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- transcript of notes for SJ & Prot. Orders

Pgs. 80

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. L-30039-84

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THE HILLS DEVELOPMENT COMPANY, :
Plaintiff, :

v. : STENOGRAPHIC
TRANSCRIPT

THE TOWNSHIP OF BERNARDS IN THE : OF
COUNTY OF SOMERSET, a municipal : MOTIONS FOR SUMMARY
corporation of the State of : JUDGMENT AND
New Jersey, THE TOWNSHIP COMMITTEE : PROTECTIVE ORDERS
of the TOWNSHIP OF BERNARDS, THE :
PLANNING BOARD OF THE TOWNSHIP OF :
BERNARDS, :

Defendants. :

x - - - - - x

Place: Ocean County Courthouse
Toms River, New Jersey

Date: July 20, 1984

B E F O R E:

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

T R A N S C R I P T O R D E R E D B Y:

HENRY HILL, ESQ.

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

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Attorneys for the Defendants, Township
BY: JAMES E. DAVIDSON, ESQ.
HOWARD P. SHAW, ESQ.
Judith R. Marinke, c.s.r.

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THE COURT: This is the return date of four motions, two each: Plaintiff's motion for summary judgment and the defendant's motion for summary judgment and plaintiff's motion for a protective order and the defendant's motion for a protective order. It's kind of oneupsmanship.

I have read all the moving papers, had an opportunity yesterday to discuss some of the factual issues involved in this case with Mr. Hill and Mr. Davidson in order to try to clarify in my own mind exactly what the facts were.

Subsequent to that conversation, so the record will reveal, Mr. Davidson called me back to -- or called my clerk and I spoke to him, to try to clarify his position with respect to what the ordinance in this case says and so that Mr. Hill should be aware of that, as I understand it, and for example purposes only. The provisions of the PRD zone, at least as it relates to PRD-3 and PRD-4 are governed not only by the portions of the text commencing with Page 400.15 through 400.18 or .19, but also by two tables in the ordinance being Table 401

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1 and Table 403 -- I am sorry -- Table 404.

2 As I understand the way the ordinance
3 works now, if there is a hundred-acre parcel
4 of property, it is Mr. Davidson's interpretation
5 on behalf of the Township that the ordinance
6 provides that 25 percent of that parcel must
7 be set aside for a single-family residential
8 zoning although need not be used, and that
9 75 percent of it may be used for multi-family
10 and that may be used at a density of two units
11 per acre, but the density is based upon the
12 total acreage of a hundred acres as opposed to
13 75 acres.

14 So, as I understand it, you can build
15 200 units of multi-family dwellings and you
16 may build them at a density of nine units per
17 acre on the 75 percent or 75 acres which would
18 mean that if you chose to cluster them,
19 theoretically you could get them all on roughly
20 8 1/2 acres.

21 Did I properly now characterize
22 Mr. Davidson's --

23 MR. DAVIDSON: Almost, your Honor.

24 THE COURT: Let's hear the part I didn't.

25 MR. DAVIDSON: The only part that I

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1 think is in the 175 acres you could put the
2 200 units.

3 THE COURT: In the 75 acres.

4 MR. DAVIDSON: Excuse me. Seventy five
5 acres you put the 200 units in less than your
6 eight acres.

7 What you cannot do is make the multi-family
8 zone the eight acres.

9 THE COURT: How could you get them in
10 less than eight acres if you could only have
11 nine units to an acre?

12 MR. DAVIDSON: That's in the zone itself.
13 It's a gross density. It's not a net density.

14 THE COURT: I understand that.

15 MR. DAVIDSON: Okay. Let me give you
16 the opposite example.

17 If I went in and said that my multi-family
18 zone was seven acres and the rest of it was
19 my residential zone, okay, the nine is going
20 to apply to the seven acres. The most I can
21 get in that seven acres is 56 units.

22 THE COURT: How do you come up with that?

23 MR. DAVIDSON: Nine times seven acres.

24 THE COURT: Sixty-three.

25 MR. DAVIDSON: Oh. Well, math is not a

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1 strong point either.

2 THE COURT: The reason I hesitated it is
3 my weakest point.

4 MR. DAVIDSON: But you knew the answer
5 to that one anyway.

6 THE COURT: It would make my daughter
7 proud. I never did learn it. I was forced
8 to relearn it with my daughter and she never
9 got past the eight times table, so let's not
10 take an example.

11 MR. DAVIDSON: Okay. I will stay
12 away from my multiplications.

13 THE COURT: Go ahead.

14 MR. DAVIDSON: But if you have set aside,
15 for instance, 50 acres, you could put the
16 whole 200 units in it or you could put -- as
17 long as the amount you set aside for your
18 multi-family area, multiplied by nine does not
19 exceed nine, you know, nine acres.

20 THE COURT: But in my example with 75 acres
21 set aside and you wanted to get a maximum density,
22 wouldn't it be correct to say that you would use
23 eight and a half roughly acres?

24 MR. DAVIDSON: Well, I am saying that
25 you could do it at 20 an acre. You are not

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1 limited by the nine.

2 The nine only limits the zone -- they
3 don't call them zones, they call them areas
4 themselves.

5 What I can't do -- what the developer
6 can't do is use most of the land for residential,
7 large lot residential, for instance, and then
8 take the last five acres and jam all the
9 multi-family in. That's what he can't do.

10 THE COURT: But that chart on 404 -- well,
11 it's Page 400T4.

12 I tell you the guy who numbered this
13 ordinance should be whipped.

14 MR. HILL: That is Mr. Frost.

15 MR. DAVIDSON: He is not here.

16 THE COURT: I am only kidding. It is
17 very comprehensive and it is also very detailed,
18 but as I read that other column, the right column
19 on 400 "T" as in Thomas 4, it says nine DU/AC
20 and I take it that --

21 MR. DAVIDSON: That's correct.

22 THE COURT: -- to mean nine dwelling
23 units per acre.

24 MR. DAVIDSON: Yes, and that is the
25 maximum dwelling for the multi-family area.

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So, you take how many dwellings in the multi-family area.

THE COURT: Twenty five must be set aside for single-family residential and that leaves us with 75 acres.

MR. DAVIDSON: That is right.

THE COURT: And you are saying that if he could do it, he could build -- I take it he could build a high rise --

MR. DAVIDSON: Assuming there is something else.

THE COURT: Except for the height limitations.

MR. DAVIDSON: That is correct.

MR. HILL: Could I ask a question of Mr. Davidson?

MR. DAVIDSON: Sure.

MR. HILL: If -- what is new to us is the notion that you could put -- we always assumed that 25 percent of our units had to be single-family, but on this 100-acre tract, if you took 75 acres for multi-family and put all 200 units there leaving 25 acres vacant, if you turn to Page 600.22 it says that in a PRD-3 or -4 we must have 25 percent open space.

Does that mean in addition to the single

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1 family --

2 MR. DAVIDSON: No.

3 MR. HILL: Is that a 50 percent open
4 space requirement if you were to do it that
5 way?

6 MR. DAVIDSON: No. I haven't read the
7 provision, but the way you have said it, no.
8 You have got 25 open space.

9 MR. HILL: But it's a single-family zone.

10 MR. DAVIDSON: That's correct.

11 THE COURT: You could leave that 25 percent
12 undeveloped to settle your open space.

13 MR. DAVIDSON: That's correct.

14 MR. HILL: I understand that, and for
15 purposes of this motion, we don't contest it
16 although the notion we didn't have to build the
17 single-family zoning was new to our planners
18 and designers, but, perhaps, you could read
19 it that way.

20 I don't think it's essential to our
21 motion for summary judgment.

22 What is essential is an understanding
23 that the overall gross density in all zones
24 with vacant developable land is nowhere less
25 than two units per acre.

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1 THE COURT: If I understand this correctly
2 then, assuming again my 100-acre tract and
3 assuming again we put all 200 units on the
4 75 acres, regardless of where we put them at
5 what density per acre, and assuming there is
6 40,000 square feet to an acre, we would have
7 something like 3,000,000 square feet; and
8 putting 200 units into 3,000,000 square feet
9 would give me my unit per square foot.

10 MR. HILL: Mr. Hutt has one.

11 MR. KERWIN: It would be two to the acre.

12 THE COURT: I think it works out to
13 something like 15,000 square feet or something
14 like that per unit.

15 The first question is: How do you turn
16 it on?

17 MR. HUTT: When you give it to a judge,
18 it's already put on.

19 THE COURT: Is this a plaintiff's
20 calculator?

21 MR. HILL: It's a plaintiff's calculator.

22 THE COURT: It's not doing anything:
23 Start, stop.

24 MR. HUTT: You are messing up my case.

25 THE COURT: My guess was right: It is

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1 15,000 square feet per unit. That's very rough
2 because I said 40,000 square feet per acre.

3 But, all right, I have got a better
4 picture.

5 Now, my second question factually which
6 we didn't discuss: Is there anything in Mr. Frost's
7 affidavit which tells us how many square acres
8 of land is open in the PRD-3 and -4 zone?

