

CA

Old Bridge

~~002407M~~
9-14-87

transcript of motion
involving O & Y and Wushaven v.
Old Bridge.

PJ's 130

CA 002407M

1 URBAN LEAGUE OF GREATER NEW : SUPERIOR COURT OF NEW JERSEY
BRUNSWICK, et al., : CHANCERY DIVISION
2 : MIDDLESEX COUNTY/
Plaintiffs, : OCEAN COUNTY
3 v. : (Mount Laurel II)

CA002407M

4 THE MAYOR AND COUNCIL of the : DOCKET NO. C-4122-73
BOROUGH OF CARTERET, et al., :
5 Defendants, :
6 and :

7 O & Y OLD BRIDGE DEVELOPMENT : SUPERIOR COURT OF NEW JERSEY
CORPORATION, a Delaware : LAW DIVISION
8 Corporation, : MIDDLESEX COUNTY/
and : OCEAN COUNTY
9 : (Mount Laurel II)

10 WOODHAVEN VILLAGE, INC., a : DOCKET NO. L-009837-84 P.W.
New Jersey Corporation, : and NO. L-036734-84 P.W.
11 :
Plaintiffs, :
12 v. :

13 THE TOWNSHIP OF OLD BRIDGE : STENOGRAPHIC TRANSCRIPTION
in the COUNTY OF MIDDLESEX, : OF
14 a Municipal Corporation of : MOTION
the State of New Jersey, :
15 THE TOWNSHIP COUNCIL OF THE :
TOWNSHIP OF OLD BRIDGE, THE :
16 MUNICIPAL UTILITIES AUTHOR- :
ITY OF THE TOWNSHIP OF OLD :
17 BRIDGE, THE SEWERAGE AUTHOR- :
ITY OF THE TOWNSHIP OF OLD :
18 BRIDGE and THE PLANNING :
BOARD OF THE TOWNSHIP OF :
19 OLD BRIDGE, :
20 Defendants. :

21 x - - - - - x
Place: Ocean County Courthouse
22 Toms River, New Jersey
Date: September 14, 1987

24 B E F O R E:

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

Judith R. Marinke, C.S.R.

1 TRANSCRIPT ORDERED BY:

2 STEWART M. HUTT, ESQ.

3 A P P E A R A N C E S:

4 RUTGERS LAW SCHOOL
5 CONSTITUTIONAL LITIGATION CLINIC
6 For Urban League of Greater New Brunswick,
7 BY: BARBARA STARK, ESQ.

8 BRENNER, WALLACK & HILL, ESQS.,
9 Attorneys for O & Y Old Bridge Development Corporation
10 BY: THOMAS JAY HALL, ESQ.

11 HUTT, BERKOW & JANKOWSKI, ESQS.
12 Attorneys for Woodhaven Village, Inc.
13 BY: STEWART M. HUTT, ESQ.
14 RONALD L. SHIMANOWITZ, ESQ.

15 JEROME J. CONVERY, ESQ.,
16 Attorney for Township of Old Bridge

17 NORMAN & KINGSBURY, ESQS.,
18 Attorneys for the Planning Board of the
19 Township of Old Bridge,
20 BY: THOMAS NORMAN, ESQ.

21 HANNOCH & WEISMAN, ESQS.,
22 Attorneys for O & Y Old Bridge Development Corporation
23 BY: DEAN A. GAVER, ESQ.

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25
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1 THE COURT: We cut down on the number of tables
2 hoping we'd get you out of here faster.

3 I apologize for the absence of the facilities.
4 We are in the process of renovating and just have
5 this temporarily preoccupied.

6 This is a motion by the defendant Old Bridge
7 Township and Planning Board to vacate the final
8 judgment and settlement of January 24, 1986, motion
9 made pursuant to Rule 4:50-1 and to thereafter
10 transfer, assuming vacation, the matter to the
11 Council on Affordable Housing.

12 Alternatively, the defendant seeks to modify
13 the settlement pursuant to the settlement, and I
14 have read the accumulated months of pleadings to-
15 gether with the exhibits that go with it. Okay?

16 Who wants to go first?

17 MR. NORMAN: Your Honor, I guess it's the
18 Planning Board's motion to set aside. We boil down
19 to the bottom line.

20 The builders and the Urban League are arguing
21 that the Blue Book contains performance standards and
22 that those performance standards would apply to any
23 development on any buildable land in Old Bridge Town-
24 ship, and particularly with regard to the two tracts,
25 O & Y and Woodhaven.

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1 Therefore, they argue logically from that
2 premise that since performance standards are
3 established, they have a perfect right to ask the
4 Township to approve development smaller than the
5 one originally proposed.

6 In fact, I think they point out in several cases
7 that this is an unusual circumstance.

8 Generally, builders are attempting to go in the
9 other direction, expand development.

10 So, they tell us that since we have the per-
11 formance standards in place, we ought to be able to
12 submit an application for smaller amounts, follow
13 the standards, receive approvals and be in strict
14 compliance with the Blue Book.

15 In effect, the Blue Book doesn't guarantee to
16 large developments. It simply sets up the groundwork.

17 The Planning Board doesn't agree with that at all.
18 We think that the Blue Book salvages three standards.
19 We agree that there are performance standards. Really,
20 there are.

21 We spent a year and a half working on them. We
22 also spent a year and a half working on two other
23 aspects of what in effect is a master plan that's in
24 the Blue Book.

25 Second is use provisions. What particular kind

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1 of uses and general categories will be allowed; and
2 thirdly, locational factors.

3 Any master plan, any plan has three elements in
4 it: Performance standards, vocational factors and
5 use criteria. We believe the plan has all three.

6 The Planning Board believed that in the negotia-
7 tions it was willing to accept the fair share number
8 of 1,668 units because it also believed it had
9 negotiated for a particular master plan.

10 No question that the plan itself would change
11 over time. It covered large amounts of land and in-
12 volved the largest development proposed in New Jersey.

13 However, built into the plan itself, into the
14 Blue Book was a 20 percent error factor.

15 Mr. Sullivan, the expert for Olympia & York
16 pointed it out very clearly to the Planning Board at
17 the hearing.

18 In fact, the Planning Board continued the appli-
19 cation three times pending further delineation of wet-
20 lands, because it acknowledged that there would be
21 changes and that if the changes represented less than
22 20 percent or some percentage in relation to the whole
23 tract that did not destroy the integrity of the plan,
24 the Township would maintain the agreement, continue
25 the hearings and follow the process.

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1 As time went on it became extremely clear to
2 everyone's surprise, not only the Planning Board, but
3 I think the applicant was probably more surprised than
4 we were, more wetlands turned up as a result of more
5 intensive detailed investigation.

6 The surprise aspect is important to understand
7 in that all municipal bodies that are involved in the
8 planning process are now following the delineations
9 of the Division of Wetlands in the Department of
10 Interior.

11 They flagged suspected wetlands.

12 On the basis of that there is an analysis of the
13 area and a delineation of wetlands.

14 The areas flagged in these two particular tracts
15 were relatively small, and there was no real concern
16 that the amount of wetlands will be as -- reached a
17 magnitude that it has in this case -- it destroys
18 entirely the Blue Book Plate A Plan of Olympia & York
19 and does substantial damage to the Woodhaven Plan.

20 It eliminates approximately 2,000 acres of land,
21 and the location of these lands are not some
22 symmetrical form, but are scattered all over the
23 place.

24 It raises questions with access. It raises
25 extremely important questions with respect to the

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servicing of the development.

We understand that in order to protect the areas that can be developed, costly roads can be established. We are sure that the roads will be turned over to the municipality.

Suddenly, we now have the responsibility of maintaining an extreme number of bridges through a larger municipality.

The point is this: That the Planning Board bargained for a particular type of master plan development. It was conceptual, but they understood that it had certain meaning and they were convinced on the basis of that meeting that they would agree to settle the matter, accept -- accept a higher fair share number --

THE COURT: What do you think you have lost out of this? You have lost possibly the trans Old Bridge connector?

MR. NORMAN: Yes.

THE COURT: I think maybe it's fair to say that in all likelihood you have lost it. I realize that it's alternative B to the revised plan, but that alternative calls upon you to get permits which the builder rather candidly indicates might be somewhat difficult.

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1 MR. NORMAN: That's correct.

2 THE COURT: I think that puts it mildly.

3 You have lost, and it's not quite clear to me,
4 but you have lost some significant commercial ratables.

5 MR. NORMAN: We believe so.

6 THE COURT: How significant? There was mention
7 of three major malls. Are they gone or are they
8 downscaled to strip stores, or where are they?

9 MR. NORMAN: Well, the locational aspects again
10 are important. The areas that were designated for
11 the malls and for the nonresidential were along Routes
12 9 and 18.

13 At the moment they appear lost.

14 THE COURT: Because of permit problems?

15 MR. NORMAN: That is right. We are told that
16 applications will be submitted to ask essentially for
17 variances from the Court to permit development on
18 these areas. We hope that's possible.

19 Those are significant in areas that we kind of
20 need for ratables.

21 Because of the location, we saw the real
22 possibility of developing those areas as ratables.

23 THE COURT: Is the golf course gone?

24 MR. NORMAN: Yes.

25 THE COURT: For sure? It's not clear to me in

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the papers.

MR. NORMAN: Yes. My understanding is the golf course is gone.

THE COURT: You have lost employment, which, I take it, you felt was a linchpin here, because if you were going to have all these 15,000 homes, you wanted some place for these people to work.

Can you calculate the reduction in employment?

MR. NORMAN: The actual numbers? No, your Honor.

THE COURT: Percentage?

MR. NORMAN: Well, at the moment, all we know, because we haven't seen a new plan yet, and that's not necessarily the developer's fault, but there has been no plan redesign which shows the area that's designated for employment.

The last plan I saw shows no areas for employment, although we are told there will be a provision made for it in the future.

THE COURT: What do you mean by "no areas of employment"? There is still remaining some commercial-professional allocation under the plan.

MR. NORMAN: There is some of it in the Woodhaven Tract.

As far as I have seen to date there is none in the O & Y Plan except for areas that are also

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1 identified as wetlands that may become available for
2 employment in the future, assuming they can work it
3 through the court process for waivers.

4 THE COURT: You mean you have lost everything
5 under the O & Y Plan potentially because of wetlands?

6 MR. NORMAN: We believe so.

7 THE COURT: That's your position?

8 MR. NORMAN: Yes.

9 THE COURT: That would mean commercial, pro-
10 fessional, any non-residential use?

11 MR. NORMAN: Yes. As we understand it now, there
12 are approximately seven to 800 upland acres in the
13 entire tract that can be developed, and the proposals
14 we have seen for maximum residential density would
15 utilize all that land for residential development.

16 We have no doubt the applicants can build some
17 areas for small neighborhood commercial activity. In
18 fact, I think it would be foolish not to.

19 But the large scale areas are gone.

20 THE COURT: Under their revised report of May
21 26th, 1987 they show 845 acres of residential area
22 which includes public purpose area, recreation area.
23 Then they show a commercial area of 128 acres, and I
24 take it, it's your position that that is wet?

25 MR. NORMAN: Can I work backwards, your Honor?

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1 THE COURT: Yes.

2 MR. NORMAN: Our position is that the SD areas--

3 THE COURT: I am sorry.

4 MR. NORMAN: Our position is that the SD areas,
5 the Special Development areas are wet.

6 THE COURT: That shows 149 in this report.

7 MR. NORMAN: We received a new set of plans.

8 THE COURT: I am looking at this. May 26, 1987.
9 Is there something more recent?

10 MR. NORMAN: Yes, your Honor.

11 MR. CONVERY: Received today.

12 THE COURT: Received today? That's one I
13 couldn't read.

14 MR. NORMAN: We were rushing ourselves.

15 THE COURT: You realize if the Giant/Chicago
16 game were on yesterday, this motion would have been
17 adjourned.

18 I mean, nothing else would take up my viewing
19 time. But instead this replaced it.

20 MR. NORMAN: It's our position that a portion of
21 that land is wetlands and will have to be re-
22 classified in order to be developed as buildable.

23 THE COURT: So, the numbers I have in this
24 report are not the current numbers?

25 MR. NORMAN: No, they are not. And we believe

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1 there is less acreage than purported in that report.

2 THE COURT: Less residential acreage?

3 MR. NORMAN: Less residential acreage. We be-
4 lieve in total there are between seven and 800 acres
5 of uplands.

6 THE COURT: So, the number of 1,459 acres of wet-
7 lands is now understated?

8 MR. NORMAN: No, no. I am misleading you, your
9 Honor.

10 One thousand four hundred fifty-nine acres are
11 the areas delineated by the Corps of Engineers, which
12 we understand to be wetlands.

13 There are also other isolated parcels which are
14 uplands but are not accessible, and, therefore, are
15 not developable.

16 THE COURT: Well, the breakdown given there is
17 that of the uplands, there is 581 acres or 39 percent
18 which are contiguous. Two hundred acres are in tracts
19 ranging from ten to 19 acres, and the balance is
20 apparently smaller, non-contiguous parcels, and I
21 don't know whether or not they can be used.

22 I understand you may be talking about bridges
23 or whatever.

24 MR. NORMAN: That is right.

25 THE COURT: But have my numbers been changed or

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1 not?

2 It's still 1459 that's delineated as wetland?

3 MR. NORMAN: Yes.

4 THE COURT: And the balance theoretically, at
5 least, are usable?

6 MR. NORMAN: Yes.

7 THE COURT: Are usable, and I don't know what it would
8 take to use them.

9 MR. NORMAN: The balance are not wetlands, there-
10 fore, they are not restricted by the wetland require-
11 ment.

12 THE COURT: And are theoretically usable. We
13 don't know what may be involved in their use.

14 I am not talking about planning considerations
15 or anything.

16 MR. NORMAN: That's correct.

17 THE COURT: All right. So, we have lost so far
18 in all likelihood the major connector road.

19 We may have lost the malls. We have lost the
20 golf course.

21 We have possibly lost, according to your scenario,
22 all the O & Y non-residential.

23 MR. NORMAN: We believe so, your Honor. A sub-
24 stantial amount of it.

25 THE COURT: What other major aspects or quid pro

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1 quo, we could call it that, have we lost?

2 MR. NORMAN: We are not sure. It's another
3 aspect.

4 Within the plan there were mid-rise units pro-
5 posed, seven of them, I believe. Or it would equal
6 out to seven.

7 They were based on 50 units to the acre.

8 As a result of the wetland problem, we are not
9 sure whether or not mid-risers can be built.

10 THE COURT: Why were they important to you?

11 MR. NORMAN: Because they actually provided more
12 space in terms of density than if --

13 THE COURT: You mean more open space?

14 MR. NORMAN: Yes, basically. More light and air.

15 Without the mid-rises you would have homes
16 stacked one on the other.

17 THE COURT: So, you have lost the mixture of
18 uses you expected?

19 MR. NORMAN: Yes.

20 THE COURT: That's a rather surprising complaint.
21 But in any event. . .

22 MR. NORMAN: Your Honor, that was the way it was
23 explained to the Planning Board and Governing Body,
24 and that's the way they understood this situation.

25 THE COURT: Well, I wouldn't have perceived that

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1 as an inducement.

2 In any event. . .

3 What else is there?

4 MR. NORMAN: That's what we perceive as lost.

5 THE COURT: How about the public -- I am trying
6 to look for the designation -- the lands that you
7 could use for public purposes? There was going to
8 be some dedications, so I take it you could have
9 schools and that kind of stuff?

10 MR. NORMAN: Yes, sir.

11 THE COURT: I gather that that would just stay
12 and be proportionately downgraded?

13 MR. NORMAN: We would assume if the matter is
14 continued, that that is what would happen.

15 THE COURT: And you would assume that public
16 purpose areas, aside from the golf course, would be
17 there and scale down?

18 MR. NORMAN: Yes, your Honor. There is a
19 difference.

20 The Plate A showed 35 acres per community,
21 recreational and public purpose.

22 The latest map we have shows 22 acres.

23 So, there is a down scaling.

24 Your Honor, we don't have any doubt whatsoever
25 that the developers can down scale the map based on

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1 smaller densities.

2 In this particular case, however, we think we
3 are losing the benefits of what we bargained for.

4 THE COURT: You have lost an integrated road
5 system, perhaps?

6 MR. NORMAN: Yes.

7 THE COURT: Correct?

8 MR. NORMAN: We believe so.

9 THE COURT: I mean, as you looked at the plan
10 before, there was a well thought out and well planned
11 new road system essentially?

