

CA - Old Bridge

13-Apr-1988

Motion for Reconsideration and Rehearing (Transcript)

pgp. 44

CA 002419M.

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION  
MIDDLESEX COUNTY/OCEAN COUNTY  
(Mount Laurel II)

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URBAN LEAGUE OF GREATER DOCKET NO. C-4122-73  
NEW BRUNSWICK, et al, :

Plaintiffs, :  
vs. :

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

Defendants, :  
and :

O & Y OLD BRIDGE DEVELOPMENT SUPERIOR COURT OF NEW JERSEY  
CORPORATION, A Delaware LAW DIVISION  
Corporation, MIDDLESEX COUNTY/  
Plaintiff, OCEAN COUNTY  
and DOCKET NO. L-009837-84 PW &  
DOCKET NO. L-036734-84PW

WOODHAVEN VILLAGE, INC., a :  
New Jersey Corporation, :

Plaintiff, :  
vs. :

THE TOWNSHIP OF OLD BRIDGE in :  
the County of Middlesex, a :  
Municipal Corporation of the :  
State of New Jersey, THE :  
TOWNSHIP COUNCIL OF THE TOWN- :  
SHIP OF OLD BRIDGE, THE :  
MUNICIPAL UTILIITIES AUTHORITY :  
OF THE TOWNSHIP OF OLD BRIDGE, :  
THE SEWERAGE AUTHORITY OF THE :  
TOWNSHIP OF OLD BRIDGE and :  
THE PLANNING BOARD OF THE :  
TOWNSHIP OF OLD BRIDGE, :

Defendants. :  
x - - - - - x

Place: Ocean County Courthouse  
Toms River, New Jersey

Date: April 13, 1988

*Motion for  
Reconsideration  
&  
Rehearing*

Judith R. Marinke, C.S.R.

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B E F O R E:

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

TRANSCRIPT ORDERED BY:

YVONNE MARCUSE

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

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

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Attorneys for O & Y Old Bridge Development Corporation  
BY: THOMAS JAY HALL, ESQ.

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

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

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

*Judith R. Marzinke, C.S.R.*

1 THE COURT: This is denominated as a motion for  
2 reconsideration, and I might just say in passing with  
3 the hope that somebody reads this, that I believe it  
4 evidences the fact that Rule 4:49 should not have been  
5 amended in the way that it was amended. Because if the  
6 rules contemplate this type of motion, it may allow  
7 this type of motion. I take it that there is no  
8 decision that the Court can make that is not subject to  
9 one of these motions.

10 It does appear, however, that the motion at least  
11 facially falls under that rule. The motion was made  
12 by Woodhaven.

13 I note that the decision in the prior motion at  
14 page 128 of the transcript the Court says, "Lastly,  
15 the plaintiff Woodhaven did argue that if the settle-  
16 ment is vacated as to O & Y, it need not be vacated as  
17 to Woodhaven for the reasons which I have stated, per-  
18 haps, in too much length." The "defendant" should be  
19 "defendants" is entitled to a vacation as to both  
20 plaintiffs. The settlement with respect to the two  
21 parties is totally interrelated and interdependent.

22 "The defendant was induced to settle with two  
23 parties based upon the total package because of what  
24 each could contribute towards an integrated develop-  
25 ment.

*Judith R. Mazinke, C.S.R.*

1           "Therefore, the vacation will apply to both of  
2 the plaintiffs."

3           Mr. Hutt.

4           MR. HUTT: Your Honor, what you just read was, as  
5 you previously remarked, just a couple of paragraphs  
6 out of a rather lengthy transcript or lengthy oral  
7 argument and a lengthy decision by the Court.

8           That decision by you in the previous pages, at  
9 least the way I read it, was fundamentally related to  
10 your ultimate decision that the effect of these massive  
11 amounts of wetlands that occurred in O & Y meant that  
12 the Town didn't get what they bargained for.

13           You used a lot of reasons for it, and I am not here  
14 to quarrel about the reasons, and you also used, if you  
15 will notice, after the recess, a map had been put up on  
16 the board and you asked the master relating to that map,  
17 that map was put on by Mr. Hall and nobody had ever seen  
18 it before, and all of the remarks that the Court made  
19 that day as far as I am concerned related to O & Y, and  
20 then there was the tail end problem.

21           So, I was concerned, and the reason for the motion  
22 was that the thrust of the argument and Mr. Raymond's  
23 remarks related to what could happen with O & Y, could  
24 they produce what they originally said they would pro-  
25 duce, and the answer was, no.

*Judith R. Marzinke, C.S.R.*

1           Now, subsequently, both by verbal conversation  
2 with you and with your letter to me of December 1st,  
3 1987, you stated, and I quote from the letter: "Having  
4 received your letter of November 18th. . ."

5           THE COURT: Can I interrupt you for just a second?

6           You made reference to Mr. Raymond's comment in  
7 response to the Court asking him whether -- whether he  
8 could state definitively how the plan as it existed  
9 has been modified.

10           He had before him at that time your letter of  
11 August 31, 1987. He had on the board the O & Y plan,  
12 but you have forwarded him a rather comprehensive  
13 letter misstating the Court's position rephrasing the  
14 facts and several other inaccuracies.

15           But in any event, he had Woodhaven's position  
16 before him as well when he made the comment that he  
17 made. Didn't he?

18           MR. HUTT: No, your Honor. In fact, you stated  
19 yourself that Woodhaven had not yet submitted a plan  
20 to him and that --

21           THE COURT: No. I said he had what you submitted  
22 in your letter of August 31.

23           MR. HUTT: What I submitted in my letter of  
24 August 31 was an argument that the plan could produce  
25 a desirable result, because, frankly, Mr. Hall and I

*Judith R. Mazinke, C.S.R.*

1 thought that was the issue facing us.

2 THE COURT: Well --

3 MR. HUTT: You said that was not the issue. The  
4 issue was whether it changed, whether it's a desirable  
5 result or not, and as a result, he has never gotten --  
6 you said yourself in the transcript, your Honor, he had  
7 never gotten a revised plan from us as to whether or  
8 not the revised plan which substantially changed the  
9 existing plan.

