Old Bridge — 1987
(P Woodhaven Village) Answering Brief
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August 10, 1987

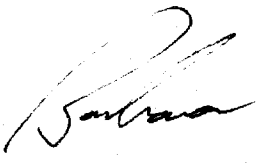
VIA LAWYERS SERVICE

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

Dear Roy:

Enclosed please find Woodhaven's Answering Brief, which we received today.

Sincerely,



encls

cc/Payne, Neisser, Mallach,
Pat, Diane, Barbara

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Attorneys for Plaintiff
Woodhaven Village, Inc.

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al Plaintiffs, v. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al, Defendants, and 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 CHANCERY DIVISION MIDDLESEX COUNTY/OCEAN COUNTY (Mount Laurel II) DOCKET NO. C-4122-73 SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY/OCEAN COUNTY (Mount Laurel II) DOCKET NO. L-009837-84 P.W. & DOCKET NO. L-036734-84 P.W. Civil Action PLAINTIFF WOODHAVEN VILLAGE, INC.'S ANSWERING BRIEF TO DEFENDANTS' MOTION TO SET ASIDE FINAL JUDGEMENT

STEWART M. HUTT of Counsel and on the Brief
RONALD L. SHIMANOWITZ, on the Brief.

STATEMENT OF FACTS

Plaintiff, Woodhaven Village, Inc. supports, joins in and will rely upon the Statement of Facts as set forth in Answering Brief of Plaintiff, O&Y Old Bridge Development Corporation, (hereinafter O & Y), except as specifically set forth hereinbelow. Additionally, this plaintiff similarly supports the legal arguments set forth therein by O & Y.

For the purposes of deciding the within motion, Woodhaven Village stipulates that approximately 490 acres of its landholdings are Wetlands.

(Note: the final Order and Judgment of Repose entered by the Court on January 24, 1986, the Settlement Agreement, and all appendicies thereto are hereinafter collectively referred to as the "Blue Book".)

POINT I

THE SPECIFIC CONCEPT PLANS EMBODIED IN PLATES A, A-1, B and B-1 ARE NEITHER CONDITIONS PRECEDENT NOR CONDITIONS SUBSEQUENT TO THE FINAL JUDGMENT HEREIN.

Apparently, the Township and Planning Board have taken the position that the final judgment must be set aside because plaintiffs are unable to build in accordance with plates A, A-1, B and B-1 (hereinafter the plates).

This is so even though Defendants never specifically state that the plates are a part of the Settlement Agreement (and rightfully so). Yet, Defendants' Arguments and Certifications are substantially addressed to the plates. Thus, the role of the plates in the Settlement is important to the within Motion. The plates are never mentioned in the Blue Book as a condition of the entry or finality of the Judgment. Specifically, the pertinent sections in which the plates are mentioned are as follows:

A. Judgment - Paragraph 4, Page 2 - Concept Plans - This reference to the plates simply sets forth that the planning board will hold hearings on the plates as of a certain date and said hearings will be completed as of a certain date, unless the planning board petitions for additional time. Approval of the plates as a condition of Judgment is not specifically required by the Judgment.

B. Judgment - Paragraph 3, Page 2 - Settlement Agreement - This provision of the Final Judgment, although not specifically

mentioning the plates, does incorporate the Settlement Agreement and all appendicies and schedules thereto into the Final Judgment. As set forth below, the Settlement Agreement then addresses the plates.

C. Settlement Agreement - Paragraph V.- B. 3a Settlement Plan - This Section of the Settlement Agreement states that the developers shall have the right to develop their lands in accordance with the Settlement Plans, (plates) and that the Planning Board shall have the right to hold public hearings on the plates provided the Planning Board abides by the procedures set forth in the Settlement Agreement. This reference to the plates in the Settlement Agreement clearly establishes the right, not the obligation, of the developers to develop their lands in accordance with the Settlement Plan.

D. Settlement Agreement V. - B. 3a (b) - This provision of the Settlement Agreement sets forth the procedures in the event the Planning Board does not approve a plate (i.e., that the Court shall refer the matter to the Master for recommendations, and shall thereafter schedule a hearing to determine what modifications, if any, would be necessary in order to make the plate acceptable to the Court). Clearly, the Settlement Agreement contemplated that the plates were not absolutes, and may require modifications.

As a reading of the foregoing pertinent section reveals, the plates were never mentioned in the Blue Book as a condition of Final Judgment, and a logical reading of same reveals that the plates were

a starting point . If the developers could prove that the plate works, then the developers would have the right, but not the obligation to develop pursuant to the plates. If the plates did not work, as is the case here, the developer simply has the obligation to prove to the Planning Board and Court that modified plates would produce a viable plan. Nowhere does the Blue Book require the destruction of the settlement where the initial concept embodied in the plates does not work for one reason or another. In fact, this possibility was contemplated by the Blue Book and that is why an appeal/review procedure was specifically set forth therein.

