Old Bridge — (1987)
Answering Brief + "Policy Analysis"
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August 7, 1987

VIA LAWYERS SERVICE

Mr. C. Roy Epps, President
Civic League of Greater New Brunswick
47-49 Throop Avenue
New Brunswick, NJ 08901

Dear Roy:

Enclosed please find copies of O&Y's Answering Brief and a "Policy Analysis" of the Hintz Report prepared by Reilly Land & Environment, Inc.

Sincerely,

Barbara

encls

cc/Payne, Neisser, Mallach

Pat, Barbara, Diane (brief only)

BRENER WALLACK & HILL
210 Carnegie Center
Princeton, New Jersey 08543
(609) 924-0808
Attorneys for Plaintiff

HANNOCH WEISMAN, P.C
4 Becker Farm Road
Roseland, New Jersey 07068
(201) 531-5300
Co-Counsel for Plaintiff

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, v. THE MAYOR AND COUNCIL of the BOROUGH OF CARTERET, et al., Defendants, and	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX COUNTY DOCKET NO. C-4122-73
O&Y OLD BRIDGE DEVELOPMENT CORPORATION, a Delaware Corporation, Plaintiff, v. THE TOWNSHIP OF OLD BRIDGE in the COUNTY OF MIDDLESEX, a Municipal Corporation of the State of New Jersey, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE, THE MUNICIPAL UTILITIES AUTHORITY OF THE TOWNSHIP OF OLD BRIDGE, THE SEWERAGE AUTHORITY OF THE TOWNSHIP OF OLD BRIDGE and THE PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY/ OCEAN COUNTY (Mount Laurel II) DOCKET NO. L-009837-84 P.W. Civil Action PLAINTIFF O&Y OLD BRIDGE DEVELOPMENT CORPORATION'S ANSWERING BRIEF TO DEFENDANT'S MOTION TO REOPEN SETTLEMENT

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MISCELLANEOUS

INTRODUCTION

This brief is submitted in response to Old Bridge Township's motion to reopen the settlement achieved and approved by this Court on January 24, 1986 after a full compliance hearing. The Township's motion is of grave import, both to the lower income housing population which would be served by the settlement and to the interests of the two developers, O&Y Old Bridge Development Corporation (hereinafter "O&Y") and Woodhaven Village, Inc. (hereinafter "Woodhaven").

If the Township were to receive the relief it seeks, it would be relieved of any obligation to construct lower income housing during the period of repose. The properties owned by O&Y and Woodhaven, which have had economic value attached to them as a result of the zoning established by the court settlement, would be vulnerable to a rezoning at very low densities.

From an historical perspective, the Township's pending motion creates a sense of deja vu. As early as 1971, during the formative stages of the emerging Mt. Laurel doctrine, Old Bridge (then known as Madison Township) strenuously urged the court to rule that considerations of flooding, drainage and a desire to protect underground water supplies provided a rationale for the Township to escape any obligation to permit lower income housing. Oakwood at Madison, Inc. v. Tp. of Madison, 117 N.J. Super. 11, 17 (Law Div. 1971). Similarly, municipal fiscal concerns, such as encouraging nonresidential ratables and avoiding increased municipal service costs as a result of higher density housing, were asserted as putative defenses to inclusionary zoning. 117 N.J. Super. 15, 18. Both claims were rejected by Judge Furman as insufficient grounds to skirt the Township's constitutional duty to facilitate housing for all sectors of the regional community.

The Supreme Court affirmed the findings and holdings of the trial court, specifically addressing the sharply limited availability of environmental defenses:

> "Ecological and environmental considerations were also advanced by the municipality in Mount Laurel to justify large lot zoning throughout the township. We point out there that while such factors and problems were always to be given consideration in zoning (see 3 Williams, American Land Planning Law §66.12, pp. 30, 34-35 1975), 'the danger and impact must be substantial and very real (the construction of every building or the improvement of every plot has some environmental impact) — not simply a makeweight to support exclusionary zoning measures or preclude growth***'. 67 N.J. at 187" Oakwood at Madison, 72 N.J. 481, 544-545 (1977).

Furthermore, the Supreme Court expressed its impatience with the failure of this municipality to respond both timely and adequately to the demands of the law. The court ordered very specific directive relief to be carried out "with the reasonable dispatch appropriate to the age of this litigation:"

> "Consideration bearing upon the public interest, justice to plaintiffs and efficient judicial administration preclude another generalized remand for another unsupervised effort by the defendant to produce a satisfactory ordinance. The focus of the judicial effort after six years of litigation must now be transferred from theorizing over zoning to assurance to the zoning opportunnity of least cost housing." 72 N.J. at 552-553.

It is indeed ironic that a full decade later, after multiple judgments invalidating the municipality's zoning, there is still no resultant low income housing. The Township continues to fence and parry and to assert the selfsame manner of "defenses" it unsuccessfuly presented sixteen years ago. There has been no tangible result from the multiple court directives.

The strategy of the Township is clear. It does not seek a modification of the judgment predicated upon newly known facts. Rather it intends, if successful on this motion, to move for a transfer before the Council on Affordable Housing in order to claim a zero lower income housing obligation (see Plaintiff's Exhibit M, previously provided to the Court as Defendant's Exhibit A-12). The effect would be to render the many years of litigation, expenses, study and analysis, and repeated court orders a nullity.

The true reasons for the unwillingness and arrant failure of the Township of Old Bridge to abide by clear directives of the courts over the past decade and a

half may never be clearly laid before this Court. They lie in the shifting sands of the local political will and are obscured by different rationales espoused by different planners, public officials and their attorneys over the many years. However, the result of these efforts from the Township's perspective has been successful. The Township has successfully avoided the actual construction of lower income housing. If this motion is granted, they will succeed once again. The New Jersey Supreme Court has addressed this failure to build lower income housing directly. In its discussion of the case of Urban League of Greater New Brunswick v. Borough of Carteret, 142 N.J. Super. 11 (Ch. Div. 1976), as part of the overall consolidated Mount Laurel cases, our Supreme Court held: "If, after eight years, the judiciary is powerless to do anything to encourage lower income housing in this protracted litigation because of rules we have devised, then either those rules should be changed or enforcement of the obligation abandoned." So. Burlington County N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 341 (1983). We believe that the reasoning of the Supreme Court is fully as sound today as it was in 1983.

FACTUAL AND PROCEDURAL BACKGROUND OF THE PRESENT CASE

O&Y has litigated with Old Bridge Township in order to protect its rights, and has had the experience (similar to that of others seeking to build affordable housing) of entering into "settlements" with the Township which achieve no demonstrable effect. O&Y originally brought suit in 1981 alleging that the Township's zoning ordinance and application procedures precluded the development of its property. This litigation was resolved by the Township's approval of 10,260 residential units for O&Y's project, with the understanding that procedures were to be adopted by the Planning Board and the Township governing body immediately thereafter.

Despite the 1981 agreement, the procedures were not adopted by Old Bridge Township until mid-1983. This torturously slow legislative process was followed by the Planning Board's refusal to approve the General Development Plan in December 1983, despite months of hearings and reams of testimony. O&Y's 1984 lawsuit was then filed. This case was settled after extensive negotiations among the parties under the supervision of the Court-appointed Master. All parties "fully settled" all issues, including those concerning affordable housing. The settlement was entered by this Court on January 24, 1986, following a full-scale compliance hearing, which denied the Township's motion to transfer. The Township did not appeal that denial.

A. Summary of Events: January 24, 1986 — July 30, 1987

1. Pursuant to the judgment, both O&Y and Woodhaven submitted project plans and expert reports to the Old Bridge Township Planning Board in February, 1986. Reports submitted by both Sullivan/Arfaa (O&Y's planning consultant) and Wallace Roberts and Todd (Woodhaven's planning consultant) contained clear statements that the planning reports and the expert reports were not part of, nor did they supersede, the Court Order or the Settlement Agreement. These reports were the beginning of an interactive Planning Board process, designed to refine proposed development concepts and respond to public inquiry as a result of the implementation of the Settlement Agreement.

2. The Old Bridge Township Planning Board commenced hearings on the Settlement Plans on February 18, 1986 for O&Y and on March 11, 1986 for Woodhaven.

3. The procedures for the hearings were as set forth in a letter provided by the Planning Board Attorney, dated February 13, 1986, and attached hereto as Plaintiff's Exhibit A. That letter referenced several specific concerns which the Planning Board wished the applicants to address. Wetlands were not included in the list.

4. By letter dated February 20, 1986, Mr. Norman contacted the U.S. Army Corps of Engineers (hereinafter "ACE"), to inquire if the ACE was aware of any wetlands on the O&Y site. Mr. Norman provided O&Y with a copy of the letter. (Plaintiff's Exhibit B).

5. O&Y, which had not prepared detailed site-specific investigations of its land, but had relied on the Township's Natural Resource Inventory (which zoned certain areas of the Township as "WS" or Wetlands/Water Supply areas), the National Wetlands Inventory Map (hereinafter "NWI") (prepared by the U.S. Department of the Interior), and on a permit granted by the ACE in 1979 (Plaintiff's Exhibit C), immediately took steps to further examine the wetlands issue. See Affidavit of Lloyd Brown, Executive Vice President of O&Y attached hereto as Plaintiff's Exhibit D.

6. On March 18, 1986, O&Y's second hearing took place. In view of the questions which had been raised, O&Y focused on the wetlands issue. This meeting was summarized in a letter to the Court sent by the Planning Board attorney dated March 19, 1986, and attached hereto as Plaintiff's Exhibit E.

7. Old Bridge Township then acquired the services of Drs. Norbert Psuty and Charles Roman of the Rutgers University Center for Coastal and Environmental Studies. O&Y fully cooperated with Professors Psuty and Roman, specifically providing them with aerial photographs and full access to the site.

8. Professors Psuty and Roman reported on April 21, 1986 that while O&Y had faithfully depicted all of the wetlands shown on the NWI, there were other areas within the site, not shown on the NWI, which appeared to be wetlands. Rather than go forward on the basis of incomplete data, O&Y immediately requested a suspension of the Planning Board hearings and initiated a full-scale investigation of the wetlands on the site. (See Exhibit D.)

9. While the wetlands investigation was proceeding, O&Y continued to work with community groups to establish appropriate locations for fire stations,

schools and public facilities (Plaintiff's Exhibit F); continued to work with the New Jersey Housing and Mortgage Finance Agency and the Township with respect to the construction of a 150 unit senior citizen housing project; and continued to work to provide adequate supplies of water and sewer to the site. O&Y and Woodhaven provided funds requested by the Township for the Affordable Housing Agency (Plaintiff's Exhibit G), and sought and received approval from the Old Bridge Township Planning Board for a subdivision of land for the senior citizen housing project (Plaintiff's Exhibit H).

10. As noted in Exhibit D, the delineation of the wetlands was extraordinarily time-consuming because of the size of the site and the pattern of the wetlands. Ultimately, a survey line of some sixty-five miles in length was established, most of it involving a trek through dense bush. O&Y worked as quickly as possible to delineate the wetlands areas and to obtain the concurrance of the ACE as to the extent of their jurisdiction. As soon as the line was established, O&Y provided copies of the wetlands delineation map to the Township and to the Court-appointed Master.

11. On December 30, 1986, the Township made a Motion to re-open the Settlement.

12. On January 30, 1987, at the request of the Court-appointed Master, O&Y and Woodhaven presented plans to the Township showing some options concerning the impact of the wetlands on development potential for both sites.

13. Old Bridge Township is now revising its Master Plan, the initial draft of which now shows O&Y's property at a density of one dwelling unit per 5 acres. (Plaintiff's Exhibit I).

14. In March, 1987, the Township's representatives raised issues concerning Carla Lerman's continued performance in her role as court appointed master for Old Bridge Township.

15. A telephone conference call took place among the parties and the court on May 22, 1987. During the course of that telephone conference call, the judge suggested that the parties meet to see if they could work out their differences.

16. On May 26, 1987, the parties did meet and reviewed the status of the case. Potential settlement proposals were developed with the assistance of the court appointed master. They were proposed for consideration before the Old Bridge Township Planning Board on the evening of May 26 and the Township Council on the evening of May 28.

17. Counsel for the Planning Board and the Township informed the other parties that the proposals were rejected by their clients; and that the Township would seek the dismissal of the court appointed master.

18. On May 31, 1987, the court appointed master, Carla Lerman submitted her resignation to this court.

19. On June 4, 1987, the Army Corp. of Engineers informed O&Y that the ACE accepted its delineation as valid (plaintiff's Exhibit J).

20. On June 25, 1987, at a hearing before this court, a return date for the Township's motion was set; a briefing schedule was established; and George Raymond was appointed as master.

B. Summary of Positions

The Township's position, as set forth in briefs and certifications supplied by the Township can be summarized as follows:

1. The "bargain" struck with O&Y is defective because:

i. The project is undevelopable. Not only is there a sizable amount of wetlands on the O&Y site, but the pattern of the wetlands is so fragmented that there will only be scattered upland areas capable of being developed.

ii. This development pattern means that O&Y will not be able to deliver the promised ratables, the independent road network, or the other benefits the Township was seeking, including the sewer and water system.

iii. Further, the Township thought it was getting a quality development with such " upscale" features as a golf course. What it will get instead is pockets of high density garden apartment-type development surrounded by swampland.

2. The Township settled for too many units of lower income housing.

i. O&Y (and Woodhaven) will never be able to deliver the quantity of lower income housing that the Township thought they would, due to wetlands.

ii. The Council on Affordable Housing (hereinafter "COAH") found that the Township's "precredited need" for lower income housing totaled 441 units, whereas the settlement required approximately four times as much--1668 units.

iii. The reopener clause gives the Township the right to reduce the number of lower income housing units.

3. O&Y should have known, and perhaps did know, about the wetlands.*

i. The Township was assured that a small percentage of the land area was undevelopable due to wetlands.

ii. There is some indication that O&Y had some knowlege of the wetlands, as evidenced by its correspondence with the ACE.

iii. O&Y should have revealed its concerns to the Township prior to settlement. Since it failed to do so, the Township should be entitled to void the settlement.

O&Y's position is as follows:

1. The O&Y project remains highly developable.

i. The plan shown to the Township on January 30, 1987 indicates that: more than 830 acres are accessible upland areas and are developable as a residential area; O&Y remains committed to delivering commercial ratables in tandem with the residential units; sewer and water systems are being developed and will be delivered to the Township, either directly by O&Y, or in cooperation with the Municipal Utility Authority; and the road system will be upgraded, as necessary, to meet the demands of the traffic which O&Y will place upon it.

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* In the most recent submission to the Court, the municipal defendants have again shifted position and appear to have abandoned this argument. Nonetheless, in order to permit this Court to have a full record of the background facts and circumstances, O&Y will set forth the relevant facts. See especially plaintiff's Exhibit D.

ii. Recreation facilities will be supplied, as necessary to meet the market demands of the future homeowners. The development remains a multi-use, varying density project. Further, all development set forth would take place with net densities no higher than those proposed in the original settlement.

iii. In effect, the Township receives the benefits inherent in a mixed use development, with a variety of different housing types, albeit at a substantially reduced scale from the 1986 plan. The plan also incorporates a 10% set aside, so that the Township continues to receive lower income housing, constructed in tandem with market rate housing.

2. The Township's contention that it settled for "too many units" of affordable housing is addressed more fully in the legal argument which follows. O&Y points out that the Township freely entered into a settlement of this dispute. The settlement would have protected the Township in the event that the COAH number went up and protects the lower income housing population in the event that the COAH number went down. Further, the Urban League recognizes that the interests of its clients -- persons seeking affordable housing in the region — are best served by having the project get under way, and have indicated that they will accept a performance-based target that yields 10% of whatever housing is built by O&Y and Woodhaven (and all other developers in Old Bridge), as opposed to having rigid adherence to an unrealistic goal. If a performance-based goal is acceptable to the court, then a major portion of the Township's argument is eliminated.

3. O&Y's contention about the history of its involvement with wetlands and its position vis-a-vis the ACE is set forth in Mr. Brown's Affidavit (see Exhibit D). O&Y contends that it had no knowledge of the extensive nature of the federally regulated wetlands on its property prior to the settlement; that it was under no affirmative duty to undertake the extensive investigations (which followed the

settlement) prior to reaching that settlement; and that the wetlands issue should not be used as a device for the Township to evade the obligations it voluntarily entered into via the settlement.

