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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 corp., 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 BRIEF OF PLAINTIFF WOODHAVEN VILLAGE, INC. IN SUPPORT OF MOTION FOR RECONSIDERATION AND REHEARING

STEWART M. HUTT, Of Counsel and On the Brief
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FACTS

On October 6, 1987, the Court entered an Order granting defendant's motion to vacate Order and Judgment of Repose dated January 24, 1986 and transferring this matter to the Council on Affordable Housing. The decision was based upon reasons set forth in oral opinion rendered September 14, 1987.[1] Woodhaven has moved the Court for a rehearing and reconsideration of the October 6, 1987 Order by Notice of Motion filed October 15, 1987.

The Court framed the issue:

> "... whether the defendants are entitled to vacate the settlement due to the existence of vast amounts of wetland which were not known to the parties at the time they settled." T103-17 to T103-20.

Woodhaven suggests that the issue could be better phrased as:

> "May the Court vacate the settlement if one of the three parties cannot perform as bargained?"

Vacation of the January 24, 1986 Order and Judgment of Repose was grounded in either or both Rule 4:50-1(a) and 4:50-1(b). Further, the Court held that under the circumstances the Reopening Clause (Section III-A.3, Settlement Agreement, Blue Book) was not

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1. The Court found that the plates were a binding component of the settlement. For the purpose of the within Motion for Rehearing and Reconsideration, Woodhaven accepts the Court's ruling that the plates were part of the settlement and binding on the parties.

applicable under the circumstances. With regard to Rule 4:50-1(a) (Mistake), the Court found as follows:

> Yet, while the existence or non-existence of wetlands was not in issue at the time of settlement and therefore cannot be said to have been material to the settlement at that time, therefore fitting neatly into the cases regarding mistake under Rule 4:50, the extent of the wetland of which the parties now are aware does affect a material aspect of the settlement, that being the ability of O & Y and Woodhaven to build the planned development as depicted in the plates or at least some reasonable facsimile thereof. (emphasis added)

(T 107-19 to T 108-3)

The foregoing sets forth that, with regard to mistake under R-4:50-1(a), the number of wetlands acres was not a material issue at time of settlement and that the material issue is whether or not Woodhaven is able "to build the planned development as depicted in the plates or at least some reasonable facsimile thereof." Based upon the arguments set forth below, Woodhaven respectfully requests the Court to reconsider its decision as same is based upon R.4:50-1a (mistake).

With regard to Rule 4:50-1(b) (newly discovered evidence), the Court found that:

> Rule 4:50-1(b) requires that the newly discovered evidence be such as it would probably have changed the result.
>
> The Court must use its discretion and attempt to determine if this discovery of vast amounts of

> wetland would have changed the result of the settlement.
>
> Clearly, defendants claim they would not have settled for the new proposal. They claim that the present package or any alternative that's been given to them constitute poor planning and the benefits which induced them to settle are gone. (Emphasis Supplied.)

(T 109-14 to 24)

The Court went on to find that the plates were a binding component of the Settlement and that all the benefits which the town bargained for by way of the plates are lost due to increased wetland acres (T109 to T118). Based upon these factual findings, the Court ruled that the Order and Judgment of Repose dated January 24, 1986 could be vacated by independently applying R.4:50-1(b) (newly discovered evidence):

> Therefore, the existence of wetlands which reduce development, this substantially would in all likelihood have changed the outcome of the settlement.

(T118-8 to 10)

Woodhaven argues that, as to the newly discovered evidence on the Woodhaven site, the outcome of the settlement would not have been changed. For the reasons set forth below, Woodhaven respectfully requests the Court to reconsider its decision as same is based upon R.4:50-1(b) (newly discovered evidence).

Further, a request for modification of the Order and Judgment of Repose on the basis of Section III-A.3 (Reopening

Clause) of the Settlement Agreement was denied. The Court took the following view of the reopening clause:

> The reopener provided in relevant part for modification, based on impossibility of performance. Clearly, performance is as initially contemplated, is no longer possible, yet at various -- as various parties have argued, modifications were contemplated because of the size of the project and the fact that it would take 20 years to build.
>
> What might happen to the market and what regulations might come into play which would affect its ability to perform, were really what was covered by the reopener agreement as has been argued by the plaintiffs here.
>
> It would be disingenuous to argue that the parties contemplate having to totally revise the plans before any approvals were received.
>
> Really, what is proposed is not a modification, but it is a brand new plan. Both developers admit the plans designated as Plates A and B are no longer viable due to the magnitude of the change and in light of what the Court believes the parties reasonably intended, given the circumstances at the time the reopener clause does not cover the situation. (Emphasis added)

(T126-6 to T127-2)

The foregoing analysis of the Reopening Clause requires that the reopening clause was meant to cover the situation where the change in a plan constitutes a modification as opposed to a "wholesale" brand new plan. Woodhaven will demonstrate that a factual comparison of Woodhaven's original plate (that which is incorporated in the Blue Book) with the plate which has been revised as a result

of the increase in Woodhaven's wetlands area does not reveal a brand new plan but only a plan which is modified within the contemplation of the parties.

In summary, whether the Court applied R.4:50-1(a) (mistake); R.4:50-1(b) (newly discovered evidence); or Reopening Clause, the threshold issue is whether the plate promised by plaintiff to defendant has changed substantially so as to prevent defendants from receiving the benefits for which defendants bargained.

ARGUMENT

I

THE COURT HAS OVERLOOKED THE FACT THAT WOODHAVEN'S PLATE HAS NOT BEEN SUBSTANTIALLY MODIFIED.

Woodhaven's Motion for Reconsideration is brought under R.4:49-2 which requires the moving party to set forth matters which the Court has overlooked or as to which the Court has erred. The Court has overlooked the true nature of Woodhaven's revised plan in that the revised plan (even with additional wetlands acreage) still gives defendants all that was promised.

Generally, the Court overlooked the specifics of the Woodhaven revised plate and simply "lumped" the Woodhaven revised plate with the Olympia & York (O & Y) revised plate thereby assuming that, due to increased wetlands acreage, Woodhaven is unable to build the development promised by Woodhaven to defendants. The transcript of hearing on Motion to Vacate Judgment is replete with examples of colloquially or findings which are incorrectly presumed to apply to both Woodhaven and O & Y. For example:

1. RAYMOND TESTIMONY: During oral argument of Defendant's Motion to Vacate and Transfer, the Court questioned the Master, George Raymond (T95 to T99). At that time everyone's attention was directed at a certain map on an easel in the Courtroom. The map on

the easel to which everyone's attention was directed and to which Mr. Raymond's statements were focused is entitled "Community Plan, Olympia & York Planned Development, Township of Old Bridge, Middlesex County, N.J.", dated September 9, 1987 and prepared by Sullivan Assoc. This plan was not received by Woodhaven until the morning of the day of oral argument (September 14, 1987). Same could not have been received by the Master any sooner (if received at all by the Master prior to oral argument). Further, the Court did not have the opportunity to review the plan to which Mr. Raymond's comments were directed (T11-4 to 14). The Court's decision hinged upon a plan that the Court, the Master and the parties either never reviewed or only had hours to review before the hearing. Throughout the Court's questioning of George Raymond and throughout Mr. Raymond's responses, there are references to "the plan" (T96-4); "this plan" (T96-6); "the plan is a sound plan" (T97-19); "When you say it is very different, in what respect do you find it different" (T97-23 to 24); and, "the plan" (T97-25). Further, there is a generalized reference to open space design (T97-25 to T98-16) and to commercial uses (T98-17 to T99-8). A REVIEW OF THIS TRANSCRIPT SECTION REVEALS THAT NO SPECIFIC FINDINGS ARE MADE WITH REGARD TO WOODHAVEN. WOODHAVEN'S PLAN IS SIMPLY LUMPED WITH THE O & Y PLAN AND ASSUMED TO BE SUBSTANTIALLY CHANGED.

