

RULES - AD - 1976 - 30

5/11/1976

- o Transcript of motion to dismiss  
by Hill & English

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

3 THE ALLAN-DEANE CORPORATION, a RULS - AD - 1976 - 30  
4 Delaware corporation, qualifie  
5 to do business in the State of  
New Jersey,

6 Plaintiff,

7 - vs -

8 THE TOWNSHIP OF BERNARDS, IN THE  
9 COUNTY OF SOMERSET, a municipal  
corporation of the State of New  
10 Jersey, THE TOWNSHIP COMMITTEE  
OF THE TOWNSHIP OF BERNARDS, and  
11 THE PLANNING BOARD OF THE TOWNSHIP  
OF BERNARDS,

12 Defendants.

13  
14 Somerville, New Jersey  
May 11, 1976

15  
16 B E F O R E:

17 B. THOMAS LEAHY, J.C.C.

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

19 MASON, GRIFFIN & PIERSON  
20 Attorneys for Plaintiff  
BY: HENRY A. HILL, JR., ESQ.

21 McCARTER & ENGLISH  
22 Attorneys for Defendants  
BY: NICHOLAS CONOVER ENGLISH, ESQ.

23  
24 Cynthia I. Morris, C.S.R.  
25 Court Reporter

1 THE COURT: I would appreciate your  
2 taking as much time as you need. I have had a  
3 chance over the weekend to review and am now  
4 refreshed on the various documents submitted; but,  
5 quite frankly, there is enough here that is unique  
6 that I would not resent at all hearing you repeat  
7 things that you have in your pleadings, et cetera.  
8 I would not be offended. I may have to hear some  
9 of this four or five times before it sinks in.

10 I believe it is your motion, so I will  
11 hear you first.

12 MR. ENGLISH: Yes, it is.

13 Your Honor, this is a motion to dismiss  
14 the Complaint, and let me make it clear that there  
15 are several purposes, I think, to be served by the  
16 motion.

17 The primary purpose is to try to simplify  
18 an obviously complex litigation in a way that  
19 would enable the Court and counsel to handle it  
20 expeditiously.

21 The second purpose is to eliminate the  
22 Mt. Laurel issues, which I submit cannot and  
23 should not be properly raised by this particular  
24 plaintiff.

25 The real difficulty that I have in

1 approaching the first aspect of the motion is that  
2 we no longer have the common law <sup>forums</sup> forums of action  
3 or the common law pleading, and whatever may have  
4 been the drawbacks to that system, at least it  
5 had the merit of requiring the pleadings to be  
6 clear and by various counts devoted to only one  
7 aspect, one complete aspect of the total  
8 controversy.

9 Now, we are supposed to be modern and  
10 forward-looking and liberal and all that kind of  
11 thing, and it seems almost anything goes in the  
12 pleading; however, I think that the Court has the  
13 power to deal with this situation. The controlling  
14 rule 1:1-2 provides that in construing the rules  
15 of procedure the Court's purpose is to secure  
16 a just determination and simplicity in procedure,  
17 and that is what I am advocating, fairness in  
18 administration and the elimination of unjustifiable  
19 expense and delay.

20 I would also remind the Court of the  
21 statement by Mr. Justice Jacobs in the Crescent  
22 Park case, which is quoted in our main brief,  
23 which I think gives the Court a power of  
24 flexibility to deal with these problems, and  
25 with your Honor's permission I would like to

1 read or extensively paraphrase that quotation.

2 The Court says: "We have appropriately  
3 confined litigation to those situations where  
4 the litigant's concern with the subject matter  
5 evidenced a sufficient stake and real adverseness.  
6 In the overall we have given due weight to the  
7 interests of individual justice, along with the  
8 public interest, always bearing in mind that  
9 throughout our law we have been sweepingly  
10 rejecting procedural frustrations in favor of  
11 'just and expeditious determinations on the  
12 ultimate merits.'"

13 Now, if the Court please, the ultimate  
14 merits, I think, involve the propriety of the  
15 zoning of the plaintiff's land, and whatever may  
16 be my view of the merits, I certainly concede  
17 that that is a legitimate kind of an issue for  
18 the plaintiff to raise and to be here in court.  
19 I submit, however, that the Complaint goes far  
20 beyond that issue and drags in a lot of matters  
21 often in the prayer for relief which I submit  
22 are improper, beyond the power of the Court  
23 and certainly not appropriate matters, not  
24 appropriate actions for this Court to take.  
25 Moreover, in reading the Complaint, it is

1 difficult to, at least I found it difficult, to  
2 separate what I call the Mt. Laurel issues, and  
3 I assume your Honor understands what I mean by  
4 that, from the issue of the propriety of the  
5 zoning of the plaintiff's land.

6 Now, if this case is to be disposed of  
7 expeditiously and on the real merits of it, I  
8 submit that the Court ought to limit itself to  
9 the propriety of the zoning of the plaintiff's  
10 land and not permit the Mt. Laurel issues to be  
11 raised in this case. This plaintiff is a  
12 developer. We do not have a situation where an  
13 individual who desires housing in Bernards  
14 Township is before the Court to say, "I would like  
15 to live in Bernards Township, but I am deprived  
16 of the opportunity to do so because of the zoning  
17 ordinance." That is not this case. Your Honor  
18 can take judicial notice of the fact that the  
19 plaintiff is simply a creature of Johns Manville  
20 Corporation. Plaintiff was incorporated in 1969  
21 after Johns Manville had decided to buy this  
22 property, and the plaintiff was created as a  
23 vehicle for holding title. Money came from  
24 Johns Manville. Its motive was simply that of  
25 an investment and to make a profit. Johns

1 Manville knew at the time that this property  
2 in Bernards Township was zoned for three acre  
3 residential use, single-family houses, and the  
4 zoning today is no different than it was then.  
5 I think it's a reasonable inference to say that  
6 Johns Manville bought this land for the express  
7 purpose of busting the zoning and enforcing  
8 its desires upon the municipality.

9 I think that history has some bearing  
10 upon the standing of Allan Deane to raise the  
11 Mt. Laurel issues. It is also a fact known to  
12 the Court that none of the proposals that Allan  
13 Deane has made for the development of its  
14 property in either Bedminster or Bernards Township  
15 has ever complied with the zoning ordinances that  
16 existed at the time.

17 Now, the courts are now, and the  
18 Borough perhaps even more confused by the way in  
19 which the whole Mt. Laurel problems are to be  
20 handled; but, we have at the present time the  
21 defendant township under a Court Order to bring  
22 its zoning ordinance into compliance with Mt.  
23 Laurel by June 18. It is a matter of public  
24 knowledge, and I think I can speak for the Court  
25 that an ordinance designed to accomplish that

1 was introduced last week, and I think there is  
2 every reason to expect that it will be adopted  
3 in accordance with the Court's directions, so  
4 that the issue of whether Bernards Township is  
5 being willfully exclusionary and so on is not,  
6 in fact, an issue anymore.

7 I think that we can assume that Bernards  
8 will have complied to the best of its ability  
9 with the requirements of Mt. Laurel within the  
10 next few weeks.

11 I think this Court must be aware, as  
12 many members of the Bar are aware, that since  
13 the Mt. Laurel decision came down it is a common  
14 practice for a developer, and I will not give  
15 further characterization, for a developer to  
16 utilize the Mt. Laurel decision as a weapon to  
17 bother the municipality. The developer's  
18 interest, as Judge Lane pointed out in the  
19 Opinion we annexed to our reply brief, the  
20 developer's only real interest is the zoning  
21 of his property, and here these very complex,  
22 difficult Mt. Laurel issues get in the case,  
23 and when you are all through it may have no  
24 bearing at all upon the actual zoning of the  
25 plaintiff's property because there may be a



1 great many environmental reasons, planning reasons,  
2 other reasons why the plaintiff's tract is not the  
3 appropriate place on which to locate the kind  
4 of housing that would be needed to comply with  
5 the Mt. Laurel decision, with the result that the  
6 courts are being put to the necessity of trying  
7 extensive, time consuming, complicated issues  
8 which have no real effect upon the ultimate rights  
9 or interests of the plaintiff.

10 I submit that while the public policy of  
11 free <sup>access</sup> action to the Court is important, most  
12 important, I think the necessity of maintaining  
13 our judicial administration intact to try to help  
14 it from collapsing under the weight of what is  
15 left upon it, the Court in the exercise of its  
16 discretion and in accordance with Rule 1:1-2 and  
17 the principles enunciated by Justice Jacobs in  
18 the Crescent Park case which are referred to,  
19 has the right and the power to rule that in  
20 this case the Allan Deane Corporation does not  
21 have standing to raise Mt. Laurel issues. I  
22 submit that if the Court agrees with that position,  
23 the appropriate way to deal with it is to dismiss  
24 the Complaint.