Thus defendants' arguments with regard to the failure of the plates misses the purpose and intention of the plates. Plaintiffs were not obligated by the Final Judgment to build developments which coincided with the proposals contained in the Plates. The Plates were to give plaintiff the right to constrain the Planning Board from arbitrarily changing the developers' plan. That is, if developers were able to prove to the Planning Board that the plates work in a planning sense, and in accordance with the standards set forth in the Blue Book appendices, (Appendix C, Substantive Revisions and Planning Standards; Appendix D, Engineering Standards for drainage; and Appendix E, Engineering Standards for Roads), then the Planning Board could not have required something else. However, as in this case, if developers could not prove to the Board that the plan works, then a new plan must be presented to the Board for the Board's approval.

The plates were neither a condition precedent nor a condition subsequent to the efficacy of the Final Judgment. Simply, the plates were not a condition at all. If the plates were "carved in stone" (i.e. a condition of final judgment) then there would be no reason for developers to go to the Planning Board for approval of same or for the appeal process contained in the Settlement Agreement. All parties admit that the plates were not automatically guaranteed to be approved by the Planning Board. The developers specifically negotiated the right to submit the plates for the Board's approval. The Planning Board recognized this fact (see Exhibit "A" of O & Y Answering Brief, wherein the Planning Board Attorney instructed the developers' attorneys that at the public hearings on the plates, the nature of the hearings will be similar to a Master Plan Hearing, and, therefore, details related to the plates will be at a relatively broad level. The Planning Board Attorney, therein, specifically stated that detailed site information would be presented by the applicants at a later time, when specific applications for preliminary site plan and subdivision approvals were sought). The true agreement between the parties herein, with regard to the plates, was that developers would be entitled to develop in accordance with the plates if the plates were viable in a planning sense. The burden of proving the viability of the plates to the Planning Board was, of course, upon the developers.

Further, there is nothing in the Blue Book which guarantees that developers would build anything at all. There is always the

possibility, for numerous and various reasons, that a developer will not build at all or cannot build what was contemplated. This happens all the time. The only "mistake" herein, is that what the Township has "hoped for" did not happen. That is an inherent risk which Townships and developers must live with every day. It is not a mistake for which a court sets aside a final judgment.

At no time prior to the entry of the final judgment did either of the developers represent that their respective sites were absolutely "guaranteed" as buildable. No sane developer would give such a guarantee. The final judgment gave certain rights to build but did not force an obligation to build upon the developers. Who knows what the next day, month, year or twenty years might bring? Numerous factors could and will affect what is ultimately built in Old Bridge Township. Interest rates can increase drastically, the financial position of developers could change and/or laws, rules and regulations could change. Any change could take place immediately or twenty (20) years from now. Would such a change a year, two years, five years or twenty years from now be grounds for setting aside a Mount Laurel Judgment despite the fact that no construction was guaranteed in the Judgment? We think not. Remember, it is not as though defendants have a right of specific performance from plaintiffs with regard to construction.

Plaintiffs admit up front that the Plates, in light of the additional wetlands encountered, are no longer viable designs. However, this is insufficient reason to set aside the final

judgment. The Blue Book contemplated modifications to the Plates with the built in protection of a public hearing, review powers and an appeal procedure. The defendants are protected. The developers have been through a lengthy review process and must now start again with new plates.

POINT II

SINCE NO RELEVANT FACT HAS CHANGED SINCE THE DATE OF THE SETTLEMEMENT (January 24, 1986), THE FINAL JUDGMENT MUST NOT BE SET ASIDE.

Defendants' papers herein have focused upon what the intentions of the Defendants were prior to and upon entering the settlement, as well as focusing upon what has transpired since the settement was entered into by the parties. These inquiries by defendants is irrelevant. The relevant issue is what was actually agreed to, not what the intentions of the parties were prior to entering into the agreement, and not what has transpired since the entry of the agreement. The intentions of the parties to the agreement (or what the parties had hoped for) is not a proper issue since the various parties had various intentions in entering the settlement. The polestar is what the parties finally agreed to, that is, the BLUE BOOK. What is important is not what the parties thought they were going to get, but what was actually agreed to. Herein, the parties expressly and specifically set forth what was actually agreed to in a highly comprehensive settlement document.

Accordingly, the Blue Book, or settlement document must be the quiding light towards the resolution of this Motion. Since the parties are bound by the Blue Book, the relevant inquiry becomes - what is it in the Blue Book which the defendants were promised, and are not going to get? The following analysis of the Certifications upon which defendants rely reveals that defendants are getting all

that they were promised pursuant to the terms of the settlement document.

