RULS - AD - 1981 - 50

2/20/81

Correspondence Among Parties Over Form of Judgment

PGS - 35

RPPW

Raymond, Parish, Pine & Weiner, Inc. 621 Alexander Road, Princeton, NJ 08540 609/452-2520

GEORGE M. RAYMOND, A.I.C.P., A.I.A.
NATHANIEL J. PARISH, P.E., A.I.C.P.
SAMUEL W. PINE, A.I.C.P.
MICHAEL WEINER, A.I.C.P.

BERNARD J. BULLER, P.E., A.I.C.P.
WILLIAM R. McGRATH, P.E.
EDWARD J. RYBCZYK

ROBERT GENESLAW, A.I.C.P.
GERALD C. LENAZ, A.I.C.P., A.I.A.
EDITH LANDAU LITT, A.I.C.P.
JOHN JOSEPH SACCARDI
STUART I. TURNER, A.I.C.P.

RICHARD A. HARRALL
NOEL SHAW, JR.
CSABA TEGLAS, A.I.C.P., C.I.P.

Gerald C. Lenaz, AICP, AIA
Director, New Jersey Office

RULS - AD - 1981 - 50

February 20, 1981

FILED
MAR 10 8 32 AM 1981
SOMERSET COUNTY
R OLSON, CLERK

Re: Bedminster Township ads.
Allan-Deane Corporation

Honorable B. Thomas Leahy
Superior Court of New Jersey
Court House Annex
Somerville, New Jersey 08876

My Dear Judge Leahy:

I am in receipt of the following letters addressed to you:

(1) From Alfred L. Ferguson, Esq., of McCarter & English, dated February 6, 1981, enclosing a form of Final Judgement in the above-referenced litigation.

(2) From Henry A. Hill, Jr., Esq., of Brener, Wallack, Rosner & Hill, dated February 10, 1981, registering a number of objections to the above.

(3) From Kenneth E. Meiser, Esq., Deputy Director of the Department of the Public Advocate, dated February 10, 1981, also registering some objections to the form suggested by Mr. Ferguson.

While many of the objections deal with matters with respect to which I do not feel qualified to comment, I thought that my views regarding some of them may be of some use to you. Where I suggest language changes in the documents already before you, I have bracketed material that I recommend be eliminated and underscored material that I recommend be added.

Comments on Mr. Hill's Letter

A. In his paragraph 7, on page 2, and paragraph 14(b), on page 4, Mr. Hill questions the desirability of a finding by the Court to the effect that the Township's current housing obligations have been satisfied by its rezoning of the Corridor in compliance with the Court Order. While it is not my intent to comment on the legal arguments adduced in support of this position, I thought it might be useful to point out the following:

(a) The rezoning was carried out in response to the Court's specific mandate which, in turn, was dictated by what the Court interpreted to be the constitutional requirement dictated by the presence of AT&T, the highway network, etc. In carrying out the mandated rezoning, the Township placed a few additional acres in a non-residential (OR) zoning district. It is, therefore, a legitimate concern on the part of the Township to ask for a judicial determination that the resulting change in housing demand, even though of minor proportions, for which it was responsible has not tipped the scales.

(b) Since the Court found the zoning ordinance and map adopted by the Township, which included the additional OR zones, to have satisfied its Order, a statement to that effect in the Final Order, as requested in paragraph B.2 or Mr. Ferguson's proposal (modified, if needed, to reflect the actual number of jobs being provided by AT&T as Mr. Hill suggests) would not seem to be out of line.

(c) As for paragraph C.1. b., I suggest that Mr. Hill's objection might be neutralized if the language were to be modified to read as follows:

1. The Bedminster Township Land Development Ordinance enacted on September 2, 1980, and as amended on October 6, 1980, affirmatively makes realistically possible an appropriate variety and choice of housing opportunities for all income levels, including low and moderate income persons, to the extent of the Township's [fair share] presently ascertainable obligation [of the present and prospective need] for the provision of low and moderate income housing.

B. In his paragraph 8, on page 2, as well as in paragraph 13, on page 4, Mr. Hill questions the incentives provided in the Bedminster ordinance for the provision of subsidized housing on the grounds that the Township has not yet adopted a Resolution of Need. I believe that the Land Development Ordinance and the Resolution of Need are two separate issues that can be discussed in the same breadth only at the price of compounding the confusion. I believe that the first part

of the first sentence in Mr. Ferguson's paragraph B.3, which ends with ". . .pursuant to the terms of the Ordinance" is a factual statement. I believe that Mr. Ferguson's paragraph 10, on page 10, is correct, also.

As for the second part of the first sentence in Mr. Ferguson's paragraph B.3, as I had occasion to state previously, I do not believe it to be either necessary or in accordance with good planning practice to treat two otherwise identical developments differently by giving one of them a density bonus in exchange for the inclusion of below-market-rate housing. The benefit of introducing an otherwise unattainable form of housing that is either needed in, or constitutionally required of, a municipality is community-wide. The price, in terms of environmental impact, of a density bonus is imposed only upon the property's immediate neighbors. If a community wishes to encourage such housing, it could offer other inducements. Among these are tax abatements the cost of which would fall upon the entire municipality or the provision by the municipality at public expense of improvements which are normally provided by developers.

Unless, as Mr. Hill claims, it is inappropriate to include this provision in the Final Judgement on the grounds that it has not been litigated in the subject case, for the reasons stated I believe that keeping the second part of the first sentence and the entire second sentence of paragraph B.3 would be a useful clarification of the issue.

C. I agree with Mr. Hill's objection as set forth in paragraph 9, on page 3. I recommend that paragraph B.4 in Mr. Ferguson's draft be revised by dropping the second sentence in its entirety. The entire paragraph would thus read as follows:

> 4. Any decreases in the densities and units permitted by the present Bedminster Land Development Ordinance, as enacted, would itself be cost generative and would not be consistent with the doctrine of least cost housing.

D. Mr. Hill's objection in paragraph 10 is too broad, in my opinion. The "existing character of already developed areas" has always been considered a constraint in zoning, albeit not necessarily an overriding one. All that the second half of Mr. Ferguson's paragraph B.5 implies is that, if the constitutional mandate can be satisfied without doing violence to the "existing character of already developed areas," this is what should be done.

The Court-ordered portion of the rezoning process in which I participated dealt only with the "Corridor" rather than the entire Township. Mr. Ferguson informed me, however, that the intent of the first sentence of paragraph B.5 is to confirm a judicial approval of the Township's entire zoning scheme that is contained in a 1975 opinion. Were his position to be held to be invalid, I suggest that the insertion of the words "in the Corridor" after the words ". . .zoning and land use planning" in the second line of the paragraph, leaving the remainder of the sentence unchanged, would meet Mr. Hill's objection.

E. With respect to Mr. Hill's paragraph 11, I agree that Mr. Ferguson's statement covers more ground than is warranted in the present situation. I suggest that paragraph B.6 in Mr. Ferguson's draft be modified to read as follows:

> 6. The provisions of the Bedminster Land Development Ordinance which permit 20% of the land in planned unit developments to be used for commercial purposes, together with the existing commercial and planned Village Neighborhood areas which allow commercial uses, are [more than] sufficient to assure that enough land will be available for the provision of all commercial services required by the Township's [future] residential development in the foreseeable future. [can be provided. The existing commercial and planned Village Neighborhood areas which allow commercial uses are sufficient to service the needs of the Township's ultimate development capacities and densities.]