4. O&Y acknowledges that there are differences between the original plans discussed with the Planning Board and the current thinking. Some observations are pertinent here:

a. Ownership of property implies the right to use that property for some economic gain. Since it came into ownership of the property in 1974, O&Y has not made productive use of the property, and has been in a series of negotiations with the Township concerning appropriate future use of that land. O&Y attempted to develop its property in accordance with the various ordinances which were in effect at the time. None of the various proposals have received the approval of the Township planning board.

b. The development process is a risky business, as the Supreme Court, has indeed observed (103 N.J. 1986). Circumstances change, the market shifts, new rules and constraints are imposed upon the developer. These shifts may mean that a specific form of development may not take place; but they should not mean that the property becomes undevelopable because of local preference for one form of development as opposed to another.

c. At all times in the development process, all parties - including the Township - have been aware that local approvals, in and of themselves, are not sufficient to permit the project to go forward. Other units of government also have approval power over various aspects of the development. All parties have been aware that grants or denials of governmental permits can affect the ultimate outcome of the project. Jurisdiction over development in wetlands lies within the ACE, not the Planning Board. Even if the original plan had been approved by the Planning Board in 1986, development within the wetlands would have been impossible without an ACE permit.

d. Development of the site is not impossible, but may require permits. O&Y contemplates obtaining a permit from the ACE to dredge, fill or otherwise alter a portion of the wetlands. As the affidavit from Steven Gray, Esquire shows (Plaintiff's Exhibit K), work is underway to obtain ACE permits at the present time. If those permits are obtained, most, if not all, of the commercial development contemplated in the settlement will be built. In the event that the permits are not obtained, then the linkage provisions in the January 1986 settlement--which provided that commmercial development would proceed in tandem with residential development -- can be addressed at that time.

e. The Planning Board will have continuing review powers over specific development applications, and can condition grants of approval of specific subdivision and site plans on performance by the developers of reasonable conditions, such as access, provision of utilities, etc.

f. This was always contemplated to be a long-term project, with a buildout to take place over twenty years. No one connected with the development thought it could be developed in accord with a plan devised in 1986. This is why the Settlement Agreement was general in scope and lacking in detail. The current wetlands regulatory picture is evolving. No one can predict what kinds of additional regulations, permit procedures, or other conditions (including the risks which developers face from the marketplace) will pertain to the O&Y site in 1990, 1995 and beyond.

g. The Township has postulated a series of objections to the development, largely based on a report prepared by Carl Hintz. This report, while legally irrelevant, has provided a "hook" on which to hang the Township's current objections to O&Y's current proposals. Mr. Hintz's report is replete with many errors of fact and interpretation. We find it necessary to address them and will demonstrate that they are of no greater significance then the other defenses alleged by the Township over the course of the past

thirteen years during which O&Y has owned its property (and over the past sixteen years during which the concept of affordable housing has been litigated in Old Bridge Township).

If the settlement agreement is examined carefully, it can be seen that O&Y is ready, willing and able to meet the essential obligations set forth within that agreeement. There is no doubt that the wetlands have affected O&Y's ability to achieve the buildout it hoped for in 1986. However, the impact of the diminution of the buildable area has its major impact on O&Y, not the Township.

O&Y continues to contemplate the construction of a mixed use project, with various types of housing, commercial, and industrial facilities, at densities no greater than those contemplated in the original agreement. The project includes a 10% set-aside of affordable housing with phasing of both housing and commercial ratables in accordance with the phasing schedule set forth in the agreement. The project proposed in 1986 would have provided important public benefits, both to the Township and to people needing affordable housing. These benefits will be available as soon as the project delivers the housing which Old Bridge Township seeks to forestall once again.

One current theme in the Township's papers is a fear that O&Y will place the same number of housing units on the smaller amount of buildable land. (See Township's Exhibit, Affidavit of Joan George, para. 12). While in no way obligated to do so under terms of the agreement, O&Y intends to reduce the number of housing units consistent with the reduction of buildable land. Development of the site will be in accordance with the building standards established in the agreement.

It is anamolous that the Township of Old Bridge, which has consistently and vigorously fought this development because of its "size and scale" and which has vigorously resisted any Mount Laurel housing over the years now seems to be asserting that the settlement should be set aside because there will not be built a huge "new town" and because there will not be enough Mount Laurel housing.

LEGAL ARGUMENT

POINT I: RULE 4:50 DOES NOT PROVIDE APPLICABLE GROUNDS TO REOPEN THIS CASE

A. Mistake As To The Extent Of Wetlands Is Not Grounds Under Rule 4:50-1(a) For Relief From A Consent Judgment.

Defendant Planning Board contends that the settlement should be set aside because the amount of wetlands on O&Y's property may exceed that contemplated by the parties at the time of the settlement. The Planning Board claims that the parties' "mutual mistake" as to the true extent of the wetlands justifies relief from the judgment under Rule 4:50-1(a). The Planning Board's original brief and supplementary materials are nearly devoid of supporting legal authority. The cases which are cited do not support the Township's position. In fact, the cited cases flatly contradict it. For the convenience of the court, we provide the following discussion of our understanding of the law in this matter.

Rule 4:50-1 provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances. Baumann v. Marinaro, 95 N.J. 380, 393 (1984). Courts are especially reluctant to set aside consent judgments because they are contractual in nature. Stonehurst at Freehold v. Township of Freehold, 139 N.J. Super. 311, 313 (Law Div. 1976). The parties bargain and accept risk in order to an end to litigation. They engage in and conclude settlement negotiations "precisely because there is uncertainty as to the extent of injuries or liability or both, and because of the uncertainty as to the outcome of ensuing litigation." Reinhardt v. Wilbur, 30 N.J. Super. 502, 505 (App. Div. 1954).

In appropriate cases, Rule 4:50-1(a) permits the court to relieve a party from a final judgment or order for "mistake, inadvertence, surprise, or excusable neglect." To be grounds for relief, the mistake must relate to a material fact, such

as the nature or diagnosis of a condition that is the subject of litigation. Spangler v. Kartzmark, 121 N.J. Eq. 64, 68 (Ch. Div. 1936). A mere mistake as to the extent or seriousness of a known condition is not sufficient. Raroha v. Earle Finance Corp., Inc., 47 N.J. 229, 233-34 (1966); Bauer v. Griffin, 104 N.J. Super. 530, 542 (Law Div. 1969), aff'd, 108 N.J. Super. 414 (App. Div. 1970), certif. denied, 56 N.J. 245 (1970).

In Raroha v. Earle Finance Corp., supra, the Supreme Court declined to set aside the plaintiff's release of a personal injury claim, even though a tingling sensation in the plaintiff's arm at the time of settlement eventually resulted in his inability to use the arm. The Court held that in the absence of a showing that the plaintiff was incapable of understanding the meaning of the settlement, "it is the law of this State that . . . [he] will be held to the terms of the bargain he willingly and knowingly entered." Raroha, 47 N.J. at 234.

A similar result was reached in Bauer v. Griffin, supra. When the plaintiff accident victim and his parents entered into a settlement for $125,000, plaintiff was comatose and all parties expected him to die from severe brain injuries sustained in the accident. He survived, but required continuous medical care for an indefinite period of time. The court refused to set aside the consent judgment, notwithstanding the substantial increase in plaintiff's damages as a result of the mistaken prognosis, because "there was no mistake regarding the nature of the injuries." Id. at 544. Any uncertainty as to the actual extent of the plaintiff's injuries was weighed by the parties in negotiating the settlement.

The court in Bauer said that, while considerations of fairness and justice are "lodestars without peer," they should not be permitted to supersede the "sanctity of final judgments" except in the most extraordinary cases.

> To permit judgments to stand or fall according to an examination in the bright noonday sun of hindsight invokes policy considerations far less meritorious than those which augur for finality by judgment. Finality of judgments and an end to litigation are said to be objects of public policy and sound jurisprudence. Paradise v. Great Eastern Stages, Inc., 114

> N.J.L. 365, 367-368 (E. & A. 1935); State by State Highway Com'r. v. Speare, 86 N.J. Super. 565, 585 (App. Div. 1965) . . . . [T]he subordination of finality in a judgment to considerations of the way things actually worked out seems warranted only for the most compelling reasons.

Bauer, 104 N.J. Super. at 545 (emphasis added). Accord, Baumann v. Marinaro, 95 N.J. 380, 395 (1984). We marvel that the Planning Board reads these cases as supporting its motion.

Defendants in the present case offer no reasons sufficiently compelling to set aside the judgment. There was no mistake as to the existence of wetlands on O&Y's property. The presence of wetlands was known to all parties at the time of settlement and was shown on both the Township's Natural Resource Inventory and on the federal National Wetlands Inventory map. The defendants had the option of conducting their own studies or continuing negotiations until an acceptable delineation was available. The risk of inaccuracies in measuring the wetlands, based upon available wetlands mappings and expert testimony, was assumed by the defendants in reaching an agreement with O&Y and Woodhaven.[1] The basis for the plaintiffs' allocations of open space were well-known to the defendants.

Indeed, in every sense of the word, O&Y has been victimized by the Township's procedures. In the 1983 Land Development Ordinance, the Township included the "WS" or wetlands and watershed protection zone. The Ordinance indicated that the district was based on the geomorphic flood plain defined by the Natural Resources inventory, performed by the Old Bridge Environmental Commission in December 1975. The WS zone lines were established by a competent environmental consultant, Dames and Moore, and were then translated to the zoning map, revised by the Township after careful consideration, and adopted in 1983. A portion of O&Y's land was designated as WS land, and was devoted to open space and conservation uses, as contemplated by the Township's Zoning Ordinance.

[1]The plaintiff also assumed the risk of uncertainty as to the extent of the wetlands. If subsequent mappings had revealed less, rather than more, wetlands than the settlement contemplated, would the defendants now be so eager to reopen the settlement? We think not.

Further, the Township had access to all aerial photography and mapping prepared by the Federal Government under the National Wetlands Inventory Process. Moreover, the Township had access to the 1983 General Development Plan submitted by O&Y as part of its plan of approval process. The environmental features of that plan had been carefully and extensively studied by a consulting firm under contract to the Township of Old Bridge. To further intensify the insult to O&Y, the court should be aware that the Township's examination of the 1983 plan was paid for by $102,000 provided to the Township by O&Y at that time. Thus, O&Y and the Township were dealing from a common pool of available information.

There was an extended period of time from the filing of the O&Y suit in 1984 to the date of settlement and there was a full hearing before this Court in 1986. The Township had ample opportunity to raise this issue and failed to do so at any point.

B. Plaintiffs Fail To Cite Any Newly Discovered Evidence Sufficient To Justify Relief Pursuant To Rule 4:50-1(b).

The defendants claim that they are entitled to relief from the consent judgment by virtue of "newly discovered evidence" regarding wetlands. This claim is asserted under Rule 4:50-1(b) without any benefit of authority regarding the standards for relief.

The Rule permits a court to grant relief on the basis of "newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R.4:49" (R. 4:50-1(b)). To be grounds for relief, newly discovered evidence must also be material, i.e., not merely cumulative or contradictory. Aiello v. Myzie, 88 N.J. Super. 187, 196 (App. Div. 1965), certif. denied, 45 N.J. 594 (1965); State v. Speare, 86 N.J. Super. 565, 581-82 (App. Div. 1965), certif. denied, 45 N.J. 589 (1965). The party seeking relief has the burden of proving diligence, and "that burden is substantial."

Quick Chek Food Stores v. Springfield Township, 83 N.J. 438, 446 (1980). Deficiencies in discovery cannot satisfy the movant's burden of proof. Nieves v. Baran, 164 N.J. Super. 86, 90 (App. Div. 1978). We note that the Township has not engaged in extensive discovery during this litigation.

State v. Speare, supra, contains two examples of post-trial developments that were held insufficient to justify setting aside a judgment in condemnation proceedings on the basis of newly discovered evidence. Speare, 86 N.J. Super. at 581. The court refused to entertain evidence of the actual sales price of a portion of the property that was conveyed after the trial. The court also refused to consider a post-trial ruling in another case that invalidated a portion of the zoning ordinance affecting the property, thus changing its value. On both issues, the Appellate Division held that the proffered evidence was discoverable at trial upon exercise of due diligence by the landowner.

The extreme difficulty of proving due diligence can be seen in the fact that the contract for sale in Speare was signed after the trial was concluded. Nevertheless, the property owner was charged with knowledge of the sales price at the trial and precluded from introducing the information at a later date because "[p]resumably, the execution of the contract was preceded by negotiations which in all probability began long before and continued through the trial." Speare, 86 N.J. Super. at 582. Accord, Quick Chek Food Stores v. Springfield Township, 83 N.J. 438, 445-46 (1980) (court refused to reopen a judgment upholding the validity of a zoning ordinance because information produced by plaintiff after trial, including descriptions of neighboring properties, could and should have been produced at trial.)

Post-judgment information on the extent or course of a known condition is insufficient grounds for relief, even when it contradicts evidence produced at trial, unless it also involves evidence of a dormant condition that could not have been discovered previously. Aiello v. Myzie, 88 N.J. Super. 187, 196-97 (App. Div. 1965) (change in doctor's prognosis in personal injury case held not to be newly discovered

evidence where original diagnosis was accurate). This is the corollary of the rule that a mistake as to prognosis is insufficient under Rule 4:50-1(a) to constitute newly discovered evidence.

The defendants' plea for relief fails under both rules because the wetlands were always in existence. They were not hidden, secret or dormant. If they were measured inaccurately, the problem is a failure of discovery as to the extent of the problem, not a lack of proper diagnosis. Furthermore, the municipal defendants in the present case cannot show that they exercised due diligence to obtain an accurate wetlands delineation prior to entering into the settlement. The wetlands were present on the site and known to all parties. If the defendants doubted the extent of wetlands, they had every opportunity to obtain their own data or to postpone the settlement until such time as acceptable studies became available. They chose to do neither. Their failure to conduct adequate discovery cannot now be used as grounds to upset the settlement.

C. Impossibility of Performance on the Part of the Plaintiffs Does Not Entitle the Defendants to Relief Pursuant to Rule 4:50-1(f).

Rule 4:50-1(f) is an equitable "catch-all" provision permitting relief from a final judgment or order for "any other reason" not enumerated in the Rule when exceptional circumstances are present. Rule 4:50-1(f) may be invoked only where enforcement of a judgment or order against the moving party would create a grossly "unjust, oppressive, or inequitable" result. Edgerton v. Edgerton, 203 N.J. Super. 160, 174 (App. Div. 1985). The Planning Board argues in its brief that it is entitled to relief from the judgment under subsection (f) because the plaintiffs cannot satisfy the terms of the settlement.

Impossibility of performance is a contractual defense by which the party that is unable to perform may seek relief from enforcement of the contract. The party to which performance runs cannot void the contract on the basis of the other

party's inability to perform. It is therefore meaningless for the Planning Board to seek equitable relief on the grounds of impossibility. If equitable arguments based on impossibility of performance were in the present case, they would belong to the plaintiff, not the defendants.

O&Y and Woodhaven have not asserted the defense of impossibility. To the contrary, O&Y maintains that the settlement will remain substantially intact, notwithstanding the wetlands, and that the essential terms of the settlement are not impossible to fulfill. The Planning Board has failed to demonstrate any inequity sufficient to justify relief from the settlement.

D. Equitable and Public Policy Reasons Strongly Argue Against Reopening This Case

1. The Settled Law of this State Stresses the Finality of Judgments, Which Are Only to be Reopened in Extraordinary Cases

In Department of The Public Advocate v. The New Jersey BPU, 206 N.J. Super. 523 (App. Div. 1985), the Appellate Division noted that "second thoughts are entitled to no weight as against our policy to favor any settlement. . . . Subsequent events which should have been in the contemplation of the parties as possible contingencies when they entered into the contract will not excuse performance." Id. at 530.

The Township is arguing for yet another bite at the apple. The Township had been sued on exclusionary zoning grounds by the Urban League (1973), by the developers of Oakwood at Madison (See Oakwood at Madison, Inc. v. Madison Tp., supra) and by the present plaintiffs in 1981 and 1984. The Township, ostensibly in good faith, settled each of these lawsuits by agreeing to modify those portions of its land use regulating process which made it impossible to construct affordable housing. As the present litigation has made clear, no such affordable housing has been constructed in Old Bridge.

