RULS-AD-1976-200

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- COURT TRANSCRIPT IN ALLAN-DEANE V. TOWNSHIP OF BERNARDS

PGS-65

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-SOMERSET COUNTY
DOCKET NO. L-25645-75

ALLAN-DEANE CORP.,

Plaintiff,

vs.

TOWNSHIP OF BERNARDS, et al,

Defendants.

MOTION

RULS - AD - 1976 - 200

Louise Gargano 10-10-76

October 1, 1976
Somerville, New Jersey

B E F O R E :

HONORABLE DAVID G. LUCAS, J.S.C.

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

MESSRS. MASON, GRIFFIN & PIERSON
BY: HENRY A. HILL, JR., ESQ.,
and
BENJAMIN CITTADINO, ESQ.,
For the Plaintiff.

MESSRS. McCARTER & ENGLISH
BY: NICHOLAS CONOVER ENGLISH, ESQ.,
and
ALFRED L. FERGUSON, ESQ.,
For the Defendants.

MESSRS. ANSCHELEWITZ, BARR, ANSELL & BONELLO
BY: RICHARD J. McMANUS, ESQ.,
For the Defendants.

MR. ENGLISH: If the Court please, one of the motions returnable today is for an extension of time within which to complete discovery. I understand there is no objection to that. I have a form of order which I have shown to Mr. Hill and also I understand that he is agreeable to the form of evidence.

MR. HILL: That is correct.

THE COURT: The record should reflect that Mr. Richardson, who serves on the County Planning Board, a defendant, has no objection of such an order.

MR. HILL: May it please the Court, the first subject of our cross-motion is seeking to compel answers by William Allen, who was deposed in this matter, on a number of questions. For the Court's information, Mr. Allen is a councilman of Bernards Township. He is also a member of the Planning Board so he serves on both governmental bodies, who are defendants in this action. Mr. Allen also, if you read the deposition, is a mathematician working at R.C.A. and has done a great deal of work as a member of the Planning Board on devising Bernards Township's reaction to the Court's obligation that he must provide their fair share of the

regional housing needs. As a mathematician or engineer, he has devised a formula for calculating Bernards Township's fair share of the regional needs and came up with a number that Bernards Township's fair share is 359 units and almost all the questions in the deposition are directed to Mr. Allen's calculations applying the Mt. Laurel case. Your Honor knows the Mt. Laurel case doesn't give guidelines, it just says municipalities must provide their fair share for the regional need. Most of the literature--and that case was decided last year--has been speculation on exactly what kind of formula the Court might have meant.

The first thing that we asked Mr. Allen for in the depositions were to turn over to us his personal notes, which had been subpoenaed, and I would say that three-quarters of defendants' brief treats the issue of whether a legislator's intent is admissible. Thereby the case cited by McCarter & English in their brief, that a legislator's motives or intent are not admissible in court action, the cases do not go to discovery but they go to admissibility in court actions.

A basic reaction to that is that Rule 4:10-2, of the Rules governing New Jersey Courts controls discovery and the scope of discovery. That rule

provides that you may discover into areas not only which may be relevant, but which are "reasonably calculated to lead to discovery of admissible evidence." We asked Mr. Allen to turn over some of the documentations to give the Court further background. As the deposition shows, there's been extensive exchanging of documents pursuant to the rule for discovery. Any of the documents by which Mr. Allen was questioned were documents which he prepared for the Planning Board explaining his calculations and his theory. The planner for Bernards Township has testified and it is shown in the deposition, that he had not done the work calculating Bernards' fair share of the regional need. So the first question, and a question that runs throughout the questions of Mr. Allen, is the legal question of to which extent may one question a legislator about his motive, and do the court cases indicating that a legislator's motive may not be admissible preclude discovery in that area? We argue that they do not. We think that the representations in most of the cases cited are older cases than the Mt. Laurel line of cases.

Some more recent cases indicate that the legislative intent is admissible for certain purposes and I would like to refer specifically, your Honor,

to the case of Wital Corporation vs. Denville, which is reported at 93 New Jersey Super 107, decided by the Appellate Division in 1966. In that case plaintiff charged that an ordinance was adopted not by reason of zoning considerations but for the purpose of depressing the value of plaintiff's property so that the Township and its Board of Education would be able to purchase plaintiff's property cheaply. The Appellate Division, Judges Sullivan, Kolovsky and Carton, said that, "If plaintiff's charge is true, it is entitled to an adjudication that the amendatory ordinances are void and this without reaching the question of whether the ordinance is otherwise arbitrary and unreasonable."

On page 110 of that decision, the Appellate Division pointed out that the trial court's misapplication of the rule regarding the admissibility of motions of Township Committee members the Court said, "In our opinion, however, the interests of justice dictates that we do not decide the case on the present record. It is evident that the Township's failure to go forward with evidence on the issue resulted from a mistaken reliance on the rule which prohibits, in the case of an attack on an ordinance which is valid on the face, inquiry into

legislative motivation, absent a showing of fraud, personal interest or corruption." Citing cases. "But that rule does not bar what is sought here, a judicial inquiry into the purpose of the ordinance. We find it unnecessary to pursue the question of whether an abuse of the zoning power such as is charged here is in any event a species of fraud rendering inapplicable the rule relied on by the Township."

So the Court may inquire and we think especially for the purposes of discovery we are permitted to inquire into the purpose behind the ordinance.

I would also like to point out to your Honor this case is about exclusionary zoning. The pleadings in the Allen-Deane case follow rather closely to the Mt. Laurel decision.

I would just like to refer to the Mt. Laurel decision, 67 New Jersey at page 170. In that case Justice Hall said, "There cannot be the slightest doubt that the reason for this course of conduct has been to keep down local taxes on property (Mt. Laurel is not a high tax municipality) and that the policy was carried out without regard for nonfiscal considerations with respect to people,

either within or without its boundaries. This conclusion is demonstrated not only by what was done and what happened, as we have related, but also by innumerable direct statements by municipal officials at public meetings over the years which are found in the exhibits."

I would like to refer your Honor to a very recent decision. We picked it up yesterday. From the Supreme Court it was the case of Tax Payers Association of Weymouth Township vs. Weymouth Township. The decision was that of Justice Pashman, decided September 28, 1976 and it is the second exclusionary zoning case decided by our present Supreme Court.

THE COURT: Is that on the senior citizens?

MR. HILL: Yes. That is the senior citizens case and in that case they summarize Mt. Laurel by saying, in that case we determine the impropriety of the system by municipalities to improve their financial position by collectively redirecting new housing to categories of people who are not revenue producers, and they recite some of them that were heard below.

The Court said, and this is the Supreme Court, at page 43--and I have no way of knowing

what page number it will be when it's published-- the Court said, "Our concern for the exclusionary potential of these ordinances is not allayed by the trial testimony of Weymouth Township officials. They candidly admitted that in considering proposals to rezone the corporate defendant's property, they were motivated partly by a desire to obtain additional municipal revenues without placing concurrent demands upon locally financed governmental services. They also hoped to avoid the imposition of additional burdens on their overcrowded schools."