25 Furthermore, I think the Complaint should

1 be dismissed for failure to join the Somerset  
2 County Planning Board as a party.

3 Now, one way to cure that would be to,  
4 if the plaintiffs saw fit, to amend and eliminate  
5 its indirect attack on the validity of the  
6 Somerset County Master Plan; but, it seems to  
7 me as I read the Complaint, that if they intend  
8 to attack the Somerset County Master Plan as a  
9 valid and reasonable plan, then the County  
10 Planning Board should be in court to give the  
11 Court the benefit of its views, and that the  
12 Board's plans should not be stricken out by the  
13 Court in a proceeding in which the Board was not  
14 a party and had no opportunity to appear.

15 I think technically the form of relief  
16 sought in one of the forms of relief sought in  
17 the Complaint -- namely, to enjoin the Township  
18 from permitting AT&T to occupy its building  
19 would call for AT&T being a party, since it  
20 would be affected; but, I would suggest to your  
21 Honor that perhaps the more practical way to  
22 deal with that problem would be this: Instead  
23 of requiring AT&T to sit here all through  
24 the trial, if, and contrary to the position we  
25 take, the Court should get to the stage of

1 considering the injunctive relief against  
2 occupation of the AT&T building, perhaps at that  
3 point it would be sufficient if AT&T were brought  
4 in on some form of notice and given a chance to  
5 be heard.

6 If I may recapitulate, I submit that the  
7 Complaint should be stricken essentially on the  
8 good old-fashioned ground that it is duplicitious  
9 and multifarious and has so many things mixed up  
10 that it's going to present the Court and counsel  
11 with very real problems in handling the case on  
12 an orderly basis.

13 Secondly, I submit that the Complaint  
14 should be dismissed insofar as it raises Mt.  
15 Laurel issues because we contend that Allan Deane  
16 Corporation has no real, substantial and legiti-  
17 mate interest in those issues. I think on the  
18 basis of history it is reasonable to conclude that  
19 they have been brought in here simply as a means  
20 of putting the squeeze on the Township, and I  
21 do not think the Court should be imposed on by  
22 the prolongation of a trial for two to three  
23 weeks for any such purpose as that.

24 Thirdly, I think the Complaint should  
25 be dismissed for failure to join the County

1 Planning Board as a party; and if we get to the  
2 stage at the end of the trial where AT&T rights  
3 are going to be affected, I submit at that time  
4 it would be sufficient to bring them before the  
5 Court by appropriate notice.

6 THE COURT: Just a moment, counsel.

7 MR. HILL: Your Honor, defendants  
8 argue that there are two purposes for this  
9 motion - one is to simplify a complex issue, and  
10 we certainly concede to dismissing a Complaint  
11 which would simplify complex issues; and two, to  
12 eliminate the Mt. Laurel issues.

13 Your Honor, we spent some time on the  
14 Complaint. If you read the Complaint over, it  
15 follows the rationale of Mt. Laurel as we under-  
16 stand it. The Complaint describes the munici-  
17 pality of the application. It has a whole section  
18 on the effect of the exclusionary zoning on the  
19 general welfare.

20 I think, as your Honor realizes, there  
21 has been no answer filed to the Complaint. For  
22 the purpose of this motion every allegation in  
23 that Complaint should be taken by your Honor as  
24 true.

25 The first point in defendant's brief is

1 that we seek to ask for relief which goes beyond  
2 the relief usually requested in the traditional  
3 and exclusionary zoning case. If litigants were  
4 not allowed to request different relief from the  
5 courts, there would be no evolution of the law at  
6 all. In fact, the relief that we request is  
7 all relief that the courts in New Jersey or courts  
8 in other states have granted applicants.

9 I witnessed the argument in the Madison  
10 Township case, the most recent argument before  
11 the New Jersey Supreme Court, and the Public  
12 Advocate is arguing strongly and the Supreme Court  
13 is presently considering the issue as to whether  
14 or not in order to promote Mt. Laurel, in order  
15 to encourage this kind of litigation, because the  
16 courts have said that one of the greatest  
17 priorities in New Jersey today is the need for  
18 housing at all ranges of the income spectrum, the  
19 Public Advocate advocates that in order to encourage  
20 this kind of litigation there should be a reward to  
21 a developer that successfully challenges under  
22 Mr. Laurel and accomplishes through a court  
23 decision a change in policy for the public good,  
24 and that reward should be that the Court should  
25 award a building permit. This has been done, as

1 I stated in my brief, in Illinois and in  
2 Pennsylvania, and the Court was very concerned  
3 six or seven months ago that since Mt. Laurel very  
4 little housing had been built in Madison Township.  
5 This case has been in the courts for six or seven  
6 years, and still not one house or not one unit  
7 of low or moderate income housing has been  
8 constructed.

9 Now, in this particular matter, I can  
10 represent to the Court that our client is  
11 determined to pursue it, since the investment here  
12 is very substantial. The property is owned out-  
13 right by Allan-Deane, and they view development  
14 as being impossible under the present zoning, and  
15 they are determined to litigate this to its  
16 conclusion. These are the most complicated kinds  
17 of cases probably being started in New Jersey  
18 today.

19 If you read Mt. Laurel with the language,  
20 "fair share," it is very similar to the language  
21 of an antitrust case where they are talking about  
22 unfair compensation, the use of social and  
23 economic data and the need to establish through  
24 socioeconomic evidence that a wrong exists makes  
25 the case very complicated.

1           Now, I don't believe that the average  
2 developer could afford to bring these kinds of  
3 cases and litigate them successfully and present  
4 the Court with the kind of evidence that a Court  
5 needs in order to make decisions of this kind.  
6 We represent that Allan Deane is willing to go to  
7 this effort and is willing to prepare this case  
8 and present the Court with what it needs in order  
9 to make a determination; and, if Mt. Laurel is to  
10 have any vitality at all, the private sector cannot  
11 be excluded from raising these important social  
12 issues.

13           Allan Deane has alleged that for the  
14 purpose of this motion your Honor must assume that  
15 fact to be true, that they intend to build at all  
16 ranges of the income spectrum, including low and  
17 moderate income housing.

18           We think, as we stated in our brief,  
19 that there is no precedent in New Jersey for  
20 striking a Complaint, let alone striking a prayer  
21 for relief, or let alone dismissing a Complaint  
22 because the prayer for relief goes too far. It  
23 is up to your Honor to determine what relief we  
24 are entitled to, and the only part of the case  
25 that should be considered on this kind of a motion,

1 your Honor, is whether the facts, if they are all  
2 true, entitle the plaintiff to any relief at  
3 all.

4 On the question of standing, we have  
5 briefed extensively the question of standing,  
6 and it is our position that the Mt. Laurel case,  
7 itself, has the key.

8 If your Honor will recall, in the Mt.  
9 Laurel case the trial court had held that the  
10 plaintiffs in Mt. Laurel had standing, the  
11 resident plaintiffs had standing because residence  
12 alone under existing New Jersey law gave them  
13 standing. The New Jersey Supreme Court --

14 THE COURT: They were not corporate  
15 residents, were they?

16 MR. HILL: Excuse me?

17 THE COURT: They were not corporate  
18 residents.

19 MR. HILL: No, they were not corporate  
20 residents.

21 The cases talk about taxpayers, your  
22 Honor, and we don't think that the corporate setup  
23 should make a difference in our client's  
24 standing. By and large, all developers of means  
25 will be incorporated, and the courts of this state



1 determine their own policy as to who is going to  
2 have access to the courts, and the type of  
3 reasoning which the courts pretty uniformly have  
4 adopted is to examine the public policy involved  
5 in allowing applicants to, in allowing these  
6 kinds of cases to come to the court. We think  
7 that the Mt. Laurel case, itself, <sup>is one</sup> in which the  
8 judiciary expresses the opinion that this is,  
9 the lack of housing in New Jersey is the number  
10 one priority in this state, as Justice, as Judge  
11 Furman pointed out just five or six days ago.  
12 The judiciary is not alone in making this  
13 determination. The State Legislature, each branch  
14 of government has made that determination  
15 independently. The Governor late last month  
16 in Executive Order 35 determined it was a top  
17 priority in New Jersey, so that each branch of  
18 government has stated that of top priority in  
19 the state is the issue of providing housing at  
20 all spectrums, at all income spectrums.

21 Now, one of the greatest social problem  
22 areas in New Jersey today is the lack of housing,  
23 particularly in the lower income spectrum, for  
24 persons in the lower income spectrum.

