CA General 29 May 1984

Transcript of Motion Concerning Builder's Remedies in Cranbury Twp.

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CA0025365

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. C-4122-73

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URBAN LEAGUE OF GREATER NEW BRUNSWICK, als

Plaintiffs

vs.

BOROUGH OF CARTERET, et als,

Defendants

TRANSCRIPT

OF

MOTION

May 29, 1984
Toms River, New Jersey

B E F O R E :

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

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

JOHN PAYNE, ESQUIRE
and
JANET LA BELLA, ESQUIRE
For Urban League

MICHAEL J. HERBERT, ESQUIRE
For Zirinsky

GULIET D. HIRSCH, ESQUIRE
For Toll Brothers

CARL S. BISGAIER, ESQUIRE
For Monroe Development Association and
Cranbury Land Company

GAYLE L. GARRABRANDT, C.S.R.
Official Court Reporter

APPEARANCES (Cont.) :

WILLIAM L. WARREN, ESQUIRE
For Garfield & Co.

WILLIAM C. MORAN, ESQUIRE
For Cranbury Township

PHILIP LEWIS PALEY, ESQUIRE
For Piscataway Township

* * * *

THE COURT: All right. Are we ready to proceed?

MR. MORAN: Your Honor, if I may, Miss Hirsch had subpoenaed Dorothy Kiviat, who is the deputy municipal clerk, to be here this morning; however, in court on Friday she and I were able to reach a stipulation as to what Miss -- Mrs. Kiviat's testimony would be, and I would like to put that stipulation on the record at this point, together with stipulations with regard to each of the other plaintiffs that are seeking builder's remedies, and then make a motion addressed to the Court based on those stipulations.

THE COURT: All right.

MR. MORAN: With regard to Miss Kiviat's testimony, Your Honor has already heard the testimony of Mayor Danser with respect to the January 6th letter from Miss Hirsch's office. It was -- it is stipulated that if Miss Kiviat were to testify, that her testimony would be that she received a letter delivered by messenger from Miss Hirsch's office, and that she signed a receipt for the receipt of that letter, and that the receipt indicated that in the letter was contained: A, the January 6th letter; B,

the proposed amendments to the zoning ordinance -- those two documents of which -- have already been marked in evidence in this case, and Your Honor has them; and C, a copy of plans for the proposed development by Toll Brothers.

Miss Kiviat would also testify that she has no recollection of the plans actually being in the envelope, despite the fact that she signed a receipt for them, and that a search of her records has failed to produce a copy of those plans; and that she copied the documents that were in the envelope and delivered them to the members of the Township Committee and also to the Township attorney and to the Township engineer, which is part of her normal distribution list on materials of that nature.

I think that's the essence of the stipulation, unless Miss Hirsch has something that she wants to add or some correction to make.

MISS HIRSCH: No, just the cover letter did indicate also that master plan amendments were included. And when she marked, "Received," that was one of the documents indicated.

MR. MORAN: That's correct, Your Honor. Now, with regard to the plaintiff Zirinsky, we have a stipulation which I would like to read into the

record, Your Honor, and this one -- this stipulation has been reduced to writing.

It reads as follows: "In 1982, Lawrence Zirinsky, also trading as East Shore Associates, Inc., began to obtain options on lands in Cranbury Township west of the Village.

"In Late March 1983, Mr. Zirinsky convened a meeting at the Princeton office of his Engineers/ Planners CUH2A, with Mayor Alan Danser and the Township planner, Tom March, to urge that the Township Land Use Plan which was then under consideration by the Township Committee be amended to allow for office-research zoning in the western part of the Township encompassing his optioned land.

"The mayor and Mr. March both indicated that there was little hope of any such change but, nonetheless, told Mr. Zirinsky and his representatives that they could apply to the Township Planning Board."

Then, Your Honor, to become part of the record, there is a series of six letters between Mr. Zirinsky's then attorney and the Planning Board, which will be marked in evidence. Unfortunately, due to a confusion between Mr. Herbert and myself, they are not here this morning, and can be provided; however, I think that we can summarize.

The gist of those letters is that Mr. Zirinsky applied to be put on the agenda of the Planning Board. He was initially put on the agenda by the secretary of the Planning Board. He was then informed that it was -- he was not going to be on the agenda because of the fact that the Planning Board did not want to consider his request at that point in time, because they were in the process of reporting and recommending the Township zoning ordinance, the new zoning ordinance, to the Township Committee for adoption, and felt that it would be more appropriate to hear him after the Township Committee had an opportunity to act on that ordinance.

During the meeting, and in the correspondence, the plaintiff did not state he sought approval for housing. At no time prior to suit being filed by Mr. Zirinsky on December 20th, 1983, did he or any of his representatives mention the institution of legal action against the Township. Other than the above correspondence and the meeting, no other proposals were made to the Township.

That's the stipulation with regard to Zirinsky.

MR. HERBERT: Your Honor --

THE COURT: Do you have a copy of that for me?

MR. HERBERT: Yes, I do, Your Honor.

MR. MORAN: Yes, we do.

MR. HERBERT: Unfortunately, the correspondence that's alluded to, as Mr. Moran indicated, is not with us, and I think we have agreed that the correspondence will be sent today by Mr. Moran's office to Your Honor and, of course, supplied to counsel.

I think it's really, after -- I have just read the Urban League's brief, and I think it's sort of tragic that they did not have the benefit of reading this stipulation and the correspondence that we are alluding to prior to that time. The only -- prior to this time.

The only thing I would add, Mr. Moran accurately represents what those letters were. I believe, however, that it was not left by the Planning Board that Mr. Zirinsky could reapply at a more appropriate time after the adoption of the zoning ordinance. I think Your Honor can look at the letters. I believe the sense was that there was a -- the zoning ordinance was then being considered, and we are talking about letters from April 4th, '83 down to June 27th, '83.

And the last letter, June 27th, '83, basically said: We are not going to consider your proposal

at this time, because of the progress, the intended review of the Land Use Ordinance.

And I believe this -- that's --

MR. MORAN: I believe that Mr. Zirinsky or Mr. Herbert's representation is correct, Your Honor; but in any event, the letters will speak for themselves.

THE COURT: All right.

MR. MORAN: With regard to the plaintiff Cranbury Land Company, Your Honor has already received a group of letters that Mr. Biegaier had provided to you, and we stipulate as to the authenticity of those letters.

In addition to that, Your Honor should be aware of the fact that there were two separate pieces of litigation that were instituted by the owners of that land during the time period 1969 through 1976.

The first of those was entitled Cranbury Land Company vs. Township of Cranbury, and that had to do with the validity of an eighteen-month building moratorium which the Township had imposed. That case was heard in the trial court. The decision was appealed.

The Appellate Division heard the oral argument

on appeal four days after the expiration date of the moratorium, ruled that it was moot and, therefore, the whole issue became moot.

The second case was entitled, Hillbury Joint Venture vs. the Township of Cranbury. And despite the fact that the plaintiff had a different name, it involved the same land. And in that case, the applicant had requested the Township Committee to rezone property and to adopt a resolution of need to qualify the property for housing financing, agency financing.

The Township had refused to do both, and the plaintiff appealed. On the appeal, the Trial Court ruled in favor of the Township on the issue of the necessity of adopting the resolution of need, and also on the question of whether or not the plaintiff was required to exhaust its administrative remedies by applying for specific relief, either by way of a variance, to the Zoning Board of Adjustment.

An appeal was taken; and, subsequent to the filing of the appeal by the plaintiff, this litigation was started, the Urban League litigation was started.

Apparently, the plaintiff then abandoned the appeal; and I understand, and Mr. Biegaier has

represented to me, and I have no reason to doubt it, that the reason they abandoned the appeal is that they wanted to see what would happen as a result of the ruling in this case, since they felt that the issues were very similar.

That's substantially it on that. There was no formal activity with regard to this piece of property since the letter from my law partner, who was then the Township attorney, which is the last of the letters that you have in 1976, which was after Judge Furman's opinion, the initial opinion in the Urban League case.

With regard to the plaintiff Garfield, there is a stipulation which we have reached to be read into the record, but Mr. Warren will do that.

MR. BISGAIER: Your Honor, perhaps before Mr. Garfield -- Mr. Warren does that, not to have the record bounce back and forth, I'd just like to add one thing, which is that the representation that was made to Mr. Moran -- and I believe he accepts that representation, that were there testimony here today, that the reason for no further action being taken subsequent to the receipt of Mr. Huff's letter was on the belief that there was -- nothing fruitful could be gained by such action pending the

resolution by the Supreme Court and the rezoning by the municipality subsequent to that.

I also have -- we haven't marked this document. It hasn't been admitted into evidence. I know Your Honor has a copy by consent of both parties. Perhaps it should be marked and admitted into evidence.

MR. MORAN: Is that the series of letters?

MR. BISGAIER: Yes.

MR. MORAN: Yes. I have no objection to that. And with regard to Mr. Bisgaier's representation, I would have no basis to correct any testimony that he presented on that question.

THE COURT: All right. Let's mark this set of correspondence relating to the stipulation for Cranbury Land and Monroe Development as PMD-3.

(Whereupon the series of correspondence was marked as Exhibit PMD-3 in evidence.)

THE COURT: All right. Mr. Warren?

MR. WARREN: As of late, Your Honor knows Garfield & Company is not subject to the motion which Cranbury is bringing, no affirmative defenses with respect to -- no affirmative defenses with respect to exhaustion of remedies or standing having been raised in Cranbury's answer.

But I believe Your Honor suggested that it would be useful to the Court in order to rule on the other motions to have an overall view as to what all of the builders did in this area; and, as a result, Mr. Moran and I have entered into the following stipulation.

On January 25th, 1983, a representative of Garfield & Company made a presentation to the Cranbury Township Committee at a public hearing on the proposed zoning ordinance which was subsequently adopted and is challenged in this litigation.

He informed the Township Committee that Garfield & Company was willing and able to develop its property in Cranbury for Mount Laurel housing as contemplated by the proposed zoning ordinance; however, such development would be impossible inter alia in light of the density provisions and transfer credit purchase requirements contained in the proposed ordinance.

Notwithstanding this presentation by Garfield & Company, the Cranbury Township Committee adopted the proposed zoning ordinance without modifying the density provisions or the transfer development credit purchase requirements affecting Garfield & Company's property, or any of the other restrictions

on development in the PD-HD zone. Garfield & Company then filed this action, within forty-five days of the adoption of the challenged zoning ordinance.

Your Honor, if it would be useful to you, we can reduce that to writing and submit it.

THE COURT: Let's do that.

MR. MORAN: The only thing noted, Your Honor, and I didn't pick it up before, is that the date -- the very first sentence there is incorrect. It should be July the 25th, not January the 25th.