12 MR. NORMAN: That is correct, your Honor.

13 THE COURT: And now there is a proposal that
14 essentially relies upon existing roadways and some
15 improvement therein.

16 MR. NORMAN: That is correct. As far as we know.

17 THE COURT: Okay. I have no other questions.

18 MR. NORMAN: I just wanted to point out one
19 additional point, since it's been raised several
20 times, and that is, what the Planning Board expected,
21 you know, what the Township expected.

22 We have been told that our expectations are now
23 too high, that we should have no right from the be-
24 ginning, that these were performance standards, and
25 it can be scaled down.

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1 There is nothing wrong with that. However, in
2 the hearings before the Planning Board of March 18th,
3 the testimony by Mr. Sullivan, the O & Y planner's
4 expert discusses every other page the village concept
5 -- the planning concept that was proposed to the
6 Planning Board and to the Governing Body at the time
7 of settlement.

8 Mr. Hutt, in the March 11th hearing of the
9 Planning Board, explains again the concept that Plate
10 A and Plate B are not sacrosanct, but they contain
11 the essential ingredients of a settlement in terms
12 of location, where things are going to be and what
13 will be provided.

14 Additionally, Mr. Wallace, who is the Woodhaven's
15 expert planner, does the same thing.

16 We believe we were receiving a certain plan sub-
17 ject to a 20 percent change, but not subject to a 50
18 percent change.

19 We think now we have turned the apples to
20 oranges, and the Township believes that on that basis
21 the settlement was really not completed.

22 The changes that occurred were no fault of the
23 municipality nor basically I think were they the
24 fault of the builders in this case.

25 I think there was a mutual mistake. I think what

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1 happened was that, to a certain extent, the rules of
2 the game changed.

3 The Army Corps of Engineers changed their
4 definitions of wetlands to everyone's surprise.

5 THE COURT: You have the transcript of the
6 settlement that went on the record on January 24th and
7 I don't.

8 I just wondered, and this is going to be an odd
9 question, but I just wondered if there is any in-
10 dication in there that we talked about wetlands at
11 any length or at all.

12 MR. NORMAN: No, your Honor, but there is a
13 discussion in it -- in the transcript of what would
14 happen in the event of a major change.

15 THE COURT: Okay.

16 MR. NORMAN: And Mr. Convery --

17 THE COURT: A major change? What are we talking
18 about?

19 MR. NORMAN: Unfortunately, I was in the Virgin
20 Islands at the time.

21 THE COURT: You just proved you are smarter than
22 we are.

23 MR. NORMAN: I would like to defer to Mr. Convery.

24 THE COURT: I will tell you, you cite in your
25 letter of August 11th to me, your reply brief or reply

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1 letter in lieu of brief, you cite something I said
2 with regard to mootness.

3 I always hate to read these things, because it
4 just shows me how inarticulately I talk.

5 But in any event, I said something that I am
6 wondering why I said it, although I vaguely have a
7 recollection of it, and I denied the motion, based on
8 mootness. But I said the mootness may evaporate and
9 come back, and I was talking about a major change
10 basically.

11 I wonder what we were talking about.

12 MR. NORMAN: That is correct, your Honor.

13 Your Honor, I think you were referring to Mr.
14 Convery's letter.

15 THE COURT: Yes. I am sorry. Yes. You are
16 right.

17 MR. CONVERY: You struck on the exact point I
18 was going to address, which was the transfer motions,
19 and figuring that Mr. Norman, as the attorney for the
20 Planning Board, would address the Planning considera-
21 tions.

22 But if one were to look at page 80 of the tran-
23 script of January the 24th, 1986, line 24, the Court
24 specifically says, "That the mootness may, if I can
25 put it that way, disappear if anyone sought to change

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1 the terms of the agreement."

2 THE COURT: Yes, but my question to you was:
3 That's what I had before me, because you cited that.

4 But why did I say that?

5 MR. CONVERY: If I can expand just a little bit,
6 your Honor, I think I can put it in perspective.

7 You then go on to say on page 81, "Therefore,
8 if there is an application to suddenly modify the
9 terms of the agreement as opposed to enforce it, the
10 Township would not be precluded from countering with
11 a motion to transfer."

12 Now, what led to this discussion, if I may go
13 back to that day, is that the settlement was being put
14 on the record.

15 Carla Lerman was testifying to certain facts,
16 and the attorney for O & Y saw fit to say that -- he
17 wanted to put everyone on notice that there could be
18 a possibility of a performance question raised by
19 O & Y regarding the staging of commercial with
20 residential.

21 THE COURT: Staging?

22 MR. CONVERY: Staging.

23 THE COURT: It didn't sound that way up here.

24 Okay. Go ahead.

25 MR. CONVERY: There was a discussion regarding

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1 the transfer motion that followed, and I think that what
2 was led into this discussion was the fact that the
3 attorney for O & Y was speaking about putting everyone
4 on notice that we could come back and say it's im-
5 possible to make the staging -- and I think you put
6 words in my mouth, and I am glad that you did -- if
7 you read the transcript saying that, well, I am sure
8 Mr. Convery would think it would be fair that if some-
9 body came back to modify the agreement, that then it
10 would be appropriate for the Township of Old Bridge
11 to move to transfer this to the Council on Affordable
12 Housing, and that was amplified, your Honor, on the
13 record.

14 Now, specifically, the Court on page 78 says,
15 "In the interest of time -- in the interest of time
16 what my view on this would be simply this: It's with
17 prejudice with respect to the settlement agreement as
18 placed on the record.

19 "If there is a modification of the settlement
20 agreement as opposed to an enforcement of the settle-
21 ment agreement, then it seems to me that the Township
22 clearly would have the right to make an application."

23 "I mean, if the terms change, if the basis upon
24 which they settled this changed significantly, then it
25 would be unfair if there is going to be such a change

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1 not to allow them to make that application."

2 Furthermore, on the next page the Court said,
3 line 2, "That's what Mr. Convery was saying. He said,
4 if you changed the terms on which we settle, it should
5 work both ways. We should have a right to change our
6 terms, and that's only fair. But as long as no one
7 seeks to change" -- he was uneasy about the suggestion
8 -- "that the basis upon which they settled might be
9 changed."

10 And then the Council -- referring to the Township
11 Council -- Governing Body, could say, well, then, why
12 do we settle? Why not go to the Housing Council?

13 That's a reasonable question. So, I submit, your
14 Honor, that we are here today with a significant
15 change.

16 THE COURT: I was a prophet and I didn't know it.

17 MR. CONVERY: It is, your Honor, a significant
18 change when 50 to 54 percent of O & Y's property con-
19 stitutes wetlands.

20 It's a significant change when they initially
21 talk in terms of building approximately 10,000 units
22 and now their revised plans call for approximately
23 5,000 units. It's a very significant change to the
24 Township of Old Bridge when Mr. Brown, on behalf of
25 O & Y, comes before the Township Council and speaks

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1 in terms of changing our staging provisions in the
2 Township Ordinance to accommodate O & Y so that O & Y
3 can build a regional shopping center at the inter-
4 section of State Highway 18 and State Highway 9 in
5 the Township of Old Bridge.

6 THE COURT: Yes. I didn't understand something
7 in your August 11th letter. That may not be your
8 fault. There is a lot of stuff here.

9 You said that if the present settlement is en-
10 forced under the terms as written, O & Y would be
11 permitted to build 50 percent of its dwelling units
12 before it provided any ratables pursuant to Section
13 V-C.6 since O & Y now proposes to build approximately
14 5,000 dwelling units, it would be able to avoid any
15 commercial development under the staging performance
16 scheduled outline.

17 I understand up to 50 percent they don't have to
18 build anything under the schedule. But isn't the
19 50 percent then scaled back?

20 MR. CONVERY: Well, if we ever were into a re-
21 opener position --

22 THE COURT: Yes.

23 MR. CONVERY: -- I would submit that that would
24 be true.

25 But what I am saying is the way this document

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1 reads now --

2 THE COURT: Oh.

3 MR. CONVERY: -- O & Y or Woodhaven are taking
4 the position, or at least Woodhaven can build up to
5 the amount that's mentioned in this agreement.

6 But if you stand by the agreement as written,
7 if Woodhaven, for example --

8 THE COURT: Well, it would be 50 percent of the
9 5,000 instead of 50 percent of the 10,000. Wouldn't
10 it?

11 MR. CONVERY: Well, it would if we reopened the
12 case.

13 But the way this reads now, they are entitled to
14 build over 10,000 units, and they would be able to
15 build 50 percent of their dwelling units before they
16 have to come in with 25 percent of the ratable.

17 THE COURT: I thought I missed something. What
18 is good for the goose is good for the gander.

19 MR. CONVERY: There is one other thing that's
20 important about this: This was a change to the bene-
21 fit of O & Y and Woodhaven from the existing ordinance.

22 The reason for the change is -- and this is in
23 the certification of Eugene Dunlop, the Town Council
24 President -- the reason for the change is because
25 Stewart Hutt, on behalf of Woodhaven, and Lloyd Brown,

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1 in the presence of his attorneys on behalf of O & Y,
2 came before the Township Council on commercial devel-
3 opment, and there was some concern about commercial
4 development staging, and Lloyd Brown indicated that
5 what O & Y is going to do at this location, the in-
6 tersection of two State Highways, is going to be of
7 benefit to the Township of Old Bridge for years to
8 come in regard to a quality shopping center and a
9 quality commercial/industrial complex at that area.

10 The Council even agreed that Woodhaven could
11 build less than 10 percent commercial, but would have
12 to only build 73 acres of commercial because Mr. Brown
13 pointed out, "Well, look at what O & Y is going to
14 build."

15 If you consider the overall picture, we are well
16 beyond 10 percent, even taking O & Y and Woodhaven
17 together.

18 He also stated that in order to give more time
19 to develop attractive ratables, they would have to
20 develop something that would be a credit to O & Y and
21 the Township of Old Bridge rather than putting in,
22 let's say, strip malls at various stages of develop-
23 ment in order to meet some staging performance re-
24 quirement.

25 So, what I am saying is: This is significant

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1 because we are now told that that regional shopping
2 center at the intersection cannot be buildable be-
3 cause of wetlands.

4 If one looks at the agreement, when it speaks in
5 terms of site specifics, I think, it's clear that all
6 the parties contemplated that this was going to be
7 built as part of this agreement.

8 Now, looking at page 19 of what Stewart Hutt
9 refers to as the Blue Book --

10 THE COURT: How a black book became a blue book
11 here is beyond me.

12 MR. CONVERY: Section V.-C.2 says "shopping
13 center site."

14 THE COURT: You are talking now of the settle-
15 ment agreement?

16 MR. CONVERY: Settlement agreement, yes, page 19,
17 your Honor.

18 THE COURT: Okay.

19 MR. CONVERY: Now, that says, "O & Y shall con-
20 struct a regional shopping center of up to, 1,350,000
21 square feet on approximately 93 acres of their lands
22 designated for this purpose located on the southerly
23 side of the proposed trans Old Bridge connector road
24 in the vicinity of its juncture with State Highway 18
25 with no additional low-income housing obligation

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1 attendant to this right, et cetera."

2 My point here on this is that: Why was the word
3 "shall" used?

4 Did not the Township of Old Bridge have a right
5 to rely on the fact that this was a site specific pro-
6 vision and that a shopping center was going to be built
7 at that location?

8 I have given you the certification of Eugene
9 Dunlop. I can produce the minutes if there is a con-
10 troversy on this, but I submit that this was some-
11 thing the Town relied on.

12 If you look at Section V.-C.1 on the same page,
13 at the top of the page, it says, "Industrial/Commercial
14 Development. O & Y shall construct office/retail and
15 commercial/industrial space on PD/SD Zone Lands which
16 are included in the Settlement Plan which lands are con-
17 tained in two separate parcels as follows. . ."

18 And it goes on to speak of the site as Texas
19 Road in the vicinity of 9 and 18, and it speaks in
20 terms of the total permitted gross floor area to be
21 built.

22 I am attaching significance to the word "shall."
23 It doesn't say "may."

24 It doesn't say, "be given the opportunity to be
25 built." It says "shall construct."

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1 Now, did not the Township Council have a right to
2 rely upon this when they voted to accept this settle-
3 ment?

4 THE COURT: That's about six million square feet
5 of space.

6 Do you know what is going to happen now, assuming
7 they could build on the reduced area?

8 It could still be built right at least at the
9 intersection.

10 MR. CONVERY: The reason that it says site
11 specific provisions I think is because of what Mr.
12 Brown had pointed out is the desirability of building
13 at the intersection of two State Highways in the Town
14 of Old Bridge.

15 Now, looking at the area that's designated as
16 wetland, the first thing that popped out when we saw
17 the wetland delineation was -- it just happens to be
18 that intersection is all wetland, that everything
19 that's on Plate A from O & Y to build in that area, I
20 submit, cannot be built.

21 Now, whether or not they could go back to put in
22 what we would consider less desirable commercial
23 properties elsewhere is not the issue.

24 The issue is: Did we have an agreement? Did
25 they agree to build on these specific sites? And can

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1 they build now?

2 Mr. Hutt seems to argue that Plate A and Plate
3 B really have no significance.

4 I totally disagree with him. I think that they
5 are specifically incorporated into the settlement.

6 The language is clear in the judgment and settle-
7 ment that these are specifically incorporated.

8 The purpose of the public hearings was to review
9 Plate A and Plate B, not to review some other plan
10 that would be submitted by the parties.

11 When you look at Plate A, which is attached to
12 the judgment, you look at what is designated Special
13 Development, you will see that it encompasses that
14 entire area where Route 18 meets Route 9 and Texas
15 Road. Now you are talking about the area where jobs
16 would be produced, where Old Bridge and its Town
17 Council would get what it was told it would have,
18 which would be a major regional shopping center at that
19 location which will draw people to the Township of
20 Old Bridge.

21 So, I don't agree that they have no significance.
22 I think they are very significant, and I think that's
23 what induced the Township Council, the Township of Old
24 Bridge to agree to this settlement.

25 I think it's significant that the two councilmen

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1 in Wards 5 and 6 --we have a Ward system where this
2 property is located -- did in fact vote in favor of
3 this agreement, and I think it's because they saw
4 things regarding commercial development.

5 They saw a golf course. They saw things that
6 were placed in the plates and were part of the settle-
7 ment that no longer are available to the Township of
8 Old Bridge.

9 So, on these site specific provisions, I think
10 that it's impossible for O & Y to meet the settlement
11 that it agreed to, and for that reason I think the
12 settlement should be set aside.

13 Now, on the transfer, your Honor, I think that
14 when the Supreme Court decided Hills Development
15 Company v. Bernards Township, what it was saying is
16 that it was the State's intention for -- that every
17 municipality would have the benefit of the compre-
18 hensive plan and its method of implementation.

19 I think that everyone contemplated that if there
20 were a significant modification to this agreement,
21 that Old Bridge and its residents would have the right
22 to participate in this statewide implementation.

23 And I think that through no fault of the Township
24 of Old Bridge or its residents, we stand before you
25 today with the settlement that is impossible to

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1 implement.

2 We are not talking here about enforcement. We
3 are talking about substantial modification.

4 I think that at various times when discussing
5 this, all the parties refer to the substantial amount
6 of wetlands that occurs on O & Y property, and I think
7 it ties right in with the discussion on a transfer
8 motion that is indicated in the transcript of the
9 proceedings.

10 I think that your Honor contemplated that if any
11 of the parties significantly changed the basis upon
12 which this settlement was granted, that the Town
13 could proceed with its transfer motion.

14 Your Honor, I obviously want to incorporate by
15 reference the materials submitted by Mr. Hintz.

16 I think they are voluminous, and all the parties
17 have had an opportunity to submit these materials, but
18 I want to point out another thing. If it comes down
19 to your Honor feeling that it's going to depend -- his
20 decision is going to depend upon how many jobs are
21 lost or whether or not substantial commercial proper-
22 ties can be developed in the near future, then I would
23 ask that you go forward with the plenary hearing and
24 we allow Mr. Hintz to testify.

25 Various -- at various times Mr. Hutt has said

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1 this is a legal argument, there is no need for testi-
2 mony. I agree that we are proceeding on the legal
3 question of whether or not the motion to set aside
4 should be granted, but, of course, you have to take
5 into consideration the fact as to whether or not
6 there has been a substantial change, whether there
7 has been a substantial mistake of fact.

8 Now, if it comes down to you wanting to know
9 on the record those details and to make a determina-
10 tion as to the credibility of whether or not our
11 planner is correct, or whether or not another planner
12 is correct, I would ask for you to set down a plenary
13 hearing.