25 If you will look at the Mt. Laurel case,

1           itself, your Honor, the Court --

2                   THE COURT:   What page?   I will follow  
3           along with you.

4                   MR. HILL:   The Court says at page 159 --  
5           this is page 16 of my brief, your Honor.

6                   THE COURT:   Okay, I am with you.

7                   MR. HILL:   At footnote 3, "The Township  
8           originally challenged plaintiff's standing to  
9           bring this action.   The trial court properly held  
10          that the resident plaintiffs had adequate standing  
11          to ground the entire action and found it  
12          unnecessary to pass on that of the other  
13          plaintiffs.   The issue has not been raised on  
14          appeal.   We merely add that both categories of  
15          non-resident individuals likewise have standing,"  
16          and cite N.J.S.A. 40:55-47.1, and Walker v.  
17          Borough of Stanhope.

18                   N.J.S.A. 40:55-47.1 states:   "For the  
19          purposes of the article to which this act is a  
20          supplement, the term 'other interested parties'  
21          in a criminal or quasi criminal proceeding shall  
22          include: (a) Any citizen of the State of New  
23          Jersey; and (b) In the case of a civil proceeding  
24          in any court or in an administrative proceeding  
25          before a municipal agency, any person, whether

1 residing within or without the municipality, whose  
2 right to use, acquire, or enjoy property is or may  
3 be effected by any action taken under the act to  
4 which this act is a supplement."

5 That is a planning act, your Honor,  
6 and they also cite Walker v. Borough of Stanhope,  
7 which I discuss in my brief and which was a case  
8 that extended standing to challenge zoning in a  
9 traditional zoning case. In that case a  
10 municipality had excluded trailer parks, and a  
11 salesman's company that sold trailer parks in  
12 some other municipality was given standing to  
13 attack that municipality's zoning ordinance, and  
14 the court, the Supreme Court made it clear in  
15 Walker v. Stanhope that the test was real  
16 adverseness.

17 We think that if Mt. Laurel is going to  
18 have any vitality, that the private sector must  
19 be given standing to raise these issues. The only  
20 other parties that are raising these issues are  
21 the Public Advocate's office and privately funded  
22 groups, such as Suburban Action, and in order  
23 for the Court's public policy decision to be  
24 enforced uniformly in New Jersey, it must, we  
25 feel, be incorporated. The private sector must

1 have standing, and, as I have stated, Johns  
2 Manville or Allan Deane has stated in the Complaint  
3 that they intend to build low and moderate income  
4 housing. They have stated in the Complaint that  
5 there is a great housing need in Somerset County,  
6 which your Honor must assume to be true, and that  
7 the construction according to the plan on the  
8 Allan Deane tract would substantially relieve that  
9 need and would substantially allow Bernards to  
10 provide its fair share of the regional housing  
11 need.

12 Every trial court which is considering  
13 this question has decided that individual plaintiffs  
14 have standing in New Jersey. The only cases that  
15 are apposite are the Federal cases which turn on  
16 the case in controversy argument. Defendants cite  
17 several Federal cases in their first brief, and  
18 if your Honor would examine these, all of them  
19 turn on the case of controversy, United States  
20 constitutional limitations on the Federal Courts.

21 The New Jersey Supreme Court has held over  
22 and over again in the cases that we have cited  
23 in our brief that the New Jersey Constitution  
24 contains no such language and that they will not  
25 be bound by those limitations on the court's

1 ability to decide the cases, that New Jersey has  
2 adopted the liberal rule that where there is real  
3 adverseness and where the court senses that there  
4 is a wrong, applicants, plaintiffs generally will  
5 have the right to be heard, and we think that  
6 Allan Deane should clearly have standing under  
7 the existing case law in New Jersey.

8 The third issue which the defendants  
9 raise is the issue of whether the Somerset County  
10 Planning Board should be joined as a party to  
11 this litigation.

12 We pointed out in our brief that your  
13 Honor has held, and we think correctly, that the  
14 Planning Board has no authority in New Jersey,  
15 no power in New Jersey beyond the power to  
16 suggest and to be consulted with over local  
17 zoning.

18 THE COURT: That was my second reluctant  
19 decision.

20 MR. HILL: And your Honor cited the  
21 Supreme Court's decision in Mt. Laurel, and we  
22 think that's a correct reading of the Mt. Laurel  
23 case.

24 THE COURT: How about in light of the  
25 statute that does finally come into effect in

1 July? It seems that the Legislature, amazingly  
2 to this Court, seems to have abided by the hint  
3 in footnote 46 or 48 of Mt. Laurel, and has come  
4 through with a requirement that municipal zoning  
5 conform to county land use master planning.

6 MR. HILL: Or state why it does not  
7 conform to their Master Plan.

8 THE COURT: Wouldn't that require at least  
9 a statement on a rational basis, not just,  
10 "We don't like it?"

11 MR. HILL: Well, we will have to wait  
12 for some court decisions on the new land use  
13 law, which, as your Honor points out, is not yet  
14 into effect.

15 Yes, they must reconcile their zoning or  
16 explain the reasoning in their Master Plan why  
17 their zoning does not conform with not only the  
18 County Master Plan, but their neighbors' zoning.

19 THE COURT: Isn't that going to make it  
20 quite difficult for them to deviate if they are  
21 going to continue to go on bended knee for Federal  
22 funds for anything and everything, because that  
23 proviso is now in practically every Federal grant  
24 program. If they want a sewer or money for a  
25 court or machine guns for the trunks of their

1 police cars, they have to show that the Master  
2 Plan conforms with regional master planning and  
3 county master planning, which by State law must  
4 jibe with regional master planning.

5 MR. HILL: They should conform with their  
6 neighbor's zoning, more importantly than, it would  
7 seem to me, your Honor, than with the county.  
8 They must only explain why they don't conform with  
9 the county, and it seems to me the burden is  
10 greater and rationally and legally I think the  
11 greater problem --

12 THE COURT: Do you think there is any  
13 likelihood that the town is going to slam the door  
14 in its own face on sewer grants and road grants?

15 MR. HILL: Well, if the Governor's  
16 Executive Order No. 35 is enforced, every town  
17 that does not meet its fair share of the regional  
18 need already has slammed that door.

19 I do not believe, and I am just  
20 speculating, your Honor, that the Somerset Hills  
21 are not interested in Federal grants. They are  
22 much more interested in reserving their present  
23 tax ratable position and their present rural  
24 atmosphere.

25 Your Honor, this is not the place to

1 argue the substance of the case.

2 THE COURT: I do have to have some  
3 feel of the substance of the case, because somehow  
4 this motion requires me to go through the language  
5 of the Complaint to the meat of the Complaint,  
6 and the one thing that I am most concerned about  
7 and that keeps coming back to my mind as I try to  
8 attack this motion in light of the Complaint is  
9 whether there is a real interest in Allan Deane  
10 in achieving a result found to be desirable under  
11 the broad mantle of Mt. Laurel. What I am saying  
12 indirectly in that past statement is where do I  
13 find other than the blatant assertion -- I think  
14 you refer to it in paragraph 29, but I am not  
15 sure -- other than the blatant assertion that  
16 Allan Deane is going to build housing at all  
17 income levels, including subsidized levels, where  
18 do I find any substance to that when there has not  
19 been a proposal seeking a variance, and, if  
20 denied, an appeal of that variance? We are back  
21 to Catch 22, because you don't want to pay  
22 \$180,000 to have that considered.

23 MR. HILL: Your Honor, to begin with,  
24 uniformly I have got 20 cases that were decided  
25 since Mt. Laurel, unpublished decisions.



1 Uniformly developer applicants, and mostly small  
2 developers come in and ask for a zoning change  
3 and they ask for a use variance, and uniformly  
4 all the cases since Mt. Laurel say that you are  
5 not entitled to the use variance, but you may  
6 attack the ordinance on Mt. Laurel grounds.  
7 Clearly you cannot satisfy the negative criteria  
8 of 40:55 something (d), the use variance  
9 statute.

10 Here we have the additional problem of  
11 1600 acres of land which is not suitable for a  
12 variance. It is such a large area that the  
13 municipality could never be accused of spot  
14 zoning where they could zone the Allan-Deane land  
15 alone. Clearly any change by the Zoning Board  
16 of Adjustment either does not conform with the  
17 Master Plan and the zoning ordinance could not  
18 satisfy the section, the negative criteria of  
19 the use variance statute.

20 The courts have held over and over again --  
21 Oh, Showcase Properties v. East Brunswick, an  
22 Appellate Division case, holds that if a  
23 municipality does not by its zoning provide for  
24 any multi-family housing, the Board of Adjustment  
25 may not allow it as a use variance, because

1 to allow something not provided for in the zoning  
2 ordinance as a use variance per se does not  
3 satisfy the negative criteria. The remedy is  
4 to get a zoning change.