F. In paragraph 12, Mr. Hill rightly points out that Mr. Ferguson's statement (in paragraph B.7) is in error regarding the density of the northern part of Bedminster Village, as provided for in the Land Development Ordinance, when measured against the top of the 5 to 15 range contemplated in the County's plan. I recommend, therefore, that the last half of the paragraph be dropped, so that the paragraph would read as follows:

> 7. The Bedminster Land Development Ordinance is substantially consistent with the Somerset County Master Plan. The Village Neighborhood concept described in the Somerset County Master Plan is implemented in both the Pluckemin and Bedminster Village portions of the Corridor.

G. In paragraph 17, Mr. Hill sets forth the corporate plaintiff's proposal as to language that would assure it of prompt and specific corporate relief. As I understand it, Mr. Hill wishes to accomplish three purposes:

(a) Protection of his client by the Court against any adverse future changes in the Land Development Ordinance that would not be deemed acceptable to the Court.

(b) Expeditious and objective review by the Township of the Application for Preliminary Approval and protection by the Court against the loss in the review process of any of the rights conferred upon the developer by the ordinance.

(c) Continued monitoring of the application process by the Court-appointed Master.

At the risk of possibly slighting important legal aspects of Mr. Hill's proposal, I suggest that the language set forth below may accomplish the above-listed purposes with less chance of creating future misunderstandings (all language is new).

D. The corporate plaintiff, The Allan-Deane Corporation (and its successor in title, The Hills Development Company) is entitled to specific relief. To that end:

(a) Until such time as the corporate plaintiff has received preliminary approval under Section 804 of the Land Development Ordinance for the development of their entire tract, the Township of Bedminster and the Township Committee of the Township of Bedminster shall give the plaintiff ten days in which to comment on any Amendment to the Land Development Ordinance. Should the plaintiff object to any provision in such Amendment, an effort shall be made to resolve the differences with the help of the Court-appointed Master. Any unresolved dispute shall be brought before this Court for a decision.

(b) The Planning Board of Bedminster Township and the Building Official and such other agencies and employees of defendant Township who may be

charged with the review and regulation of development proposals within such Township are ordered to promptly and objectively review the corporate plaintiff's application in a manner that would implement this Court's intent that the corporate plaintiff shall receive the full benefit of the applicable zoning so long as its plans comply with the provisions of all applicable regulations. The Township Committee is ordered to take such legislative and executive actions as may be reasonably necessary to enable all officials of the Township having responsibility for any phase of the review and approval process to perform their obligations promptly and effectively and to enable the corporate plaintiff to implement the developments as permitted and as required by the Land Development Ordinance of the Township of Bedminster with no unreasonable delays.

(c) In order to insure compliance with the provisions set forth in Paragraphs (a), (b), and (c) of this Order, the Court-appointed Master appointed pursuant to Paragraph 3.c. of the Order appointing Master, dated February 22, 1980, is hereby ordered to continue to observe and monitor the application process of the plaintiff corporation until such time as the corporate plaintiff shall have received preliminary approvals pursuant to Section 804 of the Land Development Ordinance on its entire land holdings in Bedminster Township for the purposes of protecting the right of the corporate plaintiff to receive the full benefit of the applicable zoning so long as its plans comply with the provisions of all applicable regulations, and protecting the rights of the Township of Bedminster to enforce the provisions of that Ordinance. The Master shall report to the Court if any further disputes arise involving the Allan-Deane development applications which cannot be resolved, and Allan-Deane Corporation and defendant Township of Bedminster are given leave to apply to this Court for such other relief as may be just and appropriate to implement the Land Development Ordinance, as amended, and the plaintiff Allan-Deane Corporation's right to

> specific corporate relief through the completion of the preliminary application phase of its development applications to the Township."

I think that the above language expresses accurately the Court's intent, as I understand it. If acceptable, it would replace Paragraphs D and E in the form proposed by Mr. Ferguson.

Comments on Mr. Meiser's Letter

I am in no position to comment on whether the Court should address the issue of density bonuses for the purpose of encouraging the building of subsidized housing. My comments are intended to help clarify the issue.

My position in no way negates the need for a certain permitted density to make the provision of such housing economically feasible. All that I am suggesting is that I believe it to be inappropriate to use a density bonus, rather than a rezoning to an appropriate higher density, as the means for achieving subsidized housing. Thus, I question the validity of treating differently two adjacent developments that are similar in all respects only by reason of the fact that one of them provides subsidized housing. If a higher density is appropriate in the particular location, it should be available for any kind of housing, including the subsidized variety. To make certain that low- and moderate-income housing will be provided the municipality could follow Bedminster's example by establishing a given density as appropriate and requiring that a certain percentage of the units be subsidized or least cost.

A rezoning action would be subject to the normal legal protections against "spot zoning," whereas the density bonus technique permits the municipality to circumvent them. Higher density areas, including subsidized housing, should be mapped following normal procedures, rather than be interspersed arbitrarily among areas held to a lower density.

Another point that should perhaps be made is that the density which makes subsidized housing possible should be capable of being ascertained objectively. It is not reasonable to suggest that, in all instances, it has to be 10% or 20% higher than that generally available for multi-family construction in the locality, whatever that available density may be, or that it should be determined by the governing body on a case by case basis.

In its Order for Remedy of March 3, 1980, the Court expressly stated its desire to avoid imposing densities that "would constitute improper land use." In my opinion, the density bonus approach would result in "improper land use." The density bonus advice, which had been suggested during the rezoning process, was rejected in favor of a device which achieves its purposes without its disadvantages. It may be useful to stress in the Final Order the fact that, at least in this instance, the rezoning carried out under Court order conferred upon the owners a density bonus sufficient to justify the requirement that a reasonable proportion of the units in the higher density areas be of the subsidized and/or least cost type.

I hope the above thoughts will be of assistance.

Respectfully yours,

George M. Raymond, AICP, AIA
President

GMR:kfv

cc: Alfred L. Ferguson, Esq.
Henry A. Hill, Jr., Esq.
Gary Gordon, Esq.
Kenneth E. Meiser, Esq.
Edward D. Bowlby, Esq.
Anne O'Brien

WOODRUFF J. ENGLISH
FRANCIS E. P. McCARTER
ARTHUR C. HENSLER, JR.
EUGENE M. HARING
JULIUS B. POPPINGA
GEORGE C. WITTE, JR.
STEVEN B. HOSKINS
RODNEY N. HOUGHTON
THOMAS F. DALY
ALFRED L. FERGUSON
CHARLES R. MERRILL
ANDREW T. BERRY
JOSEPH E. IRENAS
JOHN L. McGOLDRICK
RICHARD C. COOPER
PETER C. ASLANIDES
WILLIAM H. HORTON
FREDERICK B. LEHLBACH
MARY L. PARELL
RICHARD M. EITTREIM

NICHOLAS CONOVER ENGLISH
JAMES R. E. OZIAS
OF COUNSEL

McCARTER & ENGLISH
ATTORNEYS AT LAW
550 BROAD STREET
NEWARK, N.J.
07102
(201) 622-4444

JOHN R. DROSDICK
JOHN E. FLAHERTY
STEVEN G. SIEGEL
WILLIAM T. REILLY
HAYDEN SMITH, JR.
GEORGE W. C. McCARTER
STUART E. RICKERSON
JOHN B. BRESCHER, JR.
TODD M. POLAND
DEAN J. PARANICAS
JANE S. POLLACK
ROBERT GREGORY ANDRÉ
DAVID P. COOKE
ROSLYN S. HARRISON
ROBERT S. SCAVONE
GITA F. ROTHSCHILD
RONALD J. HEDGES
DAVID R. KOTT
JOHN J. LAMB
LOIS M. VAN DEUSEN
MICHAEL A. GUARIGLIA
ROSS J. HOLDEN
LANNY S. KURZWEIL
JOHN W. McGOWAN, III
JACQUELINE J. WONG
GERALD C. HARVEY

February 20, 1981

Re: Allan-Deane v. Bedminster
Docket Nos. L36896-70 P.W.
L28061-71 P.W.