I ask you, your Honor, how does this evidence get into the Supreme Court's record if no one was ever allowed to inquire of elected officials what the purpose of zoning ordinances was? So basically, your Honor, the defendants state that we are not entitled to the notes taken by Mr. Allen in his official capacity in figuring out fair share on the grounds that they may contain his personal opinions or his personal motivations and we're not entitled to those.

If you look at the case law, it says we may not be entitled to admit that into evidence, but none of the cases that I could find say that we're not entitled to read anything which may contain

such material.

THE COURT: Mr. Hill, can there be a further distinction made between mere computation--you say he is a mathematician who is figuring out fair share--which would be abstractions, if you like, which might well be within your reach and some comments he might make with respect to those figures once arrived at which may not or might well be thought within a discoverable area?

MR. HILL: It was our hope to look at the notes. We don't really know what may be in them. In order to see if they might lead to something that might be admissible we've gone over documents and taken depositions and people have said things that have led to more evidence and allowed us to develop portions of the case that we did not have the evidence on.

This case alleges a conspiracy between Bernards Township and officials of the Somerset County Planning Board to engage in an exclusionary scheme to keep developments from the Somerset Hills and to preserve Somerset Hills as an enclave of affluence and social homogenity, and those words are in the complaint.

In order to get to intent--and I say, your

Honor, our only interest in getting to intent would be to look at Footnote 10 in the Mt. Laurel opinion where Justice Hall makes a comment that intent is not necessarily relevant. He says to be specific, "While, as the trial court found, Mt. Laurel's actions were deliberate, we are of the view that the identical conclusions follow even when municipal conduct is not shown to be intentional, but the effect is substantially the same as if it were."

We're interested in intent for a different reason, your Honor.

THE COURT: Intent to do what, Mr. Hill?

MR. HILL: To be exclusionary and intent to preserve. To not follow the Supreme Court's directive to meet their fair share of the regional need under intent.

THE COURT: Could all of this be proved by Mr. Allen's philosophy, necessarily?

MR. HILL: We don't know. Mr. Allen has come up with what we view, and as we stated in our complaint, in cynical disregard of their obligation they have come up with a rigid formula that is absolutely ridiculous. But it's very interesting that we said those words and that the Supreme Court came out three days ago in their most recent decision

with great concern over whether housing for the elderly was being used for exclusionary purposes. The Court stated, "To avert any misunderstanding, though, we re-emphasize our concern about the exclusionary potential which zoning for senior citizens housing possesses. A pattern of exclusionary land use regulation cannot be rendered invisible to the judicial eye by camouflaging it with invocations of the legitimate needs of the elderly. The Court's failure to probe more deeply into the possible exclusionary effect of similar ordinances should not be understood to be the product of blindness to their potentially exclusionary character, but only the consequence of plaintiff's decision not to try the case on that legal theory."

Basically, we are arguing intent because we are seeking a remedy that has been approved to date in a Mt. Laurel exclusionary zoning suit. The Courts of this county have declared and have been declaring for several years that Bernards isn't meeting with their fair share of the regional needs and they have agreed to rezone, and they will. I understand that they will try it again in November or December and it was filed several years before this one on this same issue. We're hoping that at

some point in time the Court will lose patience with the failure of the public officials of this municipality to live up to their responsibilities and we'll take this matter out of their hands. The precedence for that is the Washington Township case. That's why we're interested in intent. We would like to be able to show the Court that there is no intent on the part of the elected officials to do anything but to delay. Justice Hall's statement in the Mt. Laurel case that, "The municipality should first have the full opportunity to itself act without judicial supervision," that the Court should in the first instance allow a municipality to correct the fault no longer applies, and that's the time that the zoning function be taken over by a special master or appointed by the Court. Anyway, that's why we're interested. That's the background and that's why we're interested in this line of discovery.

Going to the specific cases, going to the specific questions, there are some of the questions which in review we prepared to withdraw and there are some which we urge upon you. I would like to tell you which ones--

THE COURT: Why don't you simply list the

ones that you urge and that you're not urging with the same fervor.

MR. HILL: We urge A, which are the notes. B we don't urge with very much fervor at all. C we don't urge with very much fervor. D we urge with great fervor, your Honor. E we'll withdraw. F we urge with great fervor. We urge G. We urge H with great fervor and I think your Honor should know something about H.

Some time ago in April or May--I'm sorry, it was in March or April of this year, the Somerset County Planning Board sent out a notice to Bernards Township, it was a section of an action which Judge Leahy disposed of and which is on appeal in the Appellate Division. The County Planning Board sent out a notice to Bernards, Far Hills and Bedminster saying they wanted to have a meeting to discuss the Allen-Deane problem--I'm not sure of the language--and that it would be a closed meeting. They urged the Planning Boards and the governing bodies of these three municipalities to meet with members of the County Planning Board.

We went to Court or at least I established to the Planning Board attorney and said we were about to go to court to prevent this meeting in violation

of the Open Public Meeting Act whereupon they canceled the meeting and rescheduled it directing that only less than a quorum of each municipality appears so that it wasn't "an official meeting." We got an early hearing from Judge Leahy. Judge Leahy said it was the first case he heard of under the Open Public Meeting Act, which was in existence for approximately two months at that time, and he ruled that in his opinion it was not a meeting. Despite the language that's in the act which said that municipalities couldn't or government bodies couldn't deliberately prevent a quorum in order to get around the act. He thought that it wasn't a meeting. In any case, Judge Leahy did order that a court reporter attend that meeting so that in the event we were successful in the appeal we would be able to have a transcript of that whole meeting.

In the meantime, we asked one of the questions which we asked Mr. Allen which was, what happened at that meeting. Mr. English---as you'll see in the transcript, and that's H--said, you have no right to answer that question. It's already been decided by Judge Leahy. We state that it hasn't been decided by Judge Leahy. He only determined the very narrow question of whether they could meet and whether we

had a right to an injunction preventing them from meeting because they were in violation of the Open Public Meeting Act. This is the first time that there were any questions regarding discovery of what took place.

Anyway, their defense is that they didn't have to tell us because it was a closed meeting and Judge Leahy said we couldn't go. Our argument is that has nothing to do with the rules of discovery and we'll still entitled to our remedies, and perhaps sometime, your Honor, we'll have a full tape of that meeting.

The questions I and J, your Honor, we feel that we are correct on and we urge that. K we don't urge.

I've just received answers to our second set of interrogatories. We feel that defendants believe that we are not entitled to ask any questions about what a legislator might have intended and we feel that it's a very poor legal issue. We also feel that the cases don't go to discovery, they go to admissibility and to us that is not clear. That's the whole line of exclusionary zoning cases to speak about legislative purpose. Judge Pashman and Justice Hall said over and over again, they talked

about what the purpose was and they, indeed, capsized Mt. Laurel in this most recent case when they said, that you cannot keep housing out for the purpose of increasing your tax ratables and bettering your tax position. I think that all of this exclusionary zoning has to do with not only the effect but the purpose, because Justice Pashman makes it very clear that the Court will go to the purpose. I thank you, your Honor.

THE COURT: One question, Mr. Hill. These questions are addressed, as I understand it, to Mr. Allen.

MR. HILL: That's correct. All the questions are, your Honor.