5 I can brief this extensively for your  
6 Honor.

7 THE COURT: I am with you. I will follow  
8 you orally.

9 MR. HILL: In the first Allan Deane case,  
10 suit was brought like this, and during the  
11 pendency of that action Allan Deane applied for --  
12 that's the Bedminster case -- for a use variance,  
13 and the use variance was denied. That part of it  
14 was not appealed, because it was a useless act  
15 under our existing law. It was a proper act,  
16 so that we could not be accused of not exhausting  
17 administrative remedies; but, we were willing to  
18 take our chances on that, your Honor.

19 We don't think this is a proper case for  
20 use variances. There is much too much property  
21 involved. It is not small change. Any taxpayer  
22 in Bernards Township could get the Zoning Board  
23 of Adjustment and the Zoning Committee reversed  
24 were they to allow 1600 acres for multi-family  
25 housing as a use variance than to hold that this

1 was in conformance with a Master Plan zoning  
2 ordinance, which they must hold in order to  
3 satisfy the negative criteria of the statute.

4 THE COURT: It would do rather strong  
5 violence to the existing plan, whether you agree  
6 with the plan or not.

7 Here is the issue I want to raise, and I  
8 would really like to hear an answer to it.

9 One of the strongest arguments Mr.  
10 English proposes is that we are here facing  
11 probably a four or five week trial which will tie  
12 up one of four or, if it's reached in the fall,  
13 five available courts in this county for a period  
14 of time in which certainly 15 criminal trials  
15 could be heard and decided, and we have a terrible  
16 backlog; certainly 125 divorces could be heard,  
17 granted or denied, and we have a terrible  
18 backlog; and at least 200 juvenile cases could  
19 be decided and disposed of promptly and speedily.

20 Now, where do I get in all of this  
21 mountain of paper other than the bald assertion  
22 that Allan Deane now wishes to become an agency  
23 of social good, the substance that Allan Deane  
24 has altered its attitude since the testimony  
25 presented by its agents in Allan Deane versus

1 Bedminster and Allan Deane against Cheswick  
2 that their desire was to utilize their adjacent  
3 holdings in Bedminster for purposes that certainly  
4 would be of little or no even academic interest  
5 to those with incomes under \$50,000 a year?

6 MR. HILL: Your Honor, I have advised my  
7 client that for the purposes of standing, their  
8 standing to bring this action through a large  
9 extent depends upon their willingness to provide  
10 some low or moderate income housing in the Allan  
11 Deane tract.

12 A corporation makes a corporate decision.  
13 I cannot represent what will be their decision.  
14 All I can say is that the Complaint was reviewed  
15 at length by the top officers, not only of Allan  
16 Deane and Johns Manville Property Corporation,  
17 but the parent Johns Manville Products Corporation,  
18 and it was approved and it was filed with the  
19 court, and your Honor must take for the purpose  
20 of this motion all the allegations contained  
21 therein as true. If discovery, if in discovery  
22 Mr. English were to determine that Allan Deane  
23 had no intent to provide housing except at the  
24 highest income levels and that that housing is  
25 already available in Bernards Township, I would

1 expect him to come before the court, file a few  
2 depositions and say, "Your Honor, I renew my  
3 motion on standing. I think the Court should get  
4 to the meat of this issue now. Allan Deane should  
5 not be allowed to have standing."

6 Under the case law, you know that would  
7 be a difficult decision. I argued that case in  
8 the Taberna case, which is attached, your Honor.  
9 There clearly we had clear testimony, as I have  
10 stated in the brief, that the builder intended  
11 to build \$55,000 condominiums. The planner said  
12 that you could afford twice your family income,  
13 so that their housing was not affordable to any-  
14 body making less than \$27,500 a year.

15 Montgomery Township had demographically  
16 had much lower income than Bernards.

17 THE COURT: Don't tell Montgomery that.

18 MR. HILL: What?

19 THE COURT: Don't tell Montgomery that.  
20 They think they're Princeton.

21 MR. HILL: In any case, that did not  
22 sit with Judge Meredith. Judge Meredith, in what  
23 I thought was a carefully reasoned decision,  
24 but it's open game, because I believe that the  
25 courts will be very liberal in understanding

1 Mt. Laurel, because the Supreme Court is very  
2 upset that no housing is being built in New  
3 Jersey. Mt. Laurel is coming on to be a year  
4 old, and Justice Pashman particularly in the  
5 Madison Township argument thought that the  
6 Court had to go much, much further if they were  
7 going to accomplish anything in this area, that  
8 every municipality was dragging its heels, and  
9 he said how can a municipality, talking about  
10 Madison, come before this Court and argue that  
11 they are trying affirmatively to provide their  
12 fair share when they don't even have a housing  
13 authority.

14 Now, no municipality in Somerset County  
15 except Somerville has a housing authority, your  
16 Honor. I think that the law as handed down by  
17 the Supreme Court will get tougher. I think the  
18 Court is very convinced of the rightness of the  
19 decision, and they went to a great deal of  
20 trouble in Mt. Laurel to make sure that the  
21 Legislature could not, not to base it on the  
22 statute, but to base it on the New Jersey  
23 Constitution so that neither the Legislature nor  
24 the United States Supreme Court could reverse  
25 them.

1                   It's very interesting in terms of  
2                   judicial relationship with the Legislature, but  
3                   it represents a very strong-minded attempt,  
4                   strong-minded decision that what they are doing  
5                   is right and it was going to be the law of the  
6                   State of New Jersey, and they didn't care what the  
7                   United States Supreme Court or the State  
8                   Legislature might later decide was wisest. They  
9                   were basing it on the New Jersey Constitution  
10                  which they alone had supreme authority to  
11                  interpret.

12                  Now, I am just projecting what a Court  
13                  might do, and going to the Somerset County issue,  
14                  your Honor, originally they had drafted this  
15                  Complaint to include Somerset County as a  
16                  defendant. We passed that Complaint around at  
17                  the office and sent it to Denver and discussed  
18                  it at some length, and we decided that this was  
19                  going to be very expensive and time consuming  
20                  litigation.

21                  I don't know if your Honor knows how  
22                  many depositions were taken in the first  
23                  Bedminster case, but this case is even more  
24                  involved because the issues have gotten much  
25                  broader, and to participate in this kind of

1 litigation is not inexpensive. If there are 50  
2 or 60 or 80 depositions held on 50 or 60 or 80  
3 different days and the Board of Freeholders does  
4 not authorize counsel of the Planning Board to  
5 attend all these depositions, we have one attorney  
6 who is at a disadvantage with the other attorneys.  
7 The more parties we have the more complicated the  
8 suit becomes and the longer it will be before  
9 it is tried, and the more complex the issues are  
10 going to be.

11 We discussed in the office what we could  
12 get from the County Planning Board, and we felt  
13 that it could possibly be an order from your  
14 Honor. We frankly believe that the County Planning  
15 Board is not doing its duty in the sense that they  
16 don't seem to understand that housing is a number  
17 one planning priority in New Jersey. They are  
18 conducting study after study on the environment,  
19 but they are not conducting studies, this County  
20 Planning Board is not conducting studies that we  
21 know about on the need for housing in and around  
22 Central New Jersey and Somerset County in the  
23 Somerset Hills. They have counted the apartments.  
24 They have a nice little pamphlet on how pleasant  
25 apartment living can be in Somerset County; but



1 you know, the County Planner moreover is making  
2 statements that he does not believe in Mt. Laurel  
3 and municipalities should not be in a great hurry  
4 to provide their fair share of the regional need  
5 because maybe the law will change, and it's all  
6 very confusing and there is nothing that  
7 municipalities can do.

8 In other words, your Honor, we think  
9 that the County Planning Board is a great problem,  
10 because it's cooperating with municipalities in  
11 their attempt to frustrate the Court, the State  
12 Legislature and the executive wishes that low and  
13 moderate income housing at all income spectrums be  
14 made available in New Jersey.

15 THE COURT: I don't see how you can  
16 attack the county land use plan without making  
17 the county, at least the County Planning Board  
18 a party.

19 MR. HILL: Well, your Honor --

20 THE COURT: How would the Court get the  
21 right to consider that plan if the County Planning  
22 Board were not a party?

23 MR. HILL: Your Honor, we say the plan  
24 is irrelevant, and we will have numerous witnesses  
25 saying that the plan is not based on sound

1 logic. Mr. Roach will no doubt testify, as he  
2 did in the Bedminster case, that the plan is  
3 great. He has written letters to the State of  
4 New Jersey, to the Department of Community  
5 Affairs, to the Department of the Public Advocate  
6 trying to get them involved in the Bedminster case  
7 on the appeals. He feels strongly that the  
8 Somerset Hills should be preserved forever as  
9 New Jersey's Grand Canyon, except for the AT&T  
10 facilities, which ironically were not many years  
11 ago three acre residential zoning, just as the  
12 Allan Deans property is.