MR. WARREN: I'm sorry. I misspoke myself. I meant to say July 25th.

THE COURT: You want to present a legal argument with respect to this issue while you're at it?

MR. MORAN: Yes, I would like to, Your Honor.

THE COURT: Fine.

MR. MORAN: Unfortunately, Your Honor, some of the procedural requirements surrounding the entitlement to builder's remedy in Mount Laurel, the way I see it, are or could be clearer in the Mount Laurel II decision.

Basically, there are two sections of the opinion which speak of the question of builder's remedy in the abstract, and then there are several

sections which apply or attempt to apply that in specific cases.

My comments will be geared primarily to the two sections which deal with it as a question of law rather than with specific reference to the individual cases which were remanded in Mount Laurel II.

The main portion of the opinion which deals with it clearly raises certain things that must be established. One is good faith, and the other is whether or not the municipality -- whether or not there are sound environmental or planning concerns which were -- denied the builder the right to relief. And third seems to be tied into the question of whether or not the builder has attempted to use Mount Laurel as a club somehow, the so-called threat part of the opinion.

The interesting part of this is that although that may relate back to good faith, there is no way of tying that part of the opinion in with all of the language which is contained in the summary part of the opinion earlier, which seems to establish five criteria rather than four mentioned later on for obtaining a builder's remedy.

Basically, that is that the builder have

proposed something specific to the Township; two, that what he has proposed does include a substantial amount of low and moderate income housing; three, that the Town has been ordered to rezone by the Court and has failed to do so in acceptable fashion; or three -- rather, four is that there are no -- and this is the environmental concerns question previously mentioned; and the fifth one has to do again with, as I see it, an overall question of good faith.

It seems to me that while the Court is encouraging builder's remedies, that to take the position that anybody can simply file a suit without having done anything further than saying the Township zoning ordinance does not comply with Mount Laurel II, and I intend to build Mount Laurel housing, therefore, let me do what I propose to do, without the necessity of giving the municipality an opportunity to react, would be to create the tremendous opportunity for abuse of what the Court was trying to do.

And I submit that that is a danger in Mount Laurel II which the Court was mindful of, but which this Court and other Courts which are interpreting it have to be careful to avoid, and that is, opening the door to abuse of the doctrine.

Now, having said that, I'd like to address

each of the plaintiff builders in this case individually, because of the fact that I think that the facts are substantially different with regard to each one, and the application of the law to them may result -- although I don't think results in any difference with regard to them, the Court's thinking in it may result in some different approach.

THE COURT: Okay. Before you get to that, let me just be clear where in the opinion you feel this issue is addressed as to the threat and as to good faith.

MR. MORAN: With regard to the question of the threat, I am referring to the entire section entitled, Builder's Remedy, beginning on page -- at the top of page 279 of the Opinion and ending at page -- the middle of page 281 of the Opinion.

I think that that also has to be read in context with the short paragraph immediately preceding it, entitled, Judicial Remedies, which talks about what has to happen in order to trigger certain of these remedies, without reference to the specific remedies which are mentioned later on.

With regard to the five criteria that I mentioned in the summary portion of the Opinion, if I may just have a moment, I believe that that is in

the paragraph No. 8 on page 218 of the Opinion. Although the paragraph is short, I believe that there are clearly five criteria that are delineated there for the granting of a builder's remedy.

Your Honor has addressed the question previously of the fact that that is only the summary portion of the Opinion, and all of these criteria are not specifically delineated later on in the Opinion; however, I do think that we can't ignore that summary portion of the Opinion either, particularly in light of the fact that what the Court has done is abrogating a long-standing rule that it has adopted in saying now something that was only done very rarely before is going to be done, is going to be freely granted.

THE COURT: Do you see the words "good faith" there or its equivalent used elsewhere in the Opinion other than at 218?

MR. MORAN: No, sir, I do not.

THE COURT: Do you think it might be equated to something else they said? What I am saying is, if it's in the summary, I assume the Court must be summarizing something else they're about to say, and they have used the word, "good faith."

So do you find that good faith equivalent to

some other language later on in the Opinion?

MR. MORAN: My own opinion is that good faith ties into two things, Your Honor. It ties into A, the fact that a developer has proposed something specific to the municipality, and with the intent of actually building it; and secondly, that he is not using Mount Laurel as a club, which is referred to later on in the Opinion.

I think that's the only possible way that you can read the good faith requirement.

THE COURT: Yeah. Well, on page 280 and 281, there's first a threat language, in the paragraph starting with No. 66; and then paragraph starting 69, I suppose could be a good-faith language as well.

But it says: We emphasize that our decision to expand builder's remedies should not be viewed as a license for unnecessary litigation.

Both of those could be put in the category of good faith, I guess. Okay. Fine.

MR. MORAN: With regard -- I'm going to take plaintiffs in the reverse order of the order in which they filed their complaints, if that's all right with the Court, which means that we would start with Toll Brothers.

Your Honor has seen the letter dated January 6th, which was addressed to the Township, and the one enclosure. There is a question as to whether or not the other enclosure was there. I do not think that that is critical to the Township's argument on this question at all.

The argument here is addressed, is really addressed to good faith in the context of having proposed something in good faith in the hope that it would be built, and also with regard to the question of using Mount Laurel litigation as a club.

Your Honor has stated for the record that you found the tone of that letter offensive. The Township also found the tone of the letter offensive, in light of the fact that it was already defending four other Mount Laurel lawsuits, which obviously must have been known to the plaintiff in this case, or at least to his attorney; the fact that the original trial date of those matters was approximately two months away from the date on which the letter was addressed to the Township; and then the tone of the letter itself, which basically made five references to the fact in the letter that if we didn't do what the plaintiff asked us to do, he was going to sue us.

The last reference contained in the letter not only indicated that they were going to sue, but basically said that if we sue you, the Court may very well require you to do more, although it was stated in negative terms. You may get hit harder than what we are asking you to do.

And it seems to me that while clear there was Mount Laurel housing being proposed in the letter, at least that's what the letter said on its face, that to use that kind of a technique, where you come in and say: Do this within thirty days; if you don't do it within thirty days, you're -- we are going to sue, it's going to be a waste of time for you to defend this kind of litigation, because we know what we're talking about, we have had a lot of experience doing it, and believe me, your town is in trouble; and not only that, if you don't do what we want, the Court is very likely to hit you harder than we are asking for -- now, I ask you -- and Your Honor has had many years' experience as a municipal attorney, I know -- how a municipality is going to view that.

It seems to me that somebody that delivers that kind of a letter to a municipality has to know and anticipate that that isn't designed as a good-faith

bargaining tool. This is designed to get the municipality mad at you right off the bat.

And if you're going to get -- if you're going to approach a municipality in good faith, it seems to me the one thing you try and do is walk in with your arms open and say: Hey, let's sit down and talk about this, rather than say: I'm going to hit you over the head with a club if you don't do what I'm asking you to do.

And the fact that they're proposing Mount Laurel housing rather than something else should not be allowed to get the builder around this good-faith kind of a situation.

It seems to me clear that this kind of approach that was taken in this case was violative of at least the intent and the spirit of the good-faith requirement in Mount Laurel II, even though it may not have been a strict violation of the letter of the law in Mount Laurel II, and that this is exactly the kind of abuse which I feel that the Court should be wary of permitting to continue, to use Mount Laurel litigation as a club.

You know, the funny thing is in this case, is that if that letter had come in and proposed housing that was non-Mount Laurel housing, there's

no doubt about the fact that this would be the threat that we are talking about today. But instead, the letter comes in with a deliberately offensive tone that can only be calculated to make the municipality nonreceptive to the proposal rather than receptive to it, and then take us into court and demand the builder's remedy.

It seems to me that's exactly the kind of a situation where a builder's remedy should not be granted.

If I may, Your Honor, I'd like to then turn my attention to the Zirinsky situation. The Zirinsky case I think points out more than any other situation the dangers and the problems involved in deciding whether a builder's remedy is required or whether a builder's remedy is earned or deserved in any given case.

Here we have a builder who, by purchase of option, has acquired what amounts to a substantial portion of the Township, not just a hundred acres or two hundred acres but, by varying accounts that we have had, somewhere between sixteen hundred and two thousand acres in a town that only has a little over eight thousand acres. So by anybody's count, that's somewhere between twenty and twenty-five

percent of the town that he has under option.

Then he comes in and he says: I want to put research and office building on my property. His background is in research and office. He never mentions housing of any kind, Mount Laurel housing or otherwise.

He is told by the Township Fathers: Look, what you are proposing isn't consistent with what we have planned for out there, and we don't want it. We don't think that it's an appropriate place for it, and we don't think you're going to get very far with it. You can proceed and go to the Planning Board if you want to.

The Planning Board puts him off until after he has had -- until after the Township has adopted its new zoning ordinance, because that was all being done contemporaneously at that time.

Then nothing more is heard from the applicant for a period of several months, until December, after this new zoning ordinance has been in effect for approximately five months, after this litigation and various other plaintiffs have already started the case, when we are within three months of the proposed trial date in this case, and now he comes in, and in his complaint in this case he says, for

the very first time: I propose to build Mount Laurel housing and, therefore, you should grant me a builder's remedy.

We don't even know where on those sixteen hundred to two thousand acres he proposes to build the Mount Laurel housing, or whether he proposes to build it on all of it. I certainly hope not, because that would result in tens of thousands of housing units in Cranbury, rather than the thousands that we are already talking about.

And it seems to me that, in this regard, his request for a builder's remedy fails on two issues. One is that, clearly, he hasn't proposed something specific. He hadn't proposed anything at all to the Town until he filed the suit.

And I would point out to Your Honor that not only is the position taken by the Township firm in that position, but also, the briefs filed by at least two of the plaintiffs -- and by that, I mean the brief filed by the Urban League and by Toll Brothers -- both indicate that something has to be proposed.

I would submit that something more should be done than what the Urban League proposed; but even Zirinsky doesn't come up to the level that they say --

they would indicate that even a letter that indicates a willingness to negotiate should be sufficient.

I don't think so. I think that the municipality should be given something concrete to deal with in terms of a specific plan that they can review. But even if we take the more limited standard of you have to propose something in some fashion or form, send a letter, say we would like to build Mount Laurel housing on our property, can we sit down and talk to you about it, Zirinsky does not even rise to the level of that standard.

And the second part of that is, and the flip side of it is, I don't see what the difference is between a developer who comes in and says, I want to build research and office in your township, and the Township says, we're sorry, but we're not interested in that in that location, and then he turns around and sues on Mount Laurel grounds, and the developer that comes in and says, I want to build research and office in your township, and if you don't let me do that, then I'm going to sue on Mount Laurel grounds, and then he turns around and sues on Mount Laurel grounds.