The Honorable B. Thomas Leahy
Superior Court of New Jersey
Court House Annex
Somerville, New Jersey 08876

My Dear Judge Leahy:

This letter is in reply to the letter of the Public Advocate dated February 10, 1981, received at this office on February 18, 1981.

I believe our letter to the Court dated February 17, 1981 contains adequate responses to all of the points raised by Mr. Meiser. Generally, Mr. Meiser does not like what in fact happened in this case. Mr. Raymond recommended, and the Court in fact found, that any further density bonus would not be appropriate land use planning. The Public Advocate has argued to the Supreme Court in the six consolidated cases that good land use planning would be to allow one unit per acre as of right, and then allow higher densities if and only if the developer had a mandatory 20% set-aside for low and moderate income housing with internal subsidies and rent skewing. Thus, the density bonus argued for by Mr. Meiser in the Supreme Court is what the Court has already approved in the Bedminster ordinance, but without the mandatory set-aside. Accordingly, if the Supreme Court does come down with a new holding as to density bonuses, it is absolutely imperative that the form of the judgment reflect the thinking of Mr. Raymond which went into and formed the basis of this Court's approval of the ordinance. Otherwise, we might have a New Jersey Supreme Court's density bonus added onto and on top of Mr. Raymond's "density bonus." This is a result no one would advocate.

For these reasons, and the reasons expressed in my letter to the Court of February 17, 1981, we believe the Judgment as submitted should be signed.

Respectfully yours,

Alfred L. Ferguson

ALF/nw
cc: Henry A. Hill, Jr., Esq.
Kenneth E. Meiser
George M. Raymond, P.P.
Edward D. Bowlby, Esq.

McCARTER & ENGLISH
ATTORNEYS AT LAW
550 BROAD STREET
NEWARK, N.J.
07102
(201) 622-4444

February 17, 1981

Re: Allan-Deane Corporation vs
Township of Bedminster
Docket Nos. L36896-70 P.W.
L28061-71 P.W.

The Honorable B. Thomas Leahy
Superior Court of New Jersey
Court House Annex
Somerville, New Jersey 08876

My dear Judge Leahy:

This letter will reply to Mr. Hill's letter to you of February 10, 1981, containing his objections to the form of Judgment we submitted to the Court.

As a preliminary remark, I must point out that once again Mr. Hill is attempting to do what he failed to do in the litigation: vesting a number count which the developer would be entitled to squeeze on its land in disregard of the land development regulations enacted into law by the Township under the supervision of Mr. Raymond, and which the Township and Mr. Raymond believe will allow the most units that any developer could ask. If the Court reads Mr. Hill's letter carefully, the conclusion is inescapable that Mr. Hill wants to avoid the restrictions contained in the land development regulations; the obvious reason is that these restrictions will prevent Allan-Deane from achieving maximum profit potential. Bedminster's ordinance was developed under the supervision of the Court and Mr. Raymond, and it is absolutely shocking that Mr. Hill and his client once again are refusing to accept the explicit refusal of this Court to vest a number count which might very well be inappropriate when the development is laid out on the ground.

Our specific comments will follow the paragraph numbers of Mr. Hill's letter for the ease of the Court in resolving the objections.

1. I have no particular objection to Mr. Hill's caption for the Judgment, except that I would prefer to have the words "Final Judgment. . ." come first, before "Order for Specific Corporate Relief." It seems to me the major accomplishment of this case is the compliance with the court-ordered rezoning, and not the specific corporate relief for Allan-Deane.

2. I have no objection to reflecting the fact that Allan-Deane participated in the rezoning process.

3. We believe that it is exceedingly important for the Court to adopt and incorporate by reference the reports of Mr. Raymond. The reports of Mr. Raymond commenting on the rezoning process and the disputes therein were not only relied on by the Court, but the Court in effect adopted them as findings of fact, and they should be so referenced in the Judgment.

4. The same comment applies here as in paragraph 3 above.

5. I fail to see Mr. Hill's objection to this paragraph. It only recites that the Township "applied" for the termination of the litigation; the terms of the Order speak for themselves. The Planning Master does indeed have continuing authority under the terms of the Judgment.

6. We repeat here our comments under paragraph 3 above. The findings of fact and conclusions of the Planning Master were adopted by the Court, and we believe the judgment should specifically so state. It is irrelevant that the matters passed upon by the Planning Master (and which are contained in his reports) were not "litigated" between the defendant and Allan-Deane. What was litigated was compliance with the Court's Order, and the remedy phase of the proceeding ordered the Town to rezone. Necessarily included in the rezoning process, to which the Public Advocate and Allan-Deane were parties, were accomodations to the positions advocated by those parties. Many matters of land use were put in issue by the parties, commented on by the Planning Master, and resolved by the ordinance, which both the Planning Master and the Court approved. We believe these findings of the Planning Master and the resolution of the various disputes are crucial to the proper implementation to be given this judgment, not only in this proceeding, but by future courts and administrative bodies.

This ordinance and the judgment which is to approve it are unique; the ordinance has in fact been negotiated, drafted and adopted under the closest possible judicial and public interest scrutiny. Not only was it done under the exclusive

jurisdiction of the Court and a court-appointed planning master, it was done under the close supervision of the Office of the Public Advocate as amicus curiae and the individual plaintiffs, who were represented by the American Civil Liberties Union as their attorneys. Surely the findings of the Planning Master, coming as they do as a result of this process, deserve to be incorporated by reference, adopted and approved by the Court in this Judgment. I do not believe any conclusions are inconsistent with this Court's eventual determinations. As a matter of law, therefore, the practical solutions to numerous planning problems are indeed "the law of the case" with respect to this proceeding.

7. This is indeed a finding specifically lifted from one of Mr. Raymond's reports; see Raymond report of 10/9/80, at p. 2. I have no objection to changing 3000 to 3500 as a number of jobs at AT&T Longlines.

8. Once again, paragraph B3 on p. 6 is descriptive of one of Mr. Raymond's findings in his reports; see Raymond report of 7/11/80, at pp. 3-8. We believe this language is necessary for the use of a subsequent court or administrative body when dealing with land use planning problems which occur in the future. For instance, the Supreme Court may indicate (in language stronger than that present in the decided cases) that density bonuses are a mandatory strategy for least cost housing. Density bonuses have no place in the present Bedminster ordinance, as Mr. Raymond has specifically found that the densities allowed by the Ordinance are the most that should be allowed. If we allow density bonuses, we will have to decrease the densities in the present ordinance, so as not to allow too dense development with a density bonus. This is absolutely essential to include in the judgment; otherwise it will be only by the most painstaking resort to transcripts, reports, and the like, that anyone in the future can find out what this ordinance means.