9 MR. DAVIDSON: I don't think so, your Honor,
10 but let me say one thing: PRD-3 is not a zone
11 which --

12 THE COURT: Is not a zone?

13 MR. DAVIDSON: Well, it's not one in
14 which any Mount Laurel housing, you would expect
15 to be built.

16 THE COURT: PRD--

17 MR. DAVIDSON: -3.

18 THE COURT: So, it's just PRD-4?

19 MR. DAVIDSON: No, PRD-4 and --

20 THE COURT: -- PRD-2 was used up. Wasn't
21 it? Isn't that the one where you had 600 and it
22 was used up?

23 MR. DAVIDSON: No, that's PRD-1.

24 THE COURT: That's -1?

25 MR. DAVIDSON: That was a basic floating

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1 zone throughout both the R-2 and the R-4, and
2 those 600 units have been used up. I don't
3 know of any low and moderate income housing.

4 MR. HILL: But some may come in as low
5 as 90,000 it says.

6 THE COURT: I don't see PRD-1 in the
7 tables. There is a PED-1.

8 MR. DAVIDSON: On 400T1, your Honor. R-2
9 and R-4 both have PRD-1.

10 THE COURT: Yes. That's what I said.
11 They are not a zone. It is a use permitted in
12 the zone.

13 R-2 is your zone.

14 MR. DAVIDSON: That is correct. That is
15 with all the PRD's, that's true.

16 MR. HILL: But it ups the densities
17 of six units per acre that's available.

18 THE COURT: That's used up.

19 MR. DAVIDSON: That's used up.

20 THE COURT: And R-3 is not -- I am sorry --
21 PRD-3 is not a Mount Laurel.

22 MR. HILL: Which is part of the R-3 is
23 not -- We don't think of it as a Mount Laurel.

24 THE COURT: But R-2 and R-4 -- PRD-2 and -4.

25 MR. DAVIDSON: -2 and PRD-4.

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1 PRD-2 goes in the R-5 and PRD-4 goes in
2 the R-8 and that is the Hill's -- the Hill's
3 property is R-8, part of the Hill's property.

4 THE COURT: Now, I will re-ask the question
5 then: Do we have any idea how many acres there
6 are in PRD-2 and -4 that may be used for Mount
7 Laurel construction?

8 MR. DAVIDSON: PRD-2 -- excuse me --
9 PRD-4 is 500 acres plus or minus.

10 MR. KERWIN: 501.

11 MR. DAVIDSON: 501.

12 THE COURT: And PRD-2?

13 MR. DAVIDSON: I don't know if that appears
14 in Mr. Frost's affidavit. I do believe in
15 Mr. Frost's affidavit it can produce 3,000 units
16 of housing though.

17 I don't know if his acreage is in there.

18 THE COURT: Yes. That's why I wanted to
19 know how he got at that. That's what I was
20 getting at.

21 His total figures, as I recall, is
22 6,000.

23 MR. KERWIN: Is that Zirinsky?

24 THE COURT: In other words, I want to
25 come down on the question of how many acres here

Judith R. Marzke, C.S.R.

1 you have got to build on in those two zones?

2 MR. HILL: Your Honor, I think maybe
3 Mr. Davidson would agree that the PRD-2 zone
4 is the product that has already been approved
5 for construction, that is, Lawrence Zirinsky's
6 piece, and I don't know if it is in the affidavit
7 or not and it is a no Mount Laurel zone.

8 I don't know what the densities are,
9 but it's all approved and I don't know if it is
10 under construction yet. Is that correct?

11 MR. DAVIDSON: If the density is six and
12 a half units per acre and it is, your Honor, the
13 piece he is talking about is less than half the
14 zone.

15 THE COURT: Half the zone?

16 MR. DAVIDSON: Bonnie Brae owns a big
17 piece in there. Fred Kirby owns a big piece
18 in there. Hovnanian is in there before the
19 Board now and the approval you are talking
20 about is for 15 or 20 percent of the Zirinsky
21 piece.

22 THE COURT: Is Hovnanian -- Zirinsky,
23 I have heard that name before.

24 Is Hovnanian proposing low and moderate
25 in that zone?

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1 MR. DAVIDSON: Proposing low income,
2 I believe.

3 THE COURT: Lower income, but not low and
4 moderate. He has not been known to build low
5 and moderate yet.

6 MR. DAVIDSON: I think that's incorrect,
7 but I can't make the representation to you.

8 THE COURT: I mean in this court he is
9 not proposing. But you don't know what he is
10 proposing?

11 MR. HILL: The ordinance does not require
12 it, does it?

13 MR. DAVIDSON: He is in the zone that
14 was the subject of the Lorenz suit.

15 I can't say this from knowledge that he
16 is going to put in at least low and moderate
17 income housing, yes.

18 THE COURT: You mean moderate --

19 MR. DAVIDSON: It's the housing they
20 are talking in the Mount Laurel II case.

21 THE COURT: Okay. Now, would you say
22 that there are more than 500 acres in the PRD or
23 less?

24 MR. DAVIDSON: Yes. Oh, my gosh, yes,
25 more than a thousand.

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1 THE COURT: More than a thousand not used?

2 MR. DAVIDSON: Yes, almost totally unused.

3 THE COURT: In the PRD-2 zone?

4 MR. DAVIDSON: That's correct, your Honor.

5 THE COURT: So, we may be talking about
6 1500 units -- acres in the two zones by your
7 calculation at a density of two units per acre?

8 MR. DAVIDSON: Six point five.

9 THE COURT: No, no. The maximum density
10 by your admission is that it's two units.

11 MR. DAVIDSON: No, sir.

12 THE COURT: You can cluster them to nine,
13 or six.

14 MR. DAVIDSON: No, sir. No, sir. No, sir.
15 If you look at 400T1 under R-5, it is PRD-2,
16 there is an asterisk. It says in the PRD-2
17 the maximum allowable density that will be
18 5.5 dwelling units per acre on land defined
19 as R-5 dry lands in Article 200 and 1.0 dwelling
20 units per acre on lands defined as R-5 Lowlands
21 in Article 200.

22 THE COURT: Yes, but we have already
23 agreed, and that's why I want it to be clear
24 in the beginning, we have already agreed that
25 in the text portion of your ordinance that in

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1 no event can it exceed two units per acre.

2 MR. HILL: Aren't all the densities
3 at Table 401, your Honor, maximum allowable
4 densities?

5 THE COURT: Just a second. PRD-4,
6 Page 400.17 it says "Development according to
7 the maximum allowable density set forth in
8 Table 401 is subject to the ability of the
9 applicant to provide sewerage and sewerage
10 treatment," and the maximum density allowed in
11 401 is two units to an acre.

12 MR. DAVIDSON: No, your Honor, we are
13 talking about PR--

14 THE COURT: If you go back to PRD--
15 Well, -3 is out now.

16 We are back to PRD-2. Let's see what
17 that says.

18 MR. DAVIDSON: Yes.

19 THE COURT: It has the same provision.
20 "The maximum development within a single-family" --
21 In fact, this is more explicit -- "The maximum
22 development within a single-family development
23 area of a planned residential neighborhood shall
24 be controlled by the minimum lot areas, sizes
25 and frontage requirements, but in no case shall

1 the development of such single-family development
2 area exceed the maximum allowable density of
3 dwelling units per acre given in Table 401."

4 That's Item 10 on Page 400.14.

5 Now, if I go then over to the --

6 MR. DAVIDSON: May I interrupt a second?

7 THE COURT: -- over to the PRD-2, that
8 is where I get the asterisk --

9 MR. DAVIDSON: May I interrupt a second?

10 THE COURT: -- of 5.5.

11 MR. DAVIDSON: Paragraph 8, right above
12 Paragraph 10, two talks about the multi-family
13 dwelling unit.

14 THE COURT: Well, if that means what
15 it says, then why is it that you can only get
16 75 units or 150 units in that 75 acres or
17 200 units in that 75 acres?

18 MR. DAVIDSON: I think the question
19 you asked us related to PRD-3 and PRD-

20 If that wasn't true, +
21 understanding, and I ap-

22 THE COURT:
23 to PRD-2.

24 It is your position
25 site you can get how many?

1 MR. DAVIDSON: If it were all in the
2 dry lands, you could get 650 units.

3 THE COURT: On a hundred acres.

4 MR. DAVIDSON: Excuse me, 550 units.

5 THE COURT: And 25 percent would have
6 to be set aside.

7 MR. DAVIDSON: I think it is 35.

8 THE COURT: In that one it's 35.

9 MR. DAVIDSON: I believe so.

10 THE COURT: Okay. Now, in the PRD-4 what
11 can we get?

12 MR. DAVIDSON: PRD-4 is as we discussed
13 on the telephone.

14 THE COURT: So, you could get 200 --

15 MR. DAVIDSON: -- units in the 75 acres.
16 In a hundred reduced by 25.

17 THE COURT: So, if you have 500 acres
18 of PRD-4 land, you can get some 10,000 units.

19 MR. DAVIDSON: PRD-4? No, sir. No, sir.
20 thousand units. It's 200 units for 100 acres.
21 that was the example we used.

22 THE COURT: 200 units for a hundred acres.

23 MR. DAVIDSON: And you just said 500 units,
24 I believe.

25 THE COURT: Yes, a thousand. And in your

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PRD-2 zone at 550, now you can get -- that's for every hundred --

MR. DAVIDSON: Five hundred on the multiplication. I think in real life that is probably high, but that's what your multiplication would be.

