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Appendix

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APPENDIX

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY/
MIDDLESEX COUNTY
(MOUNT LAUREL II LITIGATION)
DOCKET NO. L-6001-78 P.W.
L-54599-83 P.W.

MORRIS COUNTY FAIR HOUSING COUNCIL, et al,

Plaintiffs,

vs.

BOONTON TOWNSHIP, et al,

Defendants

CHARLES DEVELOPMENT CORP.,

Plaintiff,

vs.

TOWNSHIP OF MORRIS, et al,

Defendants.

Civil Actions

OPINION

Decided: May 25, 1984

Stephen M. Eisdorfer, Assistant Deputy Public Advocate, for plaintiffs Morris County Fair Housing Council, et al (Joseph H. Rodriguez, Public Advocate, attorney)

Guliet F. Hirsch for plaintiff Charles Development Corp. (Brener, Wallack & Hill, attorneys)

John M. Mills for defendant Township of Morris (Mills, Hock, Dangler & Mills, attorneys)

James R. Hillas, Jr. for defendant Planning Board of Township of Morris

Martin Gelber for objector Hubschman (Gelber & Kruvant, attorneys)

Daniel S. Bernstein for defendant Chatham Township (Bernstein, Hoffman & Clark, attorneys)

SKILLMAN, J.S.C.

This motion presents significant issues regarding the procedures to be followed in the settlement of Mount Laurel litigation when the entry of a "judgment of compliance" is a precondition of a municipal defendant's willingness to settle.

This suit was filed by the Public Advocate on behalf of himself, the Morris County Fair Housing Council and the Morris County Branch of the N.A.A.C.P., against twenty-seven municipalities in Morris County alleged to have zoning ordinances which are unconstitutional because they fail to provide a realistic opportunity for the construction of low and moderate income housing. See Borough of Morris Plains v. Dep't of Public Advocate, 169 N.J. Super. 403 (App. Div. 1979) certif. den. 81 N.J. 411 (1979). The Public Advocate dismissed its action, without prejudice, against fifteen of the original defendants, while continuing to proceed against twelve others.

Morris Township is one of the remaining defendants. It is also the defendant in two separate Mount Laurel actions brought by developers.

Morris Township has reached a proposed settlement with the Public Advocate and one of the developers, Charles Development Corporation. However, Morris Township's willingness to settle is contingent upon the court approving the settlement and entering a judgment of compliance. As envisioned by the parties to the settlement, such approval would represent a judicial recognition that Morris Township has taken the steps required to comply with Mount Laurel and it would have the practical effect of foreclosing the second developer, Hubschman, from pursuing his Mount Laurel claim. The matter has been

brought before the court by the three parties to the settlement agreement on a joint motion to establish procedures for review of the settlement by the court.

The Supreme Court of New Jersey has adopted a special rule of repose which becomes operative when a municipality rezones as a result of Mount Laurel litigation. The rationale for this special rule is set forth in Southern Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (Mount Laurel II):

> That balance [of all the policies involved in the Mount Laurel doctrine] also requires modification of the role of res judicata in these cases. Judicial determinations of compliance with the fair share obligation or of invalidity are not binding under ordinary rules of res judicata since circumstances obviously change. In Mount Laurel cases, however, judgments of compliance should provide that measure of finality suggested in the Municipal Land Use Law, which requires the reexamination and amendment of land use regulations every six years. Compliance judgments in these cases therefore shall have res judicata effect, despite changed circumstances, for a period of six years, the period to begin with the entry of the judgment by the trial court. In this way, municipalities can enjoy the repose that the res judicata doctrine intends, free of litigious interference with the normal planning process.
> [at 291-292; footnote omitted].

This passage from Mount Laurel II does not expressly state that a judgment of compliance shall be binding upon non-parties. However, this seems to have been the Court's intent. There often will be numerous property owners in a municipality with land suitable for lower income housing as well as various organizations which may pursue Mount Laurel litigation on behalf of lower income persons. Therefore, if a judgment of compliance entered at the conclusion of Mount Laurel litigation were binding only upon the party who had filed the action, such a judgment would afford a municipality very

limited repose. Yet, the Court said that upon issuance of a judgment of compliance a municipality would be "free of litigious interference with the normal planning process." Id. at 292. This degree of insulation from Mount Laurel claims can be realized only if a judgment of compliance is binding upon non-parties.

Furthermore, this reading of Mount Laurel II is consistent with the effect given judgments in other representative litigation. Although the general black letter law is that a judgment is binding only upon the parties (1 Restatement, Judgments 2d, §34(3) at 345 (1982)), a judgment may be binding upon non-parties if their interests have been represented by a party. Id. §41(1) at 393. One widely recognized form of action in which a judgment may be binding upon non-parties is a traditional class action. Id. §41(1)(e); see Penson v. Terminal Transport Co., 634 F. 2d 989, 992 (5th Cir. 1981); Telephone Workers Union Local 827 v. New Jersey Bell Telephone Co., 584 F. 2d 31 (3rd Cir. 1978); Harker v. McKissock, 12 N.J. 310, 317 (1953). A second is a suit by a public official or agency which is authorized by law to represent the public or a class of citizens. 1 Restatement, Judgments 2d §41(1)(d) at 393 (1982); see Nevada v. United States, ___ U.S. ___, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983); Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F. 2d 84, 94-102 (5th Cir. 1977) cert. den. 434 U.S. 832 (1977); Rynsburger v. Dairymen's Fertilizer Coop., Inc., 266 Cal. App. 2d 269, 72 Cal. Rptr. 102 (Cal. Ct. App. 1968). Another is a taxpayers action brought on behalf of residents, citizens and taxpayers of a jurisdiction. Roberts v. Goldner, 79 N.J. 82 (1979); In re Petition of Gardiner, 67 N.J. Super. 435, 447-449 (App. Div. 1961). Non-parties

may be bound in a variety of other contexts as well. See Southwest Airlines Co. v. Texas International Airlines, Inc., supra. Indeed, in Rynsburger v. Dairymen's Fertilizer Coop., Inc., supra, the court broadly stated that "[i]f it appears that a particular party, although not before the court in person, is so far represented by others that his interest received actual and efficient protection, the decree will be held to be binding upon him." 266 Cal. App. 2d at ___, 72 Cal. Rptr. at 107.

A Mount Laurel case may be appropriately viewed in line with these authorities as a representative action which is binding upon non-parties. The constitutional right protected by the Mount Laurel doctrine is the right of lower income persons to seek housing without being subject to the economic discrimination caused by exclusionary zoning. Mount Laurel II, at 208-214; see Pascack Ass'n, Ltd. v. Washington Tp., 74 N.J. 470, 480 (1977). The Public Advocate and organizations such as the Fair Housing Council and N.A.A.C.P. have standing to pursue Mount Laurel litigation on behalf of lower income persons. Mount Laurel II, at 336-338; Home Builders League v. Berlin Tp., 81 N.J. 127, 132-133 (1979). Developers and property owners with land suitable for lower income housing are also conferred standing to pursue Mount Laurel litigation. See Mount Laurel II, at 279-281. In fact, the Court held that "any individual demonstrating an interest in, or any organization that has the objective of, securing lower income housing opportunities in a municipality will have standing to sue such municipality on Mount Laurel grounds." Mount Laurel II, at 337. However, such litigants are granted standing not to pursue their own interests, but rather as representatives of lower income

persons whose constitutional rights allegedly have been violated by exclusionary zoning. It follows that a judgment of compliance entered as a result of Mount Laurel litigation would be binding upon non-party lower income persons as well as other potential representatives of their interests such as Hubschman.

The second issue presented by this motion is whether a judgment of compliance can be entered as part of a court approved settlement or only after a full trial in which there has been an adjudication of the validity of a zoning ordinance on Mount Laurel grounds. None of the six cases decided by the Supreme Court in Mount Laurel II provided the occasion for consideration of this issue.

Our 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 rather than exposing themselves to the adverse judgment of a court. Settlements also save parties litigation expenses and facilitate the administration of the courts by conserving judicial resources.

These policies favoring settlement are operative in Mount Laurel litigation. The Court observed in Mount 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." Id. 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, it said that "the Mount Laurel obligation is to provide a realistic opportunity for housing, not litigation." Id. at 352. The 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.

Moreover, it appears that entry of a judgment of compliance frequently will be a precondition to settlement of Mount Laurel cases. Municipalities are understandably hesitant to rezone or to take other affirmative steps to comply with Mount Laurel if their zoning will remain vulnerable to attack. They want assurance that whatever expenses may be incurred in complying with Mount Laurel will be offset, at least in part, by savings in litigation expenses. Municipalities also seek the opportunity to engage in the long term planning required to implement compliance with Mount Laurel -- including the addition of necessary water and sewer service, police and fire protection, schools, parks and streets without fear that those plans will have to be changed as a result of new litigation.

While there are substantial considerations favoring settlement of Mount Laurel litigation, it also must be recognized that the improvident entry of a judgment of compliance would be harmful to the lower income persons on whose behalf the litigation is brought. As noted previously, such a judgment ordinarily will insulate a municipality from further Mount Laurel litigation for a period of six years. Therefore, there must be assurance that a settlement is

consistent with the best interests of lower income persons before a judgment of compliance is issued.

The risks of improvidently approving a settlement and issuing a judgment of compliance are most acute in Mount Laurel litigation brought by developers. A plaintiff developer and defendant municipality have complementary objectives in settlement negotiations which are likely to result in an agreement which does not advance the goals of Mount Laurel. A municipality's objective is to be assigned a small fair share of lower income housing. A developer's objective is to secure approval of his project. If a judgment of compliance is entered approving a settlement which advances both of these objectives, the result would be the construction of a small number of lower income housing units while insulating the municipality from further Mount Laurel litigation for six years.

The danger of entering a judgment of compliance which does not adequately protect the interests of lower income persons is substantially reduced when a Mount Laurel claim has been brought by the Public Advocate or other public interest organization, since it may be assumed that generally a public interest organization will only approve a settlement which it conceives to be in the best interests of the people it represents. However, even a public interest organization may incorrectly evaluate the strengths and weaknesses of its claim or be overly anxious to settle a case for internal organizational reasons.

The question is whether these dangers require that a judgment of

compliance only be entered after a case has been fully litigated or whether procedures can be established by which the court can receive reasonable assurance that a proposed settlement will result in satisfaction of a municipality's Mount Laurel obligation. In addressing this question it is appropriate to consider the procedures which are used for the approval of settlements in class and other representative actions.

Rule 4:32-4 provides that "[a] class action shall not be dismissed or compromised without the approval of the court ...." To afford interested parties an opportunity to be heard, the rule further provides that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Although R.4:32-4 only applies by its literal terms to class actions, it has been found to contain appropriate "guiding principles" for settlement of other representative lawsuits. Tabaac v. Atlantic City, 174 N.J. Super. 519, 534 (Law Div. 1980).

There is only limited discussion in New Jersey case law of the procedures to be followed in presenting proposed settlements of class actions for judicial approval and of the standards to be applied in determining whether approval should be given. See City of Paterson v. Paterson General Hospital, 104 N.J. Super. 472 (App. Div. 1969) aff'd 53 N.J. 421 (1969); see also New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Bds. 186 N.J. Super. 391 (Ch. Div. 1982) mod. 93 N.J. 470 (1983). However, R.4:32-4 was taken from and is identical to Fed. R. Civ. P. 23(e). See 2 M. Schnitzer & J. Wildstein, N.J. Rules Service at 1160-66 (1959). Therefore, it is ap-

propriate to seek guidance in federal case law in determining the procedures and standards for approval of settlements of representative actions. Cf. Riley v. New Rapids Carpet Center, 61 N.J. 218 (1972) (primary reliance placed upon federal precedents in determining maintainability of a class action).

There is a set of well-established procedures which govern the approval of proposed settlements of class actions in the federal courts. See generally 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶23.80 (2nd ed. 1982); 7A C. Wright & A. Miller, Federal Practice and Procedure, §1797 (1972); Manual for Complex Litigation §1.46 (5th ed. 1982). First, the court must make a preliminary determination that the proposed settlement has sufficient apparent merit to justify scheduling a hearing to review its terms. Second, a formal notice approved by the court must be given to all members of the class and others who may have an interest in the settlement. Third, sufficient time must be allowed class members and other interested parties to prepare documentary material and/or oral testimony in opposition to the proposed settlement. Fourth, a hearing must be held. Fifth, the court must reach a conclusion, based upon adequate findings of fact, that the settlement is "fair and reasonable" to the members of the class.

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' positions, 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. Stovall, 528 F. 2d 108 (7th Cir. 1976); Flinn v. FMC Corp., supra, at 1173.

It is noteworthy that the federal courts have utilized these procedures in approving settlements of school desegregation, employment discrimination and other class actions involving fundamental constitutional and civil rights. See, e.g., Penson v. Terminal Transport Co., supra; Mendoza v. United States, 623 F. 2d 1338 (9th Cir. 1980) cert. den 450 U.S. 912 (1981); Armstrong v. Milwaukee Bd. of School Directors, supra. The court in Armstrong observed that "there are no suggestions that the importance of the substantive rights involved precludes compromise or requires a special standard of review." [Id. at 317].

This court is satisfied that it can adequately safeguard against judgments of compliance being entered improvidently as a result of Mount Laurel litigation through the use of procedures similar to those used by the federal courts for the approval of proposed settlements of class actions.[1] Notice of the terms of

1. The court is not called upon by this motion to decide what role, if any, the court should play when parties to a Mount Laurel action reach a settlement which is not conditioned upon entry of a judgment of compliance.

the settlement to the public, public interest organizations and property owners who want to construct lower income housing will provide an adequate opportunity to be heard to any party who opposes the settlement. Furthermore, if the court concludes that the presentation of the parties and any others who seek to be heard is not adequate to determine whether the proposed settlement is "fair and reasonable," it may appoint an advisory master to make recommendations.[2] See Mount Laurel II at 283. If the material presented to the court fails to establish that the settlement is "fair and reasonable," it can disapprove the settlement or require the submission of additional information.

