

U.L. v. Carteret, North Brunswick

8/15 1984

● Transcript of Settlement Conference

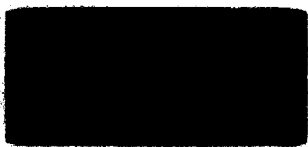
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Transcript of Settlement



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*Judith R. Marinke, C.S.R.*

1 MR. LEFKOWITZ: If your Honor please,  
2 I believe your Honor has been delivered a copy  
3 of a proposed Order of Judgment as to the  
4 Township of North Brunswick.

5 THE COURT: Yes, I have a copy.

6 MR. LEFKOWITZ: Therefore, on behalf  
7 of the Township of North Brunswick we wish your  
8 Honor to approve and enter this order and judgment  
9 with the following minor modifications: If your  
10 Honor will turn to Page 4, Paragraph (e) where  
11 it reads "construction of 120 units on the  
12 75 acre Hamelsky tract," it should be amended  
13 to read "construction of 120 units on 75 acres  
14 of the Hamelsky."

15 THE COURT: All right.

16 MR. LEFKOWITZ: Paragraph (f) directly  
17 below where it reads "construction of 58 units  
18 on the 36 acre Johnson and Johnson. . ." It  
19 should read "construction of 58 units on 36 acres  
20 of the" . . .

21 Directly below, Paragraph 6 it reads  
22 "the Township shall rezone the" -- it says  
23 "municipality owned nine acre site." It should  
24 read, "the Township shall rezone a portion of the  
25 municipally owned nine acre site."

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Page 9, your Honor, Paragraph 10. It says "the Township shall rezone the 36 acres of the tract."

The word "the" should be stricken and then it will read properly.

MR. HUTT: The second "the".

MR. LEFKOWITZ: Yes, "the Township shall rezone 36 acres of the tract," it should read.

THE COURT: The first "the" or the second? Thirty six acres of tract.

MR. HUTT: No, the second word "the".

THE COURT: Oh, there are three "thes". Okay.

MR. LEFKOWITZ: Okay. Did we come to an agreement, counsel, with regard to Page 10 in changing the language with regard to the standards?

MS. WILLIAMS: Yes, your Honor, we did. Adding a couple other sentences to the end of Paragraph 10, we would like to add the following language: "The Township shall provide plaintiff within 30 days clear and satisfactory evidence that the owner or option holder intends to develop the tract for residential development as specified in this paragraph; that if the owner or option holder is not able to provide such

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1 evidence, the option holder relinquishing its  
2 option and/or the tract becomes unavailable,  
3 the Township shall rezone either the Hamelsky  
4 tract to provide an additional 58 units of low  
5 and moderate income housing or provide suitable  
6 alternate tract sites for such housing."

7 THE COURT: All right. The Hamelsky site  
8 is Mr. Wolfson's client.

9 MR. WOLFSON: Yes, your Honor.

10 THE COURT: So, we are going to satisfy  
11 Mr. Wolfson one way or the other.

12 MR. WOLFSON: No, your Honor.

13 THE COURT: Where does that leave you?

14 MR. WOLFSON: Out on the left and ready  
15 to speak when your Honor will hear it.

16 THE COURT: Okay.

17 MR. LEFKOWITZ: On Page 12, your Honor,  
18 Item 19 it would be the second paragraph. It  
19 reads: "The Urban League, or its designee,  
20 shall have the right to inspect all prepared  
21 development applications." I believe the  
22 word should be "proposed" instead of "prepared."

23 Now, with regard to -- there was an  
24 additional paragraph that was omitted by oversight  
25 when it was retyped from the proposed prior form

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1 of order that the Urban League desires to put  
2 in without any objection from North Brunswick  
3 and without any objection from Mr. Hutt.

4 The only other question that I would  
5 have at this time is with regard to Paragraph  
6 Number 12, the top of Page 10 and Mr. Hutt would  
7 like to be heard with regard to that language.

8 THE COURT: Page 12 is it?

9 MR. LEFKOWITZ: Page 10.

10 THE COURT: Page 10.

11 MR. HUTT: Paragraph 12. The first  
12 sentence on Page 10.

13 MR. LEFKOWITZ: Paragraph 12, the first  
14 sentence on Page 10.

15 MR. HUTT: Just the first sentence,  
16 your Honor.

17 THE COURT: Okay.

18 MR. HUTT: Your Honor, as you know,  
19 from looking at the judgment there are provisions  
20 in here that is going to apply for as long as  
21 20 years.

22 We had discussed, all of us and counsel  
23 at my request, that if in the event, and let's  
24 say as a scenario, let's say two years from now  
25 or three years from now the common standards

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1 that are either existing now in the footnote  
2 eight, for instance, of the Mount Laurel decision  
3 or as you, trial judges, eventually evolve them  
4 in the next six months, let's say, if those  
5 standards change in the next two or three years,  
6 either because the Courts recognize that what  
7 they thought would work is not working or  
8 because, for instance, there was a bill that's  
9 been introduced in the legislature last week  
10 by Leona Lippman and David Schwartz on the  
11 Senate for a Housing Allocation Act it's called.  
12 I don't know whether this bill will pass, but  
13 it's somewhat similar to the Housing Allocation  
14 Commission.

15 In the bill they define the various  
16 things of income levels and what is moderate  
17 and what is low and so forth, and I would hope  
18 in the legislation, if it passes, if it ever  
19 comes out that that Housing Commission --  
20 Administrative Agency of the Executive Branch  
21 would, over time, develop, as experience dictates,  
22 possibly different standards, maybe low should  
23 be 20 percent, maybe low should be 90 percent,  
24 whatever.

25 What we want to be concerned about is

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1 over time, the language we are suggesting,  
2 North Brunswick and myself, is that instead of  
3 saying the Supreme Court, because that limits  
4 the Supreme Court, we would prefer to say that  
5 instead of the language that's there: Anybody --  
6 b-o-d-y because it might be the administrative  
7 agency for instance or it might be the  
8 legislature itself. Anybody of competent  
9 jurisdiction as determined by this Court changes  
10 the standards, then any party to this settlement  
11 can make application before your Honor and  
12 which you will determine two things: When such  
13 a body is a body of competent jurisdiction,  
14 and number two, are there good causes shown for  
15 amending any of the standards set forth in this  
16 judgment?

17 I think that's the only way we could  
18 all protect ourselves as to future events, and  
19 I include you, your Honor, to be able to  
20 foresee today what condition may exist three  
21 years from now or five years from now or ten  
22 years from now. It's not capricious.

23 It would still have to go before the  
24 courts and say an appropriate administrative  
25 agency or the Appellate Division came down or

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1 the Supreme Court came down to change the  
2 standards and this is the reason why we  
3 think this order should be modified.

4 The parties will argue pro and con  
5 either way, and you will still make the final  
6 determination.

7 But I am concerned if you don't have that  
8 in there, some taxpayers, for instance, could  
9 come in here two years from now knowing full well  
10 you can't build under these circumstances and  
11 say, you can't change them. A contract is a contract  
12 or a court order is a court order, for what I  
13 consider exclusionary purposes because, you know,  
14 if you can't build, they are going to say,  
15 hey, you can't change the standards.

16 Mount Laurel, itself, for instance,  
17 has enacted an ordinance. It talks about every  
18 builder has to build 40 percent inclusionary  
19 buildings.

20 In Jewish we have an expression: "You  
21 are talking about your daughter, but you mean  
22 your daughter-in-law."

23 They come out with these --

24 THE COURT: I have never heard it put  
25 that way.

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1 MR. HUTT: Well, that's because you  
2 didn't have a daughter-in-law.