Also, the Court indicated that the Court had several months earlier requested the parties to supply Mr. Raymond with sufficient

information for him to judge the scope and extent of the modifications involved (T95-9 to 15). Woodhaven takes issue with this statement since Woodhaven was never requested to supply documentation to the Master directed at the scope and extent of modifications to the original Woodhaven plate nor was the Master charged with the duty to judge the scope and extent of the modifications. Woodhaven supplied the Master with documentation of the continued developability and viability of the Woodhaven site (even with the wetlands). See, letter from Stewart M. Hutt, Esq. to George Raymond dated August 31, 1987, attached hereto as Exhibit A. (Woodhaven submitted to the Master a revised plate B and revised Planning report; Woodhaven is prepared to submit a revised plate B-1.) Woodhaven focused upon whether its land could still be developed with a "good" plan and did not address whether the new plate constitutes a substantial change from the original plate.

Moreover, all parties, including defendants, believed that the issue before the Court was whether the developers could build a "well planned" development and not whether the developers' new proposals represented substantial changes from the orginal plans. For example, the Township attorney in his letter reply brief dated August 11, 1987, at page 3 stated that:

> "The main point here is that the extent of the wetlands clearly indicate that we are dealing with environmentally sensitive land, and that it

> would be a manifest injustice to force the Township of Old Bridge, and its residents, to accept development which would negatively impact on the land in question, and constitute extremely poor planning."

Clearly, everyone was focusing on the "good planning" vs. "bad planning" issue while the Court decided the motion on the "substantial change" issue.

Woodhaven never argued the motion on the issue of "substantial modification." This is not unreasonable since Woodhaven's argument was that the plates were not a binding component of the settlement.

This is why Woodhaven now requests a rehearing and reconsideration. If Woodhaven had been requested to supply documentation as to why Woodhaven's revised plan is substantially unchanged from the original plan, Woodhaven would have had an opportunity to comply. However, under the circumstances, the Court made substantial findings and reached weighty conclusions without the benefit of the relevant facts.

2. THE COURT stated:

> Plaintiffs admit that the plates are no longer viable but that all the settlement provides for is that the plaintiff is to come back to the defendant with alternate plans which they have, indeed, started to do.

(T102-25 to T103-4) emphasis added.

> The plaintiffs admit that the plates are no longer viable, but they argue that the plates

> will not guarantee to the Township, and even if the plates were approved, that they were not obligated to build them.

(T109-25 to T110-3) emphasis added.

These statements are not so. Woodhaven has never admitted that the Woodhaven plate is no longer viable. In fact, Woodhaven's position, as set forth below, is that the plate is very much viable with slight modifications (the nature of which are within the contemplation of the parties.)

3. THE COURT further stated:

> Woodhaven did not submit for the Court's review a new proposal, but clearly even though they state they will still provide the full build-out.
>
> Due to the fact that they have at least twice the amount of wetland they believe they had, they must be proposing a significant modification of their plan.
>
> This review of the various changes was undertaken to illustrate the extent of change now proposed and to consider the same in light of the requirements of the rule under which the defendants move, that the new evidence be such as would have changed the result.
>
> It is clear that the plans are greatly changed. Mr. Raymond indicated in our brief discussion on the record that this is a very different plan, and in the Court's judgment it appears to be of such a magnitude as would compel the Court to conclude that it could have and would have changed the result. (Emphasis added)

(T115-7 to 23).

The Court never requested the parties to submit documentation directed at the issue of comparing original plan against revised plan for determination of substantial "modification." (as distinguished from "developability"). Therefore, the Court overlooked material matters of fact. The transcript makes clear that, with regard to the magnitude of the changes and the benefits lost, the Court was addressing only the O & Y Plan, not Woodhaven's Plan. The Court repeatedly makes reference to "the February 1986 plans" and the "May 1987 plans" (T115-3 to 6). These are O & Y plans. There are no Woodhaven plans with these dates. The Court states that it did not have the revised Woodhaven plan for review. Clearly, if the Court did not have the revised Woodhaven plan, it must have been referring only to the revised O & Y plan in ruling that a substantial change has occurred.

It is incorrect to assume that because Woodhaven's wetland acres have doubled, Woodhaven must be proposing a significant modification of the plate. In fact, as will be set forth below, the Woodhaven plate is substantially unchanged. Further, the reference to Mr. Raymond's testimony again shows that the Woodhaven plate and the O & Y plate were viewed as one "plan" by the Court. Mr. Raymond was undoubtedly referring to only the O & Y plan when he concluded that the "plan" is substantially changed. Clearly, as will be set forth below, the plates were intended to be and are independent.

4. THE COURT stated:

> The parties contemplated that there would be a reduction, but they didn't contemplate that there would be a reduction in half the proposed development which would result in a wholesale modification of the plan even before, by the way the first approval was granted.

(T116-9 to 14)

Woodhaven's revised plan, which the Court should now review, does not show any reduction in the proposed development and does not show wholesale modification. The revised plan is substantially similar to the original plan embodied in the plate.

5. THE COURT stated:

> The magnitude of the change, and particularly at the very initial step of development in the Court's opinion results in a totally new plan, be it appropriate, be it sound planning, it is not what we have when we began and it is not in any sense truly comparable to what we have when we began.

(T124-13 to 18) emphasis added.

Again, the Woodhaven revised plan is not a substantial change from the original plate.

6. THE COURT stated:

> Really, what is proposed is not a modification, but it is a brand new plan. Both developers admit the plans designated as Plates A and B are no longer viable due to the magnitude of the change and in light of what the Court believes the parties reasonably intended, given the circumstances at the time the reopener clause does not cover the situation.

(T126-21 to T127-2).

Woodhaven has never admitted that its plate is no longer viable. In fact, the Woodhaven plate is viable with only slight modification (the nature of which was in the contemplation of the parties at time of settlement).

The foregoing represent examples of how Woodhaven's revised plan was assumed to be a substantial modification from its original plan, how that assumption was in large part due to the fact that an individual analysis of the Woodhaven plan was not made, and how the Woodhaven plan was "assumed guilty" by association with the O & Y plan. Based upon the foregoing overlooked matters, Woodhaven respectfully requests the Court to reconsider the Order of October 6, 1987 with respect to Woodhaven.

As argued above, the issue with regard to vacating the Order and Judgment of Repose reduces to whether or not the plate promised by plaintiff to defendants has changed substantially so as to prevent the benefits for which the defendants bargained. The Woodhaven revised plate has not substantially changed from the original plate and the revised plate provides the defendants with all benefits promised by Woodhaven.

Moreover, the Master has neither reported upon nor testified as to the issue of whether Woodhaven's revised plate constitutes a substantial modification from the original plate. The Court has agreed, questioning whether the plaintiffs are in a

position to fully inform Mr. Raymond (T95-22 to 24) and whether Mr. Raymond is in a position to definitely state how the "plan has been modified" (T96-2 to 5). Such a report or testimony by the Master as to the Woodhaven facts with regard to this issue is a crucial matter which the Court has overlooked. Inasmuch as the Court has overlooked the substantial similarity between Woodhaven's old and new plates, Woodhaven respectfully requests the Court to direct the Master to issue a report and, if need be, conduct a hearing on this crucial issue.