10 THE COURT: I don't think that's accurate.

11 Your letter of August 31 -- I am not saying what I  
12 said you mischaracterized just now, that is --

13 MR. HUTT: You are saying I didn't mischaracterize  
14 it.

15 THE COURT: Your letter of August 31st, 1987 to  
16 Mr. Raymond included, for whatever reason, a copy of  
17 your answering brief to the defendant's motion. All  
18 right?

19 It also included a plan entitled Land Use and  
20 Road Alignment prepared by the Salkan Group dated  
21 August 26, 1987, a report entitled Project Planning  
22 Report of Woodhaven Village dated August 26, 1987 and  
23 prepared by the Salkan Group.

24 Mr. Raymond had all of those things in his  
25 possession and presumptive knowledge when, on September

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

1 14th, he responded to the Court's question of what the  
2 impact was on the plan that was contemplated initially.

3 MR. HUTT: Your Honor, I respectfully submit you  
4 are in error.

5 You pointed directly to the map that was put on  
6 the board. The transcript shows it.

7 You directed whether you said --

8 THE COURT: You are not responding to my  
9 question. He did have -- he did have Woodhaven material  
10 at the time he answered whatever I asked him.

11 MR. HUTT: As a matter of fact, you say he didn't,  
12 and I agree with you. You said right in the transcript  
13 and he didn't.

14 THE COURT: You are not right, but why don't you  
15 stay with my question? Whatever I said is evident  
16 from the transcript.

17 MR. HUTT: That's true.

18 THE COURT: And if you are right, you are right.  
19 But am I not right in what I am asking you now?

20 MR. HUTT: No, you are not right.

21 THE COURT: Okay. Why not?

22 MR. HUTT: Because we did not submit a plan to  
23 show him as to whether or not -- we had not even done  
24 them -- as to whether or not --

25 THE COURT: What did you submit then?

*Judith R. Marzinke, C.S.R.*



1 MR. HUTT: We have it here. We submitted him only  
2 one plate. There was another plate. In fact, we  
3 actually -- I actually have it here today.

4 We never submitted it to him because it was done  
5 afterwards.

6 THE COURT: Well, what is the land use and road  
7 alignment plan of August 26, 1987 and the project  
8 planning report of August 26, 1987?

9 MR. HUTT: That is not a plan showing where the  
10 villages are, where the densities are, where the public  
11 properties are and so forth. It was just a road  
12 alignment.

13 THE COURT: There is two separate plans?

14 MR. HUTT: That's right. We only submitted one.

15 THE COURT: Pardon me?

16 MR. HUTT: That is correct. We only submitted  
17 one. One plate and not a new plate -- not a second.  
18 There is an A1 and B1.

19 THE COURT: They were not the same plans, were  
20 they, as in the Blue Book?

21 MR. HUTT: That's correct.

22 THE COURT: That is correct?

23 MR. HUTT: That is correct. We didn't even submit  
24 the second plan.

25 THE COURT: But he had information before him at

*Judith R. Marzke, C.S.R.*

1 the time that he responded to the Court on September  
2 14th.

3 MR. HUTT: He had a new plate B, but not a new  
4 plate B1, your Honor.

5 THE COURT: Here's what he had before him August  
6 -- that's one of the two things he had before him.

7 The other thing is also submitted for the Court  
8 subsequently because it was omitted in the submission  
9 to the Court in December.

10 Is this document that I am holding, which is  
11 dated August 26, 1987 different or the same as the  
12 plates that were in the so-called Blue Book or Black  
13 Book, depending on what cover you got?

14 MR. HUTT: If they were by Salkan, they were  
15 different.

16 THE COURT: Sure. Okay.

17 Now, so he did have within his contemplation what-  
18 ever these reports and plans show when he answered my  
19 question.

20 MR. HUTT: Your Honor, he did not have our plan  
21 and he did not -- your question was addressed to the  
22 plan on the board.

23 THE COURT: Don't tell me what my question was  
24 addressed to. My question was addressed to whatever it  
25 says at page 90 --

*Judith R. Marzke, C.S.R.*

1 MR. HUTT: -- 96.

2 THE COURT: It starts at 95 of the transcript.

3 MR. HUTT: That is correct.

4 THE COURT: And whatever my question says somebody  
5 can interpret.

6 When he answered as follows the fact is that he  
7 had this new information before him. He said, "Your  
8 Honor, this plan or any plan that is possible under  
9 the current circumstances" -- so, he knew some circum-  
10 stances -- "is very different from the plan that was  
11 incorporated as an administration of what was intended  
12 by the developers in the settlement."

13 MR. HUTT: That's correct. And he was referring  
14 to the O & Y plan, your Honor.

15 THE COURT: Is that evident?

16 MR. HUTT: Pardon?

17 THE COURT: Is that evident?

18 MR. HUTT: Yes, it is, because that was the plan --  
19 that was the plan that was on the easel, and in  
20 addition to which I wrote a letter, your Honor. I  
21 spoke to him subsequent to the hearing and that was part  
22 of my motion for not only reconsideration, but re-  
23 argument -- for a rehearing.

24 I spoke to him. He told me even after the hearing.  
25 I asked him exactly that question and he said to me,

*Judith R. Marzke, C.S.R.*

1 and that is why I made the motion for not only re-  
2 consideration, but rehearing to clear up the record  
3 on that point.

4 THE COURT: Well, certainly Mr. Raymond has never  
5 told this Court that, and it's totally unfair to the  
6 defendants to so represent it at this stage.

7 There is nothing in the record to indicate that.  
8 If you look at the transcript at page 95, my question  
9 to him, which appears to you to be obvious, is not  
10 obvious to me.

11 My question to him is -- well, let's back up.

12 Page 95 the Court says, "The record would indicate  
13 that the Court did ask that the parties supply  
14 sufficient information to Mr. Raymond -- George  
15 Raymond, who has been appointed as Court Master in this  
16 case, to give him the opportunity if he could do so to  
17 make some judgment as to the scope and extent of the  
18 modification involved here."

19 I went on to say gratuitously, "One of the  
20 attorneys seemed to believe that my intention was to  
21 give Mr. Raymond the job of determining whether there  
22 should be a vacation, which, of course, is a matter  
23 for the Court.