In 1984, the Urban League moved to enforce its rights under the earlier (pre-Mount Laurel II) settlement of its 1973 case. Old Bridge had not rezoned in accordance with that case. Further, under the "consensus methodology" set forth in AMG Realty Co. v. Warren Tp., 207 N.J. Super. 388 (Law Div. 1984), the Urban League and the Township agreed that the Township's fair share obligation would be 2,414 affordable housing units (Court Order entered July 13, 1984). As part of its "quid pro quo" in the July 1984 settlement, the Township received some credits for units which had been developed in 1980. Thus, the July 13, 1984 Court Order contained an agreement by Old Bridge Township to provide realistic opportunities for the construction of 2, 135 affordable housing units.

As a result of intensive bargaining among the parties in the present suit, the Urban League agreed to a reduction to the Township's affordable housing obligation to 1,668 units. The Urban League had been reluctant to agree to this reduction and needed assurances that some units would be developed early on. As a consequence of this, O&Y assumed the obligation to begin the construction of a 150 unit senior citizen housing complex in 1987. This obligation was over and above the 10% setaside. O&Y's willingness to undertake this obligation led the Urban League to agree to a reduction in the overall number of units. This reduction of its obligation (to 1668) induced the Township to enter into the settlement. At the time of the compliance hearing, the Court carefully examined the number and accepted it.

Indeed, as Mr. Convery commented at the proceedings of January 24, 1986: "I think all parties agree that the figure in the order represents the obligation of 1, 668 units for the next six years following entry of the order." (p. 8 of the transcript of the compliance hearing).

Now, on the basis of the COAH numbers, the Township wishes to reopen the case, transfer to the Affordable Housing Council and evade its obligations — all on the basis of second thoughts and clearly outside the settled law of the State.

It is instructive to read the certification of Eugene Dunlop, provided by Mr. Convery. At numbered paragraph 7 of Mr. Dunlop's certification, it is abundantly clear that one of the major reasons why the Township accepted the settlement of January 24, 1986 was that it was convinced that the settlement offered the best solution of its affordable housing obligation, and that the 1,668 number was the "best deal" it was likely to achieve. The fact that another administrative agency with a different emphasis later proposes a lower "fair share" number than that accepted by the Township in a final judgment is legally irrelevant.

It should also be pointed out that at the January 24, 1986 compliance hearing, the Township brought a motion to transfer the case to COAH. That motion was denied on the grounds that the case was settled and there was nothing to transfer. The Court noted that "the town does intend this to be a complete and final settlement of all litigation..." (Transcript, p.80), which specifically included the litigation brought by Urban League to obtain "realistic opportunities" for the construction of the agreed-upon 1,668 units of affordable housing.

2. If The Township Were to Receive the Relief Requested, the Mount Laurel Housing Process Would Be Placed in Significant Jeopardy.

The Township alleges three things. First, one specific site in the Mount Laurel settlement process will not yield the total number of units it had contemplated. Second, the number it received from COAH would have been so much better than the number it settled for that it has an equitable right to reopen the case. Third, it will not get the "new town" it thought it was going to get. As a result, the Township argues it is unfair for it to have to shoulder any other burdens. When the facts are carefully examined, the Township's objections are exposed as a facade covering its real objection. It does not want any affordable housing in Old Bridge Township and is seizing upon any available excuses.

In Hills Development Company v. Bernards Township, et al., 103 N.J. 1 (1986), in its review of the number of cases which had settled, the Supreme Court

noted that 22 Mount Laurel cases had virtually reached final settlement and the total units likely to be built in those muncipalities would be in excess of 14,000 units. 103 N.J. 1 at 64.

Were this case to be reopened under these facts and circumstances, every other case where a "final settlement" had been reached would be subject to reopening. The development process, by its very nature, causes disruption to any muncipality. Dirt is moved, water courses are realigned, additional traffic results. It is not hard to foresee that creative township attorneys would seize upon these kinds of disturbances in the status quo and bring motions to the courts alleging that "significant environmental disruption" would be caused by the development process. If there were any disparity at all between their COAH "obligation" and their settled number, these municipalities would use the precedent of a successful reopening by Old Bridge as a means for reopening their own cases. This result is clearly contrary to what this Court and our Supreme Court have attempted to achieve in the settlement of the Mount Laurel cases that it would be preposterous to entertain. Yet it is this risk which the Township's motion brings to this Court at this time.

Given the Township's position that a reopening of this case would actually produce a "negative fair share responsibility" for Old Bridge Township - see Mr. Norman's letter of May 30, 1986 (defendant's Exhibit A-12, now Plaintiff's Exhibit M), discussed more fully below - a reopening or a transfer of this case would be contrary to the public policy purposes of Mount Laurel II.

3. <u>The Township Had Available to it Other Acceptable Remedies.</u>

The Settlement Agreement contemplated that change was possible. Very few projects - if any - proceed from original design to final execution without change. In a project of O&Y's projected size, over the time frame contemplated by the parties, change certainly had to be considered.

Section V-B. 3a(d) of the Settlement Agreement provided a mechanism for the Master to review the proposed overall development plan in the event the parties

could not come to an Agreement. Section V-F.1 also provided for the opportunity for the Master to assist the parties in resolving conflicts before they became matters for the court to decide.

If this case were about planning issues, the parties had available to them a mechanism to address and resolve those issues. The fact that the Township failed to avail itself of that mechanism and chose to proceed directly to court suggests that the planning issues raised in Mr. Norman's brief are only smokescreens for the real issue. The real issue is the Township's desire to evade its lower income housing obligation.

4. The Township Has Failed to Implement Its Responsibilites to Construct Mount Laurel Housing

As a result of the settlement, certain ordinances were enacted by the Township of Old Bridge. These were set forth in Appendix F of the settlement document, copies of which have been provided to all parties in this case. They require the establishment of a housing agency and the conditioning of development applications for residential development in Old Bridge upon obtaining contributions or set-aside units from other developers in Old Bridge. As the newspaper story attached hereto (Plaintiff's Exhibit L) makes clear, the Township has made little or no attempt to obtain additional funds or additional set-aside units. If the Township has done so, it has only recently begun this effort.

It is a well settled principle that "he who seeks equity must do equity".

The Township did not diligently enforce those portions of the ordinance under its control. It should be estopped from impairing the rights of the plaintiff-developers who are making diligent efforts to remove problems which are not under their control.

There is no "impossibility of performance" in this case. There is only a continuation of Old Bridge Township's historic unwillingness to perform its obligations

to do what is necessary to provide adequate, safe, and decent housing opportunities for people within the region. Indeed, it is obvious that the Township is using the wetlands issue as a lever to obtain a reopening of this case, which could lead to the transfer of the case to COAH, permitting the Township to evade its Mount Laurel obligations entirely. If COAH had established a fair share number which was anywhere close to the settlement number of 1,668, it is unlikely that Old Bridge would have initially moved to reopen the settlement as a result of on O&Y and Woodhaven's sites. The "planning issues" and the "new town" argument set forth in the certifications of Dr. George and Euguene Dunlop must be balanced against the Township's continued abysmal performance in making any effort to provide affordable housing to the citizens of the region.

POINT II: THE "REOPENER CLAUSE" DOES NOT PROVIDE THE AVENUE FOR THE RELIEF SOUGHT BY THE TOWNSHIP

Section III-A.3 of the Settlement Agreement provides that:

"Any party to this Agreement, upon good cause shown, may apply to the Court for modification of this Agreement..." (Page 8 of the Settlement Agreement).[2]

The clause then goes on to provide the basis for modification of the Settlement Agreement. They include:

1. Modification of law by a court of competent jurisdiction.

We are unaware of any "modification of law" on which the Township can rely. Since the agreement was signed in January 1986 (which was seven (7) months following the passage of the "Fair Housing Act", N.J.S.A. 52:27D-301 et seq.), the only "new law" affecting this case is Hills v. Bernards, supra. That case upheld the constitutionality of the Fair Housing Act, but does not provide any "new law" benefiting Old Bridge Township.

The decision to settle was made by Old Bridge Township in the clear light of day, following negotiations which extended over many months, during which the passage of the Fair Housing Act was clearly known. The Township chose to settle. This Court reviewed the settlement in a full-scale compliance hearing. That compliance hearing included a request from the Township to transfer this case to COAH, which was denied by this court.

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[2] Two aspects of the clear language of the provision bear emphasis. First, the clause merely permits ANY PARTY TO APPLY for a modification based upon the listed events; it in no way requires a reopening of the judgment ipso facto. Second, the clause merely speaks in terms of a "modification" of the judgment, not as principally asserted by the Township herein, a vacation of the judgment. Thus, the provision contemplates, at most, nothing more than an adjustment of the terms and conditions, not a wholesale evisceration of the basic purposes and provisions.

Indeed, this case would fall within that special category of cases referred to by the Supreme Court in which "manifest injustice" would result from transferring the case. In discussing "manifest injustice", the Court identified a unique kind of case where a transfer would be constitutionally impermissible because it would not simply delay the creation of a reasonable likelihood of lower income housing, but would render it practically impossible. The court indicated that "that result warrants, indeed, requires, denial of transfer". 103 N.J. at 55-56.

It is quite clear that the impact of the Township's motion, if granted, would be to permit the Township, through whatever devices may be available to it, to avoid the construction of any new lower income housing in Old Bridge Township.

The Township has been quite open as to the effect of the "transfer" it hopes to obtain via this motion. While Mr. Norman's brief represents that the Township will "plan" for 412 lower income units, his letter to the Court, dated May 30, 1986 and incorporated in his exhibits as Defendant's Exhibit A-12 and attached hereto as Plaintiff's Exhibit M, makes it clear that: "...the Township's projected Fair Share responsibility equals 411 dwelling units for low and moderate income housing subject to certain credits and adjustments which would reduce the fair share number to 0. . . . the final calculations. . . .will produce a negative fair share responsibility for Old Bridge Township."

In his supplementary brief, Mr. Norman now asks that the matter be transferred to COAH for review in accordance with the rules and regulations adopted pursuant to the Fair Housing Act. There is not doubt, in light of his May 30, 1986 letter, that Mr. Norman will seek to use every rule available to him to reduce the actual numbers of housing to be built in Old Bridge Township to zero. Thus, if the Court were to grant the Township's motion, the result would preclude additional housing opportunities in Old Bridge Township.

Thus, the only "new law" since the January 24, 1986 order was entered should result in a denial of the transfer motion to COAH.

In any event the law of New Jersey is clear. Absent exceptional circumstances, the courts should not permit a reopening of a final judgment. Hartford Insurance Company v. Allstate Insurance Company, 68 N.J. 430 (1975). Mr. Norman's supplementary brief cites Ford v. Weisman, 188 N.J. Super. 614 at 619 (App. Div. 1983). The appeal in that case was from an interlocutory order and that it has no bearing whatsoever on a final order. Ford v. Weisman does not support the Township's position. The case clearly indicates that Hartford is the law and that finality means finality when it comes to final judgment.

This position with respect to Mount Laurel cases has been adopted by this Court (see Motion for Reopener, Allan Deane Corporation v. Township of Bedminster, decided December 5, 1986); the Appellate Division (see Urban League of Essex County v. Mahwah Township, Motion brought June 13, 1986); and by Judge Skillman (see Morris County Fair Housing Council v. Township of Morris, decision handed down September 18, 1986).

2. A Subsequently Enacted State Statute.

We are aware of no State statute affecting this case enacted since January 24, 1986, nor does the Township cite such a statute. Therefore, this basis is not available to the Township to reopen this judgment.

3. A Subsequently Adopted Administrative Regulation of a State Agency Acting Under Statutory Authority.

This case does not fall within the jurisdiction of the Council on Affordable Housing, inasmuch as the Township's Transfer Motion was denied on January 24, 1986 and is a finally settled case. The lower numbers adopted by the Council, and indeed that entire regulatory process, should have no effect on this matter whatsoever. In similar cases in which this Court has confronted this question, e.g. Haueis and Ochs v.

The Borough of Far Hills and Allan Deane v. Bedminster, supra, it has said that any disparity between the settled number and the Council's number is simply irrelevant. In the reopening motion brought by Bedminster Township in Allan Deane v. Bedminster, the court noted that a final judgment, subject to compliance conditions, should not be disturbed. Transcript pages 78 and 80.

As this court noted in its letter opinion dated October 9, 1986 in Haueis and Ochs v. Borough of Far Hills:

> The bottom line of defendant's motion is a disturbing signal which, if reflective of general attitudes among our municipalities, bodes ill for those settlements already solemnly reached and for cases not pending. It bespeaks an attitude to void at all costs any obligation not set in concrete. It draws into question the moral commitment to do what all conceived should be done - provide at least some affordable housing, recognizing that we will not provide all that is need. Matters of conscience do not necessarily dictate legal results. However, nothing short of raw expediency, opportunism and obstructionism require that conscience be abandoned in an effort to misuse the law.
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> (Letter Opinion, p. 8)

We note the striking parallels between Old Bridge Township's motion and the motion brought by the Borough of Far Hills in 1986.

4. Impossibility of Performance.

The Township makes much of the impact of the wetlands and the loss of the "new town". As matter of law, we contend that the Township is wrong in its reliance on these contentions.

A. The Environmental Objection

The Township has commissioned studies by a licensed professional planner, Carl Hintz, with respect to the potential impact on the Township of the construction of a project by O&Y on the upland portion of its property. In a report of May, 1987, entitled "Environmental Limitations and Their Impact on Olympia & York and Woodhaven Villages", Mr. Hintz draws on several planning generalizations and

rationales to level a broad scale attack on the feasibility of the construction of both the O&Y and Woodhaven projects.

We frankly believe that Mr. Hintz's argument is legally irrelevant. As will be set forth below, together O&Y and Woodhaven will be able to deliver substantially the public benefits contemplated in 1986, even with the presence of the known wetlands. However, Mr. Hintz's report has served as the basis for much of the underpinning of the Township's case, despite the fact that it is factually incorrect, requires major leaps of faith, and cannot withstand scrutiny. Aside from our belief that the document is legally irrelevant, it is nonetheless appropriate to expose the gaps in Mr. Hintz's thinking in order to permit this court and the planning board to move forward.

Mr. Hintz points to "new communities" as being a specific type of development which "avoided environmentally sensitive lands". Dr. George and Council President Dunlop dwell on the loss of the "new town". At various intervals during the long life of the O&Y ownership of the land there would have been a variety of different proposals for development of the property. The "mini-city" and "new town" proposals are "shorthand" for planned developments, which can be of a variety of sizes and configurations. O&Y's 1987 proposal will have substantially more open space than the 1986 proposal, but it will be a planned development with a variety of residential types and non-residential uses, compatible with its environment and appropriate for development. (See affidavit of Andrew J. Sullivan, Plaintiff's Exhibit N).

Mr. Hintz uses three environmentally sensitive criteria: wetlands, soils which have high water tables, and flood plains. He writes as though these categories were mutually exclusive, and therefore that O&Y had much greater amounts of environmentally sensitive land than that shown as wetlands.

In fact, the wetlands on O&Y's property are those lands which are flood plains, have high seasonal water table, or which are poorly drained. All of the lands have been delineated on maps supplied to the Township and accepted by the Corps of Engineers. We are not dealing with a situation where O&Y has wetlands and substantial additional environmentally sensitive land. O&Y has wetlands involving a variety of environmental constraints which are not going to be developed by O&Y without first obtaining an Army Corps of Engineer's permit.

As the environmental response report prepared by Sean Reilly, with the technical support of James Coe, P.E. (Killam Associates), Gary Salzman (Converse Consultants East), Amy S. Green; TAMS Consultants Inc., Princeton Aqua Science, and TES (Wildlife Consultants) (Plaintiff's Exhibit O), clearly states development of the uplands portion of the O&Y site can take place without additional environmental insult.

While the Hintz report appears to provide a planning rationale to downzone the site to 1 du per 5 acres, it is factually incorrect. Development of the uplands portion of the site can take place without further environmental damage then typically occurs with any large scale development.