It is not practical to catalogue definitively the factors which will be relevant to the court's review of a proposed settlement of a Mount Laurel case. However, the court rejects the argument made by the objector, Hubschman, that no settlement entailing entry of a judgment of compliance may be approved without first determining the precise fair share of the defendant municipality. The Court pointed out in Mount Laurel II that fair share determinations are the most time consuming and difficult part of Mount Laurel litigation:

> The most troublesome issue in Mount Laurel litigation is the determination of fair share. It takes the most time, produces the greatest variety of opinions, and engenders doubt as to the meaning and wisdom of Mount Laurel. Determination of fair share has required resolution of three separate issues: identifying the relevant region, determining its present and prospective housing needs, and allocating those needs to the municipality or municipalities in-

2. In fact, a master probably should be appointed as a matter of course in any case where a developer is the only party representing lower income persons.

> volved. Each of these issues produces a morass of facts, statistics, projections, theories and opinions sufficient to discourage even the staunchest supporters of Mount Laurel. The problem is capable of monopolizing counsel's time for years, overwhelming trial courts and inundating reviewing courts with a record on review of superhuman dimensions. [at 248].

Therefore, requiring a fair share determination before approving a settlement would be inconsistent with the basic purposes of settlement of a Mount Laurel case, which is to save the parties litigation expenses, to conserve judicial resources and to facilitate the early construction of lower income housing rather than interminable litigation.

The conclusion that a judgment of compliance may be entered without making a fair share determination does not mean that information relating to fair share is irrelevant in reviewing a proposed settlement. To the contrary, 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. See Protective Comm. v. Anderson, 390 U.S. 414, 424-425, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968); Armstrong v. Milwaukee Bd. of School Directors, supra at 314. There are a number of other factors which also should be taken into consideration, such as the anticipated time it would take to conclude 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 units. The weight that may be assigned to any of these or other factors will depend upon the particular circumstances of the settlement proposal.

The objector, Hubschman, also argues that no judgment of compliance can be issued in settlement of the suits brought by the Public Advocate and Charles Development which would foreclose Hubschman's entitlement to a "builder's remedy" in his pending action against Morris Township. Although the Court stated in Mount Laurel II that "builder's remedies must be made more readily available to achieve compliance with Mount Laurel" (id. at 279), it did not say that any developer who has a Mount Laurel action pending when a municipality rezones in compliance with Mount Laurel II may seek a builder's remedy. Rather, it held that generally the only developers entitled to seek a "builder's remedy" are ones which have "succeeded" in Mount Laurel litigation. Id. 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." Therefore, a developer who has a separate Mount Laurel action pending may not exercise veto power over a proposed settlement between the municipality and other litigants by insisting upon his right to "builder's remedy."[3] See City of Paterson v. Paterson General Hospital, supra; cf. Penson v. Terminal Transport Co., supra, 634 F. 2d at 996 ("A judgment or consent decree entered in a class action

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3. Other interested developers such as Hubschman may of course be heard in opposition to the proposed settlement. Hubschman may seek to demonstrate at the hearing that its lawsuit played a substantial part in bringing about the rezoning of Morris Township embodied in the proposed settlement and that consequently approval of the settlement would be inconsistent with the Court's "decision to expand builder's remedies," in order to "maintain a significant level of Mount Laurel litigation," "to compensate developers who have invested substantial time and resources in pursuing such litigation" and to ensure that "lower income housing is actually built." Mount Laurel II at 279-280. The weight to be assigned this factor in determining whether to approve a settlement will depend upon the facts of the partic-

can bind the absent class member even though the member had filed a claim or instituted a personal suit before the decision in the class action.")

For these reasons the court is satisfied that it has the power to issue a judgment of compliance based upon a settlement negotiated between parties to Mount Laurel litigation which will be binding upon other parties, including parties with pending actions, provided the procedures for judicial review outlined in this opinion are followed.

The court is also satisfied that the proposed settlement negotiated among the Public Advocate, Charles Development and Morris Township has sufficient apparent merit to justify scheduling a hearing to review its terms and that the procedures for the hearing proposed by the motion are appropriate. These procedures include notice of the terms of the proposed settlement in the form appended to this opinion. The notice will be published in two daily newspapers widely circulated in Morris County and neighboring counties as well as a local weekly. Direct notice by mail also will be given to the New Jersey Department of Community Affairs, the Morris County Planning Board and a variety of other organizations which may have an interest in lower income housing, as well as any developers who have pending Mount Laurel claims. The terms of the proposed settlement, together with its factual and legal justification will be made available to any party who expresses an interest in being heard on the application for approval of the settlement. Any written objections must be filed within three weeks of the notice

and a hearing will be held one week later. The court will determine after receiving all documentary material submitted in connection with the proposed settlement whether to take testimony on the proposal and, if so, what areas testimony should cover and how extensive it needs to be.

representation to the Court.

THE COURT: Thank you. Anything else?

All right, this is an application by the public advocate, Morris Township, and the Charles Development Corporation for approval of the settlement of two Mount Laurel cases that have been brought against Morris Township, one by the public advocate brought I guess some nearly six years ago now and the other brought by Charles Development Corporation.

The legal bases for this proceeding, the issues to be decided at this proceeding, and the consequences of the issuance of a judgment of compliance all have been discussed at length in this Court's written opinion of May 25th, 1984 and there is no need to repeat all of that at the present time.

In this proceeding for approval of a proposed settlement there has been participation not only by the three parties seeking approval of the settlement but also by counsel for Sidney and Connie Hupschman

who are parties to a separate claim now pending against Morris Township. That claim is entitled Hupschman V. Township of Morris with a docket number of L-70695-83, and although not, although Hupschman is not a party to either the Morris County Fair Housing Council suit or the Charles Development Corporation suit, it has been allowed to participate fully in these proceedings because its interests may be adversely affected by issuance of a judgment of compliance as more fully discussed in this Court's opinion of May 25th.

Hupschman has taken the position during this hearing that it does not directly oppose the settlement but it does oppose the settlement insofar as it excludes Hupschman from any entitlement to a builder's remedy. Accordingly, Hupschman's participation in the proceedings has been directed primarily at demonstrating that its activities were a substantial factor in bringing about Morris Township's zoning to achieve compliance with Mount Laurel which this Court suggested in footnote number three of its May 25th opinion

might be a factor that would require disapproval of a settlement even if it were fair and reasonable to lower income persons.

Now, I have heard nearly three days of testimony as well as voluminous documentary material addressed to the questions of whether this proposed settlement is fair and reasonable and also addressed to whether the efforts of Hupschman were a substantial factor in bringing about the rezoning.

Now, based upon all of this testimony I am satisfied that the settlement is in basic concept fair and reasonable and that a judgment of compliance should be issued provided Morris Township agrees within a reasonable period of time, and I think that time would be thirty days, to several modifications to the agreement which are necessary in my judgment to assure adequate protection of low and moderate income persons.

First and foremost, there must be adequate assurance for reasons I will discuss more fully later in this opinion that most of the three hundred and thirty-five set aside

units provided for under this settlement actually will be constructed during the next six years. Therefore, as a condition of my approval of this settlement I will require that Morris Township agree to, one, to either one of the following two conditions: Either to over zone immediately a sufficient area to accommodate four hundred and thirty-five set aside units, that is to have over zoning to the extent of one hundred units over and above the three hundred and thirty-five units, set aside units postulated by the settlement, or alternatively to agree to deferred over zoning, that is to agree that to the extent that the number of units for which municipal approval has not been given as of two and a half years from the date of entry of the judgment of compliance will at that time be accomodated by appropriate over zoning, and I think appropriate over zoning at that point would be one hundred percent over zoning for whatever number of units have not as of that date received municipal approval.

So, to give an example, if as of that

date two and a half years from now there had been municipal approval of two hundred and thirty-five units, that would lead, leave a deficit of one hundred units and at that point Morris Township would be required to rezone for a second one hundred units, so that at that point you would have one hundred percent over zoning, that is the one hundred units that have now been rezoned plus another one hundred units. If there were a deficit of fifty, then there would have to be over zoning to the extent of fifty at that time, two and a half years from now.

I also will set a cut-off on that of three hundred. In other words, if there has been municipal approval for three hundred units by that date, two and a half years from now, I will consider that to be sufficient compliance not to require any over zoning.

Now, beyond this requirement for either immediate or deferred over zoning, it is also my judgment that several other provisions of the settlement agreement and/or ordinances must be modified. First of all, the phase-in provisions of the ordinance with

respect to the set asides must be amended as suggested by Mr. Mallach such that will remain the same on the first twenty-five percent of construction, that is that there need not be any set asides but that during the second phase there must be twenty-five percent set asides, during the third phase another fifty percent set asides and during the forth phase the final twenty-five percent set asides. Also the ordinance must be modified to make it clear that at least fifty percent of the set asides at phases two and three will be for a low as distinguished from moderate income persons.

I also accept the suggestion of Mr. Moskowitz of the addition of the language which I know was meaningful at least to counsel which will make it clear that before there may be occupancy of any of the units at the second phase that there must be certificates of occupancy that would be available with respect to the lower income units.

Now, as for the three bedroom units, again I will require consistent with Mr.

Hallach's testimony that fifteen percent rather than ten percent of those units be for lower income persons and that at least one-third of those three bedroom units be for low as distinguished from moderate income persons.

I also consider appropriate to assure fulfillment of the obligations of Morris Township pursuant to this settlement agreement that in addition to the monitoring provisions in the existing agreement that on an annual basis Morris Township furnish the public advocate and this Court with a statement of what has occurred during the preceding year in fulfillment of the conditions of the settlement. And in addition to such annual reports, if Morris Township chooses to agree to a modification which would entail the deferred over zoning, a further report should be submitted as of a point two and a half years from the time of entry of the judgment of compliance in order to determine whether that deferred over zoning provision will be triggered.

Now, as for the, what I noted as the

second aspect of this case, that is the role of Hupschman in the rezoning of Morris Township, based on all of the evidence that I've heard during this hearing before me I am satisfied that neither Hupschman's lawsuit nor any of its other efforts to bring about a rezoning of its parcel were a substantial factor in causing Morris Township to rezone in order to achieve compliance with Mount Laurel. Therefore, it is unnecessary for me to decide what the legal consequences would be if Hupschman had been a substantial factor in bringing about that rezoning. In making the determination that Hupschman and its lawsuit and other activities were not a substantial factor in bringing about rezoning by Morris Township to achieve compliance with Mount Laurel, I note that Hupschman's suit was not filed until November 7th of 1983, approximately five years after the public advocate had filed its well publicized lawsuit against Morris Township seeking rezoning to achieve Mount Laurel compliance.

Indeed, the record before me further indicates that Hupschman did not even raise

the issue of Mount Laurel housing until Board of Adjustment hearings toward the middle of the year 1983. By that time the public advocate suit had been pending for many years and Morris Township was already well on the process, well under way in conducting an intensive review of its zoning ordinances in order to bring itself into compliance with Mount Laurel.

I would also note that by this date of November 7th, 1983, the suit of Charles Development had already been pending for several months. I believe that suit was filed in August or September of 1983. This is not to say that Charles Development's suit was a substantial factor in bringing about the rezoning either. Indeed, if that were an issue before me, and it's not, I would be hard pressed to make that sort of finding with respect to Charles Development anymore than I'm able to make it with respect to Hupschman. Rather, I am satisfied that to the extent any legal activity beyond the decision of the Supreme Court in Mount Laurel II rendered on January 20th, 1983 was a

substantial factor in bringing about this rezoning, that that was the public advocate's lawsuit and not the lawsuits of any private developers. That is not to say that an awareness of the possibility of or existence of lawsuits not only by these two developers but possibly many others may not have been a factor at the back of someone's mind but that can be true, of course, in anyone of these situations where there is pending a Mount Laurel litigation.

I also would note parenthetically the existence of substantial questions as to environmental constraints with regard to the Hupschman property insofar as the construction of high density housing is concerned.

I would note also parenthetically that Hupschman's property is not located in the growth area portion of Morris Township, and, of course, the Supreme Court has expressed a very strong preference for compliance with Mount Laurel being achieved within growth areas.

So, without definitively resolving any

of those issues, and I'm referring now specifically to the environmental issues with respect to the Hupschman property, I am satisfied from what I've heard during this hearing over the last three days that the fact that the Hupschman property was not rezoned for high density housing, the fact that it was not part of Morris Township's Mount Laurel solution was premised upon Morris Township's conception of sound planning and was not, did not represent an effort on the part of Morris Township to punish a developer who had filed a Mount Laurel claim. I think that point is also underscored by the fact that Morris Township did include in its Mount Laurel solution a rezoning of the property of another party who had filed a Mount Laurel lawsuit, that is the Charles Development Corporation.

Now, in reaching the conclusion that this overall settlement would be fair and reasonable, I have started with the fair share number postulated by the settlement, that is five thirty-five. I have had various fair share numbers for Morris Township placed

before me. They range from a low number of sixty-eight to a high number of one thousand eight hundred and fifty-five. Now, even on a facial review of the methodologies producing the high and low numbers on this overall spectrum, I'm satisfied that those high and low numbers have little merit to them and that had this case been fully litigated there is no chance at all that I would have arrived at a determination that Morris Township's fair share was either as low as sixty-eight or as high as one thousand eight hundred fifty-five. On the other hand, there are facially creditable eight methodologies which generate numbers in the general range of five hundred up to one thousand two hundred and fifty. I, of course, have not yet made any fair share determination in this case. It is, therefore, highly speculative, even on my part, to say what a likely fair share number might have been for Morris Township at end conclusion of this litigation. A methodology developed in settlement discussions in another lawsuit, that is the Urban League case which was pending before Judge

Serpentelli has been used as a benchmark for settlement discussions and the fair share number for Morris Township generated by that methodology was nine ninety-six.

Now, there are many issues raised by that methodology, issues as to the appropriateness of a dual region; issues as to the appropriateness of an eleven county region for any purpose; issues as to the appropriateness of deferring satisfaction of any reallocated present need obligation, as to the method of calculation of present need and whether factors other than growth area and employment such as building permits ought to be taken into account in calculating fair share.

In light of all those issues, perhaps a majority of which could result in a decrease rather than an increase in the nine hundred ninety-six number, it is probably appropriate to say that the most likely range of outcomes as to fair share would be numbers on the order of six hundred to one thousand two hundred, and the midpoint of that range is nine hundred.