1. Certification of Jerome J. Convery dated December 23, 1986 -

a. Paragraph 2 of the Covery Certification argues that the Settlement Agreement proposed satisfaction of the township's Mount Laurel obligation through, in part, 500 units of Mount Laurel housing by Olympia and York, and 260 units of Mount Laurel housing by Woodhaven, and that the Final Judgment was based upon a mutual mistake of fact. This simply is not so. The developers are still willing to provide the Mount Laurel units they had originally proposed, i.e., 500 Mount Laurel units from Olympia and York and 260 Mount Laurel units from Woodhaven Village. Nobody has stated that the developers are not able or unwilling to provide the Mount Laurel units. The township is clearly getting credit for this as having provided a reasonable opportunity for construction of those units. Even if Olympia and York could only build half of its proposed project, that is approximately 5,000 units instead of approximately 10,000 units, then O & Y would still produce 500 Mount Laurel units as a result of the 10% set aside. Woodhaven is still in a position to build its entire development of 5,820 units and, accordingly, is still in a position to provide the Mount Laurel units originally proposed as part of the Township's satisfaction of its fair share number.

b. Paragraph 3 of the Convery Certification further states that O & Y proposed a project of 10,560 units, and Woodhaven Village proposed a project of 5,820 units. There was never any guarantee that either developer would build even one unit. Paragraph V - A. 1 and V - A. 2 with regard to O & Y unit count and Woodhaven unit count, respectively, simply sets forth maximum number of units that were permitted to be built by the developers. This section on vesting, again, did not guarantee that a certain number of units would be built. This section was for the benefit of both the defendants and developers in that developers knew that there was the opportunity to develop up to a certain number of units, and the township knew that they were protected by the fact that the developers were limited in the number of units they could ultimately produce.

c. Paragraph 3 of the Convery Certification further refers to the 10% set aside. The developers are still bound by the 10% set aside, plan to provide the 10% set aside and, therefore, nothing has changed about the 10% set aside.

d. Paragraph 3 of the Convery Certification states that it was implicit in the settlement that the holdings of O & Y and Woodhaven were vacant developable land available for Mount Laurel development. This may have been implicit to Mr. Convery, however, there was no specific guarantee, covenant or representation that the subject lands were developable or not. All parties knew or should have known that the developability of the subject lands would not

ultimately be known until the very last approval for the very last unit was obtained. Obviously, there is an awful lot that can happen with regard to developability between settlement of a lawsuit and construction of the last of some 16,000 units. To say that it was implicit that the lands in question were "vacant developable land" is somewhat naive in light of the long-term natue of the project, and increasing regulatory controls over land development.

2. Certification of Carl Hintz dated December 30, 1986 -

a. Paragraph 2 of the Hintz Certification states that Mr. Hintz was assured that all reports pertaining to environmental concerns would be presented to the Planning Board at public hearings to consider the developers' applications. This is true. We agree, it was not contempated that there would be a "Pre-Settlement" detailed investigation of environmental concerns inasmuch as such a detailed investigation would be more appropriate at a later date. Accordingly, Mr. Hintz could not have been laboring under a mistake in suggesting that the settlement be entered since the wetlands issue, as per Mr. Hintz' Certification, was to be addressed in detail sometime subsequent to the entry of the Settlement.

b. Paragraph 3 of the Hintz Certification states that the "new town plans" (these are Mr. Hintz' words since the phrase "new town plans" does not appear in the Blue Book) set forth in the plates did not contain sufficient detail for analysis for planning purposes by Mr. Hintz. We agree that the plates do not have sufficient detail to do specific planning analysis. The plates were

intended to contain, and do contain a concept plan and not a detailed engineering plan. Mr. Hintz' references to a "new town"and "single comprehensive entity" are his own references and perhaps his own intentions. However, these intentions which may be well intended, are not set forth in the Blue Book, and, therefore, are not part of the settlement reached by the parties.

c. Paragraph 3 of the Hintz Certification goes on to state what Mr. Hintz feels are all of the intended benefits of concept plans as embodied in the plates, which benefits Mr. Hintz feels that the Township will not now receive. Remember, the proposed benefits were only intentions in the mind of Mr. Hintz. The developers also had intentions since they very much wanted to build their developments in accordance with the plates as originally proposed. Clearly the developer's intentions similarly will not be not fulfilled due to the required modifications to the plates. Accordingly, all parties had good intentions; however, the "best laid plans of mice and men often go astray". The foolishness of the defendants' arguments are brought to light when those arguments are stated in the converse. That is, if the developers are not being permitted to do what they had intended to do, and reap all the benefits of what they intended to do on the original plates, should the developer now be entitled to modify the Blue Book and have only a 5% set aside because they received no "bonus density" and were relying even more than the Township on the "profitability" of having vast commercial structures? Clearly defendants are not entitled to

modify the Blue Book settlement just because the developers are not going to be able to build the developments which they "intended" to build.

