose or practical effect of appropriating private property for public benefits. In the Borough of Far Hills, the R-10 Zoning District is clearly calculated to exclude single family and multi-family development on lots smaller than 10 acres. The alleged purposes behind this zoning restriction are the protection of steep slope areas, floodway and flood fringe areas, areas with depths of bedrock of less than one foot and

areas with seasonal high water table of 0 to 3.5 feet. The practical effect of this restriction is to zone substantial portions of the Borough into open space apparently for the benefit of the other members of the Borough of Far Hills. Even the permission to building a single family structure on a 10 acre lot results in extensive portions of the property being zoned into inutility. The property of the plaintiffs consists of practically 19 acres and the zoning ordinance would currently permit the construction of one single family house on this property. The plaintiffs' real estate expert, John Brody, will testify based upon an expert report which indicates that the single family residential use of the property / even if bulk variances were granted to permit two single family structures on 19 acres at this particular location, would be an unreasonable use of the property in question. In his opinion no reasonable economic use is currently permitted by the zoning ordinance of the Borough of Far Hills.

The second part of the test for confiscation involves a determination of whether the challenged regulation has a practical effect of appropriating private property. Appropriation may be demonstrated if the subject landowner retains no reasonable use of the property, or in the alternative, if the value of the property is substantially destroyed.

Clearly a restraint against all reasonable use of the property is confiscatory and beyond the police power. Morris

County Land, etc. v. Parsippany-Troy Hills Township, 40 N.J. 539, at 557; Kozesnik v. Montgomery Township, 24 N.J. 154 at 182 (1957). Such a result follows where the land cannot practicably be utilized for any reasonable purpose, or when the permitted uses are those to which the property is not adapted or which are economically infeasible. Gruber v. Marin Township Committe of RaritanTownship, 39 N.J.1,at 12(1962); Averne Bay Construction Co. v.Thatcher, 278 NY 222, 15 NE 2d 587, 117 A.L.R. 1110(Ct.of App.1938). The uses permitted in the R-10 Zone in addition to ten acre residential lots are very similar to the uses struck down by the Supreme Court in Parsippany-Troy Hills. Basically these open space uses constitute clearly unreasonably economic uses of the property, particularly as applied to the property in question. Real estate expert, John Brody, has established, without any rebuttal report by the Borough of Far Hills, that there is no reasonable economic use of the property in question.

Furthermore, the expert reports of Richard T.Coppola and Ernest Hiesner clearly establish that the R-10 minimum lot size regulation of 10 acres is not designed to directly address the alleged purposes of the zoning ordinance and Master Plan. On the contrary, it is clearly excessive in terms of protection of the alleged purposes of the Master Plan and Zoning Ordinance. Contrary to the requirement of the Supreme Court as established in Mt. Laurel, the 10 acre minimum lot size is not limited to "that reasonably necessary for public protection of vital

interests." See Mt. Laurel supra at 186.

he appropriation of the plaintiffs' property may also be demonstrated by the degree to which the value of the land is diminished if one were to compare the zoned uses of one or two single family residences with more appropriate and reasonable uses of multi-family dwelling units at densities of 5 to 15 units per acre. Admittedly, every restriction of the use of the land, imposed pursuant to the police power, bridges some property rights. Pennsylvania Coal Company v. Mahon, supra. (dissenting opinion of Brandeis, J.). However, when the regulation challenged decreases its value substantially, a confiscation of private property occurs:

> "The especially relevant thesis running through our cases in this field of the law is that the test of invalidity is not necessarily the complete unuseability of the property involved for the now permitted uses, but rather whether, in view of the extent of the now prohibited uses in the close vicinity of the parcel, its value will be substantially depreciated and its marketability greatly impaired if the prohibited uses are not allowed."
> Odabash v. Mayor and Council of Dumont, 65 NJ 115, 124(1974)[emphasis supplied]

The development of the parcel in question for multi-family housing with densities of 5 to 15 units per acre suggested by the Somerset County Master Plan and as supported by the State Development Guide Plan and the Tri-State Planning Commissions Guide Plan would clearly be a use that is consistent with the surrounding village neighborhood area of the existing Borough of Far Hills and would be a reasonable use of the property in

## POINT III

IN VIEW OF THE LONG HISTORY OF ATTEMPTS TO OBTAIN REZONING OF THEIR PROPERTY AND THE TOTAL UNREASONABLENESS OF THE ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS, PLAINTIFFS ARE ENTITLED TO SPECIFIC RELIEF AS OUTLINED IN OAKWOOD AT MADISON.