3 THE COURT: It's not because I don't  
4 have the background in that field.

5 MR. HUTT: So, these people --

6 (Discussion off the record.)

7 MR. HUTT: In any event, I think there  
8 has to be that kind of flexibility built in here  
9 to protect everybody in the future.

10 MS. WILLIAMS: Your Honor, we would  
11 object to changing the language from what is  
12 set forth in the proposed order.

13 It is our belief that Mount Laurel II,  
14 since it was a Supreme Court case, any modifications  
15 the Court should be governed by the Supreme  
16 Court in terms of the settlement between the  
17 parties.

18 We have perceived it being administratively  
19 unworkable if every court or a body of competent  
20 jurisdiction determined by this court becomes  
21 the standard. It creates the potentiality of  
22 a situation of any administrative regulation or  
23 any case which may be in the interest of the  
24 developers or the Township for there to be a  
25 potential modification.

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1                   It would be our view that the language  
2 should remain as it stands by the Supreme  
3 Court.

4                   I don't believe that it is totally  
5 preclusive from a legal standpoint of the  
6 defendants or the plaintiff being able to come  
7 into court and modify the agreement, but we see  
8 no necessity for it to be part of the proposed  
9 order other than the Supreme Court language  
10 to reflect Mount Laurel II and the standing of  
11 that court.

12                   MR. WOLFSON: Your Honor.

13                   THE COURT: Yes.

14                   MR. WOLFSON: I just have a very short  
15 comment as to that.

16                   I will save my comments for whenever  
17 your Honor will hear from me.

18                   We are concerned about this settlement  
19 for a lot of reasons. One, particularly because  
20 it says "any party."

21                   Now, I don't know what my status is at  
22 the moment. I have a feeling of what it's going  
23 to be in a few minutes, but this form of order  
24 is replete with phrases like this and, you know,  
25 if any party is to be given any flexibility, does

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1 that mean only Mr. Hutt's client or the Urban  
2 League or the Township? Or does that mean any  
3 subsequent applicant?

4 Part of our application this morning  
5 is that the eight units to the acre really  
6 reflects a taking on that, and we would want to  
7 be able to make applications. So, we don't  
8 really know what is going to happen procedurally  
9 after the Court determines what to do with this  
10 proposed settlement.

11 But I think that really careful scrutiny  
12 has to be given to this order forgetting the fact  
13 that your Honor may give it to Carla Lerman in  
14 connection with fair share compliance because  
15 the way the order was drafted, just from our  
16 quick review of it, which we were under some  
17 pressure, we have identified a lot of problems  
18 like this where we think that it is just going  
19 to cause problems down the line specifically for  
20 our client, but also for the Court and for the  
21 Court-appointed expert which is why we are here  
22 today.

23 THE COURT: Let's go off the record for  
24 a minute.

25 (Discussion off the record.)

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1 THE COURT: The record will reveal  
2 there has been an extensive discussion off the  
3 record concerning the modification of the first  
4 sentence on Page 10, and apparently counsel have  
5 agreed that the Court can rule upon a modification.  
6 I would direct that that sentence be changed to  
7 adopt wording which would include: "The order of  
8 any court of competent jurisdiction, any Statute  
9 adopted by the legislature or any administrative  
10 ruling of any agency acting under statutory  
11 authority, and it should be clear that the acts  
12 of the legislature or any such agency are not  
13 binding upon the court, but only provide a basis  
14 for an application to be made to the court."

15 Now, I also did not discuss off the  
16 record, but I think Mr. Wolfson's objection is  
17 well taken. There is a rezoning here of parcels  
18 of many people who are not parties, and it seems  
19 to me that anyone affected by the order certainly,  
20 and anyone who seeks to build low and moderate  
21 housing should have the right to make the  
22 application.

23 So, it should not read "party," but  
24 "any applicant or anyone may, upon good cause" --  
25 and the word "party" should come out.

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1 MR. HUTT: If you switch the word "party"  
2 to "person."

3 THE COURT: Pardon me?

4 MR. HUTT: If you switch the word "party"  
5 to 'person.'

6 THE COURT: Any person. That person  
7 includes a corporation. All right.

8 Now, what else do we have?

9 MS. WILLIAMS: Your Honor, we have one  
10 paragraph that was omitted. It was part of the  
11 first draft of the proposed order which was  
12 submitted to your Honor, Paragraph 13.

13 There now has been a new 13, and I guess  
14 it would probably be best if we added it to the  
15 end of the draft which we gave to your Honor  
16 today.

17 THE COURT: This was in the first order  
18 you gave me. Which paragraph was that?

19 MS. WILLIAMS: Thirteen. Would it be  
20 right to read it into the record at this time?

21 MR. WOLFSON: I would request that  
22 your Honor do it because I have been given a  
23 copy of that.

24 MS. WILLIAMS: All right. Fine.

25 THE COURT: That paragraph which is also

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1 on Page 10 of the original order which I received,  
2 if I am reading the same thing --

3 MS. WILLIAMS: That's correct.

4 THE COURT: -- says the "Township of  
5 North Brunswick shall amend its zoning ordinances  
6 so that all developers of low and moderate income  
7 units are required to affirmatively market those  
8 units to persons of low and moderate income  
9 irrespective of race, color, sex or national  
10 origin.

11 "Such affirmative marketing shall include  
12 advertisement in newspapers with general  
13 circulation in the Urban Corps areas located in  
14 the 11-county-present-need region identified in  
15 the court-appointed expert's report dated  
16 April 2, 1984.

17 "The Township shall also require the  
18 developer to advertise the low and moderate income  
19 units with local fair housing centers, Housing  
20 Advocacy organizations, Urban Leagues and  
21 governmental social service and welfare departments  
22 located within the 11-county region.

23 "The Township shall also require that  
24 all marketing practices comply with applicable  
25 federal and state laws against discrimination."

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1 Mr. Hutt.

2 MR. HUTT: Barbara.

3 (Discussion off the record.)

4 MR. HUTT: Your Honor, we would like to  
5 change one word that you read in the third  
6 sentence.

7 It says: "The Township shall also  
8 require the developer to advertise the low and  
9 moderate income units."

10 We want to change that word from  
11 "advertise" to "notify."

12 THE COURT: Yes. I think that is  
13 grammatically correct.

14 You didn't intend to advertise. You were  
15 advertising in the previous paragraph.

16 MR. HUTT: Yes. Just notify the agencies  
17 as distinguished from advertising.

18 THE COURT: Fine.

19 Is there anything else, Mr. Wolfson?

20 MR. HUTT: There is one blank on  
21 Paragraph 16. I just wanted you to know there  
22 was a blank.

23 THE COURT: I see that.

24 MR. HUTT: We left something for you  
25 to do, your Honor.

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1 THE COURT: Which Sunday night am I  
2 supposed to do that on?

3 You mean Paragraph 16, Page 11?

4 MR. HUTT: Yes, sir.

5 THE COURT: I would want to just consult  
6 with Miss Lerman concerning that. She has  
7 normally been doing it in 30 days, but I understand  
8 the Piscataway situation is causing her some  
9 problem and I just want to make sure that 30 days  
10 is reasonable.

11 Is there anything else before we  
12 hear Mr. Wolfson?

13 All right, Mr. Wolfson. I haven't  
14 looked at this revision here, so I don't know  
15 what happened to your parcel.

16 MR. WOLFSON: Well, we haven't seen  
17 anything of late other than the first draft, your  
18 Honor.

19 So, we are to some extent handicapped.

20 THE COURT: You mean the draft that I  
21 was handed today?

22 MR. WOLFSON: The draft which we  
23 have attached to our complaint, we have nothing  
24 other than that.

25 MR. LEFKOWITZ: Judge, the provision is

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1 the same with regard to the unit in the allegation.

