AM - Hawes v. Far Hills 11/3/82

Brief and appendix in Support of notice of motion for Summary judgment on behalf of Δ, Planning board of Far ~~f~~ Hills

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S-8611

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

DOCKET NO. L-73360-80

Plaintiffs
ALOIS HAUEIS, ERNA HAUEIS,
JOHN OCHS and PRISCILLA OCHS,

v.

Defendants
THE BOROUGH OF FAR HILLS, THE PLANNING BOARD OF FAR HILLS, THE BOROUGH COUNCIL OF FAR HILLS, AND HENRY ARGENTO, THE MAHOR OF FAR HILLS

CIVIL ACTION

BRIEF AND APPENDIX IN SUPPORT OF NOTICE OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT, PLANNING BOARD OF FAR HILLS

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Dated: November 3, 1982

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STATEMENT OF FACTS

For purposes of the within Motion, the facts are substantially undisputed and can be summarized in the following outline. On August 18, 1981 plaintiffs filed a Complaint In Lieu Of Prerogative Writ against the defendant Borough and its Planning Board. The litigation substantially was an attack upon defendant's zoning ordinance alleging that it was exclusionary in nature and, accordingly, invalid. In addition, plaintiffs alleged that the impact of defendant's zoning ordinance was to render plaintiffs' property sterile and, accordingly, such circumstances amounted to inverse condemnation. Finally, complaint challenged the definition of the word "families" in defendant's zoning ordinance as being invalid.

Plaintiffs are the owners of a tract of land located in defendant Borough consisting of approximately 19 acres. Said property is currently vacant and situate within the R-10 zone (a single detached residence on 10 acres) of the Borough of Far Hills Zoning Ordinance.

The parties have now completed discovery and deposed, among others, their respective planning experts. Portions of experts' reports, as well as their respective depositions, will be utilized to support defendants' position in the within Motion. Other facts will be developed as they relate to the respective Points that follow.

POINT I

THE ZONING ORDINANCE OF DEFENDANT BOROUGH OF FAR HILLS IS PRESUMED TO BE VALID AND PLAINTIFF HAS THE HEAVY BURDEN OF ESTABLISHING ITS INVALIDITY.

Unquestionably, municipalities have the right and authority to regulate the use of land within their borders, which authority finds its roots in the New Jersey Constitution (1947), Art. IV, Sec. VI, Par. 2. A second constitutional dimension relevant to this point is that all laws concerning local governments, including zoning laws, be liberally construed in favor of municipal authority. New Jersey Constitution (1947), Art.IV., Sec. VII, Para. 11. In the Municipal Land Use Law, N.J.S.A. 45D-1, et seq., the Legislature gave to municipalities broad power to create districts, regulate structures and use of land through zoning ordinances. Even where Mount Laurel issues are involved, a municipality in carrying out the constitutionally and legislatively vested power is not compelled to provide for every use within its boundaries and certainly failure to do so is no cause to invalidate a zoning ordinance. Lionshead Lake, Inc. v. Wayne Township, N.J. 165 (1952), app. dism. 344 US 919 (1953); Township of Washington v. Central Bergen Community Mental Health Center, Inc., 156 N.J. Super. 388 (Law Div. 1978).

The role of a court in reviewing the validity of a zoning ordinance has been the subject of extensive judicial comment. A

precise and cogent distillation of the scope of review is to be found in Bow & Arrow Manor v. West Orange, 63 N.J. 335 (1973), in language recently quoted at length in Pascack Association Ltd., v. Washington Township, 74 N.J. 470 (1977) and Glenview Development Co. v. Franklin Township, 164 N.J. Super. 563 (Law Div. 1978):

> It is fundamental that zoning is a municipal legislative function, beyond the purview of interference by the courts unless an ordinance is seen in whole or in application to any particular property to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute. N.J.S.A. 40:55-31, 32. It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently or because the preponderance of the weight of the expert testimony adduced at a trial is at variance with the local legislative judgment. If the latter is at least debatable it is to be sustained. Kozesnik v. Montgomery Twp., 24 N.J. 154, 167 (1957); Vickers v. Tp. Com. of Gloucester Tp., 37 N.J. 232, 242 (1962), cert. den. and app. dism., 371 U. S. 233, 83 S. Ct. 326, 9 L. Ed. 2d 495 (1963). [63 N.J. at 343].

In undertaking the judicial function as outlined above, a judge must remember that the judicial role is tightly circumscribed and that there is a strong presumption of zoning ordinance validity which a court should not invalidate (or any provision thereof) un-

less that presumption is overcome by a clear showing that it is arbitrary or unreasonable. Harvard Enterprises, Inc. v. Madison Township Board of Adjustment, 56 N.J. 362 (1970). If the question raised is "fairly disputable" (Bow & Arrow Manor, supra., at p. 345) or "debatable", than the municipality should be sustained. Vickers v. Gloucester Tp. Com., 37 N.J. 232, (1962), cert. den. 371 U. S. 233 (1963).

The test with respect to exclusionary zoning cases is whether the zoning ordinance bears a reasonable relationship to the purposes which zoning is intended to promote. Napierkowski v. Gloucester Township, 29 N.J. 481 (1959). In other words, it is merely required that there be a substantial relation between the restraints put upon the use of land and the public health, safety, morals or general good and welfare in one or more of the particulars involved in the exercise of the use-zoning process encompassed in the statute. The discretionary decision by local legislative bodies in this respect is to be accorded "breadth in the legitimate range". Pascack, supra., 74 N.J. at 482. The reason for the circumscribed nature of judicial review is to be found in the deference due to those legislatively and politically entrusted in the first instance with the decision to determine how best the general welfare may be served by a zoning ordinance. It is abundantly clear that municipalities need not provide for every use within their respective borders and certainly can legitimately exclude all multi-family

housing which would have a tendancy to change the character of a particular municipality. Pascack, supra.; Nigito v. Closter, 142 N.J. Super. 1 (App. Div. 1976), cert. den. 74 N.J. 265 (1977); Swiss Village Assocs. v. The Mun. Coun. Wayne Tp., 162 N.J. Super. 138 (App. Div. 1978). Nor should the court be misled by the "presumptive" obligation placed on a municipality in exclusionary zoning cases. The initial burden of proof lies with a party attacking the zoning ordinance to establish that a particular municipality lies within the parameters of the Mount Laurel decision and, accordingly, subject to the obligations of fair share housing as outlined therein. Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975). Obviously, before the burden of proof can shift to the municipality in exclusionary zoning cases, plaintiff must establish, measured against traditional standards of the presumptive validity of zoning ordinances, that the particular municipality is a "developing community". If this were not so, then the entire body of law outlined above would have to be discarded as valueless. As articulated by Judge Conford in Pascack, supra., it would be a mistake to interpret Mount Laurel as a comprehensive displacement of sound and long established principles concerning judicial respect for local policy decisions in the zoning field.

One could not stress strongly enough the caution that a court should undertake when addressing important social needs affected by zoning. The judicial branch, after all, is not suited to the role of an ad hoc super zoning legislature with powers of clairvoyance not shared by other branches of government. Too often there are sociological problems presented that call for legislation vesting appropriate developmental control in either State or regional administrative agencies [proposed "Comprehensive and Balanced Housing Plan Act", Senate No. 3139 (1977)]. As was pointed out in Pascack, supra.:

> The problem is not an appropriate subject of judicial superintendence. Clearly the legislature, and the executives within proper delegation, have the power to impose zoning, housing regulations on a regional basis which would ignore municipal boundary lines and provide recourse to all developable land wherever situated . . .

POINT II

THE BOROUGH OF FAR HILLS IS NOT A "DEVELOPING MUNICIPALITY" WITHIN THE PARAMETERS OF THE MOUNT LAUREL DECISIONS AND, ACCORDINGLY, NOT SUBJECT TO THE HOUSING OBLIGATIONS INDICATED THEREIN.