### A. THE NEED FOR AN APPRORIATENESS OF SPECIFIC RELIEF.

While the particulars of any appropriate relief must await the conclusion of the principal case, it is respectfully submitted that this court should seriously entertain the awarding of"specific relief" and permit the plaintiffs to develop their property for multi-family housing consistent with sound engineering and planning requirements. Plaintiffs have sought rezoning of their property through the Planning Board on various occasions including as far back as 1977, nearly five years ago. The Borough of Far Hills has consistently refused to consider rezoning of the subject property and it has ignored the suggestions for growth and higher density development on the property in question as outlined in the State Development Guide Plan, the Somerset County Master Plan and the Tri-State Development Commission Guide Plan. The case law of Mt. Laurel and Madison is no longer new and untested, so that the Borough of Far Hills cannot argue that it had a lack of sufficient opportunity to comply with the requirements of the Supreme Court as set forth in Mt. Laurel and Madison.

Plaintiffs have borne the cost of financing complicated and difficult litigation against a Borough which has been reluctant to make any reasonable changes to a zoning ordinance and has refused to comply with specific mandates of the New Jersey Supreme Court. Quite to the contrary, the Borough of Far Hills has continued to exhibit patently exclusionary zoning in the form of 'estate-like' 10 acre zoning requirements and has clearly sought to exclude persons of low and moderate income from the boundaries of the Borough of Far Hills. In this context as was stated by the Supreme Court in Madison:

> "[the]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 the standing danger of having one but a pyrrhic victory. A mere invalidation of the ordinance, followed only by more zoning for multi-family or low income housing elsewhere in the township, could well leave corporate plaintiffs unable to execute their project... Such judicial action, moreover, creates an incentive for the institution of socially beneficial costly litigation such as this and Mt. Laurel, and serves the tolitarian purpose of getting on with the provision of needed housing for at least some portion of the moderate income elements of the population." 72 N.J. 549-551.

As discussed in more detail in the limited concurrence of Justice Pashman:

"...granting the specific relief sought by the corporation plaintiff...will serve several important functions.

"First, as previously noted, even after an exclusionary zoning provison has been invalidated, a shrewd, intransigent community may rezone plaintiff's property in such a manner as to frustrate the proposed use. Towns may also require lengthy approval procedures or withhold from the corporate plaintiff permits necessary to proceed with a project. As one court has noted, such actions 'effectively grant the municipality a power to prevent any challenger from obtaining meaningful relief after a successful attack on a zoning ordinance.' Casey v. Warwick Tp. Zoning Hearing Bd., supra,328 A.2d at 468. By affording the corporate plaintiff specific relief, a remedial order will effectively prevent this form of harrassment and will obviate the need for further litigation with respect to the property involved. See Sinclair Pipe Line Co. v. Village of Richton Oak, infra, 19 Ill.2d 370,167 N.E. 2d 406 at 411. Moreover, it will furnish an important incentive for developers to bring suits in the public interest. As our own Court has recognized, 'unless the immediate litigant can hope to gain, there [will] be no incentive to challenge existing practices or prior holdings which, in the public interest, ought to be reviewed.' Goldberg v. Traver, 52 N.J. 344,347 (1968)

"Second, this remedial device directly advances the fundamental objective of promoting actual construction of low and moderate income housing. By allowing the corporate landowner to proceed with his project without further delay it offers one of the fastest and surest ways of accomplishing this objective. Mytelka & Mytelka, supra, 7 Seton Hall L.Rev.at 16.