The Supreme Court does indeed have before it six consolidated zoning cases out of which can come innumerable rulings which could mandate changes in this ordinance. Unless this Judgment states the basis for the key land use decisions of the ordinance, and specifically those with respect to least cost or subsidized housing, there is a grave danger of misunderstanding and wrong decisions being made in the future. Indeed, Mr. Hill states he does not want any of this language in because of the Supreme Court cases and their possible impact upon this case. It is our understanding that the Public Advocate will appeal in the Bedminster case in order to preserve his right to say that this Judgment should be conformed to whatever the Supreme Court decides in those six cases. Accordingly, the basis for the ordinance should be set forth, insofar as is humanly possible, in

the judgment, and that is what we have tried to do. It is absolutely imperative to have this judgment as informative as possible so as to be flexible enough to meet changed requirements as the result of future court decisions.

9. Once again, I had thought this was contained in one of Mr. Raymond's reports. See Raymond report of 7/11/80, p. 2, where Mr. Raymond states:

> ". . . [S]uch [lower income] families impose much greater pressures on their immediate environment than do families with higher incomes."

10. We believe it important that a finding of good faith on the part of the Township be made by this Court. The Supreme Court has before it as one of the issues in the six pending cases the question of the importance of a finding of good faith. It is entirely conceivable that large legal consequences will be made to turn on the presence or absence of a finding of good faith. We can make such a finding; and we ask the Court to make it. Mr. Hill grossly overstates his case by alleging "eight and one-half years of noncompliance with the court order." I will not comment on the balance of Mr. Hill's objections, except to note that the excesses of his rhetorical skill and use of pejorative adjectives seem to know no limit. His characterizations of the language of the order and of the actions of the Township are totally without foundation and are false.

11. Paragraph 6 on p. 7 speaks to the amount of land provided for commercial activities by the ordinance. I think the language can be tightened up to specifically refer to the amount of land, rather than a more broad reference to the ordinance. Accordingly, I would suggest wording such as, after the word "purposes," "enough land will be made available for provision of commercial services required by the Township's foreseeable future residential development." The important point, however, is to reflect George Raymond's finding that there is adequate land zoned for commercial and business uses to service the future inhabitants of the residential units in the Corridor. This fact has been established in this litigation; it is being challenged in other litigations; and it should be made a matter of record as clearly as possible. Clearly, the ordinance does not speak to funeral homes, gas stations, airports, motels etc. No one contends that current specific use provisions will always be adequate; that would be ridiculous. The important point is that there is enough land zoned for commercial purposes, as required by good planning.

12. We believe that the language in paragraph 7 is accurate. The substance of it was taken directly from Mr. Raymond's report; see Raymond report of 5/27/80, at p. 12. The density of the Somerset County Master Plan is between 5 and 15 units per net acre, not per gross acre. See testimony of Mr. Roach at the trial. The densities allowed on buildable land in the Corridor are certainly within that range; it is only when one takes into account the unbuildable land, such as steep slope and flood plain, that the achievable gross density is less than five. There has been so much confusion as to the distinction between net and gross densities that I hesitate to raise it again, but we must. Our statement in our form of judgment is correct. We adopt Mr. Raymond's position that:

> ". . . [E]ven five dwelling units per acre throughout the Corridor would result in excessive densities on those lands which are developable." Raymond report of 5/27/80, at p. 8.

13. Mr. Hill's reference to the question of the resolution of need is absurd. At least four months ago I had a conversation with Mr. Hill in which he advised us that a resolution of need would be required at some future point in time. I told Mr. Hill that when that time arose, he should forward a copy of the resolution he needed to us, and we would present it to the Township. He never did forward us the form of his resolution, and it is only for this reason that it has never been presented to the Township. The Township has never considered a resolution of need, and it certainly has not rejected one. As the Court will recall from Mr. Graff's testimony during trial, the resolution of need seemed to be the least of the problems facing the developer. In this particular objection, and in many that follow, Mr. Hill is trying to weave the heavy fabric of alleged noncompliance and noncooperation out of his own failure to forward to the Township the very resolution he wants. There have been many dealings between Allan-Deane and the Township, and Mr. Hill's failure to forward the form of the resolution, or even to make a request directly to the Township to pass such a resolution, destroys his argument.

14(a). We repeat the same comments as to the resolution of need as were stated above. Mr. Hill's comment that Bedminster has specifically excluded low and moderate income housing as a matter of law is, once again, absurd.

14(b). The Court did make a ruling on "fair share." The Court ruled in its opinion of December 13, 1979, that it was not necessary to go into the quicksand of complicated mathematics

and formulaic approaches to fair share in which Mr. Mallach had sunk in the trial. The Court ruled that the appropriate approach to fair share was to zone in accordance with regional, state, county and municipal plans. That is the reason for the direction in the remedial orders to zone in accordance with Tri-State, Somerset County and State plans. The finding of the Court is that fair share housing can be zoned for most appropriately by complying with the dictates of regional, state and county planners who have already considered the problem and who have devised plans to accommodate fair share housing. The Court ordered the Township to so zone; it did so; and fair share has thus been accommodated. A definite finding is needed that the Township has satisfied its fair share requirements.

Secondly, this is a finding of law which we believe the Court should make in order to reflect the fact that the Township has complied with its Mt. Laurel constitutional obligations, which are articulated by the Supreme Court in terms of "fair share obligation of the present and prospective need" for low and moderate income housing.

15(a). This Court did indeed consider the issue of whether the R-3 zone in the portion of the Township west of the Corridor was reasonable. The Court, in its rulings of February 24, 1975, October 17, 1975 and December 13, 1979, specifically said that the R-3 zoning in the western portion of the Township was reasonable and environmentally justified. Those findings have never been disturbed, and indeed they have not been challenged. They are the law of the case.

15(b). The fact that the Supreme Court is considering the issue of the per se legality or illegality of "large lot" zoning is irrelevant to the findings of this Court made in 1975 and reaffirmed many times thereafter. While we can sympathize with Mr. Hill's apprehension as to the effect of the future Supreme Court decisions, I respectfully suggest that is a problem with which we are all forced to deal.

16. The reference in paragraph C5 on pp. 11 and 12 to sound principles of comprehensive land use planning is simply a reference to the Court's own language in its opinion of December 13, 1979. If sound land use planning is not necessarily incorporated in N.J.S.A. §40:55D-28, then it is not incorporated any place in the Municipal Land Use Law.

17. We have now come to the real substance of Mr. Hill's objections. He is again trying to vest a number count, in total disregard of what restrictions are placed on the developer by the provisions of the development regulations other than gross

permitted densities. Mr. Hill again refers to the resolution of need, which is extraneous and irrelevant to the problems he poses here. Mr. Hill refers to the problem of the sewer franchise, which has arisen after the date of the hearing on the judgment and is not the subject of proper comment as to the form of the judgment which should have been entered as of November 6, 1980. The matter of the sewer franchise is being worked out, and the conditions of its approval are being fine-tuned by the Township's engineering consultants in cooperation with Allan-Deane. If Mr. Hill has any problem with that fine-tuning process, he should bring a separate proceeding and not try to incorporate it in his objections to the form of the Judgment. Similarly, Mr. Hill wants to "insure prompt and objective review." That is going on now; the clock is ticking on his preliminary Phase One application; he cannot complain until and unless the clock runs out and something has delayed his application. Secondly, if he can complain, he should not do so in this proceeding which is considering the form of the Judgment.

Mr. Hill's requested language is wholly improper. See my letter to the Court dated February 5, 1981, at p. 2, in which we anticipated his objections.

We object to the use of the words "increased development costs," since this could mean anything.

