U.L. v. Carteret 7 May 1986

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John

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May 7, 1986

The Honorable Eugene D. Serpentelli
Assignment Judge, Superior Court
Ocean County Court House
CN 2191
Toms River, NJ 08754

Re: Urban League, et al. vs. Carteret, et al.
(South Brunswick)

Dear Judge Serpentelli:

Enclosed please find Notice of Cross Motion, original Memorandum of Law and Affidavit of Eric Neisser, Esq. in support thereof and in opposition to South Brunswick's Motion to Transfer. Also enclosed please find original and three copies of proposed form of Order and stamped, self-addressed envelope.

I hereby certify that by copy of this letter, the original Notice of Cross Motion and Affidavit are being filed with the Clerk in Trenton and copies of all of the foregoing pleadings are being served on Joseph Benedict, Esq., attorney for South Brunswick.

Respectfully yours,

encls

cc/Joseph Benedict, Esq.
Clerk, Trenton

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	Civil No. C 4122-73 (Mount Laurel) NOTICE OF CROSS MOTION

PLEASE TAKE NOTICE that on May 14, 1986 at nine o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned counsel for the Civic League plaintiffs shall move before the Honorable Eugene D. Serpentelli at the Court House, Toms River, for an Order as follows:

1. Denying defendant South Brunswick's demand for an order transferring this matter to the Affordable Housing Council;

2. Requiring defendant South Brunswick to comply with the terms of the duly executed Consent Order dated February 5, 1986, attached to the proposed form of Order submitted herewith as Exhibit A; or, in the alternative,

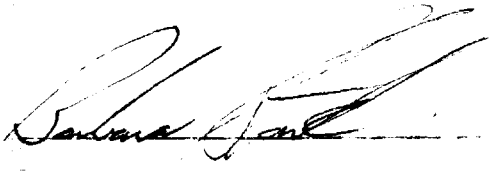
3. Setting this matter down for trial as soon as practicable; and

4. For such further relief as this Court deems equitable and just.

In support of this application the Civic League plaintiffs shall rely upon the Memorandum of Law and the Affidavit of Eric Neisser, Esq. submitted herewith.

A proposed form of Order is submitted herewith pursuant to R. 1:6-2.

Dated: May 7, 1986



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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.

Plaintiffs

v.

MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.

Defendants.

No. C 4122- 73
(Mount Laurel)

AFFIDAVIT
(South Brunswick)

ERIC NEISSER, being duly sworn, deposes and says:

1. I am an attorney at law of the State of New Jersey and co-counsel for the Urban (now Civic) League plaintiffs in this action. I submit this affidavit in opposition to South Brunswick's motion to transfer the litigation to the Council on Affordable Housing and in support of plaintiffs' cross-motion to compel enforcement of the Consent Order executed February 5, 1986.

2. In April 1984, this Court commenced the fair-share trial for the seven defendants, including South Brunswick, remanded by the State Supreme Court in Mount Laurel II. Shortly after its commencement, South Brunswick and the plaintiffs reached an agreement to settle, which was placed on the record by the

attorneys for the plaintiffs and Township in open Court in early May 1984. As a result, the trial against South Brunswick was suspended and no trial judgment was entered against it. Trial judgments as to the two remaining townships with sufficient vacant land were entered by this Court on August 13, 1984.

3. In the intervening two years, there have been extensive negotiations with South Brunswick to complete the details of the already-concluded settlement. The majority of outstanding matters were resolved by January 1985 when Bruce Gelber, of the National Committee Against Discrimination in Housing, who had done much of the negotiating, left as Urban League co-counsel. He embodied the remaining points, mostly concerning wording of the ordinances, in a letter to the Township Attorney, dated January 17, 1985. Further negotiations occurred between January and July 1985 between the Township Attorney and Barbara Williams, the next plaintiffs' counsel on the South Brunswick litigation. Most of the discussions between May 1984 and July 1985 involved reconsideration and modification of some of the sites to be re-zoned, mostly in response to Township concerns about suitability, traffic impact and the like. One major revision of the settlement in late 1984, however, involved a significant downward revision of the total fair share number by 140 lower income units.

4. On July 25, 1985, three weeks after the enactment of the Fair Housing Act, I attended a further negotiating session with Ms. Williams (her last meeting concerning this town), Mr. Benedict, the Township Attorney, and Robert Hall, the Township

Planner. At that point, although reference was made to the Fair Housing Act and to the positions taken by several other towns in this litigation (South Plainfield had already filed its resolution of participation and motion to transfer the prior week), Mr. Benedict made it clear that South Brunswick wanted to complete the negotiations and sign the Consent Order and, indeed, that it felt bound to do so by its prior settlement on the record. The session was a long and productive one in which the parties essentially reached final agreement on all the sites (the fair share number having been resolved in late 1984), and substantial agreement on final revisions of the Consent Order and ordinances. Indeed, my notes of that meeting reflect that we talked about the Planning Board reviewing the ordinances in August and the Council taking them up in September 1985.

5. Subsequent correspondence, conversations, and meetings involved fine-tuning of the wording of the Consent Order and ordinances, and revisions to add, at the defendant's request, several new phasing conditions for important sites tied to road and other improvements. Conclusion of several key points was delayed by several months by the Township's failure to provide essential documents requested first at the July 25 meeting and repeatedly throughout the fall months.

6. On December 16, 1985, Mr. Benedict, Mr. Hall and I had a final negotiating session in which we reviewed and agreed upon the final Order and ordinance language changes. Again references were made to the decisions of this Court denying the motions to

transfer filed by other towns in this litigation and to the Supreme Court's decision to expedite the appeals. Again, it was made clear that the Township Committee intended to complete and sign the Consent Order. Again, that intent was evidenced by the lengthy and detailed negotiations on specifics. Again discussion was had about dates for submission to the Planning Board and Township Committee.

7. On January 14, 1986, seven days after completion of the oral argument in Hills Development, I sent to Mr. Benedict, and with his permission to Carla Lerman, the Court's Master, for review, the final Consent Order. The Township Committee was to review the Order and the ordinance revisions and vote a resolution authorizing Mr. Benedict's signature at its meeting on January 21. On January 22, Mr. Benedict informed me that the Township Committee had tabled the matter for two weeks in order to permit the Planning Board to review the matter, believing that course of action was most appropriate, even though the Planning Board had reviewed and recommended the general settlement and the specific Order and ordinances in their various forms over the prior two years. He noted that the Committee had also introduced on first reading the portion of the ordinance creating the Affordable Housing Agency, and that at its February 4 meeting it intended to adopt a resolution to sign the Consent Order, enact the Affordable Housing Agency ordinance provision, and introduce on first reading all other ordinance provisions in the settlement.

8. On January 28, 1986, I sent Mr. Benedict, and with his permission to Ms. Lerman, a complete signed copy of the Consent Order and all Exhibits, except one resolution not yet drafted by the Townhip. After the Planning Board meeting on January 28, a few small points were modified, and on February 4, 1986, I sent to Mr. Benedict a signed revised, final Consent Order with all Exhibits attached. In the week between the Planning Board meeting and the Township Committee meeting, I had several conversations with Mr. Benedict and with attorneys for several developers. It was perfectly clear that the Township was aware of the impending decision in the transfer appeals and that the Township would decide at its February 4 meeting whether to go ahead with the settlement and sign the Consent Order or would seek transfer.