It seems to me that in one case the threat is

explicit, and the other case, the threat is implicit; and in both cases, the builder's remedy should be denied.

With regard to the third plaintiff, Cranbury Land Company, there is no doubt about the fact that Cranbury Land Company, for a substantial period of time in the early 1970's, did actually propose to the Township the provision of some Mount Laurel housing.

Of course, we didn't have Mount Laurel housing back then. It was low and moderate income housing. And the original proposals were made to the Township long before the Supreme Court's initial decision in Mount Laurel I, and at a time when we still had the Bedminster case, the original Bedminster case, which said that it was perfectly okay for a municipality to zone five-acre housing.

I make those comments not from the point of view of trying to take away from the efforts that this plaintiff has made, but rather to indicate the procedural posture that the municipality was in at that point in time.

There is no doubt about the fact that the municipality resisted those efforts; however, I think we have an additional problem here, and that is that

sometime in 1976, for whatever reason, the plaintiff apparently decided to do nothing further.

The plaintiff says that he would have testified that he was waiting to see what happened in the Opinion in the Urban League case which is now before this Court on remand. I would submit to Your Honor, however, that waiting seven years for something to happen seems to me to be stretching a point a bit, and it's -- the plaintiff had some obligation to propose something more than just sit back and wait for seven years, but should have come in and said -- or made it known that, "We still stand ready to build this type of housing, and we want to do it," and got some kind of a response from the municipality.

I call Your Honor's attention to the fact -- it's in the record -- that for a period of a few years prior to 1983, the municipality was involved in the process of revising its master plan and rezoning the town, and this plaintiff was not heard from that -- during that time period with any request for consideration for Mount Laurel housing in that process.

Lastly, we come to Garfield; and, Your Honor, with regard to Garfield, I have already stated

the fact that the municipality is -- finds itself in the position of saying that even if we didn't feel that Garfield was entitled to a builder's remedy, it just so happens to be the owner of the land where the Township feels that this kind of housing should go.

And that was already demonstrated by the fact that the Township's high density zone happens to have encompassed Garfield's property.

I would only point out for the record, Your Honor, so that I do not appear to be inconsistent, that I do not think that the type of presentation that was made by Garfield at the Township Committee Meeting on the second reading of the zoning ordinance, at the end of a three-year period of master plan revision and zoning ordinance revision, would otherwise be sufficient to entitle them to a builder's remedy, when it comes in literally at the eleventh hour and says: Wait, I want to build Mount Laurel housing.

However, I realize that because of the position that the Township has taken with regard to Garfield's property, that that argument really is meaningless in this context. I just want to indicate, however, that we are being consistent in

our impression that, in our opinion, that is not sufficient to trigger an entitlement to builder's remedy.

However, I think, for all of those reasons, that on the question of good faith and the question -- and I think the two subsidiary points that are involved, A, the use of Mount Laurel as a club and, B, the obligation of the developer to at least offer something to the town, to come in and say, "Let me do this, please," and get a negative response from the Township before it files a suit or rushes off to court to file a suit, that, on both of those issues, that the builders in this case are not entitled to a builder's remedy.

THE COURT: All right. Suppose we take the responses in the order in which Mr. Moran has addressed them.

MISS HIRSCH: Your Honor, I believe that comment that Mr. Moran made which refers to the fact that if our letter to the Township had not included an offer to do Mount Laurel housing, that it would clearly come within the threat language of the Mount Laurel decision, is very revealing.

In fact, the language at page 218, which is constantly referred to with respect to Toll Brothers --

I'm sorry, it's page 280 -- talks about a builder using that law as an unintended bargaining chip and threatening to bring Mount Laurel litigation in the course of going after municipal approval for projects which contain no lower income housing.

The letter to the Cranbury Township Committee and the Cranbury Planning Board, however you would characterize it, clearly does state that Toll Brothers was submitting a plan which involved twenty percent, a hundred and eighty-eight units, which would be affordable to lower income persons.

Additionally, I'd like to point out that the letter enclosed ordinance amendments and master plan amendments which, in at least one other town that we have been involved with, were amendments of a type that a particular governing body did find were acceptable later down the line.

Although the tone of the letter may not be acceptable -- I understand Your Honor's position on that -- we did do a good bit more than the other plaintiffs in this case who may have appeared at meetings and claimed that proposed master plan revisions would not be sufficient, there would be problems with them.

We submitted specific ordinance provisions

which we believe meet the precepts of Mount Laurel II.

As a part of our January 6th letter, we additionally offered to meet with the Township and its attorneys and planners until a certain date, to go over the analysis that we set forth in the letter.

We also said that we would like the opportunity to work with the Town on the revisions to the master plan and ordinances that would be needed to implement the proposal that we were making.

I think that those additional comments in the letter should be kept in mind. I don't believe that, in this context, that the efforts of Toll Brothers can be considered a threat.

There was an offer in the letter to do Mount Laurel housing. The suit was then filed. It was our understanding, due to the good faith and offer to attempt to resolve without litigation language in the Mount Laurel decision, that such an effort was required.

If we had not sent that letter to the Town and had instead filed suit, we would have been involved in this case perhaps more directly, earlier part of the case. The timing was -- of the letter was January 6th, 1984. We received a response from the mayor on January 18th, 1984.

If we had not allowed that time to pass, and had instead filed a complaint immediately, our complaint would have been filed a mere fifteen days after Mr. Zirinsky's.

It is our position that some effort is required by a plaintiff to bring a proposal involving lower income housing to the attention of the municipality before the litigation is filed. And I believe that the efforts of my client were sufficient, given that language. Thank you.

THE COURT: All right. Thank you. Mr. Herbert?

MR. HERBERT: Your Honor, last week, when we heard an argument about exhaustion of remedies, and based upon the -- perhaps the direction of the colloquy that took place, Mr. Moran apparently, like the good litigator that he is, has now retreated to another basis to try to eliminate my client from the case. And this one now is in the -- under the label of good faith.

To my amazement and great disappointment, last Wednesday I was notified by Urban League for the first time ever that they intended to join with Mr. Moran in that motion. This was on the same day that they filed a brief concerning priorities, in which they bemoaned the fact that settlement discussions

including my client had not been productive.

I think we can all draw, at least I can draw, certain conclusions from that, but I am not going to. I don't think it serves any purpose for me to look at the motives of Urban League, just as I believe it serves little purpose for Urban League to conjecture as to what the motives of Mr. Zirinsky are, when they never took the time to look at the various correspondence which were alluded to today in the stipulation.

That's behind us. I want to address some of the comments made by Mr. Moran about what occurred concerning my client.

In March of 1982, my client contacted Mayor Danser and the then planning director, Mr. March, to have a meeting. A meeting was held in Princeton with the engineers and planners at that time, at which time my client urged that there be adopted, or allowed for, office-research in the western part of town.

As the stipulation indicates, both representatives of Cranbury said that there was little hope of any success, but feel free to apply to the Planning Board, which they promptly did.

There was an exchange of six letters going

back and forth, culminating on June 27th, 1983 and the Planning Board basically saying: Even though we previously listed you on the Planning Board agenda, we are not going to hear you, because the zoning ordinance was then being considered by the Township.

The Township then adopted the zoning ordinance, I believe sometime in July or August, sometime during the summer; and, shortly thereafter, Garfield filed its complaint. Garfield's complaint was filed on September 7th, 1983.

It was during that period of time, I can simply represent to you, that Mr. Zirinsky, during -- after his rejection by the Board, and shortly before that rejection, that he had believed that one way of allowing for him to proceed with office and research was to provide for low and moderate income housing as part of the overall project.

That's not in the stipulation. It's simply my representation. And it was never evidenced in any writing up to that point in time, nor was it expressed by Mr. Zirinsky or his representatives up to being basically told to get lost, if you will, on June 27th.

After Garfield filed its complaint, on

September --

THE COURT: Excuse me.

(Discussion off the record between the Court and his secretary.)

THE COURT: Okay. We'll have to take a break.

MR. HERBERT: Sure.

(Whereupon a brief recess was taken.)

* * * *

THE COURT: Sorry. That was the boss.

MR. HERBERT: Your Honor, I was attempting to point out that the -- shortly after the zoning ordinance was adopted -- and you heard pretty vivid descriptions of that zoning ordinance, which the municipality acknowledges was noncomplying with Mount Laurel itself -- when that was adopted, a suit was instituted, was almost immediately filed by Garfield, which Garfield is quite proud of, and rightly so.

Shortly thereafter, suit was filed by the Cranbury Land Company, represented by Mr. Bisgaier. That was on November 9th, 1983.

On November 15th, 1983, I sent a letter to the Court indicating -- it's in the record -- indicating our interest in getting involved, of our --

I believe our interest in involving ourselves in Mount Laurel litigation; sent a copy to all, sent a copy to all of the parties in this matter.

And on November 16th, I believe there was a -- I'm sorry -- November 18th, there was a status conference here in this court, the first status conference in this case, at which time my associate, David Roskos, was in attendance.

If Your Honor recalls, that meeting was quite lengthy. The issue of any -- of Zirinsky's motion to consolidate was debated; and, as a follow-up, on November 28th, 1983, Your Honor issued the first pretrial status letter addressed to all attorneys, and it noted, at the bottom of page 2, Your Honor's intention to -- the direction to our law firm to submit an order to consolidate, and to circulate that among all of the parties on a five-day basis.

And you concluded by stating: "I would, of course, entertain any objections to the proposed order."

Your Honor, from November, there was nothing. Nothing happened in this case from the first -- the filing of suit by Garfield on September 7th until that status conference on November 18th, 1983, nothing at all other than the filing of complaints

and the filing of answers.

From that day forward, Mr. Zirinsky actively, through his law firm, actively participated in every phase of the trial.

We filed our complaint, it's true, as Mr. Moran says, several months later, in fact, on December 20th. In actuality, we were involved in this process informally as early, as I have indicated, as November 18th, after sending a letter to the Court and to all counsel on November 15th.

There isn't one aspect of this entire matter that my client has not fully participated in. There was no objection by either the defendant or Urban League or anybody else to our being consolidated as a plaintiff.

Our complaint was quite detailed, specifying, I believe, at paragraphs 13, 14 and 15 of Count 1, specifically what the history of this case was, and our involvement.

Your Honor, the rest is more or less history. We've hired a planner. There was a status conference here in January -- I'm sorry -- yes, January, on January 24th, 1984. And at that time, I believe Your Honor remarked that we were the only plaintiff -- and I mean this with greatest respect to other

plaintiffs -- we were the only party, I believe, that submitted a planner's report other than Ms. Lerman up to that point. And I think your comment at that time, Your Honor, was, we were the last one in but we were the first ones to comply with the pretrial directives.