2 THE COURT: Okay.

3 MR. WOLFSON: Your Honor recognized from  
4 my argument that my reading and counsel's reading  
5 of the proposed form of stipulation as distinguished  
6 from, or in addition to, the proposed form of  
7 order contains a myriad of items that affect us  
8 that we are not a party to.

9 The best example is this advertising  
10 requirement where the Urban League has agreed  
11 with the Town to put in burdens upon developers  
12 that are not a party to the suit separate and  
13 apart from Mr. Hutt's client.

14 It seems to me that to the extent that  
15 the Court adopts the Judge Skillman-type-of-class-  
16 action approach, which I have serious problems  
17 with, at least in those contexts the developers  
18 or the class have an opportunity to opt in  
19 or opt out.

20 Here I am placed in a situation where,  
21 in a moment's notice, we find out that a settlement  
22 is being proposed that seriously affects our  
23 land.

24 It proposes a direct rezoning. It does  
25 not propose to have a court-appointed expert make

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1 a recommendation as to what it should or should not  
2 be. It asks that it be zoned low and moderate  
3 density and it contains a tremendous number of  
4 provisions that adversely affect us without our  
5 having been given any opportunity for any input  
6 at all prior to the Court's order.

7 I respectfully would submit to your Honor  
8 that an opportunity to present arguments or  
9 documentation of evidence to Carla Lerman is not  
10 the same as being able to present it to the  
11 Court prior to that time because the Court-appointed  
12 expert will be operating to some extent under a  
13 court order.

14 Any implementing ordinance will be able  
15 to be adopted by counsel by saying, well, we are  
16 doing it because there is an order that orders us  
17 to do it. So, we won't have any realistic input  
18 at the public hearing.

19 I say that based upon past experience  
20 where public hearings are held, but there are  
21 public hearings in name only because the councilmen  
22 are acting under a compulsion: "Well, the Judge  
23 ordered it. We have to do it."

24 And to some extent I am realistic enough  
25 to understand that that is sometimes politically

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1 how those things have to occur.

2 The judge has to take the heat in a  
3 number of cases and I am sympathetic with that.  
4 I don't want to disrupt what I would otherwise  
5 perceive to be a legitimate settlement except  
6 the numbers here are so bad that I don't believe,  
7 on its face, Judge, although we have had that  
8 discussion in the Franklin case, but on its face,  
9 I think on its face a five and a half unit  
10 difference is so, you know, it so boggles the  
11 mind that it has to create at least a doubt in  
12 your Honor's mind that this settlement should  
13 even be directed to Carla Lerman until much more  
14 work is given to it.

15 This is the result of very speedy action.  
16 I don't think a tremendous amount of in-depth  
17 thought, with all respect to counsel, went into it.

18 I think there are serious problems with  
19 it separate and apart from the constitutional  
20 issues that we wanted to raise in our complaint  
21 and which we will raise by an amended complaint  
22 if we are given the opportunity to do so.

23 By our letter we ask to be consolidated  
24 into this case since we were being treated from  
25 my prospective as a party since we were being

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1           tremendously affected by the proposed order of  
2           stipulation. And if we were going to be affected,  
3           I thought it was only fair and equitable that we  
4           be a party to the litigation so that we could have  
5           input in a meaningful way, that is, before all  
6           these things happen.

7                        Now, the serious problems I have from  
8           a legal standpoint, your Honor, are -- include the  
9           following: (1) I really perceive this to be a  
10          reverse kind of spot zoning.

11                       It is a situation where separate parcels  
12          have been identified by the parties to receive this  
13          either beneficial or lack of beneficial treatment,  
14          depending on whose side you are on.

15                       From our perspective it is bad treatment.

16                       Eight units to the acre with a 20 percent  
17          set aside from our perspective is a taking, and  
18          without any overlay zoning, that gives us an option  
19          to do something other than low and moderate, it  
20          completely destroys the value of our property  
21          because we cannot build eight to the acre with  
22          low and moderate. We have no choice to build  
23          conventional at some lesser density. So, we are  
24          stuck with nothing and the Urban League gets  
25          nothing because there are no houses built.

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1 I just find it funny.

2 If you add up all the units, it meets  
3 your Honor's fair share, and my understanding  
4 of the Mount Laurel case and what I thought  
5 your Honor had said on other occasions in other  
6 contexts was to realistically provide for low  
7 and moderate income housing, you must provide more  
8 than the fair share in terms of the actual number  
9 in the zoning ordinance in order to be left with  
10 a realistic possibility of approaching the fair  
11 share number.

12 The numbers on this particular form of  
13 order reach a compromised fair share number to  
14 begin with and no more.

15 For the Urban League to be concerned  
16 that the Reider tract may or may not get built,  
17 and that is going to reflect a difference in  
18 this settlement, I think is absurd.

19 If they are worried about the Reider  
20 tract not being built, they should worry about  
21 the Hamelsky and all the other tracts getting  
22 built.

23 I think your Honor can take judicial  
24 notice of the fact that at least it is my  
25 understanding that there is no case that is

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1 settled for a 20 percent set aside, eight units  
2 to the acre in low and moderate.

3 THE COURT: You mean by order of the  
4 Court or by settlement?

5 MR. WOLFSON: By order of the Court.

6 THE COURT: Because there have been many  
7 that have settled at eight or below.

8 Manuel Pollin has a settlement at seven.

9 MR. WOLFSON: I meant litigation, your  
10 Honor.

11 Mr. Hutt corrected me.

12 THE COURT: Doesn't it tell you that  
13 it can be done?

14 MR. WOLFSON: Well, I am told that it  
15 cannot be done, and we were involved in the  
16 Bernards case where Harvey Moskowitz was the  
17 planner for Bernards and there was a negotiated  
18 agreement and Bernards is even more restrictive.

19 THE COURT: AMG in the Warren case is  
20 ready to build at a lesser density.

21 MR. WOLFSON: That includes the factors  
22 when you get the land and what price you get  
23 for it.

24 THE COURT: Again, that was a litigated  
25 case and will shortly be decided and Timber

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1 Properties at one point in time was -- there was  
2 a question about sewerage. Shainee also wanted  
3 to build at eight per acre. So, I don't know  
4 that one cannot say it cannot be done, but on the  
5 other side, I don't think that anybody has really  
6 litigated the issue of proper density and that  
7 is the whole, one of the things which I did not  
8 express when we were off the record: One of my  
9 concerns about builder's remedies is we would get  
10 into litigating those. We are going to get into  
11 litigating some extraordinary and difficult  
12 issues as to profitability and all those sort of  
13 things that are going to take as long as fair  
14 share things.

15 MR. WOLFSON: I agree that they are  
16 complicated issues and they would require much  
17 more input than either of these parties have had.

18 THE COURT: Or almost anybody has had.

19 MR. WOLFSON: I agree with you. I think  
20 that that is correct.

21 The Urban League, with all due respect  
22 for all the good they are doing, they are not  
23 builders, and although they seem to be willing  
24 to accept the settlement of the eight to the  
25 acre with a 20 percent set aside, my client has

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1 indicated that it is an impossibility, and based  
2 on that representation alone the Urban League  
3 should at least investigate that. They should  
4 be willing to accept the eight to the acre  
5 especially when faced with the situation where  
6 the only other plaintiff in the case is getting  
7 13 and a half to the acre.