The key to the applicability of Mount Laurel to the Borough of Far Hills lies in an analysis of the decision. Southern Burlington County N.A.A.C.P. vs. Township of Mount Laurel, 67 N.J. 151 (1975). An understanding of the decision requires some appreciation of the facts forming a basis therefor. The decision described Mount Laurel as a "sprawling township" having approximately 22 square miles in area, located approximately 7 miles from the City of Camden and some 10 miles from Philadelphia. In 1950, Mount Laurel had a population of 2,817 people and at that time had been primarily a rural, agricultural area with no sizable settlements or commercial or industrial enterprises. Subsequent to 1950 however, it began to experience residential development as well as some commerce and industry. By 1960 the population had almost doubled and by 1970 had again doubled. The township was found to be a part of the outer ring of the South Jersey metropolitan area. Significantly, approximately 29.2% of all the land in the township was zoned for industry, 1.2% for retail business and the balance for residential purposes. After a thorough analysis of the fiscal zoning utilized by the Township of Mount Laurel, the court observed that one of the incongruous results was that such developing

municipalities rendered it impossible for lower paid employees of industries they had eagerly sought and welcomed, with open arms, to live in the community where they work.

The issue confronting the court was clearly defined, at page 173, as follows:

> Whether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its confines because of the limited extent of their income and resources.

The court concluded that every such developing municipality was required by its land use regulations presumptively to make realistically possible an appropriate variety and choice of housing.

In Mount Laurel, the court explored in some detail the fiscal constraints motivating the Township of Mount Laurel to pursue the zoning pattern subsequently found to be invalid. The court pointed out that New Jersey's tax structure which substantially finances municipal, governmental and education costs from taxes on local real property was a significant factor commanding attention by local officials. The court was emphatic however in concluding that no municipality could exclude or limit categories of housing for that reason or purpose. The court did, nevertheless, emphasize that municipalities inviting and encouraging commercial ratables

to locate within its borders had the indisputable obligation to provide for the housing made necessary by such businesses.

In summary then, Mount Laurel established the legal principle that developing municipalities by their land use regulations have the obligation to make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, including those of low and moderate income. Clearly, intended to be excluded from the category of "developing municipalities" were those small, homogeneous municipalities with permanent character already established, such as the settled suburbs surrounding the cities in which planning and zoning may properly be geared around things as they are and as they pretty much continue to be. The concept of "developing municipalities" was intended to encompass those areas that are sprawling, heterogeneous governmental units commonly, mostly townships, each really amounting to a region of considerable size in itself. Those in which the present rural, semi-rural or mixed nature, is about to change substantially, soon to become melded into the entire metropolitan area.

The second leading case dealing with exclusionary zoning arose in Madison Township, located in Middlesex County. That township has an area of 42 square miles and, at the time, had approximately 8,800 acres still vacant and zoned for residential use. The

population of the township had grown very rapidly from about 7,000 in 1950 to about 50,000 in 1970. Oddly enough, Madison Township had zoned significantly large areas to permit multiple family dwellings as of right and in that respect was an odd place for litigation challenging such exclusion. The case did, however, provide an opportunity to focus attention more direct on the issue of exclusionary zoning along economic lines, i.e., directed against the poor, and to develop a realistic rationale to deal with this. The court in Oakwood at Madison, Inc. vs. Township of Madison, 72 N.J. 481 (1977) determined the Township of Madison to be a "developing community" within the parameters of the Mount Laurel decision. The one additional measure in the developing area of exclusionary zoning was the principle that to the extent that the builders of housing in a developing municipality like Madison could not, through publicly assisted means or appropriately legislated incentives, provide the municipality's fair share of the regional need for lower income housing, it was incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the "least cost" housing, consistent with minimum standards of health and safety which private industry would undertake and in amounts sufficient to satisfy the deficit in the hypothesized fair share.

The above two cases focus upon the obligation of developing municipalities to provide low and moderate income housing

and an opportunity for an appropriate variety and choice of housing for all categories of people. "Developing municipalities" are those of (a) sizable land areas located (b) outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas which have (c) substantially shed rural characteristics and (d) have undergone great population increase since World War II, or are now in the process of doing so, but (e) still are not completely developed and (f) remain in the path of inevitable future residential, commercial and industrial demand and growth.

Application Of The Law To The Borough Of Far Hills

The position of the Borough of Far Hills stands in sharp contrast to some of its neighbors in the context of a "developing municipality". Far Hills is a municipality of approximately 4.9 square miles of land area which has remained relatively rural over the past 50 years. Its population increased from 702 in 1960 to 780 in 1970 - decreasing slightly to 677 in 1980. It has very little in the nature of commercial ratables, most of which are oriented toward satisfying local needs. As outlined above, both Mount Laurel and Madison Township have areas of 22 square miles and 42 square miles, respectively. Both were experiencing significant residential growth and some measure of commercial growth. Both of those townships were experiencing a change in

character as commercial and residential development took place. Somewhat closer to home are the municipalities of Bedminster Township with 26.7 square miles, Bernards Township with 24.4 square miles, Bridgewater Township with 32.7 square miles and Warren Township with 19.3 square miles. All of the latter municipalities either encompass interchanges along Interstate Route 287 or Interstate Route 78 or have immediate access thereto. The commonalities of these municipalities are quite evident: (a) they all have large land masses with significant areas of undeveloped land, (b) they all have either experienced or are experiencing significant population growth, (c) they all have zoned in such a manner as to encourage the location of commercial activity within their borders, (d) the characters of all said municipalities are undergoing significant change because of commercial and residential growth, i. e., the location of AT&T along the northerly interchange of I-287 in Bernards Township and intense commercial construction taking place in the southerly I-287 interchange in Bernards Township, the location of American Hoechst and proposed substantial business activity currently in the planning stage in Bridgewater Township, the location of AT&T Long Lines and other commercial activity in Bedminster Township and the location of Chubb & Sons and planned AT&T complex along I-78 in Warren Township.

The Borough of Far Hills, on the other hand, cannot by

any reasonable definition be considered a sizable land area within the context of Mount Laurel and as compared to its neighbors. Plaintiffs' initial planner, Richard T. Coppola, conceded that the Borough of Far Hills could not be considered a "sizable land area" within the context of the Mount Laurel decision (Da 1) Plaintiffs' subsequent planner, David Zimmerman, during the course of depositions, could not reach a conclusion as to whether or not the Borough of Far Hills was a sizable land area within the context of the Mount Laurel decision (Da 2-11 ff.). Secondly, plaintiffs' initial planner, Richard T. Coppola, reached the conclusion that the Borough of Far Hills did not lose its rural characteristics (Da 3). Plaintiffs' subsequent planner, David Zimmerman, tended to disagree with his predecessor, however, the basis of the disagreement appeared to relate to standards utilized in characterizing what one might consider to be "rural" (Da 4-9).* Finally, plaintiffs' initial planner concluded that the Borough of Far Hills did not experience a significant population increase since World War II (Da 3). Plaintiffs' subsequent planner agreed with that conclusion (Da 5-5). Plaintiffs' planner, David Zimmerman, conceded that at best whether or not the Borough of Far Hills was a developing municipality within the context of the Mount Laurel decision was a debatable issue and could not be addressed with a simple yes or no answer (Da 5-9 to 18).

* Plaintiffs' planner described Far Hills as having both a "village neighborhood" character and an "estate" character (Da 6-4 ff.).

In summary,of the six standards outlined by Mount Laurel in defining "developing municipalities" plaintiffs' experts concluded that in three of those standards (large acreage, loss of rural characteristics and experiencing a great population increase) the Borough of Far Hills either did not fall within the category being described or its status was questionable relative thereto. The initial burden of establishing whether or not a particular municipality falls within the category of a "developing municipality" within the context of the Mount Laurel decision rests with the plaintiffs and the burden of proof does not shift until the developing status of the municipality has been so established. See 2 Anderson, American Law of Zoning, (2nd Ed. 1976), Sec. 8.18, p. 50. The equivocal position taken by plaintiffs relative to the issue of defendant Borough being a "developing municipality" warrants dismissal of those portions of plaintiffs' cause of action grounded upon exclusionary zoning. Thus, if one is unable to establish that a particular municipality falls within the category of a "developing municipality", the Mount Laurel principles which condemn and invalidate exclusionary zoning ordinances simply do not apply. See, for example, Township of Washington v. Central Bergen Community Mental Health Center, Inc., supra.

