RULS-AD-1984-180

5/25/84

- Transcript of motion hearing

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. L-28061-71PW and
L-36896-70PW

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12/5/84
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RULS - AD - 1984 - 180

LYNN CEISWICK,
Plaintiff,

vs.

TWP. OF BEDMINSTER,
Defendant.

TRANSCRIPT OF PROCEEDINGS

MOTION

OCEAN COUNTY COURTHOUSE
TOMS RIVER, NEW JERSEY
MAY 25, 1984

B E F O R E:

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

APPEARANCES:

RAYMOND R. TROMBADORE, ESQUIRE,
Attorney for Timber

KENNETH E. MEISER, ESQUIRE,
Attorney for Ceiswick

HENRY A. HILL, ESQUIRE,
Attorney for Hills and Deane

JOSEPH L. BASRALIAN, ESQUIRE
- and -
PETER J. O'CONNOR, ESQUIRE,
DONALD A. KLEIN, ESQUIRE,
Attorneys for Dobbs

ALFRED FERGUSON, ESQUIRE,
- and -
DANIEL F. O'CONNELL, ESQUIRE,
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GARY HALL, ESQUIRE,
Attorneys for Bedminster

Reported by:
GLORIA MATHEY, C.S.R.

THE COURT: Good morning. Please be seated.

All right. This is the return date of three motions, only two on the calendar, I believe. There's Timber Properties' motion to intervene, the Dobbs' motion to intervene, and also a notice of motion to dissolve the stay and compel immediate public production of an option agreement and to dismiss the complaint brought by Bedminster against Dobbs.

Now, I have read all of the moving papers and all of the responses thereto.

All right. Does it make any difference who wants to talk first? Mr. Trombadore?

MR. FERGUSON: Your Honor, before we start, have you heard from Mr. Hill as to whether he's coming? We have not. I would have thought he would have been --

THE COURT: I would think so. I thought we had him. I'm sorry.

MR. TROMBADORE: I spoke to Mr. Hill earlier this week. We talked briefly about this motion and this hearing. The impression I had was that he wasn't interested. He didn't indicate that he would be here. When, in fact, when I

said, "I'll see you on Friday," he said, "Well, I'm not sure that I'll be there.

THE COURT: Well, maybe we better just check.

MR. FERGUSON: I spent all day with Mr. Hill, your Honor, and --

THE COURT: Yes. I was going to ask you, you were with him when?

MR. FERGUSON: Mr. O'Connell and I were with him from eight-thirty in the morning until about four, and --

THE COURT: I thought sure he'd be here to collect his order today.

MR. MEISER: He was certainly aware that we were going to discuss the order.

THE COURT: Yes. I'd like to go over it.

MR. FERGUSON: I ordinarily wouldn't be solicitous of Mr. Hill's position or welfare, your Honor, but I don't want to do it twice, this motion.

(Off-record discussion.)

THE COURT: Let's start.

MR. TROMBADORE: Your Honor, Timber Properties has moved to intervene in this matter, and that motion is opposed by Bedminster Township

and it is opposed by the Public Advocate. The position taken by the Public Advocate, however, is different than that taken by the Township. The Township argues that the motion is defective, it is untimely, and that it is contrary to public policy. There's also some collateral argument raised as to whether Timber has standing.

The Public Advocate, on the other hand, takes the position that the motion should be denied without prejudice, and that Timber should be afforded an opportunity to separate stages of these proceedings to present its position, first at a hearing to approve any settlement that evolves from the proceedings, and secondly, if indeed there is a motion, for repose brought by the Township at the hearing on that motion.

In 1981, the lands on which Timber proposes to construct low and moderate income housing, were rezoned by virtue of recommendations which were taken to Judge Leahy in the suit then pending, and that rezoning placed these lands of Timber Properties, consisting of land of Rodenbach, people named Weiss and people named Amato, about seventy-five acres of land in the center of Bedminster, the intersection of Highway 202, and

Flemington Road, into a multi-family zone.

That ordinance required that twenty percent of any houses or units constructed on the property be affordable housing. All of this was designed to meet the standards which had been enunciated by the Supreme Court in Mount Laurel I.

The Public Advocate was not satisfied with the judgment entered by Judge Leahy based on those recommendations, and appealed from that judgment based on two grounds: Namely, that the remedy given to Allan Deane, now Hills, did not insure that that company would construct affordable housing; and, secondly, that there was no adequate definition of Bedminster's fair share of such housing.

That appeal was stayed pending the decision of the Court in Mount Laurel II. When Mount Laurel II was decided, the Appellate Division remanded the Public Advocate's appeal to this Court, and at that point in time, in August of 1983, Timber had already proceeded, having contracted to purchase this land following the judgment, following the rezoning, and proceeded also to seek planning board approvals, subdivision and site plan approvals, for the construction of

four hundred and four multi-housing units, eighty of which were set aside in accordance with the ordinance as low and moderate income units. I think all of this is recited in the various briefs; however, it needs to be put in context.

Timer proceeded through the period of time when the matter was still before the Appellate Division. While Timer was before the planning board receiving recommendations from a subcommittee of that board concerning its design, the Appellate Division was remanding this matter to this Court.

Now, Timber was aware of that litigation. In fact, anyone in Bedminster dealing with property was aware of that litigation, because it had been pending, as all of the papers point out in great detail, for some twelve years at that point in time.

Timber was satisfied that the litigation would indeed further its purposes in seeking to develop this property, because its purposes were consistent with the judgment which was entered. Timber at that time did not seek to attack the ordinance, and contrary to what is recited in the Public Advocate's brief, does not seek to attack

the ordinance at this time, in that we await the decision of this Court in defining fair share and in defining the standards for low and moderate income housing as those standards apply to Bedminster Township.

So we are, in effect, in accord with the position of the Public Advocate in asking this Court, and have been, in fact, waiting for this Court to give that definition. We had no reason to intervene in this matter or to oppose the proceedings which were taking place in this matter until we learned in February of this year, after having been told, indeed, by this Court in conferences related to other matters, that efforts in the Bedminster case were proceeding at pace and that there were prospects for settlement based on recommendations which were coming from the standing master.

Now, that information came to Timber through me in a fortuitous way. I learned, simply by hearing it discussed here in those conferences, that one of the proposals which was then being considered was the determination of a number, phasing of that number, and the proposal to down-zone other land which had been placed in

multi-family zoning in order to insure -- this is my understanding. This is not language I'm quoting. This is the impression I got -- in order to insure that Bedminster would not then be providing through its zoning ordinance more than its fair share or more than what was ultimately agreed upon by virtue of a settlement to be its fair share; namely, that Bedminster, riding with Timber's project of four hundred and four units, would be down-zoned, and, in fact, would be rezoned as part of that overall proposal being considered by the master and by the parties to an office zone.

Now, it hasn't happened and I agree and admit, as indicated by Mr. Meiser in his brief, that we may be making certain assumptions with respect to what is going to happen. I don't know how we can proceed without making certain assumptions. We have to act only on the information that we have, which, I will be the first to say, is not complete information. I have not, for instance, seen the reports submitted by Mr. Raymond, the most recent report. I've not been privy to the discussions which have taken place among the parties and with this Court, and I

know from, again, listening to what has been said, that those discussions have been extensive.

Our purpose in seeking to intervene is not to reopen all of those discussions or to interfere with a settlement, but simply to make it known to this Court that there is a property owner in Bedminster who has applied, who is prepared to proceed, and who has been before Bedminster since 1981, in December of 1981, with a proposal which, in fact, would produce low and moderate income housing. Admittedly, when that application was filed, the eighty units which were defined in the application were defined as affordable housing. But that was prior to the decision of the Supreme Court. There is no question that Timber has represented and has been prepared to build those units as low and moderate units in accordance with the definition of that term under Mount Laurel II.

In addition, in its submission to the Township, Timber proposed an expansion of the sewer plant, and that is significant, because it is understood that one of the considerations in the settlement discussions in this case is the ability of Bedminster to absorb units in particular areas because of the existence or

nonexistence of certain infrastructure. I'm given to understand that one of the significant facts is whether the Bedminster sewer plant can or cannot be expanded to provide facilities to certain developers.

There's also discussion, as I understand it, as to whether Environmental Disposal Corporation must or must not allocate certain of its gallonage to purposes other than reserve to itself for Hill's development. Timber, I think, made it very plain in the terms submitted to the Township that, not only was it prepared to provide those facilities, but that it was entirely feasible from an engineering point of view to do so. There were detailed studies and plans submitted by Mr. Jeskef, Jeskef-Kellam Associates, indicating that that could clearly be done.

I find it difficult to understand the position taken by the Public Advocate in this matter. I appreciate the suggestion that the more orderly way in which the purposes of Timber can be served is to wait until a settlment has been proposed to this Court, and then on notice to the parties and to those interested, such as Timber and Dobbs, permit them to come in to present their

views with respect to the settlement and whether it is within a range of reasonableness.