THE COURT: Would you urge on the Court that you would want the same rights to make the same inquiries of other members of your Planning Board or Township Committee?

MR. HILL: Well, Mr. Allen has a peculiar position in this case because I'm not in a position to depose Mr. English. But to some extent he appears to be functioning as an expert witness. He's not only functioning as a Planning Board member, he's functioning as a person who studied what the fair share is and as a mathematician and

as someone who has a reasonable design for distributing population around.

THE COURT: Well then, did I understand that is the only weakness of Mr. Allen's motion which lends itself to discovery?

MR. HILL: I was informing you of that, your Honor, by way of background. If Mr. Allen is an expert witness, clearly we have the right to all of these questions. I assume that by taking this position Mr. English is precluding that. But I think we also have the right because the Court at this date--how did the Supreme Court know what the officials of Weymouth Township purpose was?

THE COURT: I don't know. It may be that, as you look into it, the very question you're posing here has been answered by the mechanics of that case. I don't know that. But on the typical Planning Board, if my recollection serves me correctly, consists of seven or nine people and I served on one for some five years. Many discussions with the other members of the Board were, I'm afraid, almost notorious on occasion. Would you have the same right to depose all nine members and ask the questions that you asked Mr. Allen?

MR. HILL: There's no question here which we asked Mr. Allen, what were you thinking, what was your opinion and what was your purpose. We're asking Mr. Allen for his notes and they're saying you can't have the notes because they might disclose his purpose and his motivation. We weren't asking for subjective feelings in the deposition, we were asking him facts, what happened, and how did he calculate this and how did he calculate that.

The defendant's point of view is that protection of legislators from inquiries as to their motives extend way into discovery and not just into admissibility. The Courts, of course, have very great difficulty in interpreting statutes by looking into the subjective state of mind of legislators. Our case law is replete with Courts saying that's not the way we interpret statutes. There, some of the language goes even further and says we're not concerned with motives. What we're saying here is that court cases do say that they're concerned with the purpose of legislation in a zoning ordinance board in order to bring down the value of land so that the municipality can buy it cheaper, it's clearly invalid. Nobody has any problem with that. But that looks into motive and

purpose and to some degree the Courts do it and Justice Hall talks about it and Justice Pashman talks about it and we're asking questions and I think that we're entitled to ask in discovery whatever questions we want. We're not requiring the Court to interpret statutes for ordinances based on subjective motives. We are just trying by asking them what their purpose is.

THE COURT: I think the point is who sits on a Planning Board. Let's assume there is a subjective motivation and there might be nine different subjective motivations and out of that you would get some kind of consensus. Would the majority act of all nine members of the Planning Board then be susceptible to this kind of discovery?

MR. HILL: I don't think that I could properly call the Planning Board in and ask them how they feel; do they like Allen-Deane; would they like to see this or that. I do think that we're entitled to the notes. Notes are hard and they are written down. I don't think that's the prohibition against admitting into evidence and I think it's just one of judicial economy. The Courts don't want that kind of evidence, plus, it clutters the record.

There's no public interest in preventing us from

asking to see a person's notes taken while sitting as a Planning Board member, or a member of a governing body. We hope by reviewing these notes we would learn more and present our case better.

THE COURT: Could we agree that a legislator on a Planning Board who had an interest in a particular matter before the Planning Board that in that case, and you allege that, and it is a kind of misbehavior that you might there be permitted to make your discovery? You have a specific allegation, you have a specific reason, you have a specific area within which you might dwell. You would have this problem with that kind of situation then you're seeking out--and I just threw it out without deciding it--the motivation, if you like, whatever the end rule of those nine motivations are of the members of the Planning Board.

MR. HILL: If there's an allegation of certain kinds of intentional misconduct, we're not accusing the legislators of Bernards Township and its Planning Board of doing anything more than doing what they think best for the municipality. We say that it's horrendously against New Jersey State policy. It's against the ruling in Mt. Laurel and against the Governor's Executive Order 35 and

legislative action, but we're not alleging that nine on the Planning Board has done something quasi-criminal; it's bad faith. The conspiracy that we're alleging is a conspiracy to preserve Bernards as an enclave and the bad faith is the failure to go along with the laws of this State and the failure to respond to the policy dictates.

THE COURT: Let's assume that no one could state with specificity what the policy of the State was. Let's assume this with respect to low cost housing. There was no case which had set out, spelled out guidelines and then Laurel comes down and spells out a policy. Is everything that went before Laurel and the reason it was arrived at then merely something to discovering on new grounds purpose and motivation?

MR. HILL: Your Honor, the Supreme Court says in Mt. Laurel in Footnote 10, we're talking about intent but we really don't care about intent. Effect is what we care about. I think that in order to show that what Bernards is doing is within the case law of our State. You should be able to show that they have done the same thing that Mt. Laurel did. My problem is that none of the questions that I ask Mr. Allen are questions that regard his purpose.

Mr. English contends that that is a cloth that legislators wear and that if the notes disclose a purpose I can't have them. It's as if they are marked "Top Secret," "Classified," with C.I.A. on them. And none of this law ever went to discovery--it went to admissibility in courtrooms.

THE COURT: It may be that. Let's say that has been Mr. English's position--and I don't know that it has--that he may revise it some way. I don't know that he will.

MR. HILL: Thank you, your Honor.

THE COURT: Mr. English.

MR. ENGLISH: If the Court please, we are dealing according to counsel's argument with discovery matters which are supposed to lead out to the production of admissible material or the discovery of admissible evidence. I think it is important to define the issues in order to get some background for judging what is or may be within the proper scope of discovery here. If I may summarize my understanding of the complaint, it seems to boil down to three propositions.

First, that plaintiff, Allen-Deane Corporation, is challenging the validity of the zoning of its own land. Secondly, it challenges the validity of the

entire zoning ordinance of Bernards Township on the grounds that it fails to comply with the requirements of the Mt. Laurel case. And in the fifth count, it charges that the County Planning Board conspired with Bernards and other municipalities to adopt land policies that would substantially violate the policies of Mt. Laurel.

Now, there has been a great deal of talk in the arguments this afternoon, so far about Bernards Township having established exclusionary zoning. But the facts point out some very significant distinction between the situation in Bernards Township and the situation in Mt. Laurel Township as it came before the Supreme Court.

In Mt. Laurel Township, the zoning ordinance provides for a very significant part of the town, and I don't remember the percentage but it's my recollection that it was on the order of 25 or 30 percent of the area of the town, to be zoned for industry or other employment centers. And moreover, there was no real provisions for multi-family housing of a sort that would provide housing for the people whom the town was consciously trying to attract to its zoning for industrial and employment purposes. The areas in Bernards Township which had been zoned

for employment purposes are a very small proportion of the area of the township so that there is no parallel whatsoever between the posture of Mt. Laurel seeking to attract employers and Bernards Township. The only really significant employer in Bernards Township is American Telephone & Telegraph Company which is in the process of moving to another building in Basking Ridge.