In order to bring the zoning of defendant Borough of Far Hills properly into focus for purposes of the present Motion, two

cases merit close examination. In Glenview Development Co. v. Franklin Township, supra., a land developer owning residential property in defendant Township sought to develop same at a much higher density than permitted. The developer attacked defendant's zoning ordinance on three grounds: (a) it contended that Franklin Township was a developing municipality within the meaning of Mount Laurel and, therefore, it was required to rezone to accommodate a variety of housing alternatives which its zoning ordinance then precluded, (b) in a variation of the Mount Laurel approach, the developer contended that Franklin Township's zoning ordinance violated the purposes of the Municipal Land Use Law, N.J.S.A. 40:55D-1, et. seq., and (c) the developer contended that Franklin Township's zoning ordinance, as applied to its particular parcel of property, precluded any reasonable economic use and, accordingly it should be rezoned. The court pointed out that the principles of Mount Laurel did not apply to all New Jersey municipalities. Certainly, they did not apply to developed municipalities, citing Pascack, supra., or to rural municipalities which are not in the process of developing. Significantly, Franklin Township Zoning Ordinance allows for two residential zones - a three-acre zone and a five-acre zone, the three-acre zone constituting approximately 80% of the residentially zoned property within the township. The court made reference to the six criteria of a developing municipality articulated in the Mount Laurel decision and found as a fact that, based upon its population,

land use and lack of adequate capital infrastructure, Franklin Township had not shed its rural characteristics. The court further concluded that out of the six Mount Laurel criteria, four were met and two were not. A mathematical calculation was not dispositive, however the obvious rural characteristics of Franklin Township together with its low population and lack of major employment centers, no industry or capital infrastructure and dedication of a good portion of its land to agriculture were all matters worthy of consideration. Also significant was the fact that Franklin Township did not actively seek to attract commercial ratables while at the same time excluding from housing accommodations within the community all but a few of the persons employed in those facilities. Also significant was the fact that Franklin Township's zoning laws were consistent, generally, with low density population in the area. The court made reference to the State Development Guide Plan, Preliminary Draft (September 1977) pointing out that certain sections of the State were designated as limited growth areas and areas proposed to be preserved for agriculture (such as Franklin Township). The court concluded that the consistency of Franklin Township's land use policy with the State Development Guide Plan was a strong indicia of the reasonableness of that policy as expressed in its zoning ordinance and accordingly concluded that Franklin Township was not a developing municipality but a rural municipality to which the principles of Mount Laurel were not then applicable. In a somewhat

similar manner, as indicated above, plaintiffs have failed to qualify the Borough of Far Hills in at least three of the Mount Laurel standards for developing municipalities. Like Franklin Township, the Borough of Far Hills did not zone to attract industrial ratables and, at the same time, seek to exclude workers who may be employed in those enterprises. Over the past fifty years, the Borough of Far Hills developed as proposed: a village neighborhood developed as such and an estate neighborhood developed with those characteristics (Da 7-4 to 16). Again, similar to Franklin Township, both the Somerset County Master Plan and the State Development Guide Plan designated the majority of the Borough of Far Hills as low density residential growth (Da 8-21 to 9-23). Finally, it should be emphasized, as the court observed in Franklin Township, that Mount Laurel was conceived for the purpose of providing housing for lower and moderate income families however, its principles are being utilized by developers as leverage to break down impediments to high density construction which does not serve the interests promoted by that decision. Plaintiffs' real estate expert in the present matter before the court approximated that the selling price for multiple family units in the Somerset Hills area would range anywhere from $120,000. per unit on up (Da 10-12). Such a price range would hardly serve to provide housing for low and moderate income families as encouraged by the Mount Laurel decision. To allow plaintiffs to succeed in the present matter would simply

open the door to intense residential development in a community that historically and down to the present day has been predominantly rural in character. Additionally, as in the Franklin Township case, plaintiffs here contend that the zoning ordinance of the Borough of Far Hills is invalid because it does not serve the purposes of zoning as set forth in the Municipal Land Use Law, N.J.S.A. 40-55D-1 et. seq., however, as the court pointed out in that case:

> Whether, how and to what extent the purposes of the Municipal Land Use Law are effectuated is a decision reserved to each municipality, subject to judicial review at which time the municipality's decision must be upheld unless it is found to be arbitrary or unreasonable. Reliance upon various sections of the Municipal Land Use Law really begs the question and appears to be an attempt to reassert the principles of Mount Laurel without relying on Mount Laurel and its limitations. Glenview Development Co. v. Franklin Township, supra., at p. 578.

The second case meriting some degree of analysis is the unreported decision of AMG Realty Company v. Township of Warren, Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-23277-80 decided May 18, 1982 (Da 11-25). That case was a Prerogative Writ action challenging the constitutional validity of defendant's zoning ordinance based upon principles established in Mount Laurel. The municipality was zoned primarily for one and one-half acre residential purposes as well as half acre residential purposes without any provisions for multiple-family use (Da 12-15 ff). The approach utilized by the court was a review of the six standards

used in Mount Laurel to determine whether defendant was a "developing community" (Da 14-3 ff). Warren Township consists of approximately 19.3 square miles in land area as compared to approximately 22 square miles in Mount Laurel and the court concluded that it qualified as having a large gross acreage (Da 14-10). Of more significance for purposes of comparison with the Borough of Far Hills, the court explored the issue of whether or not Warren Township had lost its rural characteristics (Da 15-15). What the court found persuasive was what actually had taken place in Warren Township over the past ten years, not only in the area of residential development but changes that have taken place because of the introduction of substantial commercial ratables (Da 16-18). Again, unlike Far Hills the court in AMG Realty, supra., analyzed the population growth and concluded that Warren Township was experiencing a great population increase (Da 18-11). In regard to Warren Township being in the path of inevitable growth, the court directed attention to Interstate Route 78 which runs through the northerly portion of the community in an east and west direction (there are several interchanges within Warren Township) which has attracted the location of several substantial commercial facilities such as Chubb & Sons and AT&T (Da 20-18). The court having found that Warren Township fulfilled all six criteria set forth in Mount Laurel accordingly concluded it was therefore a "developing municipality".

The many similarities of defendant Borough of Far Hills to

the Franklin Township case and many dissimilarities of defendant Borough of Far Hills to the Warren Township case lead rather decisively to the conclusion that the Borough of Far Hills is not a "developing municipality" within the context of Mount Laurel. The sole issue remaining is to determine whether defendant Borough of Far Hills has any multiple-family housing obligations outside of the context of a developing municipality.

POINT III

THE BOROUGH OF FAR HILLS IS NOT A "DEVELOPING COMMUNITY" OUTSIDE OF THE CONTEXT OF MOUNT LAUREL AND, ACCORDINGLY, NOT OBLIGATED TO ZONE FOR MULTIPLE FAMILY USE.

The key to whether or not a municipality is obligated to zone for multiple family use outside of the context of Mount Laurel is to be found in Pascack, supra. Judge Conford (temporarily assigned) articulated the issue as to whether in the wake of Mount Laurel all municipalities, regardless of the state or character of their development, have an obligation to zone for multi-family housing on behalf of middle income occupants if there is a local and regional shortage of multi-family housing in general. Plaintiffs' planning expert, David Zimmerman, responded to this question in the affirmative (Da 22-1 ff.). In the Pascack case, the trial court held the entire Washington Township Zoning Ordinance invalid for failure

to make any provision for multiple and rental housing; the Appellate Division on appeal reversed the trial court's decision holding that Mount Laurel was not applicable, primarily for the reason that said decision was not authoritative except as to developing municipalities, a category in which Washington Township did not fall. The Supreme Court concluded that this determination by the Appellate Division essentially correct and affirmed it at least to that extent. A brief factual pattern of the Pascack case will lend more meaning to a discussion of its legal principles. The township comprises approximately 3 1/4 square miles and is one of a group of Bergen County residential communities commonly referred to as the Pascack Valley. The residential nature of the township is almost exclusively single family on lots ranging from 5,000 square feet to 2 acres or more. These residences consume 94.5% of the land, commercial uses occupy 3.25%, without any significant industrial or multi-family residential uses and the remaining 2.3% is vacant land. The population growth in Pascack increased rapidly since 1960 and housing density increased from 41 units per square mile in 1950 to 862 units in 1970. Five of the eight municipalities in Pascack Valley region have no multi-family units and the ratio of single family units to all others is higher in Bergen County than in the state as a whole. The trial court's determination as to the invalidity of Washington Township's ordinance in respect to the absence of multi-family housing was

based upon the shortage of housing in Bergen County and the Pascack Valley region. The trial court further found that persons in and out of Washington Township who needed housing were not able to either make the down payment or generate income sufficient to obtain a loan to purchase the average priced home for sale in the Township. Essentially, the trial court (as the plaintiffs in the within matter) concluded that all segments of the population should have a reasonable choice of living environments to the extent that it is possible and that where there is a need for multi-family housing there is a statutory requirement to provide as part of a comprehensive plan for a well balanced community at least some area, however limited it must be under the circumstances, where such housing may be constructed.