Indeed, Mr. Meiser asked me this morning, "Why do you have a problem with that? Isn't that going to satisfy what you want? What is your objection to it?" My objection is that, I'm sort of like the fellow who's been told to chase the horse after the barn door's been opened. That's turning that around a little bit, but I would be somewhat in that position, because this is not the typical case in which the Court has the benefit of litigation. This isn't even a case in which the ordinance itself is being attacked. This case is before the Court through a rather unique procedural history, and that is, it is here on a remand for a limited purpose and that purpose is to determine how that ordinance must be revised to comply with Mount Laurel II, having been drafted and ordered by a judgment which determined that it complied with Mount Laurel I.

So the purpose for which it is here is limited in that respect, and I would --

THE COURT: I don't think I quite understand that, Mr. Trombadore. Assuming that there was no settlement in this case, are you

suggesting there's not going to be a fair-share determination?

MR. TROMBADORE: Not at all.

THE COURT: And a determination of region?

MR. TROMBADORE: Not at all.

THE COURT: So why wouldn't there be a full trial on the merits with respect to, let's say, Allan Deane?

MR. TROMBADORE: Your Honor, the question would not be whether the ordinance is exclusionary. The question would be whether the definition of fair share and whether the definition of low and moderate is appropriate in that ordinance. This is not a case in which the ordinance does not have a basis predicated on earlier litigation. That's what makes this case different. And I think the issue is far more limited. The ultimate question of fair share number is the same, and I would agree that your Honor would hear testimony with regard to that.

THE COURT: How about the ordinance? No one has found that the present ordinance is compliant.

MR. TROMBADORE: Except the trial Court, not with Mount Laurel II, that's correct.

THE COURT: Yes.

MR. TROMBADORE: Now, your Honor, I would submit that Timber should be permitted to intervene with respect to those issues, at least to the extent that we are informed, and express to the Court the views of our witnesses with respect to those issues. We feel that that is in the interest of the public and in the interest of the Court.

I would submit that from any number of points of view, those interests are not adequately served by the parties in this litigation if, indeed, the Public Advocate continues to take the position that Timber should not be heard at this point in the litigation.

It would seem to me that the proposal is one which, in effect, would create the opportunities for low and moderate income housing in one package, or essentially one package, and that that in itself is not in the interest of the public, and that it would, in fact, reject out of hand an opportunity which is a real opportunity to bring such housing into existence.

THE COURT: I have two questions. The first one is: Why didn't Timber, a year ago, get

into this law suit? I know you've indicated that you thought that things were going to work out all right. But given the remand to this Court and given the language in Mount Laurel, that a town was free to continue within reason five-acre zoning, if it meant -- if it met it's Mount Laurel obligation, there was, was there not, the potential in this case for a rezoning of Bedminster generally to satisfy their Mount Laurel obligation and shift the larger lot zoning elsewhere? So that there was always the potential from the time that the case was remanded that you could be adversely impacted by down-zoning, if I could call it that, or down-zoning density on your parcel.

MR. TROMBADORE: Let me give you a very specific answer to that. First of all, the growth area in Bedminster under the State Development Guide Plan is the 202, 206 corridor. Any thought that this land would be down-zoned into a large lot area was out of the question. The entire basis of Judge Leahy's opinion was that, because that corridor was then considered to be a developing area, that it had to be rezoned. Mr. Raymond, who was the master in these proceedings,

and we knew that he was involved in these proceedings, was the very person who had recommended the multi-family zoning on this property. The application on this property was pending before the local board.

The simple answer is that, knowing the history of the matter, it was never even considered that Bedminster would look to rezone this property, since this property would furnish the basis for its fair share, at least in part would furnish the basis for its fair-share. Bedminster had just come through some ten or twelve years of litigation, resulting in this rezoning. To our knowledge, the only issue that was then before the Court, and that would be resolved by the Court, was how many, and do you have enough with what you've got, and what -- how will you define in your ordinance the language which insures low and moderate as opposed to affordable? Those were, at least as far as we understood, the issues that were to be resolved here, and that was consistent with the purpose for the appeal brought by the Public Advocate.

THE COURT: But a municipality is always free to change its mind in a non-Mount Laurel

setting, and you were in a non-Mount Laurel setting and continue to be up to today, and, therefore, theoretically at least, your property could have been rezoned while you were on appeal in Superior Court, could have been zoned downwards, whether Mount Laurel was here or not.

MR. TROMBADORE: Your Honor, I concede that's correct and the only answer that I can give is the one that I have given - that we did not consider that a practical prospect or one that was likely to occur. The evolution of that possibility through the course of the discussions in the settlment procedures in this case is what brings us here this morning.

THE COURT: The other question I have is, with regard to the general issue that Mr. Meiser raises as it relates to your request to intervene, and that is the question of whether there shouldn't come a time in Mount Laurel litigation where a municipality wants to make its peace, that it should have the right to do so free of continuing lawsuits which interrupt its rezoning process. And by that I mean, should there come a time when a municipality has been sued by one building, for example, and it says, "All right.

We realize we've be exclusionary and we realize we have to revise our ordinance, and we'll do so," and they start to do that and they select the parcels in town, including that builder's parcel, to meet their compliance, and then another builder sues them and, so, they have to rethink again to accommodate that builder, and they're just about ready to come in with a compliant ordinance and a third builder shows up. Mr. Meiser is suggesting that public policy would be promoting, by including those builders who have been called tag-along plaintiffs by those who wish to duplicate their position and letting them participate fully in the revision process to demonstrate that the Township has been arbitrary and capricious in not including their parcels, to show, for example, that the Township has selected sites which will not reasonably produce Mount Laurel zoning, and that the builder is ready to produce it immediately, and all those kinds of arguments that could be made - doesn't that make a lot of sense from the standpoint of the policy provided by Mount Laurel?

MR. TROMBADORE: It does. And I have no argument with it. Indeed, I share that, because

I, as your Honor knows, I have litigated the case where we are now faced with motions to intervene, even after the termination of the litigation, and at a point in time when we are awaiting your Honor's decision. I share that and I have no problem with that.

The difference, I think, in the motion brought by Timber is simply this: We do not come to the Court intervening to seek to attack the zoning that is upon the land. We have rested with that zoning, because we have seen it as consistent with what is called for by the opinion, consistent to the point that it lacks the determinations that must be made here with respect to the ultimate number, and that doesn't affect the zoning on this property, and the definition of what is low and moderate, which we are prepared to accept.

And with that limited purpose, what we seek to achieve is the avoidance of a situation where an existing Mount Laurel II remedy is rejected by virtue of a settlement amongst parties seeking to place that remedy in a different context and perhaps in a way that does not fully satisfy the requirements of the Court.

There is some suggestion of compromising

this settlement, and, again, I cannot speak with any definite information because we don't have that definite information --

THE COURT: By that you mean, compromise of the public interest?

MR. TROMBADORE: Of the public interest in terms of the number and how the phasing of those units is to be accomplished.

THE COURT: Fine. Good. All right.

Mr. Basralian, as to your motion to intervene, and then we'll give you an opportunity to be heard on Mr. Ferguson's motion to dissolve the stay.

MR. BASRALIAN: Well, as previously stated, this is our return date of our motion to intervene, which is opposed by Bedminster and somewhat conditionally opposed by the Public Advocate.

Although the complaint that we have filed in connection with our motion addresses both Mount Laurel II issues, count one through three, and non-Mount Laurel II issues, count four and five, this is because the entire controversy doctrine - and we would only expect the Court, really, to consider the Mount Laurel II issues in connection

with the compliance hearing - the concerns expressed by the parties that protracted litigation would result from intervening, I think, could be adequately addressed by the Court through appropriate orders limiting discovery and defining the role to be played by the various parties in the compliance hearing.

What we are seeking on behalf of Dobbs is the ability to cross-examine, the ability to present testimony and documents, and the ability to take limited discovery relevant to the issues to be decided in the compliance hearing, fair share, realistic opportunities in a builders remedy.

Mount Laurel II contemplates such a compliance hearing, and not simply the filing of objections. The latter would be inadequate to protect our clients' interests and would be inadequate to assist the Court in making a determination, or, the determination which the Court must make.

THE COURT: Excuse me. May I interrupt you?

Do I understand you that you're not looking for a full hearing, but a hearing on the review of

the package, including the fair share; is that what you're saying?

MR. BASRALIAN: Well, we're looking for our participation in the compliance. With respect to a full hearing on our other issues, I think that they are not necessarily relevant to the issue of the builders remedy and the Mount Laurel II compliance.

THE COURT: I'm not sure I understand that. Are you looking to attack the fair share number that has been suggested in the settlement posture?

MR. BASRALIAN: Well, I think that there can't be a settlement without a compliance hearing, and rather than our being limited to the filing of objections, we should have the right to the participation so that the Court, which is the ultimate finder of fact with respect to compliance, can have the input that we have suggested in the past and which we have been a party to. I think intervention is only way that that can be accomplished.