8 Now, I don't want to take anything  
9 away from Mr. Hutt's client except to use that  
10 to say there is a pretty big difference between  
11 eight and 13 and a half, and why would that be  
12 necessary except that Mr. Hutt does need his  
13 client to do it at eight units to the acre and  
14 the Town doesn't believe that anybody can do it  
15 at eight units to the acre which is probably  
16 why they are willing to go along with this  
17 settlement.

18 I think the Court should delay this  
19 direct investigation and further input from our  
20 client as a party to this litigation in order  
21 that a more intelligent, more well reasoned result  
22 or conclusion can be reached, and if the  
23 conclusion is the same, so be it, but at least  
24 at that opportunity we will have had realistic  
25 input. We will have had an opportunity to take

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1 some time, produce documentary evidence, at least  
2 discuss with the Urban League or the Town or  
3 Mr. Hutt's client why we feel the settlement  
4 documents are the way they are inappropriate and  
5 at that point if the Court disagrees with the  
6 position of my client and wants to approve the  
7 settlement subject to input, to some extent from  
8 its expert, well, that will be at least, you  
9 know, a more realistic and reasoned approach.

10 The only other legal argument, your  
11 Honor, that we have in connection with this  
12 settlement, and I hate to be in a position of  
13 disrupting settlement because it goes against  
14 the grain of everything that I believe in,  
15 especially in a Mount Laurel context, because  
16 I strongly believe that Mount Laurel will work  
17 and low and moderate income housing will be built  
18 and that is why I take such an emotional approach  
19 to this settlement because this will stop the  
20 low and moderate income housing from being built  
21 and my client is building it and is voluntarily  
22 building it without litigation in the Towns, but  
23 at different densities and different requirements.

24 I have a general comment as to the manner  
25 in which your Honor is being requested to approve the

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1 settlement. My understanding of Mount Laurel is  
2 that the Court is authorized for the first time,  
3 basically, to direct rezonings within the Town  
4 to assume the humble power of the municipality  
5 under circumstances where the municipality fails  
6 after an order to comply, or in the circumstances  
7 of builder's remedies, where the Court can direct  
8 a rezoning of a particular plaintiff's property  
9 who is, what Judge Skillman and I perceive the  
10 phrase, successful plaintiff.

11 Here we have a situation where we are  
12 not a party, Hovnanian is not a party and the  
13 Court is being asked to enter an order directing  
14 a specific rezoning of a specific parcel of  
15 property of a non-successful plaintiff, where  
16 the successful plaintiff otherwise would have  
17 an opportunity to have input as to what density  
18 he needs or she needs, and the Court would hear  
19 that and the expert would hear that and a  
20 particular remedy would be given to the successful  
21 plaintiff.

22 Here we are not a party to the lawsuit,  
23 and the Court is being asked to direct a specific  
24 rezoning of a specific parcel.

25 So, we have been deprived of the

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1 opportunity that an ordinary litigant would get  
2 in proving its builder's remedy case and the  
3 Court is being asked to exercise authority that  
4 I do not believe was delegated to it or authorized  
5 by the Supreme Court to engage in direct rezoning  
6 situations other than that which were contemplated,  
7 I believe, by the Supreme Court in Mount Laurel.

8 I don't think that your Honor has the  
9 right or the authority to enter an order  
10 directing the Town to rezone property subject to  
11 the Court's finding of the Town's noncompliance  
12 after giving the 90-day period, for example, or  
13 unless we were the successful plaintiff asking  
14 for a rezoning based upon the input after a trial  
15 or a settlement where everybody had an opportunity  
16 to have input.

17 You are being asked to rezone our  
18 property as part of a settlement which we are  
19 not a party to and which we have not been committed  
20 to take part other than today and last week in  
21 your Honor's chambers.

22 For all the reasons that I have stated,  
23 and I know I have thrown a lot at your Honor  
24 very quickly, we do not think that your Honor  
25 should approve this settlement because there is

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1 still a great number of unanswered questions.  
2 There is still a tremendous, to me, prima facie  
3 inability to comply with Mount Laurel on this  
4 proposed form of settlement, and I don't think  
5 you need to send it to Carla Lerman to realize  
6 that.

7 I think your Honor is well versed enough  
8 in what has happened between this and the other  
9 two trial courts to realize that it will not  
10 produce realistically low and moderate income  
11 units in a number that will authorize, in my  
12 opinion, a settlement of the Mount Laurel case  
13 and I would also request, your Honor, to the  
14 extent you are going to approve a settlement in  
15 some form today between these parties to please  
16 do not enter an order directing any particular  
17 rezoning of our property because that will deprive  
18 us of any meaningful input with either the  
19 Master or with the local governing body at the  
20 time of the public hearing because they will be  
21 able to say: We are just doing what the Court  
22 ordered us to do and we will be back here again  
23 under much harsher standards, I suspect, trying  
24 to justify a different zoning on our tract.

25 I strenuously would urge, your Honor,

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1 that if your Honor wants to see low and moderate  
2 units built, and I know you do and we do, that's  
3 our business and that's my business, I would urge  
4 your Honor to restrain -- refrain, excuse me,  
5 from entering this settlement or approving the  
6 settlement in the manner being requested because  
7 I think that nothing will come of it and that  
8 will do nothing to help either the Urban League,  
9 my client or the Township's or the low and  
10 moderate income people in the State.

11 THE COURT: Just as a procedural question:  
12 What do you perceive a trial court will have to do,  
13 assuming there were no builders involved in this  
14 case at all, assuming that neither you, nor  
15 Mr. Hutt had sued before we settled it, and in  
16 order to fulfill the fair share, North Brunswick  
17 had to rezone 20 parcels? Does that call upon  
18 the Court to require notification to all those  
19 people? None of them are parties and their  
20 rights are being affected and presumably settled  
21 and won't want what the zoning is going to be.

22 MR. WOLFSON: I don't think your Honor  
23 should enter an order approving the case until  
24 the zoning is already in place.

25 At that point if there are public hearings,

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1 there will be input at the public hearing, more  
2 meaningful input, as to what the zone should or  
3 should not be.

4 If you are talking about a settled  
5 posture as opposed to a litigated posture, and  
6 I haven't given this a tremendous amount of thought  
7 as you just posed it to me this morning, but it  
8 seems to me when the municipality has a public  
9 hearing to either amend its Master Plan or to  
10 amend its zoning ordinance to provide sufficient  
11 densities for low and moderate income zones, there  
12 is notice.

13 Notice is published in the newspaper.  
14 There are Sunshine Law requirements as to what  
15 has to be advertised, and at that point at least  
16 to some extent there is some advertisement, some  
17 notice to people who own property of the input  
18 and know what is going on, and they will be able  
19 to provide their input at the public hearing.

20 Whether or not that is effective to  
21 convince a local governing body to act differently  
22 in their collective mind is another question, and  
23 I don't think we have to answer that.

24 THE COURT: You are saying that notwith-  
25 standing the fact that here there will have to be

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1 an amendment and a revision, the fact that it  
2 is already being done under court order is going  
3 to mean that should other property owners affected  
4 by this appear and say, we don't want it either  
5 or we don't like it is not going to mean anything  
6 because the council is going to say, well, the  
7 judge ordered it.

8 MR. WOLFSON: Your Honor, that is  
9 precisely what I am saying and that is precisely  
10 what I have been confronted on a number of  
11 occasions. I am sure to the extent you had an  
12 analogous situation when you were borough attorney,  
13 when you were township attorney, the same kind of  
14 things happens: It gives the municipality the  
15 out, and I know the people in this room are  
16 astute enough to know that is sometimes what they  
17 want the judge to do. They want the judge to take  
18 that leap, but under these circumstances where  
19 a settlement is being proposed, which I think on  
20 its face is deficient, that your Honor ought to  
21 take that ability or take that option that the  
22 Town is trying to utilize away from them unless  
23 they come up with a better plan or a much more  
24 defined plan to do that.

