ML – Affordable Living Corporation, Inc. v. Denville

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Plaintiffs Brief in Opposition to Defendant's Motion to Transfer

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AFFORDABLE LIVING CORPORATION, INC., a New Jersey Corporation Plaintiff, v. MAYOR AND COUNCIL OF THE TOWNSHIP OF DENIVLLE. Defendant	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS/MIDDLESEX Docket No. L-042898-84 P.W.

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO TRANSFER

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INTRODUCTION

This brief is submitted by plaintiff Affordable Living Corporation in opposition to defendant Denville's motion to transfer this case to the Council on Affordable Housing (Council), pursuant to par. 16 of the Fair Housing Act. (Act)

The essence of plaintiff's argument herein is that the case should not be transferred on equitable grounds. The record below reveals a defendant that has engaged in contamacious conduct and has done everything within its power to delay, hinder and obstruct the efforts of the Court and the court appointed Master to achieve rezoning in compliance with Mt. Laurel II. The plaintiff recognizes that its equitable argument applies solely to defendant Denville, and not necessarily to any other municipality. As to the facial invalidity of the Act, plaintiff relies on the briefs filed by the other parties.

STATEMENT OF FACTS

Despite a court order to rezone within 90 days, a deadline extended by an additional 45 days upon request of the court appointed Master, defendant has failed to do so. To compound the matter, defendant has quite deliberately flouted the court order and, rather than work toward compliance with the court's directives, has adopted methods intentionally designed to delay and obstruct the goal of rezoning. (See Penn certification). The so called compliance package submitted by the defendant, given its patent deficiencies, speaks eloquently to defendant's bad faith. It is clear beyond question that defendant's unarticulated goal was to intentionally delay in the hope that the enactment of the Act would somehow spare defendant from ever constructing affordable housing.

Given the history of this defendant, affordable housing will never be built in Denville should this court with its awesome powers to force compliance with its directives transfer the matter to an agency which under the terms of the Act would have virtually no authority to force compliance. Defendant's blatant attempts to avoid its constitutionally mandated responsibility to provide affordable housing is enough, in itself, to justify this court's refusal to transfer the matter. The equitable powers of this Court should not be exercised in such manner that would have the practical result of assisting defendant Denville in its attempt to shirk its constitutional obligations.

LEGAL ARGUMENT

POINT I

THE COUNCIL'S LIMITED AUTHORITY AND THE EXTENDED TIMETABLES OF THE ACT WOULD ENABLE A RECALCITRANT MUNICIPALITY TO AVOID OR DELAY INTERMINABLY ITS CONSTITUTIONAL OBLIGATION TO PROVIDE AFFORDABLE HOUSING

The questions here presented are whether the council has the authority to compel swiftly and efficiently compliance with its orders and whether the timetables established by the Act would benefit a municipality that seeks to avoid its constitutional obligations. The questions presented are relevant only in the context of a recalcitrant municipality, here Denville. Where there is no hint of potential noncompliance with the Council's decision, it may reasonably be assumed that a municipality will comply.[1] Thus it is that the factual predicate of the argument herein is that there is every reason to believe that Denville will seek to avoid all Council directives toward compliance with Mt Laurel II.

The authority of an administrative agency consists of powers expressly granted by the Legislature as well as those powers which are reasonably necessary or appropriate to effectuate the purpose of the agency. N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978). Where reasonable doubt exists as to the authority of an agency, and where the enabling legislation

1. This is not to suggest that transfer would be appropriate in cases involving compliant municipalities. The timetables of the Act are such that the lapse of time between transfer to the Council and actual construction would be long enough to justify a refusal to transfer.

cannot fairly be read to authorize the action in question, the power to act is denied. A.A. Mastrangelo, Inc. v. Environmental Protection Department, 90 N.J. 666, 684 (1982). The enabling legislation (Act) must, therefore, be scrutinized in order to determine the authority of the Council.