9. On February 4, 1986, the Township Committee of South Brunswick adopted a resolution authorizing Mr. Benedict to sign the Consent Order on behalf of the Township, adopted the Affordable Housing Agency ordinance, and introduced on first reading all of the remaining ordinance provisions annexed to the Consent Order. On February 5, 1985, Mr. Benedict signed the Consent Order and sent to it this Court, requesting a compliance hearing.

9. On February 10, 1986, I called the Court's law clerk to inquire as to the date of the compliance hearing. I was informed that the Court would not set a date until after Ms. Lerman's report was received. On February 18, Ms. Lerman filed her report recommending approval of the Consent Order, noting that the

parties had already agreed to make necessary wording changes to address two minor points which she had noted. On February 25, Mr. Benedict asked the Court not to schedule a compliance hearing until South Brunswick had had an opportunity to review the Hills decision. On March 5, Mr. Benedict filed his notice of motion to transfer. No compliance hearing has yet been scheduled.

ERIC NEISSER

Sworn to before me this
7th day of May 1986

Attorney at Law, State of New Jersey

John

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	Civil No. C 4122-73 (Mount Laurel)

MEMORANDUM OF LAW IN OPPOSITION TO SOUTH BRUNSWICK'S MOTION TO TRANSFER AND IN SUPPORT OF THE CIVIC LEAGUE'S CROSS-MOTION TO ENFORCE THE CONSENT ORDER

INTRODUCTION

This Memorandum is submitted in opposition to the Motion of South Brunswick to transfer this matter to the Affordable Housing Council ("the Council") and in support of the Civic League's cross motion for an Order compelling South Brunswick to comply with the terms of the duly executed Consent Order dated February 5, 1986, or, in the alternative, setting this matter down for trial as soon as practicable. Since defendant has improperly sought to shift the burden of proof to plaintiff by failing to set forth any grounds whatsoever in support of its demand, in complete contravention of the applicable court rules, there is no possible basis for granting its application.[1]

Moreover, as this Court is aware, after months of arduous negotiation South Brunswick finally signed a Consent Order on February 5, 1986. Defendant now insists that it be relieved of its obligations under that Consent, noting obliquely that it relies upon "the Fair Housing Act and the Hills Development decision". There is nothing in the Act or the Hills decision or otherwise before this

---

1 Defendant's failure to set forth any grounds for the extraordinary relief demanded, contrary to R. 1:6-2(a), in itself mandates the denial of defendant's motion. Defendant attempts to obtain an unfair advantage by placing the burden on plaintiff to show why defendant should not be granted the relief sought. It is respectfully submitted that this inversion of usual motion practice, considered in conjunction with defendant's failure to file any supporting affidavits, memorandum or proposed form of Order, renders the instant application so defective as to preclude relief.

Court justifying the unilateral rescission of this Consent and it is respectfully submitted that it should be enforced.

In the alternative, the Civic League respectfully requests that this matter be set down for trial at the earliest practicable date. The Fair Housing Act expressly provides that a plaintiff shall not be required to exhaust administrative remedies where, as here, the defendant has failed to file its resolution of participation within four months of the effective date of the Act and has failed to file its fair share plan and housing element prior to plaintiff's filing of its complaint. Under such circumstances, the plaintiff is entitled to a trial on its Complaint pursuant to Section 16(b) of the Act.

I. SOUTH BRUNSWICK WAIVED ITS RIGHT TO SEEK TRANSFER OF THIS LITIGATION BY FAILING TO FILE ITS RESOLUTION OF PARTICIPATION, AND ITS FAIR SHARE PLAN AND HOUSING ELEMENT, IN A TIMELY FASHION

The Fair Housing Act clearly provides that some exclusionary zoning litigation will be tried in the Superior Court, while some will be handled initially by the Council on Affordable Housing. The Act provides definite procedures and time limits to determine where each case will be heard. The procedures were established to provide townships in litigation with the opportunity to avail themselves of the new administrative process and the time limits were imposed to prevent needless delay and upheaval by township reconsideration after further developments. In short, as with most procedural rights in our legal system, adequate time was provided for invocation, after which the right would be waived.

The purpose of the statute is evident. It affords every municipality already in litigation with the same option to avail itself of the new administrative process as a municipality not yet in litigation. On the other hand, it intends to prevent needless delay of court proceedings if the municipality does not wish to avail itself of the opportunity. A town may well choose not to transfer because, as in the instant case, the settlement may be more favorable in view of the lowered fair share number, the favorable split of low and moderate units, and the extensive phasing conditions. Whatever the reasons, the statute makes clear that the municipality has four months to decide. Thereafter it risks continued or new litigation. In short, the Legislature did not write in a specific four-month period for filing, ending November 2, 1985, so that there would be another 9-month gestation period ending August 1, 1986 during which a township could reconsider, file a housing element with the Council and seek transfer. South Brunswick knowingly, intelligently and unequivocally waived its right to seek transfer under Section 16 of the Act, and cannot now be heard to seek further delay, after two years of negotiations by which it avoided prior entry of a final judgment.

Section 9(a) of the Act provides:

> Within four months after the effective date of this act, each municipality which so elects shall, by a duly adopted resolution of participation, notify the council of its intent to submit to the council its fair share housing plan. * * *

The effective date of the Act was July 2, 1985, allowing a municipality until November 2, 1985 to file its resolution of participation. South Brunswick does not even claim that it filed its resolution on a timely basis. It is significant that the Hills Court expressly held that the transfer motions which it decided were to be "regarded as [a] petition[s] for substantive certification" under the Act. (Slip op. at 50). The Court there noted that those motions, unlike the instant motion, were filed "shortly" after the Act's effective date of July 2, 1985, well within the 4 months permitted by the Act.

Municipalities which do not choose to file under Section 9(a) may file under Section 9(b) of the Act, which provides:

> *b.* A municipality which does not notify the council of its participation within four months may do so at any time thereafter. In any exclusionary zoning litigation instituted against such a municipality, however, there shall be no exhaustion of administrative remedy requirements pursuant to section 16 of this act unless the municipality also files its fair share plan and housing element with the council prior to the institution of the litigation. (Emphasis added.)

There is no requirement in Section 16(b) to exhaust the review and mediation process of the Council before being entitled to a trial for a party, like the Civic League, which has filed its complaint prior to a municipality's filing of its fair share plan and housing element. These provisions provide the incentive for municipalities to voluntarily proceed before the Council, as South Brunswick could have, within the time frame set forth in the Act.

The Act explicitly provides that where, as here, a municipality fails to avail itself of the Council process in a timely fashion, "[T]here shall be no exhaustion of administrative remedy requirements pursuant to section 16 . . .".

The statutory scheme is quite clear. Only those municipalities filing a resolution of participation within the period set forth in section 9(a) are entitled to require their adversaries to "exhaust the review and mediation process of the council before being entitled to a trial on his complaint." Those filing after November 2, 1985 in effect wager that they will file their fair share plan and housing element prior to the institution of any litigation. The Hills Court concisely described the process:

> If the municipality fails to adopt a resolution of participation within four months of the effective date of the Act, and then later fails to file its fair share plan and housing element with the Council prior to the institution of Mount Laurel litigation, it may lose the benefit of substantive certification. § 9b. It will be subject to litigation and the remedies provided by Mount Laurel II, the replacement of which by the administrative procedures of the Council was one of the primary purposes of the Act. § 3 (emphasis added). Id. at 46.

If South Brunswick is permitted to transfer this matter to the Council, it would encourage other municipalities, which did not file a resolution of participation prior to November 2, 1985 to refrain from proceeding before the Council until they, too, are actually sued. Granting South Brunswick's demand here would seriously undermine the statutory scheme. This is exactly the scenario which the Act seeks to prevent.