24 "However, there was a legal argument made to him  
25 which I consider to be not relevant."

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

1 I was referring to your submission of your brief  
2 but -- then, I say, "However, I will ask Mr. Raymond,  
3 since he is present" --

4 MR. HUTT: Sir, you missed what I consider to be  
5 an important section.

6 THE COURT: Oh, you want me to read that sentence?

7 MR. HUTT: Yes.

8 THE COURT: "But I am not altogether certain that,  
9 based upon what occurred today, the plaintiffs are in a  
10 position to inform Mr. Raymond fully."

11 MR. HUTT: Exactly.

12 THE COURT: Whatever that means. I don't know  
13 that it means anything.

14 In other words, maybe he didn't have all the infor-  
15 mation -- that's what I assumed -- maybe he didn't have  
16 all the information he needed, and he was going to say  
17 to me, Judge, I don't know. I can't answer your  
18 question. Okay?

19 So, then I went on to say, "However, I will ask  
20 Mr. Raymond, since he is present, I don't intend to  
21 take testimony or go beyond this question, but whether  
22 Mr. Raymond believes he is in a position to tell the  
23 Court definitively how the plan as it existed has been  
24 modified."

25 MR. HUTT: Which plan are you talking about? The

*Judith R. Mazinke, C.S.R.*

1 plan was in the singular.

2 THE COURT: Why didn't he ask me?

3 And he responds saying I didn't say the plan on  
4 the board. I didn't say O & Y's plan. I said the plan,  
5 and all through here I was referring quite clearly to  
6 Woodhaven's and O & Y's plan, and you can see refer-  
7 ences, many references to Woodhaven in the transcript  
8 which I'd be happy to take the time to point out to  
9 you, since I have marked them all, and Mr. Raymond  
10 responds, "Your Honor, this plan or any plan that is  
11 possible under the current circumstances is very  
12 different from the plan that was incorporated as an  
13 administration of what was intended by the developers"--  
14 plural -- "in the settlement."

15 It was obvious to me that Mr. Raymond was respondi-  
16 ng to a total question.

17 Frankly, I don't think that is terribly important,  
18 because it was obvious to me without Mr. Raymond re-  
19 sponding that what he said was correct.

20 And the Court so stated in the last sentence of  
21 the opinion which I started this argument with.

22 MR. HUTT: Your Honor, I can only tell you that  
23 when you said "this plan," there was a plan on the  
24 easel. You pointed to it.

25 THE COURT: I didn't say "this plan." I said,

*Judith R. Mazinke, C.S.R.*

1 "the plan."

2 MR. HUTT: The plan. When Mr. Raymond testified  
3 he said, "this plan," your Honor, "this plan," and he  
4 pointed to the one on the board.

5 THE COURT: Or any plan, he said.

6 MR. HUTT: Okay. But he pointed to the one on  
7 the board.

8 THE COURT: He said any plan. What he was saying  
9 was you can't possibly fulfill the contemplation of the  
10 parties under the present circumstances. That's the  
11 thrust of what he said.

12 MR. HUTT: You asked him specifically was it a  
13 different plan regardless of whether it was a reasonable  
14 plan.

15 He says, it's a reasonable plan, but I cannot say  
16 it's a different plan.

17 THE COURT: You persist and mischaracterized when  
18 I asked him what he said. That's throughout your  
19 present brief, and now through your argument.

20 I didn't ask him that at all. I said, can you  
21 tell "the Court definitively how the plan as it existed  
22 has been modified"? That's all I asked him.

23 MR. HUTT: He answers. And at the bottom of page  
24 97 you say at line 20, "The Court; One other question.  
25 I will give counsel an opportunity if they wish to

*Judith R. Martinke, C.S.R.*

1 address a question, but I am not going to get into  
2 testimony.

3 "When you say it is very different, in what respect  
4 do you find it very different"?

5 And then he goes on to answer. And then he keeps  
6 on pointing out the fact that -- this whole colloquy  
7 here is that the plan could be desirable, could be  
8 suitable, could be nice, but I got to tell you it's a  
9 different plan.

10 THE COURT: We haven't got the plan we had when we  
11 began.

12 MR. HUTT: That is right. That is right.

13 THE COURT: That's a great line, but somebody  
14 else wrote it. It's from Fiddler on the Roof, you  
15 think?

16 MR. HUTT: That's right. You quoted, your Honor,  
17 from it.

18 THE COURT: Yes.

19 MR. HUTT: And if there was any doubt about that,  
20 we would have had Mr. Raymond in Court here this morn-  
21 ing, because, frankly, as I started to say on your  
22 letter to me of December 1st, 1987, you in effect are  
23 saying you don't care whether it was a different plan  
24 or not because you say, having received your letter of  
25 November 18th -- get my letter out for November 18th --

*Judith R. Mazinke, C.S.R.*



1 "I am satisfied that there is no reason for this  
2 motion to be heard."

3 The Court was entirely aware that Woodhaven was a  
4 completely independent project. Furthermore, the  
5 Court assumed for purposes of the motion that the  
6 Woodhaven project would not be substantially reduced  
7 due to the wetland problem which existed in Old Bridge.

8 Notwithstanding that fact, the Court expressed  
9 clearly on the record that the Woodhaven project was  
10 an integral part of the overall settlement and could  
11 not be separated from O & Y.

12 Based on that fact, I could see no reason asserted  
13 by you for reasonable condition.

14 So, you in your mind, because of my letter of  
15 November 18th, I think -- have you got it there? There  
16 was a copy that I sent to Raymond --

17 THE COURT: Yes. In other words, yes, your  
18 November 18th letter is attached to my response to you.

19 At the oral argument we did not have the extent or  
20 scope of possible wetland impact on Woodhaven for sure,  
21 although there were representations made, estimates,  
22 guesses, and they are referred to in the record rather  
23 clearly.

24 Basically what I was saying was I didn't care.

25 MR. HUTT: Exactly.

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

1 THE COURT: It could be fully buildable as far as  
2 I was concerned. It could be fully buildable in  
3 accordance with the plan that you gave to the Town,  
4 and nonetheless, I ruled that the judgment should be  
5 vacated.