THE COURT: That's how you come about the 6,000 roughly, I mean, not 6500.

MR. DAVIDSON: Yes, that's a theoretical number though.

MR. HILL: Your Honor, does your copy of the ordinance have the zoning map on it?

MR. DAVIDSON: It would be in the pocket in the back.

MR. HILL: In the pocket in the back?

THE COURT: No.

MR. HILL: Maybe the judge could look at that. It shows you the PRD-2 zone, your Honor, which is what we are talking about, which the portion of it which is dry it shows you, and the portion which is wet it shows you.

The portion that is wet is one unit per acre. The portion that is dry is 5.5 units per acre.

It is our contention about 50 percent

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1 of the zones is wet in each case, so that
2 you could see we are talking about a gross
3 density in the zone area of approximately half
4 of the 5.5 unit zone.

5 MR. DAVIDSON: Your Honor, it's the
6 piece right above the Dead River on the right-hand
7 side. That's the zone we are talking about and
8 that's why I said that the number you arrived
9 at, the 5,000 number is a theoretical number.

10 I think Mr. Frost indicates that the
11 number that you can actually get in there is
12 a little more than 3,000.

13 MR. HILL: Just calculating, it is
14 one unit on the area that is wet and 5.5 on the
15 area that is dry, and it depends on what tract
16 you carve out.

17 We have been focusing on it --

18 THE COURT: If you can get 3,000 in the
19 PRD-2 and a thousand in the PRD-4, you can only
20 get 4,000 units in.

21 MR. DAVIDSON: I think that's what
22 Mr. Frost says.

23 THE COURT: I thought he said six.
24 Maybe I am wrong.

25 MR. DAVIDSON: I think he might have

1 said theoretically you can get six, but I
2 think he has come to the conclusion it is four.

3 MR. HILL: The Hills land is in two
4 zones, the PRD-3 and -4.

5 One is zoned as two to the acre and
6 the other is .5 to the acre.

7 MR. DAVIDSON: But the 500 acres we
8 are talking about is the PRD-4.

9 There is also 500 acres or maybe a little
10 more than 500 acres in the PRD-3, but that
11 should not go into your calculation because
12 I don't think anybody views that as Mount Laurel-
13 type land at least now. We don't anyway.

14 THE COURT: Twenty percent of 4,000
15 units is going to produce 800 Mount Laurel units.

16 MR. DAVIDSON: That's correct, your
17 Honor.

18 MR. HILL: If there were a mandatory
19 set aside.

20 THE COURT: Well, if there was a . . .
21 How is that going to reach your number?

22 MR. DAVIDSON: We think that's about
23 our number.

24 MR. HILL: Didn't I see a number set
25 forth in your papers of 1272?

1 MR. DAVIDSON: No, sir, not in our papers.

2 MR. HILL: We supplied copies of the
3 numbers that Harvey Moskowitz had supplied to
4 them as their fair share, and it is attached
5 to our motion to depose him.

6 Maybe because of that number he isn't
7 their planner anymore. I don't know, but --

8 THE COURT: So, in other words, you
9 don't concede Mr. Moskowitz's number?

10 MR. DAVIDSON: I am serious when I say
11 we think our number is about 800.

12 THE COURT: Okay. Do you want to be
13 heard, Mr. Hill?

14 MR. HILL: Your Honor, basically, on
15 our motion for summary judgment, it is our
16 position that given the total lack of mandatory
17 set aside mechanism or incentive zoning as it
18 is defined in the literature in the Mount Laurel
19 case as opposed to the way Mr. Frost uses the
20 language, i.e. in the ordinance there is no
21 mention of lower income housing and there is
22 no benefit to providing lower income housing,
23 of course, Mr. Frost is right that someone who
24 has chose to out of charity, a developer could
25 do so. However, all the developers that I

1 represent have owners who tend to push them
2 to increase the bottom line.

3 We take the position that in the absence
4 of any incentive zoning, as it is defined in the
5 Mount Laurel case, in the Mount Laurel case,
6 in the absence of any mandatory set aside, that
7 the Court can look at the large lot zoning and
8 in the predominance of the town, the cost-generating
9 items which we have identified in the planner's
10 affidavit which are not contested and which
11 appear in our reply brief and determine that
12 we have established a prima facie case that the
13 municipality is not providing its fair share.

14 The purpose of us bringing this motion
15 is to get on with the case.

16 If the municipality intends to adopt,
17 as Mr. Moskowitz has recommended when he was
18 their planner, a response to Mount Laurel II,
19 we would like them to do so so that we can
20 move our case.

21 We think that the advice that they,
22 themselves, have gotten support what we have
23 set forth in our affidavit, and we would like
24 just a finding of prima facie invalidity of
25 the existing ordinance.

1 These are the ordinances which, as the
2 affidavit will show, were adopted after the
3 Bedminister decision by Judge Leahy.

4 There was a settlement in 1980 along
5 Oakwood at Madison grounds between Allan Deane
6 Corporation and Bernards which resulted in the
7 rezoning of the property from one unit for
8 every three acres down to an average density
9 of one unit per acre, although it is higher
10 in some areas and lower in others.

11 The municipality at the time adopted
12 these PRN zones and it was a step along the
13 way to what everyone believed might be called
14 least-cost housing.

15 I think it is clear on the face of the
16 ordinance that the ordinance makes no attempt
17 to provide for low and moderate income housing,
18 and having failed to provide for low and moderate
19 income housing, the Court can see that there are
20 cost-generating standards and there is large-lot
21 zoning.

22 So, we are, therefore, asking for this
23 finding of fair share invalidity which we hope
24 will move along the case so that we can spend
25 our efforts and Mr. Davidson's efforts can be

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spent litigating issues that are more interesting and more at the leading edge of the law than whether an ordinance such as this meets Mount Laurel.

THE COURT: Who says that 5.5 an acre as a matter of law is violative of Mount Laurel?

MR. HILL: Well, your Honor has a map in front of you. You can see the zones in question were 5.5 units per acre.

Where there are wet lands, they are only one unit per acre.

The densities that are coming out are about 3.5 units per acre.

We brief --

THE COURT: Who says 3.5 is Mount Laurel? I denied the same motion in Franklin.

MR. HILL: Your Honor, in the lack -- in Franklin I believe you had in front of you mandatory set asides. You have no mandatory set asides. You have no affirmative action to provide low and moderate income housing in front of you in this ordinance.

Mount Laurel, itself, talks about quarter acre lots as being in Mount Laurel I as not being small lots.

1 THE COURT: Single-family.

2 MR. HILL: -- single-family, multi-family
3 densities in that neighborhood that are multi-
4 family are -- if anything, multi-family should
5 be higher in order to qualify as lower income
6 than single-family development standards, we
7 feel that, you know, absent very, very high
8 densities in the absence completely of mandatory
9 set aside.

10 If any affirmative provision in the
11 ordinance, any incentive for developers to build
12 low and moderate income housing --

13 THE COURT: Well, that's not the point.
14 I mean, if Hills development wants to build
15 low and moderate, go ahead and do it. We do
16 not have a mandatory set aside.

17 MR. HILL: I think the affidavits show
18 that the lowest unit that Mr. Frost said on
19 Page 28 of his affidavit, he proudly states
20 that while most of the six units to the acre in the
21 PRD-1 zone have come in at 200,000 plus, that
22 he is expecting some of the new ones which
23 have not been built yet to come in at less
24 than 90,000.

25 THE COURT: But that's in the zone where

1 they say they are not claiming any Mount Laurel
2 compliance.

3 MR. HILL: That zone was a zone --
4 the balanced residential complex zone, the
5 reason it is 600 is that they figure their
6 fair share of least-cost units to be 600 at
7 some time in the past, and they allowed this
8 floating zone in an attempt to meet Mount Laurel.

9 THE COURT: They now don't claim it does.

10 MR. HILL: They now don't claim that
11 it does, and every other zone is less than that
12 and we feel that -- I mean, we are -- your Honor,
13 we will be glad to go to trial on this ordinance.
14 Nothing could be easier than to try this
15 ordinance, and if defeating this ordinance
16 will get us a developer's remedy, I am doing
17 my client a disservice to try and get this
18 ordinance set aside.

19 THE COURT: No, you are not, because
20 if you get it set aside sooner, it might
21 result in the same thing much sooner.

22 So, you are not doing any disservice.

23 MR. HILL: Seriously, is this town's
24 defense to Mount Laurel, you know, we would
25 be delighted to have our developer's remedy

1 rest on defeating this ordinance, but we think
2 it is so transparent, if you will see the
3 Moskowitz materials, you will see that he has
4 already advised them that they ought to change
5 the ordinance and that's why they apparently
6 do not want us to depose him. That's why we
7 have been unable to get a deposition of
8 Mr. Moskowitz prior to this motion, which I
9 think would have simplified this motion.

10 So, we are based, you know, we are
11 left on the ordinance as it stands on things
12 that can't be controverted.

13 Going through the two affidavits,
14 Mr. Frost's and Mr. Mizerny's, we have tried
15 to isolate a number of facts which are not
16 controverted by either, and we are trying to
17 establish in this motion that as a matter of
18 law what we have established is sufficient for
19 a finding of facial invalidity and that's
20 the purpose of this motion.