14 If, on the other hand, your Honor is satisfied
15 from the materials submitted that there is enough of
16 a basis for him to determine the amount of change that
17 is required by the wetland problem, then I would ask
18 your Honor to rule in favor of the Township of Old
19 Bridge. Thank you.

20 THE COURT: Thank you.

21 MR. HUTT: Your Honor, I will be brief because
22 learned counsel have many things to say to you.

23 They brought in a few brief cases, but I think
24 the crux of the case is what Mr. Convery pointed out.

25 The simple issue -- maybe it's not so simple to

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1 resolve -- but the simple issue: Are the plates
2 part of the settlement agreement? Or aren't they?

3 And if they are part of it, what part do they
4 play?

5 Now, the Town's coming back in with all this
6 second guessing about: They thought they were --

7 THE COURT: I don't think the issue is that
8 narrow in all honesty. I don't think we should get
9 off on that. It's more than that.

10 It's much broader than that. It's whether the
11 parties have failed to account for material facts
12 unknown to both of them at the time and what the facts
13 were that they knew at the time.

14 I think that's the issue.

15 MR. HUTT: That's another way of saying whether
16 the plates were getting some ratables development.

17 THE COURT: No, because the plates are only one
18 aspect of the facts.

19 MR. HUTT: If you look at the settlement agree-
20 ment itself, it sets up certain things: The fair
21 share number, the criteria of building, whatever type
22 you are going to build: The genetic standards, the
23 road standards and everything else.

24 The Town is not complaining that Woodhaven or
25 O & Y is not meeting these standards.

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1 What the Town is pointing out is what Mr. Con-
2 very said is they settled on the basis of a certain
3 commercial -- at the intersection of let's say, 9and
4 18.

5 However, if you read Mr. Dunlop's own certifica-
6 tion, he doesn't say that at all.

7 At the time of the settlement, what was the Town
8 bargaining for? What were the developers bargaining
9 for?

10 Mr. Dunlop says, and I just like to quote from
11 paragraph 7 of his certification which I quote in my
12 brief, he says that "Under the concensus formula the
13 municipality" -- they were to Council -- strike that
14 -- the Council was advised by Mr. Hintz that under the
15 "concensus formula the municipality's fair share
16 number would be -- would probably be 2,414."

17 He goes on to state, "When the final settlement
18 figures were negotiated, it was proposed to me as a
19 Council member that the obligation of the Township of
20 Old Bridge would be 1,668 units, half to be low income
21 and the other half to be moderate income.

22 "It was very important to me that the proposed
23 mechanism for the development of these units would be
24 that Olympia & York would provide 500 units and Wood-
25 haven would provide 260 units.

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1 "It was proposed that these units would be de-
2 veloped during the six-year period of repose.

3 "As a Council member, it was always important to
4 me that a settlement with O & Y and Woodhaven would
5 provide the bulk of the fair share responsibility of
6 the Township of Old Bridge concerning Mount Laurel
7 Housing and that the main reason for settling with
8 O & Y and Woodhaven would be to meet our Mount Laurel
9 obligation."

10 And I think that's a fair statement of exactly
11 what the Town was looking at.

12 As your Court well knows, there is nothing in any
13 Mount Laurel settlement that requires negotiations,
14 requires builders to build any kind of commercial.

15 The issue in the Mount Laurel case is: What
16 density can you build for markets and how many Mount
17 Laurel units do you have to do?

18 Now, there was a lot of negotiations back and
19 forth. The builders anticipated certain things,
20 waived them. For instance, the builders anticipated
21 getting a density bonus which, in fact, in this case
22 we never got.

23 The Town, because -- and we also agreed to go back
24 and forth -- but what you have got to look at is the
25 polestar of what they actually signed. Nobody says in

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1 the Blue Book, for instance, that O & Y, for instance,
2 is going to build a golf course.

3 In fact, even the section that counsel just read
4 from in terms of O & Y, he left out the last two
5 sentences of each relevant paragraph.

6 THE COURT: I read it. I know what he left out.

7 MR. HUTT: He says there isn't a right --

8 THE COURT: You know, Mr. Hutt, without meaning
9 to demean a profession, that kind of sounds like
10 stereo typical real estate salesman talk. You know,
11 those were just, you know, that's puffing.

12 All you get is what is in the contract.

13 MR. HUTT: No, no. We had more. We bargained
14 -- both developers bargained for this conceptual
15 planning to give us the right to go in before the
16 Planning Board and establish to do it.

17 THE COURT: Before we put this on the record in
18 January of '86, was it unknown to the Planning Board
19 that they were going to get all these goodies that
20 they are losing? They knew it. Didn't they?

21 They knew about the potential -- not the potential
22 -- the likelihood of the trans Old Bridge connector.
23 They knew about the likelihood of six or seven million
24 square feet of commercial area, about all the jobs that
25 that would provide, about the golf course.

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1 I mean, this wasn't made up just after we put
2 the settlement on.

3 MR. HUTT: No.

4 THE COURT: All that was was an inducement. Was
5 it not?

6 MR. HUTT: No, it was conversation. It was what
7 we wanted: the right to produce.

8 THE COURT: Come on. Conversation. You wouldn't
9 sell that to me, and I don't think you have sold it
10 to the Planning Board.

11 MR. HUTT: Let me ask this then: If the plates
12 were as ground in stone as you are implying that it
13 attaches by, why do we have to go before the Planning
14 Board to prove that it would work?

15 THE COURT: And why -- and let me ask you with a
16 question and give you an answer -- and why is every-
17 thing that you presented to the Planning Board that
18 said in no way will the Planning Board be entitled to
19 alter the plans which were already before the Court?

20 MR. HUTT: You mean Plate A and Plate B?

21 THE COURT: Yes.

22 MR. HUTT: They were entitled if we could prove
23 that it worked.

24 THE COURT: Yes. If.

25 MR. HUTT: And that's, in fact, what happened.

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1 We couldn't prove that it works, so we had the right
2 to come in with a new plan.

3 There is a whole new provision there. If we
4 tried through our method to show that what we had was
5 Plate A or Plate B didn't work, then they didn't have
6 to give us an approval and we would have to come
7 back with another site plan.

8 THE COURT: This is a one-sided situation.

9 MR. HUTT: Pardon?

10 THE COURT: This is a one-sided situation.

11 MR. HUTT: No.

12 THE COURT: By a consent judgment the Planning
13 Board locked themselves into not being able to alter
14 what you only had the right to do but didn't have to
15 do.

16 MR. HUTT: No, they locked themselves into a
17 couple of things.

18 THE COURT: That's the language of it as a matter
19 of fact. It says that.

20 MR. HUTT: One thing, they have a smaller fair
21 share than they would have gotten. That's what Dunlop
22 said.

23 Another thing is they got repose.

24 So, they got a lot of things that they bargained
25 for.

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1 Another thing is for the amount -- that they
2 weren't giving the developers any bonus densities.
3 We had four units to the gross acre before.

4 Now, we have four acres now.

5 THE COURT: Is it not true that the developers
6 could not use, using your language, the theoretical
7 plans that were before it at the time of the settle-
8 ment? It could not alter what was in this Black Book
9 or Blue Book.

10 MR. HUTT: If we could prove that it could work.
11 Otherwise they could.

12 THE COURT: Well, it would be -- you would be
13 altering it if it couldn't work.

14 MR. HUTT: No, no, your Honor.

15 THE COURT: But the Planning Board, as long as it
16 could work, could not change it.

17 MR. HUTT: That's what we bargained for.

18 THE COURT: So that you don't consider that that
19 constitutes some kind of binding arrangement between
20 the parties?

21 MR. HUTT: I do. I consider it binding if we
22 could prove it worked.

23 But by the same token if we couldn't prove that
24 it worked, they had a right to deny it, and then there
25 is a procedure which is really the procedure we are in

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1 now which we are saying we can't make it work.

2 We agree we can't make it work, so we now have
3 to go back to what the new procedure is.

4 If we can prove that new plan works, then they
5 give it. If they don't prove that the new plan works,
6 then they don't give it.

7 These horror stories of Carl Hintz and what they
8 are dreaming up, that remains to be seen. That's a
9 Planning Board issue.

10 If, at the time we go into the Planning Board on
11 the next round of maps, they want to deny the map
12 because they say it's got this kind of environmental
13 problem or it's got this kind of road problem or what-
14 ever, they can deny it and then it's up to the master
15 in one of the procedures to come up with their
16 recommendation as to whether they are right and the
17 final call will be either the master's or yours.

18 But the whole book contemplated the whole thing.
19 You recently went out on a tour of Jackson Town-
20 ship where you didn't contemplate seeing some kind of
21 bomb there or whatever it was, but it happened.

22 So, all parties knew: The Town knew. They had
23 as much information as we did.

24 Well, we took from their wetland map -- they have
25 a natural resource inventory and a map, it shows the

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1 green areas. We took that. They would have you be-
2 lieve -- and this has never happened in any Mount
3 Laurel case, including everyone before your Honor
4 where the developer does intensive site investigations
5 prior to a settlement, nobody does that because you
6 don't know what kind of millions you are going to
7 spend without knowing you are going to have a settle-
8 ment.

9 What happened in this case is really no different
10 than any other Mount Laurel case.

11 You make yourself a map. You go in and make in-
12 vestigations. It could show a toxic waste dump.

13 In this case the investigation showed a lot more
14 wetland than anybody else. Does that mean the settle-
15 ment is put aside?

16 It makes me smile to hear all of a sudden the
17 Township attorney and Planning Board is saying, "Hey,
18 we are being deprived of a highrise building." We
19 were not going to build it anyhow, but I remember
20 O & Y banging on the table and screaming and hollering,
21 saying, "Please, let us build these five-story build-
22 ings," and the Town saying, "No, no, no, we don't want
23 this to be the Queens," and finally conceding that
24 they are not going to get it.

25 They settle for 1600 units and the test of all

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1 this is red herrings, because if the current number
2 wasn't lower, we wouldn't be here today.

3 THE COURT: It's hardly possible to equate this
4 case to any other Mount Laurel case and to suggest,
5 for example, that there would have been no investiga-
6 tion of wetlands before because that's not true in
7 any other case, is hardly possible when I read in the
8 pleadings that it's costing a half a million dollars a
9 month just to carry the O & Y land. I don't know. I
10 can't equate it to any other case that comes before me.

11 MR. HUTT: Well, what I am saying is: There is
12 surveys that had to be done. What I am saying is the
13 Town has taken the position because every known fact
14 wasn't in existence at the time the Blue Book was
15 signed that there would be a settlement.

16 The fact is they had as much opportunity as we
17 did. We used many of their materials to come up with
18 it.

19 Now, in the case of Woodhaven there has not been
20 any substantial change.

21 I put in my brief, and I don't want to express it,
22 but I don't want to forget it either, that Woodhaven
23 can proceed exactly the way it was indicated.

24 They come up with a couple hundred acres more of
25 wetland, one way or the other it doesn't really make

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1 any difference. They don't say that anything we
2 promised them we are not delivering. We said we would
3 give them 73 commercial acres. We are going to give
4 them 73 commercial acres. Supposing there was wetland.
5 Supposing the market turns out. Right now the inter-
6 est rates are starting to go up. The market turns.
7 There is no guarantee in that settlement agreement
8 that any commercial was going to be built.

9 All it said was if you are going to want to build
10 houses, you are going to have to build commercial on a
11 certain schedule.

12 There is no guarantee that houses would be built.
13 There is no guarantee that commercial would be built,
14 and if they wanted to say that, they could have said
15 it and there wouldn't have been a settlement because
16 no builder is going to guarantee in advance.

17 Supposing, for instance, it was determined, there
18 was no wetland, supposing it was determined on the
19 intersection of 9 and 18 that the market studies show
20 that it's saturated. You don't need any more of this
21 stuff.

22 THE COURT: You have a right under this agreement
23 to build even more.

24 MR. HUTT: Pardon?

25 THE COURT: Didn't you? You had a right under

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1 this agreement to build even more than that, provided
2 the original 15,000 or so units.

3 When I say you, the collective plaintiffs. You
4 could have acquired more land, and it would have been
5 treated just as any other property.

6 MR. HUTT: Yes, with certain infill parcels.

7 THE COURT: Yes.

8 MR. HUTT: Right.

9 THE COURT: So, there is some argument to be
10 made, if you want to take that the other way, that the
11 parties could have contemplated they were going to
12 get even more than they got under the agreement.

13 MR. HUTT: Well, your Honor, obviously the pur-
14 pose of that provision was to protect the developer,
15 not the Town.

16 THE COURT: Depends, because it would have been
17 proportional.

18 MR. HUTT: No. What I am saying is the developer
19 would have been able to make economic sense of ful-
20 filling infill parcels. This is the first time I
21 have heard them complaining that the proportionate
22 amount of housing we are going to give them, and O & Y
23 says 50 percent of what they contemplated. Woodhaven
24 says the same amount.

25 The Town is complaining about that it's going to

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1 be lesser? I mean, this stretches reality.

2 The settlement agreement, as far as I was con-
3 cerned, never locked anybody into that map, because
4 if it did, they wouldn't have had to go before the
5 Planning Board.

6 What we were concerned about from the developers
7 is that we had a right to present the conceptual
8 approval.

9 We didn't want to get bounced around. As your
10 Honor knows, this case had many previous years of
11 litigation. We wanted to have the right, take our
12 plan and say, if it works, then you got to give it to
13 us. If it doesn't work, then you don't have to give
14 it to us. We will argue about it later.

15 We didn't know ourselves. It was our best guess
16 at the time whether it would work.

17
18
19 THE COURT: So, basically what you are saying if
20 I can boil it down is that Old Bridge bought a pig in
21 a poke with the hope that its Mount Laurel obligation
22 would be satisfied through these permits?

23 MR. HUTT: No, I didn't say that at all, your
24 Honor.

25 In every Mount Laurel settlement that you have

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1 been involved with and that I can recall, they did
2 everything but present a plate.

3 Never has a plate been a part -- those towns
4 didn't buy a pig in a poke. They bought certain
5 things, the density, the amount -- maximum amount of
6 units and Old Bridge topped that by getting commer-
7 cials tied into it. Okay?

8 For instance, the settlement that you approved
9 where we are involved in with North Brunswick, a very
10 big deal, 3,000 living units, and I think it's three
11 million square feet of office building. As part of
12 that settlement there is not one picture as to where
13 the residential is going to be, where the non-
14 residential is going to be, where the commercial is
15 going to be. It's never done.

16 These plates were at the insistence of the
17 developer, not the Town, because we wanted to make
18 sure that we had certain ideas that we had a right to
19 at least establish it.

20 I can't think of any case that was decided in
21 Mount Laurel where a plate was established that said
22 this was going to be built.

23 In fact, in Washington Township under the Public
24 Advocate, I think it's Pequannock, but I am not
25 sure which town it is where they settled and they

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1 make black acre as a location for Mount Laurel housing.

2 It turns out after the settlement is made and
3 everybody is working on it, a few months later the
4 black acre is 90 percent wetland. So, they can't
5 build it there.

6 Now, the Town had selected the site, not the
7 developer.

8 Now, the Town has to go back and find another
9 site.

10 THE COURT: That's happened in cases I have had.

11 MR. HUTT: Sure. Well, it's the same thing here.
12 There is no guarantee -- I take offense when you
13 say that the Town is buying a pig in a poke. They
14 weren't buying any more pigs in a poke than any other
15 town in Mount Laurel where Dunlop testifies the number
16 would have been 2400, now it goes down to 16.

17 THE COURT: I don't see how you can equate this
18 case to any other Mount Laurel case that has been
19 settled. It's a magnitude totally inconsistent with
20 any other case in terms of what this Town was per-
21 mitting to be done in its town in order to settle
22 its fair share.

23 Totally, totally different than any other case
24 before me. And to suggest that before one site was
25 substituted for another site, hardly in my mind is

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1 persuasive.

2 Furthermore, I think you would agree that in
3 every one of the cases that were settled, the Court
4 had to convince itself that the proposed sites were
5 realistic, otherwise it would have never approved
6 them.

7 MR. HUTT: That's true.

8 THE COURT: And I had to be convinced in this
9 case too.

10 MR. HUTT: No, because in this case the Mount
11 Laurel numbers that were in the settlement are still
12 there. Even the Town admits that O & Y only had to
13 build 500 under its Mount Laurel settlement between
14 1990 and 1992, and the Township is cutting the project
15 in half.