Now, all of these numbers I'm mentioning, of course, are tentative if not speculative numbers, but in any event that number of nine hundred, as I say, is in a midpoint of a range of what would be a reasonable range of numbers for fair shares is significantly greater than the number of five thirty-five which is postulated by this settlement.

Also the method of satisfying one hundred out of those total five hundred thirty-five units is subject to some question. One hundred of those five hundred and thirty-five units will be satisfied through permitting conversions of existing buildings so as to accommodate apartments.

As to that component which is almost twenty percent of the overall settlement package, there is no assurance that those units will be rented to lower income persons, although I have before me competent expert testimony, which I accept, that most likely, at least a very substantial portion of those apartments will be rented to persons in the lower income range.

It is also a fact that for the most part at least the law against discrimination would not be applicable to such rentals.

Now, I'm not saying that either of these two circumstances would prevent these units from being counted as Mount Laurel housing, only that these are issues which would have to be addressed were this matter fully litigated and the Morris Township ordinance declared invalid and rezoning including such conversions brought before this Court in an adversary posture.

I am prepared to accept that part of the ordinance permitting the apartment conversions as an experimental component of this overall settlement but must at, at the same time must say that that part of the package may not serve the interests of lower income persons as well as the other components of the package, that is the senior citizen housing and the set aside units. Therefore, this overall settlement comes out to being a settlement for only approximately two-thirds, even a little less than two-thirds of the most probable general range

of outcomes of the case were it fully litigated. As I've just said, even a part of that overall package is subject to some dispute.

Now, the question I had to ask myself is whether this settlement should nonetheless be approved. I am satisfied, as I indicated at the outset, that it should be approved provided that there is some reasonable assurance that the three hundred and thirty-five set aside units or most of the three hundred thirty-five set aside units postulated by the settlement actually will be built within the next six years.

I accept the proposition asserted by the public advocate's expert in his supplemental report, and specifically page nine of that report where he said that, "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."

The settlement also has the benefit, as I discussed in my May 25th opinion, of paving the way for the construction of lower income housing units now or at least very soon rather than many months from now at the conclusion of litigation. We are, of course, at the point just now of beginning the first phase of trial. That first phase of the trial will take several weeks necessary then to render a decision. There will then be a second phase of the trial and then were the Morris Township zoning ordinance to be found invalid there would be a further period for rezoning in compliance with Mount Laurel and one has to anticipate, I think the public advocate has said previously that six months, eight months would be an optimistic forecast of how long that overall process would take. With a settlement we are in a position where housing may start to be built relatively soon rather than waiting to some time six, nine months down the road and perhaps longer were

appeals to be taken, and that, of course, is a major benefit of settlement.

Still the question remains how substantial a trade-off of numbers should be allowed in order to facilitate settlement. That determination has to turn on the facts and circumstances of the individual case. Circumstances may be present in one municipality justifying a settlement of a Mount Laurel claim against that municipality which would not be sufficient to justify a similar settlement in another municipality where different conditions prevailed. One of the justifications offered by the parties seeking approval of this settlement was an alleged absence of vacant land suitable for high density housing in Morris Township. I've given some but limited weight to this justification for the settlement. For reasons set forth in Mr. Mallach's supplemental report as well as his trial testimony, I think that supplemental report was J-32 in evidence, I'm satisfied that there is land in Morris Township suitable for high density housing which would accommodate

more than one thousand five hundred and twenty-two units which is the total number of units of housing posited by this settlement.

In other words, the settlement posits one thousand five hundred twenty-two units of which the three hundred and thirty-five would be the lower income set aside units.

Now, in saying that there is more land suitable for high density housing than that required for one thousand five hundred twenty-two units, I'm not saying that there are no constraints upon development of residential properties in Morris Township. Morris Township is in large part a developed municipality and to the extent that there are undeveloped portions of the municipality, many of them are subject to environmental constraints. Significant portions of the municipality, particularly the southern part, are in a conservation area as designated by the State Development Guide Plan. Another portion is in a limited growth area as designated by the State Development Guide Plan. And, of course, the Supreme Court has said that every effort must be made to

fulfill the Mount Laurel obligation without causing growth in these areas. So, if Morris Township were found to have a Mount Laurel obligation on the order of eight hundred or a thousand or one thousand two hundred units and this Mount Laurel obligation had to be met primarily through set aside units with a twenty percent set aside, this would mean the construction of four thousand to six thousand units. If that were the outcome of the case, and that is the outcome being sought by the public advocate through the testimony of its expert as to the total number of units which would be required under his fair share formula, then in that event existence of sufficient suitable land would emerge as a very real issue and so in this sense vacant suitable land is a circumstance favoring this settlement because the proofs while they failed to establish that fifteen hundred and thirty-two units is all that Morris Township could accomodate of this type of housing do establish that Morris Township would be very very hard pressed, indeed, to find suitable land to accommodate as much as four thousand

to six thousand units. So, in that sense I've considered that portion of the proofs presented before me as to suitable vacant land as a circumstance providing some support for this proposed settlement. Nonetheless, the stronger justification for approval of the settlement is that it promises the early construction of a significant number of housing units for lower income persons, that is that there has been the rezoning of the properties of a significant number of land owners who are ready, willing and able to build housing which will include units for lower income persons, and in support of that factual contention I've had submitted to me letters from some, indeed most of the property owners of the lands that are subject to the rezoning indicating anywhere from fairly definite commitment to an interest in building in accordance with the new zoning ordinance.

I've also received the testimony of Mr. Moskowitz concerning various conversations had with parties interested in constructing higher density zoning as well as

the presentation of plans as to at least one of the units and, of course, I have similar materials before me from the plaintiff developer Charles Development Corporation whose project will involve the construction of seventy out of the total of three hundred and thirty-five set aside units contemplated by this settlement. On the other hand, there are also owners of some of the properties that are the subject of this rezoning who have not responded to inquires concerning their interest in constructing such housing and there's at least one such property owner, Mr. Starret, who has stated categorically that he has no intention of building high density housing on his property. It's occupied by him as his home and that he doesn't intend in the foreseeable future to put it to any other use. And some of the expressions of interest in building by other property owners while real are less than, less than unequivocal. Therefore, what I am left with is a reasonable assurance or reasonable likelihood that some percentage of the set aside units will be built, some

number in excess of two hundred, and, of course, that is in addition to the one hundred senior citizen units that already have been constructed since 1980 and which combined with the set aside units and apartment conversions would reach the overall five thirty-five number.

What is lacking, however, is a reasonable likelihood or reasonable assurance that the entire three hundred thirty-five set aside units will be constructed during the next six years. As to nearly one hundred of those units, the evidence before me is uncertain at best as to what may happen with respect to that property over the next six years. Now, given the fact that this settlement number, that is the five thirty-five is only about two-thirds of the most reasonable prediction of what the fair share number would be were this case fully litigated, this Court must have some assurance of there being a reasonable likelihood that all or almost all of the fair share units postulated by the settlement will be constructed during the six year period.

And, as I've said before, attainment of that necessary assurance can be secured in either one of the two ways I've indicated before, either by immediate over zoning or by the deferred over zoning that I have previously described.

So, for all these reasons I will approve the proposed settlement between Morris Township, Charles Development and the public advocate on the condition that Morris Township within the next thirty days pass the appropriate resolution and/or ordinances required to provide either immediate or deferred over zoning in order to provide reasonable assurance that the three hundred thirty-five set aside units included within the five hundred and thirty-five unit commitment of this settlement will actually be constructed.

Assuming that that condition is satisfied, I will at that time issue a judgment of compliance. If that condition is not satisfied this case will be restored to the trial calendar.

Any questions, counsel? Any areas

Richard Thomas Coppola
and Associates

609-799-5050

17 Candlewood Drive · P.O. Box 99 · Princeton Junction · New Jersey 08550

May 13, 1983

Paul F. Gavin, Mayor
Bedminster Township
Union Grove Road
Gladstone, New Jersey

J. William Scher, Chairman
Bedminster Township Planning Board
Bunn Road
Far Hills, New Jersey

Re: Potential Amendments to Land Development Ordinance Provisions Governing Affordable Housing in Bedminster Township.

Gentlemen:

As directed by the municipal officials, I am coordinating discussions among the Court appointed Master, the Public Advocate's office, and the Hills Development Company in our effort to accomplish the following objectives:

1. The existing Ordinance provisions governing the development of 'affordable housing' within Bedminster Township be approprately modified in order to satisfy the municipality's housing obligations under the "Mt. Laurel II" Decision.

2. The Hills Development Company be required to provide its individual share of the determined housing need within the PUD currently being reviewed by the Bedminster Township Planning Board.

3. The Court defined 'corridor' be held constant as currently planned and zoned under the March 19, 1980 Court Order of Judge Leahy which mandated the "set aside" provisions already incorporated within the Township's Ordinance provisions governing the development of affordable housing.

4. A "Certificate of Compliance", or a similarly meaningful finding by the Court, be confirmed upon Bedminster Township declaring that the Township has adopted appropriate Ordinance provisions which comply with its obligations under the "Mt. Laurel II" Decision and that the Township be protected from any further Mt. Laurel type litigation for a period of at least six (6) years.

Paul F. Gavin, Mayor
J. William Scher, Planning Board Chairman

Subsequent to the municipal meeting held Thursday evening, April 28, 1983, a meeting was held in the offices of Ed Bowlby on Friday, May 6, 1983 attended by the following individuals:

- George Raymond, Court Appointed Master, and Gerry Lenaz from his offices;
- John Kerwin, Henry Hill, Guliet Hirsch and Alan Mallach, representing The Hills Development Company; and
- myself and Scarlet Doyle representing Bedminster Township.

During the meeting, The Hills Development Company distributed two (2) items; one explaining their anticipated program for providing affordable housing within the PUD, and the other suggesting revisions to the current Ordinance provisions governing the construction of affordable housing within Bedminster Township. Copies of the distributed material are enclosed herewith.

George Raymond led the discussion and took the position that The Hills Development Company must formulate a reasonable program for the construction of affordable housing on the PUD lands in accordance with the March 1980 Court Order and the modifications to the Constitutional Law of the State caused by the "Mt. Laurel II" Decision. George Raymond indicated his feeling that Judge Leahy (if the case is remanded to him as expected and apparently agreed upon among the parties involved) will hold that The Hills Development Company has such a responsibility under the current litigation. It should be noted, however, that The Hills' position is that they only agreed to provide "least cost housing" and are not bound by the requirements mandated in the "Mt. Laurel II" Decision. This question is a legal one which must be dealt with by Mr. Ferguson.

In terms of the four (4) general goals enumerated above, George Raymond expressed concurrence with my position. Moreover, Mr. Raymond's position was that he has no basic problem with the general approach outlined by The Hills Development Company, provided there is reasonable documentation that it is a bona fide effort to meet the "Mt. Laurel II" objectives. However, it was mentioned a number of times during the meeting that endorsement by the Public Advocate's office of any proposed program and accompanying Ordinance provisions will be extremely important in order for the four (4) general goals enumerated above to be accomplished.

Mr. Meiser of the Public Advocate's office was not in attendance at the Friday morning meeting, although I specifically invited him to attend. Nevertheless, Mr. Meiser and I have discussed the objectives of the Township and there appears, at this time, to be no threshhold issues of disagreement.

At the termination of the meeting, Mr. Raymond suggested that The Hills Development Company submit a formal communication to the Township, through my offices, with copies to the participating parties, detailing the proposed program for the construction of the required housing on the Hills PUD site. This material is anticipated to be received by my offices on or about Wednesday, May 18, 1983.

Paul F. Gavin, Mayor
J. William Scher, Planning Board Chairman

After receipt of the material, a second meeting will be held among the parties during the first week in June upon Mr. Raymond's return from vacation. I intend to have formulated suggested Ordinance provisions for municipal review and discussion on or about June 15, 1983.

While this communication and the attached material is primarily offered for informational purposes as an update to the municipal officials, I would appreciate any reactions to the contents of this letter and the accompanying material as an input into my continued efforts to serve the Township in this very important matter.

Truly yours,

Richard Thomas Coppola, P. P.

RTC:e
cc:
Ralph E. Blakeslee, Jr., Township Committee Member
Robert G. Lloyd, Township Committee Member
Elizabeth M. Merck, Township Committee Member
Anne O'Brien, Township Committee Member
John Schoenberg, Township Administrator
Edward D. Bowlby, Esq., Township Attorney
Roger W. Thomas, Esq., Planning Board Attorney
Alfred L. Ferguson, Esq., Special Counsel
John Cilo, Jr., Administrative Officer

RPP&W

Raymond, Parish, Pine & Weiner, Inc. 621 Alexander Road, Princeton, NJ 08540 609 452-2820

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

May 2, 1983

Re: Mount Laurel II

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

My dear Judge Leahy:

At the request of the Bedminster Township Committee, last Thursday night I attended a joint meeting of the Committee and the Planning Board for the purpose of discussing the effects of the Mount Laurel II decision on the processing of the Hills application.

As you may recall, after receiving approval of 25% of the total units authorized in the PUD, approval of additional market rate units under the Township's Land Development Ordinance is conditional upon a certain rate of progress in the provision of the subsidized/least cost housing, as defined in that Ordinance. The Township is in process of reviewing an application for some 80 units which, when approved, will exhaust the unconditional amount of market rate housing. Early approval of these units is expected, so that Hills is in process of developing its proposal for the first installment of "least cost" housing (subsidies were sought, but proved to be unavailable).

I understand that the Public Advocate has requested the appellate court to remand the case back to the trial court to enable you to review the respective housing responsibilities of the Township and the developer in the light of the current requirement that such responsibilities be discharged through the actual provision of "affordable" housing. Pending disposition of the Public Advocate's motion, the Township and Hills are attempting to develop a mutually acceptable solution. Hills has been requested to set forth its proposals for review by the Township in a process not unlike that which led to the formulation of the ordinance itself. I have been asked to participate in that process.

The first meeting, on a staff level, will take place Friday morning, May 6th. I will be out of the Country between May 12th and May 30th, a fact which I communicated to the parties. The hoped-for deadline for the formulation of the final proposal is June 15th.

Please let me know whether my participation in this process meets with your approval. I would also appreciate any instructions as to changes in my role, if any, in light of Mt. Laurel II since, under your order, my role is limited to actions triggered only by irreconcilable disputes between the Township and Hills.