25 I just don't think that asking the Town

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1 to rezone under court order is going to provide  
2 any input or any legitimate notice or any  
3 possibility that the public could be heard on  
4 these things.

5 THE COURT: If a town's ordinance is  
6 found in noncompliance and it comes back with  
7 another noncompliant ordinance, and the court  
8 rezones, nobody is going to get much input on  
9 that. The second thing --

10 MR. WOLFSON: Well, I don't know that  
11 that is true. You will tell me that is true,  
12 your Honor, but if you rezone, you will direct,  
13 I would suspect, a Master to do a study and  
14 make recommendations to you --

15 THE COURT: Right.

16 MR. WOLFSON: -- as to what it would be  
17 and what it would not be.

18 THE COURT: Right.

19 MR. WOLFSON: And that would be free  
20 from the self-interest input, for example, where  
21 the Town and everybody would have a fair shot  
22 and everybody would have what you permitted to  
23 the Master on an equal footing.

24 If my land was on the same caliber as  
25 Mr. Hutt's caliber, my opinion is it would receive

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1 close to the same density and same treatment.

2 Here is a tremendous difference in that  
3 case, and all the other plaintiffs are being  
4 used to qualify for fair share numbers. More  
5 than five units to the acre with a different  
6 set aside.

7 As your Honor knows 3 or 4 percent on  
8 a low and moderate would make a big difference  
9 as to whether or not it can afford it or not.  
10 My client tells me that you can't.

11 But certainly between 13. Certainly  
12 you cannot -- I don't see how you can require  
13 any particular property owner to have his land  
14 zoned low and moderate.

15 It seems to me it has to be zoned  
16 something and then there would be an overlay  
17 which says, if you want a higher density and  
18 you are willing to build low and moderate income  
19 housing, you could have this, but if you don't  
20 wish to build low and moderate income housing,  
21 I don't see how this Court at this point can  
22 order any particular client's land especially  
23 not a party to a lawsuit, that he must use his  
24 land for low and moderate income housing.

25 THE COURT: Well, I don't know about that.

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1 I wouldn't want to express an opinion.

2 It seems to me the Appellate Division  
3 has done that in the remand in the Field case  
4 where neither party had requested low and moderate  
5 housing.

6 MR. WOLFSON: Well, a party to that  
7 lawsuit did, your Honor, an intervenor.

8 THE COURT: It was not part of the  
9 appeal. Neither Field, nor Franklin Township  
10 was looking for low and moderate income housing,  
11 and the Appellate Division said, by the way,  
12 on remand you are going to build 15 percent low  
13 and moderate housing.

14 Now, I know that the plaintiff in that  
15 case had not desired that and that the town had  
16 not asked for it. That case is before me.

17 MR. WOLFSON: Mark First, who represented  
18 the intervenors in that case, did request it, and  
19 asserted that they were entitled to that.

20 THE COURT: But whether or not -- I am  
21 not aware of that, but even assuming that, the  
22 Appellate Division did not give an option, they  
23 said, you are going to build 15 percent.

24 If you are going to build at all, you  
25 are going to build 15 percent which says to me

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1 that apparently that court thought they had that  
2 power. That is an issue that I have not reached.  
3 It is an interesting one.

4 The question is: Can you zone in such  
5 a fashion as to limit only to that particular  
6 type of use of the property? That is basically  
7 what it boils down to.

8 MR. WOLFSON: Separate and apart from  
9 whether it is feasible?

10 THE COURT: Yes. The question that --  
11 I think you have raised several very good arguments,  
12 but the question that concerns me is how does a  
13 court ever settle a case?

14 But when the town comes in with a package  
15 and says, look, we are willing to accept this  
16 fair share number, if the courts are going to  
17 accept it, and this is how we are going to comply,  
18 and let's say there is only one plaintiff, whether  
19 it is the Urban League or whether it is a builder,  
20 as I indicated to you, we have one town in which  
21 a builder has brought about the revision and the  
22 town is only interested in not getting sued by  
23 somebody else.

24 They want 90 days in which to have a  
25 compliant package, and how is the court ever going

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1 to rezone without stepping on other people's  
2 toes if the town cannot be the one to select the  
3 parcels? It doesn't preclude those people whose  
4 toes have been stepped upon from saying they have  
5 been arbitrarily treated either by being excluded  
6 or being included arbitrarily, and in some way  
7 unfairly affected by the revision.

8 How are we ever going to accomplish a  
9 revision if we do it in the manner you are  
10 suggesting? It would appear that the municipality  
11 would have to come in and say: Here is what we  
12 propose, and the court would say, okay, that  
13 looks all right, but I want you to go back now  
14 and hold public hearings on that. And in the  
15 meantime they get sued by another five builders  
16 and those builders are going to raise all sorts  
17 of issues concerning the propriety of it.

18 It would seem to inherit the process,  
19 for the process to go that way. Wouldn't it?

20 MR. WOLFSON: One clear message that  
21 the Court can send out is that it will not approve  
22 of a proposed form of settlement where the  
23 rezoning specifically takes into account only  
24 enough space to rezone the precise fair share  
25 number that is being agreed upon.

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1 THE COURT: That is a separate issue.  
2 The over-zoning issue I see as separate.

3 MR. WOLFSON: But that to me, I think,  
4 from a practical standard will eliminate part of  
5 the other revisions.

6 If the municipality in good faith is  
7 trying to allow a substantial amount of low  
8 and moderate, it is going to have to go to land  
9 far in excess of that which it's done here, and  
10 it's going to be zoning in densities that are much  
11 more realistic, and I think that you are not going  
12 to see the same kind of Johnny-come-lately lawsuits  
13 that your Honor is being confronted with on a  
14 recurrent basis now of date.

15 Because of those proposed settlements  
16 that the Urban League seems to upset, you are  
17 not going to have all these people coming in.  
18 If you see in the newspaper that the town is  
19 attempting to settle a lawsuit at a certain  
20 number, all of a sudden the property owners having  
21 now gotten notice for the first time, they  
22 contact their lawyers, the lawyers do a little  
23 study and all of a sudden they figure out that  
24 they are going to get nailed.

25 THE COURT: Of course, it doesn't only

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1 happen in that context. I mean, in Warren  
2 Township we did not have the Urban League. We  
3 had two builders who, if they prevail, would  
4 build a very sizable portion of Warren Township's  
5 fair share by anybody's number and still we had  
6 somebody starting the suit after the trial was  
7 completed.

8 So, the Johnny-come-latelies come in  
9 all kinds of cases, and it is just not the Urban  
10 League cases.

11 MR.WOLFSON: I think to some extent that  
12 is part of the genius of the Supreme Court opinion  
13 in the Mount Laurel case.

14 I think what the chief -- what the  
15 Supreme Court did in that case in connection with  
16 the use of a Master was done and I think intentionally  
17 precisely for these reasons: That a particular  
18 plaintiff, whether it is a builder plaintiff or  
19 public interest plaintiff, more likely if it is  
20 a builder plaintiff who wishes to reach a settlement,  
21 the Supreme Court recognized that that settlement  
22 was likely to be self-serving, and, in fact,  
23 the town and that plaintiff are going to read  
24 what they want and the rest of the Town they  
25 really don't give the same kind of attention or

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1 input. They have the rest of the town, and I  
2 think to prevent -- and I am not suggesting it's  
3 happened in this case -- but to prevent a  
4 corroborated kind of conspired settlement where  
5 the builder gets what he wants and the town is  
6 getting out of everything without realistically  
7 making any opportunity for low and moderate income  
8 housing to be built --

9 THE COURT: I can't say I agree with  
10 everything you have said, but generally speaking  
11 I think I agree with the concept that we should  
12 do nothing that is going to discourage builders  
13 to sue because the genius of the opinion is in  
14 the caret which has been held out, and also the  
15 fact that by having builders here as opposed to  
16 a non-builder plaintiff, you are more likely to  
17 get actual construction which is what the court  
18 was after, and I must say in all candor in this  
19 particular case, while I can't take judicial  
20 notice of the fact that certainly your plaintiff  
21 is well known to be a large-scaled developer who  
22 is not in here buying an option to sell the  
23 property necessarily, they are known to build and  
24 be able to build and build with dispatch. It is  
25 important to the court not to see that type of

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1 builder excluded from the process.