Indeed, the plaintiffs here could have filed a voluntary dismissal of this action against South Brunswick on November 3rd and simultaneously filed a new Mount Laurel complaint. Clearly exhaustion before the Council would then have been barred. Plaintiffs should not now be treated worse because they relied on a perfectly clear statutory limitation and proceeded with the instant 12-year-old action.

It is respectfully submitted that the Civic League should not be compelled to exhaust administrative remedies to which the Township is not properly entitled. South Brunswick's motion to transfer should accordingly be denied and South Brunswick should be held to the terms of its Consent or, in the alternative, this matter should be set down for trial before this Court as soon as practicable.

II. SOUTH BRUNSWICK SHOULD BE REQUIRED TO COMPLY WITH THE PROVISIONS OF THE DULY EXECUTED CONSENT DATED FEBRUARY 5, 1986

It is well settled in New Jersey that an agreement to settle a lawsuit is a contract, which may be enforced like any other, whether or not it is formally entered on the record. In Pascarella v. Bruck, 190 N.J. Super. 111 (App. Div. 1983), the Court upheld the validity of such a settlement even though, unlike the instant settlement, it was orally made. Citing the Third Circuit's decision in Green v. John H. Lewis & Co., 436 F.2d 389 (3d Cir. 1971) for the proposition

that an "agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of the Court and even in the absence of a writing", the Pascarella Court ruled:

> We adopt these principles as consistent with the announced public policy of the jurisdiction favoring settlement of litigation. Settlements of this nature are entered into daily in our courthouse corridors and conference rooms, the court only aware, until informed of the fact of settlement, that counsel and the parties are working toward that desirable end. Adoption of a principle that such agreements are subject to attack because they were not placed upon the record places in unnecessary jeopardy the very concept of settlement and the process by which settlement of litigation is ordinarily achieved. * * *
>
> An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into and which a court, absent a demonstration of "fraud or other compelling circumstances," should honor and enforce as it does other contracts. Indeed, "settlement of litigation ranks high in our public policy." (citations omitted). Id. at 124.

There has been no demonstration of "fraud or other compelling circumstances" here. Indeed, in view of the lengthy negotiations preceding this Agreement, it should be given greater deference than Pascarella agreements reached on the courthouse steps. As set forth in the Affidavit of Eric Neisser, Esq. submitted herewith, it reflects extensive negotiations over a period of more than two years. In addition, the resultant agreement was expressly approved by Carla Lerman, the Court-appointed Master.

South Brunswick has no more right to renege on its agreements than a natural person. Contracts between municipalities stand on the same footing as contracts of natural persons, and are governed by the same considerations in determining their validity and effect.

Beverly Sewerage Authority v. Delanco Sewerage Authority, 65 N.J. Super. 86 (Law Div. 1961). Nor, where a municipality has incurred an obligation which it has the power to incur, should it be permitted to escape that obligation. Palisades Properties, Inc. v. Brunetti, 44 N.J. 117 (1965). In Monroe Co. v. Asbury Park, 40 N.J. 457 (1963) the Supreme Court held that specific performance in connection with a lease would not be withheld where the municipality failed to sustain its burden of proof as to the illegality of such lease. Here, too, it is respectfully submitted that the municipality has not -- and cannot -- sustain its burden of proof as to the Agreement which it seeks to avoid.In view of the inadequacy of a remedy at law,the Civic League should be entitled to specific performance here.

South Brunswick states only that it relies upon the Fair Housing Act and the Hills decision. That neither bars enforcement of the Consent Order here is made clear by the Supreme Court's order in the Bernards case on the same day it issued the Hills decision. There the plaintiff developer contended that the parties had reached a complete oral agreement to settle the litigation in June of 1985, that should be enforced against the township even though the Township had refused to execute the later drafted documents embodying the agreement. Plaintiffs' Letter Memorandum in Support of Motion for Leave to Supplement Record and File Supplemental Brief, at 6, Hills Development Co. v. Township of Bernards, No. A-

122, #24,780. A copy of the letter memorandum and the Court's Order of February 20, 1986 in response to the motion are attached for the Court's convenience as Exhibit A to this Memorandum. The Supreme Court made clear that its Opinion that day transferring the Bernards case did not decide or preclude plaintiff's claims based upon the alleged settlement or estoppel. It is to be recalled that Bernards had not signed the settlement and had filed its transfer motion in a timely fashion at the time it decided not to sign. In contrast, South Brunswick, knowing of its right to seek transfer, decided to conclude negotiations and sign a formal, final, and complete settlement and file it with this Court for enforcement, rather than to seek transfer. This Court need only rely on ordinary contract law, not even the special doctrine of equitable estoppel, to enforce this settlement.

The Hills decision, moreover, does not change the law regarding settlement of litigation set forth in Pascarella nor does it alter the principle articulated in Palisades Properties that municipalities, like natural persons, are bound by their contracts. South Brunswick's reliance upon the Hills decision is accordingly misplaced. All of the municipalities in the Hills case filed their motions to transfer well before the November 2, 1985 deadline. The Hills Court explicitly held that those motions were to be considered petitions for substantive certification for purposes of the timetable set forth in the Fair Housing Act. By not filing its

motion prior to November 2, 1985, South Brunswick waived any rights it might have had to appear before the Council. Like the Civic League, it committed itself to negotiating a settlement and, if the parties were unable to agree, to a trial. The Civic League, in reasonable reliance upon this commitment, refrained from proceeding to trial. As set forth in Mr. Neisser's affidavit, the Civic League afforded the municipality every possible opportunity to voluntarily satisfy the mutually agreed upon fair share. It is a matter of record that this Court refrained from signing the duly executed Consent as a further accommodation to South Brunswick.

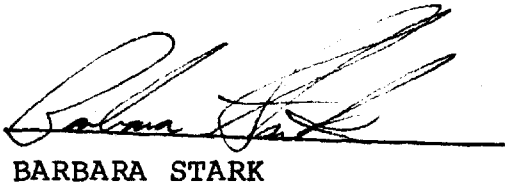
The Civic League agreed to postpone the trial in this matter only because of South Brunswick's professed good faith. It is impossible to ascertain how many interested developers and actual units have been lost during this period. If the negotiations had failed, at the very least the Civic League would be entitled to a trial on the merits. But the negotiations did <u>not</u> fail. On the contrary, the Consent represents a detailed, workable and fair compromise. It is respectfully submitted that South Brunswick as well as the Civic League will benefit by being held to its terms.

CONCLUSION

These motions require this Court to decide simply whether the government, too, is bound by the law. Must only plaintiffs, or also the government, obey statutory time restrictions delimiting rights? Must only plaintiffs, or also the government, comply with its own voluntary agreements to settle? Plaintiffs respectfully submit that because there is no system of law if the government is above the law, the Township's motion to transfer must be denied and the plaintiffs' motion to enforce the settlement must be granted.

Dated: May 7, 1986

Respectfully submitted,



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ATTORNEYS FOR PLAINTIFFS

SUPREME COURT OF NEW JERSEY
M-549 September Term 1985
M-550

THE HILLS DEVELOPMENT COMPANY,

Plaintiff-Movant,

v.

O R D E R

THE TOWNSHIP OF BERNARDS in the COUNTY OF SOMERSET, etc., et al.,

Defendants-Respondents.