Mr. Lynch, our planner, then participated actively with Mr. Mallach, the Urban League planner, and other experts, and was involved in the evolution of the consensus report. If you recall, Your Honor, Ms. Lerman and Mr. Mallach testified about the contributions of Mr. Lynch.

From that point on, we participated in all aspects of depositions. We even conducted the depositions of Mr. Ginman in my office. We participated in various pretrial motions, including a motion for recusal, and have participated, I believe, quite actively, despite the fact that my client's last name begins with Z, in the entire proceedings.

We have not missed one day of trial, and my client has already absorbed an enormous expense up to this point. At no time prior to last week did anyone ever raise the issue specifically that we would have to send a letter in prior to filing suit

as a sine qua non for having, if you will, standing to proceed with the builder's remedy.

The pretrial order does not direct, it talks generally about the right to builder's remedy. The issue was never raised by anybody in this case.

Mr. Moran raises it generally, the five points in his trial brief, it's true, but no one ever raised this in the context of a motion.

Now, I am told that somehow we are different than other planners because we, by Mr. Moran's presentation, we did not provide anything specific to Cranbury Township. Your Honor, we couldn't provide anything specific, because we -- in effect, any efforts to meet with the Planning Board early on were just rejected out of hand.

It's true that those earlier -- the only overtures that we were able to make were in the context of office and research, but we couldn't even get to first base. There were no other specific proposals ever presented, that is, site plans, in this case other than perhaps Toll Brothers, which came in after -- behind us.

It's true that Garfield, for example, made a generalized presentation, but no site plan was ever proposed, no specific units designed, and so

forth, and the same for the other plaintiff.

And, very honestly, it's understandable that they wouldn't. We had no idea of what units were going to be for the town. We had no idea what the reaction of the Town would be as to specific proposals.

I am hearing now that because my client went through the expense of optioning a great quantity of land, that somehow that should be worked in his prejudice. With all due respect, I think it should work to his advantage, and that's in the issue of builder's remedy on priorities.

I'm not going to get to that, but all I am saying is that we are trying to be fluid. We are trying to be responsive to the Town. We have had innumerable discussions with the Town, and through Mr. Moran, about possibly resolving this case, the contents of which obviously cannot be placed on the record. But our attempt was to be flexible.

But I think that gets us to where we -- what the Supreme Court was involved with when it talked about the threat that would bar a litigant from Mount Laurel relief, at page 280.

In the stipulation, it says -- the stipulation in our case -- it is acknowledged that no

threat was ever made to litigate a case, and that is true; and, therefore, the provision of page 280, paragraph 66, that Your Honor referred to before, is not applicable.

As to paragraph 69, the Court alludes to the Chester case in speaking about not using Mount Laurel as a bargaining chip.

In Chester, what occurred there, not only was there an environmentally unsound piece of property, but there was no commitment to construct low and moderate income housing.

Here there is a commitment, and I believe that that is the following -- that the following, the last several sentences of paragraph 69 at the page of 281 I believe resolved the issue, and that is that Trial Courts should guard the public interest carefully to be sure that plaintiff developers do not abuse the Mount Laurel doctrine.

Where builder's remedies are awarded, are awarded, Your Honor, the remedy should be carefully conditioned to assure that the -- that in fact, the plaintiff developer constructs a substantial amount of low income housing.

THE COURT: Do you know, in the Chester case, whether the plaintiff had actually made an application

for a variance and was denied?

MR. HERBERT: I believe he did, Your Honor. He was asking for multi-family housing on a flood plain.

THE COURT: You see, you can read that sentence -- I think you're right, but you can read that sentence two ways.

You can read it to say or to address the situation where a builder has been unable to secure a variance, that is, has been denied a variance; or has been unable, in the general sense would be unable, to secure a variance.

It has a different meaning depending on how you read it. I think in Chester, there was actually an application for a variance, which was denied.

MR. HERBERT: I believe so, Your Honor. Here, there was no -- well, I don't want to belabor the point.

There was no opportunity to even present any proposal formally to the Planning Board, because those efforts were basically met with the point that -- with the reaction by Cranbury that because the zoning ordinance was then in progress, such a meeting would be, if you will, and these are my words, fruitless.

Now, Mr. Moran would, I am sure, point out that after the zoning ordinance was adopted, as he has pointed out, why didn't the builder come forth with a specific proposal? I would like to really ask him. Would there be any hope to it?

Here we are in court, with Garfield sitting here seeking high density zoning and providing a set-aside for low and moderate income housing. It's no secret that that is in a location that Cranbury would like to locate such housing; but yet, Cranbury has resisted all efforts by Garfield to -- absent litigation, to do so.

How could we possibly hope to go through an effort of seeking zoning revisions so as to provide for low and moderate income housing in the western part of town, when, in the eastern part where, if anything, Cranbury would -- at least alleges that they'd like to see that housing, they frustrated those efforts?

The other thing I want to point out is what would have occurred had we made an application while the suit had been filed in September, and gone through this fruitless process only to find out, on the day of trial, that any such efforts would be totally unproductive.

And I would venture a guess, not a guess, but a one hundred percent guarantee, but that such efforts would be unproductive.

Then we'd be back in a position of maybe having a viable argument about exhaustion, about coming in too late.

The fact is, Your Honor, in this case, we came in very early in the game. We participated in every aspect of this trial.

The Court speaks about providing a builder's remedy as an inducement for builders to put their resources forth and to shoulder the financial responsibility of these kinds of cases.

And if they have an appropriate site, and if it's environmentally -- if it's environmentally appropriate, then, within the fair share, a builder's remedy should be granted.

Now, Your Honor, we believe that we should have an opportunity to have a master look at our sites and to fashion a specific proposal that would be detailed. And, as I said, other than Toll, the other plaintiffs have not fashioned that, simply because we don't know what the fair share number was going to be, we don't know what the overall allocation was, and so forth.

But if this motion is granted, we won't ever get that opportunity.

The thing that rings a bell with me as I stand here and read the Urban League's brief is their statement about -- page 3, at the bottom, the second sentence: "The Supreme Court, however, was also balancing fair play to the municipality against its pragmatic concern that housing production be encouraged."

I would only ask, where is the fair play for my client? Where is the fair play when somebody attempts to have an audience with the Planning Board and does not get that audience?

Where is the fair play when no one objects to a motion to consolidate only after several weeks of trial, only after we are at the builder's remedy stage, and then introduces this argument?

Your Honor, I think that if a -- if we are going to put to the litmus test the true motives of plaintiff developers, then I would venture a guess that a very guileless lawyer perhaps could say all the right things in an appropriate letter, but have intentions not to build low and moderate income housing.

That wasn't done here. No threats were made.

And we are committed, in the words of page 281 of the Decision, to construct low and moderate income housing at the appropriate offset declared by the Court.

We'd like to have that opportunity. And we don't believe, by any stretch of the imagination have we ever made any threat, and that's stipulated to as far as an explicit threat; nor have we acted in bad faith in this matter, and we therefore ask that the motion be denied.

THE COURT: All right. Mr. Bisgaier.

MR. BISGAIER: Your Honor, I think that Mr. Herbert really touched on one of the major considerations that you should have in ruling on this motion, and that is the fundamental purpose of the builder's remedy, why the Court instituted it after so many years of litigation.

I would bring to the Court's attention that it was not the builders who came to the Court seeking the builder's remedy; it was the public interest bar that came to the Court seeking the builder's remedy, believed it thoroughly argued it vociferously and at great length before the Supreme Court.

And the reason for that argument was because however serious the Mount Laurel mandate, whatever

its constitutional underpinnings, the public interest bar is in the totality, sat before the Supreme Court during those arguments, all four entities, all of which since that time have experienced the pitfalls of public interest representation from the point of view of the support it has gotten and the potential for the public interest bar to be undercut along the way.

And it was because of the need of a class of plaintiffs that would bring Mount Laurel litigation that the Court instituted the builder's remedy.

There has been talk that the builder's remedy is not a constitutional right. Of course it's not a constitutional right. It's a remedy for the satisfaction of a constitutional right; and as such, it has constitutional significance.

And for the Court to be asked to undermine it in any way is for the Court to be asked to do something very, very serious in its implications. And to couch it from the point of view of a standing issue or from the point of view of an exhaustion issue, I think is really a mistake.

I think the Supreme Court's concerns about granting the builder's remedy are spelled out at length. It did not have a significant concern with

regard to standing or exhaustion. Its concerns were to get a class of plaintiffs to litigate, not to have housing built in areas where, for very sound and very serious environmental reasons, it should not be built.

The one thing the Court mentioned which the Court was concerned about, and I think the only thing that there should be a serious concern about, is the issue of the bargaining chip, the builder who is really using the Mount Laurel litigation or a threat of Mount Laurel litigation as a way to get something other than an approval to construct low and moderate income housing.

A look at the Clinton, Caputo and Mount Laurel cases I think really expresses the Court's intent on how the builder's remedy should be utilized.

The Court had experience with the builder's remedy. It had several builders before it in Mount Laurel. It had a builder who had simply written a letter to the municipality and had done absolutely nothing more, prior to filing its litigation. And the letter simply stated its desire to build a mobile home park in the township. There was no submission of any plans. There was no application for anything else.

That builder is now constructing four hundred and some odd units of mobile homes in Mount Laurel Township as a result of the builder's remedy.

In the Caputo case, the Court was faced with a developer who had gone forward without a Mount Laurel -- without any Mount Laurel units, with the intent to build Mount Laurel units. The Court addresses the way to deal with that in its opinion.

The way to deal with that was to mandate as part of the builder's remedy that the builder build low and moderate income units. The Court didn't say because this builder went forward, sought a variance and didn't get it, it was not entitled to the builder's remedy. The Court didn't say because there was no application for low and moderate income housing, this builder was not entitled to the builder's remedy.

The only reason the builder in Caputo was not entitled to the builder's remedy was because of its site, and because of the environmental degradation that would be created on its site. No other reason was given by the Court.

And in that case, where the Court specifically addressed these very concerns, the Court said that the Trial Court's method of dealing with that

would be to mandate low and moderate income housing as part of the development.

Round Valley and Clinton is even more on point. There, the developer had gone forward with a proposal on a site which it ultimately sold for commercial and industrial development during the course of the litigation.

What did the Court do? Did the Court say: Clear evidence that Mount Laurel was being used by a developer to get industrial and commercial development on its site? Could there have been clear evidence of that? Was there a presumption raised in the Court's mind that this builder was really not intending to go forward? No.