21 THE COURT: Is your position that in
22 the absence of the mandatory set aside ordinance,
23 an ordinance is immediately violative of Mount
24 Laurel?

25 MR. HILL: I think that in the absence

of -- This is an ordinance that is four years old and nobody -- and no Mount Laurel has been produced and no amendments introduced, and I think that its -- I think that your Honor could find on its face that this ordinance does not comply with Mount Laurel because it hasn't done the job.

The densities are not such as to make it very likely it will, and the Supreme Court has indicated that in the absence of allowing trailer parks and high density, you must have mandatory set asides.

You must have affirmative action.

THE COURT: You cite me something in the case that says that. In fact, cite me to something in Mount Laurel which says that you must have mandatory set asides.

MR. HILL: The language, I

You must affirmatively provide

income housing in almost

there is language +

do not have, you .

don't have density p

have cost-generating p

THE COURT: It's .

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The first issue is: Is the town zoned sufficient acreage to provide for its fair share?

And assuming that you can't resolve that issue as a matter of law, then the second step is mandatory set aside required?

Theoretically, if the town removes all cost-generative or sufficient-cost-generative provisions from their ordinance, it doesn't have to be a mandatory set aside theoretically.

I recognize, practically speaking, that if there isn't, in my experience, which is quite different than from what the law says, in my experience then there will be no Mount Laurel housing and I also recognize, and my experience tells me, that a density of two or three or four acres will not produce Mount Laurel housing either.

Both of those are my experience, and I think that any town that rests on that proposition is on very tenuous grounds.

However, does that then permit the Court, as a matter of law, to say that in this State or in this town that that sort of density will not, as a matter of law, produce that housing? That's what the issue comes

1 down to in summary judgment because we have
2 got to assume every fact in the best light as
3 far as the defendant is concerned. They have
4 zoned at a given density of 5.5 acres in this
5 one zone.

6 Admittedly, it's not that density for
7 the entire zone because of this wet land-dry land
8 distinction, and admittedly, the other zone
9 even has a more limited number of units.

10 But the question is, first of all, we
11 don't have an established fair share for this
12 town.

13 We have Mr. Moskowitz's opinion which
14 the town disallows.

15 MR. HILL: We have Mr. Mallack's
16 affidavit which is before your Honor.

17 THE COURT: Of course, that creates
18 a factual dispute.

19 MR. HILL: I can't believe there is
20 any fair share allegations alleged by the
21 municipality one way or the other.

22 THE COURT: Well, you have attached
23 their --

24 MR. HILL: I have attached Mr.
25 Moskowitz's fair share, and we claim it's higher.

1 THE COURT: Right.

2 MR. HILL: And, in fact, both are based
3 on predicting what methodology this Court may
4 adopt in the future.

5 So, it's all based on the planners,
6 Mr. Mallach and Mr. Moskowitz's assertions
7 relating to how you have handled this kind of
8 data in other cases. But we, you know, the
9 only purpose of the affidavit was to show
10 that the fair share was greater than zero,
11 because theoretically, if the fair share was
12 zero, maybe we couldn't bring a motion for
13 summary judgment and that was the purpose for
14 which we filed. Conceptually, because we didn't
15 think that fair share would be established by
16 affidavits, given debatability of this subject
17 and the fact that it's always subject to maybe
18 the rights of trial or factual dispute.

19 THE COURT: Sometimes towns admit their
20 fair share minimum as did Princeton, and that's
21 what resulted in the summary judgment in that
22 case.

23 Because I was able to determine, as a
24 matter of law, that they couldn't possibly meet
25 their fair share. This town doesn't admit it

1 or, if they do admit it, they admit a hundred.

2 MR. HILL: This town was embarking upon
3 a course of compliance when people from next
4 door in Warren came over and said --

5 THE COURT: Oh, well.

6 MR. HILL: --fight them, you may win.

7 THE COURT: So, what else is new?

8 That's it.

9 MR. HILL: Anyway, your Honor, all I can
10 say is: Our motion is dependent on our assertion
11 that the relatively large lot zoning, coupled with
12 a lack of affirmative measures, coupled with
13 admitted cost-generating provisions, coupled with
14 a number of provisions which we say, on their
15 face, violate the Municipal Land Use Law and
16 the established law of this State, and our
17 cost-generating provisions coupled with provisions
18 which are void for vagueness which themselves are
19 cost-generating, because to put through an
20 application where you have vague standards which
21 are completely subject to the whims of the Planning
22 Board is cost-generating per se, added up to a
23 prima facie case of noncompliance.

24 We, you know, if your Honor feels
25 that that, you know, that the fair share numbers

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1 have to be established before that is so, you
2 know, perhaps, we can -- well, you know, that's
3 an issue -- that's an issue of law.

4 In any case, your Honor knows our
5 position.

6 THE COURT: Mr. Davidson.

7 MR. DAVIDSON: Yes, your Honor. We
8 contend with regard to their motion for summary
9 judgment that the ordinance that we have now
10 with its background and with regard to the two
11 zones that I think we understand are the ones
12 we think Mount Laurel housing is possible in,
13 I won't say the numbers because I will just
14 confuse it more, that in those zones that low
15 and moderate income housing can be built and
16 that the owners of the property are obligated
17 to build it.

18 THE COURT: How can you contend the
19 second thing if the ordinance doesn't say it?

20 MR. DAVIDSON: Okay.

21 THE COURT: Do you seriously believe
22 that there is a developer out there who is
23 going to be generous enough to come in here
24 and build any low and moderate housing in
25 Bernards with the density that you have given?

1 Do you seriously believe that?

2 MR. DAVIDSON: Your Honor --

3 THE COURT: Do you seriously believe
4 that anybody would build low and moderate
5 housing in Bernards even if you gave them
6 greater density?

7 MR. DAVIDSON: We don't know whether
8 gross density has anything to do with it, and
9 the reason we don't think gross density has
10 anything to do with it is land purchased for
11 this type of development by the unit, if you
12 have 5,000 units, the guy would pay 5,000 times
13 the number of units.

14 If you have 5,000 units with 5,000
15 acres, the guy would pay five. One is 55 to an
16 acre, one is one to the acre.

17 THE COURT: Won't he get also what
18 the market will bear in that town? And it isn't
19 going to be \$25,000.

20 If you give Mr. Hill here the opportunity
21 to build -- Mr. Kerwin the opportunity to build
22 at virtually any density in your town without a
23 mandatory set aside, and you can be sure he is
24 not going to be generous, he is not going to
25 give them away at 25 or 50,000.

1 MR. DAVIDSON: I think he has a mandatory
2 set aside.

3 THE COURT: Where?

4 MR. DAVIDSON: Mr. Kerwin and their
5 predecessor litigated this question in 1980.
6 That case was brought after Madison Township,
7 not before.

8 The amended complaint that is attached
9 to the certification of Mr. Dunham shows that
10 it was subsequent to Madison Township subsequent
11 to the least-cost housing idea.

12 As part of that complaint they allege,
13 among other things, that they have offered to
14 work with the Township to provide fully for
15 fair share regional housing needs for all income
16 levels.

17 Their demand for judgment is that they
18 should provide -- that they should be allowed
19 to provide for the fair share regional land of
20 all family income levels including low and
21 moderate.

22 The judgment says that the reason for
23 this judgment, which they arrived at by settlement,
24 is to provide for a greater variety of choice of
25 housing for all income groups, not some income

1 group, but all income groups.

2 THE COURT: Does that mean he has to
3 build one low 20 or 50 a hundred?

4 MR. DAVIDSON: Twenty. We say 20 and
5 Henry says 20.

6 THE COURT: No.

7 MR. DAVIDSON: Twenty percent.

8 THE COURT: I am not asking what you
9 are saying and what they are willing to do,
10 but I am asking you what, in the law, requires
11 anybody -- Let's forget it. Maybe it was a bad
12 example. Let's forget Hills. Any developer
13 walking into the Township at this point can
14 build at least densities without low and moderate.

15 What in the world would ever motivate
16 them to build low and moderate?

17 MR. DAVIDSON: There are only two
18 zones where we claim low and moderate can go.
19 One of them is subject to the ordinances, the
20 other one is subject to the order in the Lorencz
21 case.

22 The Lorencz case is almost exactly
23 the same. All over it talks about Mount Laurel I
24 housing, fair share for low and moderate income
25 housing.

1 THE COURT: But do either of these
2 orders say that anybody who builds in those
3 zones must be low and moderate?

4 MR. DAVIDSON: No. The 20 percent
5 number comes out of what the Supreme Court
6 says is a number you have to supply.

7 THE COURT: It can't be applied
8 retroactively, number one, and number two,
9 the Supreme Court has never said that it must
10 be mandatorily provided for in the ordinance.

11 Mount Laurel II -- you know, this
12 should not come as a surprise to anybody --
13 Mount Laurel II does not say that you must
14 have a mandatory set aside.

15 MR. DAVIDSON: That's correct. I agree.

16 THE COURT: So, therefore, you have
17 none in Bernards and, therefore, anyone coming
18 into this town could sue you if you made them
19 set aside, theoretically at least, on the mere
20 ground that they were not setting any aside.