6 MR. HUTT: Well --

7 THE COURT: So that -- that's what made me wonder  
8 how there can be any basis for reconsideration, because  
9 I had given you every benefit of the doubt in terms of  
10 the arguments you are making as to the separate  
11 viability of this plan.

12 MR. HUTT: Well, your Honor, I respectfully submit  
13 that you did not do that at the time of the initial  
14 decision. You didn't say you gave every doubt.

15 Your letter now makes it clear that that is now  
16 your position, which is fine, but your oral decision  
17 did not in any way state that, assuming that you didn't  
18 have to change it altogether, I still think you should

19 You never said that in your oral decision.

20 Your decision was based on the fact that you

21 that the Woodhaven plan would now, any new

22 plan would now have to be different than the

23 COURT: Where do I say that?

24 HUTT: You gave the reasons starting in your

*Judith R. Mazinke, C.S.R.*

1 opinion of the fact that -- as you said in the quote  
2 that you made, you talk about all of the reasons you  
3 gave before, and when you talked to Woodhaven, simply  
4 says, "For the reasons that I had said."

5 You didn't say that it would have made a  
6 difference. Your reasoning was that the Town did not  
7 get what it perceived it was going to get such as a  
8 golf course, shopping centers, employment centers and  
9 things like that, and all of those items, by the way,  
10 golf course, huge employment centers, the other items  
11 that you mentioned was nothing that Woodhaven in the  
12 settlement agreement had agreed to provide.

13 So, all of your remarks were directed towards the  
14 result of the Town not being able to get it, because  
15 O & Y was the one that was supposed to provide it, and  
16 they couldn't provide it.

17 THE COURT: If you go back to, rather than looking  
18 at the decision, you go back to the preceding 95 pages  
19 or oral argument, you can find numerous occasions where  
20 you talked about the interrelationship that O & Y was  
21 providing all the goodies, and therefore, the Town was  
22 tolerating or accepting the settlement with Woodhaven.  
23 Yes, that's true.

24 Woodhaven wasn't providing any of the -- and the  
25 Court recognized that -- any of the nice things about

*Judith R. Mazinke, C.S.R.*

1 this as far as the Town, the commercial ratables and  
2 so on and so forth of a significant nature, but that  
3 Woodhaven fit into the plan and, therefore, Old Bridge  
4 was willing to take Woodhaven along with O & Y.

5 MR. HUTT: Okay. And that's the position in your  
6 December 1st letter, and I understand that position.

7 All I am saying is that --

8 THE COURT: Why are we here today if you under-  
9 stood it?

10 MR. HUTT: Well, because --

11 THE COURT: I mean, I couldn't have made it any  
12 clearer -- I thought I couldn't have made it any  
13 clearer than that letter.

14 MR. HUTT: Well, Judge, I have got to admit in my  
15 almost 60 years of life I have received warmer letters,  
16 you know.

17 THE COURT: Did you say 60 or 50?

18 MR. HUTT: Almost, I said 60. As a matter of  
19 fact, you know, I noticed your clerk bringing the  
20 papers out to the bench this morning and I thought to  
21 myself, I have seen so many new clerks in this case  
22 that some of them might even be on the bench by the  
23 time the case is resolved.

24 THE COURT: I thought you were going to talk to  
25 the fact that I used to carry my own papers out and it

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

1 had something to do with my age.

2 MR. HUTT: I am reminded about a story about an  
3 80 year old man sitting on a park bench and he was  
4 crying.

5 THE COURT: By the way, this is the only thing  
6 that's going to make this oral argument worth while.

7 MR. HUTT: He is sitting on a park bench and  
8 crying, and a policeman comes over to him and says,  
9 "Are you all right? Are you all right? Are you cry-  
10 ing? Are you okay?"

11 He says, "I am fine. I am fine."

12 He says, "Why are you crying? Are you sure you  
13 are okay"?

14 He said, "Yes, my wife died a few years ago and  
15 I married a new 35 year old woman. She's a wonderful  
16 wife. She's very attentive. She's a great cook.  
17 She's terrific in bed. She's everything you would want  
18 in a woman."

19 He says, "Why are you crying"?

20 He says, "Because I can't remember where I live."

21 That's what this case reminds me of. You are  
22 trying to remember who said what to who and when.

23 THE COURT: Did you ever read Bleak House?

24 MR. HUTT: Yes.

25 THE COURT: That's what this case reminds me of.

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

1 All of the lawyers and all of the participants  
2 are long since dead, and nobody remembers what they  
3 are talking or arguing about.

4 MR. HUTT: I don't disagree, your Honor.

5 So, what I'm to get at is -- there is a letter  
6 I wrote to Raymond.

7 THE COURT: Talk about no longer viable? What is  
8 the position of Woodhaven? Are the plats no longer  
9 viable or are they?

10 MR. HUTT: Our position is they are viable.

11 THE COURT: They are viable?

12 MR. HUTT: Yes.

13 THE COURT: Then why did you admit they weren't?

14 MR. HUTT: I never did.

15 THE COURT: Oh, you didn't?

16 MR. HUTT: You said that in your opinion and I  
17 wasn't about to get up and contradict you.

18 THE COURT: Well, in footnote 1 of your brief you  
19 state that, "Except for purposes of the argument that  
20 the plats were a part of the settlement and binding  
21 on the parties."

22 MR. HUTT: That is right.

23 MR. COURT: Okay.

24 MR. HUTT: The plats were.

25 THE COURT: On page 9 of your brief you take

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

1 issue with the Court's statement that the plaintiff  
2 admits that the plats are no longer viable.

3 MR. HUTT: Your Honor, there is two different  
4 questions.

5 You see, our argument in the main on that day was  
6 that the plates were not part of the settlement.

7 THE COURT: Yes.

8 MR. HUTT: But you ruled they were. So, for the  
9 purpose of this motion we assume they are.

10 THE COURT: Right.

11 MR. HUTT: But the Court also went on to say that  
12 the parties admit the plates are not viable. O & Y  
13 admitted that. We never admitted it. We don't admit  
14 it today, and we say we can build exactly the same  
15 project.

