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Brief of Plaintiffs in Support of Settlement

Pgs 42

JOSEPH H. RODRIGUEZ, PUBLIC ADVOCATE
DEPARTMENT OF THE PUBLIC ADVOCATE
BY: KENNETH E. MEISER, DEPUTY DIRECTOR
DIVISION OF PUBLIC INTEREST ADVOCACY
CN 850
TRENTON, NEW JERSEY 08625
(609) 292-1692

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SOMERSET/OCEAN COUNTIE
DOCKET NOS. L-36896-70 P.W.
L-28061-71 P.W.

ALLAN DEANE CORPORATION, :

Plaintiff, :

and :

LYNN CEISWICK, et al., :

Plaintiff-Intervenors, :

vs. :

TOWNSHIP OF BEDMINSTER, et al., :

Defendants. :

CIVIL ACTION

LYNN CEISWICK, et al., :

Plaintiffs, :

vs. :

TOWNSHIP OF BEDMINSTER, et al., :

Defendants. :

BRIEF OF PLAINTIFFS IN SUPPORT OF SETTLEMENT

On the Brief:

Kenneth E. Meiser, Deputy Director

TABLE OF CONTENTS

TABLE OF CONTENTS

INTRODUCTION

The Ceiswick plaintiffs file this brief in support of their request to have the Bedminster settlement approved. The settlement hearing presents issues on which there is fundamental disagreement. Both Ceiswick and Dobbs purport to represent the best interests of low income people; the plaintiffs submit that this interest will best be protected by approving the settlement, while Dobbs claims it will be best served by rejecting the settlement and permitting him to build his development. The Ceiswick plaintiffs assert that the settlement is reasonable; Dobbs disagrees. Both Ceiswick and Dobbs seek a sewer expansion in Bedminster the plaintiffs propose expansion of the Environmental Disposal Corporation plant, while Dobbs seeks approval of his package treatment plant.

This controversy, however, does not come before the court in a legal vacuum It is a fundamental principle of American jurisprudence to favor settlements of all cases, including public interest cases. Mt. Laurel litigation is no exception. In Morris County Fair Housing Council v. Boonton Tp., L-6001-78 P.W. (hereinafter Morris County), the court ruled that Mt. Laurel settlements should be approved by the courts so long as they are "fair and reasonable." Slip Opinion A-10-11. Plaintiffs in this brief will demonstrate that this is the proper legal standard for reviewing a settlement agreement.

At the hearing, plaintiffs will establish that the settlement proposed in this case is reasonable. On the crucial issue of sewer expansion, they will demonstrate that the choice to seek E.D.C. expansion rather that Dobbs' package treatment plant is reasonable. E.D.C. expansion will open up a large section of the Township for development; the package treatment plant would serve only Dobbs. Additionally, there are a number of unanswered questions about Dobbs' system. Moreover, the Department of Environmental Protection has stated that it "strongly discourages the construction of private 'package'

treatment plants, as proposed by Dobbs." D.E.P. would consider such an application only as a last resort, if there were no other possible solutions. A-91. Under these circumstances, the sewer expansion choice in the settlement is eminently reasonable.

The settlement proposal is also reasonable because it maximizes the construction of lower income housing in Bedminster in the near future. It will result in removing all obstacles to the construction of 440 lower income units by Hills right away, and the expansion of E.D.C. will permit the remainder of the fair share contained in the settlement to be constructed. Rejection of the settlement, on the other hand, will produce more litigation, not housing. It virtually guarantees a protracted trial and appeal process; during this period, no lower income housing is likely to be produced and no sewer expansion program will even be approved.

Dobbs suggests, however, that no matter how reasonable the settlement may be, he must get a developer's remedy because he has "succeeded." However, if this settlement, is reasonable, Dobbs has not succeeded, and is not entitled to a developer's remedy. This court stated in Orgo Farms v. Colts Neck, 192 N.J. Super. 599 (Law Div. 1983), that a builder can only obtain (a builder's remedy) through a judgment of non-compliance. No such judgment has been entered in this case, and there is therefore no absolute right to a builder's remedy.

The Court in Morris County, supra, A-14, ruled that a developer cannot exercise "veto power" over a proposed settlement by insisting upon his right to a builder's remedy. The court added, "The weight to be assigned this factor in determining whether to approve a settlement will depend upon the facts of the particular case." Morris County, A-14. The record in this case will demonstrate that Bedminster was committed to settlement before Dobbs entered the field. Moreover, no part of the settlement is based upon Dobbs'

recommendations - not the fair share number, not the sites, not the terms of the ordinance, and not the plan for sewer expansion.

Furthermore, a developer's remedy granted to Dobbs would not be of immediate aid to low income people because of the D.E.P.'s opposition to his package treatment plan. In view of the D.E.P.'s opposition, his site is not "readily available for development." At best, if he can tie into the E.D.C. expansion his site will become available for development somewhere down the road after E.D.C. approval and construction of its expansion plant. Therefore his claim to a developer's remedy should not be a basis for rejecting the settlement. Under these circumstances, the Bedminster settlement reasonably protects the interests of lower income persons and should be approved, even though it deprives Dobbs of his claim to a builder's remedy.

PROCEDURAL HISTORY

PROCEEDINGS BEFORE THE MOUNT LAUREL II DECISION

The Ceiswick plaintiffs filed their exclusionary zoning complaint against Bedminster Township on June 1, 1972. The complaint was filed after they were denied permission by the trial court to intervene in a similar action filed a year earlier, on August 23, 1971, by Allan Deane Corporation. Upon appeal of the denial of intervention, the Supreme Court entered an order permitting consolidation and intervention. The trial court, on September 13, 1973, entered an order consolidating the two cases.

The first trial took place in March 1974. A decision was rendered on February 24, 1975, invalidating the Bedminster zoning ordinance. On January 21, 1977, the Appellate Division affirmed the trial court's decision per curiam; the Township's petition for certification was denied on May 3, 1977. Allan Deane Corp. v. Township of Bedminster, 74 N.J. 272 (1977).

A second zoning ordinance was adopted, again challenged and again invalidated by the trial court on December 13, 1979. On January 29, 1980, the court directed the Township to rezone under the supervision of a master and declared that Allan Deane was entitled to corporate relief. George Raymond was chosen as the master.

On May 27, 1980, George Raymond submitted a report to the trial court on the subject of the revised Bedminster ordinance. Pursuant to the ordinance, high density developers were required to seek subsidies for low income housing. In the event that subsidies were unavailable, he recommended that the ordinance require that low and moderate income housing be provided by the developers through price controlled units and resale controls. After receipt of the report, the trial court held a hearing on the issue of compliance on July 27, 1980. At the hearing, the court ruled that a New Jersey municipality has no obligation to

take any affirmative steps to ensure that housing affordable to low and moderate income persons is built, so long as the municipality does not preclude least cost housing.