3. Certification of Joan George dated June 29, 1987 -

a. Paragraph 2 of the George Certification states that Olympia and York is a substantial builder with a world-wide reputation, tremendous financial wherewithal, extensive building/development experience. This is as true today as it was when Olympia and York first set foot in the Township of Old Bridge.

b. Paragraph 3 of the George Certification states that the O & Y and Woodhaven tracts were proposed to the Planning Board as new town developments with their own employment and tax basis. Nowhere does the Blue Book refer to the new development as a new town, and, with regards to the new employment base and tax base, the developments will still provide same. Of course, if either one or both of the plaintiffs' developments are scaled down, then the employment base and tax base will be similarly scaled down. However, this is not a detriment to the Township since the scale down will be on a proportional basis, thereby providing sufficient benefit to the Township for the level of burden imposed by the development.

c. Paragraph 4 of the George Certification suggests that negotiations leading to the settlement focus primarily on planning and financial benefits which will innure to the residents of the township of Old Bridge. The residents of the township of Old Bridge

will still receive planning and financial benefits in that the developers still intend to proceed with developments which are sound from a planning point of view and provide financial benefits. Again, although the benefits may not be on the same scale as originally proposed, the benefits provided will be in proportion to the size of the development ultimately built.

d. Paragraph 5 of the George Certification refers to a professionally designed 18 hole golf course which would be available to the residents of the "new town". Again, the Blue Book nowhere requires the building of an 18 hole golf course. The golf course was clearly something which the O & Y development contemplated, and which O & Y would have liked to build and may still build. However, even though disappointing to Olympia and York, same may not be built. However, the golf course was never specifically guaranteed to be built by Olympia and York. With regard to active recreational activities and public facilities mentioned in paragraph 5 of the George Certification, no one has said that there will not be sufficient active recreational activities and public facilities provided in the modified plates.

e. Paragraph 6 of the George Certification states that the residential development within the O&Y tract included a full mix of residential building types and densities and a variety of architectural designs. The developers certainly still intend to provide a full mix and no one has ever said otherwise.

f. Paragraph 7 of the George Certification refers to the

importance of the staging performance schedule (or the lock step of commercial development to residential development). The developers recognize the importance of the staging performance schedule to the defendants and state categorically that developers are bound thereto and clearly plan to develop pursuant to that commercial phasing requirement. Again, the Blue Book does not require any specific commercial development; however, the Blue Book does grant the right to the developers to develop commercial projects if they so choose. Of course, if developers do not choose to develop commercial projects, this will limit their ability to develop residential units. This lock step is the developers' burden and will continue to be the developers' burden. The lock step protects the township from uncontrolled residential growth without parallel commercial growth. The staging performance schedule does not guarantee any commercial development. Without question, the developers will build as much commercial development as they possibly can, provided same is permitted and financially advantageous. The incentive to build commercial development is as strong now as it ever was since development of residential units is limited thereby.

g. Paragraph 8 of the George Certification states that the Planning Board thought that the fair share responsibility of Old Bridge would be satisfied by the O & Y and Woodhaven sites. The O & Y and Woodhaven sites are scheduled to produce 500 and 260 units of low and moderate income housing, respectively, as per the Final Judgment. This fact is as true today as it was at the time of

Settlement. The Township is in no way penalized if those units are not actually built. In fact, if those units are not actually built, the township has gained the benefit of satisfying the fair share number through realistic zoning which just so happened did not produce the Mount Laurel housing. Further, paragraph 8 states that the Planning Board believed land would be available for support facilities including schools, fire houses and first aid buildings. The developers have, in the past, do presently, and will, in the future, provide adequate lands for such support facilities. This has not changed.

h. Paragraph 9 of the George Certification states that the Trans Old Bridge Connector was an important part of the settlement in the minds of defendants. The Trans Old Bridge Connector is nowhere required of the developers in the Blue Book. In fact, the Trans Old Bridge Connector was not the idea of the developers, but was originally found in the Master Plan of the Township. This means that the township had in its Master Plan a major thoroughfare through the town which, to some extent, happened to be located in federally regulated wetlands. The developers may have difficulty in building the Trans Old Bridge Connector; however, so would the Township if it wished to satisfy its Master Plan proposal.

i. Paragraph 10 of the George Affidavit states that the proposed O & Y and Woodhaven Developments would be self-contained in terms of employment and municipal facilities to provide municipal services. This is alleged to be important to the Planning Board.

Again, the Blue Book does not specifically require this and, perhaps more importantly, no one has said that the developers can not produce such a devleopment. Furthermore, paragraph 10 of the George Certification provides that Joan George would not have consented to the Settlement if she had known of the wetlands limitations upon the subject developments. What Joan George would or would not have done in retrospect is not relevant. The fact is that the township entered into a settlement and, for better, or for worse, like the developers, must live with their bargains, respectively. Second thoughts, once a deal has been structured and formalized, as is the case herein, are of no import.