The Court has assumed that the Woodhaven development has significantly changed. However, "Comparison of Two Woodhaven Village Plans: December 20, 1985 Plan vs. August 26, 1987 Plan" (attached hereto as Exhibit B) reveals that the two plates are actually substantially the same. That which is promised in the Settlement document (December 20, 1985 plan) is also provided in the revised plan (August 26, 1987 plan).

The comparison of the original Woodhaven plate with the revised Woodhaven plate (Exhibit B), does not show a wholesale modification, but shows a revised plan that is substantially similar to the original plate in form, function and detail. All benefits bargained for by defendants are retained in the revised plate.

The Court has vacated the Order and Judgment of Repose, in part, on the basis of R.4:50-1(a) (mistake). Mistake herein has

been characterized by the Court not as the increased number of wetland acres but as the inability of Woodhaven to build the development depicted in its plate or a reasonable facsimile thereof. As stated above and as we trust the Master will find, Woodhaven is able to build the development depicted in its plate or a reasonable facsimile thereof. Accordingly, as to Woodhaven there has been no mistake under R.4:50-1(a).

There is no factual record establishing the likelihood of nonperformance by Woodhaven. The Court stated specifically, "I am not going to get into testimony." T97-22. But Woodhaven is entitled to a hearing on the facts. Woodhaven and Old Bridge are in direct conflict over whether Woodhaven can perform. When there are "diametrically opposed contentions of fact," a hearing is appropriate. Hallberg v. Hallberg, 113 N.J. Super. 205, 273 A.2d 389, 391 (App. Div. 1971). Hallberg was a post-divorce matrimonial dispute in which the parties had vastly different versions of their financial status. The parties moved for modification of their property settlement agreement. The trial court decided their motions on the basis of depositions and affidavits. The Appellate Division reversed, stating:

> "The Court should have set the matter down for a plenary hearing and taken oral testimony. * * * Whenever there is presented to the Court a motion to modify the terms of a judgment and the motion makes a prima facie showing that the moving property is entitled to relief and there are

> contested issues of facts, the motion should not be disposed of by affidavits, answers to interrogatories and depositions. There should be a plenary hearing. At the conclusion of the plenary hearing, the trial court must find the facts both subsidiary and ultimate and 'state its conclusions of law thereon.' R. 1:7-4." 273 A.2d at 391.

To the same effect are Miller v. Estate of Kahn, 140 N.J. Super. 177, 355 A.2d 702, 706 (App. Div. 1976) (the plaintiff in an assault case successfully appealed the trial court's order denying her motion to set aside a dismissal previously entered upon a stipulation; the court, relying on Hallberg, said:

> "Should contested issues of relevant fact develop, the matter should not be determined on affidavits, but a plenary hearing should be afforded." 355 A.2d at 706).

See also, Tancredi v. Tancredi, 101 N.J. Super. 250, 244 A.2d 139 (App. Div. 1968) (another post divorce matrimonial dispute) in which the Court emphasized the need for oral testimony when there is a genuine issue as to the material facts. 244 A.2d at 140-141. Hallberg, Miller, and Tancredi all support Woodhaven's position that a full hearing on the facts is necessary before the Court can render judgment vacating the Settlement as to Woodhaven.

II

R.4:50-1(b) (NEWLY DISCOVERED EVIDENCE) DOES NOT REQUIRE VACATION OF THE ORDER AND JUDGMENT OF REPOSE AS TO WOODHAVEN.

As set forth above, the Court has independently vacated the Order and Judgment of Repose based upon R.4:50-1(b) (newly discovered evidence); ruling that had the defendants known of "plaintiffs" inability to develop in accordance with the plates (or a reasonable facsimile thereof) the result of the settlement would have been altered. Woodhaven is able to develop in accordance with the revised Woodhaven plate which is a reasonable facsimile of the original Woodhaven plate. Accordingly, there is no newly discovered evidence with regard to Woodhaven.

III

THE COURT OVERLOOKED THE FACTS AND LAW IN RULING THAT THE SETTLEMENT IS NON-SEVERABLE

The Court rejected Woodhaven's argument that the settlement could be vacated as to O & Y and not as to Woodhaven:

> Lastly, the plaintiff Woodhaven did argue that if the settlement is vacated as to O & Y, it need not be vacated as to Woodhaven for the reasons which I have stated, perhaps, in too much length.
>
> The defendant is entitled to a vacation as to both plaintiffs. The settlement with respect to the two parties is totally inter-related and interdependent.
>
> The defendant was induced to settle with two parties, based upon the total package because of what each could contribute towards an integrated development.
>
> Therefore, the vacation will apply to both of the plaintiffs. (Emphasis added).

(T128-22 to T129-10).

The Court rests the above ruling on the assertion that: (A) defendants' settlement with Woodhaven is totally "interdependent" and "interrelated" with defendant's settlement with O & Y; and, (B) that defendants were induced to settle with the two plaintiffs based upon what each plaintiff could contribute towards an "integrated development."

A. THE COURT SHOULD NOT VACATE THE JUDGMENT AS TO WOODHAVEN

Woodhaven has already shown that the Court has the power to vacate a judgment as to less than all of the parties. Woodhaven's Answering Brief at 32-34. The rule of Chmielewski v. Marich, 2 Ill.2d 568, 119 N.E.2d 247 (1954) is followed in the great majority of jurisdictions which have considered the issue:

> 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 rights of the defendants or because of other special factors, it would be prejudicial and inequitable to leave the judgment standing against them. 119 N.E.2d at 251. (Emphasis added.)

See also, Annotation, Vacation or Setting Aside of Judgment As to One or More of Multiple Parties, 42 A.L.R.2d 1030, 1033-34 (1955). In the instant case, there is no "interdependence of rights" of O & Y and Woodhaven. No harm accrues to O & Y if the judgment is left standing as to Woodhaven. Nor does any harm accrue to Old Bridge which will get what it bargained for.

The judgment and stipulation may be viewed as a contract. T122-24 to T123-7, citing Stonehurst at Freehold v. The Township Committee of Freehold, 139 N.J. Super. 311, 313, 353 A.2d 560 (Law Div. 1976). See also Jannarone v. W.T. Co., 65 N.J. Super. 472,

476-77, 168 A.2d 72 (App. Div. 1961). The contract, however, is not joint, as the Court appears to believe, but several. It is the several nature of Woodhaven's contractual rights which justifies the vacation of the judgment only as to O & Y.

Numerous cases have defined "several." In Hughes v. Thurman, 213 Md. 169, 131 A.2d 479 (1957), the plaintiff was one of three consultants who had an oral personal services contract with the defendant. These three, Fenneman, Norris and Thurman, rendered services; only one, Thurman, sued. The Court stated:

> [t]he considerations furnished by Fennerman, Norris and Thurman were quite distinct. Primarily, Fennerman was the defendants' counsel . . . . Norris was an expert advisor . . . and Thurman might be briefly described as a contact man seeking to develop new business. Id. at 483.

The defendants argued that their liability was to the three jointly, and not to any one plaintiff individually. The Court relied on Section 128 of the Restatement of Contracts which specifies that if the parties have not otherwise expressed an intention then the "rights are several if the interest of the obligees in the performance of the promise are distinct." 131 A.2d at 482. The Court cited Williston on Contracts (section 325 at 942-43) as authority for the rule that "where the consideration furnished by obligees is several, their interests may prima facie be regarded as several and not joint, if other features of the contract do not

clearly conflict with this interpretation." 131 A.2d at 483. Applying Hughes, the interests of Woodhaven and O & Y would be several because they are "distinct" and the consideration "furnished" was separate. Woodhaven undertook separate obligations which were clearly defined in the "Blue Book."