I look forward to hearing from you.

Respectfully yours,

George M. Raymond, AICP, AIA
President

GMR:kfv

cc: Alfred Ferguson
Henry Hill
Kenneth Meiser

Richard Thomas Coppola
and Associates

609-799-5050

17 Candlewood Drive • P.O. Box 99 • Princeton Junction • New Jersey 08550

July 26, 1983

Paul F. Gavin, Mayor
Bedminster Township
Union Grove Road
Gladstone, New Jersey 07934

J. William Scher, Chairman
Bedminster Township Planning Board
Bunn Road
Far Hills, New Jersey 07931

Re: Potential Amendments to Land Development Ordinance Provisions Governing Affordable Housing in Bedminster Township.

Gentlemen:

This letter is intended to update the municipal officials regarding the on-going discussions among the Court Appointed Master, the Public Advocate's Office, The Hills Development Company and myself as representative of Bedminster Township; all in an effort to accomplish the four (4) objectives enumerated in my previously issued May 13, 1983 letter.

The third and most recent meeting held convened at 10:00 a.m. on July 1, 1983 in Ed Bowlby's office. Individuals attending included:

- George Raymond, Court Appointed Master
- John Kerwin, Henry Hill, Alan Mallach, representing The Hills Development Company;
- Ken Meiser, representing the Public Advocate's Office; and
- Myself representing Bedminster Township.

During the meeting, The Hills Development Company explained two (2) written communications which had been distributed prior to the meeting: the first, a June 16, 1983 letter to Messrs. Raymond and myself from Alan Mallach setting forth the conceptual approach whereby The Hills Development Company proposes to satisfy its Court mandated housing obligations; and, the second, a June 1983 communication prepared by Alan Mallach which analyzes the affordability levels for low and moderate income households in Bedminster Township.

While the written communications (copies of which are attached herewith) are comprehensive and provide an explanation of the intentions put forth by The Hills Development Company, certain aspects of the material deserve particular highlighting:

Paul F. Gavin, Mayor
J. William Scher, Planning Board Chairman

1. While the June 16, 1983 communication indicates 288 proposed units, The Hills Development Company's obligation is actually 257 units and Mr. Kerwin indicated that possibly no more than the 257 units would be provided as part of the internal subsidy program.

2. Regardless of the total number of units, approximately 2/3 of the total number of units would be condominium units for sale and approximately 1/3 of the units would be rental units. There will be no appreciable difference between the units constructed for sale versus those for rent.

3. Fifty percent (50%) of the total number of units constructed will be sold or rented to low income households and fifty percent (50%) to moderate income households.

4. The condominium sales units will comprise four (4) different types and sizes of units including a one-bedroom unit, a loft two-bedroom unit, a conventional two-bedroom unit, and a three-bedroom unit. While approximately twenty-five percent (25%) of each type of unit will be constructed, the one-bedroom and loft two-bedroom units will be utilized to satisfy low income household needs and the conventional two-bedroom and three-bedroom units will be used to satisfy moderate income household needs.

5. The rental units will comprise the same mix of units noted above for condominium sales, although the precise mix remains undefined at this time.

6. The one-bedroom sales unit is expected to sell between $25-30,000; the loft two-bedroom between $35-40,000; the conventional two-bedroom between $42-45,000; and the conventional three-bedroom unit in the $50,000 range.

7. The cost reducing factors regarding the condominium sales units is a skewing of the internal mortgage rates among the housing units to be constructed such that the average interest rate for the total household count will be approximately 10.5% while the average long-term interest rate for the low income households will be 8 3/4% and the average long-term interest rate for the moderate income households will be 11 1/4%. Actually, The Hills proposes an initial interest rate of 7 1/4% for the low income households and 9 3/4% for the moderate income households; with annual increases of 1/2 percentage point per year over a three year period. While the buy-down for the three year time period will add approximately $600 to the cost of an avergae unit, the buy-down also will increase the number of households which will be eligible to satisfy the "Mt. Laurel II" income/housing-cost ratio limitations.

8. All unit prices are based on a zero (0) land cost; however, Hills proposes to begin charging for the land at the fourth year into the thirty-year mortgage life. Specifically, The Hills proposes a $75/month land/lease charge to increase by a factor of seven percent (7%) per year over the twenty-seven year time period.

Paul F. Gavin, Mayor
J. William Scher, Planning Board Chairman

It should be noted that both Mr. Raymond and Mr. Meiser raised significant questions regarding the necessity, advisability, appropriateness and reasonableness of the land/lease mechanism. It is the position of The Hills that they should have some way of recouping the land cost from those individuals who purchase one of the low or moderate income homes and, thereafter, receive higher salaries. However, the wisdom of this approach was questioned given the fact that many households would not increase in income in proportion to the $75+ per month assessment and, further, that those households judged able to afford the monthly assessment might be kept at a minimum income level relative to their ability to spend money on other items including, possibly, necessary expenditures to maintain their individual dwelling units.

However, The Hills indicated that they had no intention of charging those who could not afford to pay and that there would be some sort of annual income re-assessment in order to monitor the ability of a household to pay for the land/lease and still be able to maintain the property.

The Hills suggested that a 'Housing Committee' be organized, comprised of representatives of the Township, the Public Advocate's Office, and the developer.

It became clear that the question of the land/lease mechanism is subject to further discussion and refinement.

9. Regarding the proposed rental units, there would be no land/lease mechanism, although there would be the conversion of the rental units to sales units at the end of a ten (10) year time period.

The proposed conversion mechanism must be viewed in the context of the "Mt. Laurel II" housing obligations on the part of the Township and, as with the land/lease noted above for the sales units, questions remain to be addressed by The Hills and considered by the parties involved.

As noted in George Raymond's letter to Judge Leahy dated July 5, 1983, a copy of which is attached herewith, the next step is the submission of a formal proposal by The Hills, refining the material presented at the July 1 meeting and addressing some of the outstanding questions raised by George Raymond and Kenneth Meiser. To date, no additional information has been received by my office.

The municipal officials should also be cognizant of the apparent intention of The Hills to submit a site plan application on or about August 22nd for preliminary and final approval for the remainder of the inner loop area. Although I did not speak for the Township, it was my recommendation to The Hills that all aspects of the housing program be finalized and approved by the participating parties prior to the August 22nd date, since the filing will trigger the affordable housing provisions currently in the Township Land Development Ordinance.

Paul F. Gavin, Mayor
J. William Scher, Planning Board Chairman

It should also be noted that The Hills hopes to have the entire review completed by the end of October 1983. In that regard, I indicated to The Hills that the Township would move as quickly as possible in its review of the material and that, given the detailed site plan work accomplished during the review of Fieldstone, the timetable did not appear to be impossible to accomplish assuming (1) a complete and detailed initial submission, and (2) the finalization of the housing program prior to the submission of the application.

Should the municipal officials desire, it may be appropriate to convene a joint meeting of the Planning Board and Township Committee to review, in more detail, the housing program proposed by The Hills. However, since more work must yet be accomplished by The Hills to firm out the proposed program, it may be more efficient to await the more detailed and formal submission of the housing program by The Hills.

Truly yours,

RT Coppola

Richard Thomas Coppola, P. P.

cc: w/enc.
Ralph E. Blakeslee, Jr., Township Committee Member
Robert G. Lloyd, Township Committee Member
Elizabeth M. Merck, Township Committee Member
Anne O'Brien, Township Committee Member
John Schoenberg, Township Administrator
Edward D. Bowlby, Esq., Township Attorney
Roger W. Thomas, Esq., Planning Board Attorney
Alfred L. Ferguson, Esq., Special Counsel
John Cilo, Jr., Administrative Officer
cc:
George Raymond, Court Appointed Master
Kenneth E. Meiser, Deputy Public Advocate
John Kerwin, The Hills Development Company
Henry A. Hill, Jr., Esq., Attorney for The Hills
Alan Mallach, for The Hills

State of New Jersey

DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY
CN 850
TRENTON, NEW JERSEY 08625

H. RODRIGUEZ
C ADVOCATE

RICHARD E. SHAPIRO
DIRECTOR
TEL: 609-292-1693

September 27, 1983

Alfred L. Ferguson, Esquire
550 Broad Street
Newark, New Jersey 07102

Dear Al:

For the last two years, Bedminster Township has been making a serious, good-faith effort to bring its land use ordinances into compliance with the constitutional Mt. Laurel requirements. This spring, there were discussions about revising the ordinance to conform to the Mt. Laurel II decision. Bedminster held off doing that because it thought that Hills Development would promptly submit a lower-income housing plan. The revision could then be done at the same time as the Hill plans were reviewed. Unfortunately, Hills was substantially delayed in submitting its plans. Accordingly Bedminster chose to act alone, and a revised ordinance received first reading on September 19. Final reading is scheduled for October 3. Despite Bedminster's justifiable reasons for seeking to resolve the matter as quickly as possible, I believe that it is in the interest f everyone, including Bedminster, that passage of the ordinance be delayed.

First, we now have a conference with Judge Serpentelli scheduled for October 6, and I am confident that he will establish a timetable that will protect all parties. Moreover, Hills Development has finally moved into action, having submitted last week a proposal for M.F.A. financing of its lower income units. Thus progress is occurring.

Second, there are a few technical problems in the proposed ordinance that, if not addressed, could jeopardize Bedminster's goal--to protect itself from future Mt. Laurel litigation. Let me give you one example. Section 13-404.7 requires a developer within a "MF"High Density Multiple Family Development to provide 35% low and moderate income housing. Every expert I have spoken to tells me that it is economically impossible for a developer to provide more than 20% lower income housing in a development.

By requiring 35%, Bedminster could be vulnerable to charges that its MF zone is an illusion and provides no opportunity whatsoever for lower income housing. The outcome of a technical issue such as whether to use a 20% or a 35% requirement could be the difference between success and failure, if Bedminster's zoning ordinance is challenged in the future.

My recommendation is that all parties ask Judge Serpentelli to have George Raymond review the proposed zoning revisions prior to their adoption. If all parties and the master recommend that Judge Serpentelli approve them as being in full compliance with Mt. Laurel II, Bedminster will be in the best possible position if it is ever confronted by another developer. For these reasons, I recommend that the Township postpone final passage at this time and await the master's review.

Very truly yours,

KENNETH E. MEISER
Deputy Director

KEM:id
cc: John M. Schoenberg, Administrator
Richard Coppola
George Raymond

BRENER, WALLACK & HILL
2-4 CHAMBERS STREET
PRINCETON, NJ 08540
(609) 924-0808
ATTORNEYS FOR PLAINTIFF
ALLAN-DEANE CORPORATION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SOMERSET COUNTY
DOCKET NOS. L-36896-70 P.W.
L-2801-71 P.W.

ALLAN DEANE CORPORATION,

Plaintiff,

and

LYNN CEISWICK, APRIL DIGGS, W. MILTON KENT, GERALD ROBERTSON, JOSEPHINE ROBERTSON and JAMES RONE,

Plaintiff-Intervenors,

vs.

TOWNSHIP OF BEDMINSTER and the TOWNSHIP OF BEDMINSTER PLANNING BD.,

Defendants.

CIVIL ACTION

ORDER

LYNN CEISWICK, APRIL DIGGS, W. MILTON KENT, GERALD ROBERTSON, JOSEPHINE ROBERTSON, and JAMES RONE,

Plaintiffs,

vs.

TOWNSHIP OF BEDMINSTER, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BEDMINSTER and the ALLAN DEANE CORPORATION,

Defendants.

Background to this Order

The trial court in this matter, after declaring the Bedminster Zoning Ordinance invalid on December 13, 1979, appointed George M. Raymond as Master with directions to assist in the rezoning by Bedminster Township (hereinafter "Bedminster") and the issuance to Allan-Deane Corporation (hereinafter "Allan-Deane") of corporate relief.

On March 21, 1981 the trial court entered a final judgment granting corporate relief to Allan-Deane and declaring the revised Bedminster Zoning Ordinance constitutional.

The plaintiffs in Ceiswick et al. v. Township of Bedminster et al. filed a notice of appeal on May 1, 1981, on grounds that (1) the final judgment granted corporate relief to Allan-Deane without requiring that Allan-Deane provide any low and moderate income housing and (2) the Bedminster revised zoning ordinance failed to provide a realistic opportunity for low and moderate income housing.

The Appellate Division on August 3, 1983 remanded the appeal to this Court for reconsideration in light of the opinion in Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel (hereinafter "Mt. Laurel II"), 92 N.J. 158 (1983).

A status conference was held in this matter on October 6, 1983.

Allan-Deane (hereinafter referred to as "The Hills Development Company"), without acknowledging any obligation under Mt. Laurel II, agreed to submit a proposal to provide 20% low and moderate income housing within its development.

This Court at the status conference on October 6, 1983 authorized George M. Raymond (hereinafter the Master) to continue to function as a court-appointed Master and expert, and requested him to report to the Court on

whether the proposal by The Hills Development Company complies with all the requirements placed upon a developer receiving a builder's remedy and specific corporate relief under Mt. Laurel II;

The Hills Development Company Proposal

The proposal of The Hills Development Company containing the following provisions has been submitted to all parties and the Master:

The Hills Development Company will build 260 housing units (hereinafter "units"), in a section hereinafter referred to as "Village Green". Half of these units shall be affordable by and sold to persons of low income, and half of which shall be affordable by and sold to persons of moderate income. Appropriately sized units will be available to both income groups. For purposes of this Order only, key terms are defined as follows:

"Low income" is defined as 50% of the median income of the area which includes Bedminster Township using the median income data for household size prepared by the United States Department of Housing and Urban Development ("HUD").

"Moderate income" is defined as between 50% to 80% of the median income of the area which includes Bedminster Township using the median income data for household size prepared by HUD.

"Affordable" means that at the ceiling income for each income group, for each household size, no household will be required to pay in excess of 25% of gross household income for the total of principal, interest, property taxes, and homeowner's association(s) assessments for each unit, calculated on the basis of a ten (10%) percent down payment.