Bedminster rezoned in accordance with the court's decision. An order of final judgment was entered on March 20, 1981, declaring that the revised ordinance complied with the constitutional requirements of Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel I, 67 N.J. 151 (1975) and Oakwood-at-Madison v. Township of Madison, 72 N.J. 481 (1977). The order, in addition, directed the master to remain on call to review the processing of Allan Deane's corporate relief. On May 1, 1981, the Ceiswick plaintiff-intervenors alone appealed, challenging the failure of the revised zoning ordinance to require low and moderate income housing, regardless of whether subsidies were available, and the failure of the court to require, as a condition of corporate relief, that Allan Deane provide 20% low and moderate income housing in its development.

On November 5, 1980, prior to Judge Leahy's entry of final judgment, the objector, Leonard Dobbs, filed a complaint against Bedminster seeking an order permitting him to build a regional shopping center. In the complaint, Dobbs did not offer to provide low and moderate income housing or even mention the subject.

The Ceiswick appeal was held in abeyance until the decision in Southern Burlington County N.A.A.C.P. v. Mt. Laurel Tp. II, 97 N.J. 158 (1983) (hereinafter Mt. Laurel II) was rendered. During this period of abeyance, Dobbs submitted a revised proposal to the Township on August 16, 1982. For the first time, Dobbs' proposal contained a housing element. In his revised proposal, three hundred low-rise housing units would be built, but not "for at least ten years." DA-C2.* There was no reference in the proposal to low and

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* Dobbs' Appendix C-2.

moderate income housing or even, for that matter, to least cost housing.

PROCEEDINGS AFTER MOUNT LAUREL II

After Mt. Laurel II was decided, both Ceiswick (on April 22, 1983) and Bedminster Township (on May 25, 1983) submitted briefs to the Appellate Division urging summary reversal and remand for the purpose of bringing Judge Leahy's decision into full compliance with Mt. Laurel II. Allan Deane sought affirmance of the trial court decision, while Dobbs made no effort to participate in the appeal. Oral argument was held on June 1, 1983. On August 3, 1983, the Appellate Division remanded the matter to this court.

Even before the Appellate Division's oral argument and the remand, attempts were commenced to resolve this case. On May 13, 1983, Richard Coppola, the Township planner, wrote a memorandum indicating the Township's desires to resolve this litigation (1) by having Allan Deane construct 20% low and moderate housing in its development, and (2) by revising Bedminster's zoning ordinance to comply with Mt. Laurel II so that it could obtain a certificate of compliance. A-41. In May 1983, George Raymond requested and received permission from the trial court to continue as master in the settlement process. A-44.

A month after the Coppola letter and several weeks after the appellate argument, Dobbs wrote a letter offering for the first time to include low and moderate income housing in his proposal. DA-F.

All parties to the Bedminster exclusionary zoning litigation, including the master, met on July 1, 1983. The primary purpose of this meeting was to review a proposal by Hills Development Company, the successor in interest to Allan Deane (hereinafter Hills), to provide 20% low and moderate income housing in its planned unit development. Amendments to the zoning ordinance were also discussed, although primarily in the context of the Hills' development. Coppola letter of July 26, 1983. A-46.

A status conference took place before this Court on October 6, 1983, and an order was entered on November 3, 1983, summarizing what had occurred. George Raymond was directed to review the proposal of Hills to construct 20% low and moderate income housing. In addition, the court directed him to review Bedminster's fair share and the proposed new land use ordinance of the Township. For purposes of convenience, the remainder of this procedural statement will first summarize the developments related to Hills' proposal and will then discuss the circumstances surrounding the zoning revisions.

THE HILLS DEVELOPMENT

The court entered a second order on November 18, 1983, approving the Hills' proposal to construct 260 lower income units. The proposal was the product of intense negotiations and meetings between representatives of Hills, Ceiswick, the Township and the master. Entry of the November 18, 1983, order was possible only because the parties' extensive negotiations produced agreement upon, inter alia, the following issues:

> The definition of affordable units to low and moderate income households;
>
> The prices of low and moderate income units for each bedroom size;
>
> The distribution of units among various bedroom sizes;
>
> The policy on the provision of rental units and the creation of a downpayment fund in lieu of rental units;
>
> The use of interest buy-downs;
>
> Waiver of specific features in the Bedminster zoning ordinance;
>
> The timing of market unit approvals by the Bedminster Planning Board.

All of these issues took time to resolve because the Hills development was the first inclusionary development in the state, and these issues were being confronted in New Jersey for the first time. Although the parties reached agree-

ment on all these issues, counsel for Dobbs objected in writing to a number of the terms and reiterated his objections at the November 18, 1983 hearing. DA-K. Despite his objections, the court approved the settlement as negotiated by the parties and the master.

Entry of the November 8, 1983, Order was a giant step forward, but much remained to be done before construction could begin. The Hills agreement was conditioned upon financing by the New Jersey Mortgage Finance Agency (M.F.A.). Hills, and the Ceiswick plaintiffs worked with the M.F.A. to obtain this approval. Bedminster Township also wrote to the M.F.A. requesting that the state agency approve the financing. A-64. The M.F.A. did ultimately approve the financing, although a change in interest rates resulted in a revised order which reduced the sales price of certain units being approved on December 21, 1983.

A second Case Management Conference took place on January 25, 1984. After this conference, resolution of issues concerning the Hills' lower income units again took center stage. Over a four month period, representatives from Hills, Ceiswick, the Township and the master worked to finalize the Hills' documents, obtain approval of these documents from the M.F.A. and the Mortgage Guaranty Insurance Corp., and resolve the remaining policy issues. Among these issues were the following:

> Contribution to the Non-Profit Corporation by Hills and, by Bedminster;
>
> The composition of the non-profit corporation and its certificate of incorporation;
>
> The form of the deed restrictions and the recapture agreement;
>
> The declaration of covenants;
>
> The procedures for selection of home buyers;
>
> Policy in cases of foreclosure.

On May 25, 1984, the court entered an order approving the agreement and documents. Dobbs made virtually no comments on these issues during the entire process.

THE ZONING REVISIONS

After the Appellate Division's remand, the importance of expediting the Hills lower income units caused Bedminster's revisions of its zoning ordinance to be placed on a back-burner. In August 1983, Coppola completed a Master Plan Housing Element, which contained recommendations for zoning changes to comply with Mt. Laurel II. On September 19, 1983, Bedminster Township's council introduced and gave first reading to a revised zoning ordinance incorporating these changes. The Township delayed enactment of the ordinance, after receiving a written request from counsel for the Ceiswick plaintiffs, dated September 27, 1983, urging postponement of enactment. A-50. The letter noted problems with the ordinance, and recommended that it not be adopted until it had been approved by the master and the parties to the Ceiswick litigation. The Township accordingly delayed action on passage of the ordinance. Two months later, this court in its November 18, 1983, order recognized that:

> Bedminster has commenced a process to amend its Land Development Ordinance to bring it into compliance with Mt. Laurel II and, at the request of the Ceiswick plaintiffs (the New Jersey Department of the Public Advocate) and this Court, has delayed any further ordinance revisions pending the submission of the Hills Development Company proposal and the reports of the Master required by Paragraphs B and C of the Case Management Order of this Court dated November 3, 1983. A-55.