This matter having been duly presented to the Court, and good cause appearing;

It is ORDERED that the motions for leave to supplement the record (M-549) and to file a supplemental brief (M-550) are denied, without prejudice to the filing by plaintiff, regardless of any outstanding stay Orders, of an application to the trial court, in a form that that court deems appropriate, asserting plaintiff's alleged development rights arising of out any alleged settlement, estoppel, or otherwise; provided, however, that such application shall not affect this Court's Order transferring the matter to the Council on Affordable Housing and provided further that this Order granting leave to file such application shall not preclude the assertion by defendants that this Court's Order of transfer forecloses such claims by plaintiff.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 20th day of February, 1986.

A TRUE COPY
Stephen Womack
CLERK

Stephen Innocenzi
Clerk

EXHIBIT A

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DANIEL J. SCAVONE

* MEMBER OF N.J. & D.C. BAR
** MEMBER OF N.J. & PA. BAR
+ MEMBER OF N.J. & N.Y. BAR
++ MEMBER OF N.J. & GA. BAR
△ CERTIFIED CIVIL TRIAL ATTORNEY

January 22, 1986

FILE NO.

The Honorable The Chief Justice and
Associate Justices of the Supreme Court
New Jersey Supreme Court
Hughes Justice Complex CN-970
Trenton, New Jersey 08625

Re: The Hills Development Company v. Township of Bernards, et al.;
Docket No. L-030039-84 P.W., No. A-122, #24,780.

To The Honorable The Chief Justice and Associate Justices of the Supreme Court:

On behalf of plaintiff/movant-The Hills Development Company ("Hills"), please accept this letter memorandum in lieu of a formal brief in support of the within motion for leave to supplement the record and file a supplementary brief. This matter is an exclusionary zoning lawsuit filed pursuant to Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II"). This matter is presently before this Court by virtue of an interlocutory appeal filed by defendant, Township of Bernards ("Bernards"), wherein Bernards seeks reversal of the trial court's denial of transfer to the Council on Affordable Housing. Trial court proceedings are stayed.

FACTS/PROCEDURAL HISTORY

The procedural history and facts of this case have been set forth in detail by Hills in its briefs already submitted to this Court in connection with Bernards' appeal of the trial court's denial of transfer. The relevant facts on this motion are as follows.

On October 17, 1985, Hills submitted to Bernards a development application pursuant to Section 707 of Bernards' land use ordinance. The cost of preparing the application was estimated at $250,000. A $74,360 application fee was paid to Bernards. (Pa196 to Pa198).[1] The application was deemed complete by the Township on December 3, 1985. Representatives of Hills and Bernards' "Technical Coordinating Committee" ("TCC") met for the purpose of discussing Hills' development application.[2] During these discussions, representatives of Bernards made various suggestions with respect to desired revisions to the plans submitted by Hills.

On the evening of January 7, 1986 (the second day of oral argument in this matter), defendant Bernards Township Planning Board summarily and arbitrarily denied said development application. The circumstances under which approval was denied include the following:

---

[1] "Pa" refers to original Appendix submitted by Plaintiff, Hills. Appendix documents referenced herein are also set forth in the Appendix in Support of Motion submitted herewith.

[2] The TCC is a development application review group established by ordinance and comprised of various Township officials. It meets informally and has powers limited to that of making recommendations to the Planning Board. It lacks power to take any action on applications other than to advise the Board.

(1) Hills received slightly more than one business day's notice of the Planning Board's intention to take action on the application. Hills was thus unable to have its expert witnesses attend or otherwise prepare for the meeting in any meaningful way;

(2) At a TCC meeting held on December 17, 1985, it was agreed that another TCC meeting concerning the application would be held on January 21, 1986 with an informal Planning Board meeting to follow on January 27, 1986. Nevertheless, without rational explanation, the application was summarily denied on January 7, 1986;

(3) Hills' offers to revise its plans to the best of its ability went unheeded;

(4) Hills offered to withdraw its application and submit a second application if Bernards would stipulate that approval of the second application would vest Hills with development rights as would approval of the original application (see discussion infra). The Planning Board declined Hills' offer;

(5) The Planning Board retired to closed session immediately prior to voting to deny the application;

(6) Hills was not permitted to present witnesses, have a public hearing or otherwise formally make a record supporting its application;

(7) A number of new Planning Board members were sworn in on that very evening. It is highly unlikely that the new members so much as glanced at the application.

Despite the fact that the application fully complied with Bernards' ordinances, Hills fully intended to do its utmost to satisfy any Township concerns with respect to the plans. Hills so advised Bernards. In fact, Hills' ability to respond to questions or concerns was confined to meetings with the TCC. Hills was totally denied an opportunity to present its plans before the Planning Board. No public hearings have been held.

The reasons underlying Bernards' summary, arbitrary and unlawful denial of Hills' development application are obvious. Shortly after Hills filed its Section 707 development application, the Bernards Township Committee introduced an ordinance which would amend Section 707 of the Township's land use ordinances. Section 707 expressly provided that approvals of development applications submitted pursuant to that section confer development rights upon the applicant. The amending ordinance, Ordinance 746, deleted the Section 707 language which vested development rights upon the applicant and, in its stead, substituted language which expressly provided that approvals of Section 707 development applications confer no development rights upon the applicant. Township counsel conceded that the reasons underlying the amendment of Section 707 included that of preventing Hills from vesting its development rights.[3]

Trial court proceedings in this matter have been stayed. However, this Court entered an order which provided that Hills was entitled to move

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[3] Despite having processed and approved numerous applications submitted pursuant to Section 707, shortly after Hills filed such an application, Bernards moved to amend the section and argued that it was ultra vires.

before the courts for relief if Bernards attempted to take any municipal action which would have the effect of frustrating compliance with the Mount Laurel mandate. (Pa48). Hills thereafter moved before the trial court to enjoin Bernards' adoption of Ordinance 746. The trial court did not so enjoin Bernards but it specified that any such ordinance must explicitly state that it would not apply to Hills' development application pending this Court's resolution of the appeal before it. The trial court's order limited the relief to Hills' pending application. Bernards indeed adopted such an amending ordinance on December 26, 1985. However, as indicated above, less than two weeks later Bernards arbitrarily denied Hills' development application for the obvious purpose of divesting Hills of the development rights which would have otherwise accrued pursuant to approval of its application. Hills has obtained a stenographic transcript of the January 7 Planning Board meeting. Hills desires to supplement the record in this matter with that transcript and any other documentation necessary to support the allegations contained herein.

Facts relevant to Hills' request to file a supplementary brief are as follows. The fundamentals of a settlement of the above-captioned litigation were agreed upon in September of 1984. At that time, representatives of Bernards approached Hills and offered to settle this litigation. (Pa139). Bernards offered to rezone a portion of Hills' property in a manner which would allow Hills to construct an inclusionary development which would provide 550 units of lower income housing. To that end, Bernards adopted Ordinance 704 on November 12, 1984 which ordinance provided zoning which would permit construction of the inclusionary development described above. (Pa161).

Thereafter, the parties and the court-appointed Master met on numerous occasions for the purpose of resolving certain relatively minor issues. These issues were, in fact, resolved and, on June 12, 1985, counsel for Bernards wrote to the trial court and advised the court that "the parties in the above mentioned matter have arrived at an agreement to settle and conclude the above matter." (Pa175). The parties thereafter concluded the process of drafting a proposed order of judgment and stipulation of settlement/memorandum of agreement. Although the drafting of said documents was resolved to the satisfaction of the parties, Bernards declined to execute any documents outlining the agreement as negotiated. (Pa143 to Pa146).

Hills desires herein leave to file a supplementary brief on the issue of whether the agreement may be enforced notwithstanding the fact that the settlement documents were not executed. In the alternative, Hills respectfully requests that the stay entered in this matter be modified so that Hills may file the appropriate motion in the trial court.