"Finally, issuance of a variance or building permit under these circumstances also serves to protect the interests of the municipality because it assures that the corporate plaintiff will undertake the proposed use and no other." 72 N.J.at 597-598.

The situation makes it even more sense in the instant case where the regional plans have clearly called for the development of this particular property in question for densities of 5 to 15 dwelling units per acre and for use for village neighborhood residential purposes. Such use would be entirely consistent with the existing development surrounding the property and could reasonably be done in a manner consistent with sound engineering and planning requirements and principles. Clearly, the Court should retain jurisdiction over the matter and appoint a special master to review any plans for development of the property in question. The Court should appoint a special master to review the form of specific relief, similar to the procedures established in Allen Deane v. Township of Bedminister. The facts in this case will establish that the property in question is entirely suitable for develoment of multi-family housing units at densities ranging from 5 to 15 dwelling units per acre. The engineering difficulties associated with sewering and storm water control can clearly be coped with by an objective expert through a mechanism under the supervision of the Court.

The New Jersey Supreme Court has suggested in Oakwood at Madison, 72 N.J.at 553 and 554 through the reference to Pazcack Associates v. Mayor and Council of the Township of Washington, 131 N.J. supra 195(Law Div.1974) later reversed on unrelated grounds. 74 N.J. 470 (1977), that the appropriate authority for such action is found in N.J. Court Rule 4:59-2a which

## POINT IV

## THE ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS AND THE MASTER PLAN OF THE BOROUGH OF FAR HILLS ARE VIOLATIVE OF THE MUNICIPAL LAND USE LAW.

### A. THE TEN ACRE ZONE OF THE ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS IS INCONSISTENT WITH THE MASTER PLAN OF THE BOROUGH OF FAR HILLS AND THEREFORE VIOLATIVE OF THE MUNICIPAL LAND USE LAW. N.J.S.A. 40:55D-62.

40:55D-62a states with reference to the power of governing bodies to zone that:

> "The governing body may adopt or amend the zoning ordinance relating to the nature and extent of uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element of a Master Plan and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element of the master plan or design to effectuate such plan element;"

The Master Plan of the Borough of Far Hills sets forth four basic natural constraints which allegedly support the low density zoning established in the R-10 District of the Zoning Ordinance of the Borough of Far Hills. The expert reports of Richard T. Coppola and Ernest Hiesner clearly establish that defendants have failed to adopt a zoning ordinance which in any way effectuates the land use plan element and environmental plan element of the Master Plan of the Borough

of Far Hills. On the contrary, the alleged environmental constraints are not directly served by the R-10 Zoning District of the Borough of Far Hills. The R-10 minimum lot size of 10 acres bears an indirect and non-substantial relationship, if any, to the alleged environmental constraints and purposes illustrated in the land use plan of the Master Plan.

Section 40:55D-62 further states that:

> "The zoning ordinance shall be 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."

This important mandate of the Municipal Land Use Law is clearly be violated by the current application of the R-10 Zoning District to the property in question. The character of this area is primarily associated with the village section of the Borough of Far Hills and the railroad station on Route 202. This concentration of development has not been reasonably considered in applying the R-10 Zoning District to the property in question nor has sufficient consideration been given to the peculiar suitability of this property for village neighborhood densities of 5 to 15 dwelling units per acre as outlined in the Somerset County Master Plan of Land Use. The plaintiffs will present evidence to prove that the use of the property for single family residents on 10 acre lots is not the most appropriate use of the land and that townhouse development with least cost housing would in fact be the most appropriate use

of the property in question.

B. THE MASTER PLAN AND ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS ARE VIOLATIVE OF THE MUNICIPAL LAND USE LAW IN THAT THEY ARE DIRECTLY AND SUBSTANTIALLY INCONSISTENT WITH THE MASTER PLAN OF THE COUNTY OF SOMERSET AND THE STATE DEVELOPMENT GUIDELINES.