16 THE COURT: That's not what I said. I don't think
17 you heard my question.

18 I said I had to in this case be convinced that
19 the sites were realistic.

20 MR. HUTT: Oh, in the past. I am sorry.

21 THE COURT: In this case.

22 MR. HUTT: Yes.

23 THE COURT: In this case.

24 MR. HUTT: That's right.

25 THE COURT: Yes.

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1 MR. HUTT: That's right. And everybody went on
2 that basis.

3 The Town thought it was realistic and we thought
4 it was realistic.

5 It's really realistic when you take into account,
6 under the worst case scenario, if O & Y builds their
7 6,000 and we build our 5,000, it's 10, 11,000 units,
8 I still say there isn't another town in the State of
9 New Jersey that's going to build that many units and
10 even have a 10 percent set aside of that many Mount
11 Laurel units.

12 So, it's still realistic in the terms of the
13 Mount Laurel problems.

14 What bothers me here is the Town bought certain
15 things and we were entitled to buy certain things.

16 They bought giving us no bonus density. They
17 bought a lower number, as Dunlop testified, from
18 2400 to 1600.

19 They have an area of repose since. They bought
20 the fact that the developers would lock in a lock
21 step of commercial development.

22 Under a builder's remedy lawsuit there was no
23 obligation whatsoever for these developers to build
24 any commercial whatsoever. All right? But we did.

25 So, they bought a lot of things which they have

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1 had the benefit of for the last couple of years.

2 There have been no other Mount Laurel lawsuits
3 in that town. They have been operating on a repose.
4 They have been collecting Mount Laurel fees under the
5 settlement agreement from other developers in accord-
6 ance with the Mount Laurel settlement.

7 Now, it comes about that even though we can't
8 build what we thought we were going to build, we are
9 still locked in by the Blue Book.

10 You will notice that they don't complain -- maybe
11 I ought to sit down and let O & Y's attorney handle
12 it -- but we say we can still do the same.

13 The infrastructure is still there. I don't
14 know if it was brought to your Honor's attention, I
15 am sure it was, but I will repeat it: There is a very
16 detailed sewer agreement with the Utility Authority.

17 So, the sewers are going to be in that entire
18 end of town. It's guaranteed.

19 There is bonds posted and letters of credit and
20 everything else.

21 Water in the community -- they had just made an
22 arrangement with the Middlesex Water Company. They
23 are going to have more water now than they have ever
24 had in their history. So that is going to be there.

25 So, there is no reason in the world why we can't

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1 proceed, and when I say "we," I am talking about Wood-
2 haven, to do exactly what the settlement agreement
3 calls for.

4 So, while I don't think they ought to knock out
5 any settlement, if you happen to, I still say as far
6 as us, we are giving them what they bargained for and
7 we are entitled to get what we bargained for.

8 MR. HALL: For O & Y. One of the risks of having
9 Stule go first is that you never know all the points
10 that you might be able to cover.

11 Your Honor is quite correct in pointing out this
12 is kind of a special case. There is a situation here
13 where I know in the case of my client we have owned
14 this land since 1974. We have been attempting to
15 actively develop it since 1979.

16 During the course of that activity, we have gone
17 through a number of different plans, a number of
18 different iterations of what we could do or what we
19 couldn't do in that town.

20 At the same time, since 1971 I know the Urban
21 League and Oakwood of Madison have been trying to
22 actively look at the issue of whether or not there is
23 enough affordable housing in Old Bridge Township.

24 We are at the place now where, yes, the scale of
25 this thing is so unusual, vis-a-vis your other

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1 realities of life, the fact that we have 1100 acres
2 of developmental -- of land which we could put
3 residential and commercial development on should in
4 and of itself be enough to say, yes, we can go forward
5 with the development which is going to provide every-
6 thing that we thought we were going to provide in
7 terms of the context of a planned unit development.

8 There will be a variety of different housing
9 types. There will be a variety of commercial develop-
10 ment and industrial development as we say that we
11 would be able to provide in 1986.

12 It's not the plan that we contemplated, for
13 example, and we brought before the Planning Board in
14 1983. It's not the plan --

15 THE COURT: You might have been a line from
16 Fiddler on the Roof that says, "We don't have a man
17 that we have when we began" when they were trying
18 to marry off one of their daughters.

19 Their densities are different too. Aren't they?

20 MR. HALL: What I again -- what Stewart was
21 talking about is it's unusual to listen to a Town, to
22 look at an open space and what the actual result is
23 in terms of the O & Y Development.

24 What we had contemplated in 1986 when we brought
25 in our initial development was 1,721 acres of

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1 residential development with an overall density for
2 the use per acre.

3 We now have about 150 acres which is land used
4 for -- it's the same density that's going to yield
5 somewhat in the neighborhood of 5,000 homes.

6 We contemplated then that we were going to have
7 a proportion of our property --

8 THE COURT: You mean to say that the density
9 has been increased because that's what this side
10 says?

11 MR. HALL: No, your Honor. The overall density--
12 the densities are going to be shrunk proportionately
13 with the available amount of development land.

14 We are not asking for any increase. We are not
15 asking for any changes in the zoning at all.

16 What we had, as Stewart suggests, is four of
17 these per acre overall.

18 We had certain areas that are non-developable.
19 We have those areas which are non-developable.

20 We have open space in the flood designation and
21 their NRI designation.

22 We have some additional open space in this Town.

23 We are going to be developing a community that's
24 going to look somewhat different. It's going to have
25 more open spaces.

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1 There is going to be more open space connected
2 with a planned unit development, but it's going to be
3 a planned unit development.

4 At the request of the master that has been
5 appointed in this case, we have been looking in a
6 variety of different iterations of how we could
7 put some commercial areas here, some commercial
8 areas there. We are not sure exactly what the final
9 numbers are going to look like, but the master has
10 pointed out that what we have in terms of an area of
11 South Old Bridge currently exists without central
12 sewer, currently exists without a central water
13 supply and currently exists without any traffic
14 improvements that would be necessary to cope with a
15 5,000 unit development.

16 Once those developmental features are in, there
17 is no doubt that the existing out-parcels which have
18 not been within our contemplation, as we had no idea
19 exactly what we were going to be doing, are going to
20 be developed as well, and that, within the overall
21 development that's going to take place in Southern
22 Old Bridge is going to be a community that is going
23 to provide that variety of housing -- housing types,
24 housing densities and commercial and industrial
25 opportunities which, I believe, were contemplated by

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1 the parties in 1986.

2 Yes, there is going to be more open space. No,
3 there is not going to be quite as much in the area of
4 industrial and commercial ratables as we contemplated
5 at that point, but we can't predict, and neither can
6 the Town, what the ultimate outcome in terms of the
7 developmental aspect of that -- of Southern Old Bridge
8 is going to be.

9 In the meantime we sit with a community which
10 has no real basis other than what is set forth in this
11 settlement for building any kind of affordable housing.

12 This started out as a Mount Laurel case, and it
13 remains a Mount Laurel case. We have got a mechanism
14 that we can bring to operate within South Old Bridge
15 which is going to yield definable quantities of
16 affordable housing, and we can't forget that aspect
17 of it too.

18 THE COURT: Tell me what this was intended to
19 mean. It's Appendix A in our Blue Book, page A10
20 actually. The last paragraph on the page: "The
21 Planning Board attorney shall instruct the Board as
22 to the limited nature of the Board's jurisdiction
23 and the nature of the plans to be reviewed and shall
24 indicate that the plats are at the 'master plan
25 concept' level and are part of" the settlement --

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1 "and are part of a settlement litigation and cannot
2 be changed without sound reasons."

3 MR. HALL: That means, I think, exactly what it
4 says, your Honor: The master plan for Southern Old
5 Bridge included a known level of density for the use
6 per acre.

7 It included a desire to have a planned unit
8 development with certain development types. It wasn't
9 going to be just single-family tract housing or wasn't
10 going to be simply a multi-family housing.

11 It was designed to be a planned unit development.
12 It was designed to have certain features in terms of
13 public water and sewer supply.

14 THE COURT: It doesn't mean this: That the plats
15 are a part of the settlement of the litigation.

16 MR. HALL: As I read both the texts within the
17 settlement agreement, it talks about how we would,
18 once we have gone through the plan, the Planning Board
19 concept, those plans in Stuiie's Latin phrase nunc
20 pro tunc are going to be put back in the settlement.

21 It was an interesting problem that we were con-
22 templating at the time, your Honor.

23 THE COURT: How could any fair minded person read
24 what I just read and come to the conclusion that any
25 fair-minded person --

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1 MR. HALL: The idea of having the Planning Board-

2 THE COURT: Let's stay with my question. Don't
3 ask me another one, I can only handle one at a time.

4 MR. HALL: The idea of having the Planning Board
5 hold conceptual hearings was designed to give the
6 Planning Board a realistic opportunity to review those
7 plates.

8 If we were just going to jam it down the Planning
9 Board's throat, we wouldn't have a Planning Board
10 process.

11 Mr. Norman, when he introduced the plates at the
12 Planning Board hearings, indicated to the Planning
13 Board they had a responsibility to look at those plans
14 fairly, and if they had real problems with them, they
15 had an opportunity to raise those real problems.

16 THE COURT: That's what the thing says. But you
17 still haven't answered my question.

18 The words in plain simple English to me mean that
19 the plats are part of a settlement of the litigation.
20 You don't agree or you do agree?

21 MR. HALL: I agree that the plans were designed
22 to put in visual form the overall scheme of the de-
23 velopment with respect to where commercial properties
24 were going to be located, where residential properties
25 were going to be located and what the overall densities

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1 of the development were. That's a master plan level.

2 We weren't going in at a subdivision plan level.

3 THE COURT: But the Supreme Court waived under
4 this agreement any right to change those things unless
5 there was some sound planning reason, and absent the
6 wetland problem, the Planning Board was stuck with
7 this plan of development.

8 MR. HALL: Unless, of course --

9 THE COURT: Legally bound by a court order.

10 MR. HALL: Unless, of course, we had other
11 reasons why we couldn't have made the development work.
12 That is correct.

13 And that's the way most Mount Laurel settlements work.

14 THE COURT: And yet they have no right to rely on
15 it.

16 MR. HALL: They have a right to take a particular
17 area of town -- let's take an area like Bedminster
18 where there is a particular area that has been zoned
19 for high-density development.

20 At a master plan level certain things were said:
21 The town set aside a certain area. It went from Washing-
22 ton Valley Road to Schley Mountain Road and zoned
23 at 10 DU's per acre from here to here. How you
24 make it work in terms of traffic flow, in terms of
25 utility layout, et cetera, those are legitimate

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1 Planning Board issues, and, believe me, they have all
2 been raised.

3 When you get to the point where your Planning
4 Board is able to say, yes, Southern Old Bridge is now
5 set aside as a 4DU per acre, planned unit development,
6 and we contemplate there will be no more than 15 or
7 22,000 or whatever the number of homes that would be
8 actually built with a full development of that area,
9 that there would be no more than one major regional
10 shopping center, that there will be no more than six
11 million square feet of commercial area. These are
12 legitimate Planning Board Master Plan level issues.

13 Do we want to have high density development in
14 Southern Old Bridge or do we want it to be a low-
15 density park? That's a master plan level scheme.

16 When you get down to exactly how many single-
17 family units, how many multi-family units, how much
18 regional shopping facilities, et cetera, et cetera,
19 et cetera that are going to be put in there, that's
20 the preliminary subdivision or site plan level. And
21 certainly none of us knew then and none of us know now
22 what we are going to actually put on that site.

23 We know we have got 1100 acres that we could
24 develop. We know that we are going to be instrumental
25 in providing sewer and water supplies to Southern Old

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1 Bridge.

2 We know that we can put in a planned unit develop-
3 ment of some size and scale. We know that it's going
4 to have a variety of different housing types. It's
5 going to have shopping. It's going to have indus-
6 trial facilities. Those are the things we do know.

7 We don't know anything other than that. We are
8 not at the site plan or subdivision level.

9 THE COURT: Do we know whether we started off
10 with a nice round disk of brie and ended up with a
11 slice of Swiss Cheese?

12 You know, what I am told here is that, as I cited
13 in the beginning, we had nice neat four and a half
14 contiguous acre package. Now we have only 581 acres
15 out of the original 26 of from -- 2,640 acres which
16 are contiguous acres. We have 200 acres which are
17 not contiguous and range in tracts from 10 to 19 acres,
18 and the balance -- between that 781 acres and the 1100
19 plus acres are even smaller than that.

20 We are going to have a thousand bridges here. I
21 mean, that's what it kind of sounds like.

22 I am exaggerating, I understand.

23 MR. HALL: The Township advocate can present any
24 picture it wants with respect to what is actually go-
25 ing to be built there. We have gone through a variety

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1 of different iterations.

2 We have one where counsel for the Township has
3 pointed out, we finished up last week and sent out to
4 all parties. That shows how you could put a village
5 concept with a variety of different housing types on
6 that site at a cost that we can contemplate building
7 and come out with 5,000 units which we would build and
8 housing which is going to be built within the current
9 zoning by others within the same area that we have
10 allocated.

11 We are not presenting that as the way that we are
12 going to develop it. We are trying to respond to what
13 the Township's advocate has said.

14 This is Swiss Cheese. It isn't Swiss Cheese.
15 There is the probability of putting together a devel-
16 opment that will meet the variety of different housing
17 type issues which are inherent in a planned unit de-
18 velopment.

19 It's probably appropriate, your Honor, for you to
20 have your master review the developmental process and
21 assist the parties to come back before the Planning
22 Board with concept plans which are in your planning
23 master's view workable and feasible. We have no ob-
24 jection to that. We think that is an appropriate
25 outcome of this case.

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1 We don't think an appropriate outcome of this
2 case is to permit the Township, under the use of the
3 wetland issue, to yet win yet another one, round of
4 delay and yet another forum for them to deal with what
5 has been their continuous issue, how they are going
6 to build any affordable housing in that Township.

7 We are prepared to work with the master. We are
8 prepared to work with the Town.

9 I am not as good as Stuie is at telling jokes. I
10 was just pointing out to the Township earlier that I
11 noticed I am on the bridge between all the plaintiffs
12 and the Town.

13 Mr. Convery pointed out it was a bigger chasm
14 than I thought, but we are willing to work with the
15 Township. We would be willing to work with the
16 Planning Master and put together a revised develop-
17 mental scheme that we think will meet the Township's
18 concern about our ability to provide both housing,
19 housing types, affordable housing, commercial and in-
20 dustrial ratables, and, again, your Honor, I think that
21 that is certainly within your Honor's purview of
22 choice.

23 THE COURT: We will take ten minutes then.

24 (A recess is taken.)

25 THE COURT: Now, we are better off. I can

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1 understand the pictures you see.

2 MR. HALL: Your Honor, during the break my client
3 suggested it would probably be useful if I did go to
4 the pictures, being worth a thousand words, and, per-
5 haps, I can take a few minutes to illustrate what we
6 have got and what we don't have.

7 Let me suggest to you, first of all, that when
8 the Township talks about what it's getting and what
9 it's giving up, I would like to have that in some kind
10 of context.

11 The area which my client and the area which Wood-
12 haven have owned since before the lawsuits were in-
13 itiated were always zoned PD at four per acre, and
14 the area that had been designated for zone at SD and
15 SD was supposed to be Special Development and was
16 supposedly going to be commercial and Special Develop-
17 ment. It had Routes 9 and 18 at that point.

18 The Township seems to have created a sense within
19 itself that areas that are wetlands, which are these
20 dark green areas here, plus the areas which are
21 immediately adjacent to them and are going to be rated
22 as wetlands are undevelopable.

23 We are not saying this is the way we are going
24 to build it. We are saying this is the way we sat
25 down with our planners and reviewed what we had, what

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we owned, what other people owned in terms of an overall developmental context.

The Township had indicated earlier that it wanted to have some kind of village perspective on this thing.

So, we have set it up into three different villages. We are not saying that this is the way it's going to develop. We are not trying to put together a Plate A and Plate A-1 in the same context that we had thought about it earlier, but this is a way the project can develop under the current regulatory scheme with the current zoning.

It demonstrates that there are areas which are currently within O & Y ownership and which are currently under the current regulations completely developable.

These areas here within the SD are developable. This area where the regional commercial center had been contemplated is developable partly by O & Y, and it's partly owned by others at this point.

The same kind of economic determinism which makes other areas developable, because once the water and the sewer are put in, the areas that have been at lower intensity uses are not developed at all or going to be developed.