13 We think that our problem is that  
14 practically speaking, if we have a party in this  
15 action who will not devote the resources, will not  
16 participate in the action, it's delaying everybody.

17 The Somerset County Planning Board was  
18 a party in every sense of the word in the  
19 Bedminster suit. If the Board of Freeholders or  
20 the County Planning Board wants to vote and  
21 seeks to join this action, and presumably they  
22 would then vote the necessary funding so that  
23 their attorneys could follow the action and follow  
24 the discovery, we will not object to them becoming  
25 a party. It would make discovery somewhat easier

1 if they were a party, but we felt in the long run  
2 that in having a governmental body, a party  
3 to the action that was not putting in the same  
4 time and developing and fine-tuning the case  
5 to the same degree that the real parties in  
6 interest were would just be confusing.

7 We have no objection, your Honor, if you  
8 want to make the Somerset County Planning Board a  
9 party, but we think that the better practice  
10 would be to let them make that decision and let  
11 the Board of Freeholders decide whether they are  
12 willing to spend the resources so that an  
13 attorney can actively participate and follow this  
14 case along rather than to drag them in and have  
15 them perhaps give instructions to their attorney,  
16 you know, not to bother with the discovery, but  
17 to be there at the trial, in which case one of  
18 the most sophisticated, complicated kinds of  
19 suits that exists today would be participated in  
20 by a party that could not be of real assistance  
21 to the Court.

22 THE COURT: That is actually the  
23 difference between their being a nominal party  
24 and their being an active party, really, isn't  
25 that what you are arguing?

1 MR. HILL: Yes.

2 THE COURT: But, I am not a nominal  
3 party. I may be dense, but I don't see how you  
4 can attack the validity of the county land use  
5 plan vis-a-vis regional planning and vis-a-vis  
6 municipal planning, et cetera.

7 MR. HILL: Your Honor, we feel that  
8 their only power is advisory.

9 THE COURT: How about under the July  
10 statute?

11 MR. HILL: We have no objection to their  
12 being a party. It will make discovery much, much  
13 easier, your Honor. We wouldn't have to go to  
14 your Honor for orders to subpoena them and their  
15 records if they were a party. We can, by just  
16 noticing them, send large numbers of people to go  
17 through their files, which we are prepared to  
18 do, your Honor; but, the only problem, and it is  
19 one that we had not decided finally in our own  
20 minds, is that unless they have the Board of  
21 Freeholders give them the resources to actively  
22 participate in the case, we are going to have a  
23 lot of motions and they may be delayed, because  
24 somebody who is not actively in the case has  
25 a trial somewhere else, and we just thought that

1 the case could be more cleanly and efficiently  
2 prosecuted without them, unless they affirmatively  
3 voted to come in. That was our position.

4 As to AT&T, I gather that the defendants  
5 have withdrawn the motion that they be made a  
6 party now.

7 Allan-Deane has no desire to keep AT&T  
8 out of their building. We really are arguing  
9 that 3500 new employees are in the course of  
10 moving and irreversible patterns of commutation  
11 will be established. These people, we believe,  
12 do not have homes, and many of them, the clerks  
13 and secretaries, will not be able to afford  
14 housing in the Somerset Hills and will travel long  
15 distances, perhaps to central cities which are  
16 already being squeezed out of tax ratables. We  
17 think that Bernards failure to provide housing  
18 today is irreparably damaging the general welfare  
19 of the State of New Jersey.

20 We wanted to point out the other side of  
21 that coin, and we argue that AT&T should not be  
22 allowed further occupancy of their complex until  
23 Bernards has provided their fair share of the  
24 regional housing need. We think, and we have  
25 researched this, to be frank with your Honor,

1 since construction has started and is substantially  
2 underway, that AT&T undoubtedly has a vested right  
3 to their building permit, undoubtedly has a vested  
4 right under conventional law to occupancy permits  
5 if they comply with the codes of Bernards  
6 Township. We do not realistically think that  
7 either we or Bernards Township, if they desire,  
8 could stop AT&T today.

9 THE COURT: I am frightened of the  
10 thought of who would have to pay the damages if  
11 they have to vacate whatever they promised to  
12 vacate so that the new tenants could get in  
13 there. I wouldn't even want to rent the tents.

14 MR. HILL: What we are arguing, your  
15 Honor, is that these people are moving in today,  
16 and if Mt. Laurel has any meaning, if the  
17 Governor's Executive Order has any meaning, you  
18 are going to have large segments of the population  
19 moving into Bernards Township over the next few  
20 years. Some 7,000 new employees will be moving  
21 out of New York, and we will have in discovery the  
22 income spectrums of these AT&T employees. Like  
23 any other company, the majority of the workers  
24 we assume will be secretaries and clerks and  
25 people making less than \$20,000 a year, and our

1 demographers tell us, and we allege in our  
2 Complaint, and our planners and economists tell  
3 us that housing today cannot be bought in Bernards  
4 Township for under \$80,000. The latest figure  
5 is \$87,000. The Complaint says \$80,000, that new  
6 housing cannot be bought for less than \$30,000  
7 in Bernards today. Using the planners' rule of  
8 thumb, that means that people earning less than  
9 \$40,000 a year cannot live in Bernards Township.

10 Now, the obviously large, large numbers  
11 of people moving in at the two AT&T sites will  
12 not be able to afford to live in Bernards  
13 Township. They will have to live elsewhere,  
14 probably in Bedminster. You can see some of them  
15 finding housing in Somerville. Some of them will  
16 live in Trenton, some of them will live in New  
17 Brunswick. These are the central cities. These  
18 are the ones.

19 There will be a lot of testimony on that,  
20 your Honor, but in a small way the deterioration  
21 of our cities is occurring every, everyday when  
22 new employees move in. The energy crisis is  
23 worsened. The general welfare to the extent that  
24 social scientists can talk about the general  
25 welfare and talk about where it is going is being

1 irreparably damaged by this municipality's  
2 insistence that it must remain an enclave of  
3 affluence and social homogeneity.

4 We argue that we have the right to raise  
5 these issues. We have the duty to raise these  
6 issues. If you do not allow us to raise the  
7 issues and other courts in New Jersey hold the  
8 same, then Mt. Laurel's vitality will suffer  
9 greatly.

10 Under traditional methods of analyzing  
11 whether parties should have access to the courts,  
12 we argue that we should be entitled to raise these  
13 issues, that we have the resources to litigate  
14 these issues effectively and to prove the kind of  
15 case that needs to be proved, and we pledge our-  
16 selves to do the homework required to make your  
17 Honor's, or whoever decides the cases, decision  
18 based on substantial facts.

19 THE COURT: Let me get to you on that  
20 point, because I want to take a recess in a  
21 moment, but I would like to ask you a question  
22 that I would like you to answer after the  
23 recess and after I come back.

24 It strikes me from listening to you and  
25 from reading your submissions, that you in part at



1 least, if not almost in whole, argue that Allan-  
2 Deane, the corporate investment, profit-seeking,  
3 developing corporation, has standing to ask  
4 relief of the court against a governmental entity  
5 on the basis of the social purpose philosophy  
6 of the Mt. Laurel decision -- in other words, the  
7 developer in sort of a bootstrap argument does not  
8 have to bring in two secretaries at the local  
9 housing association just to get standing, that  
10 Allan-Deane has a legitimate right to go out and  
11 seek relief sort of acting in its own interest and  
12 in the general public interest on the theory of  
13 Mt. Laurel, the need for housing and the need for  
14 the kind of housing that Mt. Laurel deals with.  
15 You ask that the plaintiff be permitted to seek  
16 relief on that basis.

17 Now, whenever you bring a suit you are  
18 asking a court to do something. Here in effect  
19 you are asking a court to give direction or  
20 instruction to a municipal body, a political  
21 entity. I am curious to know how you envision  
22 this suit is going to boil down and resolve  
23 itself from the duplicitious and multifarious  
24 issues, as Mr. English so nicely put it, that now  
25 are all spread out to an actual, potential court

1 order? What is it you are going to seek that the  
2 court order? It cannot just be that the existing  
3 zoning on 1600 acres is not valid. All that would  
4 accomplish would be to allow profit motive to be  
5 satisfied. Mt. Laurel clearly says it was not  
6 decided merely to satisfy a profit motive. Where  
7 are we going? Where do I find here, or what will  
8 you give me today above and beyond what I can find  
9 here in the file to indicate that you are intending  
10 to use the court's time for a purpose that can be  
11 met and that is in compliance with the purpose and  
12 aim of Mt. Laurel? Wherein is the definition?  
13 Where will we get, or where do we have the  
14 definition of when this case is over and done with  
15 Allan-Deane will have afforded an opportunity  
16 for low and moderate income families to have more  
17 housing in the State of New Jersey? I have missed  
18 it if it is in the case thus far, and I will give  
19 you a few minutes to think about it, because  
20 I need time to stretch my legs.