Section 40:55D-62 relating to the power to zone when read in conjunction with the purposes of the Municipal Land Use, N.J.S.A. 50:55D-2 and the section of the Land Use Law relating to Adoption of Master Plans, N.J.S.A.40:55D-28, indicatesthe clear legislative intent that municipal zoning ordinances should be consistent with the Municipal Master Plan and the Master Plan of the County in which the Municipality is located and the State Development Guide Plan. This legislative intent to provide for consistency of zoning ordinances with local and regional master plans is a direct reflection of the planning objective of consistency between planning and implementation. The Supreme Court in Mt. Laurel and Oakwood at Madison have recognized the necessity for consistency between the zoning ordinances of municipalities and the regional needs and regional general welfare, particularly with respect to the issue of low and moderate income housing and least cost housing. Furthermore, in Somerset County the Law Divison in the case of Allen Deane v. Township of Bedminister, supra, held that the Township of Bedminister must adopt a zoning ordinance which is consistent

with the Somerset County Master Plan of Land Use. This Master Plan called for a village neighborhood concentrations in portions of Bedminister Township which are identical to the village neighborhood suggestions relating to the Borough of Far Hills. The Somerset County Superior Court placed great emphasis on the importance of the Somerset County Master Plan in establishing the regional perspective on the need for multi-family housing and the locations appropriate for densities of development in the neighborhoods of 5 to 15 dwelling units per acre for the village neighborhood clusters.

Furthermore, the State Development Guide Plan calls for the inclusion of the plaintiffs' property within the growth area which is an area to be targeted for public expenditures for infrastructure and for higher densities of development then the low growth and agricultural zones. The Tri-State Development Planning Commissions' Guide Plan establishes similar densities for the property owned by plaintiffs and surrounding properties.

Nonetheless, the Master Plan of Far Hills improperly and incorrectly states that the Master Plan is compatible with the Somerset County Master Plan, and the guide plan of the Tri-State Regional Planning Commission. Quite to the contrary, the plaintiffs' property is directly located in the growth area of the Tri-State Regional Planning Commissions Guide Plan and the Somerset County Master Plan Village Neighborhood Area which is directly inconsistent with the low density/ten acre

minimum lot size proposed in the Far Hills Master Plan and Zoning Ordinance. See the Master Plan of the Borough of Far Hills and the report of Richard T. Coppola. Diagrams will be presented at the trial indicating the precise demarkations of the various regional and state plans.

In view of the clear inconsistency between the Borough's Zoning Ordinance and Master Plan and the Regional and State Planning documents, it is clear that the Master Plan and Zoning Ordinance, particularly with respect to plaintiffs' property, are violative of the letter and intent of the Municipal Land Use Law Sections 40:55D-2, 40:55D-28 and 40:55D-62.

C. THE ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS, PARTICULARLY THE R-10 ZONING DISTRICT IS VIOLATIVE OF THE MUNICIPAL LAND USE LAW IN THAT IT PATENTLY FAILS TO FULFILL VARIOUS SPECIFIC PURPOSES OF THE MUNICIPAL LAND USE LAW.

N.J.S.A. 40:55D-2 sets forth various specific statements of the intent and purpose of the Municipal Land Use Law. It is well established that all municipal land use ordinances must bear a direct relationship to the legitimate purposes of the police power and more specifically the purposes of the Municipal Land Use Law which sets forth the authority of municipalities regarding zoning and planning matters. The exclusionary nature of the R-10 Zoning District of the Borough of Far Hills, particularly as it applies to the property in question, but in general as well, patently fails to directly

serve any of the following purposes of the Municipal Land Use Law:

a) To encourage municipal action to guide the appropriate use or development of all lands in this state, in a manner which will promote the public health, safety, morals and general welfare;

d) To ensure that the development of the individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the state as a whole;

e) To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;

f) To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies;

g) To provide sufficient space for the appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;

i) To promote the desirable visual environments for creative development technics;

k) To encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development to the particular site;

l) To encourage senior citizen community housing construction;

m) To encourage coordination of various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land;

n) To promote the conservation of energy through the use of planning practices designed to reduce energy consumption and to provide for maximum utilization of renewable energey resources.