It is true that until two or three years ago Bernards Township zoning ordinance did not contain any provisions for multi-family housing. But within the last recent years Bernards Township has adopted a very different policy in the zoning ordinances from that which has been followed by Mt. Laurel. There is an ordinance which bears the number of 347, sometimes referred to as a P.R.N. ordinance or planned residential neighborhoods. That was adopted following a decision by Judge Leahy in March of 1974. The practical effect of Ordinance 347 is to permit what are called planned residential neighborhoods which include apartments and townhouses, two-family houses, as well as single-family houses, at the option of the landowner in an extensive area of the township which I think comes on the order of 1,700 acres of land. In addition to that, the

Township almost a year and a half ago advised Judge Leahy in open court that it recognizes the applicability of the rule of Mt. Laurel to Bernards Township and it adopts an ordinance providing for low and moderate income housing.

I am sure that even though your Honor is on the bench and properly maintains a degree of ignorance about matters unless they are brought before you through evidence, nevertheless I assume that the Court reads the newspaper and is not unaware of the very difficult political situations which the town government in Bernards Township face. But notwithstanding that, on May 18, 1976, Bernards Township adopted Ordinance 385 which gives permission as a special exception to the use in all of the residential districts in the township except the P.R.N. zoning in the three-acre zone for the construction of what is called a Balanced Residential Complex or B.R.C. A B.R.C. may include townhouses, apartments, two-family houses and single-family houses and the ordinance requires that for any B.R.C. to be approved two-thirds of the units must be subsidized for low and moderate income occupants. The total number of subsidized units which that ordinance provides for is 354. I

might also add as indicative of municipal policy that several years ago the Township Committee approved a variance to permit an organization known as Ridge Oak, Inc., to construct a multi-family housing project near Basking Ridge designed primarily for senior citizens of modest income.

Now, in view of what I have stated, the public actions taken by the Bernards Township Committee show that it has not refused to do anything to make possible a wide range of housing opportunities as called for by Mt. Laurel. But, on the contrary, it has made provisions for various kinds of multi-family housing and specifically, for low and moderate income housing.

The plaintiff's complaint says that Ordinance 385 is no good for various reasons, that the numbers do not adequately reflect the fair share of Bernards Township and various technical objections are made to the ordinance. And that being the case, the presumption of the validity of the municipal action I think applies and the burden of proving the invalidity of the ordinance rests upon the plaintiff, as is ordinarily the case. In other words, if I read Mt. Laurel correctly, the burden to justify an exclusionary ordinance rests upon

the municipality only where it has no provisions whatever to provide the various rights of the housing types, and that is in a nutshell, and the distinction between Mt. Laurel Township and Bernards Township.

If the Court please, if I understood counsel's argument a few moments ago, the question of motivation or purpose really is not in the case to the extent that the authorities permit inquiries by the Court into motivation of purpose. There is no charge of fraud or personal gain or that kind of thing in the complaint and my interpretation of the complaint is confirmed by what I understood Mr. Hill to say a few moments ago. If the Court will not consider the private views; that motive or purpose or views of any kinds, of a municipal legislator in the absence of factors which candidly are not present here, then we have a situation where clearly the discovery of such matters will not lead to, will not produce admissible evidence. That kind of thing is excluded by the Court anyway. It cannot lead to the discovery of admissible evidence.

As Mr. Hill has stated, Mr. Allen prepared a written analysis of what he considered to be the

fair share of Bernards Township with respect to regional housing needs. It would seem to me that that is a document of some evidential value because here is an analysis by someone of the question of what is Bernards fair share and which is related, of course, to the question of whether Bernards Township has met that by the adoption of the various ordinances and the granting of the variance on Ridge Oak, Inc. It seems to me that Mr. Allen having made that analysis can testify to it not because he is an expert or without regard to whether or not he is an expert, this is something he did. He can testify about it and I don't think there is any contention that the questions about that report and how it was arrived at has been objected to by defense counsel on the deposition. I think the transcript of the deposition shows that Mr. Allen produced his notes with respect to the preparation of that report. What counsel really wants is not that, but when all is said and done he wants Mr. Allen's personal noteswhich had nothing to do with this report and which fall within the rules of law that such matters are not admissible in evidence.

If I may speak technically about the questions, and for convenience I will refer to them by their

alphabetical order: Questions A and D, it seems to me, involve an inquiry, whether for notes or for otherwise, for Mr. Allen's personal, private views and they are not admissible in evidence. Even if we had them on the deposition record they would not lead to the discovery of admissible evidence.

One of the questions, this is letter I, is a little different but closely related to it. It's the same question that trial counsel asked Mr. Allen on the witness stand at the trial of the Lorenc case before Judge Leahy, and Judge Leahy accepted our view of law that the private views of the Township Committeemen are not evidential and he sustained an objection to that question.

And also, on the same broad principle, Judge Leahy, again in the Lorenc case a couple of weeks ago, sustained our objection to a great many of the interrogatories which plaintiff's counsel in the Lorenc case had propounded which interrogatories appeared to have been Xeroxed from interrogatories prepared by the plaintiffs in the Allen-Deane case which is now before your Honor.

There were four of the questions mentioned in the plaintiff's motion in which there was no

direction by me to the witness not to answer the question. I refer to B, E, I and K. I submit that B is in the same category with respect to questions C and D. I think a reading of the transcript will show that the substance of the questions was got at by other questions by Mr. Hill which was not the subject of any objection and the substance of what was obtained by a question which we deem to be improper, was in fact obtained, and therefore, there's been no injury to the plaintiff.

Question F is a little different. That was a question in which Mr. Allen was asked if another witness, Mr. Agle, agreed with something. In the first place, that's hearsay and in the second place, and this appears in the transcript of Mr. Allen's deposition, plaintiff's counsel admitted that he had already asked the same questions to Mr. Agle himself. I submit that there is no compelling purpose in asking Mr. Allen if Mr. Agle said something which counsel had already obtained from Mr. Agle's answer to that question on the transcript of Mr. Agle. I cannot see the legitimate purpose of a motion based on that.

That leaves the two questions about the closed meeting, H and F. It would seem to me that

if, as is the present posture of the case, plaintiffs have been denied access to the meeting or to the transcript, it would obviously undercut what the Court has done in the closed meeting litigation, if on deposition the question which spills the beans and opens up the door were to be allowed, if the Appellate Division decides otherwise and the transcript of the meeting is made available to the plaintiffs, they will have their answer. If the Appellate Division affirms the rule of Judge Leahy, which is, in effect, a judicial rule that they are not entitled to the information, and if that is the case, they are not entitled to get it by interrogating Mr. Allen. So I respectfully submit that there is no merit whatsoever to the plaintiff's motion to compel Mr. Allen to answer certain questions and that the same should be denied.

THE COURT: All right. Thank you, Mr. English.

MR. ENGLISH: I don't know if this is the time to bring this up or not but the plaintiffs move in their papers for a counsel fee in connection with this motion. I would suggest that the motion calls for a denial of any award of expense to the plaintiff.

MR. HILL: Your Honor, I would just like to say one thing to get all of this in a little perspective. The suit was initiated in March. We have been conducting extensive depositions. The paperwork in this case is unbelievable. It's of no small consequence to our clients. They own almost 2,000 acres. They have a book value of $7,000,000 in property which they claim has been confiscated by the zoning. The lawsuit is being extensively litigated. In other words, many lawyers from both of our offices work on this case. Ours was a cross-motion. I must say that in recent weeks the discovery has perhaps been--Mr. English and I have perhaps been a little freer about telling witnesses not to answer questions.