21 (The Court declares a short recess.)

22 MR. HILL: Your Honor has asked me  
23 to assure the Court/<sup>of</sup>the fact that the Complaint  
24 states a cause of action in which the Court  
25 can grant realistic and practical relief. The

1 Court has indicated that it's curious as to where  
2 this is all going and what it all means.

3 I would like to just state at the outset,  
4 your Honor, that for the purpose of this motion  
5 we have yet to receive an answer. All facts  
6 alleged in the Complaint must be assumed to be  
7 true, and particularly the facts alleged in  
8 Counts 26E, 27, 28 and 29, which I would just  
9 like to read to your Honor.

10 "Bernards Township has excluded, through  
11 its zoning, not only its fair share of the  
12 regional need for low and moderate income housing,  
13 but also its fair share of the regional need  
14 at all income levels below \$30,000 per year.

15 "The development of the Allan-Deane  
16 property in accordance with the submitted plan  
17 would substantially relieve the existing housing  
18 shortage in the Bernards Township housing region  
19 and would enable persons who cannot presently  
20 afford to buy or rent housing in Bernards  
21 Township to live there."

22 THE COURT: Let me stop you. I may have  
23 missed something.

24 "In accordance with the submitted plan."  
25 You are going to rely on the, what was it, 1976

1 proposal?

2 MR. HILL: Yes, your Honor.

3 In the Bedminster case, we had a plan  
4 called Wordly Woods. That plan has been junked  
5 by Allan-Deane Corporation. In February of 1976  
6 a new plan was submitted to Bedminster Township  
7 and Bernards Township. It calls for construction  
8 of approximately 6,000 units of multi-family  
9 housing on a 1600 acre tract, a density of just  
10 four units per acre, and there would be large  
11 areas where our planners and environmentalists  
12 thought could be left open spaces. The concept  
13 involved, I believe, five or six villages,  
14 scattered villages scattered over the tract.

15 THE COURT: And portions of those units  
16 were subsidized housing?

17 MR. HILL: Allan-Deane is in the business  
18 of developing real estate for a profit. We do  
19 have, and getting into the substance of the  
20 case, a consultant on subsidized housing. The  
21 trick in subsidized housing is to build according  
22 to government standards. It is possible for a  
23 municipality to frustrate a private developer's  
24 attempts to get subsidies, because the Federal  
25 Government requirement often is that a

1           municipality pass a resolution exempting the  
2           subsidized units from local taxes. The government  
3           says why should we pay for them if the  
4           municipality taxes them.

5                    THE COURT: You may not be in a bad  
6           position with a \$3½ million a year ratable.  
7           You might not be in a bad position on that  
8           argument.

9                    MR. HILL: This is a second generation  
10          Mt. Laurel case, your Honor. There are very many  
11          important issues left open by Mt. Laurel. We  
12          think that in Bernards more than anyplace else  
13          the Court is going to be faced with the issue of  
14          what a Court should do with a truly recalcitrant  
15          municipality which is aware of its obligation to  
16          provide its fair share but is determined at any  
17          cost not to do so.

18                   We have been looking through early  
19          newspaper articles in Bernards which criticized in  
20          1971 when AT&T first announced the plan to move  
21          there shortly after it was rezoned from three-  
22          acre residential land to accommodate AT&T.  
23          They were criticized, and, in fact, there were  
24          hearings before the Federal Communications  
25          Commission, which your Honor is aware of, trying

1 to stop AT&T on the ground that AT&T employed  
2 thousands of Puerto Rican and Spanish and  
3 minority group women at their New York site and  
4 they would be moving that whole site to Bernards  
5 and those people would be unable to commute or  
6 afford to commute, low paid clerical and  
7 secretarial employees. AT&T represented and the  
8 Federal Communications Commission decided that  
9 that was basically not their problem, they were  
10 not the forum in which those issues should be  
11 decided; but, the mayor, then, according to the  
12 newspapers, promised that Bernards would provide  
13 its fair share and fully intended to do so, and  
14 that it was being unjustly criticized by the  
15 Suburban Action Institute for not moving quickly  
16 enough but moving at their own pace and thinking  
17 since 1968 or 1969 of providing multi-family  
18 housing somewhere in Bernards.

19 Your Honor knows, and I was sitting in  
20 court two weeks ago when your Honor invalidated the  
21 Bernards Township Zoning Ordinance, a suit in  
22 which Mr. English was on one side and Mr. Lanagan  
23 on the other.

24 I read in the newspaper that they have  
25 come up with a highly innovative concept. They

1           are having small, 25 acre areas for low and  
 2 moderate income only as a special exception, not,  
 3 I believe, to be approved unless they get their  
 4 Federal subsidies first. When they do, they will  
 5 find that they have a chicken or an egg problem,  
 6 and you don't get Federal subsidies unless you  
 7 have land approval and somebody is going to  
 8 invalidate that on the ground that the conditions  
 9 are unrealistic. They also require that they  
 10 call them <sup>Aggie's</sup> Eggles Donuts because they are  
 11 little enclaves of low income housing surrounded  
 12 by single-family residences in a circle around  
 13 them on one-acre tracts so that the rest of the  
 14 population is not polluted by this low and moderate  
 15 income housing.

16                   They will find, and I am sure your Honor  
 17 knows of cases in front of you, but if cases come  
 18 before this one does in which they will see that  
 19 public policy today is not to create ghettos  
 20 of low and moderate income housing but to allow  
 21 people, regardless of their income to not be  
 22 stigmatized by living in these areas. We are  
 23 having the newest zoning ordinance which was just  
 24 published on Thursday of last week analyzed by  
 25 our planners. It is clearly a case of leaning

1 over so far backwards that it becomes economically  
2 impossible for anyone to construct. One hundred  
3 percent of these floating zone special exception  
4 units in these 25 acre tracts must be low and  
5 moderate. They must all have subsidies and none  
6 can be located more than a half a mile from each  
7 other, so that they are in no one part of Bernards  
8 Township. They float over the entire township  
9 except for the land zoned by Mr. Lanagan's clients  
10 and the land zoned by my client.

11 MR. ENGLISH: That is a totally incorrect  
12 statement, your Honor. I cannot sit here. The  
13 ordinance is not limited to and does not exclude  
14 it solely for Mr. Lanagan's lands or Allan-Deane's.  
15 It excludes it from the whole 3A zone and the  
16 whole PRN zone and very simply limits the proposed  
17 low cost housing to the area serviced or to the  
18 area which can economically be serviced by the  
19 existing sewerage system.

20 I don't know how much your Honor wants  
21 to get into speculation.

22 THE COURT: I don't think so far we are  
23 into that.

24 MR. ENGLISH: I must object to  
25 incorrect statements.



1 MR. HILL: In any case, new frontiers of  
2 ingenuity have been transversed in making it look  
3 like they are complying and in making sure nothing  
4 gets built, and there will be testimony, your  
5 Honor, sooner or later on these various schemes.

6 I think your Honor is squarely faced in  
7 this case with a municipality that is recalcitrant  
8 to the extreme. They will delay as long as  
9 they can. When they are finally forced by court  
10 order, they will use duplicity to try to get out  
11 of really accomodating any realistic housing.

12 I think that this case more than any other  
13 I know of pending in New Jersey or maybe Mr.  
14 Lanagan's case, if it comes up first, but in any  
15 case, cases involving Bernards Township are the  
16 clearest example that I know of of governing bodies  
17 and planning boards clearly determined to defy the  
18 law and drag their feet, and I think the Court  
19 will have to face what is clearly one of the  
20 major second generation Mt. Laurel problems of  
21 what do you do with a municipality that won't  
22 comply.

23 THE COURT: The assurance that I have  
24 that you client is the vehicle for reaching that  
25

1 issue is, I understand now, your February 1976  
2 plan?

3 MR. HILL: That is correct, your Honor,  
4 which provides -- your Honor, we believe that we  
5 can establish to the Court's satisfaction that  
6 the entire Allan-Deane property is suitable if  
7 sewered for multi-family housing. The area is  
8 underlined with basalt, as it says in the  
9 Complaint. It is not an aquifer recharge  
10 area. There can be no issue of subsurface water  
11 pollution.

12 THE COURT: I don't want to get into  
13 the issues. I just want to make sure that the  
14 issues are here.

15 MR. HILL: Yes.

16 THE COURT: You seek relief that will  
17 result in housing for low and moderate income  
18 people.

19 MR. HILL: The entire spectrum, including  
20 low and moderate income.

21 Your Honor, Bernards is discriminating  
22 against low and moderate, up to \$12,000 in a  
23 Somerset County family's annual income. Bernards  
24 is not just excluding people making less than  
25 \$12,000. It is excluding everybody, we allage,

1 making less than \$40,000, and we think that the  
2 people earning between \$12,000 and \$40,000 are  
3 also entitled to relief. Mt. Laurel makes it  
4 clear that every municipality by its zoning must  
5 accommodate, reasonably accommodate its fair share  
6 in all income spectrums, and the game that is  
7 being played now is, they call them <sup>AGLE'S</sup> Eggles Donuts  
8 or something, but these little areas of multi-  
9 family low and moderate income housing.