B. Loss of the "New Town"

In the Planning Board's Supplemental Brief, in Joan George's Certification and in that of Eugene Dunlop, much is made of the "loss of the new town." While O&Y, perhaps more than anyone, regrets that the wetlands may make it impractical for them to achieve the full build-out of the 10,560 dwelling units which they would have been permitted to build under the Settlement Agreement, it does not believe that the wetlands have so modified the building environment that a large scale, mixed use, planned unit development with commercial, industrial, and residential variety is impossible to achieve. To fully explore this question is premature at this time. It is a matter properly before the Planning Board and thereafter, the market place. This

issue is completely irrelevant, inasmuch as the Settlement Agreement makes no reference to a "new town" or a "mini-city." O&Y and Woodhaven continue to be economically viable enterprises, with a strong interest in marketing an attractive development in accordance with the terms and conditions of the Settlement Agreement.

It is appropriate to look to the Settlement Agreement for a review of what is required of the parties and what expectations are set forth in that Agreement. It is important to recognize that there are some circumstances which have arisen which will require some modifications of that Agreement. For example, the Senior Citizen Project has been put "on hold" until this matter is resolved, though the Agreement contemplated that construction on those 150 units would begin in April of 1987. Similarly, the Township Municipal Utilities Authority and the various water purveyors have been able to achieve an agreement which will provide potable water for Old Bridge for the forseeable future, which does not require the participation of either O&Y or Woodhaven (but which will be materially aided when these developments come on line). Other modifications, such the name of the Township's Affordable Housing Agency, the change of masters from Ms. Lerman to George Raymond and the slippage of dates with respect to the Planning Board review the concept plans have all been modified by circumstances and do not affect the essential nature of the Settlement Agreement.

As we see it, the Settlement Agreement provides for the following:

1. Establishment of a mechanism to provide substantial amounts of affordable housing to the Township of Old Bridge.

This mechanism includes a specific ten (10%) percent enforceable set-aside on all housing built by O&Y and Woodhaven; as well as a mechanism to attempt to assure that all other builders in Old Bridge Township will be providing affordable housing. Some circumstances have arisen (such as the discovery of the

substantial amounts of wetlands on the O&Y and Woodhaven sites) and others might arise (such as a builder, other O&Y, bringing suit to enjoin enforcement of the ten (10%) percent or cash payment requirement for Mount Laurel housing). If the circumstances do not permit Old Bridge to achieve the number of housing units set forth in the judgment, then it is possible for the parties, with the approval of the court, to modify that target goal. It is not necessary to eliminate the mechanism (the ten (10%) percent set-aside on O&Y and Woodhaven) which is sure to yield affordable housing.

2. Maintenance of an affordability control mechanism.

The Township has established a housing authority. The authority is in place to assure the continued maintenance of whatever housing is built as affordable to persons of lower income.

3. Ordinance revisions to assure compliance from other builders.

The Township has adopted ordinance revisions which are in place. If enforced, the ordinance would be of material assistance in providing affordable housing in the Township.

4. Procedural and substantive changes in land development standards.

During the process of negotiation, O&Y and Woodhaven agreed with the Township as to modifications of the application and processing procedures before the Planning Board, and a set of development standards which are clear and efficient, and will provide protection of the public health, safety and welfare while permitting the developers to construct in accordance with known standards. These standards are the basis of whatever construction plans will be developed by O&Y and Woodhaven. The standards will provide assurance to the Township that whatever development these two developers contemplate will be built in accordance with mutually acceptable standards.

5. Specific development conditions for O & Y.

A. Unit Count

The Agreement permits O&Y to build four (4) units per gross acre, or 10,560 units based on the 2,640 acres which O&Y owns. Nothing mandates O&Y to build those units. If there were an economic downturn or collapse of the housing market, there is no mechanism which would force O&Y to build units even though it could not sell them.

B. Industrial/Commercial Development

The Agreement indicates that O&Y shall construct office, retail, commercial industrial space on the PD-SD zoned land. The Agreement does not specify how much development will be built. O&Y is permitted to develop in excess of 6 million square feet of total permitted gross floor area. Nothing requires O&Y to build that. Again, the parties certainly visualized that circumstances could emerge where O&Y (or any other developer) might be able to successfully market only a fraction of that which was permitted to be built. The agreement here, as in the housing units, clearly acted as a "ceiling" rather than as a "floor".

Similarily, the agreement indicated that O&Y shall construct a regional shopping center. While the agreement indicated that such a shopping center could be located in an alternative locations, it did not specify a minimum size. Similarly, O&Y was permitted, but not required, to construct mid-rise apartments. The agreement does contemplate that O&Y and the Township would establish a time-table for staging of the non-residential development, presumably as part of the concept plan hearings, so that the Township could be assured that non-residential construction was phased so as to assist in the generation of both tax ratables and employment opportunities. The Agreement does not set forth any minimum size, either of acreage or square footage, or type of facility, which O&Y would have to build.

As we read the agreement, there are a series of "ceilings" put on O&Y (and Woodhaven), which restrict the ability of these developers to "over-develop" South Old Bridge. The property is zoned for 4 du per acre; O&Y is permitted to build not more than 6 million square feet of gross floor area of commercial/office/industrial facilities; O&Y is permitted to build only one shopping center of no more than one million three hundred fifty square feet in size. Under this agreement, the builders are not required to build any housing, any shopping, any office, industrial or commercial facilities. However, if they do wish to construct housing, they must do so in tandem with both non-residential development and a ten (10%) percent set-aside for affordable housing. That is what the agreement actually requires of O&Y (and similarly, Woodhaven).

The other "benefits" set forth in the certifications of Joan George and Eugene Dunlop are not required by the Agreement. O&Y and Woodhaven have entered into a formal agreement with the Old Bridge Township Municipal Utilities Authority for sewage service. Whatever large scale development is built in South Old Bridge will be connected to the central sewer systems. Old Bridge Township, in conjunction with Middlesex Water Co., has apparently solved the water problem, and therefore any development in South Old Bridge would be connected to a potable water supply. We would add, parenthetically, that a large scale development with central sewer and water supply is probably less environmentally damaging than low density development without sewer contruction.

The Agreement does not mandate the construction of a trans Old Bridge connector. Nor does it specify that there shall be an independent circulation network to serve all of the development. These might be desirable and are not necessarily eliminated in the current design. It is true that future development of this site will require more govenmental permits (ACE 404 permits at the present; and when the Fresh Water Wetlands Act (PL. 1987, C. 156) takes affect, NJDEP

Wetlands Permits) and the development will to be scaled in size and scope pending resolution of permit issues.

The wetlands do not make "performance" of the essential terms and conditions of this Agreement impossible. The externally imposed realities - the presence of a larger amount of federally regulated wetlands than appeared to be the case in 1986 - presents O&Y with harder economic realities than before; but does not invalidate the essential nature of the Settlement or jeopardize the delivery of lower income housing at the heart of the Agreement.

C. Affordable Housing.

Mr. Norman, in his original brief, indicates that he believes the reopener clause would permit him to set-aside the judgement on the basis of the adoption of rules by the Council on Affordable Housing. We have shown (supra) that this argument is fallacious. Additionally, Mr. Norman argued in his original brief that the adoption of the COAH numbers would permit the Township to reopen the case to achieve a downward adjustment.

Mr. Norman's brief states:

> "this language (the Reopener Clause) was intended to permit any party to modify the fair share number either upwards or downwards, depending on the regulations of COAH. In fact, this interpretation is the only possible interpretation which one can reasonably arrive at, given the language and settlement agreement. Any other interpretation would render this clause meaningless".

While it is recognized that Mr. Norman was absent from the court on January 24, 1986, when the Reopener Clause was specifically discussed, the transcript of the proceedings has been available to him. This Court, at page 35 of that transcript, raised this issue directly.

The Court: "Suppose the Council on Affordable Housing adopts some regulations which would affect the fair share number."

Mr. Hutt: "The fair share number, I think, is solid under this."

What ensued thereafter is a long discussion of what the Reopener Clause meant. The discussion included statements by parties present in Court that the fair share was not to be renegotiated in response to the Council's number. As Mr. Neisser said, quite clearly, "It was certainly our understanding that the question you raised on fair share was not going to be reopened". (Page 38 of the transcript). Mr. Convery, representing the municipal defendants in no way contested these assertions or indicated as a result of the court's inquiry any different intended result.

The Reopener Clause was designed to deal with shifts of an administrative mechanism designed to facilitate the construction and operation of lower income housing. Examples would include the modification of a housing region, the change in percentage of income which could be allocated for housing costs, or something of that nature. The Reopener Clause was a mechanism for the parties to address changes in circumstances, permitting them to deliver the essential aspects of those terms and conditions on which they had agreed. The Clause was not intended to radically alter the terms and conditions of that settlement as the Planning Board contends.

CONCLUSION

The Township has alleged that the O&Y project is unbuildable and that it would be manifestly unfair to the Township to enforce the settlement.

In contrast, O&Y has indicated that the project can go forward with a reduction in residential units, providing water, sewer and commercial development as well as the lower income housing contemplated.

The Township alleges that its interests would be gravely harmed if it were not allowed to reopen the settlement. In response, it should be noted that the settlement conferred no great advantages to the developers over the Township. In essence, the plaintiff developers obtained the following:

1. Assurances of certainty that they would continue to retain the 4 dwelling units per acre zoning which had long been established on the lands they own;

2. The vague "affordable housing obligation" set forth in the 1983 ordinance was clarified, and Mt. Laurel II standards substituted for the standards which did not meet Mt. Laurel criteria;

3. The standards and procedures of the 1983 ordinance were streamlined and clarified; and most important,

4. A Court-appointed Master was appointed to protect the developers from purely arbitrary and capricious actions.

The settlement did not permit radical departures from standards and procedures to be followed by the Planning Board. The settlement did not award any increase in density over what the developers had prior to the court case. The settlement did not award a "builder's remedy", nor impose any other significant burden on the municipality other than the responsibility to act with reasonable dispatch with respect to these developments.

In return, the region's lower income population obtained greater assurance that truly affordable housing would be built in Old Bridge. Fully two-thirds of the affordable housing contemplated in the 1986 settlement will be built under the current projected development pattern, even allowing for the impact of the wetlands.

The settlement continues to provide important public benefits, in addition to affordable housing, in the form of real opportunities for public sewer and water for South Old Bridge, along with the provision of enhanced opportunities for employment.

In the proceedings brought by the Township of Bedminster in a similar motion to reopen its judgment, this Court noted with approval the statement of Judge Skillman in the Morris Township case, as follows:

> I reject as without substance the claim that compliance with this settlement will impose some undue, unfair or improper hardship on Morris Township. Morris Township agreed to settle. I recognize that compliance with Mt. Laurel obligations, whether by Morris Township or by any other municipality, may involve significant burdens upon the municipality. But there is no showing here that the burdens of Mt. Laurel compliance which Morris Township undertook by this settlement are any more difficult or any more harsh than those faced by others.
>
> Transcript pages 82 and 83.

O&Y suggests that the same logic is present here. O&Y believes the real reason for Old Bridge Township's motion to reopen this case is not the wetlands issue, but rather the possibility of using the wetlands issue to evade its obligations to construct affordable housing in accordance with the settlement. The net result, if the Township's motion were to be granted, would be the loss of housing opportunities for lower income households, and a rezoning of the plaintiff's properties to large lot, low density zoning. The results would be enormous losses to the public, as well as to the private developers.

Therefore, we request this Court to dismiss the Township's motion and declare the judgment of January 24, 1986 to be fully intact. We further request this Court to order the Old Bridge Township Planning Board to schedule hearings on

revised development plans within thirty days following the hearings before this Court. We would further request this Court to order the Township to complete those hearings and render its decision within sixty days following the commencement of these hearings.

Respectfully submitted,
BRENER WALLACK & HILL
Attorneys for Plaintiff O&Y
Old Bridge Development Corporation

By: _____
Thomas Jay Hall

Dated:

August 6, 1987

HANNOCH WEISMAN
Attorney for Plaintiff O&Y
Old Bridge Development Corporation

By: _____
Dean Gaver

APPENDIX

Plaintiff's Exhibit A (letter from Planning Board Attorney to Hall/Hutt - 2/13/86)

Plaintiff's Exhibit B (letter from Planning Board Attorney to USACE - 2/20/86)

Plaintiff's Exhibit C (letter from USACE re: permit 8/28/79)

Plaintiff's Exhibit D (Affidavit of Lloyd Brown, Vice President of O&Y)

Plaintiff's Exhibit E (letter from Planning Board Attorney to Court - 3/19/86)

Plaintiff's Exhibit F (letter from O&Y to Planning Board Chairman - 3/26/86)

Plaintiff's Exhibit G (letter from Township Attorney to O&Y re: contribution for the Affordable Housing Agency - 4/28/86)

Plaintiff's Exhibit H (Planning Board resolution re: senior citizen housing subdivision - 9/16/86)

Plaintiff's Exhibit I (1987 newspaper articles re: new draft of Township Master Plan)

Plaintiff's Exhibit J (letter from USACE to Gray - 6/4/87)

Plaintiff's Exhibit K (Affidavit of Steven Gray, Esq. of Waters, McPherson, McNeill)

Plaintift's Exhibit L (1987 newspaper article on set-asides)

Plaintiff's Exhibit M (previously Defendant's Exhibit A-12)

Plaintiff's Exhibit N (Affidavit of Andrew Sullivan architect of Sullivan and Assoc.)

Plaintiff's Exhibit O (Report of Sean Reilly, Environmental Consultant)

Exhibit A

NORMAN AND KINGSBURY
ATTORNEYS AT LAW
JACKSON COMMONS
SUITE A-2
30 JACKSON ROAD
MEDFORD, NEW JERSEY 08055

February 13, 1986

THOMAS NORMAN
ROBERT E. KINGSBURY

T. N. (609)654-5220
R. E. K. (609)654-1778

Thomas Hall, Esq.
Brener, Wallack & Hill
2-4 Chambers Street
Princeton, N.J. 08540

Stewart Hutt, Esq.
Hutt, Berkow and Jankowski
Park Professional Bldg.
459 Amboy Avenue
Woodbridge, N.J. 07095

Re: Planning Board Hearings
Settlement Agreement
V-B.3 Approval Proceedures

Gentlemen:

After several meetings and workshops of the Planning Board and your clients, the following points are worth noting:

1. Hearing Schedules - Public hearings to consider the O & Y application are scheduled for 2/18/86 and 3/18/86. Public hearings to consider the Woodhaven application are scheduled for 3/11/86 and 4/8/86.

2. As Planning Board attorney, I shall instruct the Planning Board and the public at the inception of the hearing that the nature of the hearing is similar to a Master Plan hearing and details related to the plans shall be at a relatively broad level. Specific site information must be presented by the applicants at a later time when specific applications for preliminary site plan and subdivision approval are sought. The purpose of these hearings is to fulfill requirements set forth in the settlement agreement approved by the Superior Court.

3. The following areas of concern should be addressed:

(a) Sewer provision including capacity and transmission and any agreements to execute same.

(b) Water provision including capacity and transmission and any agreements to execute same.

(c) Road analysis of interior road system of principal roads including carrying capacity and level of service and also phasing including reference to the Trans-Old Bridge Highway; external roads including phasing in relationship to design capacity and level of service and consideration of jurisdiction of State Department of Transportation and County Department of Transportation.

(d) Plan design with emphasis on the Village concept and land planning rationale therefor.

(e) Residential densities as related to planning design and environmental considerations.

(f) Community facilities with emphasis on designated areas for facilities based upon need analysis.

(g) References to areas of initial development in relationship to rest of area described in terms of water and sewer design and road layout. Also consideration of parking and school sites should be developed.

I hope to locate all reports prepared for the Planning Board for the prior O & Y application of 1983 and will forward those immediately If you have any questions concerning the above, please do not hestiate to contact this office.

Sincerely yours,

Thomas Norman, Esq.