16 THE COURT: Look at page 3 in your brief in  
17 opposition to your motion to vacate at the bottom of  
18 page 7. Don't you say that the "Plaintiffs admit up  
19 front that the plates, in light of the additional  
20 wetlands encountered, are no longer viable designs"?  
21 That's in your brief submitted under the Federal  
22 Express letter of August 8th, 1987.

23 MR. HUTT: Well, we do use the words "no longer  
24 viable." We meant that you can't produce the exact  
25 same thing.

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

1 THE COURT: That's what you used.

2 MR. HUTT: You asked me a question as to whether  
3 we could build a project -- in fact, your own question  
4 was in your decision -- that was substantially the  
5 same with some modifications, but not destroy the  
6 whole thing. But when we couldn't use the exact  
7 same thing, we had to change it.

8 But at that point in time we did not make the  
9 analysis of how to change it. That's the point I  
10 am making.

11 We never submitted the plan to Raymond, and I am  
12 telling you that Mr. Raymond, if he was asked today,  
13 and I spoke to him on the phone and I remember writing  
14 a letter to him with copies to all parties, including  
15 the Court, stating that it was on the basis of my  
16 conversation with Mr. Raymond or one of the key bases  
17 is why I would move for reconsideration because he  
18 would testify that he did not direct his attention as  
19 to whether or not Woodhaven's plan, plate, if you take the  
20 plate and what effect now of the 200 acres of wetland  
21 could they build substantially the same plan that's  
22 not substantially different?

23 He said he was never asked that question, and if  
24 he was, his answer would be: There would be no  
25 substantial difference.

*Judith R. Marzke, C.S.R.*



1 THE COURT: I accept for purposes of this argument  
2 and previous argument that proposition.

3 MR. HUTT: Right. And that's what I was coming  
4 to, your Honor.

5 THE COURT: Not for the truth of it, but the  
6 accuracy. I don't mean that you would represent --

7 MR. HUTT: I understand.

8 THE COURT: -- but rather I will assume arguendo  
9 that that is, in fact, the case, and I assumed that on  
10 the prior motion.

11 MR. HUTT: Okay. It wasn't clear to me that you  
12 assumed it on a prior motion, but it was clear to me  
13 from your December 1st letter that you assumed that.

14 And, so, therefore, it comes up to the issue as to  
15 if, in fact, for purposes of the motion this morning,  
16 if, in fact, to make it real simple so we all are talk-  
17 ing about the same thing, if, in fact, for instance  
18 there was no new wetland zone on Woodhaven and the  
19 exact plate that was in the book by Woodhaven is the  
20 exact plate that we are going to use today, I take it  
21 from your December 1st letter that you said that would  
22 make no difference legally, that it was an integrated  
23 one-package settlement. And even if there wasn't one  
24 iota of change in your plan, you still would vacate the  
25 judgment.

*Judith R. Marzinke, C.S.R.*

1 I took it that that is the Court's position that  
2 we are here to argue about today.

3 THE COURT: All right.

4 MR. HUTT: Am I correct?

5 THE COURT: Well, I really -- I don't want you to  
6 phrase my letter to you other than what was said in the  
7 letter. I think it's rather clear.

8 MR. HUTT: Okay.

9 Now, in order to go into that conversation as to  
10 the fact that you had no change, but despite that fact  
11 you had two people there, one was changed completely.  
12 How does it affect the other person? How does it  
13 affect the third party, the Town?

14 I would like this Court to take judicial notice of  
15 the fact that I have a twin brother and all of our  
16 lives we have a great deal of similarities, but we are  
17 separate, independent people. The family treat us  
18 different. The public treats us different. Teachers  
19 treat us different.

20 Sometimes there is a confusion about that. As a  
21 matter of fact, in the recent issue of Newsweek  
22 Magazine there is a whole article about twins. They  
23 are similar in many respects, but different in other  
24 respects. They have their independent identity.

25 Now, in this particular case there were two

*Judith R. Mazinke, C.S.C.R.*

1 separate lawsuits that were consolidated for ease of  
2 convenience by two separate developers having two  
3 different sets of tracts of land. There were mutual  
4 negotiations, but they were separate and apart. There  
5 were requirements in the settlement agreement as to  
6 exactly what O & Y had to do. There was requirements  
7 in the settlement agreement as to what Woodhaven had  
8 to do.

9 There was nothing in the settlement agreement that  
10 said if one failed to do it, the other collapsed, as if  
11 I didn't take the car out -- if I took the car out when  
12 I wasn't supposed to, my father didn't punish my  
13 brother. He only punished me, although sometimes he  
14 didn't know, so he punished us.

15 Under the Hitler theory.

16 THE COURT: I find it hard to believe it was  
17 operating in your household.

18 MR. HUTT: With me nothing is unbelievable, your  
19 Honor.

20 THE COURT: I take it back, you are right as this  
21 motion evidences.

22 Go ahead.

23 MR. HUTT: The fact of the matter is we cannot go--  
24 the Town is in their so-called brief -- I say "so-  
25 called" because there were letters. They didn't cite

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

1 one case.

2 We cited cases not only in New Jersey but through-  
3 out the entire United States for the legal proposition,  
4 and that's what we are really here today to argue --  
5 the law, not so much the facts -- for the legal  
6 proposition that when there is a three-party trans-  
7 action of this nature and one party defaults, what is  
8 the effect on the second party?

9 I agree with your Honor's opinion that a consent  
10 judgment is in the nature of a contract and our whole  
11 brief and our research was to talk about this kind of  
12 a contract where there is two people on one side and  
13 one on the other side.

14 Are the obligations joint or are they several?  
15 And if they are several, when one party defaults, what  
16 effect, if any, does it have on the other party?

17 Now, we cite extensive cases in New Jersey and  
18 elsewhere. One, for instance, the Becker case for  
19 the principle that where a court assigns to each -- I  
20 am sorry -- "Where a contract assigns to each of  
21 several parties his several duties and does not bind  
22 them and make them responsible individually for the  
23 whole result to be jointly accomplished, the contract  
24 insofar as such parties are concerned is several."  
25 That's Becker v. Kelsey at 157 Atlantic 177.