ARGUMENT

POINT I

HILLS RESPECTFULLY REQUESTS THAT THIS COURT PERMIT HILLS TO SUPPLEMENT THE RECORD IN THIS MATTER SO AS TO REFLECT ACTIONS UNDERTAKEN BY BERNARDS SUBSEQUENT TO THE SUBMISSION OF BRIEFS ON BERNARDS' APPEAL.

Bernards' recent actions are quite illuminating. Bernards has steadfastly declined to advise this Court as to the course of action it would take if this Court were to reverse the trial court's decision denying transfer to the Council on Affordable Housing. Unfortunately, Hills suspects that, upon entry of

an order by this Court transferring this matter to the Council, Bernards would expeditiously move to attempt to repeal the zoning which permits Hills to construct its inclusionary development. Bernards' passage of the aforementioned Ordinance 746 surely supports Hills' suspicions. The arbitrary denial of Hills' development application on January 7, 1986 further fuels Hills' suspicions.

Hills will be moving before the trial court in an effort to have said denial declared unlawful so that the application may be processed in accordance with the Municipal Land Use Law.[4] However, Hills respectfully submits that the arbitrary denial of Hills' development application further demonstrates the bad faith of Bernards and its intentions upon a transfer of this matter. Bernards has stated to this Court and the courts below that it would process Hills' development application just as it would any other development application, i.e. in accordance with law. In Hills' view, it has not done so.

Bernards has deleted the "sunset provision" which had been contained in Ordinance 704 so that the ordinance did not expire in November of 1985. Presumably, Bernards did so in order to convince this Court of its honorable intentions. Yet, Bernards is taking extraordinary steps in an effort to divest Hills of the development rights which would otherwise accrue upon an approval of its development application. Hills believes that Bernards' recent arbitrary denial is relevant to the issue of transfer and it therefore respectfully requests

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[4] Since the trial court has already adjudicated Hills' motion to enjoin the adoption of Ordinance 746, Hills presumes that this Court's Order of November 14, 1985 (Pa48) also authorizes such a trial court application.

that this Court permit Hills to supplement the record to reflect the activities which have taken place subsequent to the filing of briefs in connection with the Township's appeal on the issue of transfer.

POINT II

HILLS RESPECTFULLY REQUESTS LEAVE TO FILE A SUPPLEMENTARY BRIEF ON THE ISSUE OF WHETHER THE SETTLEMENT REACHED BY THE PARTIES MAY BE ENFORCED.

As described above and as represented by Township counsel to the trial court in June of 1985, an agreement to settle this matter had indeed been reached.[5] However, the Township Committee refused to execute settlement documents outlining the negotiated settlement and, in fact, attempted to repudiate the settlement. Hills has become aware of a line of case law which is applicable to the facts of this matter but which has not yet been briefed. That line of case law holds that an agreement to settle a lawsuit which is voluntarily entered into may be binding upon the parties, whether or not made in the presence of the court and whether or not reduced to a writing.[6] Pascarella v. Bruck, 190 N.J. Super. 118 (App. Div. 1983) certif. denied 94 N.J. 600 (1984);

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[5] Hills alleges that the Township Committee met with the court-appointed Master in closed session prior to announcing the settlement, voted by roll call on each and every issue contained in the settlement and agreed by majority vote to authorize their attorney to proceed with the settlement. This action, taken in the presence of the court-appointed Master, could be demonstrated on remand.

[6] Counsel for Hills and Bernards indeed prepared settlement documents which were revised as a result of the parties' negotiations. However, the documents were not executed.

Davidson v. Davidson, 194 N.J. Super. 547 (Ch. Div. 1984); Green v. John H. Lewis and Co., 436 F.2d. 389 (3d Cir. 1971). Unless a requirement exists for an agreement to be in writing, parties may bind themselves by written or oral understanding, or by any combination of both. Silverstein v. Dohoney, 32 N.J. Super. 357 (App.Div. 1954). See also Davidson, supra, 194 N.J. Super. at 552-554.

Hills respectfully requests that this Court grant to Hills the opportunity to brief the issues raised by the aforementioned line of case law. The issue of whether the agreement reached in this matter may be enforced is relatively straightforward and would not require extensive briefing by the parties. Despite representations made to the trial court, Bernards would presumably deny that an agreement to settle this matter had ever been reached. Therefore, a factual hearing on the issue would appear to be necessary. Hills has already requested that this Court either affirm the trial court's denial of transfer or remand this matter in light of Hills' claims of inequitable conduct by Bernards including the issue of whether Bernards should be equitably estopped from transferring this matter or repealing Hills' zoning. If such an opportunity for a hearing on remand were granted, the issue of whether an enforceable agreement was indeed reached could also be addressed at such a hearing.[7]

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[7] But for the stay issued in this matter (Pa47 to Pa48), Hills would be able to file a trial court motion to enforce the parties' agreement. Presumably, the merits of such a motion would be independent of the issue of whether the trial court improperly denied transfer. However, guidance from this Court with respect to the issue raised herein will assist in clarifying the nature of any hearing upon remand which this Court may decide to order.

Finally, it should be noted that the identical issue raised herein may be raised in other pending exclusionary zoning lawsuits. For example, in Urban League of New Brunswick v. Carteret (So. Plainfield), A-129; #24,788, a similar issue appears to be raised. In fact, Hills believes that a number of pending Mount Laurel lawsuits may raise the issue of whether the parties' apparent agreement to settle may be enforced notwithstanding the municipal attempt to repudiate the agreement and transfer the matter to the Council on Affordable Housing. Therefore, resolution of the issue of whether the aforementioned line of case law may be applied to enforce a settlement once reached in exclusionary zoning litigation may assist in expeditious disposition of a number of pending exclusionary zoning lawsuits in which agreements to settle have apparently been reached. Therefore, Hills respectfully requests that this Court permit Hills to file a supplementary brief on the issue of whether an agreement to settle Mount Laurel litigation may be enforced by the courts notwithstanding the fact that settlement documents have not been executed.

CONCLUSION

For the aforementioned reasons, Hills respectfully requests that this Court: (1) grant Hills leave to supplement the record to reflect the actions taken by Bernards subsequent to the filing of briefs with this Court in connection with the Township's motion to transfer; (2) grant Hills leave to file a supplementary brief on the issue of whether the agreement to settle reached by the parties in this matter may be enforced by the courts; and (3) remand this matter to the trial court for a full evidentiary hearing on the issue of whether an enforceable settlement was reached in addition to the issue of whether Hills' reliance on Bernards' compliance ordinance and representations should estop Bernards from a transfer or a repeal of Hills' zoning. In the alternative, Hills requests that the stay issued in this matter be modified so that Hills may raise in the trial court the issue of whether the parties' agreement may be enforced.