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1 This area sets up three different villages. It
2 sets up a balance of commercial and development
3 ratables that tract the lock step which is set forth
4 in the ordinance and which is the lock step we agreed
5 to earlier.

6 It sets up a transportation system that works,
7 and if it doesn't work, the Planning Board has the
8 right to tell us, "You have got to improve the
9 transportation system."

10 I should point out again the Trans Old Bridge
11 Connector had been not our scheme. It had been part
12 of the Township's Master Plan scheme.

13 We put it on our map. It doesn't particularly
14 help O & Y.

15 We don't care if it's built or not. If we have
16 a workable scheme using -- this happens to be using
17 existing roadways. This happens to be the Old Bridge
18 Englishtown Road. This happens to be the Texas Road.

19 THE COURT: That's another way of saying that the
20 Trans Old Bridge Connector was part of the quid pro
21 quo.

22 You didn't want it, but they did. That's part
23 of the settlement.

24 MR. HALL: It had been a Township Master Plan
25 road. We put it on our plan.

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1 THE COURT: And they want it as part of the
2 settlement.

3 MR. HALL: If we could develop it completely and
4 it would help our development, we would have no ob-
5 jection to doing it.

6 In this case if we set aside land for Old Bridge
7 Trans Connector or any equivalent road, this is the
8 one we would make as an equivalent road and it works
9 fine, we will put it in.

10 If the Trans Old Bridge Connector in a specific
11 location which transverses the wetlands is what the
12 Township wants, we will be glad to dedicate the land
13 to the Township and be glad to set aside whatever
14 resources would be necessary to pay for our fair share
15 of that road.

16 THE COURT: But they shouldn't hold their breath.

17 MR. HALL: But they shouldn't hold their breath
18 waiting for a 404 permit crossing of the wetlands
19 which we have come to ourselves.

20 Your Honor, this is what this so-called Swiss
21 Cheese effect looks like. We have higher development
22 -- high density development.

23 We have recreation areas. We have lower density
24 development. We have recreation areas. There are
25 mid-rise units.

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1 If they want mid-rise, we will be glad to give
2 them mid-rise.

3 We have shown a couple of areas where we could
4 put mid-rise units and so forth.

5 The point is, your Honor, that the current master
6 plan of this area and the current Old Bridge Township
7 Master Plan shows this area as SD land. It shows it
8 as 4D's per acre and it shows it as contemplating
9 having public utilities being provided.

10 That's what this is going to be. There is going
11 to be 4D's per acre on the development portions of
12 the land.

13 There is going to be enormous amounts of open
14 space that had not been contemplated before, and there
15 is going to be a workable transportation system.

16 What you are probably looking for, your Honor,
17 would be Plate A, which is a colored plate.

18 THE COURT: Well, I was looking for two things,
19 but the interesting thing would be to juxtapose that
20 to Plate A.

21 MR. HALL: Well, you will find there is a lot
22 more green on this than there was in Plate A.

23 THE COURT: There is also a lot more holes.

24 MR. HALL: Well, but is it developable? Can you
25 put together a competent development that's going to

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1 provide a set of planned unit developments that is
2 going to have public sewer and water, that is going
3 to have a development of commercial and industrial
4 ratables in lock step with the residential?

5 Are you going to have that in excess of 4D use
6 per acre? Are you going to have public sewer and
7 water?

8 If you look at what we said we were going to do
9 in 1986 and look at the specifics and not just in the
10 areas of generality, then I think you are going to
11 agree that we are providing the specifics of what we
12 were going to be providing.

13 We don't know whether or not we can get a 404
14 permit for the balance of this SD land.

15 We do know we have some 68 acres in this area
16 which can be developed without a 404 permit.

17 THE COURT: Is it reasonable to conclude that in
18 reaching this settlement that Old Bridge cared some-
19 what about how these four and a half miles would be
20 developed and that planning issues were important to
21 them?

22 MR. HALL: There is no doubt they were, which is
23 why they requested the opportunity to have our plan
24 submitted to them before -- at the concept plan level
25 at the Planning Board, and (b) they didn't give up any

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1 right to say this subdivision works or it doesn't
2 give up --

3 THE COURT: The overall planning development
4 under the plats or plates, depending on how you want
5 to pronounce it, which are attached to this or in-
6 cluded in this Blue Book indicate they have got a
7 much different plan, I think you would agree, of
8 development on what I am looking at now at whatever
9 that is -- I guess it's the most current plan or one
10 of the most current alternatives as opposed to what
11 they had in this agreement, and whether or not one
12 says that they couldn't be sure they get any of it,
13 at least they could assume that if they got anything,
14 they get it in the way it's in A1.

15 They wouldn't get a totally different layout of
16 those four and a half acres or a significantly
17 different layout if it was built. If it wasn't built,
18 they wouldn't get it. It would still stay green.

19 MR. HALL: Your Honor, I would submit as a
20 practical matter what they had in 1980, 1981, 1982,
21 '83, '84, '85 was an area which was zoned in three
22 ways: PD, SD and WS. That's what they have got.

23 They had PD land which was the Planned Development
24 Land which is most of our land.

25 They had some areas which were zoned SD for

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1 special developmental, such as RCA or a commercial
2 area, and they had WS land.

3 The fact of the matter is they were wrong in
4 zoning WS land which we have found to our regret we
5 are more WS land than we thought. But we are not
6 changing the overall zoning in that tract. We have
7 WS land.

8 We unfortunately have more than we thought we had.
9 We have PD land. We have SD land and we still have
10 SD land, not as much as we hoped.

11 But basically, the Township's zoning that has
12 been in effect in that Town for, I guess, 15 years
13 now is still there.

14 We haven't changed the zoning. At the Master
15 Plan level this was intended to be a higher density
16 development.

17 They are going to get a higher density develop-
18 ment although, ironically, not quite as high in in-
19 tensity as they looked at before.

20 THE COURT: I am not suggesting your changing
21 the zoning, although there was an argument made at
22 least that you are changing the density.

23 Putting that aside, assuming you are not, Mount
24 Laurel II, which is still good law, I understand, in
25 many areas --

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1 MR.HALL: I thought so.

2 THE COURT: It finishes up the opinion, and I
3 vaguely recall finishing the Warren case when you
4 are talking about planning and Mount Laurel II said
5 something slightly different than I said, which
6 basically said that all this could be accomplished
7 without affecting the quality of life.

8 I suggested that we couldn't throw away planning
9 considerations.

10 Now, I am ready to accept your representation
11 for purposes of argument that this isn't bad planning
12 -- for purposes of argument.

13 But why should the Town be forced to accept al-
14 ternate planning when it didn't bargain for that? It
15 bargained for a substantially different plan, and
16 your picture couldn't be more graphic.

17 I am glad you put it up. That is significantly
18 different than A1. I don't think I need a planner to
19 tell me that.

20 MR. HALL: I am glad you are willing to accept
21 that this is not, for purposes of argument, that
22 plan.

23 THE COURT: Assuming that issue.

24 MR. HALL: What do we have? We have a
25 municipality. I hope I am not going to step on too

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1 many of Barbara's lines.

2 We have a municipality that has since basically
3 1971 had the illusion of a planning process that
4 yields something in the area of affordable housing,
5 but non-habitability.

6 You throw us up. You throw this plaintiff out,
7 and you are going to remove one of the only real
8 opportunities Old Bridge is going to have of actually
9 translating what they purport to offer in their
10 ordinance into some actual housing units that are
11 going to be affordable for lower income people.

12 THE COURT: It seems to me I have heard that
13 argument 11 times and got reversed 11 times, and I
14 agreed on it.

15 MR. HALL: I don't hold --

16 THE COURT: I do hold a record for one-day
17 reversals.

18 MR. HALL: I don't think you got reversed in
19 terms of the principle.

20 THE COURT: I mean, it doesn't hurt, but --

21 MR. HALL: Only a little.

22 THE COURT: -- but it's the old line of the
23 trial judge: I still think I was right.

24 MR. HALL: Your Honor, I think you were
25 right in 1986 when you approved this settlement. I

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1 think you are going to find that if you look at the
2 actual delivery of what the Township thought it was
3 going to get, it's going to get a planned unit
4 developed.

5 It's going to get ratables that are delivered
6 in accordance with the schedule that's set forth in
7 that system, and I might add that if I can relieve
8 Jerry's view, we are obligated when we come back for
9 the concept plan level to start discussing what it
10 is we are going to do for ratables and put together a
11 ratable delivery schedule.

12 We never got that far when we were before them
13 in March of 1986. We never got to the point where we
14 could identify exactly what we were going to build
15 and when we were going to build it. That takes place
16 at the concept plan level and the lock step or the
17 scheduling of that is put into effect at that point.

18 We never got there in 1986.

19 I'd like to get there before 1988.

20 So, one of the things I am going to ask your
21 Honor to do is: When we do finish up this, I hope
22 that your Honor is going to deny the Township's motion,
23 and I hope that your Honor is going to be able to
24 schedule a hearing for the Planning Board to start
25 looking at our concept plan levels, and we would be

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1 delighted if your Honor would order us to work with
2 your master and come up with new Plates A and A1 and
3 B and B1 that will meet the Township's considerations.

4 Thank you, your Honor.

5 THE COURT: Miss Stark.

6 MISS STARK: Your Honor, the Township seems to
7 have forgotten what this case is all about, which
8 is affordable housing.

9 The Supreme Court of New Jersey established that
10 there was a Constitutional right to the realistic
11 opportunity for that housing, not contingent upon how
12 many golf courses or how many ratables or how much
13 commercial development were obtained in exchange for
14 it; specifically is satisfied, specifically agrees
15 with the position taken by the plaintiff developers,
16 that what the Civic League bargained for and got was
17 a fair share of whatever development took place.

18 Now, it appears that the developers will be fully
19 able to construct the housing that was contemplated
20 by the settlement within the fair share period prior
21 to 1992.

22 Construction of the commercial ratables under
23 the judgment is tied to the residential construction,
24 and, again, Old Bridge never had a guarantee that its
25 commercial ratable -- all of the commercial

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development would be built.

The settlement merely provides a framework for decision making.

The settlement -- the review mechanisms are in place, and they are perfectly suited to deal with the revised plans to be submitted by O & Y and Woodhaven.

The issues raised by Mr. Norman are perfectly suited to be dealt with by those mechanisms.

What the Township is asking for here is a replacement mechanism. The Township is asking that the mechanisms, that COAH's mechanism be substituted for the mechanism that they have agreed to.

Mr. Convery said that the councilmen saw things when they agreed to this, to this settlement that are no longer there.

Those councilmen may well have saw things that never were there. That doesn't matter.

Their affidavits, written in hindsight that they presently regret what they agreed to a year ago, is precisely the kind of bootstrapping that characterizes the Town's whole argument here.

THE COURT: I don't read the affidavits to say that they regret what they agreed to a year ago. I read them as saying we are not getting what we agreed

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1 to a year ago.

2 MISS STARK: Your Honor, I believe they are
3 saying we are not getting what we now perceive we
4 agreed to a year ago.

5 THE COURT: All right, I will take that
6 correction. That's all right.

7 But that's quite different than saying what you
8 said, I think.

9 MISS STARK: Well, it's whether -- it comes back
10 to how final the settlement or whether the settlement
11 was an agreement to continue to negotiate, to con-
12 tinue to agree.

13 It's our understanding that under the terms of
14 the settlement, the Township would reject the -- the
15 Township can reject this plan.

16 The Township can reject the plates that were
17 submitted, and then the developers have to come back.
18 All that's required from the Township is compliance
19 within the parameters of the settlement. Good space
20 compliance.

21 Second, even if the judgment were reopened, we
22 submit that this Court should retain jurisdiction of
23 the case and it should not be transferred to COAH.

24 The Fair Housing Act gave the municipalities a
25 specific limited period in which to seek transfer.

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1 Old Bridge is far too late. Mr. Convery ex-
2 pressly conceded that by settling the case, Old Bridge
3 waived its right to transfer.

4 THE COURT: But if there is no judgment of re-
5 pose, I have to transfer it. Don't I?

6 MISS STARK: If there is no reopening the judg-
7 ment with the kind of judgment that's before the
8 Court that this Court signed with a reopening clause,
9 the judgment does not evaporate upon reopening that
10 judgment.

11 THE COURT: I don't mean reopening it, I mean if
12 I vacate.

13 MISS STARK: If the judgment was vacated, but we
14 see no basis in the Township's position, in the Town-
15 ship's argument for vacating -- there is no --

16 THE COURT: No, no.

17 MISS STARK: Yes, your Honor, I understand.

18 THE COURT: The answer is: Yes, I have to
19 transfer it if I vacate it. Okay.

20 MISS STARK: Well, it's -- your Honor, I can't
21 concede that because I don't know whether -- it's our
22 position that under the Fair Housing Act, at this
23 point it would not be proper for the matter to be
24 transferred to COAH. So, if the judgment was vacated,
25 we would be, or it could be argued that we would be

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1 back in the position we'd have a live case pending be-
2 fore a court. The repose would be lifted.

3 THE COURT: But what you are saying to my
4 decision in the Far Hills case in which I said the
5 Supreme Court drew the line at a final judgment.
6 That's what you cited to me, and that's the one that
7 is the one that is over the line on one side doesn't
8 get transferred. And I assume that what I meant was
9 that if you are not over that line, if you don't have
10 a final judgment, you do get transferred.

11 MISS STARK: Within the time read in con-
12 junction with the provisions of the Fair Housing Act,
13 your Honor.

14 THE COURT: That's not what I said in Far Hills,
15 because there the question was, you know, whether the
16 judgment was final or not. And I said, once it's
17 final, it will not get transferred and it's final.

18 MISS STARK: Your Honor, it wasn't necessary to
19 reach the issue here in that case.

20 THE COURT: Okay.

21 MISS STARK: Under the Fair Housing Act, if you
22 have the judgment -- it's not necessary for us to
23 reach that issue either at this point.

24 Finally, only -- there was earlier discussion
25 with Mr. Convery as to the meaning of your Honor's

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1 ruling on mootness, and it was what the Court said --
2 the Court said was, therefore -- this was at page 80
3 of the transcript, your Honor -- "if there is an
4 application to suddenly modify the terms of the agree-
5 ment as opposed to enforce it, that then the Township
6 would not be precluded from countering with the motion
7 to transfer."

8 Implicit in that, your Honor, is that if there
9 were an application by one of the plaintiffs to renege
10 on the agreement, to get out from under the agreement,
11 then the Township would be in a position to counter by
12 transferring. But there has been no such application.

13 THE COURT: But there would have to be, because
14 you are not doing here what you had promised would be
15 done, and any municipality that has attempted to sub-
16 stitute one plan with another has come back and said,
17 is it all right, Judge, and I would expect that these
18 plaintiffs would do that. So, there would have to be
19 a motion.

20 MISS STARK: Your Honor, what would happen under
21 the terms of the settlement if the plaintiff developers
22 went before the Planning Board and the Planning Board
23 said this is a bad plan, we are exactly where we are
24 now.

25 The obligation is then under the terms -- under

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1 the mechanism set forth in the settlement, the obliga-
2 tion is then on the plaintiff developers to come back
3 with a modified plan.

4 THE COURT: Yes. In addition, I am talking about
5 something in addition to that.

6 Even assuming you could satisfy the Planning
7 Board, you would have to satisfy the Court.

8 MISS STARK: Yes, your Honor.

9 THE COURT: Because I would have to make a
10 determination that the new plan represented a
11 realistic opportunity to provide for the fair share
12 as determined by the Court.

13 I might have to downgrade the fair share number,
14 depending on what may ultimately develop, all of those
15 things, and I have done that on several occasions be-
16 cause of site problems as Mr. Hutt has already re-
17 ferred to.

18 MISS STARK: Your Honor, we agree with the Court.

19 Again, on the reopening point and our final
20 point is that at the very least, even if this judgment
21 is reopened, the Court should retain jurisdiction of
22 it and the matter should not be transferred to COAH.

23 It would be inequitable to deprive the parties of
24 the Court's expertise, familiarity with the facts and
25 broad understanding of the goals of this litigation.

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1 THE COURT: Again, I said I thought that was true
2 in a number of other cases. That was a very persua-
3 sive argument to me back then.

4 Apparently, no one was impressed with the
5 expertise. No, I guess the Court said differently.

6 All right. Anything further from the plaintiff?

7 MR. CONVERY: May it please the Court --

8 THE COURT: Briefly.

9 MR. CONVERY: -- an issue was raised after I
10 spoke that I think has to be addressed on behalf of
11 the Township of Old Bridge.