*Judith R. Marzke, C.S.P.*

1 I am not going to go through all these cases. I  
2 assume and hope, and I know you well enough to know  
3 that you read the briefs and you have read the cases,  
4 but that principle of law is not only in New Jersey:  
5 Williston cites it. The Restatement of Contracts takes  
6 that position. Corpus Juris cites it for the proposition  
7 that if it's a severable contract, the mere fact that  
8 it's in one document does not make it jointly.

9 For instance, in this case as an illustration,  
10 if there was no -- well, the best illustration is what  
11 the parties agree to, not what some guy in his  
12 affidavit said I thought I was doing or wasn't doing.

13 We obviously contend, and you can believe it or  
14 not believe it, but it's irrelevant, and I can tell  
15 you without even representing Lloyd Brown that he be-  
16 lieved there was no way in hell that he was going to  
17 have his destiny determined as to whether or not  
18 Woodhaven ever performed under this settlement agree-  
19 ment.

20 If Woodhaven never performed, he certainly thought  
21 that he made his deal.

22 THE COURT: What do you mean by "performed"?

23 MR. HUTT: Built.

24 THE COURT: You mean with the action built?

25 MR. HUTT: Whether we had wetlands, whether we

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

1 had economic reasons, whether we went bankrupt, whether  
2 there was -- it turned out to be a burnt fly bog or  
3 hazardous disposal site -- a bomb like you found in  
4 Jackson Township, because I referred to you as the  
5 bomb, Judge, because you dropped one on me.

6 THE COURT: The Appellate Division thinks I  
7 dropped a few too.

8 MR. HUTT: And, so, there is no way that they  
9 would have settled if they knew that their lives,  
10 the corporate lives on this tract depended upon the  
11 ability of Woodhaven voluntarily or involuntarily  
12 to produce and vice versa.

13 But that's immaterial because the Town says there  
14 is no way we would have settled. If we didn't know  
15 we were going to get the whole package, if we didn't  
16 get the golf course and the shopping center, we  
17 wouldn't have settled. We wouldn't have settled with  
18 Woodhaven.

19 But that's speculation on both of our parts.

20 But we have to look at the document. What does  
21 the document say?

22 The settlement agreement in many relevant parts  
23 just contemplated exactly what is happening. We didn't  
24 contemplate it as to wetlands, but we knew it was a  
25 20-year build-out.

*Judith R. Mazinke, C.S.R.*

1           We contemplated a lot of other things that could  
2 go wrong, not the least of which was bankrupt, because  
3 no matter how big and how wealthy you are, you can still  
4 go bankrupt, and I have testimony to that: John  
5 Connelly who is a very big developer that went  
6 bankrupt and many others in these markets. So, you  
7 can't go on whether a man has the financial ability  
8 or not. He could have it today, gone tomorrow.

9           But in Section V-V.3a entitled -- well, entitled  
10 Approval Procedures Settlement Plan. I just would like  
11 to call to your attention one or two sentences from  
12 the agreement itself.

13           It says on page 13 of the settlement agreement,  
14 "O & Y and Woodhaven shall each have the right to  
15 develop their lands in accordance with the settlement  
16 plan set forth in plates A and B applicable to their  
17 land upon entry of this order."

18           And then it goes on down to Section B. "The  
19 planning board shall issue its decision on plates A"--  
20 which related to O & Y -- "and B" -- which related to  
21 Woodhaven -- "simultaneously."

22           Now, it didn't say jointly that they both had to  
23 be approved or not approved.

24           The only restriction was that the decision on  
25 both had to be made simultaneously and that

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

1 contemplated that one could have gotten approval, one  
2 could have gotten a denial, and in case that happened,  
3 what would happen?

4 Well, the next page tells us what would happen.  
5 In Subsection D on page 14 it says, "In the event that  
6 the planning board does not approve a plate or approves  
7 a plate with modifications unacceptable to the affected  
8 developer, the Court shall refer to the matter for a  
9 master. . ." and so forth and goes on to some kind of  
10 an arbitration proceeding.

11 And then on the following paragraph it says,  
12 "Following issuance" -- this is on VB --

13 THE COURT: Roman numeral --

14 MR. HUTT: -- Roman numeral VB 3b "Following  
15 issuance of a Court order incorporating the plates into  
16 this previously approved settlement agreement" -- and  
17 this is the crucial part -- "the developer or  
18 developers whose plates are approved by the Court may  
19 immediately thereafter submit development applications  
20 in accordance with the procedures. . ." and so forth.

21 So, the settlement agreement speaks to this  
22 problem and it made it quite clear that if one  
23 developer could proceed and did what he was supposed  
24 to do, he could do it regardless whether the other  
25 developer could or did or did not proceed.

*Judith R. Matinke, C.S.R.*



1 THE COURT: If words were measured with the  
2 scrutiny to which you suggested that document is  
3 entitled -- in my opinion is entitled (a) we would  
4 never get anything done; and (b) lawyers would die  
5 at age 35 -- old lawyers.

6 You can pick and choose and take out of context  
7 and take your own interpretation of words in both my  
8 judgment in that document ad infinitum whether it's  
9 developers, plural, or developer, singular, as I did,  
10 you know.

11 The question is really much broader than that.  
12 The question is what the case law says about the  
13 Court's obligation to vacate or not to vacate a final  
14 judgment. Isn't that really what the issue is?

15 And that relates to questions of material mistake  
16 of fact and the other things that are set forth in  
17 Rule 4:50 which I thought I covered in the opinion,  
18 not totally comprehensible, but I thought enough to  
19 at least demonstrate why it was that I thought it had  
20 been vacated.

21 I talk a little bit about some of the law. I  
22 remember talking about the fact that this was one of  
23 the topics I was given an opportunity to teach new  
24 judges about, that is, the finality of judgments which  
25 I thought was a bit ironic at the time.

*Judith R. Mazinke, C.S.R.*

1           But I mean, you could spend a great deal of time  
2 going through those settlement documents and finding  
3 support, I suspect, in individual words for your  
4 position.

5           MR. HUTT: Your Honor, I am not talking about  
6 individual words. I am talking about as the philosophy  
7 of the written settlement.