We object to the prohibition against "decrease permitted gross densities," since here Mr. Hill is trying to vest a number count determined by the number of acres times the gross density allowed in the ordinance. It has been explicitly stated by everyone, including Mr. Raymond, that the density figure is not the sole control; that there are many other controls in the ordinance which must be obeyed; and that they are substantial and important. Mr. Hill is trying to ignore them and fool this Court into ordering that they be ignored. The Court should not permit itself to be so badly used.

We object to the words "unreasonably delay development"; I do not know what that means. I doubt that the Court knows what it means. I do not want my client to be under the pain of contempt of court or other judicial sanctions for violating such imprecise and fuzzy language.

The attempt to enjoin the Township from any further amendments should be rejected. I would not object to a provision giving Allan-Deane notice of any proposed amendment, and allowing Allan-Deane to apply to the Court to prevent it if it deems it against its interest. I believe Allan-Deane has this ability anyway.

We do not believe the Township should be enjoined from anything. This would give Allan-Deane much greater leverage than it is entitled to. The Court will note that Allan-Deane wants the injunction to be effective until it has received preliminary approval "for the entire tract." This could be many years in duration, since Allan-Deane may not apply for preliminary approval for their entire tract for years. At this point we do not know.

Allan-Deane's request to have this Court order the Town to take such "legislative and executive action as may be reasonably necessary to permit the development of plaintiff's property and the Corridor area" is vague in the extreme and must be rejected. It would involve this court in the day-to-day administration of the land use regulations of the Township for many years to come, and could subject the Township to uncertain, and indeed presently unknowable obligations.

Once again, Mr. Hill would enjoin the Planning Board from deviating from the gross densities permitted in the Ordinance. This is merely another attempt to vest a number of housing units by multiplying the number of acres times the density allowed by the Ordinance. The other development controls would be eliminated and ignored. This Court rejected the same request at least twice before, and should reject it again now.

In his proposed paragraph G, Mr. Hill would have this Court order the Master to supervise the process until Allan-Deane has its approval for its desired unit count. I was under the impression that the prior orders of this Court, as continued in effect by my form of Order, had the Planning Master continue his supervision until preliminary approval. This is satisfactory. Using the number count as the test is most certainly not satisfactory.

18. Paragraph F on page 13 was drafted after a careful review of the transcript of the initial proceeding in June of 1980 and of the proceedings in November of 1980. I believe I have set forth language to comply with the desires of the Public Advocate, who requested the language of the specific ruling by the Court, and I believe I have followed the Court's ruling itself. It is my understanding the Advocate wants incorporated in this judgment the question of the constitutional obligation, since he wants to appeal to reserve his right to make this judgment comply with whatever the Supreme Court orders in the six consolidated cases. We do believe that the Court determined the constitutional issue. The Court ruled that it was the obligation of a municipality to "get out of the way," but it does not have "to push or shove." We believe Mr. Hill's description of the Court's ruling is wholly erroneous.

19. With respect to paragraph G, page 14, we believe that we have provided for as much continuing supervision by the Court as is necessary.

* * *

SUMMARY

We believe that the form of judgment we have supplied to the Court is wholly necessary and appropriate. We do not believe any of the language is unnecessary, and in fact we believe that the findings adopted from Mr. Raymond's reports are absolutely essential to subsequent understanding and implementation of the judgment. It is probably necessary to let an appellate court review it in a direct appeal. Allan-Deane has been trying to vest a number count for ten and a half years; it has been unsuccessful; and it should continue to be unsuccessful, until and unless a satisfactory site plan is submitted which complies with all the controls of the ordinance.

Mr. Hill's enumeration of the problems which have arisen since November 5, 1980 is not only improper, but factually incorrect. The Township has not refused to pass a resolution of need; see supra. The Township has not refused to grant Allan-Deane a sewer franchise; it is trying to work with Allan-Deane on what appropriate conditions should be imposed.

Mr. Hill neglected to inform the Court that the Township quickly granted approval for the Allan-Deane sewer treatment plant.

The Township has absolutely not delayed Allan-Deane in its approvals from DEP. In fact, the Township agreed to waive a hearing as to a serious matter of environmental regulation: the decision of DEP to downgrade the classification of the river to accept a lower quality of effluent than had been previously approved by the DEP. This took time, effort and money on behalf of the Township, and was not done without a full and thorough study by its consultants. The Township could very well have dragged out the DEP proceedings for years; it elected not to do so. Mr. Hill characterizes this as "delay." Such a claim is specious, wrong and insulting. We hope this Court will agree.

Respectfully submitted,

Alfred L. Ferguson

ALF/nw
cc: Henry A. Hill, Jr., Esq.
George M. Raymond
Edward D. Bowlby, Esq.
Ken Meiser, Esq.

BRENER, WALLACK, ROSNER & HILL
ATTORNEYS AT LAW
15 CHAMBERS STREET
PRINCETON, NEW JERSEY 08540
(609) 924-0808
CABLE "PRINLAW" PRINCETON
TELEX: 642244

3 BURNT MILLS ROAD
POST OFFICE BOX 506
PLUCKEMIN, NEW JERSEY 07978
(201) 658-4130

HARRY BRENER
ALAN M. WALLACK
EDWARD J. ROSNER *
MICHAEL D. MASANOFF **
HENRY A. HILL
ROBERT A. FELMEISTER
GULIET D. HIRSCH
NATHANIEL L. FULK

*MEMBER OF N.J. & N.Y. BAR
**MEMBER OF N.J. & PA. BAR

February 10, 1981

The Honorable B. Thomas Leahy
Superior Court of New Jersey
Court House Annex
Somerville, New Jersey 08876

Re: Allan-Deane Corporation vs
Township of Bedminster
Docket No. L-36896-70 P.W. and L-28061-71 P.W.

Dear Judge Leahy:

In accordance with Rule 4:42-1(b) the Allan-Deane Corporation hereby objects to the form of judgment forwarded to you by Mr. Ferguson on February 5, 1981 and requests that this matter be listed for a hearing.

Our specific objections to the judgment, in the order in which they appear, are as follows;

1. This judgment should not be entitled a "Final Judgment" since the Court will be continuing to exercise jurisdiction over this matter, and this caption may cause the Clerk of the Court to assume that this judgment finally disposes of all matters. We suggest that the judgment be entitled "Order for Specific Corporate Relief and Final Judgment on Issue of Defendants' Compliance with Respect to Legislative Duties required by previous Orders of this Court".

2. The second full paragraph on page 4 should reflect that Allan-Deane also participated in the "rezoning process" undertaken between March 1980 through September 1980.

3. We object to the adoption by reference and incorporation of George M. Raymond's reports of May 27, June 19 and July 11 as stated in paragraph 4 of page 4 of the proposed judgment. We acknowledge that the Court relied upon those reports but do not think that the opinions therein expressed should be "adopted by reference and made a part of this judgment". We do not see the purpose served by this language.

4. This same language with respect to George Raymonds' report dated October 9, 1980 appears in the first paragraph of page 5 and we again object to it.

5. We object to the second paragraph on page 5 in its entirety, and particularly to the language "terminating this litigation with the exception of certain duties of the Planning Master". This litigation is by no means terminated, and we fully expect, based on recent actions of the Township, to be back in court on the important issue of specific corporate relief. The court, as we understand it, has agreed to maintain jurisdiction and to continue to be available for disputes between the parties which cannot be resolved by the Planning Master. The Planning Master has no authority once this litigation is "terminated" and can only serve within the context of continuing litigation under the authority of the court.