After this order resolving part of the Hills' dispute was entered, George Raymond confronted his second task -- the review of Bedminster's fair share and its zoning ordinance. He submitted a draft report to all parties and Dobbs on December 23, 1983, and sent a final report to the Court on January 10, 1984.

In both reports, the master discussed fair share, phasing and site suitability.

Although the master received a fair share number as high as 2,008 from Dobbs (DA-L2), his report stated that Bedminster's fair share should be 944 units. However, he also recognized that if the Township were forced to absorb 944 lower income units in six years through inclusionary developments, it could result in the construction of up to 4,720 units. He concluded that "such a rate of growth would be excessive," and he recommended a reasonable phasing requirements, such as the construction of from 506 to 665 lower income units between 1984 and 1990. The Ceiswick plaintiffs, who had submitted a fair share number of 1,179 for Bedminster, indicated that they would accept the phasing recommendation for the reasons expressed by the master. A-73.

An interrelated issue concerned sewers. Dobbs and the Ceiswick plaintiffs both recognized the need for sewer expansion. Wallace, one of Dobbs' experts, discussed sewer problems in his December 1983 report. In a January 20, 1984, report, Wallace calculated that only 260 lower income units, those in the Hills development, could be built without expanded sewer treatment capability. In a January 24, 1984, letter, the Ceiswick plaintiffs stated that "without a satisfactory sewerage plan, an inclusionary zoning ordinance is meaningless." A-75. The plaintiffs requested that the master make additional findings on the need to expand sewer capacity in Bedminster, pointing out that repose could be conditioned upon a satisfactory plan and timetable for increasing sewer capacity. A-75.

The Ceiswick plaintiffs also sent a letter on December 19, 1983, outlining changes that were needed in the proposed Bedminster zoning ordinance to ensure the realistic opportunity for lower income housing. A-66. George Raymond's final report incorporated a number of these changes. DA-P 44 to 48. Dobbs made no suggestions on the content of the Bedminster zoning ordinance.

At the January 25, 1984, case management conference, Dobbs and Hills were

given the opportunity to submit plans to the Township -- Dobbs for an entirely residential development and Hills for the "top of the hill" development. The Township accepted the Hills proposal and rejected Dobbs' proposal.

In anticipation of another case management conference on April 13, 1984, George Raymond submitted a second report, Compliance with the Mount Laurel II Mandate by Bedminster Tp., New Jersey. He calculated that Bedminster's fair share under the newly developed consensus methodology was 819. His report concluded that 440 lower income units were immediately sewerable at the two Hills' sites. Sites which were classified as Group II in his report would require an expansion of the Environmental Disposal Corporation (hereinafter E.D.C.) system and franchise area before high density construction could take place there. Raymond recommended that the Bedminster zoning plan be approved, provided E.D.C. committed itself to an expansion of its plant and the Township supported the expansion application. Raymond was aware that Dobbs had submitted its plan for development on its site predicated on the construction of its own package treatment plan. Raymond's report noted, however, that the Dobbs' proposal for a package treatment plant could take seven months longer than approval and construction of the E.D.C. proposal. He concluded that expansion of E.D.C. was a reasonable response to the need for expansion in Bedminster.

The case management conference on April 13, 1984, did not produce either agreement or a settlement of the zoning issues, and on May 10, 1984, Dobbs filed a motion to intervene in the Ceiswick/Allan Deane case. On May 25, 1984, the court denied without prejudice the motion to intervene. Instead, the court granted the Ceiswick plaintiffs and the Township the opportunity to "attempt to present to the Court a statement of the remaining issues in this case, including fair share and a compliance package." Exhibit 66, para. 4. Ultimately, a

settlement was reached between the Township and Ceiswick. A-92.

In the settlement, the parties accepted a compromise fair share number of 665, 80% of the consensus methodology number. The reduction from the full consensus number was based on the arguments that Bedminster should be permitted to phase in its fair share over a period of longer than six years; the need to get a settlement and move on from litigation to the business of sewer expansion and housing construction; and the unique factual history of the Bedminster litigation.

The agreement recognized that some sewer expansion was necessary, either through E.D.C., Dobbs or the Bedminster system. The parties agreed that an agreement between E.D.C. and Bedminster furnished the quickest way to obtain the necessary sewer expansion.

The settlement agreement provided for additional zoning amendments as requested by the Ceiswick plaintiffs to ensure lower income housing and the reduction of municipal fees for this housing.

I. MOUNT LAUREL COURTS CAN APPROVE SETTLEMENTS AND GRANT REPOSE BASED UPON SETTLEMENTS SO LONG AS THE SETTLEMENT IS REASONABLE

New Jersey courts have long endorsed the policy of encouraging the settlement of litigation. Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 35 (1957); Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974). Settlements permit parties to resolve disputes on mutually acceptable terms. They also save the parties litigation expenses and facilitate the administration of the courts by conserving judicial resources. Of equal importance, they prevent the delay engendered by a lengthy trial and appellate process.

In public interest cases, such as class actions or taxpayers suits, settlements are still favored. However, unlike ordinary lawsuits, such representative litigation cannot be terminated by mere agreement among the parties themselves to the potential prejudice of absent third persons. See R. 4:37-4 (class action cannot be dismissed without approval of the court); Tabaac v. Atlantic City, 174 N.J. Super. 519 (Law Div. 1980) (taxpayer suits cannot be dismissed without approval of the court). Prior to termination of a representative suit on the basis of a negotiated settlement, the court must review and approve the settlement and determine that it adequately protects the interests of absent third parties. Once, however, a court has determined that a negotiated settlement is "fair, reasonable and adequate," it can enter a judgment in a public interest case approving the settlement and binding third parties. See, City of Paterson v. Paterson General Hospital, 104 N.J. Super. 472 (App. Div. 1969) aff'd, 53 N.J. 421 (1969) (entry of consent judgment in class action); Moore's Federal Practice ¶23.60; Tabaac v. Atlantic City, 174 N.J. Super. 519 (Law

Div. 1980) (entry of consent judgment in taxpayer suit). Plaintiffs submit that the same principles should govern entry of a Mt. Laurel II "judgment of compliance based upon a court-approved settlement of an exclusionary zoning case.