The Court said: This developer will have the right now, on remand, on another tract on which it had never proposed low and moderate income housing, to go forward and prove to a master that it would be -- that it was feasible on that site, and that financially and from an environmental perspective, low and moderate income housing could be built there.

That's how the Courts treated three proposals.

THE COURT: What actually happened in Clinton, though?

MR. BISGAIER: Pardon me, Your Honor?

THE COURT: What actually happened in Clinton?

MR. BISGAIER: I can't address that from the point of view of my own personal knowledge. I have an understanding of what happened, and that is something I think to be addressed to the Trial Court in implementing the Mount Laurel ruling.

THE COURT: It's been reported that it's -- the case was resolved without any Mount Laurel provision at all.

MR. HERBERT: Can I address that? I don't mean to interrupt Mr. Bisgaier's --

THE COURT: Go ahead.

MR. HERBERT: -- presentation. I was trial counsel and litigated the entire Round Valley case through to the Supreme Court.

What had happened was that the Supreme Court -- and I mean this with respect to the Court -- took two years to issue its decision. In the meantime, there was a Trial Court finding, by the way, that holding the land cost upwards of a thousand dollars a day.

Frankly, the developer just gave up waiting -- and this is not meant to be critical of the Court -- and settled with Clinton Township to

construct other than Mount Laurel housing, but they didn't get a builder's remedy. There was no injunction used by any Court.

And today, there's no Mount Laurel housing on that site.

THE COURT: Did the Court approve the settlement?

MR. HERBERT: I don't believe so, Your Honor. The case was resolved without any further litigation. And I can get into, you know, the discussions I had with Judge D'Annunzio in that vicinage about it, but the Clinton case was not used as a bargaining chip; nor was there any threat made.

The problem that occurred was that, as I have indicated, that it was a site that was being carried at an enormous interest cost, with land-carrying cost.

And I can only speak for -- Mr. Hill assumed responsibility for that case after I was involved. I can only tell you that the case was resolved in the two-year hiatus waiting for a decision from the Supreme Court.

THE COURT: Mr. Bisgaier, did you by chance see the brief which the Public Advocate has filed in the Bedminster case concerning builder's remedies?

MR. BISGAIER: No. I haven't seen the brief, nor was the intention to file it shared with me.

THE COURT: It's funny how the worm turns, and I apply that equally to the Urban League.

The Public Advocate has taken the position that it's appropriate -- and I don't want to mis-characterize what they have said, but I think it's -- I think this is a fair characterization, that it would be appropriate in Mount Laurel litigation for the Court to accept a settlement between a township and one builder, and treat that settlement as a resolution of the class action, and cut off any other builder's remedies and, instead, give those other builders an opportunity to be heard with respect to the proposed settlement and the ordinance revision.

It's even been argued that in a case such as -- and I am not suggesting that the Public Advocate argued this, but it's been argued that in a case such as this, which has been brought by a public interest group, that any builder who joins shouldn't have the builder's remedy because, after all, the Urban League would have carried this case to a conclusion, and the purposes of Mount Laurel

would have been fulfilled.

And I just wondered if you want to comment on both of those.

MR. BISGAIER: Well, I can't comment on the first position, it seems like -- much too complicated, on the class action issue, although I think it's abhorrent in this situation, where you have people who have been participating essentially throughout the litigation, to have a settlement with one of the class as opposed to others, as if they hadn't been there.

THE COURT: Well, it seems to apply even more strongly. In other words, the Public Advocate's taking the position that even in the absence of a public interest group in the litigation, that one of the plaintiffs can settle, and the settlement will be treated as a class action settlement and, thereafter, there will be a hearing akin to a class action hearing as to whether the public interests are being served; and the rights of the other developers will be limited to demonstrating that their parcel was unreasonably or capriciously excluded from -- in the rezoning process.

It's my understanding that Judge Skillman has ruled on such a matter last Friday, and I

understand he's going to reduce it to an opinion.

MS. HIRSCH: Yes, Your Honor. I just wanted to represent to the Court, that is correct. It was in the case of the Morris County Fair Housing Council suit and Charles Development Corp. versus Morris Township.

And that is correct, except that the judge is requiring at this hearing that the other developers who were challenging the settlement have an opportunity to show why it does not provide for the Town's fair share or why it's not within a reasonable range of what that fair share is.

THE COURT: And also to show that they should be included, --

MS. HIRSCH: Yes.

THE COURT: -- I take it. But there is inherent in his decision the concept that other builders who were plaintiffs might be excluded and not receive a builder's remedy, I think.

MS. HIRSCH: Yes, that is correct, if they don't meet the burden of showing why the settlement is unfair.

THE COURT: So he's -- if I understand it, he's taken -- essentially, the decision will be whether the Township or municipality arbitrarily or

capriciously fails to include those builders in their rezoning scheme, in light of their fair share number.

MS. HIRSCH: I think the first decision will have to be that the proposed rezoning, which in this case was adopted by the Town but was conditioned upon a judgment of compliance being issued, meets the Town's fair share or comes close to meeting the Town's fair share and, if it doesn't, that there is some good rationale for it not meeting its fair share, either insufficient vacant land or some other justification.

In that case, the only plaintiff, the only developer who was challenging the settlement was a developer who really did come in at the eleventh hour, within weeks of the case, the first trial date that was set, and additionally who Judge Skillman ordered not be joined, not be consolidated with the main action.

So, there may be some distinctions there.

MR. BISGAIER: I have had some discussion with the Public Advocate about the Morris Township situation, which I think is very different from that one. They had essentially resolved the settlement when another piece of litigation was

filed, and I think that's the context.

Although I haven't seen that ruling or heard from anybody other than Ms. Hirsh as to what it was, I would expect that would be the context of that ruling, which I think distinguishes it from the factual setting here.

The second point that Your Honor brought to our attention, as to the right to builder's remedy in the context of public interest litigation, is something that I have a very strong opinion on, and I think that there should be no question about it, in light of the history of public interest litigation in this context.

As much as the Urban League would like to assure the Court that it will be here to pursue this litigation to its finality, it can't, and it knows that, and the Court knows that, it's been its representation before the Appellate Division.

The Public Advocate was unable to do that as to twelve municipalities that it sued in 1978, dropped from litigation because of costs.

The Urban -- the Suburban Action Institute, which filed litigation against three other municipalities with Mahwah, has been unable to pursue those other municipalities because of the cost of

litigation.

The existence of a public interest litigant is certainly a benefit to the Court and a benefit to the public. It does not preclude the need for the builder's remedy, and does not preclude the -- it should not preclude the exercise of the builder's remedy.

We do not know when the public interest bar is going to drop out of a case. Neither does the Court. And in order to maintain this class of plaintiffs that the Supreme Court saw as essential to bringing Mount Laurel litigation, the existence of the public interest bar, to the extent it does exist, should not foreclose, in the context of any litigation, the granting of builder's remedy to an otherwise appropriate plaintiff.

The specifics of the facts here I think substantially enhance, certainly, my client's rights vis-a-vis the arguments of the Township.

My own view is that there is no plaintiff here who the Township has the right to foreclose from moving forward toward a builder's remedy. The fact that a representative of Garfield stood up in a public meeting is enough. I think if no representative stood up at all, in light of the pendency of

the litigation, it would have been enough.

The fact that they came, they represented -- they represented somebody who purportedly is ready, willing and able to build low and moderate income housing, is enough.

There was no threat there. There was no threat in the Toll Brothers situation. There was no threat in the Zirinsky situation.

A rebuttable presumption is now to be given in the Zirinsky situation because they didn't propose low and moderate income housing, but they came in and litigated the claim afterwards? So what? How do they rebut the presumption?

THE COURT: What about the public interest dimension which the Urban League refers to, and the perception out there in the municipalities that Mount Laurel is being abused, and the perception of a town, let's say, like Franklin Township, now, which has been sued by ten plaintiffs, as to the fairness of this process, as to the appropriateness of the process?

You don't see in that, setting that, there might be a point at which we have to say, look, we don't need ten builders to bring about the goals of Mount Laurel?

MR. BISGAIER: Yes, it is, to some extent. It's an issue that's apparently going to be heard by Your Honor at some point in this litigation, which would be the priority issue. It's another answer in terms of how to deal with numerous builders.

THE COURT: Let's assume there's enough fair share there to satisfy the ten of them.

MR. BISGAIER: If there's enough fair share there to take the ten of them, then I don't think the municipality has a standing to complain. They have the opportunity and have had the opportunity since nineteen seventy -- actually, since 1971, when the first Trial Courts began articulating the Mount Laurel doctrine, to begin to comply with the Mount Laurel mandate. They have certainly had the opportunity since January of 1983 to comply with the mandate.

If they have done nothing, if they have gone this length of time having done nothing, and put themselves in a posture where they have a fair share number of eighteen hundred or whatever it is in Franklin -- and I am unaware of the number -- which has totally been unaddressed by the municipality, I don't think that they have the right to complain that that fair share number may be divvied up among a class of plaintiffs who the Court, Supreme Court,

wanted to be encouraged to litigate.

There's no way for the Court to know how many of those plaintiffs would be able to survive the litigation at -- this lengthy litigation; to foreclose one or two or three or four of them in an step along the way, until the litigation is finalized, may well be a serious mistake.

You may be foreclosing the ones that would pursue it, and granting it to ones who, six months from now, disappear for financial reasons.

I mean, there's so many possibilities here, you know, that have to be protected in order to guard the Mount Laurel mandate, that I think it should be under the most extreme circumstances, and I think the Court pointed out what they would be, that the Court would foreclose a builder from moving forward toward the builder's remedy stage of the litigation.

On the other hand, I do think that there does come a point in time in the history of litigation when plaintiffs are entitled to know that, that there is a halt and call to intervention and consolidation; and that's something which should probably be well-briefed by people at the appropriate time for the Court, and for the Court to articulate

at a certain point in the history of the litigation when that point has come, and when others who bring Mount Laurel litigation will just have to await the resolution of the case that's before the Court.

I think it's going to be raised, I am sure it's going to be raised in the Monroe case at some point, as to what the rights are of those parties who have been granted intervention or consolidation vis-a-vis other landowners in a municipality who haven't sued.

I would just like to, in closing, just speak a little bit to the history of my client's involvement in the town.

I am hearing an argument, I believe, by Mr. Moran, that my client did not do enough and that, at some point in time after 1976, it should have come back again, and maybe again and maybe again, to the municipality, having received correspondence from the municipal attorney that, no, we understand you have an application, you have had your application, you know, for seven years, before Mount Laurel I was even brought, my client had an application to this municipality for this type of relief, that in some way, they're foreclosed from a builder's remedy now because they didn't do

something.