On my second set of interrogatories most of the questions were answered, improper, burdensome, harassing. I certainly intend to bring a motion on that. I want you to know that these discovery motions I think are a waste of the Court's time to a large extent. They are a waste of counsel's time. I wonder whether they are worth a row of beans if we win because if you lose the feeling of a deposition you're talking about a witness. You're asking a lot of questions. Suddenly, counsel objects.

For us to go back and ask that same question we are very sure to get a very carefully prepared answer, just as Mr. English is, and I think that except for one of our motions of these discovery motions all have very little consequence in both cases. To some extent we don't intend to come to court on answering a motion as to why we answered certain questions certain ways without putting the defendant to the same liability. As I said, both of our clients apparently have enough resources to spend a lot of lawyers' time, and a lot of judges' time on these kind of motions, and I'm bringing this out for the Court because our motions are cross-motions and some of them would not have been brought on their own except that we were going to cross anyway. But I think one thing that the Court should be aware of is that without this kind of deprivation the discovery process tends to deteriorate. Lawyers tend to be a little freer about telling their witnesses not to answer questions. We're believers, for one, that justice is best served by the most discovery possible and that there is very little harm that can be done to the interest of justice in pretty much requiring all discovery. And that's what I wanted to say, your Honor.

THE COURT: You have no response to this?

MR. ENGLISH: No, sir.

THE COURT: Then, we will reserve on the question of expenses.

A lot of this, gentlemen, you can get behind you without the need of coming into court to have a judge put a lawyer to work on it and go through all of the questions and the responses given and to check the rule and the case on the rule and to have to adjudicate.

MR. HILL: We had to come to court anyway, your Honor, to answer their motion.

THE COURT: Well, I'm familiar with that aspect of the practice, too. But, what we have here is a plaintiff which is well able to absorb its own expense in a litigation which I carefully considered and the implication of that has been equally carefully considered. The municipality must take the same deliberate steps to protect its long-range interest and is aware of the attendant cost. So, we are not dealing with people that is on the uneven end of the stick.

All right. What is the next motion that is presently pending?

MR. HILL: Your Honor, the next motion is perhap

the most interesting, I think, of our motions and thus, of all motions. McCarter & English, it seems, submit very detailed attorney's bills every month to Bernards Township. I happen to see one of the bills because Mr. Lanigan sent me a copy of a lawsuit he was involved in and I noted that every telephone call that every attorney at McCarter & English made was discovered on the bill, the date that the call was made, the subject of the discussion, just very long detailed, interesting summaries of what they were doing in connection with the litigation. Mr. Lanigan had gone to Bernards Township Hall and requested to see the bills under the Open Public Records Act and they were handed over to him. We then sent Mr. Kerwin (phonetic), who is sitting here, to Bernards Township Hall and ask to get the bills on our case so we can find out exactly what the attorneys on the other side had been doing.

THE COURT: You mean dealing with respect to answering the phone?

MR. HILL: Who they were talking to, what witness they were preparing, very detailed bills, your Honor. I think they submitted one of them to you. It was one month's bill for $21,000 for the month of June. This is the kind of litigation

this is and N.J.S.A. 40A:5-16 provides that a municipality shall not pay out any of its moneys unless the person receiving the same shall first present a detailed bill of items or demands, specifying the service rendered and how the bill was made up.

The Open Public Records law, N.J.S.A. 47:1A-2 provides that all records which are required by law to be made are public records and that every citizen of this State during regular business hours shall have the right to inspect such records. There are certain exceptions to that, but that's basically what the law says. We submit that clearly the bills for services rendered to the municipality of Bernards Township are public records and we assert our right, not as litigants going by way of discovery, but as a citizen of Bernards Township. As a very substantial taxpayer of Bernards Township we assert our right to go and examine the public records of Bernards Township.

THE COURT: When you sent Mr. Kerwin up, it was for the purpose, if I understand you, of examining bills submitted by counsel to Bernards Township to the Township Committee?

MR. HILL: Yes, they're public records. They're on a public voucher form required to be kept by

statute and we wanted to see these bills. Mr. Kerwin was given the voucher form, and it's attached to our papers, says for all legal services in court as per bills attached. Attached to that sheet, we gather, because attached to similar sheets were many pieces of paper detailing and describing in very great detail what McCarter & English had been doing for Bernards Township by way of defending the lawsuit which we are bringing.

I refer to the case of Irval Realty, Inc. vs. Board of Public Utility Commissioners, because that's an interesting case and it seems to be the law on this subject. Bernards Township claims that the Right To Know law starts with these words except as otherwise provided in this act, or by any other statute, resolution of either or both houses of the Legislature, executive order of the Governor, rule of court, any federal law, et cetera, other exceptions and all reports which are, "required by law to be made, maintained or kept on file by any board, body, agency, department" are public records and the public has a right to them.

But, there are those exceptions and they point to exceptions as otherwise provided by any other statute, resolution or rule of court, and

they point specifically to the rule of court because, as we shall see, other discovery rules have certain provisions concerning attorney-client privilege. Now, I would like to point to the case of Irval Realty, Inc. vs. The Board of Public Utility Commissioners. It was decided by the New Jersey Supreme Court in 1972, shortly after this act was passed.

THE COURT: What is the citation on that?

MR. HILL: It's 61 New Jersey 366. In that case apparently there was a gas explosion in Gloucester County somewhere, and a gas pipeline exploded. The plaintiffs in that case asked the Board of Public Utility Commissioners to furnish certain records. According to the rules of the Public Utility Commissioners, whenever there was an explosion or an accident the utility company involved had to furnish records explaining what had happened, explaining what, if anything, was responsible and explaining what steps they would take in the future to avoid those kind of accidents.

There was a Governor's executive order which said that certain kinds of records did not have to be disclosed. As I said, the Open Public Meeting Act said a Governor's executive order could preclude

this and the Board of Public Utility Commissioners passed a ruling pursuant to the executive order which allowed them to do so, saying that they would not disclose to any person the records of the Public utility because that would chill the public utilities being cooperative in trying to diagnose their problem, if when they diagnosed their problem, and told the Public Utility Commissioners how they had gone wrong. Plaintiff could then grab this and use it against them in court. So the Public Utility Commission said that they would rather deal with the problem, then help with the litigation.

The New Jersey Supreme Court came across the problem where there was an executive order preventing the disclosure of these records and the statute clearly says unless there is a rule of court to the contrary or an executive order. So the Court decided the question by looking at the statute and the statute starts with the language that it was the policy of the State of New Jersey at that time that reports were open to the public and that the only records that weren't open to the public would be those made necessary in order to protect the public interest. They said that's what the statute

said, the executive order doesn't matter unless it protects the public interest.

The Supreme Court says, "It went on to consider the argument that had been advanced in support of and against disclosure, as a matter of public policy, and determined that the adverse effect upon the public resulting from inspection was clearly outweighed by the plaintiffs' important need to receive all reasonable assistance in the prosecution of their claims."