In Morris County Fair Housing Council v. Boonton Tp., L 6001-78 P.W. Superior Court, Morris/Middlesex County (hereinafter Morris County), Judge Skillman specifically recognized that the "policies favoring settlement are operative in Mt.Laurel litigation." slip opinion, A-6. He referred to concerns in Mt. Laurel II that "[t]he length and complexity of [Mount Laurel] trials is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue." Mt. Laurel II, 97 N.J. at 200. Consequently, the Court expressed a desire "to simplify litigation in this area" and "to encourage voluntary compliance with the constitutional obligation." Id. at 214. In a similar spirit, the Supreme Court said that "the Mount Laurel obligation is to provide a realistic opportunity for housing, not litigation." Id. at 352. The trial court therefore concluded that "[t]he settlement of Mount Laurel litigation is a mechanism for addressing these concerns; it will avoid trials, save litigation expenses, provide a vehicle for consensual compliance with Mount Laurel and result in the construction of housing for lower income persons rather than interminable litigation." Morris County, slip opinion, A-7.

While recognizing that he had the power to approve a settlement conditioned upon a judgment of compliance, the trial court stressed that he, likewise, had the duty to determine that a settlement is reasonable. To this end, a hearing on the merits of the settlement is required. The court however, stated:

> The hearing on the proposed settlement is not a plenary trial and the court's approval of the settlement is not an adjudication of the merits of the case. Armstrong v. Milwaukee Bd. of School Directors, 616 F. 2d 305, 314-315 (7th Cir. 1980); Flinn v. FMC Corp., 528 F. 2d 1169, 1172 (4th Cir. 1975) cert.

> den. 424 U.S. 967 (1976). Rather, it is the court's responsibility to determine, based upon the relative strengths and weaknesses of the parties' position, whether the settlement is "fair and reasonable," that is, whether it adequately protects the interests of the persons on whose behalf the action was brought. Armstrong v. Milwaukee Bd. of School Directors, supra; Cotton v. Hinton, 559 F. 2d 1326, 1330 (5th Cir. 1977). Moreover, the nature and extent of the hearing required to determine whether the settlement is "fair and reasonable" rests within the sound discretion of the court. Cotton v. Hinton, supra, at 1331; Patterson v. Stoval, 528 F. 2d 108 (7th Cir. 1976); Flinn v. FMC Corp., supra, at 1173. Morris County, slip opinion, A-10-11.

As the court recognized, objectors have a right to oppose a settlement, although their role is limited. They have no right to have the case tried* or to ask the court to substitute its judgment for that of the parties. The court's function is to ascertain whether the settlement adequately protects the interests of absent parties, whether it is within the realm of reasonable outcomes in light of the relative strengths and weaknesses of the case, and whether it was reached through arm's length negotiations without improper collusion. See, Moore's Federal Practice, ¶23.80 at pp. 23-519 to 23-525; 3 Newberg, Class Actions ¶5610c at pp. 500-1 (the standard for review is whether the settlement is within the "range of reasonableness.")** Objectors have the right to demonstrate that a settlement is outside the range of reasonableness based upon these criteria. Unless the settlement is outside this range of reasonableness, it should be approved.

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* The United States Court of Appeals for the Fifth Circuit in Reed v. General Motors Corp., 703 F. 2d 170, 172 (5th Cir. 1970) commented: "The court, however, must not try the case in the settlement hearing because the very purpose of the compromise is to avoid the delay and expense of such a trial."

** As was stated in Newman v. Stein, 464 F. 2d 689, 693 (2nd Cir. 1972), cert. denied, sub. nom. Benson v. Newman, 409 U.S. 1039 (1972):

> In any case there is a range of reasonableness with respect to a settlement - a range which recognizes the uncertainties of law and fact in a particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.

II. THE SETTLEMENT AGREEMENT IN THIS CASE IS REASONABLE

Viewed in the context of the above legal principles, it is clear that the settlement agreement between Bedminster and Ceiswick is clearly reasonable and should be approved. The settlement agreement has four essential features:

(1) Removal of exclusionary features from the Bedminster land use ordinance;
(2) Selection of sites for the construction of lower income housing;
(3) Fair share determination;
(4) Expansion of the E.D.C. wastewater plant.

At trial, testimony by the master, George Raymond, and Alan Mallach will demonstrate that the settlement agreement has removed the exclusionary features from the Bedminster land use ordinance. The report of the master (BB) and the affidavit of Alan Mallach, A-114, will also establish the reasonableness of the sites. The Ceiswick plaintiffs will therefore devote the following sections of this brief to a discussion of the reasonableness of the sewer expansion choice and the fair share number. As will be evident, the settlement is fair, reasonable and in the public interest.

III. THE SETTLEMENT DECISION TO EXPAND THE E.D.C. SYSTEM IS REASONABLE

It is obvious that any Mt. Laurel II settlement in Bedminster must not only address zoning, but also must provide a sewer treatment solution. There is no doubt that the 440 Hills units can be built immediately without any sewer expansion. To achieve the rest of Bedminster's fair share, however, there must be some sewer expansion. In settling this case, there were three options available: expand the Bedminster-Far Hills plant, expand the E.D.C. plant, or construct Dobbs' package treatment plant.

The choice of E.D.C. expansion as a term of the settlement is clearly reasonable. E.D.C. has several advantages over Bedminster-Far Hills. First, E.D.C. is ready, willing and able to start the application process at once. Second, as the Callahan memo states, "The E.D.C. proposal has the ability to provide the greatest potential for Mt. Laurel II housing over the long run." DA-BB Appendix B. Third, E.D.C. has offered to release some present capacity to Mt. Laurel developers if approval of the E.D.C. expansion is accelerated. Under these circumstances, it is certainly reasonable to choose E.D.C. over Bedminster-Far Hills.

It is also reasonable to choose E.D.C. over Dobbs. First, E.D.C. has an existing system, while Dobbs would have to start from scratch. Second, the Dobbs' plant would only serve the Dobbs' site, while E.D.C. will open up a large section of the Township to development. Third, Callahan projects that it would take seven months longer to bring Dobbs on line than E.D.C., excluding any questions of political and administrative viability. DA-BB, Appendix B. Finally, although the matter is disputed, there are some questions about the technical sufficiency of the Dobbs proposal. In his September 26, 1984, report, Callahan states that Dobbs' proposed treatment system "has been

developed only to the general concept level." He further observes:

> In summarizing the discussion of the suitability and viability of subsurface effluent disposal of the Dobb's tract the following should be noted:
>
> A) General accepted design criteria for the proposed effluent disposal technique are not firmly established.
>
> B) There is a significant possibility that the areal extent of the BdB soils is not sufficient to support adequate disposal area for the projected load.
>
> C) There has been no information provided which supports the contention that there will be minimal or no impact to the North Branch Raritan.
>
> D) That only after a carefully planned and reasonable extensive site investigation and analysis, and, at a minimum, a preliminary design for the treatment and disposal system, including a cost analysis, could there be an accurate assessment of the effectiveness and technical viability of proposed treatment system. A-83.

In view of these uncertainties, it is reasonable to choose E.D.C. expansion over the Dobbs' sewer plan in the settlement.