Respectfully submitted,

BRENER, WALLACK & HILL,
Attorney for plaintiff/movant-
The Hills Development Company

BY _____
Henry A. Hill

January 22, 1986

By: _____
Thomas F. Carroll

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,	]	Civil No. C 4122-73 (Mount Laurel)
Plaintiffs,	]	
vs.	]	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,	]	ORDER DENYING TRANSFER
Defendants.	]	(South Brunswick)

This matter having been opened to the Court by Joseph Benedict, Esq. and a cross motion having been filed by Eric Neisser and Barbara Stark, attorneys for the Civic League plaintiffs, and the Court having considered the papers appearing at the foot hereof, and good cause having been shwon,

It is on this _____ day of May, 1986, O R D E R E D:

1. Defendant South Brunswick's demand for an order transferring this matter to the Affordable Housing Council is hereby denied;

2. Defendant South Brunswick shall comply with the terms of the duly executed Consent Order dated February 5, 1986, annexed hereto as Exhibit A, without attachments; or in the alternative,

3. This matter is hereby set down for trial on _____.

_____
Hon. Eugene D. Serpentelli, A.J.S.C.

PAPERS CONSIDERED:

_____ Notice of Motion
_____ Movant's Affidavit
_____ Movant's Brief
_____ Answering Affidavits
_____ Answering Brief
_____ Cross Motion
_____ Movant's Reply
_____ Other _____

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, v. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	Docket No. C-4122-73 (Mount Laurel) CONSENT ORDER (South Brunswick)

This matter having been opened to the Court by the undersigned attorneys for the plaintiffs and having been remanded for trial by the Supreme Court on the issue of fair share allocation of the regional need for low and moderate income housing and on whether the Township of South Brunswick has complied with the mandate to satisfy its fair share allocation by providing a realistic opportunity for the development of such housing and it being represented to the Court that the parties agree to the following:

Whereas, the Township of South Brunswick made major revisions to its zoning, land use and subdivision ordinances

which streamlined land development review procedures, rezoned more than 2600 acres which previously had been zoned industrial to residential, and rezoned 2495 acres from single family residential to higher density mixed residential housing types; and

Whereas, the Township of South Brunswick granted a use variance to Xebec Corporation to construct 40 rental units for low income families on a five-acre parcel on Blackhorse Lane; and

Whereas, the Township of South Brunswick required rent controls on 516 one bedroom and 220 two bedroom apartments in the Royal Oaks development, now under construction, so that the initial rents will be $440 for one bedroom units and $550 for two bedroom units; and

Whereas, the Township of South Brunswick required price controls on 57 one bedroom condominiums in the Whispering Woods development, now under construction, so that initial sales prices will be set at $47,000; and

Whereas, the Township of South Brunswick required price controls on 64 senior citizen condominium units in the Dayton Center development so that initial sales prices will be set at $44,999; and

Whereas, the Township of South Brunswick assisted in the acquisition of federal subsidies for 54 low and moderate income senior citizen rental units in the Charleston Place development constructed in 1979 and for an additional 30 similar units soon to be developed; and

Whereas, the Township of South Brunswick utilized Community Development Block Grant funds to provide home rehabilitation loans to numerous low and moderate income persons which assisted in the rehabilitation of their homes; and

Whereas, the parties desire that the Township of South Brunswick provide a realistic opportunity for the development of a sufficient number of housing units to satisfy the Township's fair share of low and moderate housing need.

Now, therefore, it is this _____ day of _____, 1986, ORDERED and ADJUDGED:

1. The Township of South Brunswick's fair share of low and moderate income housing need through 1990 is 1919 housing units.

2. The Township's fair share shall be met by new development of 1865 units -- including 1765 units for which specific sites have been determined and are presented herein and an additional 100 units which shall be encouraged by the Township as provided in Paragraph 14 below -- and credit for the 54 low and moderate income subsidized senior citizen units at Charleston Place which were placed into occupancy after April, 1980 and are occupied by low and moderate income persons. The units constituting the fair share are identified in the schedule attached hereto and made a part hereof as Exhibit A.

3. Forthwith, but not later than forty-five (45) days after the entry of this Consent Order, the Township of South Brunswick shall rezone the following tracts to the Manufactured Mobile Home

Zone (MH) permitting mobile/manufactured housing at a gross density of five and one-half (5.5) dwelling units per acre:

a) An approximate 165 acre portion of Block 30, Lot 16.17, located south of Deans/Rhode Hall Road and West of U.S. Route 130, more particularly described as that portion of the lot lying to the north and northeast of the Spring Brook, as shown on the current tax maps.

b) Block 30, Lot 23.04, and 24.01 located at the southwest corner of the intersection of Deans/Rhode Hall Road and U.S. Route 130, consisting of 23.7 acres.

c) Block 37, Lot 2 and Block 38, Lot 3, located on the southerly side of Culver Road and consisting of 47.5 acres.

d) An approximate 95 acre area, consisting of Block 40, Lot 9 and portions of Block 40, Lots 8 and 10, located on the northerly side of Culver Road and more particularly described as being bounded by Culver Road on the south, by a Public Service Electric and Gas Company property (Block 263, Lot 5) to the east, by the property lines of Block 40, Lots 7, 11, 18 and 19 to the west and by a line drawn parallel to and approximately nine hundred and fifteen (915) feet from the southerly property line of Block 262, Lot 1.01 to the north.

These zoning amendments shall further provide that 25% of the units in the MH zones shall be lower income housing and, of those units, at least 33% shall be low income housing and 33% shall be intermediate moderate income housing. These ordinance amendments and revised zoning map are attached hereto as part of Exhibit B and made a part hereof.

4. Forthwith, but not later than forty-five (45) days after the entry of this Consent Order, the Township of South Brunswick shall rezone the following tracts to Planned Residential Development VII (PRD VII) zoning permitting a gross density of seven dwelling units per acre and permitting multi-family development:

a) Block 93, Lots 1.08, 3, 4, and 41, located north of Beekman Road and east of Route 27, consisting of approximately 35 acres.

b) Block 41, Lots 9.07, 14.01, 14.02, and 16, and Block 259.01, Lot 1, located south of Monmouth Junction Road, consisting of approximately 92 acres.

c) Block 31, Lot 10.01, 12, 14, 25.16, and 37, and Block 30, Lot 30, located north of Georges Road, consisting of 224 acres.

d) Block 85, Lots 2.11, 2.19, 2.102, 4.06, 4.13, 4.14, 4.16, 10, 11, 12, 13, 14, 15.16, 16, 17, 18.01, 18.02, 19, 20, 21, 22.01, 24, 26, 32, 33,

34, 35.10, 37.03, 38 and 39, commonly known as the "Town Center," consisting of approximately 472 acres located generally between Major Road, New Road, U.S. Route 1 and the Amtrak Railroad line.

e) An 8.5 acre portion of Block 87, Lot 12.14, located near the southwest corner of the intersection of Georges Road and Kingston Lane, more particularly described as that portion of the lot located to the west and southwest of a line drawn parallel to the northwesterly edge of Kingston Lane, from a point 443.9 feet from the intersection.

These zoning amendments are attached hereto as part of Exhibit B and made a part hereof.

5. (a) Approval by the Township of South Brunswick of subdivision and site plan applications for the Deans/Rhode Hall Road site described in Paragraph 3(a) above, shall be conditioned upon the developer dedicating an 80 foot right of way and building a two-lane roadway through the site connecting U.S. Route 130 to Georges Road; provided, however, that should this condition require acquisition of, or other action affecting, property outside of the re-zoned site, the Township shall take all steps necessary to assure completion of the road to Georges Road.

(b) Approval by the Township of South Brunswick of subdivision and site plan applications for either of the Culver

Road sites, described in Paragraphs 3(c) and (d) above, shall be conditioned upon the developer or developers of the sites described in Paragraphs 3(c) and (d) being solely responsible for construction of, or their providing a pro rata contribution to, a connecting road from Culver Road to Monmouth Junction Road, but development of the site described in Paragraph 3(d) or joint development of both sites may be conditioned upon actual construction of such a road; provided, however, that the Township shall take all steps necessary to assure completion of the road to Monmouth Junction Road through acquisition or other action with regard to property outside the rezoned sites.