The Council has been vested with authority, among other things, to determine municipal fair share and to certify that a municipality's housing element is adequate. Objecters to the element have an opportunity to be heard in a contested case before the Office of Administrative Law. The Council's grant or denial of a certification following a contested hearing is presumably appealable to the Courts.

The problem with the legislative scheme, though, is threefold in situations involving a recalcitrant municipality which deliberately sets out to delay and submits a patently defective housing element to the Council. First of all, the Council would have no independent authority to enforce any orders concerning production of documents or witnesses, or to enforce timetables. An administrative agency has no authority to adjudicate and punish criminal contempts. Wright v. Plaza Ford, 164 N.J. Super. 203, 215-218 (App. Div. 1978). At best, the Council could invoke the power of the Superior Court in aid of its jurisdiction, and thereby request the Superior Court to enter a judgment followed by a contempt citation if the judgment were not complied with. But even this would require an administrative regulation relating to enforcement of the Council's orders. See Hayes v. Gulli, 175 N.J. Super. 294, 304 (Ch. Div. 1980). Although the Council has the authority to establish rules and

regulations, it would be mere speculation as to whether it will ultimately adopt procedures for enforcement of its orders.

It should be noted that the Council's authority to refer contested matters to the OAL does not in the least vest more authority to enforce orders than would ordinarily be the case. The OAL has no greater authority than the Council. In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In any event, the OAL's enforcement authority is limited to procedural, not substantive matters. See, e.g., N.J.A.C. 1:1-8.5(c).

The second problem in the situation of a recalcitrant municipality is the built in statutory delay in ultimately getting the case to be decided on the merits by the court. For example, Denville could choose to submit an inadequate housing element. Indeed, the housing element Denville selects does not have to be filed with the Council until five months after the Council's adoption of its criteria and guidelines. (See Sec. 8 of Act). In turn, the Council's criteria and guidelines do not have to be adopted until August 1, 1986. (See Sec. 7 of Act). Thus it is that Denville need not file its housing element until January 1, 1987. Following the filing of the housing element, there is a mediation process if objections are filed. (See Sec. 15a & b). Then, if the issue is not resolved, the matter is transferred to the OAL for hearing, and later sent, within 90 days, to the Council for final determination. Presumably, the Council's decision to deny certification of the housing element is appealable as a final administrative decision.

The mediation, OAL, and Council review process should take

at least six months, even on an expedited basis. It would thus be at least until July 1, 1987 that the matter would be in Court, and at least six months after that before a final judicial decision. (Given briefing schedules, oral argument, and the lapse of time before final judgment). It is altogether reasonable, then, to assume that in the case of a recalcitrant municipality, a final judicial decision on its housing element would not be rendered until January 1, 1988, at the earliest. (Even then it is not likely that an Appellate Court decision from a final administrative determination would be in the form so as to require immediate compliance by Denville.) Given Denville's history of resistence and noncompliance the plaintiff submits that it would be inconceivable to permit Denville to go into 1988 before the courts can hold it to account.

Finally, there is no reason to believe that Denville would even contest the Council's denial of certification of its housing element. What then? The Council cannot force Denville to submit an adequate housing element. Although the Act is somewhat ambiguous on this point, it is reasonable to assume that jurisdiction would revert to this Court, which could then determine the issues and force Denville to comply with Mt. Laurel II. But this Court already has the case. There is no reason to transfer this case knowing that it will come back two years or so later. On the other hand, if we assume, arguendo, that jurisdiction would not revert to the Court, what remedy exists to force a noncompliant municipality to submit and ultimately to implement an adequate housing element?

Should Denville determine to subvert the process by not even

submitting a housing element to the council, jurisdiction would not revert to this court until at least five months after the Council has promulgated rules and regulations. (See Sec. 16 of Act). The Council has until January 1, 1986 within which to propose rules and regulations. (See Sec. 8 of Act). Given the lapse of time in general between publication and promulgation, it is likely that it would be at least early Fall of 1986 before jurisdiction would revert to this Court.