21 The fact of the matter is that today
22 you would be required to give a building permit
23 to somebody coming in willing to build at these
24 densities. The fact is that the Planning Board
25 apparently indicated to the plaintiff that

1 they had to build low and moderate income
2 housing.

3 THE COURT: They might indicate that
4 they have to, and I have read those minutes
5 and that was a rather -- it wasn't a strong
6 indication, let me put it that way, and
7 secondly, what they were talking about I am not
8 quite sure. I mean, in terms of low and moderate.

9 But the fact of the matter remains that
10 putting Hills aside, I get a building permit in
11 Bernards today and these densities would not be
12 low and moderate.

13 MR. DAVIDSON: One thing: You are
14 hypothesizing a guy coming into town. We don't
15 have any of those. We have the land zoned to
16 permit this stuff. We have the owners involved
17 in all the various litigations who are still
18 there. I don't want to pick some poor guy out
19 of the stand and say, hey, I want to build it.

20 THE COURT: First of all, those
21 properties may be sold.

22 Secondly, you haven't shown to me
23 any order of any court that mandatorily sets
24 aside low and moderate income housing at any
25 level for any parcel in any zone and I don't

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1 believe, unless I missed it, I don't believe
2 that such an order exists.

3 So, there is no mandatory set aside
4 and Hills development could sell their property
5 tomorrow to someone who is willing to build at
6 the densities permitted in that zone and there
7 would be no low and moderate.

8 I think you could concede there would
9 be no low and moderate. The realities are that
10 these people are not doing this because they
11 have some altruism. There is not a builder in
12 this court that I feel would do that.

13 MR. DAVIDSON: That's what they said
14 last time.

15 THE COURT: They are doing it because
16 they can make money out of Mount Laurel when
17 they get their remedy.

18 MR. DAVIDSON: That's what they said
19 last time. Give it to us and we will do it
20 and we are saying that obligates them to do it.

21 THE COURT: Well, I know what you
22 are saying, but I am saying that there is no
23 order of any court that obligates them to do it,
24 and if they turned out to be liars, just for
25 the sake of argument, I mean, or have misled you

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1 or whatever, the fact of the matter is that
2 they could come in today and get a building
3 permit and you know as well as I know that
4 if they did, they would make not a single unit
5 of that construction low and moderate.

6 So that really, isn't there an
7 obfuscation here? Doesn't it have the
8 appearance of creating something that it
9 doesn't create?

10 MR. DAVIDSON: The ordinance doesn't
11 have the mandatory set aside. I don't think
12 it appears that way at all.

13 THE COURT: No. I am talking about
14 the densities and creating the specter that
15 6,000 units or 4,000 units can be built and
16 that 20 percent of that is low and moderate.
17 Therefore, since, for the sake of argument,
18 the Town's fair share is 800, we comply.

19 MR. DAVIDSON: No, respectfully not.

20 THE COURT: You seriously believe that
21 the ordinance, as it is presently postured,
22 could produce 800 units?

23 MR. DAVIDSON: Well, you are excluding
24 what I think is a relevant fact.

25 THE COURT: All right. And what is that?

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1 MR. DAVIDSON: The relevant fact is:
2 We think they are obligated to do it.

3 You just said: No, they are not, and
4 therefore exclude it.

5 THE COURT: No. I didn't say they
6 are not. I said: Show me what obligates them,
7 and I don't think you have submitted --

8 MR. DAVIDSON: I give to you the
9 prior litigations and all the attendant facts
10 obligate them to do it.

11 THE COURT: I have read every page
12 you have given me, and I would like you to
13 point me to something in your moving papers
14 and the responding papers and whatever that
15 says by an order of any judge that all of the
16 property owners in these zones are obligated to
17 mandatorily set aside 20 percent of their
18 housing for low and moderate income as defined
19 by Mount Laurel II.

20 MR. DAVIDSON: It doesn't say that,
21 and I contend it doesn't have to say that.

22 THE COURT: What does it say and to
23 whom does it apply?

24 MR. DAVIDSON: The cases were Mount
25 Laurel -- I am just going to repeat what I said

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1 before to you.

2 THE COURT: Okay. It didn't get through
3 to me.

4 MR. DAVIDSON: I beg your pardon?

5 THE COURT: It didn't get through to me.
6 The cases are Mount Laurel cases, I know
7 that.

8 MR. DAVIDSON: That's correct. And
9 all through those cases they indicated exactly
10 what it was they were going to do.

11 In the judgment it describes what it
12 is they are going to do and that is: Provide
13 housing for all levels of income including low
14 and moderate.

15 It is a Mount Laurel I case. All
16 Mount Laurel II does is say that in order to
17 force Mount Laurel I, we have got to do some
18 more stuff and you have to put in mandatory
19 set asides unless there is some other way you
20 can see that they are going to get built.

21 We are telling you that we concede
22 that they are going to get built and we told
23 them they have to build them because that's
24 what the whole idea of the first -- of the
25 Allan Dean case was.

1 THE COURT: Aside from Hills, you
2 believe you are in the same position with
3 respect to every property owner in these zones?

4 MR. DAVIDSON: That's correct.

5 THE COURT: They have all sued you --

6 MR. DAVIDSON: There is a rent case
7 which involved the whole zone.

8 THE COURT: And you believe under the
9 same obligation you would be able to hold them
10 up to 20 percent?

11 MR. DAVIDSON: The other set of the
12 minutes in the minutes in the meeting and the
13 other reference in Mr. Hill's letter related to
14 the Lorenz property.

15 Yes, we think 20 percent is the correct
16 figure.

17 THE COURT: Okay. Anything else?

18 MR. DAVIDSON: I'd like to be heard
19 on our motion for summary judgment.

20 THE COURT: Fine.

21 MR. DAVIDSON: Okay.

22 THE COURT: Sure.

23 MR. DAVIDSON: As you know, our motion
24 for summary judgment is based on that language
25 in the case that relates to threatening a

1 municipality, which I will find the page if I can.

2 THE COURT: I am really quite familiar
3 with it.

4 MR. DAVIDSON: Again, I won't repeat
5 the facts I said, but what happened is we came
6 up this year and it was indicated to Hills that
7 they had to put in Mount Laurel housing.

8 Hills' indication was that if you do
9 that, we are going to sue you, okay. The
10 indication of that is if you do not do it,
11 let us alone, we will build our housing.

12 It is followed up by a letter from Henry --
13 excuse me, from a letter from Mr. Hill dated
14 April 11th.

15 THE COURT: Can I stop you. I don't
16 mean to interrupt, but there are certain things
17 that are important to me.

18 MR. DAVIDSON: I am sorry, Judge.

19 THE COURT: You just said that Hills
20 Development, through someone, said that if
21 you don't let us build other than low and
22 moderate, we are going to sue you under Mount
23 Laurel. Is that what you said? I think that's
24 what I heard you say.

25 MR. DAVIDSON: The young lady said:

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If you do that, we are going to appeal.

That's what the minutes say.

Our people indicated what she was saying was: If you do that --

THE COURT: Is this in your moving papers?

MR. DAVIDSON: Yes.

THE COURT: Would you refer me to what you are now referring to.

MR. DAVIDSON: Attached to Mr. Dunham's certification.

It's on Dunham's certification. It's the fourth page from the end and it's the minutes of a meeting held on February 14th, 1984.

Granted the minutes themselves are brief, that's an understatement, the second paragraph from the bottom.

Mr. Garvin said: The Mount Laurel units will probably have to be included in further applications.

Attorney Hirsch said the applicant would appeal this condition in order to protect themselves.

MR. HILL: Attorney Hirsch being Guliet Hirsch from our office.

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1 THE COURT: I had an arrow to that.
2 I had read that, but it didn't sound like the
3 same thing you just said.

4 Okay. Go ahead.

5 MR. DAVIDSON: Now, Mr. Hill, in his
6 letter in April, further describes the
7 various conditions and gives the Town some
8 28 days to completely revamp their land use,
9 master plan, et cetera, to the way they want
10 it on their plan.

11 In there he also refers to the two
12 times he had been told that in order to develop
13 their property, they are going to have to be
14 Mount Laurel.

15 He makes reference to that fact that
16 they have been told that, and that being the
17 case, they have decided to go this way.

18 He then says, and if you don't do that
19 I am going to go to court and ask for ten units
20 per acre which is merely consistent with the
21 whole thrust of what they were trying to do.

22 We take that to mean that if they left
23 them alone back there in January, we would have
24 never heard from them. They would have built
25 whatever they wanted to build, but that didn't

1 happen.

2 We said, no, no, you have got to put in the
3 Mount Laurel housing. That's what Mr. Hill says
4 we said.

5 So, he then sued us. They didn't sue us
6 to adjust their housing. They sued us to put
7 some absolutely enormous number of houses on
8 their hill there.

9 We think that's indicative of what they are doing.
10 The whole thing is just one threat after another.

11 Now, we think the Court says that in that
12 circumstance, on page 280, "Mount Laurel shall not
13 be an unintended bargaining chip in a builder's
14 negotiations with the municipality, and that the courts
15 shall not be used as the enforcer for the builder's
16 threat to bring Mount Laurel litigation if municipal
17 approvals for projects containing no lower income housing
18 are not forthcoming."

19 We contend they wanted housing without Mount
20 Laurel.

21 "Proof of such threats shall be sufficient to
22 defeat Mount Laurel litigation by that developer."