6. We object to paragraph "B" on page 5 to the extent that it finds that the "facts, conclusions and findings" contained in all of the court-appointed Master's report are "adopted as the facts, conclusions and findings of this Court". As the Court well knows, these lengthy reports contain observations, and conclusions with respect to a number of matters which were not litigated between the parties, concerns raised by the Township which had nothing to do with the litigation and in some cases conclusions which were inconsistent with the Courts eventual determination. We therefore object as a matter of legal form to the adoption by the Court of all the facts, conclusions and findings contained in these reports. They are not strictly the "law of the case" but the practical solution to a number of problems which arose in the course of the remedy proceedings.

7. Allan-Deane objects to the inclusion in subparagraph B.2. at page 6 of the Order of the statement to the effect that the new zoning is sufficient to satisfy the Townships housing responsibility generated by AT&T Long Lines (which incidentally includes approximately 3500 jobs) and potential additional employment. This issue was never litigated and does not belong as a part of the "law of the case".

8. Allan-Deane objects to subparagraph B.3. at page 6 particularly as it relates to "subsidized housing" and "a separate density bonus". The issue of a separate density bonus was never litigated, should not be a part of the law of this case, and was simply one of a number of concepts which were contemplated and rejected by the Township as a way of complying with the court Order. Inclusion of this unnecessary language concerns us because the issue of "a separate density bonus" is under consideration in the consolidated zoning cases being considered

by the New Jersey Supreme Court. We do not want to see any language, particularly unnecessary language, which might make these proceedings vulnerable in the event the Supreme Court refines or changes the municipal zoning obligation. Inasmuch as Bedminster has still failed, despite the urging of the Allan-Deanes Corporation, to adopt a resolution of need and is therefore not eligible for "subsidized housing" we do not believe that any reference to "adequate incentitive for ...subsidized housing" should be included in the Order until such time as a resolution of need is enacted.

9. We object to the second sentence in paragraph B.4. at page 7 of the proposed Order which suggests that lower densities for subsidized units would be preferable to the densities now permitted by the Ordinance. This statement has no basis whatsoever in the Court record, is inconsistent with all of the testimony and the proofs and is a theoretical statement conceived out of thin air by Bedminster Township. We do not understand what Mr. Ferguson is trying to achieve by this language and oppose the very suggestion in the Order that lower densities would be more environmentally appropriate.

10. We object to paragraph B.5. of the proposed Order on page 7 in its entirety. We do not believe that it is appropriate to use the vehicle of this Court's Order to pass out accolades and commendations to the Township, nor that it is appropriate to commend the Township for their legislative compliance during the four month rezoning process without mentioning their 8½ years of noncompliance with Court orders. We suggest that the Township nominate itself for an award from the League of Municipalities rather than attempt to put such self serving language in this Court's Order. The second sentence appears to suggest that exclusionary zoning is justified as a "traditional concern of zoning and land use planning" in order to protect the "existing character of already developed areas" and is therefore antithetical to the thrust of this litigation.

11. Allan-Deane objects to subparagraph 6 on page 7 because it appears to be attempting to say something that was never in issue during the course of this litigation. There is no factual basis in the record for the conclusion that the existing commercial zoning is sufficient to service the needs of the Township's ultimate development capacities and that all commercial services which may be required in the future can be provided. The obvious purpose of this statement is to assist the Township in defending itself against litigation instituted by a regional shopping center developer. However laudable their purpose, we would like to suggest that there is absolutely no basis in the Court record for this conclusion, that no one has analyzed the Ordinance to determine whether funeral homes, gas stations, state institutions, airports, motels, hotels, fast-food restaurants or nursing homes, to mention a few of the

commercial uses which are prohibited in all zones, might be needed. We suggest that in the absence of such a record and in view of the fact that this issue was not litigated that it is improper, unlawyerly, confusing and useless to insert such language in a judgment. This Court has already determined in the case of Allan-Deane vs. Bernards that such language cannot bind parties not before the Court.

12. We object to the last sentence in paragraph B.7. on page 8 on the grounds that it is factually incorrect. The Bedminster Ordinance does not permit greater density even in the northern part of Bedminster Village than those suggested in the Somerset County Master Plan even if the entire planned residential area is developed in that option. The Somerset County Master Plan provides for a density range of between 5 and 15 units per acre, whereas the highest density available under the planned residential option is 10 units per acre and the overall gross density less than 5 units per acre.

13. We object to the mention of subsidized units in paragraph B.10. of the proposed Order on the grounds that Bedminster Township has not passed a resolution of need and therefore, as of this date, specifically excludes subsidized units.

14. We object to paragraph C.1. of the proposed order on page 10 on the following grounds;

a. Bedminster has not to date passed a resolution of need and therefore specifically excludes, as a matter of law, low and moderate income housing.

b. The Court expressly made no determination with respect to the Township's fair share obligation and has specifically rejected every formulaic approach.

15. We object specifically to paragraph C.3. of the proposed order on page 11 on the following grounds;

a. This Court never considered the issue of whether the R-3 zone in the portion of the Township west of the corridor was reasonable or necessary as plaintiff never attacked that zoning.

b. The New Jersey Supreme Court is specifically considering in the consolidated zoning cases now before it, whether any zone of 3 acres or more should be presumptively invalid. It seems unnecessary for this Court to make a pronouncement on issues which were never litigated and are not properly

before it. We fear that such a pronouncement might weaken the validity of these proceedings in the event the Supreme Court refuses to make residential zoning of 3 acres or more presumptively invalid.

16. We object to paragraph C.5. on page 11 of the proposed Order. It appears to say that the new Ordinance complies with "the sound principles of comprehensive land use planning" which the Court referred to, and are required by the Municipal Land Use Law as part of the municipal master plan under N.J.S.A. 40:55D-28. Our problem with this sentence is that the Municipal Land Use Law does not say define "sound principles of comprehensive land use planning", and N.J.S.A. 40:55D- 28 discusses only the method for adoption of a Master Plan and what that Master Plan should include. We therefore do not understand this sentence or what Mr. Ferguson is attempting to accomplish, nor why it is relevant to these proceedings.

17. Allan-Deane objects to paragraphs D and E on page 12 of the proposed Order as totally unsatisfactory with respect to specific corporate relief. This language fails to:

a. Reasonably protect Allan-Deane against any change by the Municipal governing body of the Land Use Development Ordinance which would increase development costs, decrease the permitted gross density or unreasonably delay development.

b. Protect Allan-Deane against the municipality's failure to take such actions as may be reasonably necessary to enable the development of the plaintiff's property as permitted in the Land Development Ordinance. For instance, the Land Development Ordinance requires specific percentages of subsidized low and moderate income housing, yet the Township has failed to adopt a resolution of need so as to make it possible to apply to State and Federal authorities for such subsidies. The Ordinance requires multi-family housing be sewered, yet the Township has failed to give Allan-Deane a sewerage franchise so that they can obtain Board of Public Utilities approval for the sewer treatment plant which has been approved by the Department of Environmental Protection over the Township's objections.

c. Insure prompt and objective review under the standards set forth in the Land Development Ordinance by the Municipal Planning Board, building official and other agencies charged with the duty of reviewing development proposals under said Ordinance.