In Becker v. Kelsey, 9 N.J. Misc. 1265, 157 A.177 (1931), the Supreme Court reviewed a motion to strike the answer in a dispute over a three-party contract for the sale of property. The property was the subject of a foreclosure action by the Summit Building and Loan Association, a non-party to the contract, but a plaintiff along with Becker. Becker agreed to bid on the premises. Margulies agreed to accept a second mortgage. Ludwig and Kelsey agreed to buy the premises from Becker, and execute a mortgage to Summit. Ludwig and Kelsey refused to perform. Becker and Summit sued. The defendants answered that Margulies had covenanted jointly with Becker and was a necessary party to the action. The Court stated: "...[W]here a contract assigns to each of several parties his several duties and does not bind them and make them responsible individually for the whole result to be jointly accomplished, the contract in so far as such parties are concerned is several." 157 A. at 190. (Emphasis added.) As in Hughes, supra, Becker asserts that "where the consideration furnished by obligees is several and not joint, the interest of the obligees may, prima facie, be

regarded as several and not joint." Id. Compare the situation in Alpaugh v. Wood, 23 N.J.L. 638, 23 A. 261 (1891) in which Alpaugh and Magowan employed Wood and Barlow "to superintend and manage the manufacturing part of the business of said pottery . . . taking entire charge of the works..." 23 A. at 261. The plaintiffs sued for breach of contract. The defendants argued "that the obligations imposed upon them by this contract are not joint, but several only." 23 A. at 262. The Court found that the contract was joint:

> This covenant does not assign to each of the defendants his several duties, nor require from either the exercise of skill and diligence in any special department of the work, but binds both to the due management of the entire manufacturing business . . . 23 A. at 263. (Emphasis Added)

In the instant case, Woodhaven and O & Y have not undertaken any joint obligation that "binds both". Their obligations are spelled out separately and at length. Their enterprises are separate and distinct neither is responsible for the obligations of the other.

In Anderson v. Nichols, 107 A. 116 (Vt. 1919), defendant, apparently a private individual engaged in the transmission of electricity, promised the eight plaintiffs (in one contract) to pay them for electrical hook-ups on a transmission line but refused to pay the plaintiffs their pro rata shares of the hook-up fees paid by third parties. The plaintiffs sued jointly. The defendant demurred, arguing the plaintiffs should have sued severally. The Court upheld the demurrer stating that the interests of the

plaintiffs were several. The Court found that the contract did not require the defendant to pay the sum specified to the plaintiffs, but binds him "To divide it between them." (at 112 of 107A) The consideration "moved separately". The defendant's promise, though joint in form is several in essence. In legal consequence, it is a group of separate promises, and gives rise to separate actions in favor of the several promises." (Emphasis added.) 107 A. at 117. In the instant case, Old Bridge's promises are also joint in form, but several in essence, giving O & Y and Woodhaven separate rights, including the right to bring separate actions.

In McDurfee v. Buck, 174 A. 679 (Vt. 1934), the plaintiffs, a father and son, each owned a separate farm and agreed in what the Court determined was contractually a single undertaking to supply lumber to the defendant. The plaintiffs jointly sued. The defendant argued that the plaintiffs could not sue jointly because the subject matter of the contract was several. The Court stated:

> Ordinarily, where the interests are joint, the contract is joint; and where the interest are several, the contract is several. The interest referred to is interest in the contract. The contract is the vital thing, and it by no means follows, in a case like this, that because the interests in the lands involved are separate, a joint recovery cannot be had. It was easily possible for the plaintiffs to 'pool their interest'--to use the language of the trial court--and to treat the whole lumbering enterprise. . . as of common interest . . . ." Id. at 679-680. (Emphasis added).

The Court held there was a ... interest in the contract because both the father and the son agreed between themselves to "pool their interest". The holding of McDurfee illumines the instant case by comparison. Woodhaven and O & Y have not "pooled their interests" as was the case in McDurfee. Their undertakings are separate, and quite distinguishable as expressed in the "Blue Book." For instant an arbitrary denial of a subdivision plan as to one, would not have allowed the other to sue or have a cause of action because of such denial. Moreover, it was clear to all parties that if a decision was made by either developer not to build (for watever reason) this did not foreclose the right of the other developer to build.

The general proposition has been well stated in Corpus Juris Secundum:

> When a several obligation is entered into by two or more in one instrument, it is the same as though each had executed separate instruments, although they may all be for the same subject matter: and consequently each obligation furnishes a several cause of action. Even though several obligations concern the same subject matter each obligee is liable for his several promise, and cannot be held for the others..."

17A Corpus Juris Secundum, Section 352 Contracts, p. 345.

This general proposition is applicable in the instant case. The "Blue Book" does not tie Woodhaven's performance to O & Y's. The two are separate corporate entities with no commonality of ownership or mangement. They own separate tracts. They brought the instant litigation separately and at different times. They entered into the

"Blue Book" separately and had different counsel. Each has an independent right to sue for non-performance by Old Bridge. Hughes, Becker, and Anderson, supra, when applied to the facts of the instant case, clearly show that when the "Blue Book" is viewed as a contract, the contract is several in nature.

Woodhaven asks the Court to reconsider its vacation of the entire judgment and give recognition to the several nature of the contract. The Court has great flexibility in exercising its equitable powers, as Justice Heher recognized almost 50 years ago:

> Equitable remedies are 'distinguished for their flexibility, their unlimited variety, their adaptability to circumstances and the natural rules which govern their use. There is in fact no limit to their variety in application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.' Pomeroy's Equity Jurisprudence, sec. 109. [5th ed. 1941] Sears Roebuck & Co. v. Camp, 124 N.J. Eq. 403, 1 A.2d 425, 429 (E. & A. 1938).

See also American Association of University Professors v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846, 859 (Ch. Div. 1974); Morsemere Federal Savings & Loan Association v. Nicolaou, 206 N.J. Super. 637, 645 (App. Div. 1986); and Sosanie v. Pernetti Holding Corp., 115 N.J. Super. 409, 279 A.2d 904, 907 (Ch. Div. 1971). Upon reconsideration, the Court should adapt to the specific circumstances, particularly the several nature of Woodhaven's contractual responsibilities and rights.

Equitable remedies should minimize harm to the parties. "The relief itself must not be harsh or oppressive." Stehr v. Sawyer, 40 N.J. 352, 192 A.2d 569, 571 (1963). "Generally, courts of equity are not wont to enforce contracts where 'enforcement * * * will be attended with great hardship or manifest injustice . . . .' [Citation omitted]." Brower v. Glen Wild Lake Co., 86 N.J. Super. 341, 206 A.2d 899, 904 (App. Div. 1965). Nor should a contract be rescinded when that would cause great hardship. Woodhaven, which can substantially perform its several obligations, has relied on the "Blue Book", expending its funds in an effort to fulfill its obligations, and would be forced with incalcuable harms and losses, if the defendants were not held to be obligated to stick by their bargain. There is no reason that a mistake with regard to the amount of O & Y wetlands should be used as justification for depriving Woodhaven of the benefit of its bargain.

B. THE PARTIES DID NOT BARGAIN FOR AN INTEGRATED DEVELOPMENT.

a) The O & Y development plan and the Woodhaven development plan are not one integrated plan.

The O & Y plan and the Woodhaven plan are not an integrated plan. An integrated plan, such as a Planned Unit Development, is defined by the Municipal Land Use Law as being "developed as a

single entity according to a plan" (N.J.S.A. 40:55D-6). See, also, the Planned Real Estate Development Full Disclosure Act which defines Planned Real Estate Development as being offered pursuant to a common promotional plan and providing for common elements in real property (N.J.S.A. 45:22A-23). The Woodhaven and O & Y developments are not being developed as a single entity or pursuant to a common promotion plan or have common elements. The two developments are not an integrated plan but are independent.