There is, in addition, further justification for this choice. The Department of Environmental Protection (DEP) considers the construction of a private package treatment plant the least attractive option for increasing capacity. The DEP position is stated in an October 16, 1984, letter from Barry Chalofsky, Supervising Planner to Kenneth Meiser:

> The Department strongly discourages the construction of private "package" treatment plants, as proposed by Mr. Dobbs. The reason for this policy involves the problems with long-term operation and maintenance of such facilities. Only if neither the Bedminster Plant, nor the EDC plant could accommodate these flows, would the Department consider such a proposal. However, either the Township, or the MUA, would be

> required to be either the sole permittee, or co-permittee, for the NJPDES permit for the plant. A-91. (emphasis added).

In these circumstances, it is certainly reasonable to choose the E.D.C. solution over a solution which D.E.P. "strongly discourages." In sum, the settlement decision to select E.D.C. expansion is reasonable.

IV. THE FAIR SHARE APPROACH IS REASONABLE

The consensus fair share approach in the Warren Township case produced a fair share number of 819 for Bedminster Township. The Ceiswick plaintiffs in their settlement negotiations accepted the consensus methodology as a valid method of determining fair share. With full awareness of the fair share number of 819, they entered into a settlement for 80% of that number or 655. An examination of the rationale for the consensus approach and for the policy behind settlements will demonstrate that this approach and the 655 number are reasonable. Alternatively, this court has the power to approve the settlement provided that all parties agree to a fair share number of 819, of which 655 must be phased in over six years.

A. The Fair Share Settlement Number of 656 is Reasonable

Carla Lerman was chairperson of the committee which developed the consensus report. In her cover letter to this Court discussing the plan, she stated that even though the methodology is reasonable:

> "no participant involved with this consensus methodology is forefeiting the opportunity to present to the court, in any given case, reasoned evidence why unique situations in a town might not alter the approach, or why existing conditions will have an impact on compliance."

She stressed that there will be a "need and opportunity" to assess a municipality's fair share number "in light of particular conditions within that town," and to raise questions about both the feasibility of the fair share and its staging. A-112. Likewise, in AMG v. Warren Tp., L-23277-80 P.W. Law Div. July 16, 1984, Slip Opinion, p. 77, this court also acknowledged that the consensus methodology is not "blindly rigid." Because this court understood that the methodology will not produce equitable results in every case, the Warren decision did not deny the litigants the opportunity to seek an adjustment

of the consensus fair share in a particular case.*

Since it is apparent from both the Warren Tp. decision and the report of the consensus planners that there can be adjustments in the fair share number in at least some litigated cases, the question then arises as to what adjustments can be made in cases that are settled. Judge Skillman declared that the range of possible fair shares which the court might allocate to a municipality if the case were fully litigated "ordinarily will be a significant consideration" in the court's review of a settlement. Morris County, May 25, 1984, Slip Opinion p. 13, A-13. The court then listed other Mt Laurel factors that should be considered as well in a settlement review: "the anticipated time that it would take to conduct the litigation if there were no settlement and whether the proposed settlement will result in the expeditious construction of a significant number of lower income housing." Morris County, id. How much weight to assign any of these factors, including the fair share that would be allocated if the case were fully litigated, will depend upon the "particular circumstances of the settlement proposal." Id.

The court expanded upon this discussion in an oral opinion of July 6, 1984, in which it approved the Morris County Fair Housing Council's settlement with Morris Township. In that case, the court approved a settlement establishing a fair share number of 535, while stating that "the most likely range of outcomes on fair share would be numbers on the order of six hundred to one thousand two hundred and that the midpoint of that

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* The plaintiffs recognize that the decision implies that adjustments at trial will be appropriate only "in extreme cases." Warren Tp., supra, at 77. Plaintiffs believe that the consensus draftsmen did not intend that there would be such a limited opportunity for adjustment in litigated cases. The meaning of the dictum in the Warren Tp. opinion, however, is not at issue in this case. Future litigated cases will furnish ample basis for deciding what is an "extreme" case and whether the circumstances in which adjustments can be granted should be expanded.

range is nine hundred." Morris County transcript p. 16, A-29. The court's approval of the fair share number was based upon a consideration of the factors that had been enumerated in the slip opinion decision: the philosophy of the courts to favor settlements, the delays that litigation produce, facilitation of early construction of housing, and municipal constraints that might prevent construction of the full fair share.*

The philosophy which favors reasonable settlements, even if they do not produce a full fair share, is summarized by the court's explicit reference in its opinion of Alan Mallach's following statement:

> "Realistic achievement of tangible lower income housing goals is significantly easier in a community that voluntarily undertakes to do so than in a community which is acting reluctantly under a Court Order or under the supervision of a master. Thus, a negotiated settlement in most cases is worth a substantial trade-off in terms of the numbers of lower income units provided for in the settlement." Morris County transcript, id. at 19-20, A-32.

Additionally, the court was concerned about the danger of delay that would be engendered by litigation. A trial would involve a hearing on fair share and compliance, a decision on those issues, the requisite rezoning and a second hearing after the rezoning. The court felt that eight months was an optimistic forecast of how long this process would take, and declined to even speculate how long the appellate process would take. The court expressed concern that if the settlement based upon the scaled down fair share number were rejected, no housing could be started during the trial and appellate process.

Furthermore, the court found that the Morris Township settlement promised "the early construction of a significant number of housing units for lower income

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* The oral decision states that "how substantial a trade-off of numbers should be allowed in order to facilitate settlement" is a matter for case by case resolution. A-34.

persons." Id. A- 37. The settlement involved the rezoning of a significant number of parcels owned by individuals who were ready, willing and able to build inclusionary developments. The court was able to make this finding because it received letters commenting favorably upon the settlement from a number of property owners whose lands were rezoned,and heard testimony from the Township planner concerning the intentions of other property owners. Additionally, one developer whose land was rezoned was a plaintiff in the litigation.

The judicial policy favoring settlements, the inherent delays in litigation and the opportunity for early construction were the major reasons which caused the court to approve the Morris Township settlement. All of these factors are present in the case at bar; in addition, there are other compelling factors justifying a settlement that were not present in Morris Township. As we will now explain, these factors provide powerful reasons for approving the fair share number in the present case.

Preliminarily, plaintiffs submit that a negotiated settlement is worth some trade-off in numbers of fair share units. The constitutional goal is a "realistic opportunity for housing, not litigation." Mt. Laurel II, 92 N.J. at 199. If municipalities such as Bedminster feel that they receive a concrete benefit in the form of a reduced fair share from settling, they are much more likely to enter into and fulfill settlements. In short, housing that is voluntarily accepted can and will more easily be produced.

Moreover, in this case rejection of a settlement will engender even more delay than in Morris Township. If the settlement is rejected, there will have to be a hearing upon the terms of a builder's remedy for Dobbs and a determination of what other action is necessary to meet Bedminster's full fair share. An appeal will inevitably follow. The Township may be able to obtain a stay

of its rezoning pending appeal. Additionally, the Department of Environmental Protection will, in all likelihood, refuse to process any sewer expansion application - either Dobbs or EDC - pending the appellate decision, since it generally declines to process applications without municipal and county support. The net result will be that all low income housing construction in Bedminster will come to an abrupt halt during the trial and appellate process. Moreover, there will be a delay of several years in getting approvals to begin the expansion of wastewater capacity for Bedminster, expansion which is a condition precedent to meeting even the reduced fair share number which the parties settled upon.