TN:mk
CC: Hank Bignell, Planner
Old Bridge Planning Board

Exhibit B

NORMAN AND KINGSBURY
ATTORNEYS AT LAW
JACKSON COMMONS
SUITE A-2
30 JACKSON ROAD
MEDFORD, NEW JERSEY 08055

February 20, 1986

THOMAS NORMAN
ROBERT E. KINGSBURY

T. N. (609)654-5220
R. E. K. (609)654-1778

James Hagerty
United States Army
Corps of Engineers
New York District
26 Federal Plaza
New York, NY 10278-0090

Re: Wetlands Permit Application
Olympia & York Development Corp.
Old Bridge Township Planning Board

Dear Mr. Hagerty:

This is to confirm our phone conference of February 13, 1986 in which you indicated that an application has been filed by Olympia and York Development Corporation for land located in Old Bridge Township. As I indicated, the Planning Board of the Township of Old Bridge has scheduled public hearings to consider the approval of a concept plan submitted by Olympia and York Development Corporation in conjunction with a Court Order of the New Jersey Superior Court concerning Mount Laurel II litigation.

In this regard I have been requested by the Mayor and Chairperson of the Planning Board of the Township of Old Bridge to contact your office for the purpose of confirming the scope and relative impact, if any, of the wetlands condition relative to the Olympia and York application.

The area encompassed in the Olympia and York application exceeds 2500 acres. If it appears that the site is relatively free of wetlands or even if there is a relatively small portion of wetlands in relation to the total site, the Corps delineation will not affect the over all permitted density and development of the tract. However, if there is reason to believe that substantial amounts of land may be qualified as wetlands

then the over all development of the site and permitted densities may be jeopardized.

The Planning Board is bound by specific time constraints which are incorporated in the Court Order resolving the Mount Laurel II controversy. A meeting may be appropriate to review any documentation and/or conclusions which the Corps has reached with respect to the Olympia and York application.

Kindly advise this office as to whether you believe a meeting is necessary and forward whatever appropriate information, if any, that you believe may be helpful to the Planning Board.

Thank you in advance for your cooperation in this matter.

Sincerely yours,

Thomas Norman, Esq.

TN:mk
CC: Russell Azzarello, Mayor
Joan George, Planning Board Chairperson
Jerome Convery, Esq., Township Attorney
Thomas Hall, Esq., Attorney for Olympia & York

Exhibit C

DEPARTMENT OF THE AR
NEW YORK DISTRICT. CORPS OF ENGINEERS
26 FEDERAL PLAZA
NEW YORK, N. Y. 10007

NANOP-E

28 August 1979

Mr. Joseph Sopiak
Quennell Rothschild Associates
32 West 20th Street
New York, NY 10011

Dear Mr. Sopiak:

This letter is in response to your request for a determination as to Department of the Army jurisdiction over the Olympic and York properties, Old Bridge, New Jersey.

From the information in your letter of 23 August 1979, it appears that the site is located above the headwaters (average flow less than 5 cfs) for each of the three streams that traverse the property. Therefore the discharge of dredged or fill material is permitted by 33 CFR 323 as published in the 19 July 1977 Federal Register. Thus, an individual permit is not required provided the attached conditions are satisfied.

Care should be taken during the operation so that all material, to include debris, does not enter the waterway and become a source of drift.

It should be noted that this waiver or authorization does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State or local laws or regulations, nor does it obviate the requirement to obtain State or localassent required by law.

Sincerely yours,

PHILIP W. McGRADE
Chief, Regulatory Branch

Incll
as

For Purposes of Section 404, the following conditions must be satisfied for any discharge of dredged or fill material in waters described in paragraph (a), above:

(1) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

(2) That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities.

(3) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and

(4) That the discharge will not occur in a component of the National Wild and Scenic Rivers System or in a component of a State wild and scenic river system.

In addition to the above conditions, the following management practices should be followed, to the maximum extent practicable

(1) Discharges of dredged or fill material into waters of the United States should be avoided or minimized through the use of other practical alternatives;

(2) Discharges in spawning areas during spawning seasons should be avoided;

(3) Discharges should not restrict or impede the movement of aquatic species indigenous to the passage of normal or expected high flows or cause the relocation of the waters (unless the primary purpose of the fill is to impound waters);

(4) If the discharge creates an impoundment water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow, should be minimized;

(5) Discharges in wetlands areas should be avoided;

(6) Heavy equipment working in wetlands should be placed on mats;

(7) Discharges into breeding and nesting areas for migratory waterfowl should be avoided; and

(8) All temporary fills should be removed in their entirety.

Quennell
Rothschild
Associates
Landscape Architecture
Environmental Planning
Architecture
West 20th Street
New York, New York 10011
929-3330

August 23, 1979

Mr. Bill Slezak
US Army Corps of Engineers
Rm. 1937
26 Federal Plaza
New York NY 10007

Re: Wetlands - Olympia & York Properties,
Old Bridge, New Jersey

Dear Mr. Slezak:

As discussed a few weeks ago, we are submitting various forms of environmental data for your review for the determination of wetlands, if any, that fall under the Army Corps of Engineer's jurisdiction.

Enclosed with this letter are:

- "Vegetation" section of the forthcoming EIS (5 pgs
- "Geology and Aquifer" section of the forthcoming EIS (4 pgs.)*
- Figure 3: geologic cross-section.
- Figure 2: geologic plan of site and surrounding areas (August 1979).
- USDA. Soil Conservation Service soil descriptions including soil types C240, M64M, 9J25, 9J25K, 9306 9726, 9726K, 9736, 9706, 9821/3, 9831, 9325,9325K, 9423 and a Soil Interpretations matrix compiled by us from the SCS Soil Descriptions.
- Soils plan (1"=400') 1979, Nicholas Quennell Assoc
- Vegetation plan (1"=400') 1979, " " "
- Watersheds plan " " " " "
- Flood Mapping plan (1"=400'), April 19, 1979, Engineering Surveying Planning Assoc.

- Continued -

*Current Draft versions.

ennell
thschild
sociates

Based on Q=CIA formula, an area of land of 2700 acres would be required to generate stream flow of 5 cubic feet per second. This is based on an average yearly rainfall of 46 inches. When converted to inches per hour (46"/year ÷ 365 days/year ÷ 24 hours/day) it becomes 0.00525 inches per hour. The site is wooded and has a runoff coefficient of 0.35.

Therefore, with Q= CIA (5 = .35 X 0.00525 X acres) the number of acres required to maintain stream flow at 5 cfs or better is 2700 acres. The whole property is 2400 acres and is located at the bead waters of three watersheds. The largest of the watersheds has an area that is less than 2000 acres as it leaves the property.

Also, there are no endangered species, flora and fauna, that are listed on the Federal Register (as of May 1, 1978) to be found on the site.

I will call you on Monday of next week to set up the meeting concerning the wetlands determination. At that meeting we will have aerial photographs at 1"-400' of the entire site.

Sincerely,

Joseph Sopiak

cc: Lloyd Brown
Pete Strong

BRENER, WALLACK & HILL
210 Carnegie Center
Princeton, New Jersey 08543
(609) 924-0808
Attorneys for Plaintiff

HANNOCH WEISMAN, P.C
4 Becker Farm Road
Roseland, New Jersey
(201) 531-5300
Co-Counsel for Plaintiff

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et. al., Plaintiffs, v. THE MAYOR AND COUNCIL of the BOROUGH OF CARTERET, et al., Defendants, and	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX COUNTY DOCKET NO. C-4122-73
O&Y OLD BRIDGE DEVELOPMENT CORPORATION, a Delaware Corporation, Plaintiff, v. THE TOWNSHIP OF OLD BRIDGE in the COUNTY OF MIDDLESEX, a Municipal Corporation of the State of New Jersey, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE, THE MUNICIPAL UTILITIES AUTHORITY OF THE TOWNSHIP OF OLD BRIDGE, THE SEWERAGE AUTHORITY OF THE TOWNSHIP OF OLD BRIDGE and THE PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY/ OCEAN COUNTY (Mount Laurel II) DOCKET NO. L-009837-84 P.W. Civil Action AFFIDAVIT OF LLOYD BROWN

STATE OF NEW JERSEY:
COUNTY OF MIDDLESEX:

I, Lloyd Brown, being of legal age, hereby depose and certify as follows:

1. I am Executive Vice President of O & Y Old Bridge Development Corp., hereinafter referred to as, "O & Y".

2. The Township of Old Bridge has filed documents with the Court setting forth numerous allegations against O & Y, two of which I believe require my personal response. In essence, they are:

> **O & Y knew, or should have known, the implications of the Federal Wetlands Regulations prior to the Court Settlement.**
>
> *and/or*
>
> **Based on mutual mistake of fact, the Settlement Agreement should be voided on the basis of no reasonable possibility of performance. Moreover, due to the impact of the wetlands, it is no longer possible to realize an acceptable development on the O & Y property and, further, the Township will not obtain the ratables it had expected.**

3. The principal asset of O & Y is a 2,600 acre land assembly situated in Old Bridge Township in the County of Middlesex in the State of New Jersey.

4. Although O & Y acquired this property in December of 1973 and I visited the site once in December of 1974, my involvement with this project did not commence until the latter part of 1978 which was prefatory to my transfer from Canada to New Jersey in September of 1979.

5. My terms of reference were to do those things necessary to convert the status of the land assembly to an approved development ready for issuance of construction permits.

6. In the latter part of 1978 or the early part of 1979, I asked the team of attorneys and consultants that I had engaged to prepare a list of all the permits or approvals that would be required in the process of taking the land assembly to an approved development.

7. Among others, the Army Corps of Engineers was listed as having possible jurisdictional authority over our lands.

8. I directed that appropriate steps be taken to comply with the Army Corps' regulation, if applicable. Under date of August 28, 1979, the Army Corps of Engineers issued a letter stating that the site came under the provisions of Army Corps of Engineers Regulation 33 C.F.R. 323 (i.e. the lands in question were permitted under the "Nationwide Permit" provided in the Corps' regulation).

9. Compliance with the "Nationwide Permit" did not present any problem for the O & Y development. Essentially, it only required that "drift" of materials into streamways be prevented but this is a requirement of several State and Federal agencies that must be complied with in any event.

10. Prior to proceeding with a master plan for development of the property, O & Y engaged various specialists to identify any site characteristics that should be taken into consideration.

(a) Converse Ward Davis Dixon, Geotechnical Consultants with offices in Caldwell, New Jersey, was engaged to report on surface and subsurface soils: specifically, whether there were any soil conditions that would present load bearing problems for the foundations of the construction envisioned, if there were any slopes that would become unstable if the ground cover were removed, if there were areas of saturated soils that would be difficult or costly to drain and similar matters.

(b) Geraghty and Miller, Groundwater Hydrologists with offices in Syosett, New York, was engaged to conduct a comprehensive exploration of the water bearing substrata.

(c) Quennell Rothschild, Environmental Consultants with offices in New York City, was engaged to ascertain the presence of any threatened or endangered species of flora or fauna and to advise if there were any environmental constraints that should be addressed.

(d) Engineering Surveying and Planning, Consulting Civil Engineers with offices in Howell, New Jersey, was engaged to map all hydraulic flood plains on the property.

(e) Converse Ward Davis Dixon was engaged to map the geomorphic flood plains on the property.

(f) Princeton Aqua Science Testing Laboratories, with offices in New Brunswick, New Jersey, was engaged to monitor, conduct chemical analysis and provide monthly reports with respect to the natural surface water run-off from the site.

(g) Elson T. Killam Associates, Consulting Civil Engineers with offices in Millburn, New Jersey, was engaged to construct a weir and gauging station to monitor the volume of surface water run-off from the site.

(h) Traffic engineers, engineers for the design of sewerage and water systems, and various other consultants were also engaged.

11. The reports of the foregoing experts including those with respect to soil conditions, surface water, flood plains and environmental constraints were provided to O & Y's planning consultants, Sullivan Arfaa, Professional Planners with offices in Philadelphia, Pennsylvania, who used the information provided by these experts in preparation of the overall development plan, accordingly, the development plan responded to the various parameters that are specific to the site.

12. I understand that in October of 1984, the Army Corps of Engineers revised their regulations, however, at that time, I received no communication from the Corps, was not aware that their regulations had been changed and had no reason to believe the status of the "Nationwide Permit" granted in August 1979 was altered in any way.

13. As part of the ordinary development process, O & Y contacted the Army Corps of Engineers in Feburary 1985 and, in response to their subsequent request for certain technical information concerning the property, submitted the requested data to the Corps in November of 1985 .

14. By letter dated January 27, 1986 O & Y was informed by the Corps that individual permits might be required for our development.

15. In accordance with Section V-B.3, "Approval Procedures", page 13 of the Settlement Agreement, O & Y commenced presentation of its development plan to the Planning Board at a public hearing held on February 18, 1986.

16. On March 18, 1986, O & Y appeared before the Old Bridge Planning Board for the second time in the public review process stipulated by the Settlement Agreement. At this time the Board questioned the impact of the Corps' wetlands regulations upon the development plan (Plate A annexed to the Settlement Agreement) and whether the development, as proposed, was realistic in this context.

17. Following the March 18th Planning Board meeting, O & Y had several meetings with Amy S. Greene, Environmental Consultant with offices in Flemington New Jersey, to define a program and establish contract terms to retain her professional services for delineation of the wetland areas on the O & Y property.

18. As we went into the matter in greater detail with Ms. Greene, we learned that large areas of O & Y's lands were potentially wetland areas and, although these areas were not shown on the N.W.I. maps, they would, nevertheless, come under the Corps' jurisdiction.

19. A meeting was arranged for Monday, April 21, 1986 at the Old Bridge Municipal offices. Representatives of the Planning Board, representatives of Woodhaven Village and representatives of O & Y attended with Carla Lerman, P.P., Court-appointed Master, present. At this meeting, O & Y proposed that it appear before the Planning Board and request that its presentation stand in abeyance until the wetland delineation was completed and the implications of the impact of wetland areas upon the development plan proposed in the Settlement Agreement could be fully evaluated.

20. On Tuesday, April 22, 1986, I appeared before the Old Bridge Planning Board and requested that further hearings on our development plan (Plate A annexed to the Settlement Agreement) stand in abeyance until the wetlands delineation could be completed. This request was granted by the Board.

21. On the O & Y property, the process of delineating the boundary between the wetland areas and the upland areas in accordance with the Army Corps' criteria involved:

(a) having an environmental expert determine the location of the line by field investigation of soil types and botanical indicia. Upon ascertaining the line, the environmentalist defined the line by flagging it with colored tape;

(b) a land surveyor followed the flagged line and permanently recorded the location of the wetland boundary in the field by monumentation;

(c) the surveyor prepared an accurate scale map of the line as surveyed;

(d) using the surveyor's map, representatives of the Army Corps of Engineers, the Federal Environmental Protection Agency, and the U.S. Fish and Wildlife Service examined the line and decided if all wetland areas on the property were shown on the map and if all wetland boundaries were properly defined.

22. The O & Y site encompasses over four square miles and the aggregate length of the lines defining the wetlands boundaries is in excess of sixty miles. Most of this line runs through dense bush which had to be hacked out by hand with machetes to run the survey line of the boundary. Although the surveyor had up to six crews on this job at one time, it took from April 1986 until February 1987 to complete the wetlands delineation.

23. We have been advised by the Corps under their letter dated June 4, 1987, that the wetlands on our property are correctly delineated. This is important to the progress of the development because if the lines were unacceptable to the Corps, this immensely time consuming task would have to be done again.

24. In this regard, according to Taylor Wiseman & Taylor, land surveyors, with offices in Mount Laurel, New Jersey, the total area of the O & Y tract, after deducting the area of the site for the senior citizens project, is 2,599.54 acres. Of this, they state, 1,458.92 acres have been delineated as wetland area.

25. On October 28, 1986, the legal firm of Waters McPherson McNeill, P.A., with offices in Secaucus, New Jersey, was engaged by O & Y. This firm has extensive experience obtaining wetland permits from the New York District Office of the Corps of Engineers.

26. The firm of Waters McPherson McNeill was requested to develop a strategy that would allow O & Y to proceed with actual construction within the shortest possible time. The affidavit of Steven R. Gray of Waters McPherson McNeill sets forth in detail that firm's recommendations to O & Y and explains the Army Corps' permitting procedures.

27. Since the the upland areas are outside the Corps' jurisdiction, O & Y intends to commence construction on the upland areas. In this regard, it appears the accessible upland areas will support in the range of 5,000 to 6,000 residential units at approximately the same average density per net residential acre as that provided in the Settlement Agreement.

28. Almost all of the areas designated for retail commercial, office/industrial have now been determined to be wetland areas, consequently, construction on these areas will require a permit from the Corps. or, in the alternative, other sites will have to be designated to satisfy the requirement for a ratable component as provided in the Settlement Agreement.