In conclusion, then, it is submitted that the inherent equitable power of the Court should not be exercised in favor of Denville and, moreover, that transfer of this case would thwart the construction of affordable housing in Denville.

POINT II

GIVEN THE SUBSTANTIAL INVESTMENT OF THE PLAINTIFF IN THE LITIGATION BEFORE THIS COURT AND THE COURT APPOINTED MASTER, AND GIVEN THE ADVERSE CONSEQUENCES TO THE CONSTRUCTION OF AFFORDABLE HOUSING THAT WOULD ENSUE IF THIS COURT DID NOT RETAIN JURISDICTION, TRANSFER OF THIS CASE WOULD RESULT IN A MANIFEST INJUSTICE.

As pointed out in counsel's certification and in the expert's report, plaintiff has, to this point, invested 843 hours in this case. Much of this time has been spent in the process before the court appointed Master, an unduly protracted process due, in large measure, to the delaying tactics of the defendant.

Plaintiff has acted in good faith throughout this proceeding. Plaintiff has invested considerable time and money on the assumption that it would ultimately prevail on the merits. Transfer of this case via legislation enacted long after plaintiff filed suit would destroy plaintiff's investment. Should plaintiff have to litigate this matter in the administrative process, the substantial investment it already has made will be doubled because issues will be relitigated.

As further pointed out in plaintiff's expert report annexed to the certification of counsel, the delay which will most certainly be occasioned by transfer to the council will have a disastrous effect on the housing market. Among other things, according to the report, the cyclical instability of the construction industry, and the availability and cost of capital mandate construction of affordable housing as soon as possible. Any delay in construction may well find the industry in an

economic turndown, resulting in the inability to construct and market affordable housing.

Since Denville has a constitutional obligation to afford a realistic opportunity through its land use regulations for the construction of low and moderate income housing, any delay which will impede the attainment of that constitutional imperative constitutes a manifest injustice.[1]

1. This is so regardless of how the term "manifest injustice" is interpreted by the Court. Even if that term implies due process standard, as defendant suggests, that standard is met.

POINT III

IT WOULD BE MANIFESTLY UNJUST TO HAVE POOR PERSONS SUFFER BECAUSE OF DEFENDANT'S OWN MISCONDUCT

This matter has been in litigation for years, and it has been six months since defendant was ordered to rezone. Had defendant acted in good faith, there would be no reason for the transfer motion. This case would now be in the posture of a positive Master's recommendation, waiting only for this Court's approval. That Denville is now in the position of seeking relief under the Act is due solely to its own misconduct. Why, then, is Denville entitled from a court of equity to the relief it seeks?

Although at the writing of this brief the Master's report is not completed, it is clear that there are not enough sites in Denville to enable it to meet its fair share obligation. The plaintiff's site is appropriate, however (as the Master has found), and if that site is not developed at a high density with provisions for affordable housing, the poor will suffer. Yet, it is clear that transfer of this case will result not only in delay of construction of affordable housing on a town-wide basis, but will also result in a substantial delay on the plaintiff's site. It would be manifestly unjust to have the poor suffer - deprived of the opportunity for affordable housing - because of defendant's misconduct.

POINT IV

IT WOULD BE A MANIFEST INJUSTICE TO TRANSFER THE CASE IF THAT WOULD RESULT IN THE PLAINTIFF BEING DENIED THE OPPORTUNITY TO A BUILDER'S REMEDY

Although the Act is silent as to whether the Council has the authority to grant a builder's remedy, it seems clear that the Legislative intent was to preclude the builder's remedy. The Act's Statement of Purpose is unambiguous, to wit "it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing."