On the other hand, approval of this construction will permit immediate construction of 168 additional units by Hills at "the top of the hill." It will lead to an immediate application for expansion of the E.D.C. system. Furthermore, there are a number of property owners in Bedminster who are prepared to take advantage of the rezoning provided for in the settlement as soon as possible. The benefits of approving the Bedminster settlement are tangible and immediate.

Finally, there are facts unique to Bedminster which support a reduction of fair share. The Coppola report of September 5, 1984, itemizes a number of these reasons:

> a. The Court indicated as early as October 1983 that the Bedminster case would not have precedential status because of its unique characteristics.*
>
> b. The settlement in the instance of the Bedminster Township litigation was delayed beyond the July 16, 1984 date of the Warren Township decision simply because of the attempt of all the involved parties, including the Court, the Township, the plaintiff, the Court-appointed Master and the Public Advocate's office, to work out <u>all</u> of the details of the settlement

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* Recognition of this case's unique status was also made part of the court's June 15, 1984, order permitting settlement negotiations. DA-GG; Transcript, Exhibit FF.

in advance of formalizing any part of the settlement, including the specification of the "fair share" number.

c. Months of work have been spent determining major issues, which will serve as models for future "Mt. Laurel II" litigation, including the institution and establishment of the non-profit corporation; the methodology for the funding of the corporation to assure its continued life; the criteria for establishing priorities for 'low' and 'moderate' income individuals; methodologies for insuring that the pricing structure for the 'low' and 'moderate' income housing units will be maintained over time; and formal agreements to insure that sewerage facilities will be made available for the construction and occupancy of 'low' and 'moderate' income housing.

d. Bedminster Township, in fact, will be the first municipality in the State of New Jersey to provide set aside 'low' and 'moderate' income housing under the edicts of "Mt. Laurel II."

e. Much of the framework for this settlement including the use of the corridor was based on the order of Judge Leahy which was not challenged by any party except for the limited appeal of the Ceiswick plaintiffs. (emphasis in original).

As the above decision reveals, there are substantial and compelling reasons for the Court to conclude that the fair share number of 656 in the settlement, which is 80% of the consensus number, is reasonable.

B. Alternatively, This Court Can Approve The Settlement Provided The Parties Agree To A Modification Whereby The Fair Share Number is 819, Of Which 655 Must Be Phased In Over Six Years

This court certainly possesses the authority to condition approval of a settlement upon the willingness of the parties to make certain modifications. Indeed, the court did just that in reviewing the Morris Township settlement. After finding certain deficiencies in the settlement, the court offered the parties the choice of correcting those deficiencies through modification of the settlement agreement or proceeding to trial. Transcript Opinion, A-40. This court could take the same course of action by indicating that a settlement of 819, with a six-year phase in of 655, would be reasonable and by affording

the parties the option to accept such a modification rather than going to trial. Such a modification would be reasonable for all the reasons discussed in support of a 656 fair share number. In addition, two other reasons should be mentioned in support of this approach: the Supreme Court's desire to prevent radical transformation of a municipality and infrastructure limitations.

The Mt. Laurel II decision allows the present and prospective fair share to be phased in over a period of years where necessary to prevent the municipality from being "radically transformed." Mt. Laurel II, 92 N.J. at 219. There is no illustration in the Mt. Laurel decision of what the Supreme Court meant by the phrase, "radically transformed." The discussion in the Mt. Laurel II case concerning Clinton Township, however, is suggestive. Round Valley, the plaintiff in Clinton, proposed a development that would have "added 10,000 people over a period of nine years to the population of Clinton, more than doubling its 1980 population of 7,345." Mt. Laurel II, supra, 92 N.J. at 323. In remanding the Clinton case to the trial court, the Supreme Court ordered that if a developer's remedy was granted, the court should consider whether the development would effect a "radical transformation" and, if so, whether it should be phased in at a rate slower than that proposed by the plaintiff, i.e., over a period longer than nine years. Id. at 331-2.

Both the Bedminster settlement and satisfaction of the full fair share would require a much faster rate of growth than that which concerned the court in Clinton. This is most readily demonstrated by the following chart:

	Settlement	Consensus
Housing Units in Bedminster 1980	914	914
Fair Share Number	656	819
Units Required to Meet Fair Share in 20% Inclusionary Development	(5 x 656) 3,280	(5 x 819) 4,095
Percentage Increase in Units in Bedminster, 1980-1990	358%	437%

Thus, while the Supreme Court expressed concern in Mt. Laurel II about the transformation effects of a 132% increase in Clinton over nine years, the settlement proposal here which Dobbs asserts is too little means a 358% increase over six years.

Coppola in his September 1984 report lists the four municipalities in New Jersey which had the largest percentage increase in housing units from 1970 to 1980:

Plainsboro	513%
Manchester Township	335%
Berkeley Township	198%
Voorhees Township	188%*

These ten year figures* strongly support the reasonableness of the Bedminster settlement as a phase-in plan. Without considering any new housing in Bedminster Township outside the inclusionary developments, the phase-in plan commits Bedminster Township to a rate of growth that is faster than that of any other municipality in the state, except Plainsboro, during the period from 1970 to 1980. Concerns about the rate of growth caused George Raymond to recommend last December that Bedminster not be required to phase-in more than 500 to 665 units between 1984 and 1990. DA-P 48-54. The settlement number of 656 is virtually the upper ceiling which Raymond recommended.

One further point should be made on the subject of phasing. Infrastructure limitations also support this phase-in proposal. Without sewer expansion, only 440 units, all by Hills, can be provided. Even the phase-in number of 656 can be met only if E.D.C. receives expansion approval early enough to permit construction of an additional 200 units of lower income hous-

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* See also A-72.

ing by 1990. The uncertainty of the timing of the expansion approval and construction further supports the phase-in alternative.

At this point, it may be helpful to return to the standards for review of a settlement. Approval of a settlement is not an adjudication of the merits of the case. It is the court's responsibility to determine whether the settlement is reasonable in light of the relative strengths and weaknesses of the case. One weakness is that no case has defined when phasing is appropriate or how a phasing schedule should be established. The master recommended that Bedminster provide between 500 to 665 units as a realistic phasing response. There is no way of knowing how this court or an appellate court would respond to that recommendation if the case were fully tried. In light of this uncertainty, the 656 number is a reasonable settlement response. This court should either accept 656 as a reasonable fair share settlement number or permit the agreement to be modified to a fair share number of 819, with a 656 phase-in by 1990.