23 It doesn't say that he doesn't get a builder's
24 remedy. The court says: It defeats the
25 litigation. It is setting

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1 up a counter policy to prevent that.

2 I assume the reason for that counter
3 policy is so the towns like us, we won't just
4 fold. We could have folded. Nothing would
5 have happened presumably, but certainly the
6 tenor of Mr. Hill's letter is the tenor of
7 the remarks at the two hearings that are attached
8 to Mr. Dunham's certification.

9 MR. HILL: May I?

10 THE COURT: Just a second. I don't
11 know if he is finished.

12 It is true that Mr. Hill's letter is a
13 30-day letter; poses affirmatively to build
14 low and moderate. Assuming that I am suspicious,
15 how do I know that he doesn't mean it? How do
16 I know that he is using Mount Laurel as a
17 threat from that?

18 The letter--whatever his letter says
19 is quite the opposite of a threat. He says,
20 I want to build low and moderate. Now, I am
21 asking you the question hypothetically. I
22 don't necessarily believe that he means it,
23 and I have expressed publicly my dissatisfaction
24 with that letter because I think it is in the
25 worst spirit of Mount Laurel.

1 MR. HILL: Slightly different letter,
2 your Honor.

3 THE COURT: In its various forms it's
4 in the worst spirit of Mount Laurel, and I take
5 personal offense to it and I think that it is
6 counterproductive to the interest of plaintiff's
7 forgetting the Town.

8 It is counterproductive to Mount Laurel
9 construction, the interest of low and moderate
10 housing, and I don't like it coming from a
11 lawyer.

12 All of those things I have said publicly,
13 so, Mr. Hill, he has not heard it for the first
14 time. I have said it in the presence of an
15 associate of his firm.

16 If I could, for a moment, dismiss his
17 suit, I would be very happy to. However, how
18 do I equate an offer to build low and moderate
19 income housing into a threat against the Town?
20 Or has Mr. Hill just been too cute to allow me
21 to do that?

22 MR. DAVIDSON: The offer is the result
23 of the threat that wasn't carried out. That's
24 always the way it's going to happen.

25 THE COURT: Where is that threat?

1 MR. DAVIDSON: The threat was: We will
2 sue you for Mount Laurel unless -- we will sue
3 for a lot of Mount Laurel unless you let us
4 build it as it is.

5 THE COURT: Mr. Davidson, I will dismiss
6 this action if you can produce for me proof that
7 someone on behalf of Hills Development, be it
8 their attorney or anyone else, has ever said to
9 this Township in sufficient act, word or deed
10 that either you give us our relief or we are
11 going to sue you for Mount Laurel.

12 We do not want to build Mount Laurel,
13 but we are going to shove it down your throat
14 unless you give us what we want.

15 I would be happy to dismiss the lawsuit
16 because that is precisely what the Supreme Court
17 was talking about.

18 That is precisely what they do not want,
19 and my own suspicion is that what Mr. Hill's
20 letter says, and I find the letter exceedingly
21 offensive, however, my suspicions cannot rise
22 to the level of law until I have something that
23 will support my suspicions.

24 MR. DAVIDSON: All right.
25

1 THE COURT: I would not mind being
2 quoted in what I am saying here. Unfortunately,
3 the courtroom is empty.

4 MR. DAVIDSON: May I say one other thing:
5 We are very concerned with their commitment.
6 They have attached a commitment.

7 Mr. Hill has referred to the commitment
8 in his reply brief to our motion. We read that
9 commitment to say that we are committed to
10 Mount Laurel housing if we get what we want.

11 We want them to be committed to build
12 Mount Laurel housing whether or not they get
13 what they want. That's what the commitment
14 ought to be, and if they are willing to build
15 it, then they ought to be willing to stand
16 behind it.

17 THE COURT: Yes, but now your naivete
18 is probably going to result in your ordinance
19 being found valid just as your argument with
20 respect to Mr. Hill's approach to the Town.

21 Unless you are going to be able to
22 prove, and you are going to have a tough row
23 to hoe, I mean, factually, in a mandatory
24 set aside, in the absence of mandatory set aside
25 that you are going to be able to produce housing

1 in this Town, it seems to me you are going to
2 face a very, very difficult uphill fight.

3 I think it is going to be rather easy
4 for Mr. Hill to demonstrate that this ordinance
5 will not produce low and moderate housing.

6 If he cannot demonstrate it as a matter
7 of law on a motion, it's going to be rather easy
8 as a matter of fact if you are going to rely
9 upon the good faith of builders to come into
10 your town and build low and moderate housing.

11 MR. DAVIDSON: Okay. I hear you.

12 THE COURT: And there is one thing
13 that follows on that, and I think should be
14 clear to you and should be thought out, and
15 that is, that the plaintiffs barred now in
16 Mount Laurel matters are now bringing these
17 motions for other purposes other than winning,
18 and that is, that they will follow with a
19 motion after they have proven invalidity
20 pursuant to Rule 4:44-6 to demonstrate that
21 the town has defended against the motion for
22 summary judgment knowing that there was
23 palpably no genuine issue of fact which would
24 then entitle them if such a motion was granted
25 to attorney's fees from this day forward.

1 MR. DAVIDSON: May I respectfully
2 say that I am offended by that, Judge.

3 THE COURT: Well, that is what -- you
4 may be offended and I may be offended, but that
5 is their intention.

6 MR. DAVIDSON: Yes. We have presented
7 nothing other than what is written, and we
8 contend that the reason there is an obligation
9 and the reason we say there is an obligation is
10 because that is what they obligated themselves
11 to do in 1980.

12 You are telling me that if they renege
13 on that obligation and I try to enforce that
14 obligation, that they can hit me for costs and
15 I think that is wrong.

16 THE COURT: Well, I am not saying --
17 if you listen to me, I didn't say that that
18 would be my order. I said that would be their
19 position.

20 MR. DAVIDSON: They can make any motion
21 they want.

22 THE COURT: That is right. And if
23 they can prove it, they can also win.

24 The point is that I believe that that
25 is why some of these motions are being brought

1 because the truth of the matter is that in the
2 absence of their being an established fair
3 share number, that is, (1) that you concede
4 as your fair share, as long as you have
5 sufficient acreage at some even questionably
6 sufficient density, the person bringing the
7 motion cannot prevail and that is why in Franklin
8 Township I denied the motion for summary
9 judgment even though the acreage, the density
10 was approximately 3.5 and that is why I am
11 going to deny it in this case as well.

12 However, there is some language in the
13 opinion which says that there must, in fact,
14 be a realistic provision for low and moderate
15 housing and that it will not create a real
16 issue of fact if there isn't, and I would be
17 happy to cite you to the language.

18 So that in defending against this
19 motion, I think that towns do have to weigh
20 that possibility.

21 You are satisfied and that is fine,
22 and I don't say it as a threat. I am saying
23 the plaintiffs say it as a threat, and I think
24 we will continue to see these kinds of motions
25 for that reason.

Your motion raises an issue for the first time that has disturbed me for some time now, and I feel rather certain that there are cases of abuses out there.

If Mr. Hill's letter is not, in fact, an abuse, it gives the impression, if one is suspicious or if one has a background that I had, it gives the impression of potentially being just that. The problem is proving it.

He has come in -- come to you with a letter saying, I want to build low and moderate. How can we call that abuse? Unless you can frame around that letter a sufficient factual background which will then permit me to say, well, the letter may say he wants to go low and moderate, but he really doesn't mean it. really doesn't mean it.

Based on the moving paper say that although I must say as close to making me + yet, and the first I am going to a do it in this case

Now, how about protective order? Do you

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1 on that?

2 MR. HILL: Your Honor, could I be heard,
3 although it is not precisely on this motion?

4 I have heard reports back on this letter
5 and I would like to respond to the Court on it
6 since the Court has made a lot of statements
7 about the letter in its various forms.

8 THE COURT: You are entitled to be heard.

9 MR. HILL: And this letter is not the
10 same letter that you look at in Cranbury.

11 The only way that it is similar is that
12 it contains a 30-day demand to rezone and a
13 promise that a suit will follow, and the
14 undertaking to do low and moderate is included
15 in the letter. The reason you know that, you
16 know, plaintiff's attorneys have long been
17 faced with a problem of looking at some of the
18 language in Mount Laurel which talks about
19 giving notice to a town.

20 There is what I call -- what some
21 attorneys call dicta, what I call public
22 relations in the beginning of the Mount Laurel
23 opinion which are said for the reporters to
24 read, and they are not the heart of the opinion
25 and they talk about litigation and how the

1 opinion is not meant to require -- to cause
2 litigation in New Jersey.

3 And then later on in the opinion they
4 say it is our hope in this opinion that there
5 will be lots of developer's litigation.

6 So, I assume that they do not mean
7 what they say in the early part of the opinion,
8 however, it's there.

9 THE COURT: That's an assumption you
10 should not make.

11 The Chief Justice -- and everything
12 he said in the opinion I am sure --

13 MR. HILL: He says several things --
14 he says different things, directly contradictory
15 things in different parts of the opinion.

16 Anyway, we poor attorneys who are not
17 judges are faced with the problem of how do you
18 give a town a notice and how do you make sure
19 that the notice isn't extended over a long
20 period of time.