THE COURT: Well, I just want to understand your position. I'm not suggesting that it's not correct. I'm just trying to clarify it.

Are you attempting to be heard on the

number? Do you want to demonstrate that Bedminster's number is higher than that suggested in the settlement?

MR. BASRALIAN: We want to be heard on the number, since there isn't a number that has yet been other than suggested, the number that has been established that has -- seems to have one universal approval by the Court and the parties as to the number affecting Bedminster Township.

THE COURT: You want a hearing on fair share? I still haven't gotten an answer to my question.

MR. BASRALIAN: Yes.

THE COURT: Okay. Now, you want a hearing on the compliance, obviously. You wish to demonstrate that that, when you talk about compliance, you wish to demonstrate that the ordinance as presently drafted does not comply with Mount Laurel, or do you wish to demonstrate that the site selection does not comply?

MR. BASRALIAN: Both, your Honor.

THE COURT: Okay. So you want a full hearing.

MR. BASRALIAN: That's why --

THE COURT: You want a full trial, not in

the compliance mode -- you see, what I call compliance, in its secondary stage, is the revision of the ordinance and the provision of sites to provide for the fair share as previously determined. The first compliance question is whether the ordinance as presented to the Court at the time of the hearing meets Mount Laurel. We're passed that to the extent that Bedminster has recognized through its previous litigation that it had to revise its ordinance; it has, and it now takes the position that its ordinance complies. You want to take the position it doesn't and you want to show that its fair share also is greater than that which has been discussed in the settlement posture and not unanimously approved by anyone yet. And, therefore, you want to have a full hearing.

MR. BASRALIAN: With respect to those issues, your Honor.

THE COURT: What issues don't you want to be heard?

MR. BASRALIAN: I don't have to be heard on my alternative count, your Honor. What I'm saying is that, basically, I don't know what the number is, and we don't know what the number is. There

have been numbers anywhere from four hundred to eight hundred and eighty, and sometimes higher, as Bedminster's fair share, and that number has yet to be established. Our input into that number may well make a difference when a number is finally arrived at. Perhaps we don't have disagreement with the number, but certainly we have input and, I think, valid input with respect to the site selection and the overall compliance and the realistic opportunity for the development.

It is our belief that without that hearing and without the intervention of Dobbs on those issues, I think there could be a result which is, in fact, only paper compliance with the Township. I think Dobbs -- Dobbs already -- its input since last September, I think, has been helpful to the Court. We've raised issues which are relevant and which the town has now been forced to address. Those issues would otherwise have been absent.

THE COURT: You're not satisfied with the suggestion Mr. Meiser makes, to permit Bedminster to present its proposal for compliance and to permit you to be heard as to why your site should be included?

MR. BASRALIAN: Mr. Meiser limits us to,

really, a forum of report without the ability for the limited forum of discovery and cross examination and presentation of our own experts. He's saying, go ahead and give the town an opportunity to settlement -- to settle. To date, I'm not aware that any settlement has come forth, and I don't know what the status of that is. I know there were meetings, but we did not participate.

THE COURT: Let me make it clear. I'm not aware that there's any settlement either, except for the two hundred and sixty units of Hill's Development, which, I understand, has been resolved and there's an order which was delivered to me yesterday. But for that, there's been certainly no approval by the Court of any overall compliance package. And, indeed, the order which I've looked at briefly indicates that the town is not ready to rezone other parcels until the Dobbs litigation, and perhaps Timber's, is resolved. So there's no settlement at this particular posture.

MR. BASRALIAN: Well, it seems to me there can't be compliance unless it is tested in the court with the ability for cross examination and with the ability for the input from Dobbs, which

is the reason why intervention is appropriate.

THE COURT: Suppose you were given a full hearing on the compliance package that is present, the town says, "Well, present a package", which presumably is not going to include Dobbs - given the town's prior position and given their intention to condemn, at least their expressed intention, suppose you were given a full hearing on the reasonableness of your exclusion from their compliance package, and by that I mean the opportunity to present expert testimony as to why their compliance package is inappropriate, and even to have limited discovery, and I mean limited in time as opposed to scope - would that satisfy your purpose?

MR. BASRALIAN: It seems on first blush, your Honor, that that parallels with what we have asked for.

Let me perhaps query where we stand with the issue of our builders remedy as part of that compliance package, because that's an important ingredient, otherwise we would be attacking one end of it, and perhaps successfully, without having reached the ultimate goal.

The genesis of this matter is that we have

come full circle from what we originally proposed in our litigation to a builders remedy, because it evolved out of the case management conferences we had where the suggestion was even made by the town's representative and by the standing master that perhaps this was -- Dobbs' was an appropriate site, and we submitted those proposals and I think those two have to go together.

THE COURT: The hearing would have to include either a legal determination as to your right to a builders remedy or a hearing on the facts as to whether a builders remedy should be granted. I mean, there may be some factual issues which lead to that, and if not, certainly a determination would have to be made as to your right to builders remedy. Yes, you would be heard on that issue, certainly, whether it be in terms of a legal issue or factual issue.

MR. BASRALIAN: Yes. I think what you have stated and what we have asked for, appear to be the same thing. But I don't think it can wait until such time as Mr. Meiser has suggested, off some time in the furture, and should come now.

THE COURT: Such a hearing would not include, as I see it, as I see Mr. Meiser's

suggestion, would not include a re-litigation of the fair share. And I take it that you would have to condition your acceptance of that procedure on some general knowledge of the fair share number arrived at. I mean, you're not going to agree to that procedure if you're told today that the fair share is four hundred, knowing that that could be satisfied through the Hill's Development.

MR. BASRALIAN: Absolutely. I think we've stated that in the past.

THE COURT: That's not to suggest that that's the number. It is not.

MR. BASRALIAN: No. I certainly didn't hope that was the suggestion:

THE COURT: All right. Unless you have anything else, I have nothing else.

MR. BASRALIAN: Well, I have a lot more, but I'll wait a response, if you will, until I've heard what others have said on the issue.

THE COURT: All right. Let's just hear Mr. Ferguson with respect to the motion to dissolve the stay with respent to the production of the Dobbs documents, and that I have concluded from my own independent review of them, that Dobbs is in possession of a viable option continuing, in

effect, since 1979.

MR. FERGUSON: We are, of course, suspicious in the extreme of a refusal to give us those documents since 1979. I don't think there's any legitimate reason for confidentiality. The only thing in the record is a statement that Mr. Dobbs would prefer to treat them as confidential.

THE COURT: What's wrong with that?

MR. FERGUSON: There's nothing wrong with him making the statement.

THE COURT: No. I mean, what's wrong with them being confidential?

MR. FERGUSON: Well, he's in court, your Honor, and it's a fact relevant to the litigation. I note that the particular Burke document is a publicly recorded document. It seems to me, judging from that, there's nothing to be lost by making it public. If he wants a protective order that it shall not go beyond this litigation, I certainly have no objection to that. We deal with such protective orders in trade-secret litigation all the time.

THE COURT: Well, I'm not suggesting that Bedminster would have any ill motive. But wouldn't you see the likelihood in Mount Laurel

litigation, giving the recognized prior unwillingness of many municipalities to meet their Mount Laurel obligation, of utilizing information that's contained in those options as a way of frustrating a builder?

For example, let's hypothecate a builder whose option was going to expire within a six-month period - wouldn't a town be well-advised under those circumstances to stall so that the option expire?

MR. FERGUSON: I don't think so, your Honor. I think the town would be apt to stall on the hope that maybe the option may expire in six months.

THE COURT: That's what I said.

MR. FERGUSON: No, no. But if they don't know that it will expire, they will hope that it will expire soon, and therefore they'll just keep stalling. Oh, absolutely, absolutely.

THE COURT: Well, then, that confirms my fear.

MR. FERGUSON: I mean, it's better to have certain knowledge so you know what you're dealing with. And aside from that, any option agreement that doesn't provide for extensions in the event

of litigation, as I take it Mr. Dobbs' option does because I've been told that, and the Timber's option does, is totally improperly drafted.

THE COURT: Your only interest in knowing what's in Mr. Dobbs' option agreement as it relates to the Mount Laurel litigation is to know whether they have -- or, that he has a property interest sufficient to give him standing with Mount Laurel obligation.

MR. FERGUSON: That's all we have a right to know, your Honor. But should we become further involved with Mr. Dobbs, we may get into the whole problem of what is the fair return to the developer and what is the extent of Mount Laurel obligation. That may be the next step, but I hope we never get there, since I hope the Court would not allow intervention.

THE COURT: That's possible. But your only interest is as I've stated it, and I have reviewed the documents in camera and tell you that, in fact, he does have such a standing.