V. THE COURT SHOULD APPROVE THE SETTLEMENT EVEN THOUGH IT EXTINGUISHES DOBBS' CLAIM TO A BUILDER' REMEDY

A. Dobbs Does Not Have An Absolute Right To A Builder's Remedy

Dobbs asserts that the hearing on the settlement is irrelevant, because regardless of whether the settlement is reasonable Dobbs is entitled to a developer's remedy. Dobbs' absolute claim is based upon Mt. Laurel II and this court's decision in Orgo Farms v. Colts Neck, 192 N.J. Super. 599 (Law Div. 1983). In Orgo Farms, this court established three elements of the builder's remedy:

> 1. The developer must succeed in the litigation, that is, demonstrate that the zoning ordinance fails to comply with Mount Laurel II.
>
> 2. The developer must propose a substantial amount of lower income housing as defined in the opinion.
>
> 3. The impact of the proposal on the environment or other substantial planning concerns must not be clearly contrary to sound land use planning.

If this settlement is approved as reasonable, Dobbs has simply not established the first element. In Orgo Farms, supra at 605, this court declared:

> The (builder's) remedy is the carrot. The builder may only reach it through a judgment of non-compliance and the provision of substantial lower income housing in an appropriate area of the community.

There is no judgment of non-compliance in this case; therefore, the first element required for a builder's remedy is clearly not present. This point was also made in Morris County, supra. The court recognized the point made in Orgo Farms, supra, that only developers which "succeed" in Mt. Laurel

litigation are eligible for a builder's remedy. Id. A-14. The court continued:

> If the court concludes that the proposed settlement between the Public Advocate, Charles Development and Morris Township will bring Morris Township into compliance with Mount Laurel, Hubschman would not be in a position to "succeed" in his Mount Laurel action and hence could not seek a "builder's remedy." Id.

This case demonstrates why Dobbs should not be absolutely entitled to a developer's remedy as a developer who "succeeded." This court, in its November 18, 1983, order recognized that "at the request of the Ceiswick plaintiffs and this court, (Bedminster) has delayed any further ordinance revisions pending the submission of the Hills Development Co. proposal and the reports of the Master required by Paragraphs B and C of the Case Management Order of this Court dated November 3, 1983." A-56. The clear implication of this provision of the court's order was that Bedminster was waiting for input from the parties and the master prior to revising its ordinance. Additionally, on June 11, 1984, this court signed an order specifically allowing the Ceiswick plaintiffs and Bedminster time "to present to the court a settlement of the remaining issues." DA-GG. Dobbs' argument essentially is that these court orders were meaningless. According to Dobbs, Bedminster acted at its own peril in following the court order and waiting for the master's report before rezoning; Bedminster's wait allowed Dobbs to "succeed" and his developer's rights to vest. Furthermore, according to Dobbs, the settlement which resulted as the results of the June 11, 1984, order was a meaningless gesture, since Dobbs had already "succeeded" and vested his right to a developer's remedy. At least under the facts of this case, such an argument must fail. Dobbs is not absolutely entitled to a developer's remedy regardless of how reasonable the settlement might be.

B. Dobbs Has Not Been A Substantial Factor In Causing The Township To Seek A Settlement Or In Bringing About The Terms Embodied In The Proposed Settlement

In opposing the Morris Township settlement, the objector argued that Mt. Laurel II precluded approval of any settlement which would foreclose an objector's right to a builder's remedy. Judge Skillman declared that a developer cannot exercise "veto power" over a proposed settlement by insisting upon his right to a builder's remedy. Morris County, supra, Slip Opinion, A-14. If the settlement is reasonable, the court can approve it even though the approval extinguishes the objector's claim to a builder's remedy. At the same time, in a footnote to the decision, the court observed that an objector could seek to demonstrate that he played a substantial role in bringing about "the rezoning of Morris Township embodied in the proposed settlement" and that approval of the settlement at his expense would be inconsistent with the Mt. Laurel II decision to expand builder's remedies. Id. A-14. Significantly, the court added, "The weight to be assigned this factor in determining whether to approve a settlement will depend upon the facts of the particular case." Id., A-14. In short, the "substantial role" objection, even when demonstrated, is not an absolute impediment to approval of a settlement. Instead, it is one of a number of factors to be considered when a court determines whether to approve a settlement.

After a hearing in which the objector was heard, Judge Skillman approved the Morris Township settlement. The court concluded that neither the objector's lawsuit nor any of its other efforts were a substantial factor in causing Morris Township to enter into a settlement. The court observed that the objector's lawsuit was not filed until five years after the filing of the Public Advocate's exclusionary zoning action. By the time the objector's suit was filed, Morris

Township was in the process of revising its zoning ordinance. In addition, the court concluded that Morris Township's exclusion of the objector's property from the rezoning was "premised upon sound planning. . . and did not represent an attempt to punish a developer who had filed a Mt. Laurel claim." Morris County transcript, supra, A-27. In finding an absence of retribution, the court noted that the Township had rezoned the property of another developer that had filed a Mt. Laurel lawsuit. Accordingly, the court approved the settlement and granted a judgment of repose, which extinguished the claim of the objector to a developer's remedy.

In this case as well, Dobbs has not been a substantial factor in causing the Township to seek a settlement or to bring about the terms embodied in the proposed settlement. There is a settlement agreement in this case only as a result of thirteen years of litigation by the Ceiswick plaintiffs and Allan Deane. In 1980, while the Township, Allan Deane and the Ceiswick plaintiffs were working with the master in an attempt to establish compliance with the dictates of the Supreme Court, Dobbs was litigating to construct a regional shopping center. In the summer of 1982, six months before Mt. Laurel II was decided, Dobbs amended his shopping center proposal to include housing units for the first time - three hundred of these units were not to be built "for at least ten years," and there was no mention of low income or even "least cost" housing. DA-C2.

After Mt. Laurel II was decided, Richard Coppola, the Township planner, wrote a memorandum expressing the Township's desire to reach a final settlement with Hills and Ceiswick so that the Township could receive a certificate of compliance. That month, George Raymond received permission from the court to participate in the settlement process. In the spring of 1984, Bedminster and Ceiswick submitted briefs to the Appellate Division urging summary re-

versal and remand of Judge Leahy's decision and argued that position vigorously before the Appellate Division; Dobbs did not participate in the appeal process. In mid-June of 1983, after the Coppola letter, the Raymond involvement, and the Appellate Division oral argument, Dobbs offered for the first time to include low and moderate income housing in his regional shopping center proposal. In light of this history, it is unlikely that this court could conclude that Dobbs' belated interest in low income housing was a substantial factor in causing Bedminster Township to reach a decision to settle.

It is equally difficult to conclude that Dobbs had a substantial role in bringing about the terms "embodied in the proposed settlement." Morris County, supra, A-14. This conclusion can best be understood by focusing on each of the settlement issues separately:

Fair Share. Dobbs assigned a fair share number of 2008 to Bedminster. On the other hand, the fair share settlement number of 656 was derived on the basis of negotiations between the Ceiswick plaintiffs and Bedminster. If this court accepts either the 656 fair share number or the consensus number of 819 with a 656 phase-in over six years, then Dobbs will have played no role in shaping the fair share number for Bedminster Township.