29. The Township contends that the Settlement Agreement should be voided on the basis of no reasonable possibility of performance. Moreover, due to the impact of the wetlands, it is no longer possible to realize an acceptable development on the O & Y property and, further, the Township will not obtain the ratables it had expected.

30. In alleging that the Settlement Agreement is no longer valid, the affidavits filed by Eugene Dunlop, Council President and Joan George, Chairperson of the Planning Board, express the Township's loss of expectation from the development in essentially the same context as they express the alleged inability of O & Y to perform its obligations under the terms of the Settlement Agreement. Since O & Y shared these grand expectations for its development, we also share to an even greater degree the significant disappointment ensuing from the realization that, due to the impact of the Federal wetlands, the full potential of the development will never be realized. There is, however, a profound difference between what O & Y and the Township once recognized as the ultimate potential of the development and what was actually agreed upon between the Parties in the Settlement Agreement. It is O & Y's contention that it can meet the requirements of the Settlement Agreement and, working under the overview of a Court Master, O & Y believes it should have the opportunity to demonstrate its ability to provide a down-scaled development in compliance with the Settlement Agreement.

31. Section V-C.6 of the Settlement Agreement states,

> **"Residential housing units and acres of non-residential Uses that may be developed by O & Y and Woodhaven shall be timed at intermediate points following the Staging Performance Schedule outlined below. The Staging Performance Schedule shall be established for each development at the time of approval of the Concept Plan by the Planning Board.**
>
> **The Staging Performance Schedule shall relate maximum percentage of dwelling units (expressed as the maximum number of construction permits issued) to the minimum percent of acres of non-residential Uses which must be improved with public water and sewer facilities, and minimum assessed valuation of building space under construction devoted to non-residential Uses."** (emphasis added)

Since O & Y's hearings before the Planning Board were curtailed before the proceedings arrived at that point where the Board would have determined the Staging Performance Schedule, it is not possible to state specifically what would have constituted compliance with this provision of the Settlement Agreement but O & Y believes it can comply with its obligations as it understands them.

32. Recognizing the Township's consistent objection to intense residential development and their desire to maintain woodland open space, it would appear that both of these objectives have now been satisfied, even if somewhat bilaterally, by the end result of the Federal wetland regulation. The O & Y plan, as now proposed, offers an overall project density of about 2 dwelling units per acre with over half of its total area (about 56%) in permanent open space, most of which will be natural wooded areas. The plan would not only satisfy the basic criteria of the Township's Land Development Ordinance for a development of this type, but would also provide over five* times more Open Space than required by the Ordinance.

33. Unless the years of litigation have diverted the focus of disagreement from the planning and development issues, I would think the Township would now view O & Y's present proposal for development of its property as having the potential to be an exemplary project.

The foregoing statements made by me are, to the best of my knowledge and belief, true. I am aware that if any of these statements subscribed to by me are willfully false, I am subject to punishment.

Lloyd Brown

Dated this 6th day of August, 1987.

* Section 9-8:1, Required Open Space, Township of Old Bridge Land Development Ordinance.

NORMAN AND KINGSBURY
ATTORNEYS AT LAW
JACKSON COMMONS
SUITE A-2
30 JACKSON ROAD
MEDFORD, NEW JERSEY 08055

March 19, 1986

THOMAS NORMAN
ROBERT E. KINGSBURY

T. N. (609)654-5220
R. E. K. (609)654-1778

Honorable Eugene Serpentelli, J.S.C.
Superior Court
Ocean County Court House
CN 2191
Toms River, NJ 08754

Re: Olympia and York v. Old Bridge
Planning Board Hearings/O & Y
Application

Dear Judge Serpentelli:

The Planning Board conducted its second public hearing to consider the O & Y application last night. The entire hearing was devoted to the issue of wetlands including the extent of such lands as defined by the United States Army Corps of Engineers and issues related to drainage, generally, on the entire site.

Proofs offered by the applicant indicate a worst case scenario of approximately 670 acres of potential wetlands. This figure was derived from data supplied to the applicant by the Corps of Engineers. Since this represents approximately one-fourth of the parcel, the Planning Board, by motion, directed the Township Planner to retain an environmental consultant immediately, for the purpose of verifying the "worst case" scenario advanced by the applicant. Additionally, the Township Planner was also authorized to retain an engineer specializing in the area of hydrology and drainage to review the reports yet to be submitted by Olympia and York, regarding viability of the applicant's drainage plan for the site.

The hearing was continued to April 22, 1986. Also, a second hearing for the Woodhaven application is scheduled for April 8, 1986. Additionally, the Court should be aware that the Planning Board has a regularly scheduled Planning Board meeting for March 25, and April 1, 1986 and also April 15, 1986.

At the suggestion of Carla Lerman, the Court Master, the Planning Board is also holding open April 29, 1986 for a special meeting for either Woodhaven or O & Y.

If Counsel for any of the parties have any comments or objections with respect to the above, please contact this office so that we may discuss them and possibly refer the problem to Carla Lerman or the Court if that action should become necessary.

Respectfully submitted,

Thomas Norman, Esq.

TN:mk
CC: All parties
Carla Lerman, Court Master
Joan George, Planning Board Chairperson
Hank Bignell, Towship Planner
Russell Azzarello, Mayor

O & Y OLD BRIDGE DEVELOPMENT CORP.
760 Highway 18 · East Brunswick, N. J. 08816 · (201) 238-8188

March 26, 1986

Dr. Joan George
Township of Old Bridge Planning Board
One Old Bridge Plaza
Old Bridge, NJ 08857

Dear Dr. George:

A meeting has been scheduled for the evening of April 17, 1986 at 7:30 p.m. in the offices of Mr. Richard Diaz, Fire Official, Township of Old Bridge Fire Prevention Bureau, which offices are located at 35 Throckmorton Lane, Old Bridge.

May I request that you arrange for representatives of other Township essential public service agencies to also be present so that the requirements of all essential services can be resolved at this one meeting. I suggest that it would also be appropriate for the Planning Board to be represented at this meeting.

I also believe that since the area encompassed by the Woodhaven and Olympia developments constitutes almost the entire southwest quadrant of the Township, it would be logical if the provision of these services were considered on an area-wide basis as required to serve the entire quadrant with the required facilities being spread across both of these developments. Consequently, I suggest that representatives of Woodhaven also attend this meeting.

Very truly yours,

O & Y Old Bridge Development Corp.

Lloyd Brown
Executive Vice President

WPI:ew

cc: Thomas Norman, Esquire
Thomas Hall, Esquire
Richard Diaz
Sam Halpern
Stewart Hutt, Esquire
Joel Schwartz

Township of Old Bridge

MIDDLESEX COUNTY, N.J.

ONE OLD BRIDGE PLAZA • OLD BRIDGE, N.J. 08857

JEROME J. CONVERY
TOWNSHIP ATTORNEY
151 ROUTE 516
OLD BRIDGE, N.J. 08857
(201) 679-0010

April 28, 1986

Stewart M. Hutt, Esq.
459 Amboy Avenue
P.O. Box 648
Woodbridge, NJ 07095

Thomas Hall, Esq.
2-4 Chambers
Princeton, NJ 08540

Re: Olympia & York Old Bridge
Development Corp. and
Woodhaven Development Corp.
vs. Township of Old Bridge
(Mount Laurel II)

Gentlemen:

This is to confirm our telephone conversations wherein I indicated that the Township of Old Bridge has made the appointments to the Affordable Housing Agency and that the Executive Director began work on April 21, 1986. Pursuant to the Settlement Agreement, (Section III - A.1) each of the developers is to contribute $5,000.00 for the seed money for the Affordable Housing Agency. Since no provision had been made in the budget for the salaries of the Executive Director and his secretary, it is imperative that this contribution be paid to the Township of Old Bridge immediately. Please have your clients send a check to Robert Shrekgast, Finance Director, payable to the Township of Old Bridge with an appropriate reference to the Affordable Housing Agency. It is my understanding that this money will be placed in a separate bank account by the Township of Old Bridge for the Affordable Housing Agency only.

Thank you for your cooperation in this matter.

Very truly yours,

Jerome J. Convery,
Township Attorney

JJC/jd
cc: Robert Shrekgast, Director of Finance
cc: Hy Babchin, Executive Director, Affordable Housing Agency

Be it Resolved, by the Planning Board of the Township of Old Bridge, County of Middlesex, New Jersey, that:

WHEREAS, an application was submitted by OLYMPIA AND YORK DEVELOPMENT CORPORATION, #74-86P, for a minor subdivision of Block 18.002, Lots 81, 82B, 83B and 84B and Block 18.003, Lots 1 through 9, 75, 76B, 77B, 78B, 79 and 80; and

WHEREAS, a hearing to consider the application was held on August 5, 1986, upon proper public and personal notice in accordance with the requirements of the Land Development Ordinance of the Township of Old Bridge and statute of the State of New Jersey; and

WHEREAS, the following Exhibits were entered into the Planning Board record:

A-1 Proposed minor subdivision, one sheet, prepared by Taylor, Wiseman and Taylor, revised through 2/25/86;

A-2 Report of Township Engineer dated 8/4/86;

A-3 Report of Township Planner dated 8/4/86; and

WHEREAS, after hearing and considering the testimony of the applicant as well as considering the reports of the Township Planning Staff, the Board finds as follows:

1. Applicant's attorney indicates that the within subdivision is being sought by the applicant in conjunction with a Court settlement involving Mount Laurel II litigation. The ultimate purpose of the land subdivision is to provide for an area for a project consisting of 150 units of senior citizen housing for low and moderate income use. This project was incorporated in the Court settlement and applicant is before the Planning Board seeking to implement the settlement and requires the subdivision for the purpose of making appropriate application to the New Jersey Housing and Finance Agency with regard to said project. Applicant's attorney further acknowledges on the record that the Court settlement has been called into issue by the Planning Board of the Township of Old Bridge before the Superior Court at a case management conference conducted by Judge Eugene Serpentelli. Applicant acknowledges that the within application is made at its own risk and that the Planning Board of the Township of Old Bridge by approval of this application does not in any way waive any rights it may have with respect to challenging the Court settlement and applicant agrees with this position.

(SEAL)

I certify the following to be a true and correct abstract of a resolution regularly passed at a meeting of the Planning Board of the Township of Old Bridge

September 16, 1986

and in that respect a true and correct copy of its minutes.

P. Donatemo

Secretary of Planning Board

Be it Resolved, by the Planning Board of the Township of Old Bridge, County of Middlesex, New Jersey, that:

O & Y DEV. CORP.
Appl. #74-86P

2. The report of the Township Planner requests consent on the part of the applicant with respect to the costs of construction of the newly aligned Birch Street which is required as a consequence of this application. Applicant, through its attorney, has indicated on the record that it is fully aware of the costs of realignment and will bear the same.

3. The within application requires that a portion of Brook Drive and Birch Street must be vacated and additionally that Birch Street must be relocated and improved. The Planning Board finds that it does not have the authority to vacate any portion of Brook Drive or Birch Street and therefore, recommends approval of the within application subject to appropriate action by the Governing Body of the Township of Old Bridge.

4. The applicant indicates that it is in full agreement with and will comply with all conditions and requirements contained in the reports of the Township Planner and the Township Engineer.

NOW, THEREFORE, BE IT RESOLVED by the Planning Board of the Township of Old Bridge, County of Middlesex and State of New Jersey that the within application for a minor subdivision is hereby approved subject to the following conditions:

1. Applicant shall comply with all conditions and requirements contained in the reports of the Township Planner and Township Engineer.

2. The application is subject to appropriate action by the Township Governing Body of the Township of Old Bridge regarding the vacation of a portion of Brook Drive and Birch Street. In this regard, this resolution is to be forwarded to the Governing Body for appropriate action in conjunction with this condition.

3. Applicant agrees to pay for all costs for the vacation of Birch Street and Brook Drive and further for the relocation of Birch Street in accordance with the plans submitted pursuant to this application.

(SEAL)

I certify the following to be a true and correct abstract of a resolution regularly passed at a meeting of the Planning Board of the Township of Old Bridge

September 16, 1986

and in that respect a true and correct copy of its minutes.

P. Genatempo

Secretary of Planning Board

Be it Resolved, by the Planning Board of the Township of Old Bridge, County of Middlesex, New Jersey, that:

O & Y DEV. CORP.
Appl. #74-86P

4. Applicant further understands and acknowledges that the Planning Board of the Township of Old Bridge does not waive any rights it may have with respect to any challenge it has made or will make with regard to the Court settlement regarding the Mount Laurel II controversy involving the applicant. Applicant further understands that any actions it may take pursuant to this application are taken at its own risk.

Motion is made by Mr. Arrowsmith, seconded by Mr. Bonczek and so ordered by the following roll call vote:

AYES: Messrs. Garland, Martinez, Arrowsmith, Mrs. Genatempo, Bonczek

NO VOTE: Chairwoman George

ABSENT: Messrs. Colaprico, Ingram, Azzarello, DiLeo, Shupin(for this vote)

(SEAL)

I certify the following to be a true and correct abstract of a resolution regularly passed at a meeting of the Planning Board of the Township of Old Bridge

September 16, 1986

and in that respect a true and correct copy of its minutes.

P. Genatempo

Secretary of Planning Board

Suburban News - July 22, 1987

Consultant reveals plan to rezone sections of town

Municipal center area to become commercial zone

By Daren Smith

OLD BRIDGE — Virtually all of the land in south Old Bridge west of Route 18 will be rezoned for low-density housing under provisions of a new master plan, according to the township's planning consultant.

Carl Hintz, who was hired to assist in drawing up a new zoning master plan, said almost half the land in the township's southern section has severe environmental constraints and will be zoned for extremely low-density development.

"These areas allow single family development with the average density dependent upon the severity and extent of wetlands and floodplains," Hintz said in a three-page outline of the land use element of the master plan.

"These areas include the proposed sites for the Olympia and York and Woodhaven Village developments, but because of the severe environmental constraints are proposed for low density," he said.

Hintz said clustering homes would be permitted for O&Y and Woodhaven on high ground suitable for construction, with density averaged over the entire tract.

The master plan will include new classifications which will rezone the area near the municipal center into a commercial and office zone and which will establish a marine commercial area on the Laurence Harbor and Cliffwood Beach shorefront.

The master plan, according to Hintz, will include a village node designation near the municipal center. The village node will establish an area of mixed development such as stores, offices and condominiums in the area of Cottrell Road and Route 516.

Under provisions of the new plan, the shopping conduit of Route 516 will be transformed into a "Main Street Commercial" zone. This zone will recognize existing retail areas and seek to upgrade them with improved streets, sidewalks and trees.

Industrial and warehouse areas will not expand under the new plan, Hintz said. Recognizing pollution and traffic problems, the plan creates special development zones for industry off Bordentown Avenue and off Route 35 in the Cliffwood Beach area.

Much of the remainder of the township has been classified as medium and medium-high density areas and village center areas, allowing for development on the scale of two to six units per acre.

The village center areas, located in and around the municipal center, are designed to accommodate new planned developments which would include housing for families with low and moderate incomes. The majority of new growth in the township will be focused in the village center areas, Hintz said.

"Under the plan, an additional 6,600 to 8,200 new housing units could be built over the next 20 to 30 years, which is far less than permitted by the current master plan and zoning ordinance," Hintz wrote. "The build-out population to the year 2010 and beyond will be around 17,500 added population."

That figure is far less than previously expected, Hintz said, and would bring the township's total population at that time to about 75,000.

News Tribune - July 22, 1987

Old Bridge master plan includes new town center

By K.J. COCUZZO
News Tribune staff writer

OLD BRIDGE — An additional 6,600 to 8,200 new housing units could be built here over the next 20-to-30 years under the township's proposed master plan.

The plan, being drafted by the Pennington-based Hintz-Nelessen Associates, envisions a less-developed township than would result under Old Bridge's current zoning law.

"The 'total buildout' population to the year 2010, or beyond, will be around 17,500 added (residents)," the Hintz-Nelessen planners project in the "land use element" of the proposed master plan.

The consultants, whose package will be presented to the public at a special Aug. 11 Planning Board meeting, foresee continued commercial growth in Old Bridge, which as a population of about 55,000.