4. Certification of Eugene Dunlop dated July 20, 1987 - The factual contentions (as well as arguments and conclusions) of this Certification are largely repetitious of the three foregoing Certifications. Accordingly, this plaintiff will not repeat its responses except to incorporate the above responses as if set forth herein at length as a response to Mr. Dunlop's Certification.

However, there are a few comments in Mr. Dunlop's Certification that bear response. They are as follows:

a. Paragraph 5 of the Dunlop Certification states "the representatives of Woodhaven Village indicated that they could only build approximately 5% commercial on their property due to its relationship to the various highways". (emphasis supplied)

That was true then, and it is true now.

It was not feasible then, and it is not feasible now for

Woodhaven to devote more than 5% of its property to commercial uses because of the above stated reason.

However, Mr. Dunlop goes on to say that he would not have accepted this "truism" but for the fact that O & Y intended to develop more than 10% of its property as commercial. That may or may not be true as to Mr. Dunlop's and the Council's intention. But it does not change the fact that Woodhaven did not and could not agree to provide more than 5% of its lands for commercial. Woodhaven still can and intends to devote 5% of its lands for commercial.

b. Paragraph 7 of Mr. Dunlop's Certification indicates that he and the Council were advised by Mr. Hintz that under the "consensus formula" the municipality's fair share number would probably be 2,414. He goes on to state...

> "When the final settlement figures were negotiated, it was proposed to me as a Council member that the obligation of the Township of Old Bridge would be 1,668 units, half to be low income and the other half to be moderate income. It was very important to me that the proposed mechanism for the development of these units would be that Olympia & York would provide 500 units and Woodhaven would provide 260 units. It was proposed that these units would be developed during the six-year period of repose. As a Council member, it was always important to me that a settlement with O & Y and Woodhaven would provide the bulk of the fair share responsibility of the Township of Old Bridge concerning Mount

> Laurel housing, and that the main reason for settling with O & Y and Woodhaven would be to meet our Mount Laurel obligation." (emphasis added).

It is important to note that everything Mr. Dunlop said above is still true. To wit:

1. The fair share number is still not in excess of 1,668;
2. O & Y can and is obligated to provide 500 units and Woodhaven can and is obligated to provide 260 units.
3. O & Y and Woodhaven are going to provide the bulk of the fair share responsibility of the Township.
4. The main reason for settling with O & Y and Woodhaven was for the town to meet its Mount Laurel obligation, and none of the plaintiffs, including but not limited to the Urban League, deny that the Judgment and Settlement "as is" does not satisfy the Township's Mount Laurel obligation.

c. Paragraph 9 of the Dunlop Certification states:

> "To allow the settlement to go forth with a ten (10%) percent set aside for O & Y and Woodhaven, merely rewards them for building less Mount Laurel II units, and compels the Township of Old Bridge to look for other sources of low and moderate income housing."

This is an obvious mistatement of fact since:

1) The developers are not "rewarded" by being compelled to build a 10% set aside without receiving a bonus density; and

2) The Township has received a Judgment of Repose and neither the Urban League nor the developers are seeking to have the Township "look for other sources of low and moderate income housing".

In light of the foregoing analysis of the Certifications submitted by defendants in support of the within Motion, the defendants are getting all that was promised to them pursuant to the Blue Book. That is all the defendants can expect to get and that is what the defendants are getting. Therefore, defendants have failed to show sufficient reason to set aside the Final Judgment.

Moreover, during settlement negotiations, the parties negotiated, and subsequently agreed based upon the information known at the time of settlement - January 24, 1986. All parties knew that plaintiffs did not have site specific information that was specific enough to plan construction. It would have been impractical and foolish for the developers to have obtained, prior to the settlement agreement (Final Judgment), the level of detail which was garnered after the parties knew a final settlement was in hand.

What was contemplated by the final judgment (or "Blue Book") actually happened. There is no surprise or mistake here. It was known from the beginning by all parties (who happen to be sophisticated in these matters) that site specific in-depth investigation was needed. What happened to occur during the

in-depth site specific investigation highlights the very reason for doing such an investigation. Until one investigates, there are unknowns. Everyone knows this. It is part of the facts of life of developers, Townships and Planning Boards.

Interestingly, the Township 1983 Ordinance, like the Blue Book, required a General Development Plan approval for Planned Developments, with more detailed plans not required until application is made for subsequent preliminary site plan or subdivision approvals. The idea being that no one wants detailed investigation until an approved general plan is in hand. In this manner, all parties are not "spinning their respective wheels" on very large projects which consume tremendous time, money and energy of both developer and municipality. Therefore, the logical remedy herein is to have the developers go back to the Planning Board until a General Development Plan (i.e. New Plates) is agreed upon.