2 The other side of the coin is that  
3 voluntary settlements have got to be encouraged,  
4 and if towns cannot come to some resolution  
5 without anyone who is offended by it, upsetting  
6 it, we are just not going to get those settlements.

7 Miss Williams, this question of overzoning,  
8 I know we discussed it in chambers. I understand  
9 your position is that you believe that the sites  
10 selected are so certain that you are going to  
11 satisfy your fair share.

12 Mr. Wolfson, in effect, is saying, well,  
13 to the extent that you are using my client, you  
14 are wrong because we are not going to build an  
15 eight acre with eight and therefore we are going  
16 to fall short on the fair share.

17 MS. WILLIAMS: Your Honor, you are  
18 correct, but the potentiality of the housing  
19 being built was one of our main concerns.

20 We are satisfied at this point in time  
21 that that will occur.

22 I do not believe that the issue of eight  
23 per acre, in terms of density which is now being  
24 objected to, our planners have assured us that  
25 there is not a problem with that, we do not believe

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1 that that should stand in the way of a settlement  
2 at this point in time.

3 Certainly other settlements have gone  
4 through with that type of a density, that type of  
5 a set aside, and we discussed it before, and I  
6 believe that overzoning in this case in terms  
7 of a settlement is not necessary.

8 MR. HUTT: Your Honor, may I be heard  
9 for a moment?

10 The first thing I'd like to get back  
11 in direct answer to some of these questions: To  
12 Page 9, Paragraph 10, if you will recall, Miss  
13 Williams read in an amendment to that in addition  
14 to it. The substance of that addition was that  
15 if a Reider tract is supposed to be certified  
16 satisfactory to them by the Township of North  
17 Brunswick, that it's going to build and if it  
18 doesn't, it's going to go to Hamelsky or other  
19 suitable land.

20 I made a representation to counsel, which  
21 I want to put on the record, that on behalf of  
22 my client that in the event that Reider does  
23 not build or that certification does not occur,  
24 that in that event my clients are ready, willing  
25 and able to acquire the property from Johnson and

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1 Johnson under the same terms and conditions as  
2 Reider has it and to build in accordance with the  
3 terms of the order, the eight units per acre and  
4 so forth so that in the event it turns out that  
5 he doesn't build or doesn't want to build, we  
6 represent that we will take over his option or  
7 buy the land from Johnson and Johnson at the  
8 same price and comply with the very terms of the  
9 order.

10 THE COURT: Not only ten --

11 MR. HUTT: Ready, willing and able.

12 THE COURT: You are in a position to  
13 acquire it?

14 MR. HUTT: Yes.

15 THE COURT: Legally?

16 MR. HUTT: No, not legally. Johnson and  
17 Johnson would have to be willing to give it to us.

18 I don't know what the reason is they  
19 are concerned. If Reider just doesn't want to  
20 build or he is not interested or something, we  
21 will step in his shoes and build it.

22 THE COURT: What I am asking is: Do you  
23 know that if you can acquire it from Johnson and  
24 Johnson?

25 MR. HUTT: No, I don't.

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1 THE COURT: Okay.

2 MR. HUTT: We haven't even discussed it.

3 THE COURT: So, you are ready, willing  
4 and able, but you don't know if Johnson and  
5 Johnson is ready, willing and able?

6 MR. HUTT: Right. But we want to be  
7 in that position.

8 Now, it is not often that I get up  
9 in court and say that I agree with a lot of  
10 things with an adversary. He is not really an  
11 adversary yet, but I do agree with what he said.

12 There is a dilemma in this situation,  
13 no question about it, and there is a lot of merit  
14 to what he said. The trouble is: If you followed  
15 through on what he suggests, number one, there  
16 could never ever be a settlement in Mount Laurel  
17 on fair share number, okay? And you could never  
18 even have a settlement on a lot of these other  
19 things because if you go through this public  
20 hearing process and one guy says, I need eight,  
21 one says I need seven and the other says I don't  
22 want to build, how come you don't do my lands?  
23 And the public hearing process is far less  
24 coordinated than with a court stenographer. I mean,  
25 one that works -- they use these tape machines and

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1 everything else, and people are screaming. I think  
2 the Court could take judicial notice of at least  
3 one thing that Mount Laurel is an emotional issue.  
4 All right? So, it doesn't work.

5 What I see is: You have to devise, and  
6 the Court is devising a unique situation -- When  
7 I say "unique situation," I mean this: You are  
8 kind of allowing a settlement that is distinguishable  
9 from any other kind of settlement in that this  
10 settlement, if it affects third parties such as  
11 his client or any other land owner in North Brunswick,  
12 he may some day in the future have a portion of it  
13 changed, not voluntarily by the parties, but  
14 because, for instance, he could come in and --  
15 or any other land owner in North Brunswick, after  
16 this thing occurs and that's why I related to that  
17 other paragraph about the Supreme Court and  
18 everything else, somebody could come in and say,  
19 hey, there was a court order. There was ordinances.  
20 They made it eight units to the acre on my property.  
21 I am not a builder. I am a lover and I don't know  
22 how to build eight units to the acre, and what  
23 is more, all my experts had hearing with the Urban  
24 League and convinced them they were wrong in the  
25 first place.

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1           No way can we do it eight units to the  
2 acre. ac I think they can come in and ask the  
3 Court to set aside that portion of the ordinance  
4 that affects their property on the same grounds  
5 as before Mount Laurel, any land owner could come  
6 to any court to ask if it would set aside a  
7 municipal zoning ordinance on the ground that  
8 it's unreasonable, arbitrary and capricious, and  
9 if you establish the fact that it won't work, you  
10 can't use it, that it is arbitrary, unreasonable  
11 and capricious, the Court could set aside its own  
12 finding, that their property should be zoned this way,  
13 without, at the same time -- I say it is unique --  
14 without at the same time destroying the fact that  
15 the case was settled.

16           Because in all these Mount Laurel cases  
17 the towns are settling these cases with the  
18 Urban League, with builders and public advocates  
19 for two reasons. Only two reasons they are  
20 settling: One is they are getting -- three  
21 reasons -- one is they are getting a lower fair  
22 share number than they are at risk if they go to  
23 trial.

24           That's one compelling reason that every  
25 town that is settling has in mind.

          The other is:       They are avoiding extensive  
litigation.

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1                   And the third is: They have a right to  
2 select where this compliance property is going  
3 to be.

4                   THE COURT: There is a fourth one, and  
5 that is repose.

6                   MR. WOLFSON: Repose.

7                   MR. HUTT: And the repose. Right.

8                   But even if repose, in my opinion,  
9 doesn't stop a plaintiff in the future, a property  
10 owner coming and saying my zone is arbitrary and  
11 illegally zoned, I can't use it.