On the assumption, then, that plaintiff could not obtain a builder's remedy from the Council, the question then becomes whether it would be inequitable, or manifestly unfair, to transfer the case.[1]

This plaintiff has invested considerable time and money in the litigation of this case. The inducement for the filing of plaintiff's lawsuit was the potential of a builder's remedy. While it is true that this Court has previously denied plaintiff's application for a builder's remedy, that denial does not preclude a later application for the same remedy based on facts which emerged during the process before the Master

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1. Also at issue is whether the Act is unconstitutional on its face because it does not provide for a builder's remedy. The absence of a builder's remedy in the Act is contrary to the principles enunciated in Mount Laurel II. Without the builders remedy, the constitutional mandate of Mount Laurel II would be reduced to a nullity. The plaintiff submits that the Act is facially unconstitutional because of its failure to provide for the award of a builder's remedy. Plaintiff will rely on the briefs submitted by the other parties in support of this proposition.

and facts which may emerge during any evidentiary hearings before this Court on the rezoning of Denville. Moreover, at the completion of all proceedings plaintiff will have the option to appeal this Court's previous denial.

Whatever the prospects may be for the plaintiff to eventually obtain a builder's remedy, whether through this court or on appeal, transfer of the case to the Council eliminates any possibility that plaintiff can obtain the remedy it sought when suit was filed. In this regard, it must be kept in mind that plaintiff's involvement in this litigation has been lengthy (over one year) and intensive. That involvement was predicated on plaintiff ultimately obtaining a builder's remedy. Transfer of the case, then, would have the practical effect of extinguishing plaintiff's cause of action and eradicating its substantial investment in the matter.

Plaintiff's cause of action, including the right to a builder's remedy with its roots in Mt. Laurel II, was a vested property right. Terracriona v. Magee, 53 N.J. Super. 557, 569-574 (County Ct. 1959); Engler v. Capital Management Corp., 112 N.J. Super. 445, 447 (Ch. Div. 1970); Briscoe v. Rutgers, 130 N.J. Super. 493, 500 (L. Div. 1974). Legislation enacted after plaintiff's cause of action was filed cannot divest plaintiff of its vested right without running afoul of Due Process of Law. State Department of Environmental Protection v. Ventron Corp., 94 N.J 473 (1983); Rothman v. Rothman, 65 N.J. 219 (1974); Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372 (1954).

Thus it is that even if this court determines that the term

"manifest injustice" at Sec. 16 of the Act connotes a constitutional standard, rather than a lower, equitable standard, the plaintiff has met the higher standard.

CONCLUSION

For the reasons expressed herein plaintiff submits that defendant's motion to transfer should be denied.

Respectfully submitted,

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AFFORDABLE LIVING CORPORATION, INC., a New Jersey Corporation, Plaintiff, v. MAYOR AND COUNCIL OF THE TOWNSHIP OF DENVILLE, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MORRIS/MIDDLESEX COUNTY DOCKET NO. L-042898-84 P.W. Civil Action CERTIFICATION OF ARTHUR PENN, ESQ. IN OPPOSITION TO DEFENDANT'S MOTION

1. This certification is being prepared in opposition to defendant's motion to transfer this case to the Affordable Housing Council.

2. The history of this case, including the history of the proceedings before the special master, reveals, on the one hand, the duplicity and bad faith of the defendant, and, on the other hand, the good faith as well as the substantial investment of time and money of the plaintiff.

3. The background of this litigation until the appointment of the special master, including the tentative settlement agreement reached by plaintiff and defendant which was abrogated without reason by the defendant, is set forth in my certification of January 22, 1985. That certification is attached hereto, and made a part hereof. (Exhibit I)

4. On or about March 5, 1985, this Court appointed David Kinsey as advisory master to assist in the defendant's rezoning.

At the time of the appointment, the Court indicated that defendant had until May 1, 1985 within which to complete its rezoning.

5. Pursuant to his charge from the court, Mr. Kinsey felt that it was desirable and appropriate to convene weekly meetings at Denville with the defendant, parties, and any other interested persons or groups. The purpose of these meetings was to exchange information and ideas for the implementation of defendant's Mount Laurel II obligations.