POINT III

THE FAIR SHARE NUMBER WILL STILL BE SATISFIED IN ACCORDANCE WITH THE FINAL JUDGMENT.

Simple principles are important to this motion and it is easy to lose sight of the principles through the forest of paper and accusations. The Township is the party obligated to satisfy its fair share of lower income housing pursuant to the Mount Laurel Doctrine. The settlement embodied in the Blue Book was, AND STILL IS, the mechanism by which the Township agreed to satisfy its fair share. Nothing has changed about that.

The Township's realistic opportunity for the construction of its fair share of lower income housing included by way of the final judgment, 500 units from O&Y and 260 units from Woodhaven toward satisfaction of the Township's six year fair share obligation (1992). That compliance mechanism remains unaltered even though the O&Y site, and perhaps the Woodhaven site, may produce less than the contemplated number of lower income units. The Township is not required by the settlement to produce the units elsewhere. This was a risk taken by the Urban league at the time of settlement. There is no additional Mount Laurel burden on the Township. No one is insisting on more lower income units somewhere else. The developers are obligated to a 10% set aside to help satisfy any obligation of the Township for Mount Laurel Housing. That is the developer's problem. Win, lose or draw, they are

stuck. The Township gets the benefit of production of lower income units to satisfy its obligation without any additional burden (even if O&Y and Woodhaven produce less Mount Laurel units than contemplated.)

All of the issues raised by defendants herein amount to one big "Red Herring". For instance, the Township argues that it would never have entered the settlement if it knew that the Mount Laurel housing was not going to be located in the southern portion of the Township. This is just not so. The Township, as stated above, is not required to "make up" any lost units by re-zoning/re-locating same elewhere in the Township. The Blue Book does not require this. All the Township has the right to expect from the developers is the set aside numbers in the final judgment. All the Township was and is expected to do was and is to provide a realistic opportunity for the creation of this number of Mount Laurel Units.

Now, the Township has satisfied its fair share via the Blue Book. Reductions in the number of units in plaintiffs' development do not increase the Township's Mount Laurel burden. Since the Township is getting the protective benefits of the settlement (i.e., satisfaction of the township's fair share number and protection from builder remedies lawsuits) and no increased Mount Laurel burden as a result of a change in the developer's plans, how do defendants have the audacity to request that the final judgment be set aside? If the Township is worried about satisfying its agreed upon fair share, that worry is misplaced as stated above. If the Township brings

this Motion based upon ulterior motives, then the Motion clearly must be denied.

POINT IV

ASSUMING O & Y's COMMERCIAL COMPONENT OF DEVELOPMENT (OR EVEN WOODHAVEN'S FOR THAT MATTER) IS NOT DEVELOPABLE, THE FINAL JUDGMENT MUST NOT BE SET ASIDE.

The Township has argued that the final judgment must be set aside because the Township may not get the Commercial Development for which it hoped. This argument ignores the true meaning of the promises contained in the Blue Book. Nowhere does the agreement among the parties hereto promise the Township commercial ratables. The Blue Book only requires that if there is to be any residential development, then the commercial development must be "lock-stepped" with any residential development pursuant to the staging performance schedule (Section V - C. 6). This "lock-step" development is all that the Township has been promised and is exactly what the Township will get. Remember, this the developer's problem. If the developers can not do the commercial development, then they can not do the residential development.

Section V - C. 5 of the Settlement Agreement provides that:

> "Woodhaven Commercial Development
>
> Woodhaven shall construct office, retail, commercial and/or industrial space on the 73 acres designated Commercial on its

> Settlement Plan with no additional lower-income housing obligation attendant to the exercise of this right. This right is conditioned upon Woodhaven meeting the Regulatory Standards set forth in the Appendices (and specifically Appendix C)." (emphasis added)

The foregoing establishes the right of Woodhaven to construct commercial development. No obligation to do so is set forth. The Settlement Agreement with regard to Woodhaven (and O & Y for that matter) gives the developer the option to build commercial and certaintly did not vest in the Township an entitlement to a certain amount of commercial development. This makes sense in light of any Zoning Ordinances or Land Development Ordinance. Such Ordinances, throughout this State, limit development but do not require a minimum amount of development. For instance, if someone owns lands zoned for Office/Commercial use, that landowner is permitted such use but is not obligated to provide the township with such use just because the Township hoped for same by zoning for office/commercial.

Similarly, the township was promised a "lock step" of Mount Laurel units with market units. (See A. 8 of Appendix "A" - Phasing Schedule). The developers are not required to build even one Mount Laurel unit or even one market unit. However, if the developers do build market units, then the developers must abide by the phasing schedule. This phasing schedule for Mount Laurel units, like the staging performance schedule for commercial development, does not guarantee a minimum level of development, but

simply guarantees that if there is development, then same must proceed in a lock-step with the provision of commercial development and Mount Laurel units.