Woodhaven's development plan can be built completely independent of the O & Y development plan. The facts supporting this conclusion are as follows:

i) Sanitary Sewer - The Woodhaven site was intended to be and can be sewered whether or not O & Y builds. Provision for sewer to the Woodhaven property is governed by "Agreement between The Old Bridge Township Sewerage Authority (now known as Old Bridge Municipal Utilities Authority) and Woodhaven Village, Inc. and O & Y Old Bridge Development Corp." dated July 27, 1984. This agreement was not secret to the defendants. The Township had the Sewer Agreement since July 27, 1984. Same is referenced in the Blue Book, and members of the Township Council

were also members of the O.B.M.U.A. at the time of Settlement. Sewering the Woodhaven development in the event the O & Y development did not go forward, for whatever reason, was specifically contemplated by the sewer agreement. Section 11 and Section 12 of the Sewer Agreement specifically address this issue and make clear, that one development may proceed independent of the other. Section 11 and 12 provide that if Developer A is moving forward with its development, thereby necessitating certain sewer improvements, and Developer B does not so need the sewer improvements, then Developer A can force Developer B to install the improvement. Developer B is then reimbursed for costs of installation whether or not Developer B ever uses the sewer improvement. The essence of the sewer agreement being that if one developer builds and the other does not, the building developer is not left hanging high and dry for sewer improvements.

ii) Water -- Potable water can be brought to the Woodhaven site regardless of O & Y's fate. Water distribution lines could be installed in existing Rights-of-Way. (O & Y's property or O & Y permission

is not required). The water distribution system for Woodhaven can physically be accomplished without O & Y. For example, the parties never contemplated that Woodhaven's water would be drawn from a well or tower or water system developed by O & Y. Woodhavens water is completely independent of O & Y's water. The overall issue of potable water has not changed since settlement. (If anything, the potable water situation has improved now that the Township has agreed to purchase water from Perth Amboy).

iii) Traffic -- Woodhaven's revised plate provides a spine road with substantially the same size, shape, design, capacity, location and serving the same function as the TOB shown on Woodhaven's original plate. The TOB on Woodhaven's site can be built regardless of what happens to O & Y's development

iv) Planning: Woodhaven's development was not designed to depend upon the proposed O & Y development for shopping centers, industrial or office space or public purpose areas or any other planning function. The Woodhaven plan and the O & Y plan are no more interrelated than any two developments which happen to be across the street from each other.

Whereas the Woodhaven plan has been characterized as interrelated and interdependent with the O & Y plan, on closer analysis one finds that the Woodhaven plan is actually a self contained, self supporting, independent development.

b) Defendants did not lose any benefits as a result of modifications to Woodhaven's development plan.

All the benefits of defendants' bargain which the Court found were lost due to increased wetland acres relate to the O & Y development and not the Woodhaven development.

The golf course which is lost was never promised by Woodhaven. An internal traffic network which functioned independently of existing internal local roadways was promised by O & Y. Woodhaven never made such a promise since Woodhaven's site as distinguished from O & Y's site has no existing internal "thru-roads." The employment center, major malls to be built at the intersection of Routes 9 and 18, and mid-rise buildings were all promised by O & Y and not by Woodhaven. Also, Appendix C of the Blue Book (specifically C200) sets forth specific provisions which relate to the plates. Woodhaven is complying with these provisions in all respects. While the Settlement Agreement provides site specific provisions which require specific uses at specific locations, these site specific requirements apply virtually only to

O & Y (V-C.1--Industrial/ Commercial Development; V-C.2--Shopping Center Site; V-C.3-- Optional Shopping Center Site; V-C.4--Midrise Apartments). The only possible site specific provision which applies to Woodhaven appears in the Settlement Agreement at V-C.5 (Woodhaven Commercial Development). Section V-C.5 provides that Woodhaven shall construct office retail, commercial and/or industrial space on the 73 acres designated Commercial on its Settlement Plan. Woodhaven's revised plate (August 26, 1987) satisfies this requirement with substantially the same number of commercial acres at substantially the same location. Woodhaven can provide all benefits it promised in the settlement and the August 26, 1987 plan is an expression of just that.

c) The parties did not bargain for an integrated development.

There is no factual support for the conclusion that the parties bargained for an integrated development. To the contrary, the parties clearly did not bargain for an integrated development. There is not one single reference anywhere in the Settlement document by word or idea to: "interrelated", "interdependent" or "one package". Moreover, the Settlement document does not even suggest the idea of a linkage between the two developments. On the contrary, the Settlement document specifically contemplates one project moving forward independently of the other.

For example, suppose Woodhaven and O & Y had respectively settled with defendants on the basis of Woodhaven's revised plate and O & Y's original plate. Then, subsequent to settlement, O & Y is unable to build the development encompassed in its original plate (because of increased wetlands acreage or for any other reason), and, Woodhaven is able to build precisely the development proposed in the Settlement. Under the circumstances should defendants be entitled to set aside the settlement as to both O & Y and Woodhaven just because defendants are not getting from O & Y that which defendants expected from O & Y? We think not. Such a result makes Woodhaven responsible for O & Y's mistake (or even for O & Y's change of mind if that be the reason O & Y does not build according to plan). Although the settlement herein is embodied in one document, the parties throughout negotiated independent bargains.

Further, the settlement agreement specifically provides that the Planning Board could approve the development plan of one developer and deny the plan of the other developer, thereby demonstrating that the parties did not bargain for an integrated development but actually contemplated the possibility of one development without the other. (See, Settlement Agreement, Section V-B.3 Approval Procedures which provides for simultaneous action of the Planning Board which Board could approve one plan and deny the other. Section V-B.3 further provides that if one of the plates is

disapproved, then a prodecure is established for review of a revised plate by the master and ultimately by the Court.). The intention of the parties with regard to the independence of each plan could not be more clear.

Moreover, there were other components of the defendants' compliance package besides set aside units from O & Y and Woodhaven. Suppose that (because of wetlands or any other reason) the Oakwood, Brunetti, Rondinelli, rehabilitation and/or Senior Citizen component of the package failed completely. Would the settlement then be set aside as to Woodhaven? Is Woodhaven's settlement with defendants contingent upon all of the other compliance package components being successful? The answers must be no! Woodhaven contends it would not have settled if it were known that its fate hung on the fate of O & Y (or any other component of the package for that matter). In light of the stakes involved, Woodhaven needed to know for certain that the settlement was firm. There is no way Woodhaven could have settled if Woodhaven knew the deal was contingent upon all other parties doing what they promised to do. (While it may be moot at this time, it cannot be denied by any of the parties that Lloyd Brown, on behalf of O & Y, would never have settled after years of litigation if his settlement was contingent on Woohdaven's ability to perform.) It is true that defendants' may contend they would not have settled if the

settlement was not contingent on O & Y's ability to produce. The "subjective intentions" of either plaintiffs or defendants are not capable of ascertainment. The only valid test is an objective one. That is, what in fact did the settlement document provide for in this eventuality? (As pointed out above Section V-B.3 requires only simultaneous "action" not simultaneous approval.) The settlement document does not make Woodhaven's rights and obligations contingent upon O & Y's ability to perform or visa versa. Since the settlement agreement does not provide for such a contingency the Court should not write a different agreement than that reached by the parties.

The Court concluded that "The settlement with respect to the two parties is totally interrelated and interdependent." (T129-2 to T129-4.) This conclusion is not based on any language in the Blue Book. The Court has in effect rewritten the Settlement, by indicating that the performance of Woodhaven was contingent upon the ability of O & Y to peform.