It went on to say, "We agree with the conclusion of the Appellate Division, but we would like to amplify the basis of the decision."

And then they said, and this is at page 372, "A person seeking access to public records may today consider at least three avenues of approach. He may assert his common law right as a citizen to inspect public records; he may resort to the Right To Know law, or if he is a litigant, he may avail himself of the broad discovery procedures for which our rules of civil practice make ample provision."

So I had three choices in getting these records, I could go under discovery or under the Right To Know law, and as a citizen.

And then the Court said, "It is, however, necessary that the citizen be able to show an interest in the subject matter of the material he sought to scrutinize." But under the Right To Know law, no such showing is required. Then it says, under discovery rules, you must show relevance or likely to lead to something that could be admissible. So we're going purely under the Right To Know law. It is a public record. It became a public record by definition in the Right To Know law because it was required to be filed and we're entitled to it under the Irval Realty case, unless your Honor finds that it must be protected to preserve the public interest. We submit that we are the force representing the public interest, the destruction of the exclusionary zoning barriers, and Bernards does not represent the public interest in this case. We claim that we're clearly entitled to the bills submitted by McCarter & English and that in any case they would not be privileged. We haven't seen the bills, apparently one has been submitted to your Honor for your review as provided in Irval Realty as being the proper procedure. They say that to an expert, to a legally-trained adversary, we believe to pursue these bills they would indirectly reveal

impressions, conclusions, opinions and legal theories of trial counsel to the eye of a legally-trained adversary. We don't think that the bills are that way and we think that deposing their witnesses might indirectly reveal to us the legal theories or impressions of trial counsel and we don't think that that indirect kind of harm is protected. We ask the Court to require that these bills be turned over to us.

THE COURT: And your ground, as I understand it, is simply that there is a Right To Know law.

MR. HILL: There is a Right To Know law that provides that those bills are public records because they are required by law to be filed, the statute specifies what form they are to be in and where they are to be kept.

THE COURT: With an exception in one instance.

MR. HILL: The only exception is if there was a rule of court to the contrary. The only exception, that I understand the defendants are pressing, is that there was a rule of court to the contrary and they say that the rules of discovery provide that you cannot have discovery of things that are privileged, attorney-client

privilege. So the rules of discovery, we say, don't apply to this and that we're entitled to it because it is a public record.

THE COURT: As I understood it, you said there were disjunctive means by which you could obtain under common law, rights to know and discovery under the rules.

MR. HILL: Right. I have chosen not to proceed under A or C, common law or discovery, and simply on the basis of Right To Know law and we therefore must not show a special interest. We have no requirements except that we're in New Jersey and we request it and that we think we're entitled to it under the Public Records law.

THE COURT: And this has nothing to do with your status as a litigant?

MR. HILL: Well, obviously we're interested in it because we're a litigant. The Supreme Court said, and there was a problem in the Irval Realty case, they said, "We conclude with a brief word as to procedure. Here the plaintiffs had instituted a plenary suit and have done so in reliance upon Bzozowski...it was their hope that in all cases invoking the Right To Know law relief must be sought in a plenary action. The Court based this conclusion

upon N.J.S.A. 47:1A-4, which provides that anyone seeking relief under this statute may institute an action in lieu of prerogative writ. We think this provision should be held only to apply in a mandatory sense when there is not already an action pending to which the applicant for relief is a party. Our 'single controversy' doctrine would seem to dictate this result. Where there is a pending action, full relief of the type sought can readily and more expeditiously be sought by taking appropriate steps within the cause." So we're asserting our right to know within this cause as provided by the Supreme Court in Irval Realty at page 376. That is our procedural position at this time.

MR. McMANUS: My name is Richard J. McManus and I appear for the defendant, Bernards Township. I submitted a brief in this matter and attached to it is a McCarter & English bill for the period of February through June which is the subject of the motion. Your Honor also has before him the voucher which was attached to that bill and which was given to Mr. Kerwin of the Allen-Deane Corporation.

Initially, we have to look beyond the legal arguments made by Mr. Hill to Allen-Deane's actual

position here. They are not citizens of the town who are simply coming into the municipal building to check on the Township Committee to see whether they are paying too much in legal fees and whether they are getting their money's worth. They are adversaries in a significant lawsuit and indeed logically there is no reason why they would be seeking that information if it wants to obtain the detailed information, as Mr. Hill points out, which does reveal, even if only indirectly, the opinions of counsel, his impressions and the kind of matter that is protected by the lawyer-client privilege.

I think Mr. Hill incorrectly states my argument as it appears in the brief. There are exceptions to the Right To Know law including those that are set by statutes in the lawyer-client privilege, Rule 26 of the Rules of Evidence, is a statutory enactment. Impressions or opinions is exactly the kind of matter that is privileged and not the subject to evaluation to members of the public or to discovery in an adverse proceeding.

The Irval case cited by Mr. Hill is really inept here. In that case we are talking about information which was otherwise subject to discovery between a plaintiff as against the gas company, I

believe it was, or the utility company. In this case we're dealing with privilege matters, lawyer-client relation, which would not be subject to discovery. Our reply to this motion is that it is the statute which protects the rule of the Court, and I only cite the rule of the Court as a support for that statute. There was a reference made earlier to the bills being given to Mr. Lanigan in another somewhat related lawsuit. In that case the subject matter of the litigation was the payment of moneys to McCarter & English without them having been properly appointed special counsel for the Township. Therefore, the very payment of the bills was the mechanics of the litigation and not as here, only peripheral to the suit, and I submit to the Court this should be privileged in the material.

THE COURT: Let me ask you, Mr. McManus, the attorney moving under the discovery law to get the bills, forgetting the Right To Know law for just a moment, do you have any questions that the Court could so cloak the advisability of the discovery matter and the disclosure as to protect the attorney for the defendant?

MR. McMANUS: It would appear to me under the

rule cited in my brief that the Court could not, by the very terms of the rule, permit that kind of matter to be subject to discovery.

THE COURT: All right. Then that is your position.

MR. McMANUS: Yes.

THE COURT: And let's assume that I buy it and I said that was susceptible to discovery under the rule. They can have it. And suppose I then cloaked or protected, if you like, the bills in such a fashion that it can only be used for a specific purpose. For example, it is not to be used in the public press, it is not to be used to embarrass public officials, it is not to be used to embarrass a given law firm. Do you have any problems with my ability to impose this restriction?

MR. McMANUS: Yes, I do, your Honor. I think the purpose of the rule is to create a fair situation between adversaries. If I accept Allen-Deane's position here, the public body is always at a disadvantage in any litigation because their detailed attorney bills can be looked at and the plaintiff can thereby get some idea of the minute processes of the attorney for the municipal body.

That is what I see to be the purpose of the rule not public exposure or some other improper use of it.

THE COURT: It is likely that in a position taken by plaintiff's counsel, that if they utilized the right to know as a basis for obtaining bills of counsel in public interest cases, that it may well be less authority in the Court to protect those bills from the disclosure for purposes other than the immediate litigation.

MR. McMANUS: I would agree, your Honor.

MR. HILL: It seems that a newspaper reporter could go and get these bills but we can't because we're in litigation. We think that we should be entitled to these bills, too.