Now, I don't want to put myself in a position of saying trust me, but on the other hand, I think that you've got to deal with the intrusiveness to his contractual dealings, number

one. I don't know why the consideration for his option has to be a matter of public knowledge or even semi-public knowledge, whatever protective order I might put on it. And, number two, I don't have the slightest doubt that an ill-moded town could abuse its knowledge it contains from an option agreement, and if it's discoverable in this case, I assume it's discoverable in any case, in any Mount Laurel case, and I see that as being a device to possibly frustrate builders in some settings.

What would you think of the notion - if you're not willing to trust the Court, and I don't mean to put it in that posture, but because it recognizes, notwithstanding the fact that one of the principal areas in my practice was real estate, that perhaps it could be argued that I misread the documents - but what would you think of the notion, the Court appointing an independent expert to review the documents, the independent expert being a skilled real estate attorney, and to acknowledge their viability as binding documents? I must say that, I have to put one caveat on the finding I made with respect to binding, and that is, I have been provided with

documents that were signed in counterpart and I do not have fully-executed documents. They're executed -- different documents are executed by different persons, and before I could make the finding that I made, I would have to receive them as fully executed. I have no reason to believe they're not, but that would be a condition of any finding on my part.

I refer you, for example, to what the Court did in Martin versus Educational Testing Service, which is in 179 New Jersey Super, commencing at page 317, and in that case, you might recall there was a young fellow who flunked a test and he felt the test was improperly graded and sought to get the exam, and there was a defense raised of constitutionality -- I'm sorry -- of confidentiality, trade secrets and so forth, and Judge Dreier acknowledged in part the necessity, indeed the right, to know why the exam -- or, whether the exam was accurately graded, but he also acknowledged the ill effects of any dissemination of a standardized exam and, therefore, saw the appropriate necessity of having an independent expert check the accuracy of the grading. And I think it's an appropriate

compromise.

There is, of course, expressed authority in Mount Laurel to make such an appointment, both Mount Laurel I and II, and also in Service Liquor Distributors versus Calvert Distillers, 16 Fed., 513.

Why wouldn't that satisfy your needs?

MR. FERGUSON: The ETS case, your Honor, recognized a legitimate public interest in the confidentiality of nation-wide tests, distributed and trade secrets, plus also a right of privacy of the parties. There is absolutely no counter -- no analogous or similar public interest here. Indeed, the only interest that is sought to be protected is the, I take it, the option price and what the developer will receive.

Now, the option --

THE COURT: And the date of its expiration.

MR. FERGUSON: And the date -- your Honor, there's never been any question about stalling for the date of an expiration. I think it is highly relevant in this case, what the option price is, what the developer who optioned a land for a regional shopping mall and that is trying to get a number of Mount Laurel units plus market units,

which would bring him a similar rate of return, which would inure to give him the same option on the market price --

THE COURT: How that is --

MR. TROMBADORE: Also, it's triggered to different prices for different purposes.

THE COURT: How is that relevant?

MR. FERGUSON: It's not relevant right now, but it will be.

THE COURT: It isn't relevant to standing.

MR. FERGUSON: Not to standing. Right now the only question before the Court is standing. I just don't see the public interest sought to be protected. I have yet to hear any detriment to the plaintiff from the disclosure of the option documents.

THE COURT: I thought I gave you one.

MR. FERGUSON: That we would delay until it expired some?

THE COURT: Yes.

MR. FERGUSON: Well, I think that we're in court and the Court is well aware of that possibility, and I think adequate provision can be made in the courtroom to prevent it - if that possibility exists, is my point. We might -- if

we wanted to delay and use delay to frustrate, we'll use delay to frustrate in the hope that somehow we will have caught the option expiration. I mean, I think you're giving us incentive to delay indefinitely and forever by this kind of ruling.

THE COURT: Well, on that theory, you should delay indefinitely, forever, for any plaintiff on the thought that they may not own property --

MR. FERGUSON: I don't think the incentive to delay forever is there. I think the delay incentive has been killed by Mount Laurel II. I think that's one of the things the Court wanted to deal with.

THE COURT: Absolutely, no question about it.

MR. FERGUSON: I don't think that's a real threat that the Court has to worry about.

THE COURT: It might influence whether you take an appeal or not.

MR. FERGUSON: Oh, I don't think so. I think you could make a ruling. For instance, the Court can probably make a ruling that the option shall be extended.

THE COURT: Oh, I can't -- how can I do that with respect to an independent third-party?

Okay. I'm going to dispose of this motion. I don't have to hear argument on it.

I will deny the motion for a disclosure of the documents, having said what I have said, on the condition that I be provided with proof of its full execution. However, I will give to Bedminster the right to have an independent third-party appointed by the Court, at Bedminster's expense, to review the documents and confirm their viability, that is, to confirm the fact that a prepared binding option agreement exists by which Mr. Dobbs could acquire this property at this time.

MR. FERGUSON: I would request a certification go along with it, that all option documents to date are provided.

THE COURT: All option documents have been provided to me, to the best of my knowledge, from 1979 to presently. And I would, of course, provide those to the expert. The expert will not be appointed unless Bedminster requests its appointment.

MR. FERGUSON: I missed what you said about

the cost, your Honor.

THE COURT: It's going to be at the cost -- at the expense of Bedminster.

MR. FERGUSON: Your Honor, I think if the person who invokes the need for the privilege ought to be saddled with the cost of the --

THE COURT: Judge Dreier didn't think so. I thought his opinion was pretty sound.

MR. FERGUSON: With all due respect, your Honor, the public interest is entirely different.

THE COURT: All right. That will be the order on that motion.

All right. Now, Mr. Meiser, you've been sitting patiently. I'll hear you with respect to the two intervention motions.

MR. MEISER: Your Honor, we have basically two positions, one, in a short term, for sixty days we feel that there should not be any permitted intervention. Ultimately, we feel that they do, both of them, have a right to be heard. And I should distinguish between the two arguments.

Our reasons for suggesting a denial now primarily go to the history of what's happened in this case since October.

We reached an agreement in a case management hearing to try to settle this case, all of the case, to get the master involved. Depending on what the Court does on the next matter this afternoon -- this morning, we'll see if the Allan Deane matter has been solved. We think we may be moving towards a presentation to the Court of either a rezoning by the Township or a settlement signed by all the parties, which the Court can consider.

I would suggest that, given how much of a commitment has been made to trying to reach a settlement, that nothing in this intervention be done for sixty days.

THE COURT: Why would we need sixty days, given the extensive discussion that's gone forward?

MR. MEISER: Because, realistically, with our experience in trying to settle the Allan Deane part, we went through eight drafts.

THE COURT: That's the problem. That's problem.

MR. MEISER: Well, I think a definite time period gives the Court and gives all the parties knowledge that they either meet a deadline or they

don't. Either in sixty days, for example, there is a settlement between the parties or there is rezoning. The Supreme Court said originally ninety days after an invalidation there's supposed to be rezoning. In all the cases it realistically has taken longer than ninety days. The Court can pick whatever time it determines is appropriate; sixty days was our suggestion. But in -- are you thinking of a particular --

THE COURT: Yes. I'm only interrupting, though, because I'd like to get you all finished before we have to stop at ten forty-five. If we can't, we'll just take a break.

I might say first of all, that I really enjoyed your brief and it was supremely well done and, I think, the first time the whole issue of settlement of Mount Laurel cases and the class action concept has really been adequately presented to the Court. It was extremely helpful.

There's one overriding policy concern which you may want to address now or later, and that is whether the position the Public Advocate is taking is not somewhat inconsistent with the expressed purposes of a builders remedy as set forth on page 279 of the opinion, which is to maintain a

significant level of Mount Laurel litigation, to compensate developers who have invested time and resources in pursuing the litigation, and also that it's the most likely means to insure that lower income housing is actually built. Those are the three reasons the Court gives.

Now, having expressed the negative side of permitting tag-along plaintiffs to Mr. Trombadore, I've now expressed the positive side, I think, and I wonder whether a position which would essentially boil down to rewarding the first builder in the door, or maybe the first and second or whatever, those who sued initially, so to speak, as opposed to those who sued later, while it is sufficient from a Court's standpoint and while it might promote settlement, might not it slow down the level of Mount Laurel litigation to an undesirable point?

MR. MEISER: I think that's a very difficult question, and I think the truth is that only experience will give us the final answer.

What I'd like to do, though, is, for a second, go through what we see would happen in a settlement proceeding, because that might be helpful to the Court in answering that question.

We see that if a settlement is reached, either by the first builder, in a builder's case, and the town, or by individual plaintiffs, that there must be a hearing. The hearing is somewhat different and there is a lot of literature class actions, because the Court has to approve the reasonableness of the settlement, but at the same time the Court is not making an independent judgment of what the underlying status is. In case after case, it talks about this - the Court has to have enough information to decide if it's reasonable without a full trial, because if there's a full trial, we shouldn't have settlement. You know, by definition we aren't having settlement. The reason that the Court hears from everybody, from absent people, is because it gives the Court the maximum amount of information to decide if, in fact, it is within the zone of reasonableness.