8           THE COURT: Yes.

9           MR. HUTT: The Court cannot make a --

10          THE COURT: The substance of it?

11          MR. HUTT: That is right.

12          THE COURT: The overall meaning and intent of  
13 the parties and all of those things.

14          MR. HUTT: Your Honor, I would respectfully submit  
15 that you are doing something that courts are enjoined  
16 from doing, and that is, to make a better contract for  
17 the parties than they made themselves in terms of  
18 Old Bridge.

19          THE COURT: You are right. I can't do that.

20          MR. HUTT: That's right. Remember that.

21          Because you are in effect ruling and saying and  
22 thinking that this contract in effect says in the  
23 event one party, one developer cannot or does not or  
24 will not proceed, then in that event the entire settle-  
25 ment is dead. It could have said that.

*Judith R. Marzke, C.S.R.*

1           As a real estate attorney I do it all the time  
2 when I am acquiring tract A and then the adjacent tract  
3 B, and it only works as one unit and I want to make  
4 sure that I don't get stuck closing on tract A and  
5 not being able to close on B tract.

6           We put a clause in the contract. This clause is  
7 contingent upon me closing the other guy's title.

8           If I can't close the other guy's title, then the  
9 whole deal is off. They could have said that.

10          They didn't say that. The words that you say I  
11 am picking and choosing are not just picking and  
12 choosing words. It was the whole philosophy of the  
13 deal contemplating that that could occur.

14          We knew it was a 20-year build-up.

15          THE COURT: That's what could occur.

16          MR. HUTT: That one party could proceed and one  
17 party may not proceed.

18          One party may get approval, one party may not get  
19 approval.

20          THE COURT: Does it contemplate that there would  
21 be a substantial reduction in the amount of what could  
22 possibly be developed? And by "substantial," I mean  
23 50 percent of O & Y.

24          MR. HUTT: It contemplated zero. It contemplated  
25 that one, it might not even proceed.

*Judith R. Mazinke, C.S.R.*

1 THE COURT: In other words, it would be absurd to  
2 argue that the parties recognize that O & Y's tract,  
3 for example, had a 50 percent overstatement of what it  
4 could build in just pure land area, forget what could  
5 be built on the remaining land.

6 MR. HUTT: The parties recognize that O & Y may  
7 never build altogether.

8 THE COURT: You didn't answer my question.

9 MR. HUTT: I don't think any of the parties  
10 thought that they had 50 percent less buildable land  
11 than they had.

12 THE COURT: You can answer it more affirmatively  
13 that none of the parties ever contemplated anything like  
14 that.

15 MR. HUTT: No, but they contemplated total dis-  
16 aster either from a regulatory point of view or from  
17 a -- when I say "regulatory point of view," the plates  
18 were the plates and they were coming in with this and  
19 that.

20 It didn't have to be wetlands. It could have been  
21 something else where -- that we had to satisfy that  
22 this could work.

23 For instance, the road network. None of these  
24 plans that were submitted on any of the plates talked  
25 about how the traffic was going to be handled.

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

1 In fact, part of the deal was traffic would go  
2 into on preliminary approval if we couldn't establish  
3 that the roads could take it, then we'd have to build  
4 less. It only got us the right to go to the maximum.

5 The Planning Board was not obligated to give us  
6 the maximum if it didn't make good planning sense or  
7 violate the regulation.

8 So, it's always contemplated by these developers.

9 Ours is around 6,000.

10 THE COURT: By the developers you said?

11 MR. HUTT: And by the Town.

12 THE COURT: And that there might be a total dis-  
13 aster and none of this would take place or 50 percent  
14 wouldn't take place.

15 MR. HUTT: It was always contemplated that none  
16 of them might take place in terms of economic con-  
17 ditions.

18 THE COURT: I am talking about because of wetlands.

19 MR. HUTT: Obviously.

20 THE COURT: Obviously there is no guarantee in  
21 economics.

22 The market might not be there or whatever.

23 MR. HUTT: Exactly.

24 THE COURT: But in terms of the nature of wetlands  
25 or of that nature, that was never contemplated. They

*Judith R. Marzinke, C.S.R.*

1 never contemplated total disaster in that respect.

2 MR. HUTT: No, that's correct.

3 THE COURT: Because they wouldn't have settled  
4 in the face of that if they knew it.

5 MR. HUTT: Well, you see, that's a subjective  
6 judgment that you are making --

7 THE COURT: Well --

8 MR. HUTT: -- without proofs, without hearing.

9 THE COURT: Who rules upon the Court to make a  
10 judgment both with respect to newly discovered evidence  
11 and also what was in the contemplation of the parties.  
12 Both of those have to be made, and I have got to say  
13 there is no case I have ever been involved in in which  
14 I was more equipped to make the judgment than in this  
15 case, even all of my involvement in everything that  
16 led up to this settlement.

17 It's much different when you are making that  
18 kind of judgment in a jury setting. Ten years on the  
19 bench I have never set aside a jury verdict on a motion  
20 for a new trial. I have never set aside --

21 MR. HUTT: You want to change that philosophy  
22 when it relates to judges either?

23 THE COURT: It's a somewhat different setting when  
24 you are in a non-jury posture and have been intimately  
25 involved, as you are forced to be, in Mount Laurel

*Judith R. Marzinke, C.S.C.*

1 cases in the excruciating negotiations leading up to  
2 the settlement.

3 MR. HUTT: Your Honor --

4 THE COURT: So, the Court had a unique knowledge  
5 of what the parties were after in this case.

6 MR. HUTT: Well, let's take it on that premise.

7 Do I take the Court to mean that the developers  
8 would have settled if they knew that their fate was  
9 dependent upon the other developers' performance?

10 Are you making that judgment?

11 THE COURT: I don't have to make that judgment.

12 MR. HUTT: That's what the problem in the contract  
13 is.

14 Our obligations to the Town are being met. We  
15 have a right -- and they said if we meet our obligations,  
16 they will give us their obligations.

17 And now the Court is saying, and they are saying,  
18 and you are agreeing with them, that if some third  
19 party didn't meet their obligation, then they can  
20 breach the contract with us. That would be true if it  
21 was a joint contract.

22 THE COURT: See, you are saying that I am saying  
23 that. What you want to characterize as my ruling will  
24 meet the result that you want to reach, but I am not  
25 going to let you do that.