The New Jersey Supreme Court pointed out that there was no per se principle in this State mandating zoning for multi-family by every municipality regardless of its circumstances with respect to degree or nature of development. The court further said, at page 482:

> It is obvious that among the 567 municipalities in the State, there is an infinite variety of circumstances and conditions, including kinds and degrees of development of all sorts, germaine to the advisability and suitability of any particular zoning scheme and plan in the general interest. There must necessarily be corresponding breadth in the legitimate range of discretionary decision by local legislative bodies as to regulation and restriction of uses by zoning. [emphasis supplied].

The court further emphasized that beyond the judicial strictures against arbitrariness or patent unreasonableness, it is merely required that there be a substantial relation between the restraints put upon the use of land and the public, safety, morals or the general good and welfare in one or more of the particulars involved in the exercise of the use-zoning process specified in the Municipal Land Use Law. As far as Washington Township was concerned, the court was satisfied that maintaining the character of a fully developed, predominantly single-family residential community constituted an appropriate desideratum of zoning to which a municipal governing body may legitimately give substantial weight in ariving at a policy legislative decision as to whether, or to what extent, to admit multi-family housing in such vacant land areas as remain in such a community. The court further pointed out that single family development such as took place in Washington Township, was very characteristic of many communities serving a basic social and regional need. Certainly there was nothing invidious about such development or about the decision of the township planners in the past to continue that basic scheme of development in order to maintain the established character of the community. Such a determination fully accorded with the statutory criteria of consideration of the character of the municipality and the most appropriate use of land throughout the municipality. Indeed, to introduce multi-family housing in the midst of low density

single-family development might very well generate discord which would be adverse to the objectives of sound planning and zoning. See Shipman v. Town of Montclair, 16 N.J. Super 365 (App. Div. 1951). It was further emphasized that the reasonableness of the residential zoning policy precluding multi-family housing was not adversely affected by the attempts on behalf of the municipality to attract additional commercial ratables. Significant was the caveat that none of the New Jersey cases to date stand for the proposition that because of the conceded general shortage of multi-family housing in New Jersey the zoning statute has, in effect, been amended to render such housing an absolute mandatory component of every zoning ordinance.

The court clarified any confusion in the Mount Laurel decision which many construed to mean that all municipalities must zone for housing for all categories of the population, middle and upper classes as well as low and moderate income, in the following language:

> A moment's reflection will suffice to confirm the fact that such references contemplate fairly sizable developing, not fully developed municipalities - particularly small ones - which may vary in character from such a tiny municipality as Winfield in Union County, developed in a dense, moderate-income multi-family residential pattern, to one like the subject municipality, homogeneously and completely developed as a middle-upper income, moderate to low density, single-family community. [Pascack, supra., at p. 486].

Mount Laurel never intended to include smaller municipalities whose characters had already been formed and, in this respect, the court quoted from Vickers v. Twp. Com. of Gloucester Twp., supra., at p. 253, in which the court said:

> They are not small, homogeneous communities with permanent character already established, like the settled suburbs surrounding the cities in which planning and zoning may properly be geared around things as they are and as they will pretty much continue to be.

One cannot simply equate the word "vacant" with the word "developing" in a Mount Laurel context and assume that they are interchangeable terms. The concepts are dramatically different. In a Mount Laurel sense, vacant large acreage is simply one of the criteria to determine whether or not a municipality is a "developing community". Vacant land is simply one of the standards as is the shedding of rural characteristics. Over the past 50 years, the Borough of Far Hills has developed slowly and achieved a balance between low density estate residential growth, a limited neighborhood business district together with some higher density residential growth adjacent to the neighborhood business area. The significant difference between the Borough of Far Hills and neighboring Bedminster Township, Bernards Township and Warren Township is that the Borough of Far Hills has remained a rural community and is likely to continue to remain rural whereas its larger neighbors have experienced substantial residential and commercial growth and are changing their respective characters.

Again, the major distinction is that the Borough of Far Hills has not over the years engaged in fiscal zoning and, accordingly, should not at the present time be required to change its character. To say that a modest introduction of multi-family zoning into the Borough of Far Hills would have little or no adverse impact and conceivably make a contribution is simply ludicrous. Compelling least cost housing in an already developed 10 acre residential area on its face is repugnant to sound zoning and planning. Plaintiffs' position that their tract of land abutting U. S. Route 202 and a railroad distinguish it from other adjacent 10 acre parcels is a specious distinction to say the least. With the realization of Interstate Route 287, the parallel U. S. Route 202 has diminished in its stature as a main vehicular artery. In addition, the limited use of the existing railway which dead-ends in the neighboring municipality of Peapack-Gladstone can have very little impact upon plaintiffs' tract of land. If anything, the railroad line serves as a barrier between the neighborhood business zone and the abutting low density residential zone, somewhat similar to a stream or river. There can't be the slightest doubt but that the Somerset County Master Plan and the State Development Guide Plan both designate the existing residential development in the Borough of Far Hills as low density growth which more than supports the reasonable relationship between the existing zoning and the public health, safety, morals and general welfare. Plaintiffs' grievances are with their particular piece of property specifically and, in

this respect, seek a judicial determination equivalent to a "d" use variance for multi-family zoning. It is submitted that a court is without jurisdiction to grant such relief. The reasonableness of exclusion by zoning of multi-family housing depends upon the nature and extent of development in the municipality. The nature of development in Far Hills has been low density estate growth with an established, more densely populated village neighborhood containing business and professional services locally oriented and it is anticipated that such development will continue in the future. Thus, where the historical development of a small municipality over a period of time has been a total devotion to the provision of a homogeneous single-family residence community satisfying the needs and desires of people, most of whose household heads had occupations elsewhere, there is nothing invidious in a zoning or general welfare sense about such development. Fobe Associates v. Mayor and Council of Demarest, 74 N.J. Super., 519 (1977).

There is no question but that the Borough of Far Hills has developed over the years into predominantly an estate character community providing for single family dwellings on minimum parcels of 10 acres. The topography as well as environmental constraints have been significant factors in molding the municipality as such. It is also quite obvious that the municipality has accommodated a village area of the Borough which is more densely populated, containing business and service facilities oriented primarily toward

the local community. The Zoning Ordinance of the Borough of Far Hills divides the residential use into three zones: (a) single family, detached dwellings on separate lots in the R-10 zone requiring a minimum lot area of 10 acres (Sec. 4.2.1 and Schedule A), (b) single family dwellings, two-family dwellings and multiple family dwellings in the R-9 zone, requiring a minimum lot area of 9,000 sq. ft. (Sec. 4.2.3 and Schedule A), and (c) the same uses permitted in the R-9 zone district are also permitted in the R-5 zone, requiring a minimum lot area of 5,000 sq. ft. (Sec. 4.2.3). Multiple family dwellings are permitted as a conditional use under Article 9 of the Zoning Ordinance and provide for the conversion of larger old houses in all residential zone districts to multiple family dwellings as indicated therein and also provide for multiple family dwellings on vacant lots in both the R-9 and R-5 zones. The requirement that existing densities be preserved would translate into 4.8 units per acre in the R-9 residence zone and 8.7 units per acre in the R-5 zone. The most densely populated area of the Borough of Far Hills is to be found in the triangular portion bounded by U. S. Route 202, the flood plain along the north branch of the Raritan River and the railroad to the east. This area is commonly known as the "village" which has developed over the past many years and established a rural character consistent with the surrounding area. This type of development in the Borough of Far Hills is substantially consistent with the Somerset County Master Plan, the State Development Guide Plan and zoning in surrounding municipalities. Thus, as the

Borough of Far Hills developed over the years it achieved a stable balance between the higher density of the "village area" and the low density of the "estate area". This balance has characterized the Borough of Far Hills as a rural community in the past and continues to characterize it as a rural community at the present time. Major changes in the form of rapid residential and commercial growth currently taking place and in the planning stage affecting neighboring communities simply has not been taking place in Far Hills. To open up the door to multiple family zoning in the Borough above the level of that already provided would cause an irreversable and dramatic change in its character and is totally unwarranted.