6. These meetings were held on March 27, April 9, 10, 18, 25, May 2, 9, 16, 23, 29, June 6, 13, and July 18, 1985. I attended all these meetings on behalf of the plaintiff.

7. The history of the process before the master discloses that defendant deliberately set about to delay and to obfuscate the issues, and that defendant never intended to comply with the court's order to rezone by a date certain. As evidence of this, I point particularly to the following facts:

(a) At the first meeting of March 27, 1985, the defendant disclosed that it had not taken any action toward revising its master plan because it had wanted to wait until the fair share number had been established. All procedures relating to the fair share number were completed by January 31, 1985, however, and the defendant thus did absolutely nothing between January 31, 1985 and March 27, 1985 toward its court ordered directive to rezone. Also at this first meeting, defendant disclosed that much of the underlying data for rezoning had been completed during the preceding nine months, and all that

defendant had to do was zoning and planning. Despite this allegation, defendant has not rezoned nor has it made any legitimate efforts to rezone in complaince with this Court's orders. The data supposedly gathered by defendant has not, for the most part, been presented to Mr. Kinsey, even at this late date. Indeed, as a result of the defendant's reluctance to supply information relevant to rezoning, Mr. Kinsey is in the position of having to recommend a rezoning plan for the defendant without having substantial input from the defendant.

(b) At the meeting of April 9, 1985, the Mayor of defendant municipality stated that defendant did not want to put "its cards" on the table until it saw the proposals of the developers. At that time, only twenty-one days remained under the court order to rezone. The defendant also disclosed that it contemplated submitting a report by mid-May on the water and sewer situation, and that it had commissioned the previous week, the firm of Camp, Dresser and McKee to prepare a report on zoning and on the plaintiff-developer sites, which report was to be done early in mid-May. Defendant also disclosed that it hoped to have a draft ordinance by the end of May.

(c) The defendant subsequently indicated that it could not complete an ordinance by the end of May. At the meeting of April 25, 1985, defendant represented that it would submit its Mount Laurel II compliance package by June 14, 1985, and that the document would be in a form that would be readily transferred to drafting an ordinance. This court extended its deadline for the rezoning of defendant to June 14, 1985.

(d) On June 13, 1985, the defendant presented its

"compliance" package at the weekly meeting with Mr. Kinsey. This event was the culmination of the process that had been ongoing before Mr. Kinsey since March 27, 1985. The so called "compliance" package, which has been submitted to this court, speaks for itself. Given that the entire process before Mr. Kinsey was designed to lead up to this "compliance package," and given that defendant had presumably hired experts to prepare that package, certain unassailable adverse inferences can be drawn.

(e) Defendant's failure to develop adequate plans to comply with Mount Laurel II led this court to conclude that Mr. Kinsey should submit his own recommendations on rezoning by August 1, 1985. At a meeting with the parties on June 20, 1985, this Court made it clear, however, that defendant could still present a compliance package prior to the date of Mr. Kinsey's report and recommendations. On July 18, 1985, at the weekly meeting with Mr. Kinsey, it was disclosed by Mr. Kinsey that he had not received a new or revised compliance package from the defendant and that he did not expect to receive anything more from the defendant. Defendant's counsel indicated that he had nothing further to add to Mr. Kinsey's statement.

(f) At this point in time, despite an extension of the Court's deadline for the submission of an ordinance which would comply with Mount Laurel II, the defendant has not done so, and by its actions has made it clear that it does not intend to comply. Not only this, but during the process itself before Mr. Kinsey, defendant has failed to meet deadlines, and failed

to submit material and information to Mr. Kinsey relevant to rezoning.

8. In contrast to the defendant's actions, the plaintiff has made diligent, good faith efforts to comply with all requests of Mr. Kinsey, and to assist Mr. Kinsey in his task. In particular, plaintiff points to the following:

(a) Plaintiff has appeared and participated in every meeting with Mr. Kinsey.