It has been held that "[c]ourts cannot make contracts for the parties. They can only enforce the contracts which the parties themselves have made. Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43, 161 A.2d 717 (1960)." Hartford Fire Ins. Co v. Riefolo Construction Co., 161 N.J. Super. 99, 390 A.2d 1210, 1218 (App. Div. 1978). This Court has ignored this basic principle. Moreover,

> [a]nd when the terms of a contract are clear and unambiguous, it is the function of the Court to

> enforce it as written and not to attempt to make a better contract for either of the parties. Id. at 43, 161 A.2d 717. The Courts cannot insert exceptions in a contract that the parties might have done but did not do, nor relieve them from hardship that they might have guarded against in their contracts. 390 A.2d 1218. (Emphasis added)

There is nothing ambiguous about the settlement document. Therefore, this Court should not attempt to rewrite it. If Old Bridge suffers hardship, and Woodhaven does not believe the Township will, then the Township should have bargained to avoid the hardship.

Undoubtedly, the parties did not contemplate an integrated development plan by O & Y and Woodhaven. Actually, the parties bargained for just the opposite. Thats why there were two separate sets of plates.

Suppose that both Woodhaven and O & Y apply for approval. Woodhaven is approved and O & Y is denied (for whatever reason). O & Y revises its plans and resubmits. Meanwhile, Woodhaven is building vigorously and O & Y is, not for lack of approval. Could Woodhaven's right to build be set aside because O & Y never satisifies the Planning Board. This would be ridiculous. No lawsuit involving multiple plaintiffs and/or multiple defendants would ever be comprehensively settled since each party is resting its fate on the fate of each of the others.

The Court stressed that a consent judgment is a contract with the sanction of the Court. Since the consent judgment herein is in the nature of a contract (T122-24 to T123-10), there must be mutuality of contract. The Court's ruling when read in light of the foregoing hypotheticals does not provide for mutuality of contract.

The Township would never had entered the settlement if plaintiffs had insisted that the O & Y and Woodhaven plans were totally integrated, that if one plan failed the other automatically failed, and that defendants' Judgment of Repose was conditioned upon the requirement that both O & Y and Woodhaven go forward with development in accordance with the plates. The Township viewed the Woodhaven plan and the O & Y plan not as integrated but as independent developments each contributing toward defendants' Fair Share obligation.

If defendants had truly bargained for the benefit of having both O & Y and Woodhaven build (i.e., an "integrated plan") then defendants could have made the settlement contingent on both developers building. For example, it is not unusual for a developer to acquire by two separate contracts with two separate vendors contiguous properties which the developer intends to submit to the Planning Board for appproval as one integrated development (i.e., mutual roads, sewers, open space, parking, etc.) The developer can protect himself with a clause in the acquisition contracts that if

developer cannot close title on one tract he doesn't have to close on the other tract. Defendants never requested a clause making the Settlement of each developer contingent on both developers being able to perform (and plaintiff builders would never have stood for it). The defendants never bargained for an integrated plan.

Woodhaven respectfully submits that the Woodhaven plan can be developed independently of the O & Y development and that the parties did not bargain for an integrated development. Accordingly, Woodhaven requests the Court to reconsider its Order entered October 6, 1987.

IV

THE COURT IS EMPOWERED TO TRANSFER TO COAH THOSE ISSUES REMAINING AFTER THE SETTLEMENT IS UPHELD AS TO WOODHAVEN.

Should the Court reconsider the Order entered October 6, 1987 and uphold the Order and Judgment of Repose as to Woodhaven, then the Court could transfer to COAH the remaining issues in the case, if any. This is precisely what was done in the Branchburg Township case wherein the Pizzo and Pizzo settlement was upheld and the remainder of the case transferred to COAH. Recently, COAH granted a builders remedy in a transferred case. The builders remedy satisfied 12% of the Township's fair share and the township was required to satisfy the remainder. (Motzenbecker v. The Borough of Bernardsville, Docket No. COAH 87-18). The Motzenbecker case demonstrates that the Township's compliance package is comprised of individual, several components.

The Settlement herein affected the rights and obligations of Woodhaven, O & Y, the Urban League, lower income families and defendants. Further, defendant's compliance depended upon Oakwood at Madison, Brunetti, Rondinelli, rehabilitation, seniors citizen project and mandatory 10% set aside from all other developers. In return for this satisfactory compliance package, defendants were granted repose from Mount Laurel litigation by anyone. The Township

has had the benefit of repose since the date of settlement (January 24, 1986). The defendants have received the consideration or benefits for which they bargained (i.e. REPOSE). Completely vacating the judgment is unjust in that the defendants get the benefit of their bargain but Woodhaven does not (even though Woodhaven is living up to its agreement). Woodhaven is not getting the benefit of its bargain and is getting an inequitable burden. Woodhaven is now foreclosed from continuing its builders remedy suit.

Now, assume for the purposes of this Motion that O & Y's proposed project, or any facsimile thereof, is clearly unbuildable. Does that mean that all other rights and obligations disappear? No, the deal was that if one party did what it promised then that party is entitled to the benefit of its bargain with the defendants (just like any other contract!) Suppose Oakwood, Brunetti and/or Rondinelli or anyone else could not build at all, does everyone else get wiped out as a result? No, the Court should modify the judgment relative to the party who cannot perform but still preserve the other parties' bargains.

Further, by color of the settlement the Township has been requiring Mount Laurel set asides or monetary contributions from various other developers. (See page 9, Letter Reply Brief of Jerome Convery, August 11, 1987). The defendants are receiving the benefits of part of the settlement while the remainder is vacated.

Defendants are "picking and choosing" their benefits from the Settlement (Repose, setasides, and monetary contributions) without the obligations. If the defendants want to vacate the entire settlement then the entire settlement must be unraveled. Developers must be released from their set aside or contribution requirements (and contributions refunded).

The Court should uphold the entire settlement except that aspect which deals with O & Y. The remainder of the case, if any, could be transferred to COAH. If COAH finds that the Township has a reduced fair share then the Court could reduce Woodhaven's total unit count as the Court deems just and proper (For example, the Court could reduce Woodhaven's total unit count by 582 units which represents the 10% Mount Laurel set aside). The defendants requested a modification of the settlement (Point VI, Brief of Planning Board, pages 14-15) and the Court has the power to modify. Accordingly, we request the Court to modify the settlement, by vacating as to O & Y only; upholding as to Woodhaven, and allowing defendants to transfer the remainder of the case to COAH.

Alternatively, the Woodhaven component could be modified pursuant to the equitable principles of the Reopening Clause. Since Woodhaven has increased wetlands acreage, the defendants may claim that they are getting the same number of units (5820 units) on less buildable land. While Woodhaven can still build all 5820 units on

the remaining buildable lands in strict accordance with the requirements of the Blue Book, Woodhaven is amenable to a decrease in total number of units, pro rata with the decrease in "Buildable Land." (i.e., 287 additional acres of wetlands[2] times 4 units per acre would result in a 1148 unit decrease if the Master or the Court deems same desireable.) Woodhaven urges the Court to utilize its equitable powers and mold a creative remedy as opposed to vacating the entire settlement.

---

[2] Woodhaven initially had 203 acres of wetlands and has now stipulated to 490 acres of wetlands. The increase in wetlands acreage is 287 acres (490 acres minus 203 acres).

CONCLUSION

In light of the foregoing, Woodhaven respectfully requests the Court to reconsider the Order entered October 6, 1987. Woodhaven requests that the Order and Judgment of Repose not be vacated with regard to the Woodhaven settlement, that the Master be ordered to report on the Woodhaven revised plan, and/or, that the court set this matter down for a factual hearing with regard to the issues herein presented.