"Appropriately sized units" are described as follows:

	Household Size
1 Bedroom	2 persons
2 Bedroom (loft)	3 persons
2 Bedroom	4 persons
3 Bedroom	5 persons

Predicated on the use of the Newark Standard Metropolitan Statistical Area (SMSA) data,as published in 1983, the following figures are derived:

A. The low and moderate income ceilings for the Newark SMSA are:

Family Size	Low	Moderate
2	$13,100	$20,150
3	$14,700	$22,700
4	$16,350	$25,200
5	$17,650	$26,750

B. The Hills Development affordable housing units will sell for the following prices:

	Low Income	Moderate
1 Bedroom	$26,500	$---
2 Bedroom(loft)	$29,500	$48,500
2 Bedroom	---	$52,500
3 Bedroom	$33,500	$55,500

C. With a 10% downpayment and a mortgage obtained through the New Jersey Mortgage Finance Agency, the annual cost for the first year will be:

Income	Low Income	Moderate
1 Bedroom	$3,065	---
2 Bedroom(loft)	$3,411	$5,607
2 Bedroom	---	$6,070
3 Bedroom	$3,873	$6,416

D. Based on a study prepared by a market research firm, Residential Concepts Incorporated, these units have a 1983 estimated market value as shown:

Unit	Estimated Market Value
1 Bedroom	$51,000
2 Bedroom(loft)	$58,700
2 Bedroom	$70,000
3 Bedroom	$79,800

The Hills Development Company further proposes to:

A. Establish a mechanism to regulate the purchase process and sales price upon re-sale so that, to the extent possible, the units continue to remain affordable to, and occupied by lower income persons.

B. Establish a procedure for creating a non-profit corporation which will oversee the screening and selection process for lower income purchasers and the resale controls and to resolve other questions concerning the adminstration of the lower income units.

C. Establish an income recapture mechanism to provide a partial repayment of the differential between the fair market value of the units and the affordable price of the units, in the event that the incomes of unit owners rise to a point whereby they can afford to make recapture payments.

The Master at a meeting on November 7, 1983 determined that the proposal complies with the requirements established in Mt. Laurel II, and has confirmed his findings in a letter to this Court dated November 11, 1983.

Bedminster Land Development Ordinance Provisions

Bedminster has commenced a process to amend its Land Development Ordinance to bring it into compliance with Mt. Laurel II and, at the request for 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.

The Hills Development Company proposal requires a waiver from certain features of the Bedminster Land Development Ordinance which is

presently in effect, and which provides the framework on which the proposal can be approved in accordance with the requirements of the Municipal Land Use Law. The waivers are specifically Section 13.606.4j(1) which requires that at least 25 percent of the lower income units be senior citizen housing; Section 13.606.4j (2) which requires that 35% of the units be rental housing; and Section 13.606.4j(3) which requires certain bedroom ratios.

The Master recommended that the senior citizen and bedroom ratio requirements be waived in this case in order to permit the implementation of Mt. Laurel II lower income housing, and determined the following bedroom provisions of the Hills Development Company proposal to be reasonable:

Number of Units	Size of Units
68	1 Bedroom
68	2 Bedroom (loft)
80	2 Bedroom
44	3 Bedroom

The parties agreed that rental housing can be important since some families are unable to purchase a home because they do not have a downpayment.

The Hills Development Company proposed, in lieu of rental housing, to create a fund to provide downpayments so that 44 sales units are available to low income purchasers who are unable to raise any or all of the downpayment and who otherwise would be unable to purchase a home.

The Master determined that the proposed number of sales units without the required downpayment constitutes an acceptable substitute for the required rental units, and accordingly recommended waiver of the Bedminster rental requirement.

The Need for Expedition

The feasibility of this specific proposal is dependent upon New Jersey Mortgage Finance Agency financing (hereinafter MFA).

MFA indicated it will consider this proposal on December 2, 1983.

MFA indicated that it is important to its consideration that this Court review and approve the lower income housing proposal, and that the Bedminster Planning Board approve the site plan application prior to December 2, 1983.

The construction and marketing schedule of The Hills Development Company requires municipal approval of all units proposed for the inner loop which were originally submitted to the Bedminster Planning Board on August 26, 1983, which application has been deemed "conditionally" complete by the Bedminster Planning Board, such condition being a certification that the lower income units meet the requirements of Mount Laurel II.

It is necessary to expedite the entire approval process for The Hills Development Company lower income and inner loop market units.

Modifications of the Plan

In the event that The Hills Development Company is unable to obtain MFA financing by January 1, 1984, the site plan approval for Village Green and any market units contained in the pending applications in excess of 207 shall be deemed void. In that event, The Hills Development Company has the option to return to this Court within 60 days of the MFA decision with a revised plan to meet Mt. Laurel II, or to terminate its settlement offer. The above shall not, in any way, modify the Board's required review and approval of the market units set forth in the Order of November 3, 1983, provided that the substantive requirements of the Bedminster Land Development Ordinance have been met or appropriate waivers granted.

In order to permit adequate consideration of the resale, recapture and other provisions of The Hills Development Company proposal, it may be necessary for The Hills Development Company or one of the parties to suggest modifications in the form of the resale and recapture provisions, in the structure of the non-profit corporation, or in other parts of the proposal, which modifications shall not alter The Hills Development Company's compliance with the basic requirements of the Mt. Laurel II decision.

Conclusion

And the Court having considered the report of the Master, and the comments of all counsel, and good cause having been shown;

IT IS on this day of November, 1983, ORDERED that:

1. This order supplements the Case Management Order entered November 3, 1983;

2. The findings and recommendations of the Master, contained in his letter to this Court dated November 11, 1983, concerning the compliance of the Hills Development Company proposal with Mt. Laurel II requirements shall be and hereby are adopted;

3. The proposal of The Hills Development Company submitted to this Court with the approval of the Master constitutes, for and with respect to the 1,287 residential units in the residential portion of the PUD which is the subject of this Order, compliance with all of the requirements of a developer receiving a builder's remedy and specific corporate relief under Mt. Laurel II;

4. Upon final site plan approval of The Hills Development Company's lower income units by the Bedminster Planning Board, and MFA approval of the financing for these units, Bedminster shall receive credit for the 260 units towards satisfaction of its fair share obligation under Mt. Laurel II;

5. Notwithstanding Paragraph E of the November 3, 1983 Case Management Order, Bedminster Planning Board shall have the right to approve 353 market units and the 260 affordable units. If the Bedminster Planning Board, subject to the exercise of reasonable discretion and the imposition of necessary conditions, approves The Hills Development Company application for 353 market units and 260 affordable units (which units are in addition to all residential units approved for The Hills Development to date), then, in that event, the Bedminster Planning Board shall be deemed to be in compliance with the Case Management Order dated November 3, 1983, and this Order. Such approval shall be subject to the following conditions:

a. Building permits may not be issued for more than 207 of the above described market units until MFA approval for funding of the lower income units is obtained and documented to the planning board attorney;

b. In the event that a MFA funding commitment is not received by January 1, 1984 for the lower income units in the Village Green section, building permits shall not be issued for more than 207 of the market units within the above described applications unless the Hills Development Company demonstrates either of the following:

1. That an order has been issued by this Court relieving the Hills from its obligation to provide low and moderate income housing, or

2. That it is committed to provide 260 low and moderate income units despite the failure to obtain MFA funding, which units shall be phased in a

manner to be provided in a subsequent Order of this Court.

c. A waiver is hereby granted from Bedminster Land Development Ordinance section 13-606.4 j(1) in order not to require the Hills to provide affordable housing restricted to senior citizens;

d. A waiver is hereby granted from Bedminster Land Development Ordinance section 13-606.4j(2) in order to permit all of the affordable units to be offered for sale;

e. A waiver is hereby granted from Bedminster Land Development Ordinance section 13-606.4j(3) so that no four bedroom units are required and only 44 three bedroom units are required.

f. In the event that the commitment of MFA funding for these 260 units is not demonstrated and The Hills Development Company is not relieved of its obligation to provide low and moderate income housing by this Court order, or does not make a commitment to provide such units despite its failure to obtain MFA funding, building permits will not be issued for more than 207 of the market units discussed above.

6. Any suggested modifications of the proposal by any party shall be submitted first to the Master for his review, and then submitted to this Court within sixty (60) days of this Order;

7. The figures contained in this Order are predicated on data for the Newark SMSA published in 1983. Upon the promulgation of new figures for the Primary Metropolitan Statistical Area (PMSA) which includes Somerset

County, The Hills Development Company may apply to this Court for a determination as to whether any modification of its proposal is warranted.

8. The Master and the parties are directed to continue the studies and reports ordered in Paragraph C of this Court's Case Management Order, dated November 3, 1983, in accordance with the terms thereof. The Master is instructed to submit his report, if at all possible, on or before December 7, 1983.;

9. Nothing in this Order shall be construed so as to:

a. Prevent the parties and the Master, after completing the studies referred to in Paragraph 8 of this Order and Paragraph C of the Case Management Order dated November 3, 1983, from drafting and enacting into law revised development regulations for Bedminster Township which are in full and complete compliance with Mt. Laurel II;

b. Prevent the imposition on all developers in the Township of Bedminster, including the plaintiff Hills Development Company, of all the requirements of the revised land development regulations of Bedminster Township as they may hereafter be amended to comply with Mt. Laurel II; provided, however, that any approvals granted by the Township or this Court with respect to The Hills Development Company's 1,287 residential units which are the subject of this Order, shall be governed by the provisions of this Order, the Case Management Order of November 3, 1983, and the previous Order issued by Judge Leahy, dated March 21, 1981.

(c) Prevent the imposition of all of the requirements of a developer receiving a builder's remedy and specific corporate relief under Mt. Laurel II upon all areas, lands and future development of The Hills Development Company other than with respect to the 1,287 residential units which are the subject of this Order, as to which units the Orders listed in (b), above, shall control;

(d) Imply that The Hills Development Company has waived any rights with respect to any other lands which it owns in Bedminster;

(e) Imply that this Order or the proposal contained herein has any precedential use in any other case, due to the unique factual and legal circumstances of this case.

EUGENE D. SERPENTELLI, J.S.C.

DATED: December 18, 1983

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PETER J. LYNCH

November 28, 1983

Re: Bedminster Township
Site Plan Approvals, Hills Development Co.

Bedminster Township ads Allan-Deane
Docket Nos. L-36896-70 PW
L-28061-71 PW

Ms. Constance Gibson
New Jersey Mortgage Finance Agency
1180 Raymond Boulevard
Newark, New Jersey 07102

Dear Ms. Gibson:

This firm represents Bedminster Township in the 13-year old litigation in Somerset County, involving the regional housing obligation of Bedminster Township and the appropriate response to Mt. Laurel II.

On November 21, 1983, the Planning Board of the Township of Bedminster approved certain development applications of the Hills Development Company, which applications included 260 low and moderate income housing units. These approvals cover the physical site planning aspects of the applications.

The affordability aspects of the application were approved by Judge Serpentelli in a separate court order by Judge Serpentelli, dated November 18, 1983. This court order was the result of extensive negotiations by the Court, the court-appointed Master, George Raymond, and all parties to the litigation.

Accordingly, the application of Hills Development Company, which we understand you will discuss at your meeting in early December, has been approved by both the Superior Court of New Jersey in the litigation, and by the Township.

The Township Committee has authorized me to convey to you their earnest wish that your Agency look most favorably upon the application of Hills Development Company for mortgage financing assistance. If the application is granted, it will result in the first low and moderate income housing actually built under the Mt. Laurel doctrine. The parties to the litigation and the Court system have invested immense resources in helping Hills Development Company to prepare and submit this application: 13 years of litigation, a year and a half of court supervised planning with a court-appointed Master, numerous appellate proceedings, and innumerable meetings between the developer and the Township to iron out the many problems which always arise. If your Agency does not approve the application, the Court and all participants in the litigation run a substantial risk of losing the benefits of all that has gone before.

The Township Committee of the Township of Bedminster has authorized me to inform your Agency that the Township of Bedminster favors most strongly the application of the Hills Development Company, and urges your Agency to act favorably on the application.

If you have any questions, please call.

Sincerely,

Alfred L. Ferguson

ALF/nw
cc: Mayor Paul F. Gavin and
Township Committee
J. William Scher, Chairman
Planning Board
Honorable Eugene D. Serpentelli
Henry A. Hill, Esq
Mr. John H. Kerwin
Kenneth E. Meiser, Esq.
Edward D. Bowlby, Esq.
Roger Thomas, Esq.
George M. Raymond, AICP, AIA

State of New Jersey

DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY
CN 850
TRENTON, NEW JERSEY 08625

JOSEPH H. RODRIGUEZ
PUBLIC ADVOCATE

RICHARD E. SHAPIRO
DIRECTOR
TEL: 609-292-1693

December 19, 1983

George Raymond
555 White Plains
Tarrytown, New York 10591

Dear George,

Most of the attention in Park 2 of your Bedminster assignment has focused upon fair share issues. There are other issues, however, which should not be lost in the shuffle. Since I am leaving for a week's vacation, December 19th, I wanted to send you an outline of these issues before I left. I consider the last issue on this list to be most important.

1. Items Waived in Alan Deane Settlement. Our settlement involved the waiver of the requirements for senior citizen housing, bedroom ratios and rental housing. I believe the senior citizen provision should be removed from the ordinance. I think the present bedroom ratio requirement is too burdensome. I would suggest a maximum of 50% one bedrooms, and a minimum of 20% three bedrooms. I do not see how we can realistically require a developer in today's economy to construct a percentage of rental units.

2. Inclusionary Requirements. The Public Advocate opposes any requirement which would force a developer to provide 35% low and moderate income housing. The Department believes that 20% is the most any developer should be expected to provide.

3. PRD 6, 8 and MF Zones Some review should be given to certain features of these zones to determine whether it is possible to increase the likelihood that lower income housing will actually be constructed.

Pursuant to 13-606.3 garden apartments are not permitted in PRD-6 zones, although townhouses are. Our experience has been that most developers are planning to provide their lower income housing through garden condominiums.

There is also concern about whether the maximum density of 6 to the acre for the PRD-6 should not be raised. The same 20% requirement is imposed on all PRD developers, regardless of whether

their density is 6 or 10 to the acre. Six to the acre density seems on the low side to support a 20% Mt. Laurel II requirement.