12                   THE COURT: That's the question. I  
13 think that is what is bothering Mr. Wolfson.

14                   I mean, if you are right, then a lot of  
15 the impetus for the town to settle is taken away.

16                   Let me say that I have been in many  
17 settlements requiring that the judgment contain  
18 a provision that if the particular builder  
19 plaintiff does not build within a certain period  
20 of time absent their being justification for his  
21 failure to build, that he loses the builder's  
22 remedy and the town will have to rezone for  
23 someone else.

24                   MR. HUTT: That is in there too, by the  
25 way.

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1 THE COURT: That is the type of thing---  
2 Now, I don't think that destroys repose.

3 MR. HUTT: No.

4 THE COURT: Because the town should  
5 not be able to object since they are supposed  
6 to be rezoning in good faith.

7 MR. HUTT: Right.

8 THE COURT: But beyond that, if I  
9 were to say, for example, if any parcel here  
10 is not utilized within a reasonable period  
11 of time, then anybody can make application to  
12 this Court to set aside the rezoning of that  
13 part, it seems to me.

14 MR. HUTT: Excuse me, sir. That is not  
15 what I was saying. I was saying the opposite.

16 I was saying where the ordinance or  
17 the order zoned somebody's property for  
18 mandatory set asides, he didn't ask for it,  
19 he doesn't want it, he wanted one-acre farm-  
20 lands and now he comes to this black acre and  
21 zones it for mandatory set aside and he  
22 comes in, he says, two years later I woke up  
23 this one day and saw this mandatory set aside.

24 There is no sewer. There is no water.

25 The only one that can get here is horses.

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That's why I want farmland.

I can't use it for anything else and he establishes that to the Court's satisfaction.

I don't think any settlement or order gives the towns six years' repose and says, despite the fact situation, he can't use any of his property, he can't get that zoning ordinance knocked out as to his land. I can't believe that is what is meant by repose.

I think it gives repose on their fair share standards, their fair share and everything else, but nothing can bind a non-party from something that, by my scenario, is arbitrary, illegal and capricious.

The Middlesex board says, yes, someday they will put water there.

That's why Carla Lerman is looking over it, so there is no risk of somebody coming in and saying that is small, but it's still there.

I don't think you can take a property owner's right to prove at any time that his land has been confiscated.

But that is why I said it is unique procedure in that regard because ordinarily in a

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1 settlement, a settlement is a settlement and  
2 that's it, and nobody could ever change it.  
3 But it has to have that manual flexibility for  
4 the due process of constitutional problems that  
5 Mr. Wolfson is raising.

6 MR. WOLFSON: I am just not so sure  
7 that I reach the same conclusion.

8 If the town feels that eight units to the  
9 acre can and the plaintiff thinks it is a fair  
10 settlement, I am not sure that they are barred  
11 from coming in and litigating the issue of eight  
12 units to the acre.

13 THE COURT: I assume you wanted to amend  
14 your complaint to allege that the rezoning is  
15 arbitrary or capricious?

16 MR. WOLFSON: And confiscatory, taken.

17 THE COURT: Okay.

18 MR. WOLFSON: And if the Court enters  
19 an order of compliance, I am not so sure that  
20 insofar as those issues -- I don't know the  
21 answer to this, but I'd hate to have to wake  
22 up six months from now and have the Court decide  
23 on motions or after a year that we are barred by  
24 the six-year repose because what we are really  
25 doing is saying that the ordinance that was adopted

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1 pursuant to this settlement or court order gives  
2 a six-year repose as to the densities necessary  
3 to produce low and moderate, as to the numbers  
4 of low and moderate that are going to be produced --

5 THE COURT: You mean barred by the six-year  
6 repose in a sense that you could not do anything  
7 else with your property?

8 MR. WOLFSON: I don't know the answer to  
9 that, Judge.

10 THE COURT: Well, I think I'd answer that  
11 for you now: I think that any order entered in  
12 this case would direct Carla Lerman (1) to look  
13 at the issue of overzoning which gives me some  
14 concern. I am not suggesting that in every case  
15 there has to be overzoning.

16 As a matter of fact, the Court says it  
17 doesn't have to make it.

18 But secondly, it should look at the  
19 reasonableness of the treatment of your parcel  
20 specifically and all the rest of the parcels for  
21 that matter.

22 And third, I am prepared to make as part  
23 of this order -- You write your amended complaint  
24 to allege arbitrary -- since you have started the  
25 suit and your suit is still viable, I don't think

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1 that this case disposes of your suit. It doesn't  
2 have a right to, and you have a right as a matter  
3 of fact if you want to go full blown with  
4 your suit, but I think you have a right certainly  
5 to challenge the reasonableness of the treatment  
6 of your parcel.

7 If you should succeed, then I suppose  
8 one of two things is going to happen: Either the  
9 township could choose to modify, alter the treatment  
10 of your property so that you could build low and  
11 moderate or maybe they will rezone it in another  
12 fashion altogether. They have that option too.

13 So, you know, you could win the battle  
14 and lose the war. I don't know. But if they  
15 choose the second step, then they are going to have  
16 to turn around and provide some alternative  
17 parcel, and I think they realize that risk as well.

18 MR. WOLFSON: If I am not a party to this  
19 suit, your Honor, I won't have any realistic  
20 input with Carla Lerman.

21 THE COURT: I will, in addition, order  
22 that you have all input that you want to have in  
23 terms of the unreasonableness as you deem it of  
24 the zoning of your parcel and the unreasonableness  
25 of the order in general because it certainly will

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1 relate to your ability to build low and moderate  
2 housing, whether it is under a density of eight  
3 or whether it is under a rezoning density that  
4 should result from the finding that the ordinance  
5 was arbitrary and capricious as to your parcel.

6 So, I have no problem with you having  
7 a right to completely review and disclose to  
8 Carla Lerman your findings with respect to the  
9 inadequacy of this order both as to your parcel  
10 with respect to specific zoning, and secondly,  
11 with respect to the order in general and also  
12 with respect to this issue of overzoning because  
13 if Miss Lerman finds that there is something  
14 tenuous about any of the parcels involved here,  
15 she is going to have to report that to the  
16 Court and we are going to have to take a look  
17 at whether your parcel should be treated differently  
18 or the Town should do something else with some  
19 other parcels.

20 So, I don't think that the prejudice is  
21 as great, but I will concede that if I didn't  
22 settle it at all, I suppose you would be happy.

23 MR. WOLFSON: Well, if you didn't settle  
24 it today.

25 THE COURT: Yes. However, the problems

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1 inherent in that are so numerous that I don't  
2 think that that is a sound or viable alternative.

3 I want to emphasize that I don't believe  
4 that accepting the settlement is by any means  
5 acceptance of a class action approach and I don't  
6 want to say more than I don't entirely concur,  
7 which I still don't, in the concept that a class  
8 action would be viable under all the circumstances  
9 if that is the thrust of his opinion and I am not  
10 suggesting it is, but some people have interpreted  
11 it as such.

12 What I am saying is I am not passing on  
13 that concept at all, and I don't see this as a  
14 settlement of a class action concept.

15 We must look at the fact that your lawsuit  
16 was filed last week, and when a settlement here  
17 was really already --

18 MR. WOLFSON: That's because we had no  
19 notice of it.

20 THE COURT: I understand that fact, but  
21 I am not settling it in a class action setting.

22 MR. WOLFSON: Your Honor, I only have one  
23 other comment and that really is spurred by what  
24 your Honor has just said.

25 To the extent that the Court desires to

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1 give us meaningful input in the matter as I have  
2 interpreted it, see, my problem is: If you look  
3 at Paragraph 16 of the settlement, there is a  
4 provision there that says, "This judgment shall become  
5 final five days after the Court appointed expert  
6 reports to the Court on the matters specified."