And I would say that would be really an extraordinary thing to bring back to the client at this point, that having been proposing this type of use before 1970, in fact, and having litigated the issue of the moratorium, and having litigated it until the Urban League brought their action prior to the builder's remedy, having undertaken this -- these actions, having sought a resolution of need to be adopted by the municipality, having struggled with the municipality to get it to provide for regional housing needs and local needs, having jeopardized its own ability before the municipality by representing itself publicly to be that landowner who is pursuing low and moderate income housing in the municipality for years, and having litigated shortly after the rezoning, albeit not within forty-five days, which is totally irrelevant, to be told now that it didn't do what it was supposed to have done to give it standing or to say that it hasn't -- it didn't threaten the municipality in some way, I think is really a totally unacceptable argument by the Township.

The Township has to be estopped from even pursuing those arguments. It has constantly been

using the fact that it's going through its master plan process as a justification for not meeting with builders. It has used with my client the fact that it was in litigation as a reason not to discuss specific developments with builders.

The mayor himself took the stand and stated, "We didn't respond to the Toll Brothers application," not because he didn't like the letter. He could have said that. Not because he was upset with the letter. He could have said that. And those are probably reactions that he and the Township had.

He testified that he did not respond to that application because they were in litigation. They were already in litigation. And the fact that the municipality is already in litigation is a major fact, I believe, of a major significance for the Court in this context, from the developer's point of view, from the builder's point of view.

The municipality's already in litigation. It's already fighting, and it hasn't rezoned. It could rezone at any time.

The -- Cranbury could have rezoned in 1977, and it didn't. And builders and landowners have known that all along, and know the doctrine as enunciated in Mount Laurel II with regard to this

municipality.

It's remanded back to this Court for this municipality, and this municipality adopts the ordinance that it chose to adopt, in what would appear to be relatively flagrant violation of Mount Laurel rulings that its own -- of the Court's ruling, since its own planner testified that it was adopted in response to Mount Laurel I and not in response to Mount Laurel II.

To say that builders should be prevented from moving forward when there's ongoing litigation, and trying to join that litigation to present their claims in light of the municipality's record, really would be contrary to, I believe, the letter of the Opinion.

We do have in the Opinion itself an example of the Court dealing with a developer coming in within the context of existing litigation. The Supreme Court has dealt with that issue and accepted that developer and gave that developer a builder's remedy.

There's no -- there's nothing in the facts in these cases which would justify Roger Davis getting a builder's remedy in Mount Laurel and these plaintiffs not being entitled to go forward with a

builder's remedy in this case. Thank you.

THE COURT: We'll take fifteen minutes.

(Whereupon a recess was taken.)

* * * *

THE COURT: Mr. Warren? You wish to be heard? I mean, are you -- fools rush in where wise men fear to tread, or something like that.

MR. WARREN: I'll try and compromise and be brief, Your Honor.

In light of Mr. Moran's presentation, I spoke with him during a previous break, and he confirmed that Garfield and Company is not the subject of his motion, as indeed I think he would have to in light of the fact that the affirmative defenses which provide the basis for the motion were never raised with respect to Garfield and Company.

The only comment I'd like to make in light of that, therefore, is pick up on something that Mr. Herbert said. He said that Garfield and Company is proud, and rightly so, of having initiated this litigation among the builders, builder-plaintiffs, first.

And, Your Honor, that's quite correct. We are proud that we were the first builder-plaintiff to come in and analyze the zoning ordinance, proposed

Township Committee and, in general terms, explained to the Township Committee the problems with the ordinance which related to the Mount Laurel housing to be built in the PD-HD zone. And when the Township Committee nevertheless passed the ordinance, Your Honor, we are proud that we came in within the forty-five-statutory-day period for prerogative writs and brought this action as the first builder's remedy so as not to in any way delay this remanded action.

And so to that extent, I certainly agree with Mr. Herbert. Thank you.

THE COURT: Mr. Payne.

MR. PAYNE: Your Honor, I, too, will be brief, because despite what Mr. Bisgaier seemed to say a moment ago, this is not the Urban League's motion; this is Mr. Moran's motion, and I think the position that we stated in our letter brief made available this morning emphasizes that, for the most part, we do not support Cranbury Township's position this morning.

We have not supported Cranbury with respect to the exhaustion argument, and I want that emphasized,

because it perhaps wasn't attended to quite as clearly in our brief, that we do not support Cranbury with respect to the argument concerning good faith and prior negotiations, at least in the context of this litigation.

The language that the Supreme Court has given to us to work with is, unfortunately, very ambiguous as to all of this. It's the Urban League's position that, with respect to the activity of the four builders present in court here, that the ongoing process of litigation, the remand from the Supreme Court, the Township's articulated position with respect to the litigation, would have made it wholly futile for any of the builders to have thought it appropriate to undertake extended negotiations with the Township in the context of specific proposals.

Now, I can't say with confidence what the situation as to that requirement may be some months or years hence. As we gain more experience with post-Mount Laurel II procedures in these situations, it may well be, and I would hope that it would be, the case that towns would be sufficiently open and aware and cooperative in their sense of obligation to meet the Mount Laurel II mandate, that it would be fruitful to sit down with detailed proposals and

work them out in advance.

But with all due respect to Mr. Moran's position, that certainly is not the case with Cranbury under the present circumstances.

Our agreement with the Township's position is on the very narrow point of the so-called threat exception to the entitlement to builder's remedy. And even with respect to that, I believe our position is an extremely narrow one.

We ask simply that there be some prior expression by the builder-claimant of a commitment to the Mount Laurel purpose in order to proceed beyond the threshold stage.

There obviously is a long process ahead in terms of priorities amongst competing builders, problems of suitabilities, finding an appropriate time in the course of litigation to cut off further motions for consolidation or whatever.

Those issues are before the Court. They obviously will have to be resolved, but we would suggest to you, Your Honor, for the reasons you have already indicated, that our concern is with the overall health of the Mount Laurel doctrine, not with the Township's position, not with the builders' position, but that it can become, over the long haul,

a workable means to achieving the ends that the Supreme Court has articulated.

And we do believe that that requires some minimal commitment in the form we have suggested, as a rebuttable presumption, which I would emphasize in this case we think might be rebutted.

We have not had access to the letters. We have not had access to the conferences or other communications between the builder and the Township that might show a different context than appears from the stipulation. But we do believe that that minimal showing was what the Supreme Court had in mind when it required that non-Mount Laurel zoning purposes not lay behind -- lie behind a piece of Mount Laurel litigation.

It seems obvious that under almost any conceivable circumstances, the smoking gun of an overt threat would be avoided;therefore, there has to be a somewhat more sophisticated inquiry into what the context of the relationship between the Township and the developer may be, if that language is to have any meaning.

THE COURT: Where does the Court go with drawing the line here as between Toll Brothers, which deems it necessary under the decision to write

a letter, and writes a letter which it probably knows is going to be fruitless and, if you want to take Mr. Moran's argument, was intentionally framed that way, so as to evoke a negative response, and Zirinsky, who says, I give up, I've been trying to develop my land, I know I'm not going to get what I want, and if I write a letter, it's probably going to look like a threat if I say, okay, you didn't give me OR or whatever the designation is, office-research, and I now write and say, I now want to talk to you about Mount Laurel?

It's not the smoking gun, but one could certainly imply a threat from that. And so Mr. Zirinsky says, rather than get myself into that, I'm just going to start suit, and I have this land here, I've got an option on it, and I'm willing to build Mount Laurel.

And maybe with Mount Laurel, I can convince the Town to also let me have some commercial.

Which is more offensive?

MR. PAYNE: Do I have to choose, Your Honor?

THE COURT: Okay. Which is the more violative of the Mount Laurel doctrine? I didn't mean offensive in terms of the tenor of the approach, but in terms of the doctrine itself.

MR. PAYNE: They're different problems, Your Honor. As we have indicated, we don't wish in any sense to suggest that the Toll Brothers approach is one that we would encourage. Far from it. But on its face, tone and style apart, we believe that it meets the requirements that the Supreme Court has set out at the threshold for the claim of the builder's remedy.

As to Mr. Zirinsky's situation, I fully agree that once the initial non-Mount Laurel offer has been put on the table, it is increasingly difficult for the builder to switch gears, to make a Mount Laurel claim, without suggesting the implicit threat.

That's why I believe our bottom line position is that the offer should be made up front and at the outset. And as I indicated in our brief, we think that's to the good, that it encourages builders who see the potent weapon here in Mount Laurel to think through the Mount Laurel possibilities from the outside, to frame it, to offer it, and stick with it thereafter.

THE COURT: But what's wrong with somebody in the Zirinsky situation, who sees the handwriting on the wall, he's negotiated, attempting to get what

he wanted, and had no interest in Mount Laurel at all, which I think I can fairly say may be the typical builder in the State of New Jersey, and he sees the Township adopt a zoning ordinance which doesn't coincide with what he wanted, he sees the fact that there's not going to be any likelihood of him ever getting it, in light of the manner in which the western half of the Town is zoned; is he to be barred from changing his mind because he chose the use most desired to him?

He is at that point -- what's he supposed to do, get rid of the land, sell off his options, or sell off the land he owns? Or can he not say, well, I know that I'm never going to get my primary goal, but there's one use that I might be able to get that's economically desirable to me and, from the standpoint of the likelihood of success, perhaps more achievable; I may not be able to demonstrate that the Cranbury ordinance is arbitrary and capricious in excluding office-research, but in light of the dictates of Mount Laurel, it may be improper?

Can't he change his mind without having that be deemed bad faith or a threat?

MR. PAYNE: Of course he can change his mind,

Your Honor, but it's the builder's remedy that we are talking about, not the use of his land, not the ultimate relationship between any builder and any township.

Indeed, I think it's entirely appropriate that the existence of Mr. Zirinsky's options, the possibility that some of those options may be converted into ownership that could serve a Mount Laurel purpose, be a fact that is considered by the Court, by the master, by the process at some point in the litigation.

The builder's remedy, as I understand it, gives the landowner something more simply than the ultimate possibility of using his land. It gives him, to some degree, a pre-emptive right to use it as against considerations of municipal preference, as against considerations of the most desirable planning criteria in a community.

Again, that's an issue that we haven't yet faced, suitability, priorities amongst builders, and so forth.

I don't for a moment wish to suggest that the Zirinsky landholdings become irrelevant to this litigation once this issue is faced; but even though the builder's remedy has become, in the Supreme

Court's words, a routine rather than extraordinary remedy in terms of availability, it still is an extraordinary remedy in terms of the degree of disregard that it allows of the municipality's general control of its land.