I think that if a Court finds a settlement is reasonable, that there's a substantial benefit - we'd get the litigation over and we'd get immediately on with the process of building housing, and I also feel it will give other municipalities much more of an incentive to settle

rather than drag out litigation for four or five years.

But let's assume we came up with a settlement, the Public Advocate representing Ceiswick plaintiffs in Bedminster, and we came up with a fair share of eight hundred, the issue before the Court that I think would be in a settlement hearing is, is eight hundred a reasonably acceptable number that the Court could accept? It doesn't mean that if there was a trial the Court would find eight hundred. The Court might feel if there was a trial, it would accept nine thirty-three. But the Court would hear testimony from Timber, from Dobbs, to say that eight hundred is so outrageous, so unreasonable, that no reasonable settlement could be based on a premise of eight hundred units; a reasonable settlement can't possibly be anything less than nine fifty or a thousand.

Based on that information, the Court makes a decision. The decision isn't, as I said earlier, what is the fair share number; it's, is the eight hundred number a reasonable settlement taking into consideration the goal of ending litigation and getting on with the business of

building housing?

I think that giving developers that opportunity to be heard but still giving the Court the right to approve a settlement is in the best interest of moving the Mount Laurel doctrine along.

THE COURT: Assuming that intervention were permitted in this case at this time --

MR. MEISER: Yes.

THE COURT: -- for either or both Timber or Dobbs, and assume by virtue of that intervention, a right to builders remedy was created. There would be a significant difference, would there not, to denying intervention and permitting participation only in a class action settlement mode, if I can use that. There's no builders remedy and, therefore, the -- it would be a race to the courthouse doors, so to speak, in every municipality.

Obviously, a builder who doesn't have a builders remedy is disadvantaged to the extent that, the builder who does is going to consume X portion of the fair share. In some towns it might be fifty percent; it might be a hundred percent. I can think of one town in Somerset County where

we have ten plaintiffs, and one of the plaintiffs can, arguably at least, satisfy the full fair share. There's another town in Middlesex County that that can happen to, and I'm sure there are many out there that would have a significant portion of their fair share satisfied. And yet we would, in effect, be giving the first plaintiff a leg up and certainly undercutting the builders remedy as to anyone else. I think that's -- that would be the effect of it, wouldn't it?

MR. MEISER: It would. And I think the goal is getting the housing built, getting a fair share determination down, and getting the housing built. And I don't think it's crucial that every developer gets a developers remedy. Let me give you an example, if I can.

Let's assume -- we'll take the extreme case, where there are ten developers and it's all consolidated in one case. The way I read the class action precedents, the town could reach a settlement with developer one, four and six, and say, "We're meeting our fair share," by rezoning their lands, giving them the developers remedy, and, "We're leaving the other seven developers out in the cold." If this Court follows the class

action precedents that I've cited on page nine and page ten, if the Court finds that reasonably accommodates the town's fair share, the Court, in my opinion, could enter a judgment approving the reasonableness of that settlement. Three developers win, seven lose. But the real beneficiaries are not the developers - they're the beneficiaries in the Mount Laurel II decision - the beneficiaries are low and moderate income people, and if the Court finds that the housing is going to get built in that way, then I think the ultimate purposes of Mount Laurel have been satisfied.

THE COURT: Let's suppose that the procedure which you propose, which, by the way, is very attractive from the standpoint of my own job, if that were followed, and in this case Bedminster rezoned and came in with sites that were useable and had no significant constraints and were zoned without any cost-generating devices and met all the requirements that Mount Laurel talks about, and then Dobbs and Timber, or either, said, "Well, they may be Mount Laurel sites, but we are also, and we'll promise that we'll build ours immediately," the other sites, we don't know.

They're on the open market. They may or they may not go. Do we then develop a kind of quasi-builders remedy because of availability? I mean, do we say, "Well, they didn't have a builders remedy, but they should be a preferred consideration, and the town did not do that?" And yet the opinion allows the town, after it satisfies the successful builder, to choose whatever sites it wants within reason.

Would it become unreasonable under those circumstances to deny Dobbs and Timber if they were ready to build and they were, let's say, within the same general framework of the type of building that the town was going to permit? Now, you need more; you need to know where they're going to be in the town or things of that sort. Let's assume they're in the same general area as the other sites. I know it's a lot of hypothetical.

MR. MEISER: Right.

THE COURT: But what I'm getting at is, doesn't it put the Court in the posture of possibly losing active interested builders and allowing the town - and I don't mean Bedminster in this case - to select those sites which maybe it

knows, because of local factors, are less likely to go? There may be less development pressures on those sites and, therefore, may it not dilute the amount of Mount Laurel building we'd get?

That was a long question, but I think you know what I'm getting at.

MR. MEISER: I understand. I think there are a couple of options for the Court. One is to determine if some housing be built immediately; if some of the units are going to get built; in other words, half of the fair share is going to get constructed immediately. I think the Court might be much more willing to say, "Give the town a chance," rather than, "If we don't know about any of the land--

THE COURT: Let me interrupt you. I'm sorry. I'm getting flagged from out there. I'd like to start your answer again. We're going to have to take a break. They're taking a composite picture of all the judges and it's got to be in here.

(Matter in recess.)

THE COURT: Okay, Mr. Meiser, before the interruption you started to answer the question. I don't know if you still remember the question,

but --

MR. MEISER: Well, generally, let me just suggest that I think the question does confront us with two undesirable results. On one hand, it is undesirable to choose for low income people to rezone land that might not get built rather than zoning land for a developer that's ready, willing and able to build. I think that is an undesirable result. But there is also a second undesirable result, and that undesirable result would be to say in a case where a town is being sued by ten developers, that they can't settle that case unless they give all ten of the developers what they want, up to their fair share, regardless of whatever reasons they might have against particular development. Because I think we say that there isn't going to be a settlement and we're forcing towns to litigate all the way up to the Appellate Division.

So let me suggest two possibilities that the Court might want to consider. First of all, I don't believe that repose has to be unconditional. We have entered into several settlements in Morris County that have contingencies. A town wants to zone certain properties or try to get

senior-citizen housing. We have said we will give you one year or two years or three years to see if that happens, but we want built into the agreement a fall-back position if that doesn't happen by a certain date. And I think an order of repose could say the same thing. We will give town X a right for three years to zone these properties that it wants over the interest of certain developers who are in the court and whom the Court has a reason not to want to give a developers remedy to. But if a preliminary site plan isn't submitted in '87 or '88 or whatever time period the Court fixes, then a condition of repose will be, in that event, that this other property is ultimately rezoned. And I think the Court has that kind of discretion.

My second suggestion would be, if a Court finds that a town wants to rezone other properties rather than the property of a developer who's before the Court, the Court can inquire into whether there's a legitimate municipal reason for it.

For example, I can see a situation where a town might be concerned that eleven developments in eleven parts of the town might so lead to

sprawl and unmanageable growth as to be counter to all the goals of orderly planning, and that might be a legitimate reason to say that the developers remedy shouldn't be given in certain parts of the town.

So one thing a Court can do is ask the Court -- ask the town, "What reasons do you have for preferring this piece of land over the developer's parcel? Is it reasonable and consistent with legitimate planning?" And the Court can also use the master to make that recommendation.

So I don't have an answer that completely takes care of the problem. I think the Court has to make some sort of trade-offs if it wants to get settlements. But I think there are conditions to see that the town is acting reasonable, and I've tried to suggest two of them.

THE COURT: Let me ask you two other questions. The first one: Are you suggesting that if a town is sued by two or more builders contemporaneously, within a short time span, that the town could pick and choose, at least for the purposes of settlement, and if they did so in a reasonable manner, that the other builders

remedies could be terminated?

MR. MEISER: I would suggest that City of Paterson versus Paterson General Hospital is a precedent for that decision if the Court --

THE COURT: And in a policy matter, you see see that as appropriate?

MR. MEISER: If the Court is interested in -- sees that as an aid in protecting low income people as a goal of that settlement, it could be appropriate in those particular situations.

THE COURT: And you don't see at present, at times, more than one builder in Mount Laurel litigation adds to the aggressiveness or - I suppose that's enough - with which the litigation is pursued, and that perhaps the benefits of Mount Laurel might be more efficiently, appropriately, and fully to the Court so that, let's say, builder number one and the town just don't cut a sweetheart deal and the public interest is not as adequately represented -- you know, I don't have the Public Advocate in most of the litigation; I don't have an urban league or a similar public interest group, and the most that I can do if a case is settled is to notify the public at large, perhaps even bring in a Court-appointed expert,

but it's not the same, of course, when you have plaintiffs who have their own individual interest which they're seeking to sustain in terms of seeing to it that the town is more quickly put to its Mount Laurel obligation.