POINT IV

CURRENT ZONING IN THE BOROUGH OF FAR HILLS AS IT AFFECTS PLAINTIFFS' PROPERTY DOES NOT RESULT IN INVERSE CONDEMNATION.

Plaintiffs are the owners of approximately 19.108 acres which are located in the R-10 zone district in the Borough of Far Hills permitting single-family residences on 10 acre parcels. The parcel fronts primarily on Sunnybranch Road for approximately 1,217 feet and abuts an existing and established 10 acre residential development also fronting on Sunnybranch Road. Peculiarly, one of the plaintiffs (Ochs) was the developer in that particular area and during the subdivision process apparently left the subject remaining parcel consisting of approximately 19 acres instead of two 10 acre parcels that would have complied with zoning regulations. It would, however, appear reasonable to conclude that plaintiffs would have little difficulty in obtaining a minor area variance to subdivide the subject premises into two conforming residential parcels.

In their Second Count, plaintiffs allege that the zoning ordinance of the Borough of Far Hills is so restrictive as to allow nothing but economically unfeasible or otherwise inappropriate uses of plaintiffs' land and, accordingly, such constitutes a taking of their property without just compensation. The law relevant to this issue appears in 1 Anderson, American Law of

Zoning, (2nd Ed.), Sec. 3.26, p. 146. Generally stated, a zoning ordinance that deprives a land owner of the entire use value of his property is unconstitutional since it effects a taking of property without due process of law in violation of both the Federal and New Jersey Constitutions. As was pointed out in Tidewater Oil Co. v. Carteret, 84 N. J. Super. 525 (App. Div. 1964), aff'd 44 N. J. 338 (1965), only where the zoning prohibitions are so restrictive as to allow nothing but economically unfeasible or otherwise inappropriate uses, while forbidding practical utilization of the land, will they be stricken down as confiscatory. Thus, only where property is unusable for any purpose permitted by applicable zoning restrictions will it be deemed to have been taken without due process of law. Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N. J. 539 (1963). Plaintiffs' burden in establishing confiscation is not sustained by proof that the ordinance denies the land owner the highest and best use of his land, or that the ordinance reduces the value of the subject property by proscribing a more profitable use thereof. In the deposition of plaintiffs' real estate expert the distillation of his responses to questions in regard to developing the subject premises for the purposes zoned, indicated at best that single family houses would not sell for as much as other homes farther removed from U. S. Route 202, the railroad and neighborhood business district (Da 27-11 to 31-25). Diminution

in value is no basis for an inverse condemnation case - all an owner is entitled to is some reasonable use of his property. AMG Assocs. v. Twp. of Springfield, 65 N.J. Super. 101 (1974). There is simply no way that plaintiffs can establish that they do not have a reasonable use of their property under current applicable zoning.

POINT V

THE DEFINITION OF THE WORD "FAMILY" IN THE FAR HILLS ZONING ORDINANCE IS SEVERABLE AND DOES NOT AFFECT THE VALIDITY OF THE BALANCE OF THE ORDINANCE.

Plaintiffs in their Fourth Count allege that the biological or legal relationship as a basis for defining a single housekeeping unit is contrary to the thrust of State v. Baker, 81 N.J. 99 (1979). The definition of "family" in the Borough of Far Hills Zoning Ordinance appears in Article 16 encompassing individuals related by blood or marriage who reside together as a single housekeeping unit. Certainly the objective of residing together as a single housekeeping unit is compatible with the definition of "family" as approved in State v. Baker, supra., and is a severable provision. Certainly, the objective of defining the term "family" to include a bona fida housekeeping unit with some measure of permanency is a legitimate zoning objective re-

lated to the health, safety, morals and general welfare of a rural community. See Property Owners Association of Belmar v. Borough of Belmar, Docket No. A-316-80-T4, decided by the Appellate Division and appearing in 110 N.J.L.J. at p. 15.

Article 18 of the Zoning Ordinance of the Borough of Far Hills provides as follows:

> If any section, paragraph, sentence, clause or provision of this Ordinance shall be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair invalidate or nullify this Ordinance as a whole and such adjudication shall apply only to the section, paragraph, subdivision, clause or provision so adjudged and the remainder of this Ordinance shall be deemed valid and effective.

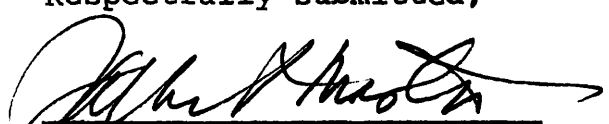
Clearly, excising the main theme of the definition of "family" as a single housekeeping unit can survive from the balance of the definition that may be deemed to be contrary to State v. Baker, supra.

CONCLUSION

The various forces that participate in attempting to resolve an exclusionary zoning case are complex indeed. Many of the issues are clouded and the problems being addressed are difficult. Certainly, no one discounts the importance of decent housing for all economic groups in New Jersey. The housing problem addressed in Mount Laurel and the principles established therein could be hardly criticized on moral grounds. Significantly, however, exclusionary zoning cases since Mount Laurel have been inclined to proceed much more cautiously and with some measure of reservation. The reason for this is quite obvious. Courts (i.e., the judiciary) are not super-planners and do not have all the answers. If the cases since Mount Laurel do anything, they direct attention toward two significant concerns. First of all, housing is a wide spread problem throughout the state of New Jersey and has little respect for municipal boundary lines. On the other hand, zoning under traditional statutory provisions, has been exclusively within the control of the 567 local municipalities. Thus, an attempt to resolve a broad-spectrum problem through the vehicle of countless individual decision makers becomes an almost insurmountable objective. As pointed out by Justice Sullivan in his concurring opinion in Pascack, supra., until regional zoning is established based on comprehensive planning, the problems

being addressed by the court in the area of exclusionary zoning cannot be resolved except on an ad hoc basis. This latter approach is unsatisfactory to say the least. The second major concern is of a much deeper significance. The question is not only how the housing problem should be resolved but, more significantly, who is in a better position to resolve it. Courts can go so far within established principles of judicial restraint and, indeed, the constitutional framework of separation of powers. The more perceptive thinking along these lines has led to the conclusion that housing problems so inextricably associated with our socio-economic fabric are better resolved by those branches of government designed to address them, i.e., the legislature and executive.

Respectfully submitted,



J. ALBERT MASTRO
Attorney for Defendant,
Planning Board of Far Hills

Dated: November 3, 1982

APPENDIX

Judge Leahy of the Superior Court of Somerset County, New Jersey aptly summarized the housing versus environmental versus private property conflicts as a contest of rights: ". . .the right of minorities and those of limited income to fair housing opportunity, the right of a landowner to a reasonable use of his private property; the right of a community to plan and zone for its future as it envisions that future should ideally be; and the right of all to have ecological necessities recognized and respected . . .the question is not one of right against wrong, but one of right against right - - each worthy of legal recognition and of legal protection."

FUTURE OBLIGATIONS

Far Hills Borough as a "Developing Municipality"

As indicated earlier, the essential conclusion of the Mount Laurel decision is that "developing municipalities" like Mount Laurel must affirmatively plan and provide by its land use regulations the reasonable opportunity for an appropriate variety and choice of housing, to meet the needs, desires and resources of all categories of people who may wish to live within its boundaries. While the purpose of the litigation was to provide low- and moderate-income housing (which the court emphasized as essential), the decision specifically requires "developing" municipalities to provide an opportunity for an "appropriate variety and choice of housing for all categories of people".

The Mount Laurel decision provides municipalities with an "escape" mechanism, thereby obviating the mandate to satisfy regional needs apart from parochial interests. Apparently, communities which are not shown to fall within the "developing community" category are not required to provide a variety of housing types. The decision outlined six (6) components of the "developing municipality" definition, including:

1. A very large gross acreage;
2. A location outside the central city and built-up suburbs;
3. The loss of rural characteristics;
4. Has experienced and is continuing to experience great population increases;
5. Not substantially developed and having significant parcels of vacant developable lands remaining; and,
6. A location in the path of inevitable future growth.