Rather than criticize the language on a line by line basis we propose the following language with respect to specific corporate relief:

> "D. The corporate plaintiff, The Allan-Deane Corporation (and its successor in title, The Hills Development Company) having borne the stress and most of the expense of this public interest litigation albeit for private purposes, for nine years and having prevailed in two trials and an extended appeal is entitled so such specific relief as will:
>
> 1. Reasonably protect the corporate plaintiff against any change by the defendant Municipal Governing Body of the Land Use Ordinance which would increase development costs, decrease the permitted gross densities or unreasonably delay development or any failure to take such actions as may be reasonably necessary to enable the development of plaintiff's property as permitted in the Land Development Ordinance.
>
> 2. Ensure a prompt and objective review under the standards set forth in the Land Development Ordinance by the Municipal Planning Board, Building Official and other agencies charged with the duty of reviewing development proposals under said Ordinance.
>
> E. The Township of Bedminster and the Township Committee of the Township of Bedminster are hereby enjoined from making further Amendments to the Land Development Ordinance without the leave of this Court until such time as the corporate plaintiff has received preliminary approval under Section 804 of the Land Development Ordinance for the development of their entire tract and is ordered to take such legislative and executive action as may be reasonably necessary to permit the development of plaintiff's property and the corridor area rezoned pursuant to this Court's Orders.
>
> F. The Planning Board of Bedminster Township and the Building Official and such other agencies and employees of defendant Township who may be charged with the review and regulation of development proposals within such Township are ordered to promptly and

objectively review the corporate plaintiff's application and to approve any reasonable development proposal at the gross densities permitted in the Land Development Ordinance which complies with the standards set forth in the Land Development Ordinance.

G. In order to insure compliance with the provisions set forth in Paragraph D, E and F of this Order, the Court-appointed Master appointed pursuant to Paragraph 3.c. of the Order appointing Master, dated February 22, 1980, is hereby ordered to continue to observe and monitor the application process of the plaintiff corporation until such time as the corporate plaintiff shall have received preliminary approvals pursuant to Section 804 of the Land Development Ordinance on its entire land holdings in Bedminster Township for the purposes of protecting the rights of the corporate plaintiff to the full development of their property at the intensity provided in the Land Use Ordinance subject to applicable design standards and protecting the rights of Bedminster to enforce the provisions of that Ordinance. The Master shall report to the Court if any further disputes arise involving the Allan-Deane development application which cannot be resolved, and Allan-Deane Corporation and defendant Township of Bedminster are given leave to apply to this court for such other relief as may be just and appropriate to implement the Land Development Ordinance, as amended, and the plaintiff Allan Deane Corporation's right to specific corporate relief through the completion of the preliminary application phase of its development applications to the Township."

18. With respect to paragraph F on page 13, while Allan-Deane does not object to this language, we would like to point out to the Court that the constitutional issue as to whether or not a municipality has an obligation to require housing to be constructed which is actually "affordable" is under review by the New Jersey Supreme Court in the consolidated zoning cases. We did not understand this Court to have made a

determination on the constitutional issue; rather it was our understanding that the Court never reached the constitutional issue but determined that in this case, in view of the current unsettled state of the law, that it would not compel Bedminster, in order to be adjudged in compliance with this Court's previous Orders, to require internal subsidies, rent skewing, rent control or control of the resale price of dwelling units. Since the Court has complete discretion over what it will require in order to achieve compliance of its orders, it is not necessary in a hearing on compliance to reach those conditional issues which were never part of the main trial. We realize that this is a small distinction, however, we are reluctant to put this judgment in constitutional jeopardy when, as a matter of procedure, it is not necessary to reach the constitutional issues.

19. With respect to paragraph G, the final paragraph of the proposed Order, we again object to the characterization of the specific corporate relief as a "limited supervisory jurisdiction". We believe at this juncture that the Court's jurisdiction should not be circumscribed and that the Court should maintain all the power which it may need to enforce specific corporate relief.

Summary

In summary we object to the Order because;

1. Its provisions do not adequately protect Allan-Deane with respect to specific corporate relief.

2. It contains much unnecessary language which has no relationship to the issues litigated in this case which appear to be designed to protect the Township in perpetuity against any future attack from unknown direction on their Ordinance or which justify political decisions or opinions which they have made with respect to how they intended to comply with your Honor's Orders.

3. The Order as a whole gives a completely erroneous picture of the case. Someone unfamiliar with the history of this litigation could reasonably assume that the purpose of this Order is to praise Bedminster for its outstanding zoning effort and to only allow the plaintiff, which had the impudence to challange such a worthy zoning and planning effort, to proceed "expediciously with its development applications". The Order as drafted is an attempt on the part of the Township to snatch victory from the jaws of its defeat since it only praises the Township and fails completely to protect Allan-Deane.

As we have intimated to the Court there are many problems which

have arisen since November 5, 1980 in the application process which would indicate that we will be back in Court. These include:

a. The Township's refusal or failure to pass a resolution of need to enable Allan-Deane to apply for low and moderate income housing.

b. The Township's failure or refusal to grant a consent to Allan-Deane to operate a sewer treatment plant within a given franchise area as required by the Board of Public Utilities prior to approving the company as a public utility.

c. The Township's consistent effort, so far unsuccessful, to impede and delay the approvals which Allan-Deane needs from the Department of Environmental Protection including their failure to execute various forms forwarded by the DEP in connection with their review of our final engineering plans.

We think that everyones' time would be saved if the Court would consider reasonable affirmative language, such as that suggested here, expressing the Court's intent with respect to specific corporate relief. Such language may discourage further delaying tactics and may encourage the Township to take those ministerial actions, such as the resolution of need which are reasonably necessary to enable the development of plaintiff's property as permitted by the Land Development Ordinance.

Very truly yours,

Henry A. Hill

HAH/vwa

cc: George M. Raymond, AICP
Edward D. Bowlby, Esq.
Gary D. Gordon, Esq.
Alfred L. Ferguson, Esq.
Kenneth E. Meiser, Esq.
John H. Kerwin

State of New Jersey

DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY
P.O. BOX 141
TRENTON, NEW JERSEY 08625

STANLEY C. VAN NESS
PUBLIC ADVOCATE

CARL S. BISGAIER
DIRECTOR
TEL. 609-292-1693

February 10, 1981

Honorable B. Thomas Leahy
Court House Annex
Somerville, NJ 08876

Re: Final Judgment
Allan-Deane v. Bedminster

Dear Judge Leahy:

The proposed final order declares that the Bedminster ordinance is in compliance with the prior orders of the court and with the constitutional requirements of Mount Laurel. I have no objections to this because it is what the court has declared.

I am concerned with part B of the order in which the court "explicitly adopts the following findings of the Master." I have major problems with some of these explicit findings which the court is requested to adopt as its own.

An example of my concern is proposed finding B4 on page 7. The proposed finding states:

> Any further distinctions between subsidized and unsubsidized units in terms of densities should, if anything, require lower densities for the subsidized units since lower income occupants of subsidized units generally exert greater pressures on the immediate environment, and lower densities are more appropriate to cope with the increased pressures.

This finding would be an advisory opinion by the court on "future distinctions," on what should be done in the future. In numerous cases throughout the state, various plaintiffs are arguing that subsidized housing is feasible only at high densities. If this court incorporates this sentence into its order, municipalities in every exclusionary zoning battle in the state will cite this sentence as an official judicial finding.

What is so extraordinary is that the court is asked to make a highly controversial finding on a matter on which no testimony has been heard, no briefs submitted and on which there is not even a justiciable controversy. Bedminster has, in fact, not enacted an ordinance providing lower densities for subsidized units. If the Township should adopt this at some future date the court could, if necessary, upon a record then make a decision. I am at a loss however to understand why an anticipatory finding on this subject should be rendered at this time. If this court does feel the need to make such a finding as part of its opinion, I would respectfully request the opportunity to brief and submit affidavits on the subject.