(b) On April 10, 1985, plaintiff presented its concept plans and delivered a presentation on those plans by its expert to Mr. Kinsey and other parties present at the weekly meeting.

(c) At Mr. Kinsey's request, plaintiff submitted to him information relative to planning and zoning in general, including a model ordinance and site suitability criteria.

(d) Plaintiff submitted to Mr. Kinsey a detailed and comprehensive analysis of its site (see Exhibit II) The work put into preparation of this document, as well as other documents submitted by the plaintiff, is in clear contrast to the abysmal and virtually non-existent efforts of the defendant in this process.

(e) At the invitation of the defendant, on May 30, 1985, the plaintiff presented its concept plans to a general meeting of interested citizens. Hundreds were in attendance. Although the public meeting was ostensibly called to inform the citizens of the details of plaintiff's and other developers' proposed sites, placards posted throughout Town billed the meeting as "Stop Mt. Laurel II". At the meeting itself,

officials of the defendant, including the Mayor, were openly hostile to plaintiff, to the Mt. Laurel II concept itself, and held preconceived notions about the desirability of plaintiff's site. Although it was clear that nothing substantive could come of this meeting, for weeks beforehand defendant claimed that it could not possibly prepare its draft ordinance to comply with Mount Laurel II until the meeting was held.

(f) Plaintiff has invested considerable time and money in this matter. In addition to being represented by counsel at all of the weekly meetings, plaintiff has used the services of sewer, traffic, and planning consultants. The total time spent, including counsel and experts' time, has been 840 hours.

9. On or about July 17, 1985, Mr. Kinsey issued his report and evaluation of plaintiff's site. He concluded that plaintiff's site is "generally suitable for the proposed development." (p.55).

10. There is an absence of adequate sites in Denville where developers are ready, willing and able to build. Unless those sites that are available are actually developed, Denville may not be able to reach its fair share number. It is essential, therefore, that plaintiff's site be developed.

11. For the reasons expressed in the brief accompanying this certification, transfer of this case to the Council will result, at best, in interminable delay in the construction of affordable housing and, at worst, the housing will never be built. The plaintiff as well as the general public will suffer.

12. Attached hereto as Exhibit III is plaintiff's expert report on the consequences to the housing market should there be a substantial delay in the rezoning of Denville in compliance with this Court's order of six months ago. As that report indicates, because of market conditions, delay may well mean that affordable housing will never be built.

13. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: August 9, 1985

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AFFORDABLE LIVING CORPORATION, INC., a New Jersey Corporation Plaintiff v. MAYOR AND COUNCIL OF THE TOWNSHIP OF DENVILLE Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MORRIS/MIDDLESEX COUNTY DOCKET NO. L-042898-84 P.W. CIVIL ACTION CERTIFICATION OF ARTHUR PENN, ESQ. IN SUPPORT OF MOTION

1. I am an attorney-at-law of the State of New Jersey, and I represent the Affordable Living Corporation, the plaintiff in this action.

2. The Affordable Living Corporation is a New Jersey Corporation engaged in the business of developing residential real estate. In late June, 1984, the plaintiff contracted to purchase approximately 43 vacant acres in the Township of Denville, known as Block 10001, Lot 3.

3. The plaintiff was and is desirous of developing its land for high density residential housing, including a substantial amount of low and moderate income housing.

4. The Township of Denville's land use regulations and ordinances prohibited plaintiff from developing its land for high density housing and, as a result, on or about June 29, 1984 plaintiff filed a lawsuit against the Township seeking, among other things, to invalidate the Township's zoning ordinances and a builder's remedy.