Accordingly, since the Township is getting precisely what it bargained for, the final judgment must not be set aside.

POINT V

THE "REOPENING CLAUSE", IF APPLICABLE, CONTEMPLATED ONLY A MODIFICATION OF THE SETTLEMENT AGREEMENT.

Defendants rely upon the Reopening Clause of the settlement agreement as a basis for setting aside the final judgment. The Reopening Clause (III-A.3 of the Settlement Agreement) sets forth the following:

> "III-A.3 Reopening Clause
> Any party to this Agreement upon good cause shown, may apply to the Court for modification of this Agreement based on a modification of law by a Court of competent jurisdiction, a subsequently enacted state statute, a subsequently adopted administrative regulation of a state agency acting under statutory authority, or based on no reasonable possibiity of performance. (emphasis added)

The above quoted Reopening Clause appears in Sect. III-A - "Mount Laurel Compliance" (P.6) in the Settlement Agreement. The Settlement Agreement (as distinguished from the Judgment) does not reference the fair share number. Section III-A of the Settlement Agreement (of which the Reopening Clause is a part) addresses such issues as: (i) establishment of a Housing Agency, (ii) percentage set aside and determination of income levels and other

"administrative" issues with regard to Mount Laurel sales and rentals. The remainder of the Settlement Agreement deals with: (i) Ordinance Revisions; Vesting of building rights; (ii) establishment of landholdings; (iii) Approval Procedures for the Plates; (iv) site specific provisions, (v) Off-tract improvements; and (vi) Water and sewer.

Therefore, the Reopening Clause was clearly intended to deal with "administrative" issues. A change in the Fair Share number by COAH is certaintly not a change which triggers the Reopening Clause. Accordingly, the Reopening Clause is inapplicable to the facts herein.

Even if the Reopening Clause were applicable, that clause expressly allows only a "modification of this agreement"; being the Settlement Agreement. So, if the Defendants are to be accorded any relief pursuant to the within motion, that relief must be limited to a modification of the Settlement Agreement. Undoubtedly, a set aside of the final judgment is not intended, required, or desireable.

Of course, if the Settlement Agreement were modified pursuant to the Reopening Clause, the final judgment would be no less final for transfer reasons.

POINT VI

THE JUDGMENT SHOULD NOT BE DISTURBED WITH REGARD TO WOODHAVEN VILLAGE, INC.

The Court has the power to vacate the judgment with regard to O & Y Old Bridge Development Corp., and to maintain the status quo with regard to Woodhaven Village, Inc. There is no requirement that a vacation of a judgment as to one party necessitates simliar treatment to the other parties.

Although no New Jersey case deals explicitly with the subject, there are a number of jurisdictions which permit the vacation of a judgment "as to less than all of the parties against whom it was rendered." 46 Am Jur 2d 844 and cases cited therein. In the State of New York, Hewlett v. Van Voorhis, 187 N.Y.S. 533 (Sup. Ct. App. Div. 1921) held that the dismissal of an action against one defendant did not vacate a judgment against a second defendant, saying:

> "The rule [is] that where a judgment consists of distinct parts so separate and independent in form and nature as to be easily severed, and each is, in fact, a distinct adjudication, on appeal an adjudication not affected by error may be affirmed and an adjudication affected by error may be reversed . . ."

quoting City of Buffalo v. D.L. 7 W. R. Co., 176 N.Y. 308, 68 N.E. 587 (1903). See also Gilbert v. Stanton Brewery, Inc., 295 N.Y. 270 272 (C.A. 1946), allowing severance where there is error of law

underlying one judgment.

In Illinois, the Court also has the power to set aside a judgment as to fewer than all the parties. Handley v. Unarco Industries, Inc., 463 N.E. 2d 1011, 1016, 124 Ill. App. 3d 56 (1984). Also rejecting the unitary judgment rule are Mau v. Unarco Industries, Inc., 481 N.E. 2d 1207, 1209, 135 Ill. App. 3d 736 (1985) and Chmielewski v. Marich, 2 Ill. 2d 568, 119 N.E. 2d 247, 251 (1954). Altogether, some 22 jurisdictions permit the Court the power of partial vacation. See, Annotation, Vacation or Setting Aside of Judgment As to One or More of Multiple Parties, 42 A.L.R. 2d 1030, 1033-34 (1955).

Thus, the general rule as to the effect of vacating part of a Judgment and the effacacy of the remainder of the Judgment is well set forth by the Supreme Court of Illinois in Chmielewski, supra. as follows:

> "We hold, therefore, that when a judgment or decree against two or more defendants is vacated as to one of them, it need not for that reason alone be vacated as to any of the others, and should not be vacated as to any of the others unless it appears that because of an interdependence of the rights of the defendants or because of other special factors, it would be prejudicial and inequitable to leave the judgment standing against them."