12 Many of the plaintiffs seem to refer to the
13 Township and the Planning Board interchangeably, and
14 that's not true in this case because when the Township
15 Council voted to approve this settlement, it did so
16 as a separate body and as a separate party to this
17 lawsuit.

18 And when it voted to accept this settlement, it
19 agreed to accept Plate A and Plate B without any
20 right of review by the Township Council.

21 Now, the question of whether or not this Plate A
22 and Plate B is part of the settlement, I submit is
23 clear by the language throughout.

24 I would ask any of the plaintiffs to show me
25 one example where it's referred to as anything other

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1 than part of this settlement.

2 Every reasonable inference is that it is part of
3 the settlement. For example, Appendix A, which your
4 Honor referred to earlier, in the first section of
5 A-13 it says concept plan approval hearings. This is
6 page A10 of the Blue Book.

7 It says -- and you can tell that this was drafted
8 by the attorney for O & Y originally because it says,
9 "The Planning Board shall hold hearings to approve
10 plates A and B using the standards set forth in the
11 settlement agreement."

12 It's clear throughout that Plate A and Plate B
13 was a part of this settlement agreement and it was
14 accepted by the Township of Old Bridge in that form,
15 and it's incorporated as part of the Appendix.

16 Now, if we take that next step that's being
17 urged by various plaintiffs and counsel, they are
18 indicating that if the Planning Board is unhappy with
19 the new plate that's submitted, the Planning Board
20 can review it.

21 The Planning Board can recommend changes. The
22 Planning Board, if it says that it's not acceptable,
23 would have it go to the master and ultimately to the
24 Court.

25 There is no mechanism for the Township Council

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1 on behalf of the Township of Old Bridge, to review any
2 subsequent document that's submitted.

3 I think that's significant, because it shows that
4 the Township Council relied upon Plate A and Plate B.

5 In this so-called mechanism to allow the plain-
6 tiffs to take an entirely new plan or call it Plate A
7 or call it Plate B and substitute that for review by
8 the Planning Board doesn't allow for review by the
9 Township Council which means that the Township
10 Council made a decision, based upon what was presented,
11 and now that has changed.

12 I think that to some extent, you know, if you try
13 to draw analogies, I think back to that situation
14 where a number of people bought Cadillacs and they
15 found that they had Chevy engines.

16 It's a real case. In this case I think O & Y
17 came forward, in particular Mr. Brown, and told the
18 Township Council that they were going to get a Cadillac.
19 They were going to get O & Y, with its major holdings,
20 was going to build one of the main shopping centers
21 in the State of New Jersey at the intersection of
22 two State Highways, and now we find out that when you
23 lift up the hood, you don't have a Cadillac, you have
24 a Chevy engine. And I think what you would do if you
25 were a judge and you were placed in that situation,

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1 you would say, I am going to give that purchaser the
2 right to rescind.

3 Well, these concepts, when you apply them to
4 everyday people, should also apply to townships and
5 other entities that have to approve settlements.

6 When this settlement was approved, it was the
7 understanding that it would incorporate Plate A, and
8 there is no mechanism for this Township Council to
9 change it.

10 Furthermore, when your Honor was discussing with
11 Carla Lerman the settlement in question, there was a
12 discussion on page 41 of the transcript whereby you
13 talked about the review process and you made the
14 reference to: Is he or is she reviewing or acting as
15 a super planning board?

16 Now, I submit that if you allow these plaintiffs
17 to submit a new plan to the Township Planning Board,
18 it's obvious that their hired consultant has indicated
19 that the planning won't work in this area.

20 Even if it's referred to the master or ultimately
21 to the Court, you are being asked to substitute your
22 judgment as to what constitutes good planning for Old
23 Bridge.

24 I don't think that was contemplated by the Town-
25 ship Council for the Township of Old Bridge when it

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1 entered into this agreement, and I think that any need
2 for you or a master, no matter how qualified the master
3 is to substitute its judgment for the Township of Old
4 Bridge, was not agreed to and is a basis for the
5 setting aside of this agreement.

6 The last point, your Honor, is, and I will be
7 brief, is the question of the intent of the Township.

8 The Township agreed to pass ordinances to set up
9 a mechanism for a 10 percent set aside. That was done.
10 That's in place.

11 The Township agreed to hold hearings before the
12 Planning Board for a review. That was done.

13 There is no example in this settlement document
14 or judgment where the Township agreed to do something
15 that it did not perceive to do.

16 This reference to bad faith going back to 1971
17 is totally inappropriate. The Township of Old Bridge
18 stood before your Honor on January 24th, 1986, entered
19 into a settlement knowing other towns had refused to
20 implement orders that your Honor had given.

21 Where township councils and mayors were being
22 told they had to appear before your Honor to implement
23 the orders of the Court regarding Mount Laurel, we were
24 commended for cooperating with the Court when we
25 entered into the settlement.

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1 I think the Town acted in good faith.

2 The fact now that there is a drastic change in
3 the amount of wetland on their property, and the fact
4 that it totally upsets the agreement that we entered
5 into, is not the fault of the Township Council of the
6 Township of Old Bridge, and we should not be held to
7 an agreement that was not before us when the agreement
8 was voted upon, and I would ask you to set it aside on
9 that basis. Thank you.

10 MR. NORMAN: Your Honor, one point. I would just
11 direct the Court's attention to page 13, VB3a en-
12 titled Settlement Plan.

13 THE COURT: Where are you?

14 MR. NORMAN: Page 13. This is Roman Numeral V
15 B3a page 13. It's captioned Settlement Plan.

16 It states very specifically, "O & Y and Woodhaven
17 shall have the right to develop their land in accord
18 with the settlement plans set forth on Plates A and
19 B applicable to their land upon the entry of this
20 order."

21 That's what we understand the agreement was.

22 MR. HALL: Your Honor, if I could finish the
23 rest of that phrase, I think that it does demonstrate
24 exactly what was contemplated and what we are seeking
25 today.

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1 That sentence continues: "Provided, one, we
2 had to come before the Planning Board for public
3 hearings; two, the Planning Board had to reach a
4 decision on those hearings."

5 And then we get to the interesting part which,
6 perhaps, we can remind the counsel for the Planning
7 Board and the Township they agreed to: That the
8 Planning Board should either approve a plate and then
9 it is incorporated, the approved plate into the
10 approved settlement agreement or in the event that
11 the Planning Board doesn't approve a plate, the Court
12 is to refer the matter to the master.

13 There was a belief at the time we entered into
14 the agreement that we had tried to incorporate what
15 the zoning was, what the Town's thinking was and so
16 forth.

17 We had the obligation to give the Planning Board
18 an opportunity to fairly review the planning con-
19 siderations.

20 We did not try to stuff it down their throats.
21 They had the opportunity to have a hearing.

22 If they approved the plan with the planning
23 considerations, then it was incorporated into the
24 settlement agreement.

25 If they didn't, we had the opportunity to come

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1 back before the Court.

2 The theory was that we had a plan which we thought
3 was going -- which incorporated the various issues
4 that the Town had looked at, the Town had the
5 opportunity to review the plan -- the planning con-
6 siderations.

7 It was a realistic opportunity. If they ob-
8 jected to it and had legitimate reasons, then we
9 had to come back either before the Court or to satis-
10 fy the Planning Board and that mechanism is set forth
11 in place.

12 Your Honor, let me just conclude with one re-
13 minder: We didn't come into Court seeking a change
14 in zoning. The zoning was there.

15 We didn't come into Court seeking an increase in
16 density. The density was there.

17 What we tried to do was present the Court and
18 the parties and the Town with a way that we could
19 carry out what the existing zoning was at the exist-
20 ing densities.

21 The big issue that had to be dealt with in our
22 judgment was: There were no realistic opportunities
23 for any developer to come into the Township of the
24 planned developer with a clear understanding of what
25 the procedures were, what the standards were, what was

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1 meant by affordable housing and how to achieve a 4DU
2 per acre development.

3 We think that the settlement agreement in all
4 its volume set forth an understandable way for us to
5 proceed.

6 We'd like to live within the context of the
7 standards that we set forth at that time.

8 MR. HUTT: Your Honor, I would like to add one
9 thought to that. The funny part is that Mr. Norman
10 had referred to page 13 because I was going to refer
11 to it too. It constantly uses the words "right to
12 develop," not "the obligation."

13 You asked a question of Mr. Hall about in-
14 structions Mr. Hall was to give to the Planning Board.
15 That's at page 10 of Appendix A.

16 He did give those instructions. He told us in
17 advance he was going to give those instructions, and
18 he did give those instructions.

19 The issue though is this: That he instructed him
20 as paraphrasing, you can't change anything unless you
21 have sound reasons.

22 Obviously, there is sound reasons. There is a
23 lot of wetlands. They can't work.

24 So, now, we are altogether. Now the question
25 comes: What does the settlement agreement say about

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1 what happens when they find there were sound reasons
2 for changing Plate A or Plate B or whatever? It
3 doesn't say they moved --

4 THE COURT: Mr. Hutt, that's not what the parties
5 were contemplating when we were talking about change.

6 We were talking about a plat or plates which
7 bound the Planning Board to their fundamental planning
8 allowed.

9 Unless the Planning Board found some problem with
10 them from a nuts and bolts standpoint or otherwise
11 which would justify a change, but it certainly was not
12 in the contemplation of the parties that the changes
13 would relate to a massive wetland problem, because if
14 it was, they would have never had those plates in the
15 first place.

16 MR. HUTT: Supposing there was a difference?
17 Supposing instead of wetland, as we started to build,
18 you found a toxic wasteland --

19 THE COURT: Over 50 percent of Old Bridge.

20 MR. HUTT: No, over 50 percent of the land.

21 THE COURT: Fifty percent of affordable acres.
22 Is that what you are saying?

23 MR. HUTT: What I am saying is we contemplated
24 going in and changing.

25 THE COURT: No one contemplated that 50 percent

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1 of the land would be unusable for any reason.

2 MR. HUTT: I would point out that that is not
3 true in the case of Woodhaven.

4 THE COURT: I understand it was 30 percent.

5 MR. HUTT: It was 200 acres, more than you
6 thought it was going to be.

7 Out of 1450 acres there was 200 acres more than
8 we contemplated. So, it's not that.

9 But then what you are really saying or implying
10 is if they turned it down, for whatever reason, they
11 could move to reopen the judgment.

12 It says you come up with a new plan.

13 Keeping in mind that we didn't zone the property,
14 as Mr. Hall pointed out, we inherited the zoning from
15 the Town. So did O & Y. They are the ones that said
16 the SD thing by Routes 9 and 18 was there.

17 O & Y didn't ask for that zoning that was there
18 in place.

19 So, if anybody made an error or didn't know, it
20 was them. They never told O & Y and say, hey, you
21 can't build here because there is wetland. So, don't
22 show it on your plate. They had a natural --

23 THE COURT: That was the least convincing of all
24 the arguments in the papers. I mean, to charge this
25 Township with the responsibility of mapping your

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1 wetland is just simply ridiculous. They used the best
2 source of information available to them under what I
3 consider to be appropriate circumstances.

4 To have every planning board in the State of New
5 Jersey survey all of their property and to find out
6 what streets are going where --

7 MR. HUTT: Your Honor, that wasn't --

8 THE COURT: -- and whether a spider's nest is
9 in that area or not to find out whether there is wet-
10 land is absurd.

11 MR. HUTT: My point is: They did rezone something
12 at our request and find out it couldn't work. That
13 zoning was in place before we ever came along, and so
14 all we did was try to comply with their zoning.

15 Now, it comes out later on, neither party knew
16 that you couldn't comply with their zoning, and now
17 the zoning that they made, which we tried to comply
18 with, they should say we should set aside the settle-
19 ment.

20 THE COURT: Something strikes me that had you not
21 liked the zoning, you would have bargained for it as
22 part of the Mount Laurel settlement and changed the
23 zone.

24 You accepted the zoning because you could do it.
25 You accepted the zoning because it would produce Mount

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1 Laurel housing and still you would make a profit.

2 So, I don't know what the relevance of the ex-
3 isting zoning is.

4 MR. HUTT: The relevance is when you asked the
5 question: What did they bargain for and what did they
6 get?

7 THE COURT: Yes.

8 MR. HUTT: We didn't bargain with them to change
9 zoning. We accepted their zoning.

10 THE COURT: No, but they didn't bargain for
11 something they already had either.

12 MR. HUTT: I am sorry?

13 THE COURT: They didn't bargain for something
14 they already had either.

15 MR. HUTT: No, they bargained for three things:
16 They wanted a lower fair share number, commercial
17 and their zoning ordinance density remaining the same
18 without a bonus density. Those are the three main
19 things which is in the settlement agreement.

20 They also bargained for certain standards of
21 development.

22 THE COURT: Think of that, an attorney of your
23 competence, and put yourself on their side, and here
24 you are faced with an unacceptable fair share number,
25 all likelihood that the Council is going to have a

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1 much further reduced number.

2 All likelihood that continued protracted delay
3 will pay off because the tract record demonstrated it
4 at the time of the settlement.

5 They couldn't have done any worse, but not settle
6 unless -- unless the development that they got had
7 some incidents.

8 They were crazy to settle at that point. Weren't
9 they?

10 MR. HUTT: I don't know. I think you are taking
11 it out of context. Their COAH numbers were not
12 available at that time. They didn't know whether it
13 was going to be higher or lower. Nobody knew.

14 THE COURT: I think everyone had a strongly
15 held suspicion, let's put it that way --

16 MR. HUTT: No, your Honor.

17 THE COURT: -- that the numbers -- or at the
18 very least, at the very least they would have gotten
19 the benefit of some additional delay and couldn't have
20 done any worse.

21 MR. HUTT: Your Honor, as you well know, some
22 of these towns got much higher numbers from the COAH.

23 In Monmouth and Southern Ocean County --

24 THE COURT: Initially let's see where they end
25 up.

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1 MR. HUTT: I don't know where they end up.

2 THE COURT: I know where they end up. They will
3 end up lower or virtually lower, and Old Bridge would
4 have had the benefit, after all of these periods of
5 delays, wouldn't they, if they didn't settle? They
6 would have still not had a single plan before them
7 for that matter unless someone wanted to develop in
8 accordance with existing zoning and that kind of thing.

9 The record would indicate that the Court did ask
10 that the parties supply sufficient information to
11 Mr. Raymond -- George Raymond, who has been appointed
12 as Court Master in this case, to give him the oppor-
13 tunity if he could do so to make some judgment as to
14 the scope and extent of the modification involved
15 here.

16 One of the attorneys seemed to believe that my
17 intention was to give Mr. Raymond the job of deter-
18 mining whether there should be a vacation, which, of
19 course, is a matter for the Court.

20 However, there was a legal argument made to him
21 which I consider to be not relevant.

22 But I am not altogether certain that, based upon
23 what occurred today, the plaintiffs are in a position
24 to inform Mr. Raymond fully.

25 However, I will ask Mr. Raymond, since he is

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1 present, I don't intend to take testimony or go beyond
2 this question, but whether Mr. Raymond believes he is
3 in a position or could be in a position to tell the
4 Court definitively how the plan as it existed has
5 been modified.

6 MR. RAYMOND: Your Honor, this plan or any plan
7 that is possible under the current circumstances is
8 very different from the plan that was incorporated as
9 an administration of what was intended by the devel-
10 opers in the settlement.

11 I have to make a lot of assumptions because of
12 the short time, relatively short time that I had to
13 consider this matter. But I would assume that given
14 the existing zoning of the site, the developers came
15 forward to the Town with a plan that they thought was
16 the best plan that they could conceive for the area
17 and for the benefit of the Township partly to induce
18 the Township to grant necessary approvals, but
19 partially because they were trying to develop the
20 best possible plan for themselves into the kind of
21 community that they would build on the site.

22 If the question now is: Can a very desirable
23 community, with the substantial number of units con-
24 taining a substantial number of units be conceived
25 on what is buildable in the area, I would say yes, it

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1 can.

2 If the question now is: Can the amount of non-
3 residential ratables that can be provided be relatively
4 proportionate with what had been intended originally
5 with respect to the reduced number of units, I would
6 say that is possible.

7 If I were asked a question as to whether the
8 Trans Old Bridge Connector is a necessary adjunct to
9 this plan in order to make this plan work, I would
10 say it is not.

11 Its infeasibility would be -- would -- negates
12 the possibility of its being built and the new master
13 plan of the Town recognizes that because it does away
14 with it.