MR. MEISER: Well, the Court's saying it has the power to approve a settlement in that situation doesn't mean that the Court will approve the settlement. Obviously, the second or the eighth developer is going to be hurt; he's going to put on some evidence vigorously opposing the settlement. And the cases that I've read say, obviously, the intensity of the opposition to the settlement is one factor for the Court to consider.

So the Court would have to make an individual decision on a case by case basis, whether it would ever approve a settlement in a particular case, you know, in this situation. All I'm saying is, I think it's clear the Court has the power to do it.

THE COURT: All right. Did I interrupt you from any other argument?

MR. MEISER: No. I think the Court has my brief, and if there's any questions I'd be glad to

answer.

THE COURT: No. It was very well done. I appreciate it.

All right, Mr. Hill. Do you wish to be heard?

MR. HILL: Yes, your Honor, on two issues. Although Hills Development Company generally agrees with Mr. Meiser's brief and his argument, I think there are a couple of issues that we'd like the Court to look at that come out of this.

I think that the rule that Mr. Meiser proposes would work best if we had a municipality which had a course of action proposed and a commitment to that course of action and were here before the Court saying, "We're going to rezone this, this, this, and this, and we've calculated our fair share to be Y, and we're passing that ordinance, and we ask the Court, with that degree of risk, to look at our rezoning and approve it and give us the judgment of repose."

What we have here - although I'm very satisfied that I think we have resolved the Pluckerman issues and your Honor has an order that's been agreed to by all parties - but as for the rest of the town, we are just the most

favorite landowner. We find ourselves in a little bit of a position of the favorite concubine who's being whispered in one ear, "Your land on the top of the hill is the nicest," but in the other ear, "But if things don't go the way we like them, we may zone it into a park," which isn't that much different from Dobbs's position or Timber's position. And I think that a town that wants to sit there and not make a commitment to a land use policy, should not be allowed to hold out intervenors.

I think that what troubles me the most as an attorney is seeing another land developer, basically Timber Line, being proposed for down-zoning, when I know the town has a master plan and they've made all kinds of conclusions as to the appropriateness of that land for a given use. And I worry, because I've got other cases, and do I have to tell every one of my clients that if there's -- if the town in which they own any land is involved in a Mount Laurel litigation they run the risk that the Mount Laurel Judge will allow a down-zoning of that land, irregardless of all the other law that exists in the State of New Jersey on appropriateness and on master planning

and on making choices?

I think that there has to be some integrity in the land choosing process, and we have a great body of law, and the unfortunate -- on that in New Jersey -- and the unfortunateness of this issue, from my point of view as an attorney, is that Mount Laurel can probably be read to say, "Once you're doing your fair share having to do with housing and other uses, we don't care if the rest of the town -- we don't care if the town is zoned five-acre." If that's a rejection of due process to other landowners, it's a very serious decision, and as the attorney for Hills, I would hate to see the Court trample in such a way on the rights of other landowners, that I, as an attorney, had to advise Hills that I have grave doubts in the benefits which we'd receive from the Court's decision as being withstandable of another forum or federal court. And I think those landowners -- and I most sympathize with Mr. Trombadore's position, because I wonder if he could take a down-zoning to another judge in a conventional zoning case and argue a case the way it should be tried and say, "Look at the master planning and look at the decisions," and have Bedminster say,

"Well, Judge Serpentelli said this was all right," and lose his rights.

Just as I wonder what's going to happen to Hills if things don't work out the way Bedminster chooses, despite their master plan, despite their land use choices, and they decide to down-zone the top of the hills and we end up litigating with them, and your Honor takes the position that just because they're meeting some quantified fair share, that we have no conventional rights as opposed to Mount Laurel rights to protect our reliance interest on land that was rezoned subject to a Court decision based on taking and based on other law, not out of which has been thrown out by the Supreme Court of New Jersey.

And it seems to me that Mr. Meiser's position would be most tenable if we were faced here with a municipality which came to this Court and was willing to defend the integrity of their land use decision and their master plan and said, "These are our choices and we will run the risk and we believe in what we're giving you, your Honor, and we've passed the ordinance and we'd like a judgment of repose." I think such a town with that kind of courage and integrity in making

choices maybe should be entitled to the protection of having those choices quibbled over by tag-along plaintiffs.

But a municipality such as Bedminster, which has come in with absolutely no choices and is willing -- and has told this Court, you know, if the top of the hill -- if Dobbs goes, then the top of the hill in Bedminster may be zoned to a park land, and that Timber Line is being down-zoned despite the fact that they have master planning decisions which were -- and a land use rationale which, under any conventional theories, would be upheld, I'm convinced, in conventional zoning courts. I have a lot of trouble with giving a municipality that wants to have it both ways - they want to keep out all the intervenors and they want to make no commitment until the Court has approved their plan, which they have yet to present to the Court.

And I think that with the system that Mr. Meiser proposes -- and it so happens that we're aware of that law because we've been working with the Public Advocate's office in Morris Township where there is a settlement under consideration by Judge Skillman where a town has come and rezoned

the entire town and put in the zoning ordinance that the ordinance doesn't take effect until there is a judgment of repose, and it seems on its face to meet the fair share number, and they've made their choices and some of the plaintiffs are happy and some aren't happy, and they're prepared to defend those choices and they've committed themselves to the extent of this ordinance caveat, except to the extent of this provision in the ordinance which says it isn't effective until the judge has given the judgment of repose. And I think that town is entitled to different treatment than a municipality which won't come in and which doesn't seem to base their land use choices on rational planning, but rather on, "What can we get away with this time?"

Your Honor, that is our position.

THE COURT: Okay. Does the planning board --

MR. FERGUSON: So speaketh the sayer --

THE COURT: No, no. The planning board.

MR. THOMAS: With regard to the questions that have been raiseed by Mr. Hill, I think the planning board has certainly dealt with all of the zoned plan that has been established in Bedminster

Township, and I think the Court must realize, and does of course realize, that the zoned plan that Bedminster was given, in fact, was given by Judge Leahy back in March of 1980 as a result of a Court order, and that was based upon litigation that had been going on, as Mr. Hill well knows, brought by the Hills Development Company. It was a plan with regard to the requirements of the then Mount Laurel I. The master plan was looking at the requirements of the law as it then was applicable to Bedminster Township, and I think that was a reasonable approach to take.

The master plan certainly envisioned the evolvement of the law as it has come to the point of an obligation under Mount Laurel II. The plans that we have submitted, I think, have to be predicated and recognized under what has gone on in this twelve- or thirteen-years' worth of litigation.

So from that point of view, I think it's a unique situation that Bedminster found itself in. It was told that it would zone its overall development corridor in a certain way. So from the point of view that our master plan decisions are, in fact, evidence that the Timber's property

or the Hill's property, for that matter, have been zoned specifically and are justified, certainly they are justified, but it's within the context of what we were told to do by prior litigation. So I think it's that kind of concept that has to be recognized by the Court in regard to these traditional zoning concepts that Mr. Hill refers to.

THE COURT: All right, Mr. O'Connor.

MR. O'CONNOR: I'd like to just comment on Mr. Meiser's position, I think first on his class action settlement arragement versus a full compliance hearing.

We use that in the Mount Laurel case right now that's going on before Judge Gibson, but there is a major distinction. There was a class, and the class that we were noticing to see whether the settlement was reasonable, were the low and moderate income people that we represented, and there wasn't any other interest involved there. Here, there is no class of builders. There's a whole -- there's obviously different interests here, and in that case --

THE COURT: Just a second. Doesn't the builder represent the class? Isn't a Mount Laurel

action a class action in a general sense? Let me answer that.

The Court has given some fairly strong indication that it might be. If you read page 288 of the opinion and in particularly footnote 43 on page 289, there's some rather strong language that at least equates to it, including the statement that, "The scope of remedies authorized by this opinion is similar to those used in a rapidly growing area of law commonly referred to as institutional litigation of public law litigation." And up above, on page 288, it specifically uses the language, "It does have little difference from declaring that the zoning ordinance is invalid on equal protection grounds, the effect of that often being simply to allow a plaintiff to use his property in a manner not permitted by the ordinance, referring to the builder, but to give the same rights to an entire class."

It seems to me that there's some support for at least a concept in Mount Laurel litigation being promoted by a builder.

MR. O'CONNOR: What I was saying, the stage we're at in Mount Laurel, we didn't get to the

ordinance yet. We were just giving notice on the one particular -- the mobile home park, and there, the class that was affected as the beneficiaries were low and moderate. In that sense, having objections come forward and setting up that type of a procedure might be appropriate.

THE COURT: And the other side of the coin in Mount Laurel II, notwithstanding the presence of a representative of a public interest group in Mount Laurel itself, the Court said, "We're going to give Davis a builders remedy anyway." That seems somewhat inconsistent with Mr. Meiser's argument.