THE COURT: You think that a reporter could walk in and get the detailed bills of counsel in a litigation such as this?

MR. HILL: Certainly. I read in the newspapers several weeks ago--I don't know how they got the information about what law firms were getting from various municipalities--but I assume that they walked in and asked for these bills. If they had information about what each law firm in Somerset County was making on municipal work, I assume

that the material was gotten that way and in the public interest that it should be available and the public should know. The municipality is like the State. The State never loses. A municipality never loses and justice is done in the long run. It is to the advantage even though it may not fulfill the policy of the present incumbent.

MR. McMANUS: Your Honor, two points. First, the municipality would invoke the lawyer-client privilege to prevent this from being released to the press during the course of litigation, obviously for the reason that it would not want it to find the way into the hands of an adversary. Secondly, the type of information which Mr. Hill is talking about, which was the subject of some recent articles in a local newspaper, is available from the voucher which we had released the amount of the bill. What they are really seeking is to find out what McCarter & English did for the money and that's the kind of thing that we're saying is privileged information.

MR. HILL: That's what we're really saying. We have no interest in giving it to the newspapers or anything else, but we are asserting our rights under the--

THE COURT: You are alluding the Right To Know law to obtain information which might not otherwise be discoverable under the rules of discovery. Is that what you're talking about?

MR. HILL: The Supreme Court says we have three choices in obtaining information and we happen to choose choice two because we don't have to worry about whether it's privileged or not.

THE COURT: Does that include the disclosure in a peculiar strategy in a case?

MR. HILL: Well, I cannot imagine that material being in a legal bill. If we proceeded under discovery, according to this case, we could ask for them and then your Honor would have to scrutinize them and see if they infringe upon any attorney-client privilege. We don't have to worry about that here. They belong to the whole world and they are filed with the municipality. They have perhaps the sacrifice of having to proceed openly in the public and it's no disadvantage in the long run because your Honor, I'm sure, will only dispense justice.

THE COURT: Of course that's always susceptible to interpretation. You know that.

MR. HILL: We think the more we know the

better we can pose a case to your Honor, the more effectively we can joint the issues. We feel this will help you make a correct decision in the case and that's why in all issues our position is we're in favor of maximum discovery.

THE COURT: I will reserve on that. Now, on your side, Mr. English, extensive time for completion of discovery was taken care of by virtue of the consent order.

MR. ENGLISH: Correct, sir.

THE COURT: Then I still have the efficiency of their answers or objections to your first question for admission.

MR. ENGLISH: Yes. And for an order to compel Mr. Murray (phonetic) to answer certain questions on depositions and we haven't gotten through either of these. How long is it going to take us?

MR. CITTADINO: I intend to try to follow your Honor's advice with respect to this. I now have not had an opportunity to look at our questions or at Mr. Ferguson's response. I think the questions are clear and I think Mr. Ferguson's responses and objections are stated clearly. I just have a few comments with respect to five points from our point of view. So the five notes which I made and which I'd

like to have the Court, from our point of view, bear in mind while considering whether or not to order more specific answers, are these: First, a large number of objections are with respect to the production of documents. An objection has been made to these questions on the grounds that the files of the Township have been thrown open to plaintiff, for plaintiff's perusal at will. I submit to the Court that there is an actual purpose to interrogatories and I would also submit to the Court that it is in the interest of judicial economy.

It is now the philosophy under the rule of the Court to eliminate surprise from the trials, no last minute surprise witnesses, no last minute discovered letters. When we ask for documents relative to certain specific factual situations, we're asking for them to demonstrate specifically those documents of which the defendants are aware, or which, through the exercise of reasonable diligence, they can become aware which are relevant to those particular issues, and the issues are the interrogatories. I would ask the Court to review the comments well in considering this. The interrogatories go specifically to issues raised in the complaint. We know we want specific answers. We

don't want to be told, here is our files. We want to know what they're going to rely on in responding to our allegations. If they say there aren't any papers in our files that we're not going to rely on, fine. But, they can't later come to trial and talk about conversations and talk about documents that are going to be available to them to rebut our case.

I would like to go on to a distinction that's already been made by Mr. Hill which I would only allude to briefly, and that is the distinction between discoverable and admissible evidence. Objections have been made on the grounds that they, perhaps, are not admissible in evidence. Of course, that subject has been hashed over.

I would like to briefly refer to page two of the brief in opposition. There's a statement by the law of New Jersey that the validity of an ordinance is to be judged solely by the objective effect and not by the process by which it was adopted. I am referring to the Tax Payers Association of Weymouth Township vs. Weymouth et al. It is the senior citizens case decided September 23, 1976. There is a statement, "The Township officials candidly admitted that in considering

proposals to rezone the corporate defendant's property, they were motivated partly by a desire to obtain additional municipal revenues without placing concurrent demands upon locally-financed governmental service." I think the question of how that got into the case is cleared up by that statement. There's talk by the Court as to net revenue producers. Mr. English alluded briefly that AT&T is the largest employer. All our inquiries concerning the means by which AT&T was permitted to establish its facility had been met with resistance. We submit that not only is our inquiry into the facts and circumstances surrounding the presence of AT&T in the Township relevant to the issue of conspiracy which is raised, but it's also relevant in terms of motivation that we're talking about net income producers and I think there's very little argument that AT&T is going to be a net revenue producer for Bernards Township.

So there is a legitimate issue raised of conspiracy in the pleadings. Here again, the Court will remember that under my first point I talked about, well, if they say they don't have any documents, perhaps I shouldn't be permitted to bring forth anything later. But here, we have a problem. We're

trying to dig out the evidence of conspiracy in this case. And I think that AT&T is relevant to this case. So I would say to the Court both that case and again the Wital Corporation vs. The Township of Denville case. There's a statement on evidence that the Township's failure to go forward with evidence on the issue resulted from mistaken reliance on rule prohibiting the inquiry into legislative motivation of an ordinance which is valid on its face.

We would submit, your Honor, that the facts set out in the complaint there's an allegation of conspiracy. I would just ask the Court to consider those two cases and the distinction between discoverability and admissibility and the fact that the AT&T matter is very relevant to the Allen-Deane matter.

Actually, the talk about conspiracy, I suppose, is my third point, so we're already to four and that is, there seems to be great objection to any production or any answers in interrogatories which call for oral evidence, or evidence of conversations which may have taken place. The answers they give are "burdensome and harassing" when we're asking about connection with AT&T, which

is some years ago. But the point is, your Honor, and I want to suggest this to counsel, but if they can't remember, they can't remember. No one is asking them to do the impossible. What we're asking, and they're going to have to put this together sometime before trial, what we're asking is to the extent that they can remember today. We want to know the substance of the conversations about which we have asked in these interrogatories.

THE COURT: Are you asking the name of specific officials?

MR. CITTADINO: What we're asking with respect to date and time, there are some letters that our client wrote in November and December of 1975 with respect to our application. We're asking who talked about those letters. Does anybody ever remember talking about them. Were there discussions among the Township officials concerning our inquiries.