A Very Large Gross Acreage: Far Hills Borough consists of approximately 3,136 acres or approximately 4.9 square miles of land area. Compared to the average and median sizes of the other 566 municipalities in New Jersey, Far Hills Borough cannot be considered a "sizeable land area" as specifically referenced in the Mount Laurel decision. As documented in a May 1977 article appearing in the "New Jersey Municipalities" publication, the median size of municipalities in New Jersey is 4.3 square miles while the average size is 13.2 square miles. (1) The range of municipal acreage in New Jersey spans from Shrewsbury Township in Monmouth County with a land area of

(1) "After the Recent New Jersey Supreme Court Cases: What Is The Status of Suburban Zoning?", by Jerome G. Rose, published by the "New Jersey Municipalities", May 1977.

Mt. Laurel was for middle and upper income housing which there is a demand. The demand for prestigious estate multi-million dollar housing is very small. I don't think one would expect rapid development in that type of environment. I would dare say if the zoning in Far Hills was one acre instead of 10 acres, you would have rapid development.

Q Did you in the course of your preparing the report review Mr. Coppola's report?

A Yes, I did.

Q Do you agree with his conclusion that "Compared to the average median sizes of the other 566 municipalities in New Jersey, Far Hills Borough cannot be considered a 'sizable land area' as specifically referenced in the Mt. Laurel decision."

Do you agree with that statement?

A I can't answer that because I don't know how the area of Far Hills ranks compared to the other 566 municipalities in New Jersey. For example, the planner for Far Hills, Alan Dresdner, did such a tabulation for Somerset County in which he indicated that Far Hills ranks somewhere in the middle. Some are larger and some are smaller. That computation or that analysis was not undertaken by Coppola. I can't answer that.

Q You can't tell me whether you disagree or

only 0.09 square miles to Hamilton Township in Atlantic County with a 113.00 square mile area. Far Hills' gross acreage, therefore, is not significantly greater than the median size of municipalities throughout New Jersey and is less than the average size.

A Location Outside the Central City and Built-Up Suburbs: Far Hills Borough is indeed located outside the central city. The geographic location of the municipality and the major roadways within the area has resulted in the residents of Far Hills Borough sharing their interaction with a number of relatively small cities and built-up suburbs as opposed to being oriented to any particular major city.

A documentable indication of the interaction between the residents of Far Hills Borough and the cities and other municipalities within New Jersey is a computation of: 1) the number of employees throughout New Jersey who commute to Far Hills Borough for job opportunites; and, 2) the number of residents within Far Hills Borough who work within other jurisdictions throughout New Jersey. This information is shown on Plates 1 and 2.

As the data indicates, 97.2% of the incoming work trips to Far Hills Borough originated within Far Hills Borough or within other municipalities situated either within Somerset or Morris County.

Conversely, considering the employed residents within Far Hills Borough during 1970, approximately 91.8% of the workers were employed within Far Hills Borough or within municipalities situated within either Somerset, Union or Morris County. Discounting the number of Far Hills Borough residents working outside the State of New Jersey during 1970, the percentage of employed residents of Far Hills Borough working within the three (3) county area increases from 91.8% to approximately 95.7%.

The Loss of Rural Characteristics: Far Hills Borough remains a relatively rural municipality. As of September 1971, the Somerset County Master Plan indicates that approximately 1,895 acres or 60.4% of the municipal land area remains vacant or wooded. In 1970, the gross density of Far Hills Borough was apprxoaimtely 159 persons per square mile of land area; as of 1981, census statistics indicate that the density of Far Hills Borough decreased to approximately 138 persons per square mile.

Has Experienced and Continues to Experience Great Population Increases: The population of Far Hills Borough increased by a factor of 11.1% between the years 1960 and 1970. The population in 1960 was 702 persons, while in 1970 the population grew to 780 persons. The 1980 U. S. Census counts indicate that Far Hills Borough has a population of approximately 677 individuals. It is clear that Far Hills Borough is not experiencing significant population increases.

Not Substantially Developed and Having Significant Parcels of Vacant Developable Lands Remaining: As indicated earlier, Far Hills Borough is a municipality with an abundance of undeveloped land; approximately 1,895 acres or 60.4% of the municipal land area remains vacant or wooded.

Location in the Path of Inevitable Growth: Far Hills is located within an area of suburban growth which is greatly influenced by Interstate Route 287 and State Routes 202 and 206. (*) The New Jersey Department of Community Affairs, in the publication entitled "State Development Guide Plan", dated May 1980, recognized the pattern of development emerging within and around

(*) See APPENDIX to this Report.

agree with that statement?

A Correct.

MR. COLLINS: I'm going to put an objection on the record of any questions regarding the Coppola report to the extent that I may have to move to protect Mr. Coppola's conflict of interest that that report be excluded from the record.

Q Mr. Coppola also concludes " Far Hills Borough remains a relatively rural municipality." Do you agree with that statement?

A It depends on how you define "rural". I think this is an important issue in my own mind. Maybe the rest of the world doesn't think it's important but since I have the podium, I think there are various ways to look at the issue of rural. Is it country, is it large estate or is it agricultural farmland. I tend to think that what Mt. Laurel had in mind, what enunciated that criteria was farmland type communities; that is communities in which major land masses were actively farmed and farming was an important economic activity in the community. To that extent I don't think Far Hills would be considered a rural community. It may be considered rural in the sense of country, open spaces, items of that nature.

Q Would you consider it as having lost its

rural characteristics?

A It has not in my opinion lost its rural country characteristics using country as a definition of rural as opposed to agriculture.

Q Mr. Coppola concludes, "It is clear that Far Hills Borough is not experiencing significant population increases." Would you agree with that?

A That one I agree with.

Q Mr. Coppola also concludes, "It is arguable whether or not Far Hills Borough is a developing municipality." He has "developing municipality" in quotes. Do you agree with that?

A Yes, I do.

Q Let me ask you again. In your opinion does Far Hills fit within the standards of a developing municipality as outlined in Mt. Laurel?

A I don't think that question can be answered in a yes or no fashion.

Q Could you expand again on page 14, second paragraph? Would you expand on the State-wide Housing Allocation Report 1978 identifying an existing physical need of between 14 and 32 units?

A I think the next paragraph generally talks about what would characterize those -- the next sentence, I'm sorry -- would characterize those units as being one which

take it in particular.

A Well, in general it may or may not depending upon the extent of development, the amount of area that is available for new development. In particular Far Hills Borough has several characters.

Q Would you identify those characters for me?

A One characteristic is what the Somerset County Master Plan identified as a village neighborhood. That is, the developed area astride Route 202 which has seen residential and commercial land uses of a higher density, higher density scope. A second character is the estates on larger lot sizes. There are subsections within those two categories. It depends on how fine you want to characterize the community.

Q Would you consider the estate character of the area stable? Do you understand that question or would you like me to expand on it?

A I think I do.

Q All right. Go ahead.

A Yes, I would.

Q Do you see a process continuing over the years of a rural environment that really hasn't changed much?

A Well, I'm not sure we're 100 percent on our definitions of rural; but if we look at certain criteria,

one might be led to the conclusion that Far Hills has not changed much in X period of time again depending upon what time frame you're talking about.

Q Let's focus on 1932 to date. In your studies have you determined any significant changes in the character of Far Hills as it relates to both the village neighborhood and the estate areas?

A Well, over that period of time, both of those communities within the borough have developed in the sense that the homes have been built, people have occupied the housing, population has increased.

Q I assume by your response, you mean they've developed as proposed, the village neighborhood has developed as a village neighborhood and the estate neighborhoods have developed as estates?

A Correct.

Q So in effect you would agree with me that over the years there's been very little change in direction as far as development is concerned?

A Well, we would agree that there has been change in Far Hills. The estate area has changed in terms of homes are and have been built on 10-acre tracts or larger; and homes and businesses and industries have developed in the village neighborhood area consistent with the high density zoning and intense uses characteristic of the vil-

A Yes.

Q How would you classify the village neighborhood district in Far Hills?

A In terms of its market?

Q In terms of the standards I indicated. Is it oriented more toward the immediate needs of the community or is it designed to attract a much wider market as say a mall would, Short Hills Mall or what is anticipated in Bridgewater?

A I would characterize the shopping facilities, professional offices, other non-residential uses in the Far Hills neighborhood as neither obviously being comparable to a regional mall. However, I would also add that they do attract from outside the immediate boundaries of residents in Far Hills Borough. From Peapack-Gladstone, Bedminster sections of Bernardsville, Chester.

Q Is it fair to conclude then that it's more designed to meet the needs of the municipality of Far Hills than its adjoining municipalities?

A Correct.