HUTT, BERKOW & JANKOWSKI
ATTORNEYS FOR WOODHAVEN VILLAGE, INC.

BY: _____
STEWART M. HUTT, ESQ.

Dated: November 25, 1987
W:0075A

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Our File #

August 31, 1987

George Raymond, P.P.
Raymond, Parish, Pine & Weiner
555 White Plains Road
Tarrytown, NY 10591

Re: Woodhaven Village, Inc.
vs. Township of Old Bridge

Dear Mr. Raymond:

As you may know this office represents Woodhaven Village, Inc. with regard to the above captioned matter. The Court has requested that the parties provide you with documentation necessary for your evaluation of the Woodhaven site and its developability as a result of constraints due to wetland acres. Accordingly, we enclose the following documents for your review:

1. Copy of "Plaintiff, Woodhaven Village, Inc.'s Answering Brief to Defendants' Motion to Set Aside Final Judgment";

2. Plan entitled "Land Use and Road Alignment Plan" prepared by The Salkin Group and dated August 26, 1987;

3. Report entitled "Project Planning Report, Woodhaven Village", dated August 26, 1987 and prepared by The Salkin Group, Inc.

It is our understanding that you have been provided with a copy of the settlement documents consisting of an Order and Final Judgment of Repose entered January 24, 1986, Settlement Agreement and Appendices thereto (hereinafter referred to as the "Blue Book").

We would like to take this opportunity to give you the benefit of a summary explanation of the above enclosures. The

EXHIBIT A

enclosed Answering Brief submitted on behalf of Woodhaven Village, Inc. in Opposition to the Township's Motion to Set Aside Final Judgment is based upon a very simple premise. That is, the parties are governed by the provisions of the Blue Book and that the Township and Planning Board, which seek to set aside the Blue Book settlement, are being given everything that was promised to them by the developers. The Township will receive from the developers a "master planned" community which community is guided by an overall planning framework instead of piecemeal development (the enclosed Land Use Plan is Woodhaven's proposed master Plan for its community based upon environmental constraints known at this time).

The Blue Book contemplated a planned development on Woodhaven's 1,455 acres and that the planned development would be comprised of a maximum of 5,820 dwelling units. The maximum number of dwelling units was defined by the Blue Book as the number of acres controlled by Woodhaven (1,455) multiplied by a density of 4 dwelling units per acre. Woodhaven is still bound by this maximum. The Blue Book does not contain a net density requirement. The Blue Book does contain a maximum or gross density requirement (i.e. 4 units per acre) and, the Blue Book sets forth very detailed development standards and controls with regard to the developers' rights to develop their lands. The developers are certainly bound by the maximum density requirement and the development/design standards requirements and, of course, these constraints will control the ultimate number of units built (which number cannot exceed 5,820). Woodhaven is permitted to develop its lands to the maximum allowed, in Woodhaven's case 5,820 units, provided Woodhaven conforms to all of the design standards set forth in the Blue Book.

The Blue Book does not require the building of a specific "master planned" development. The Blue Book only requires a "master planned" development which has been approved by the Planning Board and this is what the defendants will get. The fact that the respective Land Use Plans of the developers have been modified should come as no great surprise. The Land Use Plans are planning blue prints for projects which are contemplated to have 20-year build outs. In revising the Land Use Plan, we are doing precisely what the Blue Book envisioned. The fact that the original "Master Plan" has changed somewhat to take the form of the new Salkin Land Use Plan is simply part of the master planning process.

Also, the Blue Book, by two specific provisions, obligates the developers to develop their lands at a pace which has been limited for the benefit of the Township. First, the development of residential market units is "lock-stepped" with development of Mount Laurel units such that Mount Laurel units must be "phased in" with market units. Second, development of residential market units is "lock stepped" with commercial development such that commercial development must be "phased in" with market units. These two "lock-step" provisions operate to protect the interests of the Township and those benefitted by lower income housing. The Township is assured of a balanced and orderly development process. Those in need of Mount Laurel Housing are assured that same is provided in a timely manner.

Further, the Trans Old Bridge Connector which the Township and Planning Board claim was promised and allege they are not getting, is not promised in the Blue Book as part of the proposed developments. The true agreement provided by the Blue Book is that the ultimate "master planned" community agreed upon by the developers and Planning Board would be a well planned community with a logical road network, an appropriate open space provision for passive and active recreation and sufficient lands reserved for public purposes and commercial uses. That is the basis for the agreement embodied in the Blue Book and that is precisely what the Township is getting.

The Land Use Plan enclosed prepared by Salkin Group has been revised from the plate B attached to the Blue Book as a result of the increase in federally regulated wetlands. The Salkin plan is the result of Woodhaven having instructed its planner to disregard the original plate B and consider the current facts (including the increased number of wetlands acres). The Salkin plan does alter the original Land Use Plan slightly as a result of the increased wetland acres. In addition, since the Trans Old Bridge Connector is no longer possible due to wetland acres on the Olympia and York Site, Woodhaven has re-aligned the major arterial on its site.

Clearly, the change in the Federal Government's regulation of wetlands has increased the number of wetland acres originally thought to be on the Woodhaven site.

The result is that Woodhaven now proposes, albeit involuntarily, more open space than the minimum required. The logical response to such a proposal would be some form of rational discourse. Disposal of the Blue Book hardly seems a considered response. The point is that the Blue Book is a comprehensive document that anticipates the cycle of proposal and revision based on new information and insight that is characteristic of any design process and indeed of any learning process. The Blue Book is both the legal remedy and the planning remedy. The Blue Book must not be set aside, provided the developers can prove that their lands can be developed in a manner which comports with good planning sense. Afterall, the Blue Book contemplated an approval process for the plates which clearly recognized the possibility of modifications to the plates.

With regard to the enclosed Land Use Plan, (Salkin Plan) we wish to direct your attention to certain features of same. First, your review of the Salkin Plan will reveal that our planners have done all that is in their power to minimize the impact on wetland acres. Second, the road network is logical and efficient since same is based upon and reinforces the essential character of the site. That is, the corridors of mature vegetation will be preserved thereby defining the site into neighborhood sized sub-communities which are tied together by a continuous pattern of open space. For example, roadways are organized such that major roads have maximum length along and adjacent to open space areas to reinforce the residents' experience of the open space preserves. Third, the Land Use Plan contemplates a Town Center which includes a major parcel of commercial development as well as a substantial public purpose parcel. Other smaller commercial sites and other public purpose sites are dispersed throughout the community to serve the residents' needs. The enclosed Land Use Plan is further described by the enclosed report entitled "Project Planning Report, Woodhaven Village", dated August 26, 1987 and prepared by Salkin Group, Inc.

In an effort to avoid any confusion, please note that the original plates B and B-1, attached to the Blue Book, were prepared by Wallace, Roberts and Todd in their capacity as Project Planners for Woodhaven Village, Inc. The enclosed Land Use Plan was prepared by the Salkin Group. The Salkin Group has taken on all Woodhaven project planning responsibilities due to the appointment of Wallace, Roberts and Todd as principal planners for the State Planning Commission's development and re-development plan.

We trust the enclosures and the above explanation will be helpful to you in analyzing the facts herein. Of course, should your require any additional information please advise and we will be pleased to supply same. We look forward to working with you and to having the benefit of your assistance.

Very truly yours,

STEWART M. HUTT
FOR THE FIRM

SMH:al
Enclosures

cc: Hon. Eugene D. Serpentelli
Mr. Sam Halpern
Mr. Joel Schwartz
Mr. Larry Salkin
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EXHIBIT B.