There is some language in the interrogatories which goes somewhat like this: Provide facts which tend to support or rebut one or another proposition or one or another conclusion. This is objected to as calls for some kind of legal determination on the part of the person who's answering the question. I submit to the Court that that is simply another

way of saying provide information on which you intend to rely with respect to a certain point, facts upon which you intend to rely. We're not asking for a legal argument. We're asking for facts and they will have to make some judgment as to whether certain facts are needed to be relied on or not. We're requesting for facts not legal opinions.

Finally, there is one question, I wasn't able to find the copy of the interrogatories which was appended to our moving papers, but I get the impression that we didn't include the letter of July 14, 1976 from Mr. Ferguson of McCarter & English, with reference to interrogatory number three in our moving papers. If in fact that's the case, we'll provide that. We don't feel that letter provides a responsive answer to interrogatory number three. The answer in the interrogatory itself says nothing will be supplied or not now available, and if that's the only answer the Court is aware of, I'll apologize for that and ask that the Court permit me to provide you with a copy of their supplemental answer. There is a number of supplemental answers and sometimes they get mixed up. We would ask you to look at the letter and we

would submit that it's not responsive to all of the items about which we asked. And beyond that, your Honor, there's nothing more that I can say. The questions are clear and the objections are clear so I would ask you to go ahead and decide whether we ought to have that in the spirit of relating more open discovery so it's more likely this matter is to proceed expeditiously.

THE COURT: Mr. Ferguson.

MR. FERGUSON: May it please the Court, the objections are clear. The questions most certainly are not. To go in an inverse order of the points just made, we do not have to put up the information requested. These questions do not ask for the facts upon which we will rely at the time of trial to support a proposition which we are putting forward. For instance, number six sets forth all facts which support, rebut or pertain in any way to the validity of the rezoning of residential land in 1971 to take care of AT&T. We make no contention of rezoning in 1971. If the plaintiff's want to make a part of their case, they're free to do so. But, I don't see why the Township should be put in the position of having to say something about the zoning in 1971. We're making no contention

at all. But, what the plaintiffs are doing here is to put forward on proposition which they apparently like and want to make part of their case and then saying we think this is true and if you don't think it's true, you give us all the facts on which you rely to say it isn't true. I don't think that is a proper subject of discovery. We're under an obligation under the discovery rules to make available documents and facts upon which we rely and we will do so. But as to oral conversations, the specific language of the questions relating to the letters, the two letters sent by Allen-Deane in 1975 and 1976, are asking for all conversations between any individual members of the municipal governing body, the Planning Board and employees relating to those letters in a certain period of time, extending over a period of a year to a few months.

I submit that there are no facts which can be gained by this which is the legitimate purpose of the discovery process. They want us to get all the present and past members of these public parties together and say, all right, now who talked to whom about these letters at a certain time; what did you say; who else was present; do you have

any note memoranda; et cetera. That's what they're asking us to do. I submit this is unduly burdensome and harassing and is not calculated to lead to any discoverable term at all.

Mr. Cittadino says that the plaintiff is trying to dig up the evidence. We have opened our files, as indeed we must. We have made available to them all Township files. I call the Court's attention to the rules submitted in our brief 4:17-4(D) about the option to produce business records. The burden of going forward to find out whatever facts the plaintiff wants is and should be upon the plaintiff. We shouldn't have to rummage around in our files to come up with facts which may or may not fit in with plaintiff's theory. That's for the plaintiff to do and I don't mean the interrogatory device is the proper means or I don't think there's any means which can be legitimately used to cast the burden upon the defendant.

Now, once again, the issue of motives has come up. That has been argued by Mr. English and incorporated in the motion for more specific answers. I submit that by going down question by question, the Court will see that we have in fact

answered what they ask. They ask who are your experts who you retained with respect to the adoption of the several master plans in zoning ordinances and I've answered that the only expert is Mr. Agle. I don't know quite what else I can say to that. His deposition has been taken. His notes have been marked at his deposition. Our files are open. If I've left somebody out, they're free to find it. I don't think so. If they're referring to the reports of other commissions which might make us part of the master plan, such as environmental commission or the natural resources inventory, that's no secret to them that those are the subject of other interrogatories.

I have set forth in detail the specific objections, question by question, in the memorandum. Unless the Court has any further questions I won't offer anything further except to say one thing, the second set of interrogatories which we just answered yesterday to a large extent, the last set of interrogatories are a carbon copy of interrogatories served upon the Township of Bernards by Mr. Lanigan in the Lorenc suit. There was a motion before Judge Leahy with respect to those interrogatories if any objections were argued. The

rest of Judge Leahy's ruling was that where you have a public body and its records are public records, they're available to any party and there's no trouble about copying them.

In a litigation of this kind and also the Lorenc and the Mt. Laurel suits, the burden should be upon the plaintiff to come in and get whatever it wants to out of the records and that a municipality should not be put under the obligation of searching through and weeding out documents through the burden of proving the plaintiff's case. I'm not saying that this Court is bound by what Judge Leahy did in the Lorenc suit and I'll be happy to argue each question by question, but I point out the ruling of Judge Leahy as an indication of indeed what is judicial economy and discovery economy and that is let the plaintiff do what it wants to with our records. We should not be under an obligation to do it for them.

MR. CITTADINO: Your Honor, just very briefly. I hope that I would and I know I will read the questions and not rely on Mr. Ferguson's representations as to what they say. Question one is a little bit more apprehensive than what he represented to the Court and his answer did not address itself to several

of the areas in which we inquired. He's arguing now about our second set of interrogatories which we haven't even moved to have more specific answers--

THE COURT: Why anticipate. We'll get to that.

MR. CITTADINO: We'll get to it. We weren't going to bring it up, strangely, but it seems to me Mr. Ferguson has opened the door.

THE COURT: Well, don't open it too widely this afternoon.

MR. CITTADINO: All right, Judge. Those second set of interrogatories were long overdue and we were nice enough not to push too hard for those answers and now appears that the only purpose--since most of the questions aren't answered--that the only purpose in the delay in responding was to wait for Judge Leahy's ruling and it is unfortunate that we didn't exercise our rights sooner.

MR. FERGUSON: Indeed, Mr. Cittadino is quite correct. The part of the purpose in the delay was to see exactly what the scope of the interrogatories was as determined by Judge Leahy. If we had to get the information on the Lorenc suit we might not have to act on it in this suit because this information would have been there. I see nothing

wrong with that. We are now in our third set of interrogatories from the plaintiff and I don't think it's wrong to try and conserve our efforts in this kind of proceeding.

THE COURT: There is still two motions pending. I'm inclined not to hear arguments on them any further this afternoon. I think what I'll do now is cut your two, Mr. English, and I'll probably adjourn it a couple of weeks. We'll set it up for another Friday afternoon and if you choose to come in and orally argue these, you will be given an opportunity to do that. You will be given an opportunity to make responses. I will be better prepared and we may get rid of it right there from the bench. But, I think for this afternoon I would appreciate it if we would discontinue. I'm appreciative of the assistance of all of you and I thank you very much.

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C E R T I F I C A T E

I, NANCY J. GROSSI, a Notary Public and Shorthand Reporter of the State of New Jersey, do hereby state that the foregoing is a true and accurate transcript of my stenographic notes of the within proceedings, to the best of my ability.

Nancy J. Grossi