15 So that looking at what is possible on this site
16 in terms of numbers, in terms of satisfaction of the
17 Mount Laurel requirements, in terms of the relationship
18 of non-residential to residential uses, I would say
19 that the plan is a sound plan.

20 THE COURT: One other question. I will give
21 counsel an opportunity if they wish to address a
22 question, but I am not going to get into testimony.

23 When you say it is very different, in what re-
24 spect do you find it very different?

25 MR. RAYMOND: Well, the plan that was originally

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1 conceived was a compact plan with some open space
2 like a central park, but of a size which is quite
3 different from what is contemplated -- what can be
4 developed at the present time.

5 On the other hand, as the map on the stand shows,
6 what the new plan can be described as is a residential
7 community surrounded by a green belt which is also a
8 very sound planning concept.

9 So, I cannot say that this would not be a de-
10 sirable community. I cannot say that this community
11 would impose substantially greater costs on the Town
12 of Old Bridge in terms of services than the original
13 plan, because essentially the area to be covered is
14 about the same, and the fact that the existing roads
15 are going to be used rather than some new roads I
16 don't think are material.

17 THE COURT: And you are not in a position, if I
18 understood you to say, definitively that the
19 commercial uses would be equivalent or non-residential
20 uses would be equivalent to what was there before?

21 MR. RAYMOND: No, they are not equivalent but
22 proportionately, in other words, the number of units
23 and the amount of acreage that can be developed for
24 non-residential uses is referable, comparable given
25 the reduced number of units that the non-residential

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1 development has to support.

2 THE COURT: So, we may be talking about before
3 a major shopping mall, now we may be talking about a
4 reduced mall or maybe a different type?

5 MR. RAYMOND: Yes, it's different, but the number
6 of jobs proportionate to the residential development,
7 reduction of residential development would be roughly
8 comparable.

9 THE COURT: Okay. Anyone else wish to be heard?

10 As indicated this is a defendant's motion. There
11 is a cross-motion by the Civic League which we have
12 not argued and need not be argued concerning 1:10-5
13 enforcement.

14 The Court is going to take the time to try to
15 summarize this second because I assume that there may
16 be the potential for an Appellate review, at the same
17 time I don't want to wish -- I don't want to delay the
18 matter any further, and therefore, I am not going to
19 take the time to write an opinion. So, it's going
20 to take me a certain amount of time to get to the
21 conclusion.

22 The defendants essentially claim that subsequent
23 to the entry of the judgment here, all the parties
24 became aware of an extensive amount of wetland on
25 properties of both of the plaintiffs here, that is,

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1 O & Y and Woodhaven.

2 It appears that the numbers are approximately
3 as follows: O & Y owns approximately 2,640 acres and
4 1,459 of those acres or 56 percent of them are in the
5 wetland area.

6 As I indicated earlier, the upland consists of
7 contiguous parcels of 581 acres, 200 acres are in
8 tracts ranging from 10 to 19 acres and the balance
9 is apparently smaller non-contiguous parcels. I take
10 that information from the report of May 26, 1987.
11 I take it there may be some modification of that.

12 The plaintiff argues -- I am sorry -- the
13 defendants argue that, indeed, there is less upland
14 than I have just indicated.

15 The defendants -- I am sorry -- Woodhaven owns
16 approximately 1,455 acres. It appears that 490 acres
17 or 30 percent of that is wet.

18 The defendants argue that the incentives which
19 induced them to settle are gone for the most part.
20 They contend that the wetland problem makes fulfill-
21 ment impossible, and, therefore, the Township loses
22 all the benefits it had bargained for.

23 Additionally, the general welfare of the Township
24 would not be served, they contend, by enforcement of
25 the judgment.

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1 The defendants argue that this situation is a
2 result of a mutual mistake of fact or newly dis-
3 covered evidence pursuant to Rule 4:50-1(a) and (b)
4 respectively or that it is a basis for a modification
5 of the settlement, based upon impossibility of per-
6 formance in accord with Roman Number III, paragraph
7 A.3.

8 Defendants believe they are entitled to the
9 benefit of the fair share number as calculated by the
10 Housing Council which is roughly one-fourth of their
11 present number.

12 The plaintiffs, Urban League or now Civic League,
13 O & Y and Woodhaven obviously all oppose the motion
14 for similar reasons.

15 The plaintiffs claim that the essence of this
16 settlement agreement was proportionality, which means
17 that the residential development would be lock stepped
18 with the commercial development and that the defendants
19 will receive that on a lesser scale.

20 The plaintiffs, Woodhaven and O & Y, claim that
21 the settlement agreement never mentions anything called
22 a "new town" which the plaintiffs have frequently re-
23 ferred to and that the defendants are only entitled
24 to what was agreed to in the judgment and accompanying
25 documents.

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1 The plaintiffs argue that the proposals as
2 represented in the plates were not written in stone
3 and were subject to modification.

4 They argue that the numbers set forth in the
5 agreement represents ceilings, but do not obligate
6 the plaintiffs to build anything.

7 The plaintiffs state that the agreement does not
8 mention the Trans Old Bridge Connector or a golf
9 course and that the defendants cannot now claim to
10 have relied on such incentives.

11 The plaintiffs state that the plates only serve
12 to prevent the defendants from arbitrarily changing
13 their plans.

14 The existence of a vast amount of wetlands, the
15 plaintiffs argue, is a risk accepted by both of the
16 parties at the time of the settlement.

17 Plaintiffs claim that all parties knew that
18 there were wetlands in the property and they just
19 didn't know how much. So that they cannot now claim
20 a mistake or newly discovered evidence.

21 Additionally, some plaintiffs argue that the
22 Township did not act diligently to discover the extent
23 of the wetlands as would be their burden pursuant to
24 Rule 4:50-1B.

25 Plaintiffs admit that the plates are no longer

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viable but that all the settlement provides for is that the plaintiff is to come back to the defendant with alternate plans which they have, indeed, started to do.

The plaintiffs assert that the reopener clause covers the situation and that the defendants are not entitled to vacate the order, but they may, of course, modify it.

The plaintiffs finally argue that all of the parties contemplated that the order might require a modification at some future point due to the magnitude of the project and the fact that there is a 20-year build-out involved in this settlement.

The plaintiffs state that they can fulfill the essential terms of the order and that there is no impossibility of performance on their part.

The issue before the Court is whether the defendants are entitled to vacate the settlement due to the existence of vast amounts of wetland which were not known to the parties at the time they settled.

And certainly, if they are not entitled to vacate it, the plaintiffs are entitled to some relief in terms of enforcement.

The case law regarding Rule 4:50 has established that to vacate a judgment due to mistake, the mistake

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1 must relate to material facts.

2 The mistake must relate to a past or present
3 material fact to the contract and not to opinions re-
4 specting future conditions as a result of present
5 facts. That is Bauer v. Griffin 104 N.J. Super, 530
6 at -- I am sorry -- 104, 530 at 542 (Law Division) 1969
7 which was affirmed in 108 N.J. 414 (Appellate Division)
8 1970 and certification denied in 56 N.J. 245, 1970.

9 Bauer cites Spangler v. Kartzmark, 121 N.J. Eq.
10 64 at page 68, (Chancery Division 1936.)

11 The Bauer Court observed that Spangler involved
12 a known physical injury concerning the future effects
13 of which all were incorrect.

14 The Court then went on to quote from Reinhardt
15 v. Wilbur 30 N.J. Super 502 at 505, (App.Div 1954) as
16 follows: "The question to be determined is whether a
17 duly executed general release may be invalidated upon
18 the ground of mutual mistake of fact merely because
19 an injury subsequently becomes more serious than
20 the releasor believed it to be or because she sus-
21 tained injuries of which she was not aware at the time
22 of the execution of the release.

23 "The very suggestion of invalidation for such
24 cause is contrary to firmly imbedded principles of
25 law. We cannot shut our eyes to the realities of

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1 everyday practice.

2 "Persons involved in accidents or their repre-
3 sentatives carry on and conclude negotiations pre-
4 cisely because there is uncertainty as to the extent
5 of injuries or liability or both and because of the
6 uncertainty as to the outcome of any ensuing litiga-
7 tion."

8 That is at page 543 of Bauer.

9 Bauer, I might mention, is an interesting case,
10 and I have had the privilege in the last two years of
11 lecturing new judges on the principles of finality of
12 judgment which is rather ironic, and Bauer is one
13 that I always cite.

14 It's a case in which all of the parties assumed
15 that the injured person would die and he fixed them.
16 He didn't die, and, of course, the motion was made to
17 up the amount of the settlement because of the fact
18 that he did not die.

19 The Court in that context used the language which
20 I have just indicated.

21 What these quotations illustrate is that the
22 happening of an accident and the existence or non-
23 existence, that is, the potential for injuries are a
24 bases for entering into a settlement, and the parties
25 recognize that the potential, that the nature of the

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1 injury may change, but they settle rather than run the
2 risk of litigation.

3 These are known risks, and they are at the core
4 of the settlement.

5 In this case the existence or non-existence of
6 wetlands was not a COAH issue at settlement.

7 The risks avoided by settlement were typical --
8 were Mount Laurel litigation risks such as the award
9 of a builder's remedy, satisfaction and a setting of
10 the fair share number, perhaps, avoiding over in-
11 volvement of the master who might rezone the Town
12 rather than giving the Town their freedom to do so,
13 and those types of potential risks facing all
14 municipalities involved in Mount Laurel litigation.

15 While all parties may have been aware of the
16 existence of some wetlands on the properties which
17 consisted of 4,000-plus acres, no one believed them to
18 be a significant factor in the development plans.

19 In fact, Woodhaven provided in its planning re-
20 port of December '85 and February '86, the latter
21 presumably prepared in conjunction with the plats
22 that 203 acres or 14 percent of its property was wet-
23 land.

24 Additionally, Mr. Norman states in his brief for
25 the Planning Board that O & Y had mentioned throughout

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1 the presettlement negotiations that only 14 acres of
2 its property was wetland.

3 I should refer also to defendant's exhibit A-21
4 which is a letter dated December 10th, 1985 from
5 Richard Tomer of the U. S. Corps of Engineers to
6 William Iafe, who is the project engineer, I believe,
7 for O & Y wherein Mr. Tomer states, "Your environ-
8 mental impact report" -- and I will insert the word
9 "indicates" to make it read grammatically -- "there
10 are approximately 14 acres of wetland on site."

11 So, while clearly the parties were aware of the
12 existence of wetland, it's just simply not accurate
13 to say that it was an issue at the time of settlement.

14 It certainly was not central to the settlement
15 agreement. It would be absurd to argue that the
16 parties, especially the Township, recognized a
17 potential for sizable amounts of wetland and then
18 settled the case in the face of that risk.

19 Yet, while the existence or non-existence of
20 wetland was not in issue at the time of settlement
21 and therefore cannot be said to have been material to
22 the settlement at that time, therefore fitting neatly
23 into the cases regarding mistake under Rule 4:50, the
24 extent of the wetland of which the parties now are
25 aware does affect a material aspect of the settlement,

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1 that being the ability of O & Y and Woodhaven to build
2 the planned development as depicted in the plates or
3 at least some reasonable facsimile thereof.

4 Defendant also cites Rule 4:50-1B regarding newly
5 discovered evidence and argue this as another basis
6 for relief.

7 The facts may fit even more neatly under B than
8 A.

9 Rule 4:50-1B provides for relief if the newly
10 discovered evidence would probably alter the judgment
11 or order and which, by due diligence, could not have
12 been discovered in time to move for a new trial under
13 Rule 4:49.

14 In the case of Quick-Chek Food Stores v. Spring-
15 field Twp. 83 N.J. 438 (1980), the plaintiff moved
16 for a new trial citing newly discovered evidence.

17 The Court said, "The law governing motions for a
18 new trial, based on newly discovered evidence, is the
19 same as a motion to vacate, based on newly discovered
20 evidence under Rule 4:50-1B."

21 The Court said, and I quote: "It is well
22 established that it must appear that the evidence
23 would probably change the result that it was un-
24 obtainable by the exercise of due diligence for its
25 use at trial and that the evidence was not merely

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1 cumulative."

2 That is at page 445, citing cases which I have
3 omitted.

4 It may be important to point out at this point
5 that a motion to vacate is addressed to the sound
6 discretion of the trial court guided by equitable
7 principles. See Hodgson v. Applegate 31 N.J. 29 at
8 page 37 (1959) citing Shammas v. Shammas 9 N.J., 321
9 (1952).

10 Furthermore, the trial court's decision will
11 generally be upheld in the absence of an abuse of
12 discretion. See Hodgson at page 37, Quick-Chek and
13 State v. Speare 86 N.J. Super 565 (App. Div. 1965.)

14 Rule 4:50-1B requires that the newly discovered
15 evidence be such as it would probably have changed the
16 result.

17 The Court must use its discretion and attempt to
18 determine if this discovery of vast amounts of wet-
19 land would have changed the result of the settlement.

20 Clearly, defendants claim they would not have
21 settled for the new proposal. They claim that the
22 present package or any alternative that's been given
23 to them constitutes poor planning and the benefits
24 which induced them to settle are gone.

25 The plaintiffs admit that the plates are no longer

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

They also argue that their alternative will constitute a sound, appropriate approach to the satisfaction of the Mount Laurel fair share obligation, and as well constitute good planning.

The Court accepts the fact that the plans were not a guarantee to the letter.

There can be little doubt that the full build-out with all the details shown on the plates, however, was something that was contemplated with some modification in location, size and so forth, and that is what the parties envision.

While the so-called Blue Book is clearly a comprehensive document, the plaintiffs cannot argue that it was a fully integrated agreement wherein parole evidence would not be allowed to explain its meaning.

If they argue that the plates are not guaranteed but are subject to change, it cannot be said to be a complete document, because the development itself is not a part thereof.

It is, therefore, appropriate to consider the present, rather the presettlement negotiations as set forth by Eugene Dunlop in his affidavit and Joan

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1 George in her affidavit.

2 It is also helpful to look at the planning re-
3 ports for each development, because although sub-
4 mitted in February, 1986, they merely explain what is
5 depicted on the plates and were probably prepared in
6 conjunction therewith.

7 Clearly, the plaintiffs' planners were in-
8 tricately involved with the settlement negotiations,
9 and finally it's not inappropriate for the Court to
10 acknowledge its own involvement to the extent that
11 they are matters of record or at least matters un-
12 disputed.

13 It's evident that the parties involved throughout
14 thought and planned with an expectation that there
15 would be a full 20-year build-out.

16 Everyone expected that that was the result of
17 the settlement with some recognition of future un-
18 knowns.

19 For example, Mr. Brown, vice-president of O & Y,
20 stated in his October 6th, 1987 certification at para-
21 graph 30, and I quote, "In alleging that the settlement
22 agreement is no longer valid, the affidavits filed by
23 Eugene Dunlop, Council President and Joan George,
24 Chairperson of the Planning Board, expressed the
25 Township's loss of expectation from the development in

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1 essentially the same context as the alleged inability
2 of O & Y to perform its obligations under the terms of
3 the settlement agreement.

4 "Since O & Y shared these grand expectations for
5 its development, we also share to an even greater
6 degree the significant disappointment ensuing from the
7 realization that due to the impact of the Federal
8 Wetlands, the full potential of the development will
9 never be realized."

10 Mr. Brown goes on to say that what was the
11 ultimate potential and what was actually agreed upon
12 are very different.

13 Picking up the argument that the parties only
14 bargained for what is spelled out in the Blue Book,
15 which does not include the plates at least in that
16 form.

17 So, we see that O & Y at least shared defendants
18 views as to what was initially to be produced.

19 Additionally, the Planning Board reports of both
20 developers are written in terms of full build-out of
21 10,560 units by O & Y and 5,820 units by Woodhaven.

22 The plaintiffs refer to the Trans Old Bridge
23 Connector as the major circulation spine for the new
24 development providing excellent internal access to the
25 Town's center. That is in the O & Y report of February

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1 28, 1986 at page 3.

2 As a major element of a circulation system which
3 will serve not only the residents of Woodhaven, but
4 also the Township at large. That's in the Woodhaven
5 report of February 28, 1987 at page 7.

6 The O & Y planning report further describes the
7 circulation system at page 14, and I quote, "The
8 circulation system connects the villages into a co-
9 hesive community. It has been designed based on the
10 existing road network with the goal of maintaining
11 as much independence from the local roads in the area
12 as possible.

13 "The result is a system comprised of new roads
14 which not only serve the proposed development, but
15 also enhance circulation in the Township as a whole.
16 Each of these roads is an important component in the
17 overall circulation system."