The Borough of Far Hills has clearly failed to reasonably serve the aforementioned purposes of the Municipal Land Use Law if not all of the purposes outlined in 40:55D-2. In view of this clear and patent arbitrariness and unreasonableness, the Zoning Ordinance of the Borough of Far Hills should be invalidated.

## POINT V

THE DEFINITION OF "FAMILY" IN THE ZONING ORDINANCE OF THE BOROUGH OF FAR HILLS IS NEARLY IDENTICAL TO THE DEFINITION STRUCK DOWN IN STATE v. BAKER AND DOES NOT BEAR ANY SUBSTANTIAL RELATIONSHIP TO THE EFFECTUATION OF ANY LEGITIMATE STATE INTERESTS; PLAINTIFFS HAVE STANDING TO RAISE THIS CLAIM.

In State v. Baker, 81 N.J. 99(19279) he Supreme Court held that the definition of "family" in the Plainfield zoning ordinance, which excluded persons not related by blood, marriage or adoption, was violative of New Jersey Constitution (1947) Art. I, Par.1, Art.IV, Section 6, Par.2.

In State v. Baker on page 1 and 13, the Supreme Court states:

> "Accordingly, we hold that zoning regulations which attempt to limit residency based upon the number of unrelated individuals present in single non-profit housekeeping unit cannot pass constitutional muster. Although we recognize that we are under a constitutional duty to construe municipal powers liberally, See N.J.Const. (1947), Art.IV, Sec.7 Para.11, municipalities cannot enact zoning ordinances which violate due process." See, e.g. Pascack Ass'n. Limited v. Mayor and Council of Washington Township, 74 N.J.470,483 (1977); Burger v. State, 71 N.J. 206, 223-224 (1976); N.J. Const.(1947), Art. I, Para. 1; Art. IV, Sec. 6, Para.2.

This holding is directly applicable to the Zoning Ordinance of the Borough of Far Hills. The definition of "Family" in the Far Hills Ordinance states in its entirety as follows:

"FAMILY. Any number of individuals related by blood or marriage and their full-time servants who have no other employment, boarders, and guests, all of whom reside together as a single housekeeping unit. More than five persons exclusive of the domestic servants not related by blood, marriage adoption, or approved foster care arrangements, by living on the same premises shall not be deemed as a 'family'."

This definition is nearly identical to the definition used by the City of Plainfield in State v. Baker. The Plainfield Zoning Ordinance defines "family" as follows:

"One (1) or more persons occupying a dwelling unit as a single non-profit housekeeping unit. More than four (4) persons...not related by blood, marriage, or adoption shall not be considered to constitute a family." See State v. Baker, 81 N.J. at 104.

In light of the clear similarity of the definitions of the term "family" in the Zoning Ordinance of the Borough of Far Hills and the invalid zoning ordinance of the City of Plainfield, the Far Hills definition must be stricken as violative of the Constitution.

Plaintiffs clearly have sufficient standing to raise this claim under New Jersey rules relating to standing. See Elizabeth Federal Savings and Loan Association v. Howell, 24 N.J. at 448, 449(1957). See also In re Quinlan, 70 N.J. 10, 34-35, cert.den'd. 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976). The New Jersey Courts have established a standing doctrine which is

> non-residents who desire to secure decent housing have standing."

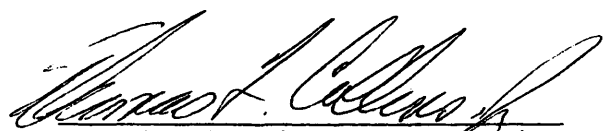
Under the above principles, plaintiffs clearly have standing to challenge the definition of "family" in the Far Hills Zoning Ordinance.

## CONCLUSION

Based on the aforementioned points and authorities, it is respectfully requested that the Court invalidate the Zoning Ordinance of the Borough of Far Hills, in general and as applied to Plaintiffs' property and provide plaintiffs with specific relief as outlined hereinabove and provide plaintiffs with damages for the taking of their property.

Respectfully submitted,

VOGEL AND CHAIT
A Professional Corporation



THOMAS F. COLLINS, JR.

DATED: August 13, 1982.