The MF zone permits a maximum density of 12 to the acre, regardless of whether townhouses or garden apartments are constructed. The Public Advocate's expert report submitted to the master in the Southern Burlington County N.A.A.C.P. v. Mt. Laurel Tp. case recommended densities of 14 to the acre for a townhouse, 18 for a two-story garden apartment and 22 to the acre for a three-story garden apartment. It should also be noted that the Affordable Housing Handbook prepared by the Department of Community Affairs (1980) states at p. 27:

> As a means of providing some indication of what constitutes appropriate densities for various housing types we offer the following table:

Type of Unit	Optimum Density Range (Per Gross Acre)
Townhouse, Quadruplex, etc.	10-20 units
Garden apartments	15-25 units

Consideration needs to be given to raising this density, particularly for garden apartments.

4. Flexibility for a Mt. Laurel II developer. This is the most crucial question of all. The Bedminster ordinance, as amended, would require that a developer provide 10% lower income housing and 10% moderate income housing if he wants to take advantage of the PUD or MF provisions. We strongly support this provision. Nevertheless, none of us can see the future. None of us knows what interest rates will be three years in the future. What if, because of a rise in interest rates, it is simply not feasible for a developer to provide under the terms of the ordinance 10% lower income housing affordable to households with incomes at 50% of median, paying 25% of their income for shelter? It is no answer to say that the developer should either wait for interest rates to go down or file suit challenging the ordinance. More litigation is the last thing Bedminster wants or needs.

The Public Advocate's proposal is that in such a case the developer should be entitled to request the Planning Board to modify the terms of the ordinance by either giving the developer additional assistance in meeting the requirements or easing the terms of the 10-10 requirement. Furthermore the developer could

request the master to review, at the developer's expense, the request for a modification and make recommendations.

The ordinance should permit the planning board or the governing body to increase densities, reduce cost generating features or fees, modify bedroom ratios, and grant tax abatements, when the master finds it necessary. Alternatively, the master could permit the low income units to be increased in price where absolutely necessary (e.g., permitted to sell at prices affordable to persons at 60% of median. In no event, however, could the developer provide less than 20% of his development as lower income housing, so the development would still fully count towards Bedminster's fair share.

Should the master be unable to continue in this role, the Planning Board should appoint a replacement, considering the suggestions of the master.

I don't know if the ordinance could adequately lay out the factors the Planning Board or the master could consider in evaluating a request for a waiver. It is obvious that the most crucial factor will be interest rates. Special attention must be given to that. Beyond this general statement, I am not sure whether any attempt to list factors worthy of consideration would be productive.

I hope these suggestions have been helpful.

Sincerely,

KENNETH E. MEISER
Deputy Director

KEM:id
cc: Alfred Ferguson
Henry Hill
Peter O'Connor
Rich Coppola

(dictated by not proofread)

State of New Jersey

DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY

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RICHARD E. SHAPIRO
DIRECTOR
TEL: 609-292-1693

January 24, 1984

Honorable Eugene D. Serpentelli
Court House
CN 2191
Toms River, New Jersey 08754

Re: Ceiswick v. Bedminster

Dear Judge Serpentelli:

This letter will summarize the plaintiffs' response to the January 10, 1984 report of George Raymond. The master's report discussed the proposed inclusionary zoning ordinance of Bedminster, fair share and phasing. Before commenting upon the substance of the report, plaintiffs should discuss the context in which these comments are being submitted. A court appointed master, George Raymond, was appointed in early 1980 to work with the parties to rezone Bedminster Township. At the meetings with the master, plaintiffs did not challenge the amount of land which Bedminster proposed to set aside for high density housing. Plaintiffs sought rather to ensure that Bedminister, in rezoning these lands, would include a requirement that a percentage of the units be made available for lower income units. The master in a May 27, 1980 letter to the court recommended that Bedminster require a developer who could not obtain Federal subsidies to provide a percentage of units that were affordable to low income persons, and also establish resale controls to keep them affordable. On June 27, 1980, the trial court held that the Supreme Court had not required municipalities to take any affirmative steps beyond least cost zoning. Based on this ruling, the Township rejected the master's advice and adopted a zoning ordianance which imposed no inclusionary requirements upon a developer in the event subsidies were unavailable.

Plaintiffs on May 1, 1981, filed a limited notice of appeal. Choosing not to challenge either fair share or the amount of land rezoned, they confined their appeal to two issues: the granting of a developer's remedy to Alan Deane without a low and moderate income housing component and the failure of the Township to make realistically possible the construction of lower income housing on the sites which Bedminster established for "least cost" housing. During the pendency of the Bedminster appeal, both before and after the Mt. Laurel II decision, the plaintiffs informed Bedminster that they would dismiss the appeal if sufficient affirmative steps were taken to ensure the construction of lower income housing on the sites that had been rezoned in 1980.

It is with this background that plaintiffs reviewed the master's report. Much of their review focuses upon the terms of the proposed inclusionary

zoning amendments since these amendments go to the heart of the plaintiffs' appeal. Plaintiffs acknowledge that the revised ordinance is a substantial improvement over the ordinance which is now in effect. In this letter to you and in the December 19 letter to the master, plaintiffs have, however, suggested additional revisions that should be made in the ordinance.

Plaintiffs have reviewed the master's proposed fair share and phasing recommendation. In view of the limited nature of plaintiffs' appeal, they do not propose to challenge either number. Plaintiffs have, nevertheless, reviewed with concern the master's conclusions about sewer availability. According to the master's own findings, six of the eleven sites which Bedminster chose to rezone for high density housing are unavailable for construction until after 1990 because of sewer constraints. Plaintiffs submit that the sites which Bedminster itself choose to rezone are not realistically available under these circumstances unless Bedminster upgrades its sewer system. Accordingly, plaintiffs recommend that the master should be asked to supplement his report to determine what steps need to be taken to upgrade the sewer system and to propose a timetable for such updating. Compliance with such a timetable could be a condition of dismissal of the litigation or of "repose."

I. INCLUSIONARY ZONING

Plaintiffs believe that the proposed inclusionary zoning ordinance of Bedminster is a substantial improvement, but submit that the modifications suggested in our December 19, 1983 letter are necessary. The report of George Raymond, the court-appointed master, recommends the adoption of most of these suggestions. Plaintiffs will not repeat here the contents of the December 19 letter, but will elaborate on several suggestions that were either not approved or were modified by the master.

(A) Flexibility

An inclusionary ordinance must be flexible enough to permit the construction of an inclusionary development even in the light of unforeseen circumstances. The density and conditions offered in an inclusionary ordinance may simply not be sufficient to permit the construction of the inclusionary development, particularly if the planning board imposes additional conditions or restrictions beyond those in the ordinance. In footnote 37 of the Mt. Laurel II decision the Supreme Court recognized that if a builder's remedy is not profitable, then the remedy is meaningless. Likewise, if an inclusionary ordinance does not permit the profitable construction of an inclusionary development, the ordinance is meaningless.

George Raymond and I discussed the possibility of having the Planning Board or municipality draw up a list of five housing experts. A developer who sought additional relief could pay to have one of these experts review his application to determine if additional assistance were necessary. If the special expert so recommended, the Planning Board or the Township Committee would be authorized to increase densities, reduce cost generating features, grant tax abatements or waive fees, where necessary. As a last resort, if the special expert concluded that even with all of this assistance

it was not feasible for the developer to meet the literal terms of the ordinance concerning low income housing, the expert could make recommendations permitting the low income units to be raised in price to the extent absolutely necessary (e.g. made affordable to persons at 60% of median rather than 50% or made affordable with an expenditure of 28% of income rather than 25%). Such options would be permissible only after the municipality had implemented all the other recommendations.

Mr. Raymond discusses and recommends adoption of this concept in his report. I do not think, however, that we have enough experts in the state to permit three special experts per project as Mr. Raymond's report recommends, p. 47. Further, while I agree with Mr. Raymond that it is not feasible to force the municipality to accept the experts' recommendations, I think the municipality should give reasons for rejecting any of them. These details aside, it is imperative that such a provision for outside review be in the ordinance, as the master recommends.

(B) Transfer of Development Rights

We also discussed the option of transfer of development rights. Developer one could enter into an agreement whereby he would provide 40% of his units as low and moderate so that the developer who compensated him need not provide any, so long as twenty percent of the combined developments was low and moderate income. This transfer option has been widely used in California. Mr. Raymond rejects this suggestion for two reasons: "first, it would tend to result in the segregation of the affordable units rather than being provided as an integral part of market rate developments .... and second, the difficulty of phasing in the construction of the required affordable units with that of the market rate units...." p. 48

The administrative difficulties of phasing could be resolved by a developer who sought to take advantage of the option. On the subject of segregation, it should be recognized that Bedminster is not a Newark or a Trenton. While plaintiffs would strenuously oppose any attempt to transfer lower income housing to a inner-city ghetto, they do not believe that a financial arrangement whereby, for example, the Hills Development would have contained 40% lower income housing will result at all in "the segregation of affordable units." On the other hand, such a voluntary transfer option might facilitate the construction of a municipality's fair share of lower income housing.

(C) An inclusionary developer should be given maximum flexibility to produce lower income housing. It should be his choice whether to provide the units through garden apartments, townhouses, or single-wide or double-wide mobile homes, and at densities recommended by the Sternlieb Report and the D.C.A. Affordable Housing Handbook. The ordinance does not give this flexibility or this density in all zones. See December 19, 1983 letter, paragraph 3.

The proposed Bedminster zoning ordinance is a major improvement over Bedminster's previous ordinance. Nevertheless, to be fully in compliance with Mt. Laurel II principles, the modifications suggested in our December 19 letter, most of which were recommended by the master, should be adopted.

II. FAIR SHARE AND PHASING

The master accepted an eight county region and within that region concluded that Bedminster's fair share number is 908. More importantly, the master suggested that Bedminster should be permitted to phase in its fair share over a period of years to avoid an excessive rate of growth. The master declared that providing 506-665 units of Mt. Laurel II-type housing in Bedminster within six years "would definitely cause it to lose that negative quality-exclusionary zoning-which the Mt. Laurel II decision intends to eradicate." (p. 57). The concept of phasing was recognized in Mt. Laurel II, where the court indicated that it would not require the construction of "lower income housing in such quantity as would radically transform the municipality overnight." Mt. Laurel II at 219. To prevent this, the Court gave the trial courts discretion, which should be exercised sparingly, to permit the lower income units to be phased in.*

The master recommended phasing in this case, pointing out that Bedminster had only 938 housing units in 1980. The following chart shows what would occur, if various fair share plans were fully implemented between now and 1990 in developments with 20%** low and moderate income housing.

Fair Share Number	Total New Housing Units (20% Inclusionary Developments)	Percentage Increase in Housing Units
506	2,530	270%
666-771(Bedminster)	3,330-3,750	355-394%
944 (Raymond)	4,720	503%
1179 (Abeles)	5,835	622%
1360 (Dobbs)	6,800	725%

These percentage increases may become more relevant when contrasted with what happened in the past two decades. From 1970 to 1980 the largest percentage increases in the state in housing units among New Jersey municipalities were:

1.	Plainsboro	513%
2.	Manchester Tp.	335%
3.	Berkeley Tp.	198%
4.	Vorhees Tp.	188%

The decade from 1970 to 1980 was a decade of exclusion and limited growth. On the other hand, the decade from 1960 to 1970 involved some of the most productive years for new construction in New Jersey. In that decade, the fastest growing municipalities were the following:

---

* Phasing defers rather than reduces a fair share obligation.

** In the absence of subsidies, it is not realistic to require a developer to provide more than 20% low and moderate income housing.

1.	Little Egg Harbor Tp.	525%
2.	East Windsor	468%
3.	Hi-Nella Borough	295%
4.	Manchester	286%
5.	Willingboro	218%
6.	North Hanover	206%*

There are obvious limitations on the suitability or use of percentage increases. Obviously, a municipality with a low amount of housing units can very easily have a high percentage of growth. Likewise, it is possible that the reason a municipality has a small number of units is because of its prior exclusionary practices. Plaintiffs are also aware of the growth in employment in Bedminster from 1970 to 1980. Recognizing these limitations, the presence of a very high percentage increase in housing units can nevertheless be one indicator of an "overnight radical transformation," Mt. Laurel II at 219. It should be noted that if the phasing plan proposed by the master were fully implemented by 1990, Bedminster would have a rate of growth which was exceeded by only two municipalities in the state in either of the last two decades.

As discussed in the introduction of this letter, the plaintiffs made a deliberate choice not to challenge Bedminster on fair share grounds, when they filed their notice of appeal from Judge Leahy's decision. Plaintiffs' position was that if Bedminster took all feasible steps towards assuring that inclusionary developments with a lower income housing component could be built on the sites which were rezoned as a result of the prior proceedings, then plaintiffs would dismiss their appeal. Plaintiffs took this position both during the pendency of the appeal and after the Mt. Laurel II decision was rendered. Under these circumstances, plaintiffs do not plan to challenge either the master's fair share number or his phasing recommendation.

III. SEWER CAPACITY AND REALISTIC OPPORTUNITY

Whether the issue in this case is viewed as involving the validity of the master's phasing analysis, or the more limited question of Bedminster's affirmative duty to make realistic the provision of lower income housing on the sites which it chose for this purpose, several unanswered questions about sewer capacity remain. The master adopts a phasing number of 506** and concluded that the follwing number of units could be developed:

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* Source: United States Census

** Although Mr. Raymond establishes a phasing limit for six years of between 506 and 665, plantiffs will assume that the phasing number is 506. The 665 is based upon the assumption that one developer will use the entire site E for senior citizen subsidized housing. There is no indication that the developer has such an intention or that subsidies can be obtained. In 1983, 3 developers in the state out of 40 applicants received Section 202 subsidies.

Available for Immediate Development	466
Probably Available Within Three Years	40
Other Affordable Sites (After 1990)	255
	761*

The fair share goal which Mr. Raymond concludes can be phased in--506--is achievable only if all five sites (I,J,K,L. and E), which he feels are immediately available or available within three years, are constructed at the maximum possible densities. According to the master, the other high density sites will not be available until after 1990 because of sewer constraints.