5. On July 3, 1984, this court granted plaintiff's motion to consolidate its lawsuit with the lawsuit brought by the Public Advocate against the Township of Denville in Docket No. L-6001-78 P.W. The consolidation order provided, however, that consolidation be for the limited purpose of the fair share proceedings, and that plaintiff was precluded from participating in these fair share proceedings. (See Exhibit A).

6. On or about August 8, 1984, the Township of Denville filed its answer to the complaint of the plaintiff.

7. On August 28, 1984 I received a telephone call from Stephen C. Hansbury, Esq., the attorney for the defendant Township of Denville, who told me that his clients wished to settle the lawsuit and who then made a settlement offer to me.

8. On the same day I met with my clients to discuss the defendant's settlement offer, and, after carefully weighing the defendant's proposal, we decided to accept it.

9. On August 29, 1984, I call Stephen Hansbury and advised him that my client accepted his client's settlement offer without modification.

10. Mr. Hansbury suggested, and I agreed, that our lawsuit should be put on the inactive list. I immediately wrote to the court and requested inactive status because of the settlement. (See Exhibit B) (The Court responded on September 5, 1984, indicating that inactive status was not necessary since the court could adequately coordinate the matter. See Exhibit C)

11. The settlement proposal consisted of the Township's agreement to rezone the plaintiff's property to permit approximately nine units per acre, for a total of 364 units; of these there were to be 40 low income units and 40 moderate income units. The defendant's settlement was only contingent on the settlement of the Public Advocate's lawsuit against the defendant. As of that time there was a proposed settlement between the Public Advocate and the defendant which included my clients site for rezoning for high density use.

12. On September 10, 1984, I received a letter from Mr. Hansbury which memorialized the terms of the settlement. (See Exhibit D)

13. Subsequent to my receipt of this letter, I spoke with Mr. Hansbury and agreed on bedroom mix and to the fact that my client agreed to pay its pro rata share of any necessary off site sewer and water improvements.

14. As a result of the settlement of this case, no discovery was pursued, and no activity whatever took place on the case. In point of fact, it was unnecessary for either party to actively pursue the case, since the matter had been settled.

15. On December 19, 1984, Mr. Hansbury telephoned me and advised that his client would not agree to any settlement with the Public Advocate which included my client's site.

16. On December 20, 1984, I appeared before this Court with all other interested parties including other developers who had sued the Township, for a status conference, which was held off the record.

17. My notes of that meeting reflect that Mr. Hansbury indicated, without offering any reason or explanation, that his client rejected my client's site for inclusion in the settlement with the Public Advocate. Mr. Hansbury offered some explanation for his client's rejection of other sites which were included in the Public Advocate's settlement.

18. During this status conference the Court rescheduled the fair share hearing, which was terminated months earlier when the Public Advocate and the Township of Denville reached a tentative settlement, and the court requested all parties to refrain from taking any further action until the court set a fair share number.

19. On January 14, 1985, the court announced its decision on the fair share number of units.

20. In addition to the facts set forth above, of relevance is that by order of November 9, 1984, this court invalidated the zoning ordinances and land use regulations of the Township

of Denville on the application of Siegler Associates in Docket No. L-029176-84 P.W.

21. When Siegler Associates made its motion to invalidate the ordinance, my client did not join, since our case with the defendant was settled. In fact, I specifically advised my client that it would be inappropriate for us either to join in Siegler Associate's motion or to initiate our own claim for relief because our case with the defendant was settled.

22. My client has at all times acted in good faith and in reliance on the word of the defendant. The settlement proposal with us was initiated by the defendant, and was not contingent on any action by my client other than its acceptance of the terms set down by the defendant. The defendant's withdrawal from the settlement with the Public Advocate had the effect of negating my client's settlement with the defendant. My client did nothing to precipitate the defendant's actions vis a vis the Public Advocate settlement, and, indeed, my client at all times honored and acted in reliance on the settlement it had with the defendant.

23. I certify that the foregoing statements made by me a true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: January 22, 1985

ARTHUR PENN, ESQ.
Attorney for Plaintiff