18 The report then goes on to describe the Trans
19 Old Bridge Connector and other roads as shown in
20 Plate A, and it is further stated, and I quote,
21 "The traffic network was designed to operate
22 essentially independent of existing local roadways
23 to preserve these 'country roads' in their present
24 state while providing a higher quality of access to
25 all areas of the development."

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1 A review of the most recent planning report sub-
2 mitted on May 26, 1987 by O & Y shows among other
3 changes a greatly changed circulation system.

4 It provides, and I quote: "Both of the land use
5 alternatives relied primarily on the existing roads --
6 existing road network with necessary improvements
7 and the addition of some minor arterial roads.

8 "While neither of the alternatives is dependent
9 upon the Trans Old Bridge Connector, alternative B
10 includes the Trans Old Bridge alignment because this
11 was a requirement of the settlement."

12 That quote really has two significant meanings.
13 It says gone are the country roads which were bar-
14 gained for, and secondly, that indeed the Trans Old
15 Bridge Connector was a bargain for inducement to
16 settlement as O & Y candidly admits.

17 While the initial circulation system as proposed
18 may no longer be required because of the proposed
19 down-scale in the development, clearly the plans that
20 form the basis of the settlement negotiations are
21 dramatically changed.

22 It is also interesting to note that O & Y's
23 planner perceived the Trans Old Bridge Connector to
24 be a requirement of the settlement. This simply
25 illustrates that even though the plaintiffs may argue

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1 that there were no guarantees, these benefits were
2 clearly the incentive that the defendants argue about.

3 A review of the February 1986 plans and the
4 May '87 plans gives a pretty good insight into the
5 magnitude of the changes and just what benefits are
6 lost.

7 Woodhaven did not submit for the Court's review
8 a new proposal, but clearly even though they state
9 they will still provide the full build-out.

10 Due to the fact that they have at least twice the
11 amount of wetland they believed they had, they must
12 be proposing a significant modification of their plan.

13 This review of the various changes was undertaken
14 to illustrate the extent of change now proposed and
15 to consider the same in light of the requirements of
16 the rule under which the defendants move, that the
17 new evidence be such as would have changed the result.

18 It is clear that the plans are greatly changed.

19 Mr. Raymond indicated in our brief discussion
20 on the record that this is a very different plan, and
21 in the Court's judgment it appears to be of such a
22 magnitude as would compel the Court to conclude that
23 it could have and would have changed the result.

24 The plaintiffs' argument that all the defendants
25 are entitled to is residential development, if it

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1 occurs, being lock stepped with commercial development
2 is simply not persuasive.

3 The defendants bargained for much more than that,
4 and the concept plans were clearly without any
5 question in the Court's mind, the inducement to
6 settle even if the parties did not contemplate that
7 there would be no change. The parties certainly
8 understood that there would be some.

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

15 The plaintiffs' argument that the Township could
16 not rely in any way on the concept plans is very
17 troublesome.

18 The plaintiffs state approval of these plans
19 permits but does not obligate the plaintiffs to build
20 one unit.

21 The defendant is said to be protected by this
22 arrangement from overdevelopment by the maximums set
23 forth, and, of course, there is an argument to be made
24 that I alluded to in oral argument, if anything that
25 the parties anticipated that the plaintiffs would

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1 build even more than is set forth in the plan if they
2 could, because the settlement agreement provides that
3 the plaintiff may acquire additional lands, the in-
4 fill or out-parcels and that these lands would be
5 treated as a part of the plaintiffs' initial holdings
6 and may be developed as the land would be at the time
7 of settlement.

8 Had the Court not believed that this settlement
9 represented a binding promise exchanged by the parties,
10 it may not have approved the settlement.

11 The case law which I will discuss in a minute
12 does not support the plaintiffs' argument in this re-
13 gard.

14 Plaintiffs' argument with respect to the non-
15 binding nature of the concept plans is somewhat be-
16 lied by the various provisions in the settlement
17 agreement itself.

18 I pointed already to A-13, concept plan approval
19 hearings which provides, and I quote: "The Planning
20 Board Attorney shall instruct the Board as to the
21 limited nature of the Board's jurisdiction and the
22 nature of the plans to be reviewed and shall indicate
23 that the plates are at the master plan concept level
24 and are part of the settlement of litigation and
25 cannot be changed without sound reasons."

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1 Additionally, Appendix C beginning at C200 illus-
2 trates that the parties were relying on the concept
3 plans more than the plaintiffs will admit.

4 Thus, I believe, that the parties have relied
5 on plans to a very great degree making allowance for
6 minor variations due to planning considerations and
7 minor unknown conditions.

8 Therefore, the existence of wetlands which re-
9 duce development, this substantially would in all
10 likelihood have changed the outcome of the settlement.

11 Additionally, the plaintiffs argue that the
12 defendants could have discerned the existence of the
13 wetland with the exercise of due diligence. As I have
14 already indicated in oral argument, perhaps, more
15 cryptically this is totally without merit.

16 The plaintiffs themselves state that until they
17 received some preliminary approval, they did not know
18 the type of, or they did not engage in the type of
19 investigation so as to waste money and time on it.
20 That's the plaintiffs' reasoning, although the Court
21 finds it somewhat difficult given the magnitude of
22 the investment in this case.

23 It wasn't the defendants' responsibility to dis-
24 cover the extent of the wetland by going out into
25 the field and surveying four and a half miles of

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1 property. That burden is on the developer.

2 Clearly, the defendants had some obligation, and
3 their master plan, indeed, mapped wetland area in
4 accord with the data available to them.

5 It is certainly not the standard in the market-
6 place to have municipalities survey all of the
7 property within its town or with regard to any appli-
8 cation before it, before it approves a plan, because
9 had the Town approved the plan, the plaintiffs were
10 still subject to State and Federal regulations either
11 implicitly or by operation of law which would have
12 meant approval by all agencies having appropriate
13 jurisdiction in the matter.

14 Thus, it appears that the defendant is entitled
15 to a vacation of the final judgment, based on mistake
16 and/or newly discovered evidence.

17 Yet, due to the magnitude of this case and the
18 magnitude of the defendants' request, it is appro-
19 priate to discuss some of the other relevant con-
20 siderations in a little more detail.

21 The Court is, in light of the fact that the
22 Township also seeks to transfer this case to the
23 Council on Affordable Housing because of a greatly
24 reduced fair share number. If that was not one of
25 its motivations, it could simply enter into a

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1 modification of this plan with the plaintiff.

2 The defendants have even indicated that they
3 believe that they may be able to reduce their fair
4 share number to zero which certainly didn't help this
5 Court in its subjective analysis of this case.

6 Plaintiffs argue that to allow such a result
7 would be an injustice to the Mount Laurel doctrine.

8 Clearly, if the defendants sought to transfer
9 it, based solely on the Council's fair share number,
10 the Court would reject such a motion similarly.

11 As I have suggested, the fact that they even
12 argue is disturbing.

13 While the reopener clause may appear to support
14 such an argument, the colloquy on the record at the
15 compliance hearing would preclude any relief of that
16 type.

17 The Court specifically inquired whether the fair
18 share number was solid and there was no dispute that
19 it was.

20 Yet, if the defendant is entitled to a vacation
21 of the judgment as opposed to a modification due to
22 impossibility of performance in accordance with the
23 reopener clause, clearly then they are entitled to
24 a transfer to the Council pursuant to the language
25 in Hills Development v. Bernards 103 N.J. 1(1986),

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1 that point was virtually conceded by the plaintiffs
2 with some hesitation.

3 So, the question becomes whether the defendants
4 should be allowed to vacate or does the reopener
5 clause cover this situation, and must the defendants
6 abide by that agreement as plaintiffs argue?

7 The Court has made it clear, I hope, that the
8 concept plans were more integral to the agreement than
9 the plaintiffs will admit. In fact, the plans pro-
10 vided the basis for the settlement. That is not to
11 say that any rights vested pursuant to the plans,
12 because the Municipal Land Use Law provides to the
13 contrary. See N.J.S.A. 40:55D-10.1.

14 However, they are strong evidence of what the
15 parties agreed to. Granted there was room for some
16 flexibility, some unknowns, to find that the plates
17 were practically irrelevant as to -- as the plaintiffs
18 seem to argue would be to find that the defendants
19 were bound by the terms of agreements to which the
20 plaintiffs were not bound.

21 The plates were said to bind the Planning Board,
22 but not the defendants.

23 In fact, Woodhaven states in its brief, "It is
24 not as though defendants have a right to specific
25 performance from the plaintiffs with regard to

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1 construction. Woodhaven states that all the Blue Book
2 guaranteed was proportionality.

3 It says the Blue Book only requires that if there
4 is to be any residential development, then the
5 commercial development must be lock-stepped with any
6 residential development pursuant to the staging per-
7 formance schedule. This lock-step development is
8 all the Township has been promised and is exactly
9 what the Township will get. That's at page 26 of the
10 brief.

11 If the proposals as set forth on the plates
12 were not seen as integral to the settlement, it's
13 doubtful whether all the essential ingredients of
14 the contract would be present.

15 The duties of the parties must be to set forth
16 with enough specificity that the Court can determine
17 what performance was to be rendered.

18 See Heim v. Shore 56 N.J. Super 62 at page 72
19 (App.Div. 1959.)

20 While the mechanism for dealing with the applica-
21 tion is present and certain necessary ordinances, a
22 major element is missing, and that is what, in fact,
23 is being proposed if it is not the plates as attached.

24 A concept judgment -- I am sorry -- a consent
25 judgment is a form of contract as stated in Stonehurst

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1 at Freehold v. The Township Committee of Freehold 139

2 N.J. Super 311, 313 (Law Division) and I quote:

3 "While a consent judgment is of the nature of both
4 a contract and a judgment, it is not strictly a
5 judicial decree, but rather in the nature of a con-
6 tract entered into with the solemn sanction of the
7 Court.

8 "A consent judgment has been defined as an agree-
9 ment of the parties under the sanction of the Court
10 as to what the decision shall be."

11 I have omitted citations.

12 In the case of -- and I will spell it:

13 G-i-u-m-a-r-r-a v. Harrington Heights 33 N.J. Super
14 178, 190 (App. Div. 1954) affirmed 18 N.J. 548 (1955),
15 the Appellate Division stated, "The modern concept is
16 that in the case of bilateral contracts not only are
17 the promises consideration for one another, but the
18 parties also contemplate that the performances
19 promised shall be exchanged one for the other.

20 "Failure of consideration exists wherever one,
21 who has promised to give some performance, fails with-
22 out his fault to receive in some material respect the
23 agreed exchange for that performance.

24 "Where the counter promise to perform relates to
25 a material matter, the disappointed party has the right

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1 to rescind the contract."

2 Plaintiffs argue that they are permitted, but
3 not required, to build one thing. If this was the
4 case, clearly there would be a failure of considera-
5 tion.

6 Lock-stepping is not all that the defendants
7 bargained for. The concept plans are representing
8 of the presettlement negotiations and evidence of
9 what induced the defendants to settle.

10 The parties contemplated and planned for one of
11 the largest, if not the largest development in the
12 State of New Jersey.

13 The magnitude of the change, and particularly at
14 the very initial step of development in the Court's
15 opinion results in a totally new plan, be it appro-
16 priate, be it sound planning, it is not what we have
17 when we began and it is not in any sense truly
18 comparable to what we have when we began.

19 Plaintiffs' return promise was to develop a
20 project such as depicted in Plates A and B.

21 An essential characteristic of an enforceable
22 contract is that its obligations be specifically
23 described in order to enable a court to know what was
24 promised and what was undertaken.

25 See the Malaker Corporation v. First Jersey

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1 National Bank 163 N.J. Super 463, 474 (App. Div. 1978).

2 As Woodhaven itself put it: If the developers
3 were able to prove to the Planning Board that the
4 plates work in a planning sense, and in accordance
5 with the standards set forth in the Blue Book
6 appendices, then the Planning Board could not have
7 required something else. That's at page 5 of the
8 brief.

9 Thus, while conceptual approval does not vest
10 rights, apparently these plates resulted in their
11 being incorporated into a settlement agreement, and
12 the Planning Board review was limited to sound planning
13 considerations.

14 So, it is clear that the concept plans were in-
15 deed material to the settlement, allowing the same type
16 of flexibility as one might expect in dealing with
17 nuts and bolts as opposed to major concepts.

18 With this in mind I return to the reopener
19 clause and whether it covers the present situation.

20 In the landmark case of Tessmar v. Grosner 23
21 N.J. 193 (1957), Chief Justice Vanderbilt said, "In the
22 quest for the common intention of the parties to a
23 contract, the court must consider the relations of
24 the parties, the attendant circumstances and the
25 objects they were trying to obtain.

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1 "An agreement must be construed in the context
2 of the circumstances under which it was entered into,
3 and it must be accorded a rationale meaning in keeping
4 with the express general purpose."

5 At page 201.

6 The reopener provided in relevant part for
7 modification, based on impossibility of performance.
8 Clearly, performance is as initially contemplated,
9 is no longer possible, yet at various -- as various
10 parties have argued, modifications were contemplated
11 because of the size of the project and the fact that
12 it would take 20 years to build.

13 What might happen to the market and what regula-
14 tions might come into play which would affect its
15 ability to perform, were really what was covered by
16 the reopener agreement as has been argued by the
17 plaintiffs here.

18 It would be disingenuous to argue that the
19 parties contemplate having to totally revise the
20 plans before any approvals were received.

21 Really, what is proposed is not a modification,
22 but it is a brand new plan. Both developers admit
23 the plans designated as Plates A and B are no longer
24 viable due to the magnitude of the change and in light
25 of what the Court believes the parties reasonably

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1 intended, given the circumstances at the time the
2 reopener clause does not cover the situation.

3 Mr. Convery points out in his brief that the
4 Court denied the motion to transfer, based on moot-
5 ness but stated on the record that a change in the
6 terms of the settlement may justify a renewal of the
7 motion.

8 While the Township -- I am sorry -- while the
9 Court spoke in terms of the Township opposing the
10 modification requested by the plaintiffs, in fact,
11 this is what has happened. And, as I said earlier,
12 the plaintiffs would have had to make an application
13 to this Court for modification sooner or later.

14 The Township argues and the Court agrees that the
15 change is so significant that the Township is en-
16 titled to vacate the judgment and to have its case
17 transferred to the Housing Council.

18 I say that sentence with a great deal of re-
19 luctance with a full knowledge of the enormous
20 amount of effort and time that has gone into this,
21 and I presume in good faith from all parties.

22 The fact of the matter is the Court cannot inter-
23 pose any sense of what is just and fair in this case
24 and have it comport with what the Supreme Court has
25 felt to be just and fair in all of the cases which

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1 were in a similar posture which were transferred.

2 Many cases were at the brink, so to speak, of
3 housing, and nonetheless, were transferred.

4 This case is now without a final judgment, and
5 the Court believes that it has no alternative but to
6 transfer the case to the Council on Affordable
7 Housing pursuant to the Hills decision.

8 The plaintiffs' motion is therefore moot. I
9 recognize there could theoretically be some obliga-
10 tion on behalf of this Township to pursue the non-
11 payment of fees that has apparently admittedly
12 occurred here. That is not something which the Court
13 need deal with at this particular juncture.

14 I also recognize that there is pending an appeal
15 with regard to the validity of the collection of those
16 fees in another setting, and the Court will not at
17 this time entertain any motion to enforce that aspect
18 of the judgment.

19 Of course, it's a substantial question whether
20 I have jurisdiction to enforce anything at this
21 point given the vacation of the judgment which I have.

22 Lastly, the plaintiff Woodhaven did argue that
23 if the settlement is vacated as to O & Y, it need not
24 be vacated as to Woodhaven for the reasons which I
25 have stated, perhaps, in too much length.

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1 The defendant is entitled to a vacation as to
2 both plaintiffs. The settlement with respect to the
3 two parties is totally inter-related and inter-
4 dependent.

5 The defendant was induced to settle with two
6 parties, based upon the total package because of what
7 each could contribute towards an integrated develop-
8 ment.

9 Therefore, the vacation will apply to both of
10 the plaintiffs.

11 All right. Counsel can submit an order.

12 MR. NORMAN: Thank you, your Honor.
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C E R T I F I C A T E

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

10
11 Judith R. Marinke
12 JUDITH R. MARINKE, C.S.R.
13 Official Court Reporter
License No. XI-00392

14 Dated: Oct 22, 1987
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