Q Do you agree that the Somerset County Master Plan designates Far Hills primarily as low density in the estate area and more intense development in the village neighborhood?

A That's correct.

Q And the State Guide Plan does what?

A Designates Far Hills in two categories, one being growth area and one being limited growth area.

Q Is it somewhat similar to that proposed by the Somerset County Master Plan?

A Yes and no. As I interpret the definition of limited growth area, I think it would absorb or be seen as absorbing somewhat significantly more growth than the comparable definition for that same area in the Somerset County Master Plan.

Q What are the parameters of the growth anticipated in each? Take the Somerset County Master Plan.

A The Somerset County Master Plan designates the majority of Far Hills as rural settlement which would involve and is mentioned in the county plan as accommodating large acreage zoning. The State Development Guide Plan is limited growth area which they indicate may grow at a moderate rate pace and may serve as a reservoir for future development. So I would say there is a nuance of difference in that the State Development Guide Plan may envision moderate pace growth or a reserve for future development in the lower density areas whereas Somerset County Plan sees it as a low density residential area.

Q Essentially that's what page 10 of your report indicates?

healthy as townhouses.

Q As marketable as townhouses?

A Depending upon the lot sizes, yes, and the sale price of the improvement.

Q Did you make a study or did your report include an analysis of projected price ranges for townhouse units on the subject premises?

A No. The report does not address that.

Q Do you have any opinion as to an appropriate range of prices for such units on the subject premises?

A No, I do not.

Q Do you have any knowledge of what townhouse units sell for in the Somerset Hills area?

A They range anywhere from $120,000 up.

Q Do you know of any area in Somerset Hills where townhouses are selling for less than $120,000?

A I haven't made a study of that specifically. I was dealing mainly in ranges. It could be 20 percent on either side of $120,000 either direction.

Q Do you have any knowledge of any townhouses in the Somerset Hills area selling for less than $120,000 per unit?

A I don't know.

Q Are you familiar with projected construction in Bedminster?

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY
DOCKET NO. L-2377-80

AMC REALTY COMPANY, a partnership organized under the laws of the State of New Jersey, and SKYTOP LAND CORP., a New Jersey corporation,

Plaintiffs,

vs.

THE TOWNSHIP OF WARREN, a Municipal Corporation of the State of New Jersey,

Defendant.

Stenographic Transcript of Opinion

Place: Somerset County Courthouse
Somerville, New Jersey

Date: May 18, 1982

BEFORE: THE HONORABLE ARTHUR S. MEREDITH, J.S.C.

TRANSCRIPT ORDERED BY:
JOSEPH E. MURRAY, ESQ.
JOHN E. COLEY, JR., ESQ.

A P P E A R A N C E S:

MC DONOUGH, MURRAY & KORN, ESQS.
BY: JOSEPH E. MURRAY, ESQ.
Attorney for the Plaintiffs

KUNZMAN, COLEY, YOSPIN & BERNSTEIN, ESQS.
BY: JOHN E. COLEY, JR., ESQ.
Attorney for the Defendant.

Charles R. Senders, C.S.R.
Official Court Reporter
Somerset County Courthouse
Somerville, New Jersey 08876

affirmative action by the Township of Warren in retaining jurisdiction in the meanwhile.

THE COURT: This is a suit brought in lieu of prerogative writ challenging the constitutional validity of the zoning ordinance of the Township of Warren, on the grounds set forth in the landmark opinion of Mt. Laurel.

The plaintiffs are owners of certain property. One of the plaintiffs, an owner of a 90-acre tract located in a residential-rural section of the Township which provides residences of a minimum of acre and a half. The other plaintiff owns about 214 acres.

Both of these properties located in the northwestern corner of the Township, which is zoned ECR, which is known as the environmentally critical-rural area.

Which also provides for a zone, a residential use within certain

limitations with a minimum lot size of one-and-a-half acres.

The zoning ordinance of the Township of Warren provides for the two zones that I have just mentioned, residential. It also provides for an R-20 zone of 20,000 square feet, or roughly a half an acre.

However, the R-20 zone appears from the testimony to be substantially developed and there are no or few vacant lots available in that zone.

Evidently, there is also an R-10 zone, which I am not quite clear from the testimony, whether that still exists. I believe it does not still exist except as a non-conforming use. Zoning districts don't indicate any R-10 zone.

Nowhere in the Township is any provision made for density higher than one-and-a-half acres or the R-20 zone with half-acre.

For all intents and purposes,

that is not available for development, because it is entirely built up.

The first question to be addressed by the Court is the question of the criteria set forth in the Mt. Laurel opinion, to determine whether or not a community is a developing community.

There are six such criteria. The first criteria is that of large gorss acreage. Evidently, the defendant-Township concedes that Warren qualifies in that regard. That it is about 19.3 square miles of land area as compared to Mt. Laure, which was approximately 22 square miles, or approximately the same.

So, there is no question that in that criteria, that criteria is met in determining whether the Township is a developing community.

The second criteria is the location outside the central city and built-up suburbs. Again, the defendant does not really contest this

classification or this criteria. Certainly, Warren Township is not in a central city, it is outside of the central city. The nearest central cities may be said to be Plainfield or Newark.

It is outside also the suburban, the well-developed suburban areas of Essex County and Union County.

Therefore, there is no question that the second criteria is met in the determination of whether or not Warren Township is a developing community.

The third criteria is loss of rural characteristics. Defendant contests this to some degree. Then he has testimony from the tax assessor of the Township of Warren to the effect that back in 1972 there were 53 farms with a total of 1,920 acres. Those farms so assessed as farmland for assessment purposes. That in 1982, that 1,920 acres have increased to roughly 2,500 acres and roughly 87

farms.

The Court feels that is not really determinative of the amount of acreage involved in the farmland so assessed.

The Court is aware that certain farms are farmed primarily not for the purpose of real farming, but for the purpose of taking advantage of tax breaks which the farms can get.

The Court had an opportunity this afternoon to view the entire, almost Warren Township. The Court recalls very well having seen it many years ago, maybe not this well for some 10 or more years.

But certainly, it is losing its rural characteristics with the development of Chubb & Sons, with the development of other commercial establishments, with the development of residential properties, evidently the new ones $200,000 or more, the development of

three years ago of a shopping center.

The Court is satisfied beyond any doubt that Warren Township is in the course of losing its rural characteristics.

Number four is the criteria of experiencing great population increase.

The Court again, regardless of the defense claim that it is not that great an increase, feels that Warren Township, and finds that Warren Township, is experiencing a great population increase.

Between 1960 and1970, Warren Township increased a total of 59.5 percent. Its population in 1960 was 5,386 and grew in 1970 to 8,592. The 1980 census indicates the population is 9,791, or 100 percent growth since 1960.

Although the growth in the last 10 years was not as much as originally predicted by the Planning Board, the County Planning Board, growth has still

been substantial. Particularly, in the period when a certain amount of economic recession occurred, as far as the growth of the housing industry is concerned.

In addition, the factor pointed out by Mr. Coppola, the planner who testified for the plaintiff, that are family sizes have decreased from 3.4 per family to 2.9 per family.

The Court is satisfied, again, that this criteria of population increase has also been met.

Fifth, the criteria of not substanitally developed and having significant parcels of vacant developable lands.

When this Court asked the planner, Mr. Chadwick, the planner for the Township, whether in his opinion Warren Township was a developing community, he said that, well, technically no, on the grounds that he finds that only 1,160 acres are available for growth because of the

environmental constraints.

He actually gave no reason why he would say no as far as any of the rest of the criteria is concerned.

The Court has had testimony on both sides of this controversy that there are about 4,500 developable vacant acres in Warren Township.

There is some disagreement and conflict in the testimony of how many of those acres are readily available and readily suitable for building.

Again, Mr. Chadwick says 1,160 acres that are not environmentally encumbered out of that 4,500 acres.

I think his estimate is extremely low. The testimony of Mr. Coppola is that it is considerably more than that. Certainly, the environmental constraints can be built around.

The Court is satisfied that there are substantially significant parcels of vacant developable lands

remaining to be developed. Therefore, the fifth criteria is also established by the plaintiff in determining whether or not this community is a developing community.

The final criteria is the location in the path of inevitable growth. Again, I don't think the defense has in any way challenged that it is not in the path of inevitable growth.

We have the growth of Route 78, which now is going to be completed within a few years, running directly from New York to Easton, Pennsylvania. It runs through the northern boundary of the Township.