(c) Approval by the Township of South Brunswick of subdivision and site plan applications for the Georges Road site, described in Paragraph 4(c) above, shall be conditioned upon firm construction commitments for that part of proposed Route 522 which will connect Georges Road to U.S. Route 130.

(d) No certificates of occupancy shall be issued by the Township of South Brunswick for development of any parcel within the Town Center site described in Paragraph 4(d) above until construction of that portion of proposed Route 522 that connects New Road to Kingston Lane and no more than 50 percent of the authorized certificates of occupancy shall be issued for any development within the Town Center until completion of Route 522 to Route 1. These conditions shall not apply to development of Block 85, Lot 18.01. In addition, it shall be a condition of

development of Block 85, Lots 4.06, 4.13, 4.14, 4.16, 2.11, 2.19, 2.102 and 15.16, that no certificates of occupancy shall issue until completion of an internal access road to Route 522. An additional condition of that portion of the Town Center site described as Block 85, Lots 2.11, 2.19, 2.102, 15.16, 4.06, 4.14, 4.16 and 4.13 shall be construction by the developers thereof of a Major Road trunk sewer line from the existing twelve inch (12") Town Center sewer main within Block 85, Lot 17 on Major Road to and along Major Road to and abutting Block 85, Lot 8.05 on U.S. Route 1.

(e) The Township of South Brunswick shall cooperate with the State of New Jersey, the County of Middlesex and the affected developers and take all action necessary to expedite construction of proposed Route 522. Attached hereto as Exhibit C is a letter dated September 30, 1985, from the New Jersey Department of Transportation setting forth the State's current intentions as to the construction of Route 522.

6. Forthwith, but not later than forty-five (45) days after the entry of the Consent Order, the Township of South Brunswick shall rezone the following tract to General Industrial-3 (I-3):

a) An approximate 43.5 acre area, consisting of portions of Block 40, Lots 8 and 10, more particularly described as being bounded by the property line of Block 40, Lot 7 on the west, by the southerly property line of Block 262, Lot 1.01 on the north, by the Public Service Electric and Gas Company

property (Block 263, Lot 5) on the east and by a line drawn parallel to and approximately nine hundred and fifteen (915) feet from the southerly property line of Block 262, Lot 1.01.

7. Forthwith, but not later than forty-five (45) days after the entry of this Consent Order, the Township of South Brunswick shall enact a mandatory set aside ordinance which shall provide for a mandatory set aside for lower income units of 20% of the total number of units that may be developed assuming full development at the gross density of seven units per acre provided by right in each zone for all developments in the PRD VII zones. The Township, through its Planning Board or Board of Adjustment, may not approve an application for development within the PRD VII and MH zones at less than the densities permitted as of right by this Order and the attached zoning ordinance amendments, unless the applicant is obligated either: (a) to construct the number of lower income units equal to 20 percent of the total number that may be developed at the maximum of-right density on the entire acreage covered by the application, or (b) to make an appropriate in-lieu cash contribution that will be sufficient to subsidize construction elsewhere of any units not constructed on the site which is the subject of the application, provided, however, that in any case all applicants must construct on their site at least the number of lower income units equal to 20 percent of the total number of residential units actually

constructed. In-lieu cash contributions may only be approved by the Township after express written agreement of the plaintiffs and approval by the Court. Plaintiffs shall respond within thirty (30) days to Township requests for such agreement and consent shall not be unreasonably withheld. Such cash contributions shall be used to further development of lower income housing opportunities, through subsidization of rent or construction of new units, rehabilitation of existing substandard units, or for a regional contribution agreement as specified in Paragraph 8. No other sites in the Township may be zoned or approved at densities greater than 4 units per acre unless they are subject to a mandatory set aside provision reasonably proportionate to those contained herein, but in no event less than 15% of the total number of units to be developed. Any additional sites, other than those specified herein, zoned or approved at gross densities of seven units per acre or greater shall be subject to a minimum requirement of a 20% set aside for low and moderate income development.

The mandatory set aside provisions shall require that a minimum of 1/4 of the lower income units be low income and a minimum of 1/4 be intermediate moderate income, as defined in paragraph 9 below.

The zoning amendments required by this Paragraph are attached hereto as part of Exhibit B and made a part hereof.

8. The Township of South Brunswick may enter into regional

contribution agreements, pursuant to P.L. 1985, c. 222, Section 12, to satisfy some portion of its fair share obligation, provided that any such agreement is approved in accordance with the Fair Housing Act and agreed to by the plaintiffs in writing. Plaintiffs shall respond within thirty (30) days to Township requests for such agreement and consent shall not be unreasonably withheld.

9. Forthwith, but not later than forty-five (45) days after the entry of this Consent Order, the Township of South Brunswick shall adopt an affordable housing ordinance which shall provide that units designated as low, intermediate moderate, or moderate income units shall be sold or rented only to families who qualify as low, intermediate moderate, or moderate income families. The ordinance shall further provide that such units shall be re-rented or re-sold only to qualifying families and that such units are affordable to low, intermediate moderate, or moderate income families. To be affordable, the monthly expenses of a sales unit shall not exceed 28% of family income while the monthly rental charge, including utilities, shall not exceed 30% of family income. Low income shall be defined as less than 50% of median regional income with adjustments for family size, intermediate moderate income shall be defined as between 60% and 70% of median regional income with adjustments for family size, and moderate income shall be defined as between 50% and 80% of median regional income, with adjustments for family size. For the purposes of

this section, the region for determining median income shall be the 11 county region set forth in the AMG v. Warren Township decision. Restrictions on resale will expire 30 years from the date of the initial sale of the premises. The ordinance shall, however, provide exceptions from the resale restrictions in the case of foreclosure and resale by a lender after foreclosure. The ordinance shall provide for enforcement of the provisions contained herein by either establishing a municipal agency or contracting with a non-profit organization or other public agency which has the capacity of administering the requirements set forth herein. The Township of South Brunswick may condition final site plan approval of any development subject to this Order upon payment by the developer to the Township of the reasonable costs of administering or contracting to administer the affordable housing ordinance provisions with regard to the lower income units within that particular development. In addition, the Township of South Brunswick shall condition final site plan approval of any development covered by this Order upon payment by the developer to the Urban (now Civic) League of Greater New Brunswick of the sum of $30 per lower income unit (equal to $5 per unit for each of the six years covered by this Order) for each of the lower income units authorized by that approval, said funds to be used to monitor compliance with this Order; provided, however, that such payment shall not be required for units in developments that have already received preliminary site plan

approval or use variance as of January 14, 1986 or for any subsidized units in Sections II and III of Exhibit A. The provisions of the affordable housing ordinance required by this Paragraph are attached hereto as part of Exhibit B and made a part hereof.

10. Forthwith, but not later than forty-five (45) days after entry of this Consent Order the Township of South Brunswick shall amend its zoning ordinance to provide that in all developments within the PRD VII and MH zones provided by this Consent Order, no more than 50 percent of the low income, intermediate moderate income or moderate income units shall be efficiency and one bedroom units, and, in developments containing 100 or more lower income units, no less than 20 percent shall be three bedroom or larger units. The foregoing provision for three bedroom units shall not apply to lower income units restricted to senior citizens. In addition, low income, intermediate moderate income, and moderate income units developed in accordance with this Order shall not be smaller than the following minimum standards:

Efficiency units	500 square feet
One bedroom units	600 square feet
Two bedroom units	800 square feet
Three bedroom units	1000 square feet

Furthermore, lower income units in developments governed by this Order shall be reasonably well dispersed throughout the entire development, but in any case shall be subject to the following minimum requirements:

(a) Definitions

A building - is any continuously enclosed structure containing one or more separate dwelling units.