COMPARISON OF TWO WOODHAVEN VILLAGE PLANS:
DECEMBER 20, 1985 Plan vs. August 26, 1987 PLAN

December 20, 1985 Plan	August 26, 1987 Plan
1455 acre site	1455 acre site
73 acres commercial	73 acres commercial
22 acres public purpose	22 acres public purpose
5820 Dwelling units	5820 Dwelling Units
218 acres OPEN SPACE	490 acres OPEN SPACE
1092 acres RESIDENTIAL LANDS	800 acres RESIDENTIAL LANDS
1. Basic Planning Concept	1. Basic Planning Concept
"The Woodhaven site is traversed by corridors of open space. The preservation of these areas in their natural state organizes the site into a pattern of seven villages. These villages are both bounded by and joined together by this green network of open space. The layout of the road network enhances the basic planning concept of Woodhaven: to create a pleasing blend of open space and villages, each incorporating unique site characteristics, to establish a special identity and sense of place." Project Planning Report, February 28, 1986, p. 8	"The natural features of the site provide the framework for the community. Streams, wetlands and large wooded areas will be preserved in perpetuity as contiguous, permanently deed-restricted greenways. The community is interwoven into this fabric of open space. Careful placement of housing, roads, and recreation areas will reinforce the feeling of living within this natural setting." Project Planning Report, August 26, 1987, p. 5.
2. Circulation Plan & Concept	2. Circulation Plan & Concept
A major arterial roadway traverses the site from Northeast to Southwest, connecting Texas Road with Old Bridge Englishtown Road. This arterial is a 4 Lane-Plus, median divided boulevard. (T.O.B.) A network of 4 collector roads integrates with the T.O.B. to provide access to the rest of the development.	A major arterial roadway traverses the site from Northeast to Southwest, connecting Texas Road with Old Bridge Englishtown Road. This arterial is a 4 Lane-Plus, median-divided boulevard. (T.O.B.) A network of 3 collector roads integrates with the T.O.B. to provide access to the rest of the development.

December 20, 1985 Plan	AUG 1987 SALKIN
2. Circulation, continued	2. Circulation, continued
"Throughout the preparation of this plan, considerable attention has been given to the inter-relationships between areas which are to be developed and areas which are to be undeveloped in perpetuity. Major roads are strategically located to enable residents and visitors to experience major elements of the open space network as they travel through the community. The high visibility of natural areas throughout the community will encourage use and appreciation of these natural areas, and will reinforce Woodhaven's identity and special character." Project Planning Report February 28, 1987 p. 3.	"Woodhaven Boulevard, a major arterial road, is envisioned as a green entrance to and a greenway through the development. A four-lane, median-divided boulevard... [its] design criteria and approximate alignment..... are consistent with the Township Master Plan, which has envisioned a Trans-Old Bridge Connector Road (T.O.B.) in this area. Woodhaven Boulevard is not dependent upon construction of other roadway segments associated with the T.O.B. The alignment of arterial and collector roads is coordinated with the open space network to maximize visibility and appreciation of these areas. The parkway nature of these roadways reinforces residents' perception of the special character of Woodhaven." Project Planning Report, August 26, 1987, p. 17.
3. Commercial: 73 acres total Eight (8) Commerical sites, of which:	3. Commercial: 73 acres total Thirteen (13) Commerical sites of which:
The major one is the Town Center, 25 acres, located at the major internal intersection nearest Texas Road	The major one is the Town Center, 25 acres, located at the major internal intersection nearest Texas Road.

December 20, 1985 Plan	August 26, 1987 Plan
3. Commercial, continued	3. Commercial, continued
3 sites, totalling 33 acres, are distributed along Texas Road.	5 sites, totalling 23 acres, are distributed along Texas Road.
3 sites, totalling 12 acres, are distributed along Englishtown Road.	4 sites, totalling 16 acres, are distributed along Englishtown Road.
1 site, of 3 acres, is internal to the development, on the T.O.B.	3 sites, totalling 9 acres, are internal to the development, along the T.O.B.
"The villages are oriented around a Town Center, the community's "Main Street". The Town Center is planned to include a generous amount of open space in the form of a central square, as well as court-yards and arcades. In conjunction with other planned commerical areas at Woodhaven, the Town Center is intended to satisfy day-to-day needs of community residents and to establish an unique identity for the community." Project Planning Report February 28, 1986, p. iv.	"A focal point of Woodhaven will be the Town Center, the community's Main Street. The Town Center is planned as the social and mercantile heart of the community, emphasizing the sense of order and place that is characteristic of well planned and successful communities. In conjunction with other planned commercial areas at Woodhaven, the Town Center is intended to satisfy day-to-day needs of community residents and to establish a unique idenity for the community." Project Planning Report, August 26, 1987, p.6.
4. Public Purpose	4. Public Purpose
3 sites, totalling 22 acres	3 sites, totalling 22 acres
One 9-acre site is adjacent to Town Center and Open Space Corridor.	One 8-acre site is adjacent to Town Center and Open Space Corridor

December 20, 1985 Plan	August 26, 1987 Plan
4. Public Purpose, continued	4. Public Purpose, continued
One 7-acre site is along the T.O.B. and the Open Space Corridor at the center of the site.	One 7-acre site is along the T.O.B. and the Open Space Corridor at the center of the site.
One 6-acre site is along the T.O.B., near southern end of site.	One 7-acre site is along T.O.B., near southern end of site.
5. OPEN SPACE	5. OPEN SPACE
TOTAL = 218 acres	Total = 490 acres
Open space is distributed thoughout the site in the form of continuous corridors. These areas are "showcased": major roads are located to heighten perception and use of the open space. By virtue of the length, some 2 miles, of the some of the corridors, and their very accessibility, these green corridors are a tremendous recreational amenity and a great enhancer of the quality of day to day life at Woodhaven.	Open space is distributed throughout the site in the form of continuous corridors. These areas are "showcased": major roads are located to heighten perception and use of the open space. By virtue of the length, some 2 miles, of the some of the corridors, and their very accessibility, these green corridors are a tremedous recreational amenity and a great enhancer of the quality of day to day life at Woodhaven.
"Woodhaven is planned as a community of villages, each of which is bounded and connected by the green network of open space...Central to the planning of Woodhaven is its open space network, which is woven through the fabric of the community. Streams, wetlands, and large	"The continuity of the open space is a natural framework that serves many purposes. The even distribution of the open space throughout the site serves to link the various neighborhoods as an "emerald necklace". Rather than large isolated parcels of undevelopable land, this network

December 20, 1985 Plan	August 26, 1987 Plan
5. OPEN SPACE, continued wooded areas will be preserved in perpetuity as contiguous, permanently deed-restricted greenways." Project Planning Report, February 28, 1986, p. iv.	5. OPEN SPACE, continued of open space weaves through the variety of planned uses, linking them in a park-line manner. Further, these preserved lands create natural buffers separating these uses, and a natural transition between levels of use and intensity." Project Planning Report August 26, 1987, p. 15
6. Recreational Nodes 8, total, distributed throughout the site.	6. Recreational Nodes 9, total, distributed throughout the site.
7. Villages 7 villages Village size and boundaries are essentially the same as in the August 26, 1987 Plan.	7. Villages 7 villages Village size and boundaries are essentially the same as in the December 20, 1985 Plan.

Village 1:	1,140 D.U.	± 20%
Village 2:	800 D.U.	± 20%
Village 3:	1,060 D.U.	± 20%
Village 4:	920 D.U.	± 20%
Village 5:	1,000 D.U.	± 20%
Village 6:	240 D.U.	± 20%
Village 7:	660 D.U.	± 20%
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