10 Now, the Court is going to be faced with  
11 the problem of what to do if that zoning is  
12 changed so that it's practical to build these  
13 zones of low and moderate income housing allowing  
14 people making less than \$12,000 and allowing people  
15 making more than \$40,000 to live in Bernards, and  
16 people making between \$12,000 and \$40,000 will  
17 not be allowed to live in Bernards unless the  
18 present planning is changed, and we think that  
19 those people are entitled to the Court's  
20 protection, and we think that Mt. Laurel makes it  
21 clear that a municipality by zoning must provide  
22 for a broad range of housing in all types that  
23 are needed.

24 Clearly, the market cannot accommodate  
25 without subsidies the low and probably the bottom

1 three-quarters portion of the moderate quadrant.  
2 Again, this will have to be established by  
3 testimony.

4 Moreover, in this case, and what we  
5 are saying to you, your Honor, is that we are  
6 prepared to do a job. We are prepared to bring  
7 economists, sociologists, planners, environmentalists  
8 to testify and really break down and analyze this  
9 zoning and plan in a way that has not been done  
10 before in our experience in exclusionary zoning  
11 litigation. This is a second generation suit.

12 Excepting Mt. Laurel, itself, the  
13 courts have not had really sophisticated socio-  
14 economic analyses of the consequences of  
15 exclusionary zoning, and when you look at the  
16 consequences of exclusionary zoning, if you  
17 read that Complaint, you see that Bernards'  
18 equalized tax rate is going down, down, down, and  
19 the rest of New Jersey's equalized tax rate,  
20 New Jersey's generally equalized tax rate is going  
21 up, up, up, and they have accomplished that very  
22 simply by excluding housing and bringing in large  
23 tax ratables.

24 THE COURT: That's all very interesting,  
25 but the Court is tired of taking the negative

1 position of throwing out zoning without anything  
2 affirmative being offered. I just wanted to make  
3 sure there is an affirmative aspect to this  
4 suit.

5 MR. HILL: We think that this is the case  
6 where the Court should overrule the zoning power  
7 and appoint a special master or receiver to take  
8 over the zoning power and to comply with the  
9 Court's order. We don't believe that the Court  
10 will have any success in trying to persuade the  
11 governing bodies and planning boards of this  
12 municipality to comply with the law, because that  
13 is not their intent, and/view the area as so  
14 confused that their best bet is to drag their  
15 feet until the communities around them have  
16 complied with their fair share.

17 We think that the whole rationale of  
18 whether New Jersey, the whole issue of whether  
19 New Jersey should follow the rationale of the  
20 Casey and Chesterdale Farm cases, which we  
21 discussed in our brief at pages 4, 5 and 6, is  
22 ripe. In those cases both the Supreme Court of  
23 Pennsylvania and the Supreme Court of Illinois  
24 have decided that the only way to encourage  
25 exclusionary zoning litigation and to advance

1 that social policy is to allow developers who  
2 successfully establish that zoning is exclusionary  
3 and whose land is not patently and clearly  
4 and environmentally unfit to have building  
5 permits.

6 THE COURT: That implies a plan to order  
7 the permits to construct.

8 MR. HILL: Yes, we have a plan.  
9 The plan has been presented to the Planning Board.  
10 It was be a part of this record. It's referred to  
11 in the Complaint. The plan is a site plan. It  
12 has all kinds of analyses in it. It's many  
13 pages long with maps, and the municipality has  
14 been advised that we believe, if we are allowed  
15 to construct, that we can construct housing  
16 significantly more cheaply than it now exists.  
17 We are asking for 6,000 units in Bernards and  
18 Bedminster, most of them multi-family units.  
19 It is our hope, and costs are constantly changing,  
20 that we can construct them substantially below  
21 the present market, meet the upper spectrum of  
22 the moderate income in the apartments at least,  
23 and that we can work with a sponsor and provide,  
24 obtain Federal subsidies and build a substantial  
25 number under Section A of Federal funding or

1 through some new Federal or State funding program  
2 so that they would be subsidized. How much we  
3 can do, of course, depends on whether the  
4 municipalities cooperate with us.

5 I can't come before your Honor and say  
6 that we will build 1,000 units of low and  
7 moderate income housing, because we don't have  
8 the funds now. We would have to apply for them,  
9 and in the final analysis the municipality would  
10 have to cooperate in the tax exemptions in order  
11 for us to get the funds. All I can say is that  
12 we are analyzing that problem and we will provide  
13 as many as we can, and we don't necessarily need  
14 to lose money, because the Federal Government  
15 will subsidize the rent, and the rent subsidies  
16 are enough so that supposedly investors and  
17 developers can turn a modest profit. It's not a  
18 large profit, but Allan-Deane is willing to do  
19 that and has stated that they will do that in the  
20 Complaint.

21 Basically, your Honor, we think that  
22 this case is a second generation Mt. Laurel case,  
23 and we are prepared to present the evidence and to  
24 raise the really much more sophisticated issues  
25 which have not been raised and which have not been

1 clearly defined as yet as to what exactly  
2 constitutes the fair share, and we would press  
3 your Honor for more affirmative action by way  
4 of relief than heretofore provided by any  
5 court in a Mt. Laurel case. We think we are  
6 entitled to that because we think that the quantum  
7 of and the damage to the people's welfare presented  
8 by Bernards Township and the quantum of their bad  
9 faith is such that this is a case that is ripe for  
10 the Court to show municipalities that the law  
11 in the State of New Jersey shall be followed.

12 Thank you.

13 THE COURT: Thank you.

14 Something may have been said that you  
15 would like to respond to.

16 MR. ENGLISH: Yes.

17 If the Court please, I think what has  
18 been argued on behalf of the plaintiff strengthens  
19 the motion to dismiss.

20 If the Court please, I must take  
21 exception to the unsubstantiated statements to  
22 this Court that Bernards Township has not been  
23 acting in good faith, particularly when  
24 supporting statements for that are incorrect,  
25 such as that Bernards has not had any zoning for



1 multi-family housing yet and won't until this  
2 ordinance. That is incorrect.

3 The PRN Ordinance was adopted three years  
4 ago.

5 If the Court please, I think the basic  
6 question which counsel has not addressed himself  
7 to at all is suppose, and I don't concede this,  
8 but suppose for the sake of argument that the  
9 new Mt. Laurel ordinance, which Bernards is in  
10 the process of adopting, does not comply? Suppose  
11 Bernards concedes that it must provide, as far as  
12 zoning will permit, suitable locations for low  
13 cost housing. Suppose all that. It does not  
14 follow from that that this court or any court  
15 can compel Bernards Township to put it on the  
16 plaintiff's land, and the basic question is what  
17 is the suitable use from a planning and zoning  
18 standpoint of the plaintiff's land, and I submit  
19 that is the sole interest, the sole legitimate  
20 interest that the plaintiff has in this  
21 controversy.

22 Now, your Honor will recall by taking  
23 judicial notice of the evidence in the Allan-Deane  
24 Bedminster case that the Somerset County Master  
25 Plan calls for the area where Allan-Deane's tract

1 is located to have a low density, rural settlement  
2 character. It recommended that neither sewers  
3 nor water mains be extended to that area.

4 Your Honor will recall the planning  
5 reports by Tristate Regional Planning Commission  
6 which argued that headwater areas should remain  
7 relatively free from development. This is a  
8 headwater area of the Passaic River, which already  
9 has the distinction of being one of the ten most  
10 polluted rivers in the United States. From a  
11 planning standpoint, it is absolute nonsense to  
12 put 6,000 dwelling units on 15 or 1600 acres of  
13 land in this location, and even if Bernards  
14 Township has to do a lot more than it is presently  
15 trying to do with low cost housing, it does not  
16 follow from any rational standpoint that such  
17 housing can or should be put on the plaintiff's  
18 land.

19 So, I submit the first question and the  
20 dispositive question is what is the validity of  
21 the zoning of the plaintiff's land? Is three  
22 acres reasonable, or is it not, and if that  
23 question is settled in favor of the Township, I  
24 submit it does not make any difference what the  
25 Mt. Laurel problems are. That ends this case, and

1 that is the extent of the plaintiff's legitimate  
2 interest.