MR. O'CONNOR: Well, the point I'm making is, when you get away from, like, the Davis situation, which is just notice to low and moderate income, as to whether they think it's a good project and whether that's acceptable, an objection type of proceeding there might be appropriate. But when you get into the full-blown ordinance and a question of fair share and sites and different sites and competition between a town plan and a builder's desire, there, I think, you undercut the Court - even though it might be easier - you said for yourself, I think you

undercut the independent findings if you establish a limited test of reasonableness. And I think that it's appropriate to make sure that Mount Laurel works, that you keep the integrity of the builders remedy. I mean, I was involved in this since 1970 and the whole evolution of the doctrine, and from '75 to '83, without the builders remedy, there was very little action and very little effort going on to try to implement Mount Laurel I. The towns weren't doing anything, and there was no pressure on them, which is precisely why they put the builders remedy in.

THE COURT: Well, let me ask you this: I agree obviously with what you said, and I think the genius of the Court's opinion was to promote builder activity in a manner that it has. The question is, is it going too far and is that counter-productive to what the Court sought to achieve? I mean, a town that gets sued by nine plaintiffs throws up its hands and says, you know, "What are we going to do? Give us a chance." Is it creating the impression that there's going to be such huge builders remedies in town after town, that they'd rather fight than settle, whereas if there's going to be a single builders remedy and a

review of the reasonableness of their package, they might rather settle.

The scope of the litigation - and I hear this time and time again from municipal attorneys - the scope of the litigation is giving the impression in their municipality their exposure is so great, but that they have no other alternative but to fight because they're being sued by so many plaintiffs.

MR. O'CONNOR: Well, I'd like to just have the Court step back and take a look at the towns. These are towns that are clearly performing unconstitutional acts in discriminating against the poor. If they weren't, they wouldn't be in that posture.

THE COURT: I'm not defending the towns. I'm talking in terms --

MR. O'CONNOR: Well, you have to look at that in viewing how sympathetic you are to their position.

THE COURT: I'm not sympathetic at all to their plight in terms of being sued. I'm concerned about the bigger issue, and that is the promotion of the Mount Laurel goals in the most efficient manner.

Now, the Court clearly focused in the opinion on voluntary compliance, it hoped that the threat of a builders remedy - and I use threat in a good sense - would bring about the voluntary compliance, and that we wouldn't have to have the huge number of cases being filed which are being filed. I have over fifty cases pending before me at this time and the vast majority of them have been filed since January 1 of this year. Given the, you know, given the particular nature of this litigation, that's a lot of action, and it's not slowing down.

Now, the towns that are being sued by more than one builder are the ones who are most difficult to settle and they're the ones most reluctant to settle. I have one town that's been sued by one builder and called and said, "Judge, if you'll cut off all -- any other builder remedies, we'll give you your compliance package immediately, but we want to zone our town in a reasonable fashion. We're willing to have the Public Advocate notified; we're willing to have a full public hearing on the reasonableness of it; we're willing to have a Court-appointed expert review it, but we don't want all of this

litigation, and if we do get all the litigation, we're going to fight it to the end." And I think that is a rather expected, normal, and maybe appropriate reaction.

MR. O'CONNOR: Well, let me respond to two things. First, I think whatever the Courts do, if they do it in a way that weakens the builders, the potential use of the builders remedy, I think it's too early in the evolution of Mount Laurel II doctrine to do that, because I think that that is a ploy of the towns, and I think that many of those compliance proposals will be totally inadequate, and there will not be the aggressive party developer there to challenge it, and I just cite this instance right here.

If Dobbs were not in this case to raise at least three issues that I'm familiar with, I'm confident they would not be raised.

THE COURT: You're suggesting that the public interest is not being adequately represented by the Public Advocate. I hate to put it that bluntly, but that's what you're saying.

MR. O'CONNOR: Well, I'll put it that bluntly. It's for two reasons. One is a question of manpower and resources. They can't be every

place, and where they are present, they can't be in the department that someone who has a private interest would be. So I think that's one reason.

The second is that, I think that the Public Advocate is a State institution, and regardless of how large you spell Public Advocate and public interest, they're influenced by the politics of the day, and I think that's a reality, and so some of the positions they take may be farther looking down the road and may weaken a position that's going before the Court than a private developer who's coming in and raising issues like affordability, site appropriateness, phasing, sewers. None of those issues were raised aggressively in this case by the Public Advocate. The Dobbs' interest raised those questions, and I think if we were not here, there would be a settlement that I believe would be inadequate.

So there are two reasons. One is not to weaken the incentive of the developers to come forward, and, two, there is a valuable public interest being presented, one, to get the housing for the poor and, two, to make sure test proposals that are coming before the town, irrespective of whether the Public Advocate is involved, they are

not an absolute gospel to blessing something that will guarantee it, as well as if there is an adversary proceeding, as we have here.

I think on the question of the Court being concerned that towns are going to get bombed or overwhelmed with litigation, I don't think that's the case. I think that there will be a lot of lawsuits, but as the three judges determine region, fair share, sub-allocating the fair share, then I think that a lot of the lengthiness and time involved will be cut down, and I think that all these other issues -- I've been reading complaints and answers filed by the towns. I would say that ninety percent of the answers that I have read would go by the board in a couple of weeks, things like standing and all other procedural issues, exhaustion of remedy, all the additional things that I don't think this Court or the three judges are dealing with.

So I think that even though it sounds good and it sounds like the towns might get overwhelmed, I think when you look at the realities of it, that this is really not the case. I think it's a ploy to avoid compliance or to put forth a plan that will get your blessing with your

fifty cases, and if you have a hundred, in all respect to the Court, it's going to be difficult to really get into each one of those, and there may be a tendency, if they're going with developer A - and I think this is a perfect example of that kind of a sweetheart arrangement - if -- I think you used that term. I think that the --

THE COURT: Not necessarily with respect to this litigation, but I did use the term.

MR. O'CONNOR: Well, I have a different opinion of the depth and appropriateness of this settlement with developer A, let's say, without using names, just pointing to Henry, but I think that that could be prejudicial to the interest of one plan, because, you say, "Look, we've bought 260, and they only want eight hundred. So they got twenty-five percent. Let's see what happens."

So, one, it might hurt the poor who need those other six hundred units, and, two, it's going to back off private builders who are going to say, "Why should I go through what Dobbs is doing, if I'm going to get the rug pulled out from under me, even though I'm raising good issues, even though I have a relatively comparable site," let's say, and all the rest, "and even though I'm

willing to spend money and kick into the monitoring system? Why should I do it, Mr. Basralian? Should I go forward? You give me the answer." And he's going to have to say, "Well, it doesn't look like you might get all the way there; around third base, and then the game will be called." I mean, that's going to uncercut in the evolution of this doctrine the chances that the poor have for housing.

Now, if we're ten years down the road, and maybe there is housing going on, and maybe the towns are coming around through the pressure of the builders remedy, then it might be wise to take a different look. But I can give you experience of '70 to '75 where nothing happened; '75 to '83 where nothing happened, and the towns were all applauding and saying, "We don't have to do anything." And now, for the first time in the last fifteen months, something is happening and all of a sudden the towns now want to say, "Geez, that's too much. We'll do it ourselves." I don't believe that and I think the Court should not be hoodwinked by that kind of municipal response.

THE COURT: We have an interesting situation before us in the Urban League-Carteret

case, in which there are seven defendants, four of whom have not been sued by a builder, and three of whom have, and the case has been tried now for about thirteen or fourteen days, and the four who were not sued by a builder had settled, and the three who were sued by a builder have not, and I don't know what one draws from that, but that could be supportive of your argument or it might not be.

Okay. Anything further?

MR. O'CONNOR: Yes. Just the one question. It hasn't been put before the Court, and that's the question of the concept of the over-zoning versus, like, a strict five sites, hundred units a site, fair share, five hundred, and if the Court is going to rely on builder one doing a hundred units and four sites being done by the market, where's the builder stand who's seeking a remedy on sites six and seven under the concept of over-zoning in such a kind of compliance hearing, or is that over-zoning no longer relevant anymore, even though the market hope is the only hope that the poor have?

So I think that's another reason for not pushing out a private developer seeking a remedy,

because I think that, like a plan, needs to have that over-zoning component, and clearly, that's not the case here. They're looking for strict compliance on a number-call basis and say, "Hey, we have sites one through five. That does it and let's go home," and hope that the Court buys that Hills is going to do number one and that the other four will happen over six years. And I think if the Court would deal with the concept of the over-zoning, that that would be another reason for opening the door granting intervention and involvement of builders who have site six, seven and eight, let's say.

THE COURT: Do you see any difference in the appropriateness of Mr. Meiser's suggestion? And I've been saying Mr. Meiser, by the way. I think, to some extent, Mr. Ferguson also pursued that in his brief.