21 It's easy if you go to Franklin or
22 Bernards or any one of a hundred municipalities
23 and ask them to change the ordinance, and they
24 say, we will think about it, and you can sit
25 there with them thinking about it for weeks or

months or years. The only way we, as attorneys, can fashion a notice with a beginning and an end to it is in the form of an ultimatum and that is the reason for the particular letter.

The letter also in various forms is, you know, serves the purpose of: If we are lucky enough to have the town say, no, very quickly, we can then bring our lawsuit.

In fact, in a case like the Cranbury case, our particular client had come to us before a client who was in the main part of the opinion and we couldn't represent the second client because we gave a notice of 30 days, we filed last and that it turned out had consequences in a multi-development case although we brought the notice first because we filed last.

We somehow find ourselves where, depending on the development law, we may or we may not have a remedy.

Anyway, that confront us at with how do we put cases can survive the kind of a

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1 get our case filed in time so that other
2 plaintiffs do not come first and the result
3 is the letter which, in effect, as you know,
4 I don't agree with, your Honor.

5 I have heard your Honor's statements
6 and I don't understand why the craftsmanship,
7 you know, is objected to by your Honor.

8 Although your Honor has made these
9 statements in various forms, it has not resulted
10 in any action, I don't understand the purpose
11 of your Honor's criticism of an attorney's
12 attempt to draft a letter to achieve a certain
13 result and which result is, in fact, being
14 achieved.

15 Finally, in answer to Mr. Davidson's --
16 THE COURT: Just on the letter, it's
17 not the same in this case as it is in Cranbury,
18 and you were not here for the Cranbury case
19 in which the letter came up.

20 Do you know anybody else who is sending
21 letter like this when you say "We attorneys"?
22 Is this a form of letter sent out by you:
23 "We attorneys throughout the State of New Jersey..."

24 MR. HILL: No. I am saying that we have
25 a problem of -- as a class of advising a way of

1 noticing towns prior to bringing suit as
2 required by the opinion.

3 THE COURT: No. My question was: Was
4 the "we" Brener, Wallack & Hill? Was the
5 "We" the Bar of the State of New Jersey?

6 MR. HILL: I have no idea. I do not
7 speak --

8 THE COURT: My suspicion is Brener,
9 Wallack & Hill because I have never seen
10 another letter like it elsewhere; and secondly,
11 with respect to what -- the fact that the Court
12 has done nothing to date doesn't mean that the
13 Court won't; and thirdly, with respect to the
14 letter that said that we are experts in the
15 field of municipal litigation.

16 MR. HILL: You are not talking about
17 this letter, are you?

18 THE COURT: I am talking about the
19 Cranbury letter that we have resulted in many
20 thousands of multiple-dwelling units being
21 constructed, and we can assure you that there
22 is no point in fighting because you are going
23 to lose, taken in the context of public
24 statements about municipalities being harp
25 seals and the firm being -- and yourself being

1 known for having said that. I can see that
2 causing a municipality being rather offended
3 because of this release and stiffening which
4 can do nothing about being productive to low
5 and moderate housing.

6 Do you disagree with that? If you
7 feel it is your professional responsibility
8 to conduct a Mount Laurel case in that manner,
9 I say to you: Go ahead and do it until someone
10 tells you it's inappropriate or worse.

11 MR. HILL: Your Honor, I just have a
12 problem when statements of criticism get back
13 to me and they do not come directly from your
14 Honor, but through various forms and I have
15 tried many cases in front of you.

16 THE COURT: I wish my statements would
17 not only get back to you, but be publicized.

18 Unfortunately, you managed -- matters
19 of your successors have been publicized.

20 I think Mount Laurel is being abused
21 in the press in some instances and I don't
22 know how that happens, you know, I don't know
23 who is putting it there, but it happens and I
24 get letters -- I get letters sent to me
25 anonymously and otherwise.

1 I get newspaper articles sent to me
2 about comments that attorneys, plaintiff's
3 attorneys have made about it and defendants,
4 you know. I get them from both sides and it
5 seems to me to lend nothing to what the doctrine
6 is about. It does nothing but underline it.
7 It does nothing but destroy a possible
8 voluntary compliance. It does nothing but
9 stiffen the will of those people who don't
10 want this building to occur, and it has to stop
11 at some point.

12 How it is going to stop, I am not sure.
13 Maybe it will stop to the detriment of the
14 very people it is intended to help or to the
15 detriment of the builders or whomever. I don't
16 know. But it cannot be helpful, Mr. Hill, to
17 have comments of that nature or the aggressiveness
18 which I perceive in that letter.

19 It cannot be helpful to people who
20 are really serious about building low and
21 moderate housing and that is a big "if".

22 MR. HILL: But you are not talking
23 about this letter in this case.

24 THE COURT: Well, I find this letter
25 to be inappropriate as well, not as offensive

1 as Cranbury.

2 MR. HILL: Finally, I would like to
3 just say for the record there are copies of
4 minutes of meetings of the planning board which
5 I am mentioned, but in the process of things
6 which I said are discussed in the process of
7 representing another client, namely, Mr. Zirinsky
8 on the Sage tract in Bernard Township, I assume
9 that you are not trying to weave a web of
10 statements that I make for one client and use
11 them against another client.

12 THE COURT: The record should indicate
13 that that comment was addressed to Mr. Davidson
14 rather than the Court.

15 MR. HILL: I just see that -- there are
16 minutes included which are purely discussions
17 of low -- whether Mr. Zirinsky would have to
18 build low and moderate on the Sage tract, and
19 I was there as Mr. Zirinsky's attorney and I
20 don't happen to remember what I said, but --
21 and I remember very well I have never
22 threatened: I will sue if I have to build low
23 and moderate, but I just want the Court to be
24 clear and I want you to be clear that what I,
25 as an attorney, say for one client in front of

1 a town, it cannot be tagged on another client.

2 Just, you know, that they are two
3 different clients and they are two different
4 pieces of property and they are two different
5 situations.

6 I don't know, and, you know, what the
7 purpose of putting in minutes from a meeting
8 where I was representing another developer on
9 to this application was.

10 THE COURT: Well, I have already ruled
11 that Mr. Davidson has not reached the level
12 of factual proof which would permit me to dismiss
13 the complaint and to that extent his cross
14 motion for summary judgment is denied.

15 Do you want to be heard on the
16 protective order?

17 MR. HILL: Yes, your Honor. We seek
18 simply to -- a protective order because of the
19 request for production of documents and because
20 of the request to take the deposition of
21 Mr. Kerwin included very broad information about
22 the financial background of the company, the
23 financial resources of the company, the
24 financial projections of the development,
25 marketing, we simply seek a protective order

1 for the reasons set forth in the brief before
2 the Court from the internal financial
3 circumstance of Hills.

4 In fact, Hills has zero sales in
5 Bernards Township as of this day. It has
6 about \$40,000,000 in sales in Bedminster alone
7 since January 1st and we don't think that the
8 financial information relating to Hills is
9 the business of Bedminster or our competitor
10 or Bernards, and we seek a protective order
11 simply to curtail the kind of financial
12 information coming particularly since all
13 financial information as opposed to financial
14 projections will be from Bedminster which we
15 do not think is -- has any relevance to this
16 suit.

17 With respect to the projections, we
18 feel that our projections again are not the
19 business of Bernards' projections from various
20 scenarios as to what density we might get if
21 we were to bring Mount Laurel and how much --
22 what the Mount Laurel would cost, those kinds
23 of internal documents we do not -- we are
24 seeking be protected from discovery.

25 Thank you.

1 THE COURT: On the Moskowitz matter.

2 MR. SHAW: Howard Shaw for the
3 defendant.

4 If I may respond first to Mr. Hill's
5 argument on the plaintiff's application for
6 a protective order.

7 The plaintiff's application seeks to
8 prevent Bernards Township from getting access
9 to all of the plaintiff's financial records,
10 and essentially what the plaintiff is asking the
11 Court and the defendants to do is take on faith,
12 the plaintiff's contention that they just simply
13 cannot afford to build Mount Laurel housing
14 under the zoning regulations as they presently
15 are.

16 We think that the financial records of
17 the plaintiff are pertinent to several matters.

18 First, they are pertinent to
19 substantive matters, specifically to the
20 veracity of plaintiff's claim that they cannot
21 afford to construct Mount Laurel housing in a
22 cost-effective order despite the 1980 bonuses
23 of more than 200 percent and despite the
24 elimination in 1980 of the cost-generative
25 provisions in that rezoning.

1 Secondly, we submit that the
2 financial records of the plaintiff are relevant
3 to the remedial phase, if it comes to a
4 remedial phase in this case, that if the
5 ordinance is invalid, we are entitled to seek
6 cost information to know what provisions must
7 be changed in the ordinance and to what extent
8 in order to enable the plaintiff to build
9 Mount Laurel housing in a financially reasonable
10 way.

11 The Mount Laurel case in several
12 passages makes reference to cost, most
13 noticeably on Page 259 the Court refers to
14 some documentary evidence, some report and
15 says that those will be good guides for the
16 courts in determining the effective cost-
17 generative provisions, but it also says on that
18 page that the Court should take specific cost
19 evidence from the litigants.