I would submit to you, Your Honor, that even the very brief history thus far of Mount Laurel II makes it crystal clear that builders are going to be forthcoming to claim the builder's remedy. There seems to be no question about that, and it's obvious that the Urban League type case, which is primarily a public interest plaintiff, is going to be a small part, if any part at all, of future litigation.

That's why I think it's so important to straighten out these remedies here, so that yes, it's a hard case, it's a hard rule, but it does not burden builders very strenuously, I would submit.

THE COURT: Well, the question is whether a ruling which would give the Court the option to pick and choose, whether it be along the lines of what Judge Skillman is reported to have done -- and I say that because I don't know precisely the context within which he's ruled -- or the suggestion

which would deep-

bringing suit, might then tend to detract from the argument which you have just made, that the builders are now actively coming to the Court, more than the Court would like to deal with, maybe, but they are actively pursuing those matters.

And that, of course, was, as I understand it, one of the primary purposes of the builder's remedy in the first place, as you are correct in saying, that the public interest groups are dropping out either because of independent reasons -- and with respect to the Public Advocate, I am informed that they are not pursuing any new litigation, and I think maybe that puts the statement mildly.

I have a rather strong feeling that we are not going to see any public interest groups in Mount Laurel litigation when these pending cases are completed. That may be an overstatement, but I think that probably is closer to the truth, so that a Mr. Zirinsky or whomever, viewing the potential that they can come this far and be knock out, is going to have to be leery about that. They're going to have to read what some judge may

under similar circumstances.

And indeed, if the class action approach is applied, it will mean the race to the courthouse, the first guy there, and then the first one to settle. I'm not sure how that equates to the public interest in Mount Laurel.

MR. PAYNE: Your Honor, I share those concerns. I think we're moving into the issues that we have separately briefed on our priorities brief.

I would only suggest that, at this point, that I think the timing considerations in this case are perhaps unique. I would not want to argue seriously as a general proposition that this is the best or the clearest time to make this issue. It has come up at this point. Your Honor has heard argument on that previously, and has agreed to hear it at this point.

I would submit that what is essential to the health of the builder's remedy is out of this case, I would hope, because there are public interest plaintiffs present.

Certainly in some case in the very near future, from yourself, from the other Mount Laurel courts, a clear articulation of a set of ground rules for the builder's remedy problem -- the

Supreme Court obviously has not faced the complexity of the situation as it now appears.

I believe that once those ground rules are articulated, as we argued in our priorities brief, just as with any litigated issue, the parties can cast their likely success at an early stage, even if the ultimate decision is later on, and there need not be an unnecessary burden on litigation.

We have to keep these cases open to builders. Our position on the general issue, contrary to some suggestions you asked about earlier, probably with Mr. Bisgaier, is that we do not suggest that there ought only be one builder, or that the builder's remedy ought to be cut off at some point short of the fair share obligation of the municipality.

We think the remedy ought to be generously available, but it does, I would submit, need some ground rules.

THE COURT: Okay. Mr. Paley, you want to be heard?

MR. PALEY: Yes. Briefly, Your Honor, I support the argument that Mr. Moran made as to his position generally addressed to builder's remedy. Obviously, I take no position with respect to the specific plaintiff builders in this case whatsoever,

but I would add to the comments that Mr. Moran made the following.

At page 279 of the Opinion, the holding of the Supreme Court is, and I quote: "We hold that where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted."

And then the Court goes on to have some exceptions based upon environmental and planning constraints.

Now, I think that there's two points in that holding that should be stressed by the Court, first of all, the words "where a developer succeeds." In this particular case -- and whatever is going to happen in the future will hapen, but in this particular case, we have had the Urban League prosecute this case aggressively through the conclusion or the virtual conclusion of the trial, where we are now.

They have been represented by able and competent counsel. They have been assisted by the Constitutional Law Clinic of Rutgers, the State University, in their presentation. And they have often argued applications before the Court, as

Mr. Payne just did a few moments ago, and that there has been no shortage of strong activist attitudes taken by the Urban League in this particular proceeding.

I think, therefore, that it's not necessary to have a general rule as to the role that public interest litigators are going to take in the future.

But in this case, certainly, one can argue that whatever results are achieved were achieved primarily, if not exclusively, through the efforts of the Urban League and Mr. Payne and his colleagues.

Secondly, the Supreme Court says, in the quote that I just referred to, that the developer must propose a project. Now, I'm not sure, of course, exactly what the words "propose a project" mean.

On page 330 of the Opinion, when addressing this particular -- in the conclusion of their general opinion, they refer to the fact that there is to be a proposed project. And on page 331, they use the term, "proposed development."

Now, I submit --

THE COURT: That's in the Round Valley case, 331.

MR. PALEY: Yeah, I believe that that's

correct. I'm sorry, Your Honor. I believe that the use of those terms suggests something more than a builder or developer standing up before a Township Committee or Township Council or a Planning Board and saying, I believe that your ordinance is unconstitutional, and I'm available to build Mount Laurel housing.

Indeed, I can tell the Court that municipal attorneys have been receiving correspondence on a general basis from no attorney in this case, and from no developer in this case, as far as I know, from lawyers which state: We represent Mount Laurel developers, and if you have a problem meeting your fair share, just give us a call, and we'll happily put you in touch with a developer who can come into your town and meet your needs and satisfy Judge Serpentelli.

THE COURT: It's worse than that. The majority of the complaints filed in this court never even tell me what is going to be built, the nature of the building, nor the number of units involved.

We call on a regular basis, after the complaint is received, and ask the plaintiff's counsel, what is it that you are proposing, so we have some

idea of the magnitude of the proposal and the amount of low and moderate housing to result from that.

And most of the time, the answer is: I don't know. We'll have to get back to you.

MR. PALEY: Well, I think, Your Honor, that it is incumbent upon anyone who seeks a builder's remedy to have some specific plan or proposal. Obviously, I would not argue that he needs site plan approval, or that even that he has to file an application for site plan or subdivision approval with the appropriate municipal agencies.

But something of detail should be presented to a municipal agency, and discussion should ensue before a developer-plaintiff should be entitled to a builder's remedy. And I think that's what the Court had in mind when they said, "Propose a project."

I also think that that kind of situation avoids the problem that the Court pointed out in colloquy with Mr. Payne, using Zirinsky just as an example, where then you don't have to decide on the fine line whether or not a developer who proposes something other than residential housing, and sees he's not going any place, you then have to judge the good faith of his change of mind.

I think what has to happen is that some specific project has to be submitted.

Now, just some general comments other than that, on some of the argument that has taken place.

With respect to the position of plaintiffs who have participated in the trial, and particularly in this trial, I would argue that their participation here, particularly in light of the Urban League's participation, ought not to have any effect for good or bad upon the decision of the Court.

The pretrial order that was entered in this case made quite clear that it was only at a later point in time that the right and entitlement of any plaintiff developers to a builder's remedy was going to be adjudicated. I don't think that anyone was misled.

Any party, as has been pointed out, could have brought an application before this Court to resolve the question we are now talking about, or the exhaustion of remedies question, or the standing question, however that's characterized, at an early point in this proceeding, and no one did.

The second point is that I believe Mr. Bisgaier made a point, when addressing this subject, when he said: Aren't we told now that we didn't do what we

should have done then, if you accept Mr. Moran's argument?

Well, of course, that's been the position that all of the municipal defendants find themselves in. And I can recall some specific cross examination, particularly from Mr. Warren, I believe, to the effect that you municipalities have had ten years in order to get your house in order and your ducks in a row.

But, of course, Mount Laurel didn't come out until January of 1983, after two and a half years of consideration by the Supreme Court; and many of us believe, those of us who represent municipalities, who have taken steps to rezone, and who have taken steps to promote high density housing, would argue that we did so in good faith.

And while I am very much aware of the statement in Mount Laurel which says we don't really address the question of good faith as far as the municipalities are concerned, it's results that count -- and that's a paraphrase, of course, but I think that that's clearly what they say -- I think that we find ourselves in the position of appearing before this Court as the bad guys, despite whatever efforts we may have made.

We are indeed the baby seals that this Court alluded to earlier, and anything that this Court can do to temper the blow I think is -- takes a positive approach, especially in those municipalities that have made some effort.

The last thing I want to say, Your Honor, is, there's been talk here about the public interest. And I'm somewhat sensitive to that term, because I view my representation of the Township as being in the public interest.

I represent 42,223 people, as of the 1980 census. Mr. Moran represents several thousands of people in Cranbury.

To argue that the municipal attorneys here representing townships and boroughs throughout Middlesex County are not representing the public interest is, I think, inappropriate. We represent the public interest as much as the Urban League does.

We may have a different view of where that interest lies, but we certainly represent the public interest far more than developers, builders who come in and seek to develop lands for high density, which happens to be coincident with high profits.

And without addressing the motives of any of the particular plaintiffs in this case, Your Honor, it seems to me that one can conjecture that the arguments that I hear would be substantially different if the ruling in Mount Laurel was for low density housing. We wouldn't be hearing the talk about devotion to the public interest.

I wonder if any of the developers in any of the cases before Your Honor has offered to take the additional profits that are going to be generated by the higher density housing and plow those additional profits back to the municipality, to permit the municipality to construct an infrastructure to serve those houses.

They may be compelled to do so by way of off-site improvements and so forth, to the extent that Mount Laurel permits, but you don't hear any of that.

It's -- that must be said at this point, Your Honor, and when Your Honor considers the question of who is entitled to a builder's remedy, I don't believe that it's fair for Your Honor to ignore the municipal interest. And I speak on behalf of Piscataway and baby seals everywhere.

THE COURT: Let me, just for the purposes of

the record, make it clear that there was an attribution to me of this baby seal language. The only comment that I recall about it was my expressing my distress with that kind of language, and I certainly wouldn't want it to become mine.

MR. PALEY: May I -- I did not mean to suggest that Your Honor had originated that comment at all. Your Honor pointed out that that appeared in a newspaper or magazine article, and merely reported it.

THE COURT: And I think I commented that I didn't approve of it.

MR. PALEY: That's correct.

THE COURT: Secondly, with regard to your last argument, we can't forget the fact that the Court has indicated that Mount Laurel litigation must be profitable; otherwise, we are not going to get builders in here.

I concede that there comes a point at which the issue of profitability may be reached.

The third comment that I would make, and you may wish to address yourself to it, and that is if we define succeeding in litigation, how do we square that with Mr. Davis's builder's remedy in Mount Laurel? He didn't succeed in that case alone.

That case had been carried all that period of time by a public interest group, and he got in on the bandwagon, and the Court kind of just gave that very short shrift.