From the above, it can be seen that there has to be a case by case examination to determine whether part of a Judgment can

be vacated or an entire Judgment must be vacated. An analysis of the facts and documents in the instant case show that there is no interdependence of the rights of the Township or prejudice to the Township if the Judgment was vacated against O & Y and not against Woodhaven, for the following reasons:

1. It may be elementary and simplistic, but the fact of the matter is Woodhaven's lawsuit is a separate and independant lawsuit from O & Y's lawsuit, including having separate Docket numbers, that were consolidated only for the purposes of convenience. In other words, the two developments and the two developers were not suing as a "unit", or as some type of joint venture with an overall development plan.

2. Page 1 of the Judgment specifically provides separate Mount Laurel obligations for each plaintiff, to wit:

260 units for Woodhaven, and 500 for O & Y.

3. There are separate distinct land use plates, to wit:

A and A -1 for O & Y, and B and B-1 for Woodhaven.

Moreover, page 2 of the Judgment provides for separate hearings for each set of plates for each developer.

4. Page 12 of the Settlement Agreement sets forth different vesting for respective lands of the two developers and refers to separate "Map 1" for O & Y and "Map 2" for Woodhaven, and allows for each of them respectively to acquire additional lands (out parcels) from time to time, as shown on said respective maps.

5. Page #3 of the Settlement agreement (V-B.3a.)

describes each developer's respective rights to develop their lands in accordance with their respective settlement plans (Plates A & B). It is signifigant that sub-paragraph b) of V-B.3a states :

> "The Planning Board shall issue its decisions on Plates A and B simultaneously...".

Nowhere does the Settlement say, as it could have said, that if one developer's plan were unsatisfactory, the other developer could not proceed. As a matter of fact, sub-paragraphs C & D of said Section specifically provide that the Planning Board could approve one developer's plate and at the same time reject another developer's plate, in which case, the developer whose plate was rejected could go through an "appeal" process. Moreover, V-B.3b. specifically provides, inter alia:

> "...the developer or developers whose plate are approved by the Court may immediately thereafter submit development applications in accordance with the procedures set forth in the attached appendices to the Township Planning Board for its review and approval each time any of the lands within the Plates are proposed for development;...".

Again, it is important to note that the right of a particular developer to proceed is not dependant on the right of the other developer to proceed.

6. As to commercial development, there is a specific provision as to Woodhaven, (V-C.5), which provides that it shall have the right to construct on 73 commercial acres, conditioned upon

satisfying the regulatory standards set forth in the Appendices. On the other hand, there are site specific provisions that relate solely to O & Y (V-C.1 to V-C.3)

Thus, it can be seen that whether or not O & Y can not build, either because this Court vacates the Judgment as to O & Y, or because of physical impossibilities, or for any other reason, there is no reason why Woodhaven shouldn't get the "benefit of its bargain" and be allowed to proceed with its development, in accordance with the terms of the Settlement, including, but not limited to, all the specific standards set forth therein, such as the construction of central sewer and water systems, infrastructure, etc.

(The converse, of course, would be true for O & Y if for some reason Woodhaven never proceeded with the contstruction of its development, and O & Y was in the position to proceed with construction).

From the other point of view, there is no action by any of the plaintiffs, including but not limited to the Urban League, to set aside the "benefits of the Township's bargain". To wit: it still has a Judgment of Repose, even if the Judgment is set aside as to O & Y, because the Township obtained that in its settlement with Woodhaven.

In short, there is nothing in the Judgment or Settlement Agreement which states that if one developer does not physically proceed, for whatever reason, that the other developers' rights are

affected. To the contrary, the Judgment and Settlement Agreement treats each developer separatly, albeit, in many respects they are treated in a similar manner.

It should also be noted that all of the alleged "complaints" of the Planning Board and the Township and their experts fundamentally relate to their apprehension about not receiving from O & Y what they "expected". There is very little, if any, contention by the Township and the Planning Board that it is apprehensive about receiving what it "expected" from Woodhaven.

Despite the above contention that the Judgment as to Woodhaven should not be vacated even if it is vacated as to O & Y, we hasten to add that it is our opinion that the Judgment should not be vacated as to either developer.

CONCLUSION

In light of the foregoing, Plaintiff, Woodhaven Village, Inc. respectfully requests this Court to deny defendants' Motion to set aside the Order and Judgment of Repose entered by the Court on January 24, 1986 and to deny transfer of this motion to the Council on Affordable Housing.

Dated: August 8, 1987

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Attorneys for Plaintiff,
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BY: _____
STEWART M. HUTT, ESQ.

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