Hintz-Nelessen projects that about 9.5 million square feet of new office and commercial space, "with as many as 48,000 jobs," could result over the next two-to-three decades.

The land use portion of the master plan is a key component of the total package, according to Hintz-Nelessen.

"This element sets forth the future land development pattern for the community and the basis for the zoning ordinance and zoning plan," the planners wrote.

Extensive mapping and analysis has been done in the master plan to protect the wetlands, which are estimated to comprise about one-fifth of the 40-square-mile township.

Most of the wetlands are scattered throughout South Old Bridge, an area divided by Routes 9, 18, Englishtown and Texas roads.

Hintz-Nelessen said the master plan will focus on the development of "a new town center, near the Old Bridge Municipal Complex at Route 516 and Cottrell Road.

Central Jersey

Woodbridge, N.J.—Sun., May 31, 1987

Wetlands may hold key to Old Bridge growth

By K.J. COCUZZO
News Tribune staff writer

OLD BRIDGE — With new houses sprouting up like dandelions on a suburban lawn, township officials say they are doing their best to put the brakes on residential development.

The township's master plan — now in draft stages — may be the best way to do that, some municipal officials say.

"It should protect the town for the next 20 years," said Planner Henry Bignell. "We're also proving environmentally that most of Old Bridge should be not be developed, or at least developed at extremely low (housing) densities."

The preliminary findings of Hintz-Nelessen Associates, the township's master plan consultant, indicated that about half of Old Bridge's 40 square miles may be undevelopable.

One map prepared by the Pennington-based firm shows large areas of Old Bridge containing wetlands and-or high water tables. Some of the land is designated for aquifer recharge.

"I don't think any of us realized the extent of the wetlands in Old Bridge and the importance they seem to have statewide and nationally," said Planning Board member Philomena Genatempo. "We have constraints. We have to look at things in a different light."

Besides housing, the wetlands findings will also affect the township's road network, which officials agree needs improvement.

Carl Hintz, a principal in Hintz-Nelessen Associates, said the proposed Trans-Old Bridge Expressway "cannot be built because a major portion of it is wetlands."

The expressway, planned to be Old Bridge's second major east-west artery after Route 516, was contained for years in previous master plans.

Under its original alignment, the highway would have connected routes 516, 18, 9 and 34 with Exit 120 of the Garden State Parkway in the township's Laurence Harbor section.

Residential development in the late 1970s and early 1980s eliminated the proposed link between Route 34 and the parkway.

In South Old Bridge, Olympia & York and Woodhaven Village, two major builders, were to construct large segments of the expressway as part of their projects.

But the O&Y and Woodhaven developments — which at one time totaled about 16,000 housing units — remain uncertain because of wetlands.

Hintz told Old Bridge officials Route 516 does not need to be widened to four lanes.

His partner, Anton Nelessen, recommended the two-lane county highway be improved, particularly at its intersections, from the Browntown commercial area to Morganville Road.

One improvement alternative is installation of jughandles. With high-volume rush hour traffic in the mornings and evenings, it is nearly impossible to make left turns from Route 516, local officials said.

"It's a really good idea to have a traffic consultant do a study of the highway," Hintz said.

Mayor Russell Azzarello, who is also a planning board member, said Hintz's recommendations for Route 516 make sense.

"The Municipal Complex (at Route 516 and Cottrell Road) would be the hub for downtown Old Bridge," Azzarello said. "But you can't do that with a four-lane Route 516. At that width, it would be a super-highway."

The Hintz-Nelessen master plan envisions Cottrell Road as the future downtown or "main street" area, an idea Azzarello called excellent.

A Hintz-Nelessen survey of township officials showed a preference for five-acre building lots and resistance to strip-type commercial development along Old Bridge's highway frontages.

"I think the master plan shows that runaway development of the township is a thing of the past," Azzarello said. "If you can't build roads because of wetlands, you certainly can't build houses."

Said Mrs. Genatempo: "If nothing else, we have a better understanding of what needs to be changed in Old Bridge."

DEPARTMENT OF THE ARMY
NEW YORK DISTRICT, CORPS OF ENGINEERS
26 FEDERAL PLAZA
NEW YORK, N. Y. 10278

June 4, 1987

REPLY TO
ATTENTION OF:
Regulatory Branch
Western Permits Section

SUBJECT: Request for determination of jurisdiction, Olympia & York Old Bridge Development Corporation

Steven R. Gray, Esq.
Waters, McPherson, NcNeill
Attorneys at Law
400 Plaza Drive
Secaucus, New Jersey 07094

Dear Mr. Gray:

Reference is made to your request for a determination of Department of the Army jurisdiction regarding certain roadway and other infrastructural improvements associated with a proposed 5,000-unit residential development to be constructed on upland portions of a 2,640-acre site drained by several tributaries of the South River at the Township of Old Bridge, Middlesex County, New Jersey. You have also requested a confirmation of the wetland delineation as performed by Amy S. Greene, Environmental Consultant.

Based upon our review of the following documents:

1) Wetlands Delineation Report, prepared by Amy S. Greene, dated February 1987;

2) Wetlands Location and Survey Maps prepared by Taylor, Wiseman & Taylor, dated September 5, 1986 and revised March 25, 1987 (at one inch=600 feet scale) and dated October, 1985, revised March 24, 1987 (at one inch=200 feet scale);

3) TAMS Engineers report dated April 7, 1987, including Figures 1 through 11 which show wetlands adjacent or proximate to existing roadways which may require widening;

4) Sullivan Associates Development Plan, dated April 8, 1987, showing locations of proposed new and improved roadways;

the delineation of wetlands shown on these documents appears accurate. A Department of the Army permit, in accordance with 33 CFR 320-330, will not be required provided no fill is placed into waters of the United States, including waterbodies and wetlands.

We have also reviewed the Conceptual Site Plan prepared by Sullican & Associates, dated April 6, 1987, identifying certain roadway and other infrastructural improvements associated with the residential development. The road improvements are more particularly identified on Plates B, C, and D of the aforementioned TAMS report, and the detention basin construction in wetlands is more particularly shown on the General Plan and Typical Details enclosed with an April 6, 1987 letter from Elson T. Killam Associates addressed to Mr. Lloyd Brown of Olympia & York Old Bridge Development Corporation. It is our understanding that the applicant intends to undertake these improvements without placement of fill in waters of the United States using the methods illustrated on these plans or in some other manner not involving fill placement into waters of the United States regulated by the Department of the Army. Based upon our review of these drawings, a Department of the Army permit will not be required for these improvements since no fill would be placed in waters of the United States.

Care should be taken so that any fill or construction materials, including debris, do not enter any waterway to become a drift or pollution hazard. You are to contact appropriate State and local government officials to ensure that the subject work is performed in compliance with their regulations.

Sincerely,

Richard L. Tomer

Richard L. Tomer
Chief, Western Permits Section

Steven R. Gray, Esq.
Waters, McPherson, McNeill, P.A.
400 Plaza Drive
Secaucus, New Jersey 07094
(201) 863-4400
Attorneys for O&Y Old Bridge Development Corp.

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs v. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al. Defendants and	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: MIDDLESEX COUNTY/OCEAN COUNTY (Mount Laurel II) DOCKET NO. C-4122-73
O & Y OLD BRIDGE DEVELOPMENT CORPORATION, a Delaware Corporation, and WOODHAVEN VILLAGE, INC., a New Jersey Corporation Plaintiffs v. THE TOWNSHIP OF OLD BRIDGE in the COUNTY OF MIDDLESEX, a Municipal Corporation of the State of New Jersey, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE, THE MUNICIPAL UTILITIES AUTHORITY OF THE TOWNSHIP OF OLD BRIDGE, THE SEWERAGE AUTHORITY OF THE TOWNSHIP OF OLD BRIDGE and THE PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY/ OCEAN COUNTY (Mount Laurel II) DOCKET NO. L-009837-P.W. and No. L-036734-4 P.W. CIVIL ACTION CERTIFICATION OF STEVEN R. GRAY

STATE OF NEW JERSEY:
SS:
COUNTY OF HUDSON:

I, STEVEN R. GRAY, hereby certifies as follows:

1. I am an Attorney at Law of the State of New Jersey and a member of the firm of Waters, McPherson, McNeill, P.A., with offices at 400 Plaza Drive, Secaucus, New Jersey 07094.

2. We were retained in October of 1986 to represent O&Y Old Bridge Development Corp. in connection with the development of a 2,640 acre site located in Old Bridge Township. More specifically, we are representing O&Y in connection with the potential impact of the development on wetlands located within the jurisdiction of the Corps. O&Y has asked us to prepare this Certification to outline the regulatory requirements which O&Y must satisfy in relation to the potential impact of its development project on wetlands.

3. We have reviewed the affidavit of Lloyd Brown. The historical background concerning O&Y's activities involving wetlands should be read in the context of the legal framework of the Corps regulations. At the time that O&Y acquired the Old Bridge site, the Corps regulations permitted the discharge of dredge or fill material into non-tidal rivers and streams including adjacent wetlands provided that these wetlands were located above the "headwaters" of the subject stream. 33 CFR 330.4(a)(1)(1982). Accordingly, in August of 1979, O&Y submitted information concerning the environmental conditions relating to the project site including information concerning the drainage on the site in order to establish that the site was located above the headwaters of each of 3 streams which traversed the property. In response to that submittal, on August 28, 1979, the Corps confirmed that the project site was located above the headwaters of each of the 3 streams that traversed the property and accordingly wetlands fill for

the project was permitted without an individual fill permit pursuant to the terms of the Corps regulations which were then in effect in New Jersey.

4. In October 1984, the Corps amended it sregulations which had authorized without an individual permit an unlimited amount of wetlands fill within the headwaters of a non-tidal water body (including adjacent wetlands). As of that date, the new Corps regulations as they were applied in New Jersey required projects that had not yet obtained all necessary State and local approvals to obtain an individual fill permit form the Corps. O&Y had not obtained local zoning permits and thus at that point was required to address the requirements of the Corps concerning development in wetlands. The foregoing facts demonstrate that O&Y acted reasonably in light of the changes in the Corps regulatory process.

5. There are two steps in determining whether wetlands fill is required for a development project. The first step is to determine the extent of Corps regulated wetlands on the site. Corps regulated wetlands are defined as "areas that are inundated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

6. The Corps uses a three parameter approach to delineate wetlands areas. These three parameters include hydric soil, vegetation, and hydrology. In order to be considered wetlands within the Corps' jurisdiction, wetlands must meet three criteria. Firstly, the predominant plant species must be hydrophitic or typical of vegetation which grows on wetlands. Secondly, the wetlands must have as its predominant substrate soil hydric characteristics. Lastly, the soil must exhibit a hydrology which demonstrates

that the soil is either saturated by water at a critical depth or be covered with standing water for a substantial portion of the growing season.

7. The second step to decide whether a project necessitates wetlands filling is to overlay the wetlands delineation on the site plan for the proposed project and determine whether any areas of proposed filling on the sie plan are located on areas delineated as wetlands. Assuming that the project site plan contemplates fill on more than on acre of wetlands, an individual fill permit from the Corps is required.

8. To the extent possible, O&Y has sought to minimize the amount of fill to be placed on wetlands. The O&Y project contemplates both residential and office/commercial development. Insofar as the residential portion of its project is concerned, an initial concept site plan proposes the development of approximately 5,000 residential units in another road along Pleasant Valley, Englishtown, Graystone and Marlboro Roads. O&Y has designed its site plan so as to avoid the need for an individual wetlands fill permit for any portion of the residential project. Therefore, concurrent with the request of confirmation of the wetlands delineation, O&Y will ask the Corps to also confirm that the construction associated with the residential development (including the widening of the spine roadways, the bridging of wetlands, and the installation of retention basins for stormwater drainage control) is outside the wetlands jurisdiction of the Corps. The second phase of the project contemplates the filling with the Corps of a wetlands fill permit to facilitate commercial development along Routes 9 and 18 consistent with the terms of the Settlement Agreement.

9. The Settlement Agreement also allows O&Y to build commercial development including offices at the junction of Routes 9 and 18, a shopping center along Route 18 and retail development placed at various locations along Route 18 and the project site.

While, once again, O&Y has sought to minimize wetlands fill for this aspect of its project, the commercial development will necessitate some filling of wetlands and O&Y is now preparing a concept site plan to determine the extent of the filling of wetlands necessitated for this aspect of the commercial development project.

10. In accordance with the rules of the Corps, a wetlands fill permit will issue provided that the applicant can demonstrate that two criteria have been met. Firstly, because the O&Y project is not water dependent, it must demonstrate that there is no "practicable" alternative to the proposed fill or discharge which would have a less adverse impact on the wetlands ecosystem. In determining whether an alternative is practicable, the Corps must take into consideration "cost, existing technology, and logistics in light of overall project purposes," 33 CFR Section 230.10(a)(2). Consistent with the requirements of the Corps regulations, O&Y will demonstrate that there are no economically viable upland alternatives for the commercial development located either on or off the project site. Insofar as on site or on-wetlands alternatives are concerned, O&Y's preliminary study concludes that frontage along a major highway is a critical prerequisite to the viability of its project. The court settlement and thus the new Old Bridge Master Plan and Zoning specifies the locations on the O&Y site on which this commercial development is permitted. At these locations wetlands adjoin the roadway in the area where development is contemplated. More to the point, O&Y's preliminary market analysis concludes that moving the project back any significant distance from the major roadway makes the project unmarketable. Thus, on-site alternatives to avoid wetlands filling are not practicable.

11. Insofar as off-site non-wetlands alternatives for the project are concerned, an inventory of property in the market region will provide conclusive evidence that

there is no land mass located along this major highway of sufficient size to locate the mix of office and commercial uses for a viable project to respond to the market which O&Y has identified. In this regard, O&Y does not seek to justify the need for office/commercial development at this location based solely upon the needs of the population projected for its residential development. Indeed, it will document that the project population growth and market for this type of development in the region will be present whether or not O&Y proceeds with its residential development. These factors demonstrate that other viable project sites are not available.

12. Consistent with the Corps' requirements, O&Y will compensate for any adverse impacts on wetlands as a result of its development so that there is "no net loss" of wetlands values. Finally, O&Y will provide sufficient mitigation to compensate for any adverse impacts on wetlands as a result of its development so that there is no net loss of wetlands values. Mitigation will take one or two forms. O&Y can agree to acquire or deed restrict other parcels of property to create new wetlands or to enhance the value of existing wetlands. The migitation plan proposed to the Corps will include a plan for creation and/or enhancement of wetlands which is equivalent in quality to the value of the wetlands proposed to be filled. For example, in certain locations proposed for commercial development along the major highways, there are uplands immediately adjoining the wetlands proposed to be filled. Thus, these uplands present a readily available opportunity to create new wetlands and thus insure that no net loss of wetlands occurs as a result of the development project.

13. On April 2, 1987, O&Y submitted to the Corps a final wetlands delineation map and requested confirmation of that wetlands delineation. In addition, it asked the Corps to confirm that roadway and other infrastructural improvements associated with

the residential development can be constructed without triggering the jurisdiction of the Corps. By letter dated June 4, 1987, the Corps confirmed the wetlands delineation submitted by O&Y and concluded that the proposed improvements for the residential development do not require a Department of the Army wetlands fill permit. (See attached Exhibit A.)

14. The fill application for the commercial development is being prepared and will be submitted on or about October 31, 1987. With respect to the likely success of that application, the Corps is charged by law with the responsibility to make a "public interest" judgment in deciding whether to issue a wetlands fill permit. This public interest judgment must recognize the public benefits to be realized from the O&Y development. The O&Y project will respond to an identified market need in the central region of the State, generate tax ratables and jobs for the State and local economy. More importantly, O&Y will offer mitigation which insures that there is no net loss of wetlands as a result of its development. For these reasons, there is a persuasive case for the Corps to issue a wetlands fill permit for the commercial aspect of the project.

15. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false I am subject to punishment.