7 See, that goes back procedurally to what  
8 I was talking about with your Honor before. I don't  
9 think your Honor should approve anything until the  
10 package is complete. Once the package is complete  
11 and you have determined its propriety or its  
12 compliance and you consider the Master's report  
13 and you subscribe to the findings of that report,  
14 and if your Honor determines as the Judge delegated  
15 by the Supreme Court to make that decision that  
16 there is compliance, then an order is entered.  
17 This is the order according to these people.

18 THE COURT: I agree with you and I think  
19 that sentence is inappropriate.

20 MR. LEFKOWITZ: Judge, respectfully, it  
21 isn't the order because the order provides for  
22 further -- it's the order with regard to the  
23 issues contained and specifically mentioned and  
24 directed in this form of order and judgment, but  
25 that the order does provide that there are to be

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1 further orders of the Court with regard to  
2 compliance and the other elements of the Mount Laurel  
3 decision.

4 THE COURT: What does that sentence  
5 mean? "This judgment shall become final"?

6 MR. LEFKOWITZ: With regard to the fair  
7 share number. With regard to the areas of -- that  
8 have been designated as set aside, with regard to  
9 the specifications --

10 THE COURT: Well, suppose Miss Lerman  
11 reports that she has problems with the order by  
12 the wording of this sentence, it would become final  
13 anyhow. The judgment would become final anyhow.

14 MR. LEFKOWITZ: That I agree, but if, in  
15 fact, she has no problems with regard to the  
16 proposed specifications of the order, then I would  
17 seek to have the Court, in fact, enter a judgment  
18 with regard to the items that are specifically  
19 agreed to in this order, and this order does not  
20 pretend to deal with the other issues of compliance.

21 THE COURT: But wouldn't it be better  
22 saying that this judgment shall become final after  
23 the Court has received the court-appointed expert's  
24 report and either accept the recommendations thereon  
25 or otherwise rule with respect to those recommendations

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1 MR. LEFKOWITZ: That's fine.

2 THE COURT: That would then give anyone  
3 who I felt might be agrieved enough an opportunity  
4 to be heard.

5 MR. WOLFSON: That's right. Since we  
6 would proceed as to whether your Honor's decision  
7 is in compliance or not and we would like the  
8 opportunity to make comments on the Lerman's  
9 conclusions to your Honor before that happens  
10 which is also why we want to be a party to this  
11 lawsuit because I don't know what my status is now  
12 for those purposes.

13 THE COURT: Well, I see no point in  
14 consolidating you because I think that you may  
15 want to amend your complaint in any event in  
16 anticipation of the matter being resolved.

17 I think you should amend your complaint  
18 as an alternative count.

19 If it is resolved in its present form,  
20 you are going to pursue your own separate lawsuit  
21 as I see it.

22 So, there is no point in really  
23 consolidating the action. So that you are not  
24 a party to this suit, but you are a party before  
25 the Court and you are a party litigant against the

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1 Township of North Brunswick.

2 I think the conditions which I have  
3 indicated should be inserted in the order.

4 I take it somebody has got that.

5 We will adequately protect you and, that  
6 is, number one, that Mr. Wolfson will have a  
7 complete right of commenting upon the proposed  
8 form and substance of the order to Miss Lerman,  
9 have a right to specifically detail to her that  
10 the zoning of his property is not appropriate,  
11 that Miss Lerman will review specifically the  
12 issue of whether there is a necessity of overzoning  
13 as well as the reasonableness of the order in its  
14 totality, and that Mr. Wolfson, without -- we  
15 could include it in this order -- that Mr. Wolfson  
16 will have a right to amend his present complaint  
17 to assert a claim generally grounded in arbitrariness  
18 and take -- but on those conditions and with those  
19 amendments I will approve an order subject, I might  
20 say, to my specific re-reading of it, that for  
21 wording purposes only the fair share number I am  
22 satisfied to accept.

23 MR. WOLFSON: I just wanted to request,  
24 your Honor, and it is a request --

25 THE COURT: One other thing before we

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1 get to that, Mr. Wolfson.

2 Does the order specifically bar any further  
3 suits for builder's remedy --

4 MR. HUTT: No.

5 THE COURT: -- during the process of  
6 review by the expert?

7 MS. WILLIAMS: No.

8 THE COURT: All right. I want that in  
9 as well.

10 Any other actions brought during this  
11 period of time for builder's remedies are barred.  
12 I don't know that I can do that legally.

13 MR. WOLFSON: That doesn't affect us.

14 THE COURT: That doesn't affect you and  
15 any other actions to be commenced after this  
16 statement.

17 MR. WOLFSON: The request, your Honor,  
18 is a simple one, and that would be for purposes  
19 of the subsequent event and procedures that are  
20 to be followed hereafter.

21 I would like to be given the courtesy  
22 or the privilege of getting notice of everything  
23 that goes on, the same as any other party to that  
24 lawsuit. So, although I am not consolidated in  
25 that suit, I would like to be given copies of all

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1 correspondence that otherwise would be appropriately  
2 documented to all parties, any correspondence to the  
3 Court or the Master that was not otherwise  
4 privileged or under general rules that would be  
5 served on all parties.

6 THE COURT: Any correspondence between  
7 counsel and to the Master and the adoption of any  
8 proposed ordinances.

9 MR. WOLFSON: Or correspondence to the  
10 Court.

11 THE COURT: Or correspondence to the  
12 Court.

13 MS. WILLIAMS: Your Honor, I would only  
14 ask that it also work in reverse.

15 THE COURT: Absolutely.

16 MS. WILLIAMS: Any correspondence to  
17 Miss Lerman also be given to us.

18 MR. WOLFSON: Certainly.

19 THE COURT: Yes.

20 MR. LEFKOWITZ: By way of procedure,  
21 your Honor, it is my understanding that we do not  
22 go ahead and start preparing ordinances with regard  
23 to compliance and ordinances to carry out the  
24 intent of this order until we hear whether or not  
25 it is approved or disapproved by Miss Lerman and

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1 the Court?

2 THE COURT: No, no. I think you should,  
3 because Miss Lerman also reviews the ordinances.

4 MR. LEFKOWITZ: Well, the problem becomes:  
5 Do we go ahead and prepare new master plan zoning  
6 ordinances to carry out this and then 30 days from  
7 now Miss Lerman throws the whole thing out the  
8 window theoretically and then your Honor throws  
9 it out the window. It's a lot of work and it's  
10 a lot of time for the municipality and a lot of  
11 cost for the municipality if, in fact --

12 THE COURT: Well, as a practical matter  
13 I don't see the whole thing getting thrown out  
14 the window, that the most that is going to happen  
15 is some adjustment, if at all, based upon the  
16 objection Mr. Wolfson has raised and possibly the  
17 issue of overzoning, but I think there is at least  
18 a -- at least in draft form the ordinances should  
19 be prepared, in some draft form because she will  
20 want to redo those. That's part of her function.

21 MS. WILLIAMS: Fine. We will go ahead,  
22 but I will leave it at that, your Honor.

23 THE COURT: Okay. Anything further?

24 Thank you. I appreciate it.

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MR. WOLFSON: Your Honor, thank you  
for allowing us the opportunity to be heard.

\* \* \* \* \*

CERTIFICATE

I, JUDITH R. MARINKE, a Certified Shorthand  
Reporter and Notary Public of the State of New Jersey,  
certify that the foregoing is a true and accurate  
transcript of the proceedings as taken before me  
stenographically on the date hereinbefore mentioned.

Date:

Aug 15, 1984

Judith R. Marinke  
JUDITH R. MARINKE, C.S.R.  
License No. XI00392

Judith R. Marinke, C.S.R.