Sites. Dobbs has criticized the suitability of certain sites which Bedminster selected, but has not recommended a single additional site beyond his own. The problems with his own site in terms of his proposed package treatment plant has already been extensively discussed in Point III.

Zoning Provisions. At the time this settlement was reached, Dobbs had not critiqued a single provision in the Bedminster zoning ordinance. Changes have been made in the Bedminster zoning ordinance as a result of the Ceiswick correspondence (A-66), and the negotiations between Ceiswick and Bedminster.

The Hills Development. The Hills exclusionary development conditions

and documents (resale controls, etc.) will be the starting point for all future Mt. Laurel developments. Dobbs raised certain objections to the low and moderate income provisions in the proposed court order on November 17, 1983, but those objections were rejected by the court. He made no further suggestions.

Sewers. The Dobbs letter of December 5, 1983, discussed sewer problems in Bedminster. The Ceiswick plaintiffs, on January 24, 1984, also recognized the problem with sewers, stating that any judgment of repose could be conditioned upon a plan and timetable for upgrading sewer capacity in Bedminster. A-75. However, while both Dobbs and Ceiswick recognized the problem, their approach to resolving the sewer issue sharply differed. Dobbs offered to construct a package treatment plant; Ceiswick and Bedminster negotiated an agreement based upon an expansion of the E.D.C. plant. Assuming that the court finds the decision to expand E.D.C. is a reasonable response to the sewer expansion issue, Dobbs will have made no contribution to the method for sewer expansion embodied in the settlement.

After this summary, one conclusion is apparent. No part of the settlement is based upon Dobbs' recommendations - not the fair share number, not the sites, not the terms of the zoning ordinance, and not the plan for sewer expansion. In the event this court concludes that the settlement is reasonable, it also must conclude that Dobbs' has played virtually no role in the terms of the settlement that the parties negotiated.

C. Even If This Court Concludes That Dobbs Played A Substantial Role In The Settlement, The Court Should Still Approve The Settlement

The Morris County decision, supra, A-14, footnote 3, states that if an objector played a substantial role in bringing about the rezoning embodied in

the settlement, the exclusion of the objector's land from the rezoning would be one factor for the court to weigh in approving or rejecting the settlement. However, it would not be grounds for automatic rejection of the settlement. The Ceiswick plaintiffs suggest that in deciding to approve or reject the settlement, the bottom line should be what is in the best interest of the low income people who seek housing in Bedminster. There are a number of reasons why approval of the settlement meets this test irrespective of Dobbs' role.

First, granting a developer's remedy to Dobbs is not likely to produce an immediate housing opportunity. This court's order of June 11, 1984, stated:

> Any settlement must consider the sites most readily available for development now unless good reasons for rejecting a readily available site are shown. DA-66(3).

In Bedminster, lands are not readily available for development unless they are tied in to some type of sewer. Thus, a grant of a builder's remedy to Dobbs would only be a symbolic action unless Dobbs' proposal for its own sewer expansion is feasible. Otherwise, in this case the builder's remedy will not produce a readily available opportunity for lower income housing.

As we have already mentioned, the Department of Environmental Protection has declared that it disfavors the Dobbs' package treatment plant:

> The Department strongly discourages the construction of private "package" treatment plants, as proposed by Mr. Dobbs. The reason for this policy involves the problems with long-term operation and maintenance of such facilities. Only if neither the Bedminster Plant, nor the E.D.C. plant could accommodate these flows, would the Department consider such a proposal. However, either the Township, or the MUA, would be required to be either the sole permittee, or co-permittee, for the NJPDES permit for the plant. A-91.

In view of the position of D.E.P., granting a builder's remedy to Dobbs would certainly not produce the desired goal -- the immediate construction

of lower income housing.*

In taking this position, plaintiffs fully accept the proposition that the D.E.P.'s water quality efforts cannot destroy the constitutional Mt. Laurel rights of lower income persons. See, In Re Egg Harbor Associates, 93 N.J. 358 (1983). However, no confrontation between Mt. Laurel rights and water quality is present here. D.E.P. has merely declared that of the three possible alternatives for sewer expansion to implement Bedminster's fair share, the agency "strongly discourages" the Dobbs' solution. Surely, there can be no legitimate objection to implementing Mt. Laurel and simultaneously maintaining water quality. In view of the D.E.P.'s position, Dobbs' site is not "readily available for development now." DA-GG.

It may be possible for Dobbs to connect into an expanded E.D.C. plant. That means that the Dobbs site would be included in what George Raymond called "Group II" sites, supra, p. 11 -- sites that would become available sometime in the future after E.D.C. expansion. Plaintiffs submit that the interests of low income persons would not be served if a reasonable settlement were rejected so that a builder's remedy could be given to a Group II developer, who could commence development at some undetermined point in the future after E.D.C. expansion took place.

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* As this Court recently declared in Warren Tp., supra, p. 70:

> Certainly, the court does not want to award a builder's remedy which cannot be fulfilled. The master should carefully scrutinize this issue so that the court can be assured that the builder's remedy received by the plaintiffs is likely to be implemented within a reasonable time frame. If the court cannot be so assured. Warren will be called upon to satisfy its obligation elsewhere.

Second, approval of the settlement would permit the immediate construction of lower income housing. Should this court approve this settlement, there would be two immediate benefits: the immediate approval of 168 lower income units at the "top of the hill," which have no sewer constraints, and the immediate cooperation between Bedminster and E.D.C. on the expansion of the E.D.C. plant, which once achieved will permit full implementation of the fair share. Both of these immediate benefits are contingent upon approval of the settlement.

Third, granting a developer's remedy could easily generate additional litigation that could delay the construction of housing for two years. In response to the award of a builder's remedy to Dobbs, Bedminster would likely rezone under protest. The Township could then seek a stay of the rezoning pending appeal, a request that might well be granted in view of the proposed settlement. The result would be a delay in the construction of lower income housing for a period that could easily exceed several years.

Additionally, such litigation would also stalemate the sewer situation. D.E.P. would likely hold up review of both E.D.C. and Dobbs' proposal pending the outcome of the appeal since the agency's review is conditioned upon municipal and county approval.

Finally, the unique history of this case justifies denying Dobbs a developer's remedy. These facts are discussed in Section III of the brief and need not be repeated here; they do provide substantial reasons for the Court to approve the settlement, despite Dobbs' objections, even if the court would not do so in another case without this unique history.

CONCLUSION

Wherefore, plaintiffs respectfully submit that the settlement should be approved.

JOSEPH H. RODRIGUEZ,
PUBLIC ADVOCATE

BY: _____
KENNETH E. MEISER
Deputy Director

Dated: November 1, 1984