20 The minutes of the Planning Board on
21 January 24 indicates the fact that Mr. Hill
22 mentioned at that meeting that he has a number
23 of clients -- a number of his clients are
24 builders.

25 "They have figures what it will cost

1 builders to build these units."

2 MR. HILL: Who was I representing at
3 that meeting?

4 THE COURT: Excuse me. Don't
5 interrupt.

6 MR. SHAW: Regardless of who Mr. Hill
7 was representing at that meeting, he indicated
8 that he has a number of clients who are
9 builders and who have cost information.

10 We are interested in that cost
11 information. We think it is pertinent.

12 We are interested in information
13 regarding land costs, labor costs, equipment
14 costs, their financing costs, methods of
15 allocating their costs to determine whether,
16 in fact, they are making a fair allocation
17 so that the allocation that they are saying
18 results in Mount Laurel housing being too
19 expensive is a fair estimate, their own
20 internal projections to see if what they are
21 telling the Court about their costs is really
22 true.

23 THE COURT: Won't that all become
24 relevant only if they are awarded or may be
25 awarded a builder's remedy?

1 In other words, won't it become
2 relevant only after the fair share and
3 compliance of the ordinance is determined?

4 MR. SHAW: Not entirely. No, it is
5 relevant in part to the substance of the
6 case, the fair share -- not the determination
7 of a fair share number certainly --

8 THE COURT: Right.

9 MR. SHAW: -- but compliance, yes,
10 because the allegation --

11 THE COURT: No, no. Compliance of
12 your ordinance, compliance -- their building
13 plans has nothing to do with whether the
14 ordinance complies with it.

15 MR. SHAW: Well, it does in the sense,
16 your Honor, that they are alleging that our
17 ordinance, as it stands, makes it impossible
18 to build the Mount Laurel housing, and we
19 submit that if we have access to their financial
20 information, we will have an opportunity to
21 determine whether, in fact, their allegations
22 are true or they are not true.

23 If they are not true in alleging that
24 they cannot afford to build Mount Laurel housing,
25 that substantially undercuts their argument that

1 the ordinance doesn't allow for the building
2 of Mount Laurel housing.

3 That is a substantive issue before
4 you ever get to the remedial stage.

5 As regards the remedial stage, also,
6 the projections of cost and profitability
7 determine whether --

8 THE COURT: You mean to tell me that
9 if ordinances are going to rise and fall on the
10 financial acumen of the particular developer
11 in the town so that if you have Hovnanian who
12 has a capacity and is much smarter than builder
13 "X", I was going to say Hills -- said in jest --
14 that your compliance is going to rest on that?
15 Doesn't it rest on whether anybody under the
16 ordinance as it stands can come in and build
17 at those densities?

18 MR. SHAW: Well, I think the questions
19 are intertwined because if you are talking
20 about anybody in a vacuum, then all you are
21 talking about are theoretical perceptions of
22 the ordinance that are not related to real
23 numbers.

24 What we are looking for from the
25 plaintiff is some real numbers --

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THE COURT: There are people out there, many of them, who will testify that at "X" density per acre no one can build Mount Laurel housing and that at "Y" density it is possible and at "Z" it is for sure, and it is irrelevant whether Hills can do it because they may not be the plaintiff. They may not be the builder.

I mean, you know, maybe they are packaging this deal and they are going to walk away. That's not the important question.

The question is whether Joe Shmoe can build it. That's what the issue is and that's what the Court was talking about.

Otherwise the ordinance will rise and fall upon how sophisticated the plaintiff is.

That obviously is not the intent of the Court.

MR. SHAW: Well, your Honor, specific allegations in this case are that Hills cannot do it. And if, in fact, their figures show that Hills can do it, well, that goes some way at least to showing that Joe Shmoe can do it and there has got to be least common Joe Shmoe. I don't know whether Hills is it, but in any event, someone has got to be it and if Hills has

1 going to come in and say, no, and put on a
2 witness and say, no, here is the ordinance.
3 We have looked over our books, can't do it.

4 THE COURT: No. I presume the plaintiff
5 is going to come in and say, it's not a question
6 of: We, Hills can't do it. It can't be done.
7 That's what I presume the plaintiff will say.

8 In fact, I would be very surprised if
9 the plaintiff took the approach you have just
10 indicated.

11 MR. SHAW: Well, we submit, your Honor,
12 that we are entitled to look at Hill's figures
13 to rebut that very presumption.

14 If there is testimony that it can't be
15 done and Hill's figures will enable us to
16 show that it can't be done --

17 THE COURT: You see, in the builder's
18 remedy aspect it may very well be relevant.
19 Let's suppose that the ordinance was found
20 non-compliant and suppose that Hills was
21 granted a remedy, and suppose that Hills
22 presents a plan at 20 an acre and you say, no,
23 you know, you are entitled to a bonus now
24 because you have got a builder's remedy, but
25 this is ridiculous. You can do it in pen and

1 Hill says, no, we can't.

2 Now, at that stage I have no problem
3 with proper discovery. What the level of that
4 discovery is we haven't dealt with yet.

5 Of course, we have not reached that
6 in any case, but I have a great deal of problem
7 with it before it's ever been decided that
8 Hills is even entitled to a builder's remedy.

9 I don't think you need that to prove
10 the compliance of your ordinance.

11 The ordinance should stand or fall
12 upon whether it provides a realistic
13 opportunity to any builder to build low or
14 moderate housing, and if that is the case, it
15 should not be relevant that Hills has got more
16 money than anybody else or anything of that sort.

17 MR. SHAW: Let me turn to one other
18 aspect of this, your Honor, on the substantive
19 matter.

20 We have raised, and your Honor has
21 addressed at length, our allegation that Hills
22 lacks standing to pursue this case. Your Honor
23 has refused to grant our motion for summary
24 judgment because we haven't -- on the ground
25 that we haven't presented sufficient facts in

1 these documents to show that Hills is lacking
2 in the good faith in wanting to build this
3 housing.

4 The financial information will show,
5 as well whether Hills is lacking in good
6 faith, in making the allegation that they cannot
7 afford to do it.

8 If they are alleging before this Court
9 that they cannot afford to do it and therefore
10 they need density bonuses and they need
11 striking of what we consider to be legitimate
12 requirements in the ordinance and we are able
13 to show through their cost records that, in fact,
14 they can do it and they are just looking to
15 maximize profits, we think that may go a long
16 way also toward helping to prove the defense
17 that we have raised.

18 THE COURT: All right. I am satisfied
19 at this point that the request with respect to
20 the disclosures sought from Hills is premature
21 and I will deny that application without
22 prejudice at an appropriate time in the
23 litigation which would most likely be in
24 connection with the builder's remedy.

25 With respect to Dr. Moskowitz, I think

1 on that motion we have to kind of fish or cut
2 bait, and I am going to permit the Town to
3 notify Hills within a period of 20 days whether
4 or not Dr. Moskowitz will be utilized as an
5 expert witness for this litigation, and if he
6 will be, then he shall be subject to depositions
7 upon proper notice.

8 If it is the position of the Township
9 that he will not be, then he is no longer an
10 expert witness. Therefore, the depositions
11 would be inappropriate unless there was some
12 other basis for them.

13 MR. SHAW: May I have one moment, your
14 Honor?

15 THE COURT: Yes.

16 (Discussion off the record between
17 defense counsel.)

18 MR. SHAW: Your Honor, with due respect,
19 may we ask that rather than 20 days from today
20 be the deadline that it be 20 days from the
21 date of the release of your Honor's opinion in
22 the Warren case and I ask that very seriously,
23 your Honor.

24 THE COURT: Yes, that is okay.
25 It is coming out on Wednesday.

1 MR. SHAW: That's fine.

2 THE COURT: Sure. No problem.

3 All right. Just so we can summarize,
4 and I would ask that Mr. Davidson submit the
5 order.

6 The motion for summary judgment brought
7 by Hills is denied.

8 The motion for summary judgment
9 brought by the Township is denied.

10 The motion for a protective order
11 brought by Hills is granted.

12 The motion with respect to a protective
13 order for Dr. Moskowitz is granted subject to
14 the provision that it shall be for only a
15 period of 20 days from the release of the
16 Court's decision in the A.M.G. versus Warren
17 and that within 20 days thereafter the Township
18 shall notify the plaintiff whether or not it
19 intends to rely upon Dr. Moskowitz as an expert.

20 If it does, the order will be
21 vacated and the plaintiff shall have the right
22 to depose Dr. Moskowitz with proper notice.

23 All other motions are denied without
24 prejudice to be renewed. All right.

25 MR. HILL: Your Honor, is the form of

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order on the protective order that we submitted
with the motion just on the financial
information adequate?

THE COURT: Well, I want to put it
all in one order in any event.

MR. HILL: All right.

MR. DAVIDSON: Thank you, your Honor.

MR. HILL: Thank you, your Honor.

THE COURT: Thank you.

* * * * *

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CERTIFICATE

I, JUDITH R. MARINKE, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, certify that the foregoing is a true and accurate transcript of the proceedings as taken before me stenographically on the date hereinbefore mentioned.

Date: Aug 1, 1984

Judith R. Marinke
 JUDITH R. MARINKE, C.S.R.
 License No. XI00392

My Commission expires on:

Sept 18, 1984

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