It said: It's true that Davis is not a typical plaintiff developer, and it could be argued that the primary reason for granting a builder's remedy wasn't present there. But they turned around and said: There are really three reasons we are going to give him the remedy.

And it seems to me that perhaps the third reason was the most important, and that is, it's time that something be done, and he was there to do it.

Now, that leads me, then, to the question of whether, in a -- even in a suit brought by a public interest group, or a suit brought by one builder in which other builders join, there isn't value in that setting as opposed to a suit brought by one single plaintiff.

Now, we have had four cases settled here with the Urban League in which there's been no builder. And we have, and we will, revised ordinances which everyone hopes will result in Mount Laurel construction. But we don't have before

us in any of those cases somebody ready, willing and able before the Court to build, and upon whom the Court can impose a condition of building.

The language of the Opinion would permit me to say to Garfield and to Cranbury Land and to Zirinsky and so forth: You get a builder's remedy, but you get it done, or you lose it. You start building within twenty-four months, or you're going to lose it.

Isn't there the benefit of, which the Court expressed in terms of builder's remedy, of getting natural construction? Isn't that much more likely where you have multiple plaintiffs than when you don't?

MR. PALEY: Let me address the first point first. With respect to the Mount Laurel case itself, I think it's at least arguable that what the Supreme Court intended to do was to reflect its consternation with the fact that in the Mount Laurel municipality, not one low income dwelling had been zoned for, and they viewed the attempts on the part of Mount Laurel to comply with even Mount Laurel I as being specious.

And I believe that it's arguable that that's why Mr. Davis succeeded to a builder's remedy and

was awarded a builder's remedy in that case.

Secondly, Your Honor --

THE COURT: You don't see that that might be equally applicable here? Maybe not specious, but Cranbury hasn't responded with a compliant ordinance since 1976.

MR. PALEY: Well, I'll let Mr. Moran argue those attempts that he feels that Cranbury has made.

THE COURT: No. He's conceded the compliance issue first. Well, first Judge Furman decided that; and then secondly, on revision, he's now conceded that. So he -- the fact of the matter is that Cranbury has not zoned in such a manner as to provide for affordable -- or a realistic opportunity to build affordable housing in -- well, we can take eight years, if you want to start with Mount Laurel I.

MR. PALEY: Well, Your Honor, let me talk about Piscataway for a moment, because the same thing applies in Piscataway. We have one complaint filed by a proposed builder. I would say that if there were four or five --

MR. HERBERT: Excuse me, Your Honor. I don't mean to cut off Mr. Paley. I apologize to him, but in fairness, if Mr. Paley is going to address the complaints that have been filed with

this Court by an adversary, is now going to address that, and particularly in the context of a motion brought by Cranbury, it might not appear to be appropriate.

THE COURT: I don't know where you are going with that.

MR. PALEY: I'll withdraw the comment.

THE COURT: Yes.

MR. PALEY: Had several complaints been filed against Piscataway for seeking builder's remedy --

MR. HERBERT: Your Honor, the same objection. I mean, perhaps I don't have standing to do it, but Mr. Paley is alluding to a different circumstance than that of which he's faced in an adversarial context, with a client, with a party who is not here in court to hear his argument.

THE COURT: Well, let me see where you are going. Go ahead.

MR. PALEY: I would certainly think that that might provide options to Piscataway to try to resolve the matter with those individuals and on those sites that Piscataway felt were appropriate for development for low and moderate housing.

We don't have that situation in Piscataway, because there's only one.

THE COURT: And it's after the fact, isn't it?

MR. PALEY: Well, that's to be -- it certainly was filed after this trial started, and argument on that will await another day.

But it seems to me, Your Honor, that my point in addressing this particular motion is to try and place the general municipal position in perspective, that it doesn't necessarily mean, because one builder files an action, that a lot of other builders are going to run in.

With Piscataway, with the fair share number for Piscataway, the consensus fair share number as high as it is, and that being well published, does the fact that we only have one developer who's filed an action suggest that there is not demand for low and moderate housing with the Township of Piscataway? And is that something that the Court ought to consider?

I don't think that the developers ought to be the one who are going to be the judges of when and where Mount Laurel housing is going to be built. I think that's up to the Court. And following the arguments that have been made by the plaintiff developers here, and applying them to Piscataway

generally, I think that they would require that the Court place too much discretion, if you will, in the decision of any landowner to file an action and to come into court. They know that they're going to win.

And in this particular case, it's been the Urban League and it's been the Court-appointed expert that has presented the bulk of the testimony that the Court has been heard -- that the Court has heard; it has not been the builders. Thank you, Your Honor.

THE COURT: Okay, thank you. I am not going to rule on the matter until I have received the Zirinsky material. It's an extraordinarily difficult situation, as far as I am concerned.

Just in general terms, the interests being weighed are what I perceive as a very strong policy statement in the Opinion as to the liberality of granting builder's remedies and the obvious encouragement for builders to bring suit, and the possible undermining of the Mount Laurel principle should the builder's remedy approach be modified, cut back on, in any significant fashion.

The other side of the coin is fairness to the Town, judicial efficiency, the need to conclude

Mount Laurel litigation as rapidly as possible, and to get results.

And those two objectives have to be weighed. I think that's all that I will say with regard to it at this point, until we receive the letters. When will I have those?

MR. MORAN: They will be mailed today, Your Honor.

MR. HERBERT: The problem I had is that the only copies I had I gave to Mr. Moran, and I didn't realize that --

THE COURT: They're going to be mailed today? Wouldn't it be easier to bring them in tomorrow morning?

MR. MORAN: I hadn't planned on being here tomorrow. I thought -- if you want me to, and if Your Honor's going to rule at that time, I can come back tomorrow.

THE COURT: It's all right now. If you're not going to be here, that's okay.

MR. HERBERT: Your Honor, I could arrange to, perhaps to have somebody pick them up at Mr. Moran's office and have them here this afternoon.

THE COURT: As long as I have an opportunity

to read them, that's fine.

MR. HERBERT: That could be arranged as soon as we conclude.

THE COURT: All right. What are we doing next?

MR. MORAN: Your Honor, I believe, unless I'm misreading things, that that essentially concludes Cranbury's participation in this phase of the case, with the exception of the rulings that I have asked Your Honor to make, and which you had indicated that you will make when you receive the documents.

I believe that under the ruling in Mount Laurel, the next phase of the case would be to remand it to the Planning Board with instructions to rezone to accommodate a specific number of low and moderate income housing units, with or without the assistance of the master.

And Your Honor has indicated, although the appointment of the master is optional in the Opinion, Your Honor has indicated, I believe, on a few occasions, your intention to appoint a master.

On the question of the appointment of a master, I would -- I have two requests, and they're not necessarily exclusive.

One is that Your Honor give consideration to the appointment of a master whose background is in land use planning and, secondly, that it may be appropriate to use the same procedure that you used when you appointed the Court-appointed expert, and that is, you asked the parties to submit recommendations, and you attempted to select from those recommendations someone that was acceptable to as many of the parties as possible.

I realize that with the pool of experts that we have in this case, the pool that remains available may be somewhat limited.

THE COURT: Everybody's out of the pool. I take it from what you say that you do not want to have the present Court-appointed expert converted into a master, if the Court chooses to select a master.

MR. MORAN: I have reservations about that, and the reason I do have reservations is because, as I understand, although she's a licensed professional planner, and this is nothing -- to take away nothing from Ms. Lerman. I don't want to cast any doubt upon her ability in her area of expertise.

But as I understand her background over the last several years, it has been primarily in the

field of housing, as executive director of the Housing Authority, with very limited involvement of -- in land use planning at the municipal level on a day-to-day basis, that's involved in the preparation of a master plan and the preparation of a zoning ordinance.

And those are the reservations that I have.

THE COURT: All right. Mr. Warren?

MR. WARREN: Your Honor, before we get into the next stage of the case, just so as the record is crystal clear, I believe that all of the parties in the Cranbury case agree to a stipulation on the record that the builder's remedy plaintiffs were willing to provide a substantial amount of Mount Laurel housing which, of course, is one of the conditions I don't believe has been put on the record yet; and I'd just like to take this opportunity, with the agreement of the Court, my co-plaintiffs and Mr. Moran, to put that on the record with respect to all of the builder's remedy plaintiffs.

THE COURT: And "substantial" is as defined in the Opinion.

MR. WARREN: Yes, Your Honor, exactly.

THE COURT: Which is a minimum, and I underline minimum, of twenty percent. All right.

All right, Mr. Moran. You want to leave, I gather.

MR. MORAN: Well, Your Honor, as I understand, the next procedure that the Court is going to go into is a compliance portion of the case with regard to Piscataway, and I don't see any sense of burdening the taxpayers of Cranbury with the expense of having me sit through that.

THE COURT: All right. How about counsel for the builders in Cranbury?

MR. HERBERT: Well, Your Honor, I'm sure arrangements will be made to have the letters delivered to the Court within a matter of an hour or two; and assuming that occurs, I take it the Court will be issuing some kind of decision.

And might I inquire as to what -- when that would be, presumably tomorrow?

THE COURT: Either -- yeah, probably tomorrow morning. That doesn't say you have to be here if there's no other reason. What --

MR. MORAN: Do you intend to announce it from the bench, Your Honor?

THE COURT: I would, yeah.

MR. MORAN: Oh.

THE COURT: What else do we have to do beyond

Mr. Nebenzahl?

MR. BISGAIER: Your Honor, we need at some point a brief conference with you on Monroe. Mr. Gelber and Mr. Mallach probably will participate. It will be no more than five or ten minutes, just --

THE COURT: All right, we can do that during the lunch hour, if you want to get out of here. And then the other plaintiffs, I assume, don't want to be around.

MR. WARREN: I wouldn't put it that way, Your Honor.

THE COURT: I'd get out if I could. Well, maybe the thing to do is to break now for lunch. Let me take this Monroe conference. We'll start with Mr. Nebenzahl at one-thirty. All right?

And I take it he will be the last witness. Are we going to have anybody else?

MR. PALEY: Your Honor, Piscataway has one other witness, which is a representative of Rutgers, some of whose testimony may be able to be stipulated to.

I haven't spoken with Mr. Gelber yet. He will be brief. But Mr. Nebenzahl will certainly take all of today and probably well into tomorrow.

THE COURT: All right. Let's meet on the

Monroe matter, and then we'll start on the Piscataway portion at one-thirty.

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C E R T I F I C A T E

I, GAYLE L. GARRABRANDT, a Certified Shorthand Reporter of the State of New Jersey, certify that the foregoing is a true and accurate transcript of the proceedings as taken before me stenographically on the date hereinbefore mentioned.

GAYLE L. GARRABRANDT, C.S.R.
Official Court Reporter

Date: 6-25-84