The Supreme Court in Mt. Laurel II discussed the zoning ordinance of Mt. Laurel Township which had provided lower income zones consisting of three tracts of land owned entirely by three individuals. The court noted:

> (T)he individuals may, for many different reasons, simply not desire to build lower income housing. They may not want to build any housing at all, they may want to use the land for industry for business, or just leave it vacant. Mt. Laurel II, at 260.

It is not likely that Bedminster can meet even its phased-down fair share under these circumstances because it is simply not likely that all five developers will construct inclusionary developments at the maximum permitted densities within the next six years. Yet, unless this happens, even the fair share of 506 will not be met. To prevent a fair share goal from being frustrated in this manner by a developer's indifference or inaction, Mt. Laurel II and Madison stress overzoning for lower income housing as a means to ensure the realistic, rather than theoretical, opportunity for lower income housing. If a municipality zones more land for lower income housing than it needs to meet its fair share, then there is a margin of error to cover the land that remains vacant.

Bedminster has engaged in some overzoning, but the other sites have sewer problems, as both Mr. Raymond (p. 53-4) and Dobbs recognize. The master notes that an additional 200 lower income units could be produced on lands now zoned for high density if the sewer line were expanded to these sites. (p. 53-4) There is no discussion in the master's report as to what expansion is needed or when it will be provided.

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* Acceptance of the phasing number is premised upon the assumption that developers cannot provide more than 20% lower income housing in a development. Should a developer obtain subsidies for a 100% lower income development, those units in excess of 20% low income should not be considered part a phasing ceiling component.

Were these sites sewered for construction, it is possible that sufficient overzoning would exist to provide a realistic opportunity for 500 units. The unavoidable fact, however, is that without a satisfactory plan for disposition of sanitary waste a development cannot be approved. Field v. Franklin Tp., 190 N.J. Super. 326 (App. Div. 1983). Without a satisfactory sewerage plan, a inclusionary zoning ordinance is meaningless. Indeed, without a sanitary waste option - sewer, package treatment, etc. - the Township could rezone all lands in the municipality at 20 to the acre and no lower income housing would be produced. Resolution of unanswered questions about sewer capacity then is crucial to any determination of the adequacy of a fair share plan.

Even though plaintiffs are not challenging fair share, resolution of the sewer issue from their perspective is also essential. They are willing to end their litigation if Bedminster does everything possible to facilitate lower income housing on the sites which Bedminster, in conjunction with the master, itself chose for least cost and/or lower income housing. Plaintiffs cannot, however, accept Bedminster's rezoning of these lands as satisfactory if, because of lack of sewer capacity, the result is that six out of the eleven sites which it chose are undevelopable until after 1990. (See master's Report, p. 55).

In light of these factors, plaintiffs submit that the master should be asked to supplement his report to the Court. He should personally determine what excess sewer capacity presently exists; what is being done to resolve the infiltration problems (see January 8, 1984, Cappola letter) and the likelihood of success); the probability that A.T.&T will defer or relinquish its allocated capacity; the possibility of a written commitment or incorporation of such a commitment into a court order; and specific other steps that can be taken to upgrade the sewer capacity, as well as a timetable for doing this. In this context, the master should consider the January 13th letter of Dobbs' water resources expert, Robert Hordon. The Hordon letter suggests that even some of the sites which the master determined to be immediately available for development may in fact not be available because of sewer constraints. In view of this uncertainty, the master's supplemental report should make specific recommendations about what, if anything, needs to be done by the municipal utility authority to make realistic the opportunity for lower income housing on these eleven sites in the near future.

Plaintiffs ask Bedminster to take whatever affirmative steps are necessary to ensure that the sites which Bedminster chose produce lower income housing. Bedminster seeks six year "repose" which would result from a declaration that it has made a realistic opportunity for lower income housing. If the court accepts the master's 506 number, Bedminster's obligation would be to make realistically possible 244 units beyond those 260 units provided by Alan Deane. It is possible that sufficient overzoning to provide 244 units would exist under the present zoning, if an acceptable sewer expansion plan were submitted.

Nothing in the Mt. Laurel II decision prohibits this court from conditioning a six year repose upon acceptance of, and compliance with, a plan and timetable for resolving sewer capacity issues. Indeed, in the Mt. Laurel II case itself, after remand, the trial court ordered the Mt. Laurel

Township M.U.A. joined as a defendant so that it was bound by any court orders which were entered. Such action could be taken here.

In sum, this Court should request the master to provide a supplemental report on the subject of sewer capacity. Once the Court receives the supplemental report, all parties and the Court will be in a better position to evaluate whether this action can be dismissed, whether repose is appropriate, and, if so, whether any conditions for repose are necessary.

Thank you for your consideration of this letter.

Respectfully yours,

KENNETH E. MEISER
Deputy Director

KEM:id

Environmental Disposal Corporation
P.O. BOX 509
PLUCKEMIN, N.J. 07978
201-234-0677

TO: Henry A. Hill, Esquire
Attorney for The Hills Development Company

FROM: Neil V. Callahan, President, Environmental Disposal Corp.

RE: An Evaluation of the Proposed Onsite Teritary Wastewater Systems for the Dobbs Site

DATE: September 26, 1984

THE PROPOSED TREATMENT PROCESS

Dobb's proposed treatment system consists of "Rotating Biological Contactors (RBC), clarifiers, and denitrification facilities" housed in an "architecturally compatible building" on a one acre parcel of land near the residential units. The system capacity is 280,000 gallons per day (gpd).

The description of the proposed treatment process is rudimentary, none of the following elements were mentioned: preliminary treatment units, primary treatment units, disinfection units, effluent storage dosing or pumping facilities, sludge handling facilities, laboratory facilities, and standby generating equipment. A discussion of these elements of the treatment system, all of this required by the New Jersey Department of Environmental Protection (NJDEP) regulations concerning preparation of plans for wastewater treatment plants,[1] should have been included in a discussion considering the "construction and installation time", and the treatment systems ability to "provide an effective, environmentally acceptable method of wastewater disposal."

The proposed treatment process is said to include "denitrification facilities." Although these two words contain all the descriptive information offered to date for a process that is;

A. Fundamental to the evaluation of Dobb's contention that the treatment system is environmentally acceptable.

B. The most difficult technological obstacle to overcome in the design of the proposed system due to very limited successful full scale use of denitrification processes.

Denitrification processes are not simply off-the-shelf technology as are RBC's and many other waste treatment equipment.

It is apparent that the proposed treatment system for the Dobb's tract has been developed only to the general concept level. The embiguities and omissions prevent any substantial evaluation of the proposal. There are only two facts apparent. First, the capacity of the proposed system is 280,000 gpd. Second, that RBC's are the proposed biological treatment unit of choice.

THE PROPOSED EFFLUENT DISPOSAL SYSTEM

The proposed effluent disposal system for the Dobb's tract consists of a subsurface perforated piping network that will allow percolation of the treatment system effluent through defined areas (ie "fields") located within native Birdsboro soils. The Hordon Report[2] identifies that 18.8 acres of Birdsboro (BdB) soils above the flood plain can be found on the Dobb's tract. Hordon calculates that 13.4 acres of disposal fields are required based on the general soil characteristics ascribed to (BdB) soils in the U.S. Soil Conservation Service Soil Survey for Somerset County (U.S. SCS, 1976).[3]

The Proposed Effluent Disposal System - continued

It is indicated that phosphorus removal will be accomplished by this effluent disposal method.

Hordon (1984) cites the Soil Conservation Service (SCS) Soil Survey (U.S. SCS, 1976) as the only source of information available regarding the suitability of soil conditions for the site. Hordon directly references the general characteristics of the BdB soils as they pertain to subsurface disposal. Other characteristics of BdB soils mentioned in the SCS survey are as follows:

"Frequent flooding and a perched seasonal high water table are limitations for community development"

"In a few places bedrock is as close to the surface as 4 feet"

With regard to the use of BdB soils for septic tank absorption fields; slight limitations - "hazard of ground water pollution"

With regard to the suitability of BdB soils for reservoir embankments: "Fair to poor...low resistance to piping"

These points are mentioned to underscore the idea that it is hypothetical to presume that 100 percent of a given soil type in a given area is going to be suitable for use as an effluent disposal area.

To support the contention that "there is enough acreage available to accomodate the expected effluent load." Hordon (1984) estimates the minimum bottom area requirement of the disposal field using a design figure of 2.10 square feet per gpd. This figure was taken from design criteria for individual household septic absorption trench or bed systems design[4] (NJDEP, 1978). Inherent in the use of this figure are the following assumptions:

A) The disposal area will have minimal additional percolation due to rainfall. U.S. EPA[5] (EPA, 1980) requires that individual septic system absorption field site selection criteria dictate adequate surface drainage.

B) The proposed disposal area has no lateral movement of ground water into the site.

C) The infiltrative surface of a perferated piping system laid in trenches of unspecified design is equal in performance to the infiltrative surface of a conventially designed absorption trench or bed system, a component of which is a rockbed to allow ponding (see typical details, figures 1 & 2).

There is no supportive information offered for accepting these assumptions at the proposed site.

FIGURE 1

TYPICAL TRENCH SYSTEM

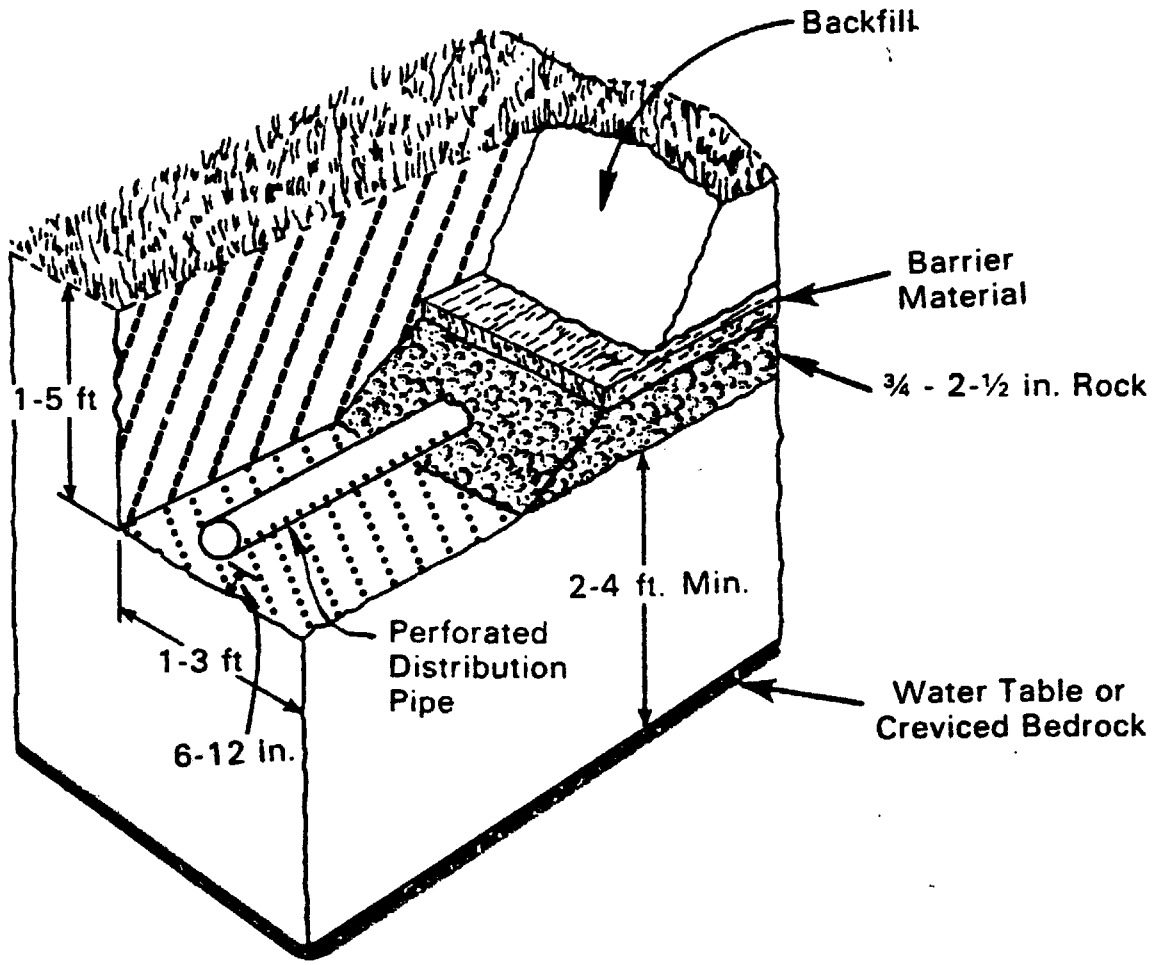
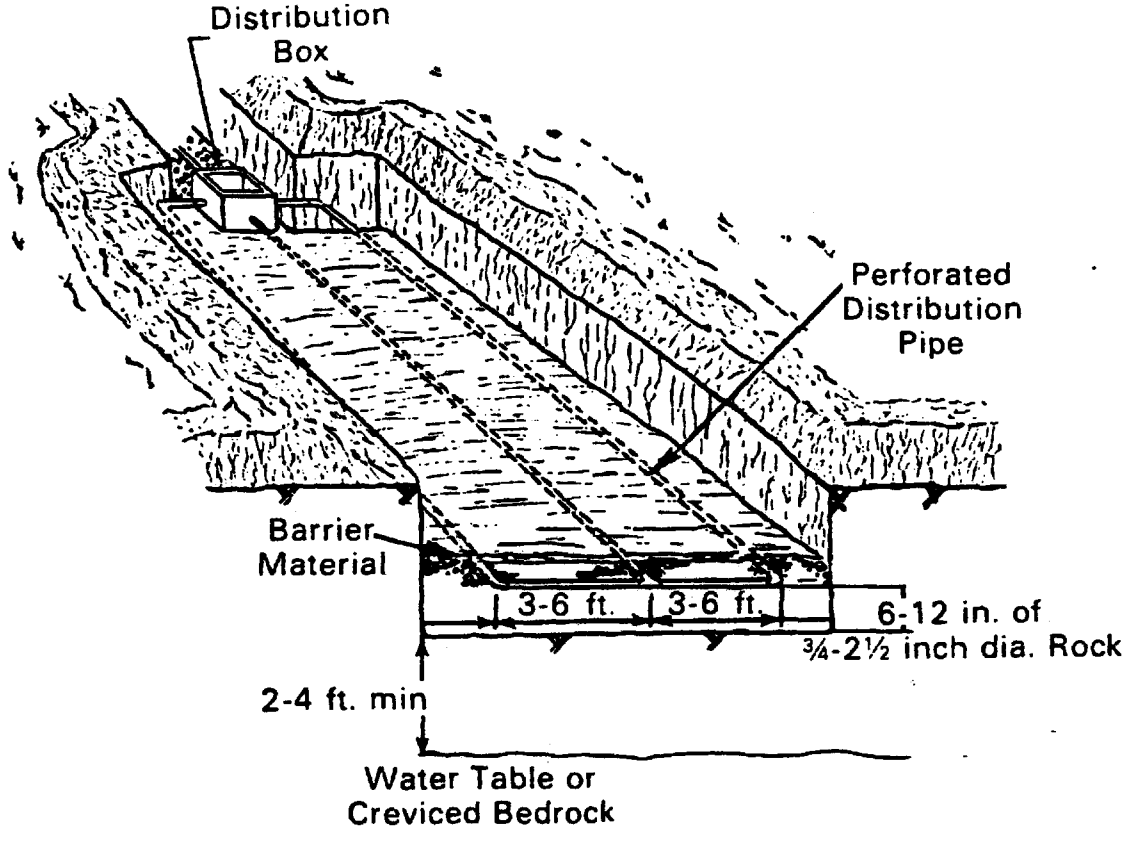


FIGURE 2

TYPICAL BED SYSTEM



The EPA (U.S. EPA, 1980) recommends that for abosrption systems for multi-home wastewaters "Flexability in operation should also be incorporated into systems serving larger flows since a failure can create a significant problem. Alternative bed systems should be considered. A three field system can be constructed in which each field contains 50% of the required absorption area." "Two beds are always in operation, providing 100% of the needed infiltrative surface. The third field is alternated in service on a semi-annual or annual schedule." "Larger systems should utilize some dosing or uniform application to assure proper performance."