It is already attracting Chubb & Sons with a large facility upwards to a half a million square feet of office space.

There is testimony in addition to that, AT&T has also purchased a large tract along 78. Undoubtedly, with 78 and with 287,

not running directly through this Township but close by, 287 running north and south and Interstate Route 78 running east and west, let alone other major highways such as Route 22, which is in close proximity, and which have been developed more down toward this area, and it is further being developed further westward in Hunterdon County.

The Court is satisfied without any doubt whatsoever that this criteria is also met.

Therefore, this Court finds that in accordance with the criteria set forth in the Mt. Laurel case, Warren Township is a developing community.

The question then comes whether Warren Township has provided its fair share of low and moderate-income residences.

It is again obvious that it has not. There is not a single zone allowing any multiple-family dwellings.

For all intents and purposes, there is no zone allowing anything more dense than a one-and-a-half-acre lot.

In addition to that, not only has the planning expert of the plaintiff testified that Warren Township is exclusionary in its zoning and has not provided toward its fair share and has estimated that according to State projections or based upon State projections for the region and his computing of a region for Warren Township, based upon employment in and out of the Township of five counties; namely, Morris, Somerset County, Union County, Middlesex County, and Essex County, that the fair share would be 431 units of a moderate and low-income range.

When this Court asked Mr. Chadwick, the planner for the Township, whether he thought, without giving a figure of number of units, that Warren Township was providing its fair share of low and moderate-income

housing, he said no, agreeing actually with the planner offered by the plaintiff.

The Court, therefore, finds that the zoning has been exclusionary, is exclusionary, pursuant to the principles set forth in the Mt. Laural case.

That Warren Township has failed to provide housing for the low and moderate-income group and, for that matter, eventthe least costly, or in an area between the low and moderate-income group.

The Court, therefore, finds for the plaintiff. The Court orders the Township of Warren to rezone pursuant to the criteria of Mt. Laurel and pursuant to which this Court has stated during the course of its opinion.

The Court will not order specifically, however, that the plaintiffs' properties be so rezoned at this point. Although the Court

has heard some testimony indicating the appropriateness for higher-density zoning in the plaintiffs' properties, the Court tends to agree with that, but the Court has not really reviewed in any great detail any other portions of the Township of Warren which may also be suitable for higher-density zoning.

The question might further be, what density does the Court provide and is the Court going to do rezoning here. The Court is not going to do so at this time.

However, the Court will retain jurisdiction in this matter and will order the Township of Warren to rezone. The Court will give the Township a period of nine months within which to comply with that order and to present back to this Court at that time for the Court's approval to determine whether or not the requirements of Mt. Laurel have been met.

All right. The plaintiff may

submit the appropriate order.

MR. MURRAY: Thank you, Judge.

THE COURT: I may say, as you realize, I started to ad lib this opinion. That in the event there were to be an appeal, I would probably write a more detailed form opinion.

So in the event that you are going to do so, I would appreciate a letter to that effect.

MR. COLEY: Thank you.

(Whereupon, the matter is concluded.)

Q Would you turn to page 14 of your report? You indicate that the posture of a community whether it's fully developed or in the process or not developed is unrelated to the need for housing and the obligation to provide a balanced housing supply. Is that a fair statement?

A That's correct.

Q Is it your conclusion that in spite of Mt. Laurel all municipalities have the obligation to provide their share of balanced housing?

A That's correct. I think there are what I call three pillars to planning and zoning as I see it. One important pillar is the needs of society and I think that the housing needs of society cannot and should not be absorbed by those communities which are identified as developing. Obviously Newark is not a developing municipality in the classic Mt. Laurel sense but there are housing needs that have to be satisfied in Newark. You might say that a rural township near the Delaware may also have housing needs, housing needs for which migrant workers, farm workers or housing needs for just the expanding population regardless of a suburbanizing pressure for housing needs. I think each community has to examine what's happening with its own borders and what's happening in communities immediately around it and make

A Yes, I did, sir. But again, I'm sorry but I just don't have it -- I brought this report but I didn't bring the backup statistical materials that I had.

Q You made the analysis in respect to this particular case or some other case?

A It was done with this case with materials that I had accumulated in another case also.

Q Would you be referring to Timber Properties case?

A Yes.

Q You concluded on page 10 of your report that the subject premises would not be suitable for 10-acre zoning. Is that correct, sir?

A Yes.

Q Are the abutting properties to the north and to the east suitable for 10-acre zoning?

A Are you referring to the properties along Sunnybranch Road?

Q Indeed, along Sunnybranch Road.

A Those properties are currently developed as single-family.

Q You feel that's appropriate?

A Those that are not fronting on the railroad and on Route 202, yes.

Q Could the subject premises be suitably

developed for 10-acre zoning assuming that there was a two-lot deal?

A No. In my opinion it would not be apropos.

Q Would that apply to both of the proposed two lots or to one?

A To the parcel.

Q What would be the adverse impact or any adverse elements as far as the proposed lot that one might create not fronting on Route 202? What would be the adverse elements as far as developing that parcel of 10-acre zoning?

A There would be -- I don't know how it would be subdivided. I don't know what the remaining lot -- whether the non-conforming lot its frontage on Route 202 would be disadvantageous. Its depth would be extremely shallow in comparison to the traditional lots. Its overall land scheme adjacent to the residential parcel that you're alluding to would not be apropos -- I just don't see even a simple subdivision creating any type of economic unity to this particular parcel other than one use.

Q In spite of the fact that one would create two nine-acre parcels, you don't find that development of those two parcels single-family use would be appropriate?

A That's correct, sir.

Q And among the factors for your conclusion

are proximity to Route 202; correct?

A Yes, sir.

Q Proximity to the railroad?

A Yes.

Q Any other factors?

A The proximity to the train station and also the overall lot in comparison to the commercial establishment in Far Hills and the overall shape of the parcel.

Q Do any of the other lots that are developed share any of those deficiencies?

A None of the lots that are developed are as irregular as the subject parcel. None of the lots are as shallow as the subject parcel. None of the lots front on Route 202 as does the subject parcel. None of the lots back up to the train station as does the subject parcel.

Q Mr. Brody, do you really need an excess of 1,000 feet of depth for a single family residential lot in this area?

A Do you really need it? Some people would think so; others would think not.

Q Relating that depth to this area, to this location, you are telling me you can't locate a one-family house on two nine-acre tracts sufficiently positioned with screening, et cetera, to avoid the adverse impact from the factors you indicated?

A Yes, sir.

Q Yet on the other hand one can appropriately locate, nestle within the tract multi-family zoning can avoid the adverse impact from the factors you indicated. Is that correct, sir?

A No. You're talking about two potential nine-acre parcels in an area where those homes would supposedly conform to the economics of the surrounding homes. And in order to do that appropriately, it's my opinion that you couldn't do it based upon the physical characteristics of those two potential lots; but you could screen very appropriately townhouses based upon a normal density, traditional density and still maintain the integrity of the neighborhood.

Q If I understand what you said, in regard to the single-family home development of potentially two lots, there was an adverse impact from the adjacent village business zone, from the proximity to 202, shape of the lot. However those factors could be overcome if you develop for multi-family use; is that what you said?

A You're dealing with different dollar economic improvements.

Q Relate your response solely to the question which I asked. You told me initially that there would be difficulty or an adverse impact if one were to develop

the subject premises for single-family dwelling use, i.e., dividing the tract into two parcels and nestling two houses -- one house on each parcel. The factors you indicated to me were proximity to 202, depth of lot, proximity to the railroad, proximity to the village business zone. You also told me that you can however develop the tract for multi-family use and avoid any adverse impact from those same factors. Is that true?

A I believe I also stated in there based upon the dollar economic values of the homes in the area takes on a critical aspect in the conclusion.

Q How would you expand upon that for me, please?

A The latest home to sell on Sunnybranch sold for approximately 385 plus or minus thousand dollars. To maintain the continuity of a single-family home on that block, it's my opinion that the individual developing a home on a 10-acre or nine-acre parcel would not attempt to put a $45,000 house on that piece. Economically it's not an appropriate thing to do neighborhood-wise. It's very inappropriate and economically infeasible to do. Therefore the type of home that would traditionally be built on that parcel would in most likelihood conform to the homes in the area for a three, four, $500,000 home. That type of home in my opinion would not be appropriate for