3 Now, counsel stated, and I agree with  
4 the statement that as far as access to the court  
5 is concerned, the courts determine public policy  
6 in allowing certain issues to come to the court,  
7 and I am arguing that the Mt. Laurel issues  
8 raised by this plaintiff should not come to the  
9 court. It was stated on behalf of the plaintiff  
10 that plaintiff views development impossible under  
11 the present zoning. That's a great statement  
12 for them to make now because the zoning today  
13 is exactly what it was when the plaintiff bought  
14 it, and if the plaintiff now figures that he made  
15 a lousy investment, I submit that that is no  
16 reason to take up the Court's time for five weeks  
17 on a bunch of extraneous issues that have nothing  
18 to do with the legitimate interests of the  
19 plaintiff.

20 I was interested in the statement by  
21 Mr. Hill that if standing is provided, they  
22 expressed a willingness to provide low and moderate  
23 income housing.

24 Now, if the Court please, this is a  
25 clear admission that this whole Mt. Laurel business

1 this whole sudden deathbed conversion of Allan-  
2 Deane is admittedly a profit-making enterprise  
3 and that the concerns of the poor and lonely and  
4 all that is simply a lawyer's gag to get a toe  
5 hold in court to clobber Bernards Township,  
6 and I submit that this Court in its discretion  
7 does not have to be imposed upon by a long trial  
8 dealing with issues that have been dredged up for  
9 that purpose.

10 Now, I make that statement on the basis  
11 of the argument made before your Honor. I submit  
12 that it is clearly apparent that plaintiff has no  
13 legitimate interest in the Mt. Laurel interests.  
14 They have not been brought up in good faith.  
15 They are here simply as an imposition on the  
16 defendants and an imposition on the Court, and I  
17 think the motion to dismiss the Complaint should  
18 therefore be granted.

19 THE COURT: As I see the defendant's  
20 motion, in essence, in effect, in impact it is in  
21 the nature of a very early motion for summary  
22 judgment.

23 In effect, the motion asserts that given  
24 all the facts the way plaintiff asserts them to  
25 be that the case should not be entertained by the

1 Court, that the case is, in essence, primarily an  
2 effort to impose a heavy burden on the municipality.

3 Now, there is a very real concern there.  
4 A municipality is not merely an it. It is  
5 people, and when you impose costs of trial  
6 preparation, et cetera, upon the people of a  
7 municipality you are, in effect, denying them the  
8 utilization of the funds involved for other  
9 purposes; so, the Court states for the record,  
10 and openly acknowledges that it is very aware  
11 that this type of suit is expensive to prepare  
12 for, to present, et cetera, and for that reason  
13 the motion is not frivolous.

14 Basically, as I see it, the plaintiff  
15 can seek and is seeking either or both of the  
16 following rulings from the Court. The first  
17 would be that the zoning as is on plaintiff's  
18 tract is confiscatory, rendering the tract  
19 unusable and demanding relief.

20 The second is that affirmative relief  
21 should be granted by the Court in order to cause  
22 the providing of the type of housing referred to  
23 in the Mt. Laurel decision to cause the social,  
24 general social good of increased housing for those  
25 portions of the population of the State that are

1 in such desperate need for housing.

2 Now, if the first of those, the  
3 confiscatory aspect is the only purpose of the  
4 suit, much of the relief requested and of the  
5 claims asserted in the Complaint would be totally  
6 irrelevant and would amount to an unwarranted  
7 consumption of time on the part of the Court.  
8 This is why I kept questioning to make sure that  
9 there was a representation in the pleadings and  
10 by counsel that the second aspect of the suit was  
11 real.

12 The defendant is obviously 150% convinced  
13 that that aspect is not real, but the Court has  
14 an assertion before it that it is real. It may  
15 be naive on the Court's part, but for the Court  
16 to be cynical and unbelieving and to deny hope  
17 would be a terrible thing for society. The  
18 Court must always hope that there may well be a  
19 corporation in existence that is willing to act  
20 in large part for the social good.

21 With that thought in mind, I feel that  
22 the motion is therefore premature at best, and  
23 the motion will be denied without prejudice,  
24 however, to its renewal in whatever appropriate  
25 <sup>forum</sup> forum you may choose if after exercise of

1 discovery rights defense counsel believes that it  
2 has been established that there is no real  
3 intention on the part of plaintiff to serve the  
4 general public good by providing housing of the  
5 types found worthwhile by the Supreme Court of  
6 this State in its Mt. Laurel decision.

7 If a further investigation of plaintiff's  
8 plans and intentions should demonstrate that there  
9 is no substance to that issue, the Court will not  
10 hesitate to listen again to the essence of the  
11 argument that was presented this morning.

12 As to ordering the including of the  
13 County Planning Board as a necessary party, the  
14 Court will leave that up to counsel. Forewarned  
15 is forearmed, and the Court just cannot envision  
16 it, though counsel may see it and may be able to  
17 succeed at it. Frequently lawyers teach this  
18 Court -- constantly lawyers teach this Court many  
19 things, but it's difficult to see how the County  
20 Master Plan can be reached if the County Planning  
21 Board is not a party, and the Court anticipates  
22 a real issue on the supportive strength, the  
23 understructuring that may well be provided by that  
24 County Master Plan of land use in light of the  
25 new planning statute of this State and in light

1 of Federal and State laws on grants and aids,  
2 et cetera, regional planning vis-a-vis county  
3 planning, the whole network of hidden planning  
4 sanctions that do exist in the law and which  
5 may be reflected now by the Legislature in the  
6 new act, though they weren't at the time of the  
7 Supreme Court's decision in Mt. Laurel.

8 The Court also will not strike the  
9 requested relief of barring occupancy of the  
10 AT&T structures. The Court will state on the  
11 record that it is going to take something the  
12 Court has not been able to imagine to bring about  
13 the granting of that kind of relief. I would not  
14 be surprised if that issue were abandoned before  
15 we actually get to trial. I would be very  
16 surprised if it is not.

17 Would 30 days be adequate for  
18 answering?

19 MR. ENGLISH: Yes, sir.

20 THE COURT: All right.

21 MR. HILL: Your Honor, we will have to  
22 confer on the County Planning Board. If we file  
23 an Amended Complaint, I understand we can do so  
24 until there is an answer without the order of the  
25 Court.



1                   Your Honor, if we file an Amended  
2                   Complaint within the next week, would the  
3                   defendant be required to answer that within 30  
4                   days?

5                   THE COURT: I would think so. The  
6                   issues have been thought about so thoroughly that  
7                   three weeks to answer that count would not be  
8                   unreasonably short.

9                   MR. ENGLISH: No, but if he waits 29  
10                  days and then files the Complaint --

11                  THE COURT: We will relax the rules,  
12                  then.

13                  You might well keep in touch with one  
14                  another. I have that much respect for both of  
15                  you so that I'm sure you will do that.

16                  MR. ENGLISH: I don't want to be in  
17                  default. Perhaps your Honor would want to rule  
18                  something like this: Give us 20 days to answer  
19                  either the present Complaint or any amendment,  
20                  and then he has 15 days or whatever.

21                  THE COURT: Is 10 days enough to make  
22                  your decision?

23                  MR. HILL: Yes, we will either file an  
24                  Amended Complaint within 10 days or won't file  
25                  an Amended Complaint. I will make that

1 representation.

2 THE COURT: Let's have the Order reflect  
3 that the plaintiff shall have 10 days within  
4 which to file an Amended Complaint at his  
5 discretion.

6 MR. HILL: From today.

7 THE COURT: And defendant shall have  
8 20 days.

9 MR. HILL: Thereafter.

10 THE COURT: Thereafter, which means 10  
11 days plus 20 days, so you shall have 30 days from  
12 today to answer the Complaint and any Amended  
13 Complaint filed pursuant to the Order.

14 I think that covers the issues. If there  
15 is anything left dangling, I will be happy to  
16 address myself to it.

17 MR. HILL: I think not, your Honor.

18 MR. ENGLISH: I think your Honor covered  
19 it.

20 THE COURT: Okay, good. I sometimes  
21 leave things out.

22 MR. ENGLISH: Who do you want to draft  
23 the Order?

24 THE COURT: Plaintiff.

25 All right, I thank you both, and I

1 think the motion and this morning's discussion  
2 has at least helped clarify things in my mind  
3 and even might have made things a little clearer  
4 to counsel on where this can go.

5 MR. HILL: Thank you, your Honor.

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C E R T I F I C A T E

I, CYNTHIA I. MORRIS, Certified  
Shorthand Reporter and Notary Public of the  
State of New Jersey, do hereby certify the  
foregoing to be a true and accurate transcript  
of my original stenographic notes taken at  
the time and place hereinbefore set forth.

\_\_\_\_\_  
CYNTHIA I. MORRIS, C.S.R.  
Court Reporter

DATED: \_\_\_\_\_