*Judith R. Mazinke, C.S.C.R.*

1           What I characterize as my ruling is contained in  
2 this transcript, and I guess if you want to supplement  
3 it by my letter of December 1st which attempted to make  
4 it clearer to you, I would incorporate that as well.

5           MR. HUTT: When I was in law school they say when  
6 the law is on your side, bank on the law. When the  
7 facts are on your side, bank on the facts. And when  
8 neither is, bang on the table. And I choose to sit  
9 down.

10          THE COURT: Anybody else? Plaintiff?

11          MS. STARK: Your Honor, we join in Woodhaven's  
12 motion, and we also ask the Court to reconsider its  
13 rejection of our cross-motion without explanation.

14          THE COURT: Okay.

15          MR. CONVERY: May it please the Court, Jerome  
16 Convery on behalf of the Township of Old Bridge.

17          Your Honor, I have heard the argument of Mr. Hutt  
18 for approximately one hour.

19          I submit there has been no mention of any new law.  
20 He has not brought forth any new facts.

21          The only new facts in this case are that Mr.  
22 Norman is no longer the Planning Board Attorney, I am  
23 no longer the Township Attorney.

24          MR. HUTT: Can you imagine if they lost, your  
25 Honor?

*Judith R. Mazinke, C.S.C.R.*



1 MR. CONVERY: I don't think it has any bearing on  
2 the motion.

3 THE COURT: I think it's also very ungrateful.

4 MR. NORMAN: We thought so.

5 MR. CONVERY: I would submit on the basis of the  
6 papers previously filed.

7 THE COURT: Okay. I had a little opinion written  
8 up here that I was going to read, but I really don't  
9 think it's necessary to do it.

10 I would only indicate that I am not going to  
11 address what I consider to be, and I don't say this  
12 critically -- if the words sound harsh, don't intend  
13 them that way -- either recharacterizations or mis-  
14 characterizations of the Court's position. If I  
15 started to do that, it would take much too long.

16 I don't want to sound defensive about this, but  
17 for purposes of any Appellate review that would occur,  
18 I am simply not going to address what I consider to be  
19 statements in these papers that improperly characterize  
20 the Court's ruling.

21 I have already pointed out one which is a rather  
22 obvious inconsistency, the Court is criticized for  
23 stating that the plaintiffs admit that the plats are  
24 no longer viable and yet the Court based that in part  
25 on plaintiff Woodhaven's explicit, express, unambiguous

*Judith R. Mazinke, C.S.R.*

1 admission in its brief prior to the hearing of this  
2 motion that they admitted "up front" that the plats  
3 in light of the additional wetlands encountered are no  
4 longer viable designs.

5 There is an additional statement that the Court  
6 indiscriminately lumped together both plans, and at  
7 page 11 Woodhaven cites the transcript, that is, at  
8 page 11 of its brief, cites the transcript at pages 113  
9 through 116 stating references were only made to O & Y's  
10 plans and not Woodhaven's.

11 That's clearly not so just looking at the tran-  
12 script wherein the Court cites the Woodhaven report  
13 which the transcript refers to as February 28th, 1987,  
14 and probably the Court misspoke rather than the tran-  
15 script being mistyped. It's actually '86.

16 But in any event, the Court was at that very point  
17 in the transcript referring to the Woodhaven report as  
18 well.

19 There are a number of instances which I could  
20 catalog were it necessary to do so.

21 In addition, it just should be pointed out, I  
22 think, that the plaintiff has really completely changed  
23 the basis of its argument from the first time around,  
24 that is, the plaintiff, Woodhaven.

25 Initially, the plaintiff had argued that nothing

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

1 was ever written in stone, that the Blue Book gave the  
2 plaintiff the right, but not the obligation, to build  
3 according to the settlement, and all the defendants  
4 bargained for was a lower fair share number, a lock  
5 step commercial and residential development and four  
6 dwelling units per acre.

7 Now, the plaintiff's approach is totally different  
8 but equally persuasive.

9 Frankly, it seems to fit within the language of  
10 the Michel case which Judge Kraft decided, and then  
11 the rule for reconsideration was thereafter amended.

12 Now, the argument is that it was written in stone,  
13 very much so, and that it's independently binding as it  
14 was written.

15 But in any event, those apparent inconsistencies  
16 or mischaracterizations in the brief really don't  
17 affect me. I simply stand by what I said, both in the  
18 opinion portion of this transcript starting somewhere  
19 around page 95 and throughout the entire oral argument  
20 which I think made evident, I thought made evident what  
21 the Court's position was.

22 Woodhaven may have had some independent rights  
23 regarding developmental approvals and so forth, but it  
24 was both developments for whatever they could jointly  
25 offer which induced these plaintiffs to settle.

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

1 I would stand by what the Court said in that  
2 regard as well as the law that's cited in the decision.

3 So, I remain dissatisfied that if I made a mistake,  
4 I will compound it by affirming that mistake. I con-  
5 tinue to feel about this case as I did then, and that  
6 is, that I was not happy about the decision that I had  
7 to reach in terms of the ultimate beneficiary of low  
8 income housing, but you have to do what you have to  
9 do, and it's quite clear to me that I had to reach  
10 the result that I did.

11 So, the motion for reconsideration, or whatever it  
12 is properly denominated, is denied.

13 All right. Counsel can submit an order if you  
14 would like.

15 MR. CONVERY: I will do it on behalf of the Town-  
16 ship of Old Bridge and send copies to all counsel.

17 THE COURT: Thank you.

18 MR. HUTT: Thank you.

19 MS. STARK: Thank you.  
20  
21  
22  
23  
24  
25

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C E R T I F I C A T E

1  
2  
3 I, JUDITH R. MARINKE, a Certified Short-  
4 hand Reporter and Notary Public of the State  
5 of New Jersey, certify that the foregoing is  
6 a true and accurate transcript of the proceedings  
7 as taken before me stenographically on the date  
8 hereinbefore mentioned.  
9

10 Judith R. Marinke  
11 JUDITH R. MARINKE, C.S.R.  
12 Official Court Reporter  
13 License No. XI-00392

14 Dated: May 16, 1988  
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