Date: August 6, 1987

STEVEN R. GRAY

#4

EXHIBIT A

DEPARTMENT OF THE ARMY
NEW YORK DISTRICT, CORPS OF ENGINEERS
26 FEDERAL PLAZA
NEW YORK, N. Y. 10278

June 4, 1987

REPLY TO
ATTENTION OF:
Regulatory Branch
Western Permits Section

SUBJECT: Request for determination of jurisdiction, Olympia & York Old Bridge Development Corporation

Steven R. Gray, Esq.
Waters, McPherson, NcNeill
Attorneys at Law
400 Plaza Drive
Secaucus, New Jersey 07094

Dear Mr. Gray:

Reference is made to your request for a determination of Department of the Army jurisdiction regarding certain roadway and other infrastructural improvements associated with a proposed 5,000-unit residential development to be constructed on upland portions of a 2,640-acre site drained by several tributaries of the South River at the Township of Old Bridge, Middlesex County, New Jersey. You have also requested a confirmation of the wetland delineation as performed by Amy S. Greene, Environmental Consultant.

Based upon our review of the following documents:

1) Wetlands Delineation Report, prepared by Amy S. Greene, dated February 1987;

2) Wetlands Location and Survey Maps prepared by Taylor, Wiseman & Taylor, dated September 5, 1986 and revised March 25, 1987 (at one inch=600 feet scale) and dated October, 1985, revised March 24, 1987 (at one inch=200 feet scale);

3) TAMS Engineers report dated April 7, 1987, including Figures 1 through 11 which show wetlands adjacent or proximate to existing roadways which may require widening;

4) Sullivan Associates Development Plan, dated April 8, 1987, showing locations of proposed new and improved roadways;

the delineation of wetlands shown on these documents appears accurate. A Department of the Army permit, in accordance with 33 CFR 320-330, will not be required provided no fill is placed into waters of the United States, including waterbodies and wetlands.

We have also reviewed the Conceptual Site Plan prepared by Sullican & Associates, dated April 6, 1987, identifying certain roadway and other infrastructural improvements associated with the residential development. The road improvements are more particularly identified on Plates B, C, and D of the aforementioned TAMS report, and the detention basin construction in wetlands is more particularly shown on the General Plan and Typical Details enclosed with an April 6, 1987 letter from Elson T. Killam Associates addressed to Mr. Lloyd Brown of Olympia & York Old Bridge Development Corporation. It is our understanding that the applicant intends to undertake these improvements without placement of fill in waters of the United States using the methods illustrated on these plans or in some other manner not involving fill placement into waters of the United States regulated by the Department of the Army. Based upon our review of these drawings, a Department of the Army permit will not be required for these improvements since no fill would be placed in waters of the United States.

Care should be taken so that any fill or construction materials, including debris, do not enter any waterway to become a drift or pollution hazard. You are to contact appropriate State and local government officials to ensure that the subject work is performed in compliance with their regulations.

Sincerely,

Richard L. Tomer

Richard L. Tomer
Chief, Western Permits Section

NORMAN AND KINGSBURY
ATTORNEYS AT LAW
JACKSON COMMONS
SUITE A-2
30 JACKSON ROAD
MEDFORD, NEW JERSEY 08055

May 30, 1986

THOMAS NORMAN
ROBERT E. KINGSBURY

T. N. (609)654-5220
R. E. K. (609)654-1778

Honorable Eugene Serpentelli, J.S.C.
Ocean County Court House
CN 2191
Toms River, N.J. 08754

Re: O & Y vs. Township of Old Bridge, et al

Dear Judge Serpentelli:

As the Court is aware, both Olympia and York and Woodhaven Village have requested and received continuations of their applications before the Old Bridge Planning Board in order to permit both applicants to revise their respective plans in light of the existence of significant areas of wetlands.

Old Bridge Township has now been advised by the New Jersey Affordable Housing Council that the Township's projected Fair Share responsibility equals 411 dwelling units for low and moderate income housing subject to certain credits and adjustments which would reduce the fair share number to 0 at least through 1993, the term for which the fair share number has been projected by the Affordable Housing Council. Carl Hintz, the Township Planning Consultant, has been authorized by the Planning Board to verify the admittedly rough calculations although the Planning Board believes, strongly, that the final calculations, based upon the proposed regulations of the Affordable Housing Council, will produce a negative fair share responsibility for Old Bridge Township.

The settlement involving the parties hereto was based upon a fair share number of 1649 units of low and moderate income housing. The settlement was also based upon the understanding on the part of Old Bridge Township that its legal responsibilities, under the terms of Mount Laurel I and the Oakwood at Madison opinion as well as Mount Laurel II , required rezoning of vast amounts of land in Old Bridge Township for planned developments with the additional requirement

that the developers must provide low and moderate income housing. As a consequence, Old Bridge Township resolved to permit Olympia and York and Woodhaven Village to develop and construct approximately 16,000 units of residential dwellings with commercial and office development on approximately 4,000 acres in the southern portion of Old Bridge Township. It now appears that more than 1200 acres may be classified as wetlands pursuant to regulations promulgated by the U.S. Army Corps of Engineers. These lands cannot be developed. Sound planning requires that lands adjacent to large tracts of wetlands must be planned carefully and sensitively and certainly not at high development densities.

Clearly the advent of the wetlands issue has seriously affected the viability of the settlement. The proposed criteria and guildelines promulgated by the Affordable Housing Council also impact upon the viability of the settlement. Old Bridge Township will, in good faith, satisfy its Mount Laurel obligation as it has attempted to do in the past and as the record made before this Court clearly demonstrates.

It is within this context that the Township, through its Governing Body and Planning Board, will meet with the developers of the Olympia and York development and the Woodhaven development in order to identify areas of commonality as well as areas of disagreement. However, in this attempt to explore the extremely complicated issues raised as a result of the wetland issue and the proposed fair share standard, the Old Bridge Township Planning Board seeks to go on record as not waiving any rights it may have to reopen the terms of the settlement due to the wetlands issue or due to the significant change in municipal responsibility under the proposed regulations of the Affordable Housing Council.

Respectfully submitted,

Thomas Norman, Esq.

TN:mk
CC: All Parties

BRENER, WALLACK & HILL
210 Carnegie Center
Princeton, New Jersey 08543
(609) 924-0808
Attorneys for Plaintiff

HANNOCH WEISMAN, P.C
4 Becker Farm Road
Roseland, New Jersey
(201) 531-5300
Co-Counsel for Plaintiff

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et. al., Plaintiffs, v. THE MAYOR AND COUNCIL of the BOROUGH OF CARTERET, et al., Defendants, and	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX COUNTY DOCKET NO. C-4122-73
O&Y OLD BRIDGE DEVELOPMENT CORPORATION, a Delaware Corporation, Plaintiff, v. THE TOWNSHIP OF OLD BRIDGE in the COUNTY OF MIDDLESEX, a Municipal Corporation of the State of New Jersey, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE, THE MUNICIPAL UTILITIES AUTHORITY OF THE TOWNSHIP OF OLD BRIDGE, THE SEWERAGE AUTHORITY OF THE TOWNSHIP OF OLD BRIDGE and THE PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY/ OCEAN COUNTY (Mount Laurel II) DOCKET NO. L-009837-84 P.W. Civil Action AFFIDAVIT OF ANDREW SULLIVAN

Andrew T. Sullivan, of full age, being sworn on his oath, hereby deposes and says:

1. I am Andrew T. Sullivan, a registered architect and a principal in the firm of Sullivan and Associates, a full scale architectural, landscape, planning and design firm, with offices in Philadelphia, Pennsylvania. I am a licensed professional planner and a registered architect, in the State of New Jersey.

2. I have been employed by O&Y Old Bridge Development Corp. (hereinafter, "O&Y") as their principal planner since 1980.

3. In my capacity as the principal planner for the O&Y project located in Old Bridge Township, Middlesex County, New Jersey, I reviewed reports concerning the developmental characteristics of the site prepared by other professionals and prepared a variety of alternative site development plans for the project.

4. On the basis of information available to us, including the National Wetlands Inventory and the Township's Natural Resource Inventory, my firm prepared a General Development Plan for consideration by the Old Bridge Township Planning Board in 1983.

5. On the basis of additional material, including reports on soil suitability provided by Converse Consultants, I prepared a revised Concept Development Plan for submission to the Old Bridge Township Planning Board in 1986.

6. That design was based on development standards negotiated between the parties in 1985-86. It included overall development at four dwellings per acre, restricting development from the flood plains and the environmentally sensitive areas as mapped in the township's zoning map and its natural resources inventory,

7. That design showed the development of the site with a potential capacity of 10,560 dwelling units, plus associated commercial development.

8. As a result of information provided to our offices through investigations undertaken by Amy S. Greene, Environmental Consultants who did detailed wetlands delineation and mapping of the site in 1986 and 1987, we prepared two (2) alternative plans of development. These were accompanied by a Planning Report dated May 26, 1987. These plans and report were prepared under my supervision.

9. Carl Hintz, the Township's planning counsultant, in a report issued in May, 1987 concluded that because of environmental constraints, O&Y could not develop their property in conformance with the settlement agreement of February, 1986. I hereafter refer to that report as "HNA".

10. I have reviewed this report and would offer the following observations and conclusions:

a. The basic premise of HNA is that the property cannot be developed as a new town and is, therefore, not a feasible planned development, as expressed in the Settlement Agreement.

b. HNA presents the subject as if there is some kind of specific planning construct called a "new town" and that there is widespread agreement as to what that entity is.

c. In fact, a new town is simply one type of planned development.

d. Within planning theory and within the New Jersey Municipal Land Use Law, a planned development is visualized as a flexible form of development incorporating a variety of different uses, under arrangements developed on an interactive basis between a developer and a municipality.

e. There is nothing within the Settlement Agreement which required the O&Y development to be a " new town", whatever that is; but rather, there was an agreement to build a planned development.

f. By failing to distinguish between a new town and a planned unit development, HNA ignores the possibility of any other type of planned development which would be more appropriate and achievable on this site.

g. We have demonstrated through plans prepared and submitted with the May 26, 1987 Planning Report by my office that the major requirements of the settlement as it pertains to the provision of lower income housing, can be met on this site, using the standards achieved in the Settlement Agreement and under sound planning principles.

ll. In addition to making a major initial planning assumption, namely, that the Agreement contemplated a "new town", HNA also made major tecnical errors which included a flawed analysis of the amount of vacant land. These flaws included::

a. HNA used three factors:

i. The first is the depth to seasonal high water table as depicted by the Soils Survey of Middlesex County, New Jersey.

ii. The second factor is Flood Plains as contained in the National Flood Insurance Program data. In neither case did HNA perform any field evaluation.

iii. These two factors were then included with a third factor--wetlands mapping--which was assumed to be an independent, rather than an inclusionary variable.

b. The problem with this analysis is that the field determined wetland areas, based upon Army Corps of Engineers criteria, take into account both severe seasonal high water table limitations and frequent flooding.

c. By definition, these "so called" additional constraints have already been accurately mapped, field checked, surveyed and are contained within the limits of the wetlands delineation.

d. Aside from a few isolated areas of the 100 year floodplain which may be outside the wetlands, it is unreasonable to remove an additional 350 odd acres from the developable land classification.

e. Therefore, instead of having a developable land area of 784 acres, as HNA alleges, a more accurate figure would be 1141 acres, which is based on the amount of uplands areas and is noted in the May 26, 1987 Planning Report prepared by my office.

f. Of this total between 835 -845 acres are devoted to Residential Uses.

12. Following the major planning assumption that a " new town" is required, and then compounding that by double counting undeveloped land so as to reduce the amount of vacant developable land, HNA then characterizes the O&Y revised project as having a sprawling development pattern with no neighborhood character which would place a large burden on the municipality in terms of maintenance. The report contends that neighborhoods must be self-contained units with all services within walking distance, and having a minimum of 500 dwelling units.

13. Furthermore, an early draft of a Site Development Plan prepared by my office, is misrepresented as a "conceptual layout of a typical neighborhood" to illustrate how poorly our proposed neighborhoods function, as well as the sprawling nature of the development.

14. This is inaccurate and misleading for the following reasons:

a. First of all, our Site Development Plan was intended to be and was represented as an illustration of how various types of housing clusters would be accessed and how they would interface with the wetlands.

b. The area shown was not chosen because we felt it represented a neighborhood, but because it was a convenient geographic area of the site which illustrates a variety of cluster configurations, each of which is intended to be a neighborhood.

15. The argument that the O&Y Development creates a sprawling community with high municipal maintenance costs is fallacious and totally unsubstantiated. Sprawl is generally characterized by large areas of land being developed for a given use in an inefficient, spread out manner. This inefficient layout is not measured by its shape, but by the relative amount of acreage allocated for a given use and in the length of road and utility lines which must be developed and maintained.

16. Our current plans as contained in the May 26, 1987 Planning Report, maintain the same residential density as set forth in the Settlement Agreement. This density would indicate the same level of efficiency within the clusters as previously proposed.

17. HNA asserts that usable open space for active passive recreation normally constitutes 25% of the total development area.

18. The criticism of the development also assumes that recreation will not be provided on uplands. Lands for active recreation uses have been allocated to upland areas on both Land Use Plans submitted with our report.

19. The development complies with the requirement agreed to in the settlement that 20% of the residential area be devoted to open space. Lands for active and passive recreation uses have been allocated based on standards published by the National Recreation and Parks Association, a standard recommended by Carl Hintz earlier in settlement negotiations.

20. Since the May 16, 1987 release of our Planning Report, two new regulatory factors must be taken into account. The first is the acceptance of the wetlands delineation by the Army Corps of Engineers and the exclusion of the minor

road crossings from the 404 permitting process. The second change is the passage of the New Jersey Freshwater Wetland Act. (PL. 1987, C.156).

21. Notwithstanding these regulatory factors, my conclusions remain substantially the same as those contained in the May 26, 1987 Planning Report. My reasons are as follows:

a. The O&Y Planned Development is approximately 2,600 acres.

b. Extensive field investigation and surveying have determined that there are 1,141 acres of upland and 1,459 acres of wetland on the property.

c. Construction activity involving fill material in designated wetland areas is regulated by the US Army Corps of Engineers. Similar activity occurring on upland areas is not regulated by the Corps.

d. O&Y has proposed two (2) alternative development plans. In each case, residential construction is confined to upland areas. Between 835 - 845 acres are allocated for residential purposes. Minor road crossings avoid wetlands by short-span bridging. A determination has been obtained from the Corps that these crossings will not require a 404 permit.

e. The two development proposals vary as to the inclusion of or deletion of the Trans-Old Bridge Connector (T.O.B). Orth Rodgers Thompson, Traffic Engineers, informed me that the traffic and circulation plans would be adequate to handle the expected traffic generated by the project without the T.O.B.

f. The plans are designed to accommodate 149 acres of Special Development area and between 128 and 155 acres of commercial uses, thus, between 277 acres and 304 acres are ratable uses. However, some of these areas will require a 404 permit.

g. Using as a basis the same residential densities set forth in the Settlement Agreement, these Alternatives can provide in excess of 5,000 dwelling units. Ten percent (10%) of the total units would be devoted to lower income households.

h. All dwelling units can be accomodated in conformance with the site planning standards contained in the Settlement Agreement.

22. The additional wetlands, while having an effect on the proposal depicted in the Settlement Agreement do not preclude a viable development, including lower income housing, a variety of market housing types, commercial and SD uses, community and recreational facilities and open space, on the O&Y lands, all consistent with the standards of the Settlement Agreement.

23. The proposed plan, as illustrated by the Site Plan in the May 26, 1987 Planning Report shows a series of unique clusters, each one having its own character and identity. Each cluster is surrounded by undisturbed open space. Each cluster is efficiently laid out and their configuration responds to good sound planning.

24. The site plan also shows how recreational amenities can be integratd into the residential clusters where appropriate.

25. An example of a community commercial use has also been added. This use is located with convenient access over the proposed road system. The overall Land Use Plan shows additional commercial uses in the appropriate locations.

26. The provision of public services, school sites, and recreational amenities is addressed in the Planning Report and land has been allocated for them. We view this development as an integral part of the existing Old Bridge community rather than a complete self-sufficient "new town" imposed on the Township. This development can provide a substantial amount of lower income housing.

The foregoing statements and opinions by me are true, to the extent of my knowledge and belief. They are based on information supplied by others, where noted, and to that extent, I have relied on those sources. I know that if any statement made by me is willfully false, I am subject to punishment.

Andrew T. Sullivan

Dated: August 6, 1987

Sworn and subscribed before me
this 6th day of August, 1987.

Sharon L. Smith

SHARON L. SMITH
A Notary Public of New Jersey
My Commission Expires Aug. 19, 1991