A second example of my concern is paragraph B3, page 6. It states:

> The densities afforded in the Corridor by the Bedminster Land Development Ordinance are sufficient in and by themselves to provide adequate incentive for developers to build least cost and subsidized housing, pursuant to the terms of the Ordinance, and the concept of a separate density bonus to be given to a developer as an incentive to provide any particular kind of housing is not appropriate for use in the Corridor under the Ordinance as drafted and enacted. The rezoning of the Corridor to reflect a 10-fold increase in additional dwelling units is in itself a density bonsus, and any further density bonus device would be inappropriate land use planning. (emphasis added).

This court's order definitively states that the latest Bedminster ordinance is constitutional. This proposed finding would have the court additionally declare that the concept of density bonuses is "inappropriate land use planning." The court's order must declare whether the ordinance passes constitutional muster; I do not understand why the court should give its opinion onwhat is appropriate or inappropriate land use planning.

The Supreme Court in the six exclusionary zoning cases is considering numerous zoning issues. One of them is the propriety of and necessity for density bonuses. Obviously if this court declares density bonuses to be "inappropriate land use planning," the Supreme Court will immediately be informed. This court's finding will then be used to bolster the argument of certain municipalities who have cases pending in the Supreme Court.

I again do not understand why this court should make findings which go well beyond the issue of the validity of the ordinance. No party has challenged the failure of the Bedminster ordinance to contain density bonuses. Neither evidence nor briefs have been submitted to the court on the subject. I believe that finding three is unnecessary, not before the court and beyond the scope of this order.

I would suggest that this court carefully examine the findings of the master which it is explicitly adopting. Has the court made a binding finding of fact about the adequacy of commercial services as is stated in paragraph 6, page 7? More importantly, is the court in agreement with every finding of fact and conclusion of law made by the master (page 5, paragraph B) or did the court use the reports of the master as a general guide to review the overall validity of the ordinance?

In conclusion, I believe that at the very least findings B3 and B4 should be deleted.

Respectfully yours,

KENNETH E. MEISER
DEPUTY DIRECTOR

KEM:id
cc: Henry Hill
Alfred Ferguson
Gary Gordon

WOODRUFF J. ENGLISH
FRANCIS E. P. McCARTER
ARTHUR C. HENSLER, JR.
EUGENE M. HARING
JULIUS B. POPPINGA
GEORGE C. WITTE, JR
STEVEN B HOSKINS
RODNEY N. HOUGHTON
THOMAS F DALY
ALFRED L. FERGUSON
CHARLES R. MERRILL
ANDREW T. BERRY
JOSEPH E. IRENAS
JOHN L. McGOLDRICK
RICHARD C. COOPER
PETER C. ASLANIDES
WILLIAM H. HORTON
FREDERICK B. LEHLBACH
MARY L. PARELL
RICHARD M. EITTREIM

NICHOLAS CONOVER ENGLISH
JAMES R. E. OZIAS
OF COUNSEL

McCARTER & ENGLISH
ATTORNEYS AT LAW
550 BROAD STREET
NEWARK, N.J.
07102
(201) 622-4444

JOHN R. DROSDICK
JOHN E. FLAHERTY
STEVEN G. SIEGEL
WILLIAM T. REILLY
HAYDEN SMITH, JR.
GEORGE W. C. McCARTER
STUART E. RICKERSON
JOHN B. BRESCHER, JR.
TODD M. POLAND
DEAN J. PARANICAS
JANE S. POLLACK
ROBERT GREGORY ANDRÉ
DAVID P. COOKE
ROSLYN S. HARRISON
ROBERT S. SCAVONE
GITA F. ROTHSCHILD
RONALD J. HEDGES
DAVID R. KOTT
JOHN J. LAMB
LOIS M. VAN DEUSEN
MICHAEL A. GUARIGLIA
ROSS J. HOLDEN
LANNY S. KURZWEIL
JOHN W. McGOWAN, III
JACQUELINE J. WONG
GERALD C. HARVEY

February 5, 1981

Re: The Township of Bedminster ads
Allan-Deane Corporation, et al.
Docket Nos. L-36896-70 P.W.
L-28061-71 P.W.

The Honorable B. Thomas Leahy
Superior Court of New Jersey
Court House Annex
Somerville, New Jersey 08876

My dear Judge Leahy:

We enclose an original and two copies of a form of Final Judgment in this litigation.

At the hearing on November 5, 1980, the Court asked us to prepare a form of judgment, a draft of which had been previously submitted to counsel. We have conferred extensively with Mr. Hill, and our efforts to achieve 100% agreement have not been totally successful.

I believe this form of judgment is sufficient to protect the interests of the corporate plaintiff and provides for the continuation of the application process under the auspices of Mr. Raymond, the court-appointed Planning Master.

As we requested and the Court decided at the hearing on November 5, 1980, we have incorporated by reference the prior findings and conclusions of the Court and the reports of Mr. Raymond submitted to the Court; we repeated some of the more significant findings by Mr. Raymond so as to have the final judgment be as self-contained and self-explanatory as possible. See transcript, November 5, 1980, p. 49, l. 4-12.

The provisions as to specific corporate relief are contained in paragraph D at page 12. We repeated the proposition that the corporate plaintiff (and its successor) are entitled to specific and prompt corporate relief; reflected the fact that the master has been appointed to supervise the continuing process; and recited the language from Mr. Raymond's last report which the Court at the hearing directed us to include. See transcript of the hearing of November 5, 1980, at p. 48, l. 7.

Mr. Hill sent me a draft of language he wants included under the specific corporate relief paragraph. He would have prohibited the town from decreasing the permitted gross densities allowed under the ordinance or "unreasonably" delaying the development application, and from taking any action which would "insure prompt and objective review" under the ordinance. Mr. Hill would have the Court order the Township from making any further amendments to the Ordinance without specific leave of Court until the plaintiff has its preliminary approval. Mr. Hill would have the Court order the Township officials individually to "promptly and objectively review" his development application, and to approve it at the densities permitted in the ordinance. I believe Mr. Hill would also have the Court order Mr. Raymond to participate in <u>all</u> parts of the process, and not just in those parts of the process in which the parties think he can be helpful or as to which a dispute may have arisen.

I believe Mr. Hill is trying to put back in the Judgment those things which he asked the Court to order at the hearing of November 5, and which the Court declined to do. Secondly, Mr. Hill would invoke the powers of the Court to solve problems before they have arisen, and would totally tie the hands of the Township in trying to conduct its land use planning processes. We think it inappropriate, and we are so informing the Court of our reasons in advance.

Mr. Brice, from the Office of the Public Advocate, wanted specific language covering the disposition by the Court of their application to have the Court order the Township to make affirmative provision for "affordable" housing. I have reviewed the transcripts of the June and November hearings and have included the Court's finding with a good deal of specificity, which I hope would be satisfactory to the Public Advocate's Office.

We apologize for the delay in submitting this Final Judgment to you, and hope that not much more time will go by before it is entered. Unless any counsel objects to the Judgment within 5 days, and if you find the Judgment appropriate, we ask that you execute the Judgment and return to this office in the stamped, self-addressed envelope provided and we will file with the Clerk in Trenton.

Respectfully yours,

Alfred L. Ferguson

ALF/nw
Enclosures
cc: George M. Raymond, AICP, AIA
Edward D. Bowlby, Esq.
Henry A. Hill, Esq.
Gary D. Gordon, Esq.
Kenneth E. Meiser, Esq.
Anne W. O'Brien