But if I may call it the Public Advocate's suggestion, do you see any distinction in a case in which a single builder is sued, the town immediately responds and seeks to rezone, proposes a settlement to the Court, or is very close to a settlement, and then is sued? Let's say it's within days of proposing a settlement, or thirty

days, and then it's sued by a second builder, do you see any distinction in the appropriateness of the class action in that setting as opposed to this setting in which, at least Dobbs can contend it's been here for all this period of time, if not formally, and Timber can contend that it has had zoning of a Mount Laurel nature for some period of time? Do you see a distinction in that setting? Would it be appropriate outside of the setting of this case to pursue that sort of approach to a resolution of the Township's fair share obligation?

MR. O'CONNOR: I would just make it clear that that's not the situation here. But in response to your hypothetical, I wouldn't want -- I can obviously see the distinction, and the feeling that the Court, the town, and the Public Advocate might have, say, "Let's narrow the test and try to get this settled because of that policy." I wouldn't like to see that happen at this stage of Mount Laurel, because I think that the hope that the poor have of getting housing is not some inconvenience to the town or some paper plan with the hope of market compliance, but I think the real hope is builders.

Now, you might want to scrutinize closer in that situation the plan of that particular builder in his ability to carry out what he's saying. But I wouldn't want to go so far as to say that there should be a different test and he should be excluded, because I think then you're back to -- now, it might be different if there were five developers and they meet ninety percent or something like that. I feel that the more open the market hope is for the poor, the less chance they're going to have and the more it looks like a paper settlement, even though the provision of the ordinance might sound good. And where ever there's a builder coming in that's going to deliver, I don't think the Court in the interest of just getting another case off the docket and getting some ordinance settled should, you know, back off and exclude that particular developer, even though I can see where the Public Advocate may take that position because of a broader interest, like State-wide, to make, in my opinion, to make peace with a lot of the towns so that the politic issues subside. And I think that's where it's coming from more than the interest of housing for the poor delivered, or else there would be no

reason to give such credence to towns that are being so exclusionary for so long versus the private industry, who, for the first time in the last fifteen months, is trying to push in there and deliver the housing.

THE COURT: Thank you. Mr. Ferguson, you want to be heard or no?

MR. FERGUSON: I do. I'm touched at that Mr. Hill characterized his client as a concubine. Mr. Hill, the slayer of seals, who's covered me with blood, stamped around his office on Wednesday and said, "You do what we say or we'll pave the whole town." If that's the concubine --

THE COURT: You mean people do things like that?

MR. FERGUSON: No, sir. That's purely hypothetical.

I'm touched that Mr. O'Connor represents a man who's so concerned with the poor. I hold in my hand, your Honor, the pleadings filed from the Dobbs litigation. Until the amended complaint, the only position before this Court was a regional shopping center, a fair share regional shopping center. By the way, I agree with the position of Mr. Meiser. We had it in our brief in somewhat

different language, but the same concept. We acknowledge that the Court can't cut the sweetheart deal. It has an obligation to the constitution and the Mount Laurel doctrine to hold a settlement hearing or compliance hearing. Whether the standards of proof should be different at those two hearings is another question. We don't have to address it at this point. But we do agree with that concept and we support what Mr. Meiser says.

It's our own suggestion as well that these motions to intervene be denied without prejudice to give the parties a chance to do what we've be trying to do for fourteen years.

We have particular problems with this case. In the order that was given to the Court, the second to last paragraph says, "This shall not be a precedent for any other case because the facts and circumstances are different." The reason for that is obvious - no other case in the State has this background. We have to deal with it. And one of the things we have to deal with is the timeliness of the application, particularly that of Mr. Dobbs.

Mr. Dobbs, by his own admission, has been

trying to get zoning relief in Bedminster Township since August of 1979. My right hand holds the pleading book of the Allan Deane case. This is all since August of 1979. And throughout this entire set of proceedings, including the zoning -- rezoning process with Mr. Raymond, appointed by Judge Leahy, Mr. Dobbs never sought to intervene. And the plain fact of the matter was, he didn't do it because he didn't think it would do him any good because he wanted a shopping center. I'm not going to dwell on this too long. I know we've briefed it and the Court is well aware of the facts, but I do think the application to intervene at this late date is extraordinarily untimely and cries out for denial on that ground alone.

THE COURT: Let me ask you: Where is the condemnation proceeding as of today?

MR. FERGUSON: The bond ordinance had been introduced by the Township on May 21 for four million dollars plus, and the -- that's scheduled for adoption --

MR. O'CONNELL: A hearing on June 18th.

MR. FERGUSON: June 18th. The Township intends to proceed with that. We have to. Under the statute, we must negotiate in good faith with

Mr. Dobbs once the ordinance is in place before you can go to condemnation.

As to the compliance package which Mr. Hill says Bedminster, or, he infers, if I understand Mr. Hill and I'm not always sure I do, but if he is inferring that we have shown bad faith by not putting the compliance package forward and trusting in the Court, my recollection is that we introduced amendments that we thought complied with Mount Laurel II in June or so of 1983, and at the request of Mr. Hill himself and this Court, we withheld any further action pending the resolution, the investigation, by Mr. Raymond of the whole fair share number. We now have a proposed package as a result of everything that has gone on, and we are prepared to implement it in a very short period of time. I would say within thirty days, although -- I would say that we can probably do it within thirty days. I think sixty is safer.

There's absolutely no question in my mind but that the rule that Mr. Dobbs is looking for, and Timbers, would open up Mount Laurel litigation to a point where you, in effect, have no zoning at all for the Township. The Court is taking

responsibility to adjudicate all the claims which the Court in Mount Laurel II said don't belong in Mount Laurel litigation; that is, taking the appropriateness of the condemnation procedure, all the conventional --

THE COURT: Wait, wait, wait. On the condemnation issue, the Appellate Division has just remanded a case to me that says that I have to decide - I have to decide - whether condemnation is being used as a, quote, thinly veiled attempt - I think the quote should stop there. Maybe "attempt" isn't even right, but thinly veiled is there - to deny a Mount Laurel remedy. So it appears as though I'm going to have to decide that issue in that case, and I don't know whether or not it exists in this case.

Mr. Basralian, the ordinance as introduced as I understand it, authorizes some four million dollars to acquire the parcel which Mr. Dobbs has the option on. Have you decided that your position with respect to an offer which will follow, and must follow under the condemnation law --

MR. BASRALIAN: First of all, I don't know how many acres it covers, your Honor, and I

haven't seen the ordinance yet. I don't believe it's the whole tract. Is that correct or --

MR. O'CONNELL: Two hundred and nine acres, the entire tract.

MR. BASRALIAN: Two hundred and nine acres.

THE COURT: What I'm asking you is, if you're going to contest the condemnation. Based upon an offer of the maximum authorization under the ordinance, they can't offer anymore.

MR. BASRALIAN: We intend to contest any offer, your Honor, because whether you wish to quote it or not, I do view it as a very thinly veiled threat to attempt to prevent the relief we seek. It's a recurring dream of the municipality, and it continues to be so.

THE COURT: So that negotiations at the authorized amount would be fruitless.

MR. BASRALIAN: I believe it will be. This is the first I've heard as to the amount, your Honor, and I've not consulted --

THE COURT: Your client just shook his head.

MR. BASRALIAN: Up or down, sir?

THE COURT: In the affirmative. I take it it's in the affirmative.

You want to consult?

MR. BASRALIAN: Fruitless.

MR. FERGUSON: Mr. O'Connell correctly points out, your Honor, that we have to negotiate with the owners and I think it has to be a three-way negotiation on that.

THE COURT: Well, that may be, but if Mr. Dobbs has an option on the property, he's going to have to be involved and --

MR. FERGUSON: No question. I'm not saying --

THE COURT: Well, I don't know how this settlement could take place without his concurrence.

MR. BASRALIAN: That's correct.

MR. FERGUSON: The point is, in a condemnation we have to proceed against the owners of the property.

THE COURT: Yes.

MR. FERGUSON: And we have to negotiate with the owners. Now, maybe the owners are constrained by Mr. Dobbs, but we don't know what the owners are going to do with Mr. Dobbs. That's, you know, a whole separate proceeding. There's no question but that the Township wants to

prevent Mr. Dobbs from getting what he is asking for. That has been our absolutely clear position since August of 1979. The fact he has shifted his proposal from a one million plus square foot shopping center to alleged Mount Laurel housing, does not change our position for solid and valid planning principles.

THE COURT: Do you both have a copy of that opinion, by the way?

MR. FERGUSON: Far Hills?

THE COURT: Far Hills opinion.

MR. FERGUSON: Yes, your Honor.

MR. BASRALIAN: Yes, your Honor.

THE COURT: All right. I'm satisfied I've heard everything I have to hear, unless someone --

MR. FERGUSON: I just would remind the Court that the Mount Laurel overlay -- all our Mount Laurel zoning has been of the overlay variety. That basic underlying zoning in the ordinance really hasn't changed. We're talking about the overlays to make up the compliance package.

Unless the Court has any other questions of me, I don't think I need go on.

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C E R T I F I C A T E

I, GLORIA MATHEY, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

GLORIA MATHEY, C.S.R.