A cluster - is any grouping of buildings in close physical proximity to each other, usually arranged around a common feature such as a court yard or parking area.

A section - is any building or grouping of buildings, or any cluster or grouping of clusters set apart by natural features, landscaping or buffers from other parts of the development so as to constitute an identifiably separate portion of the development. A separately named building or grouping as defined herein is presumptively a section.

(b) Standards for dispersal of lower income units

i. No more than 24 lower income units may be located in any single building. No building, cluster or section shall be required to contain any lower income units. In any cluster or section that contains lower income units, no more than one-third of the total number of units may be lower income units.

ii. The restrictions contained in subparagraph (b)(i) above shall not apply to any building, cluster or section when necessary to finance the development of the building, cluster or section through public or tax exempt funding, or to any building with lower income units restricted to senior citizens, but in no event shall any one building, cluster or section developed pursuant to this paragraph contain more than 150 lower income units.

iii. Lower income units must be located so as to afford comparable access to transportation, community shopping, recreation, and other amenities as is provided to other residents of the development.

iv. The landscaping and buffers used around buildings and within clusters or sections containing lower income units shall not be different from those used in other portions of the development and the landscaping and buffers used to separate such buildings, clusters and sections shall be the same as is used to separate other portions of the development.

The zoning amendments required by this Paragraph are attached hereto as part of Exhibit B and made a part hereof.

11. Forthwith, but not later than forty-five (45) days after the entry of this Consent Order, the Township of South Brunswick shall rezone a tract of at least six acres located off Route 27 to permit a subsidized 40 unit Farmers Home Administration development.

12. Forthwith, but not later than forty-five (45) days after the entry of this Consent Order, the Township of South Brunswick shall rezone a tract of at least six acres on Route 522, which are part of the Whispering Woods development, to permit the construction of 39 subsidized units.

13. The Township of South Brunswick agrees that it will continue to take all acts necessary to acquire federal subsidies and to construct an additional 30 low and moderate senior citizen

rental units in the Charleston Place development. If federal subsidies cannot be obtained and/or construction has not commenced within two years of the entry of this Consent Order, the Township of South Brunswick shall inform the Urban League in its quarterly report and rezone sufficient additional land within the Township to enable 30 low and moderate units to be constructed.

14. Forthwith, but not later than forty-five (45) days after the entry of this Consent Order, the Township of South Brunswick shall adopt a Resolution committing the Township to apply for available state and federal housing subsidy programs and to encourage and assist private developers to so apply. That resolution is attached hereto and made a part hereof as Exhibit D. The Township shall encourage the development of a minimum of 200 subsidized units by December 31, 1990. The Township shall rezone, if necessary, suitable sites for the development of these subsidized units. A number representing one-half of the subsidized units developed by December 31, 1990, other than those identified in Exhibit A, Section II, shall be credited toward the Township's staged present need obligation for the period from 1990 to 1996.

15. Forthwith, but not later than forty-five (45) days after entry of this Consent Order, the Township of South Brunswick shall amend its land use and zoning ordinances to provide that the minimum tract requirements for the PRD VII Zones and MH Zones

subject to this Consent Order shall be no greater than 40 acres but the following parcels of less than 40 acres shall be exempted from such provision:

a) Block 93, Lots 3, 4, and 41

b) Block 85, Lot 18.01

c) Block 87, Lot 12.14.

The zoning amendments required by this Paragraph are attached hereto as part of Exhibit B and made a part hereof.

16. Forthwith, but not later than forty-five (45) days after entry of this Consent Order, the Township of South Brunswick shall amend its zoning ordinance pertaining to the PRD VII Zones so that multi-family development is permitted by right and the open space requirements are reduced to 25% of tract area.

17. Forthwith, but not later than forty-five (45) days after entry of this Consent Order, the Township of South Brunswick shall amend its zoning ordinance so that the minimum lot size for townhouse development is reduced to 2000 square feet and the net density for the PRD VII Zone is increased to 12 units per acre.

18. Forthwith, but not later than forty-five (45) days after entry of this Consent Order, the Township of South Brunswick shall amend its zoning ordinance so that the minimum mandatory reservation of 5% of tract area for commercial and office development in the PRD VII Zones is eliminated.

19. Forthwith, but not later than forty-five (45) days after entry of this Consent Order, the Township of South Brunswick

shall amend its zoning ordinance to eliminate the restrictions on the proportion of each housing type that may be included in the PRD VII Zones.

20. Forthwith, but not later than forty-five (45) days after entry of this Consent Order, the Township of South Brunswick shall amend its zoning ordinance to eliminate the requirements for a Traffic Circulation Impact Statement and Environmental Impact Statement except for tracts located in areas that have been determined in the Master Plan to have potential traffic problems or which have been determined to be environmentally sensitive.

21. Forthwith, but not later than forty-five (45) days after entry of this Consent Order, the Township of South Brunswick shall amend its zoning ordinance to eliminate the requirement for a School Impact Statement.

22. Forthwith, but not later than forty-five (45) days after entry of this Consent Order, the Township of South Brunswick shall amend its zoning ordinances to exempt the sites within the PRD VII and MH zones from the critical area requirements of Section 16-62.29 of the existing ordinance. In the event that there are critical areas within the sites specified in this Order, which sites the parties hereby agree are generally suitable for the development permitted by the zoning specified herein, site planning shall be performed in a manner to avoid substantial adverse impact on those areas.

23. Forthwith, but not later than forty-five (45) days after entry of this Consent Order, the Township of South Brunswick shall amend its zoning ordinances so that developers of low and moderate income units in the PRD VII and MH Zones are required to affirmatively market those units to persons of low and moderate income, irrespective of race, color, sex, or national origin. Such affirmative marketing shall include advertisement in newspapers with general circulation in the urban core areas located in the 11 county present need region identified in AMG. The Township shall also require the developer to advertise the low and moderate income units with local fair housing centers, housing advocacy organizations, Urban Leagues, and governmental or private housing referral agencies located within the 11 county region.

The zoning amendments required by Paragraphs 15-23 of this Order are attached hereto as part of Exhibit B and made a part hereof.

24. The Township of South Brunswick shall report in writing to the Court and to Plaintiff, Civic League or its designee, within forty-five (45) days of the entry of this Consent Order or when all ordinance amendments and resolutions have been duly enacted by the Council and Mayor of the Township, whichever first occurs, certifying that all ordinance amendments and resolutions have been enacted or providing an explanation as to why they have not been enacted. Upon certification that all required

amendments and resolutions have been enacted the Court will enter an Order of Compliance which will be valid and binding for six years from July 2, 1985. If all ordinance amendments and resolutions required herein have not been enacted, the Court shall set this case for trial.

25. The Township of South Brunswick shall report quarterly in writing to Plaintiff, Civic League or its designee, commencing with March 31, 1986, providing the following information:

(a) itemization of all proposed developments for which applications have been filed with the Township's Planning Board, including the location of the proposed site, the number, type, size and estimated cost or rental price of lower income units, the name of the developer and the developer's attorney, and the dates and nature of any action that Planning Board has taken or anticipates taking, and

(b) a copy of the affirmative marketing plans provided for each development together with copies of advertisements and a list of newspapers and community or governmental organizations or agencies which received the advertisements.

EUGENE D. SERPENTELLI, A.J.S.C.

We hereby consent to the form, substance, and entry of this Consent Order.

Date: 2/4/86

Eric Neisser

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