In discussions with one engineering firm experienced in New Jersey in design, approval, and construction of community subsurface disposal systems (Telephone interview with William Nero, Keller & Kirkpatric, September 24, 1984) the engineer indicated that it was common practice to use a 150% safety factor and size the disposal fields 50% larger than required by bottom area requirements. It was suggested that the NJDEP generally required it.

If one was to recalculate the disposal field area requirements using a 150% design criteria, the suggested 2.10 square foot per gpd, and an estimate of the percentage of Birdsboro soil area that may not be utilizable for effluent disposal because of any of the following reasons; shallow bedrock, unacceptable bedrock slope or permeability, high or seasonally high ground water table, buffer area requirements, setbacks, access road, disposal field or cell geometry and layout area losses of 15 percent, then the amount of BdB soil area required for the effluent loading would be as follows:

280,000 gpd x 2.10 sq. ft./gpd = 588,000 sq. ft.

588,000 sq. ft. of active disposal area x 1.176 (yield factor for 15% unsuitable area) = 691,765 sq. ft.

691,765 sq. ft. BdB soil area x 1.5 safety factor = 1,037,650 sq. ft.

1,037,650 sq. ft. BdB soil required = 23.8 acres

23.8 acres > 18.8 acres BdB soil available on-site.

Therefore, an analysis considering some additional criteria may not support Dobb's contention that sufficient on-site acreage exists for subsurface disposal on the proposed tract.

Hordon suggests that phosphorus would tend to absorb onto soil particles in the disposal field, be removed, and therefore not impact the North Branch Raritan. An EPA report[6] (EPA, 1977) in a discussion of the "Use of Soil for Treatment and Disposal of Wastewater" states "Phosphorus may leak into the ground water, however, where high water tables or very coarse sand and gravel occur or where the seepage bed has been loaded heavily for a long time. In such instances, concentrations of phosphorus above 5 mg/L as phosphorus have been observed."

In summarizing the disucssion of the suitability and viability of subsurface effluent disposal for the Dobb's tract the following should be noted:

A) Generally 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 reasonably 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.

ESTIMATED SCHEDULING FOR PLANT COMPLETION

Hordon (1984) suggests that the eight month period for soils and site investigation and an 18 month construction schedule to have the system on-line are inappropriate. It is presented that the soils and site investigation can be done in 1 to 2 months, and construction of the RBC's in 30 weeks to 12 months. However, it should be noted that the 8 month period was indicated because the local Board of Health has jurisdiction over subsoil disposal and the local board, based on past history, is likely to require a significant ground water table, and water quality background study. The eight months being suggested as a spring-summer-fall period of investigation. The emphasis of the discussion of a 30 week to 12 month construction schedule was the relative ease of RBC construction, which is true. However, the disucssion does not consider installing in excess of sixteen miles of pipe (see below). The EPA (U.S. EPA, 1980) recommends that disposal fields should not be installed in wet weather. It may not be realistic to envision a 1 year construction schedule even with simultaneous construction.

Example

Consider pipe requirements without 15% loss of available BdB land

588,000 sq. ft. of active disposal area x 1.5 safety factor = 882,000 sq. ft.

250' x 3,500' = 882,000 sq. ft. Using 10" spacing of laterals the disposal field would require 350-250' long laterals or 87,500 linear feet, plus manifolds. This is 16.6 miles of perforated pipe.

INSTITUTIONAL AND REGULATORY CONSTRAINTS REGARDING THE PROPOSAL

Consideration should be given to the recognition that the Dobb's proposed wastewater treatment and disposal system will not be reviewed in abstract. The review processes will attempt to reconcile the proposal with the existing planing and regulatory framework. The difficulty with the proposed system arises when it is recognized that the NJDEP as a policy does not want a proliferation of small package plants with designs based on limited planning horizons, and with limited financial bases.

Growth pressures existing in the Upper Raritan Watershed, (some of which are due to Mount Laurel initiatives) when brought to bear on NJDEP by a treatment plant expansion application by EDC will cause considerable concern to an agency charged with pretecting the state's interest in ground and surface water quality. EDC believes that an existing obligation to provide service to the general public within an existing franchise, and the use of best available technology and monitoring, can adequately address these concerns. However, when these concerns are exacerbated by near simultaneous filings for construction by EDC and Dobb's, in an area where only minimal additional discharges have previously been projected, the potential exists to bring to a head a major program shortfall at NJDEP; the failure to be able to reconcile Mount Laurel initiated growth with long term water quality objectives in the Upper Raritan Basin. In this event a stalemate is likely to develop and construction delays would occur.

SUMMARY

Until such time as significantly detailed information is given, at a minimum, as to; type and expected performance of denitrification process, design details of fields and trenches, groundwater movement (existing and anticipated) bedrock investigations and analysis, phosphorus absorption tests, dosing and distribution concept, and percolation rates throughout the disposal area it is speculative at best to indicate that the proposed effluent treatment and disposal system for the Dobb's tract is viable or environmentally sound, or acceptable to NJDEP. EDC does not accept this proposal, as is, as being viable or environmentally sound. And wheras, NJDEP (Robert Gordon, NJDEP, Telephone interview 9/20/84) has already indicated that the proposal would have to be evaluated for compliance with New Jersey Surface Water Quality Standards and Anti-degradation policy. EDC does not discount the possibility that, given that the wastewater treatment and disposal system proposed by Dobb's is, at this point, only an academic exercise, and if a builders remedy was granted and this proposed system is not feasible or economically attractive, other treatment and disposal methods, including direct stream discharge might be built.

A direct stream discharge such as by the Dobb's development would delay, reduce the capacity of, or eliminate EDC's expansion. It would impair or eliminate EDC's ability to provide service to customers already existing within its franchise and EDC's ability to provide service to the full number of 1,300 to 1,430 Mount Laurel housing units projected within its franchise.

REFERENCES CITED

1. Rules and Regulations for the Preparation and Submission of Plans for Sewer Systems and Wastewater Treatment Plants, NJDEP.

2. Hordon, Robert M., "A Proposed Onsite Tertiary Wastewater Disposal System for the Dobbs Site in Bedminster, Somerset County, New Jersey" August, 1984, 23 pp.

3. U.S. Soil Conservation Service., Soil Survey of Somerset County, New Jersey., 1976, 114 pp.

4. New Jersey Dept. of Environmental Protection, "Standards for the Construction of Individual Subsurface Disposal Systems," July 1, 1978 32 pp.

5. U.S. Environmental Protection Agency, Design Manual: Onsite Wastewater Treatment and Disposal Systems, EPA - 625/1-80-012, October, 1980

6. U.S. Environmental Agency, Alternative and Small Wastewater Treatment Systems, EPA - 625/4-79-001. October, 1977.

State of New Jersey

DEPARTMENT OF THE PUBLIC ADVOCATE
CN 850
TRENTON, NEW JERSEY 08625

JOSEPH H. RODRIGUEZ
PUBLIC ADVOCATE

October 4, 1984

TEL. 609-292-7087

Barry Chalofsky
Supervising Planner - Water Resources
Department of Environmental Protection
1474 Prospect Street
Trenton, New Jersey 08625

Dear Mr. Chalofsky:

On October 2, 1984, I called you with certain questions about the Department of Environmental Protection's policy concerning applications for approvals of wastewater treatment systems. You requested that these questions be submitted to you in writing, and indicated that you would submit written responses.

A background to this request may be helpful to you. We represent plaintiffs in exclusionary zoning litigation against Bedminster Township. The litigation was instituted in 1971, and has been in the courts for thirteen years. Recently, the plaintiffs and the Township entered into a settlement agreement which could resolve this litigation. The settlement, however, must be reviewed and approved by the Mt. Laurel judge who has jurisdiction over the case before it can take effect.

The parties to the settlement reached agreement among themselves as to what Bedminster's fair share of low and moderate income housing should be. Furthermore, they recognized that it would be impossible to accommodate this fair share unless there was an increase in sewage capacity within the Township. There are presently two sewage plants in Bedminster, the Bedminster-Far Hills plant and the Environmental Disposal Corporation (E.D.C.) plant, and both are nearing capacity. Therefore, to make possible achievement of the goals of the settlement, E.D.C. agreed to seek a permit for expansion of its plant from D.E.P., and Bedminster agreed to support the E.D.C. application.

A developer, Leonard Dobbs, is objecting to the settlement and is urging the court to reject or modify it. The developer asserts that the fair share number for lower income housing in the settlement is too low. Dobbs, in addition, is asking the court to grant him a builder's remedy, permitting him to build a high density development with a percentage of lower income housing on his site within the Township. The developer's proposal includes a plan for on-site sewage treatment through a Rotating Biological Disk tertiary treatment plan with denitrification facilities. The plant, as proposed, would have a capacity of 280,000 gallons per day.

It has become apparent that the issues of rezoning and sewage expansion in Bedminster are inextricably linked together. Any rezoning of the Township which attempts to provide a realistic opportunity for low and moderate income housing will in large measure be an academic exercise if there is not also expansion of the sewage capacity in some form. Both the decision of the court in reviewing the settlement and the decisions of D.E.P. in approving or denying sewage treatment permits will be of crucial importance in determining what low income housing will be built in Bedminster. Because the issues are so interrelated, I feel that it would be extremely beneficial if the court were informed of some of the policy considerations which enter into D.E.P. decisions on the subject of sewage expansion. Such information could aid the court in its review of the zoning settlement.

In writing this letter, I recognize that D.E.P. cannot make official permit decisions, except after a full review of all the facts in a particular case. I also recognize that D.E.P.'s primary goal is maintenance of water quality standards, and that water quality considerations would be a crucial factor in any decision that D.E.P. makes. While recognizing these caveats, I would still appreciate as detailed answers as you can give to the questions in this letter. If there is any other information about D.E.P. policies which you feel would be helpful for the court to be aware of, I would invite you to include it, even if it is not specifically raised by one of the questions.

These are the questions which I have:

1. Assuming that E.D.C. submits an expansion plan which satisfies D.E.P.'s water quality standards, what other criteria or policy considerations would D.E.P. utilize in reviewing the application?

2. Assuming that the E.D.C. expansion plan satisfies D.E.P. water quality standards, what is the likelihood that D.E.P. would approve its expansion plan?

3. Are there any actions which Bedminster Township must take, or any commitment from the Township which D.E.P. would require, before D.E.P. would approve the E.D.C. application?

4. Assuming that Leonard Dobbs submitted a plan for an on-site Rotating Biological Disk tertiary treatment plan with denitrification facilities which satisfied D.E.P.'s water quality standards, what other criteria or policy considerations would D.E.P. utilize in reviewing the application?

5. Assuming that the Dobbs' on-site plant satisfies D.E.P. water quality standards, what is the likelihood that D.E.P. would approve this application?

6. Are there any actions which Bedminster Township must take, or any commitment from the Township which D.E.P. would require, before D.E.P. would approve the Dobbs application?

7. Does the type of on-site plan which Dobbs proposes, a Rotating Disk tertiary treatment plan with denitrification facilities, increase or decrease the likelihood of D.E.P. approval?

8. Does the capacity of the proposed plant, 280,000 gallons per day, increase or decrease the likelihood of D.E.P. approval?

9. Are there policy considerations which would cause D.E.P. to prefer the expansion of the E.D.C. site over approval of the Dobbs application, or vice versa?

I want to thank you for your offer to answer these questions in writing and I appreciate the assistance which you are providing me and the court. Because this matter will be heard relatively soon, I hope you can respond to this letter within ten days.

Very truly yours,

KENNETH E. MEISER
Deputy Director

KEM:id
cc: Alan Mallach
George Raymond

State of New Jersey

JOHN W. GASTON JR., P.E.
DIRECTOR

DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER RESOURCES
CN 029
TRENTON, NEW JERSEY 08625

DIRK C. HOFMAN, P.E.
DEPUTY DIRECTOR

October 16, 1984

Mr. Kenneth Meiser
Deputy Director
Department of the Public Advocate
CN 850
Trenton, N.J. 08625

Dear Mr. Meiser:

This is in response to your letter of October 4, 1984 regarding Bedminster Township. Please be aware that this letter represents general policy responses to your questions and is not to be interpreted as a conceptual approval or disapproval, for any specific sewerage treatment proposal. As you stated in your letter, the Department's primary goal is the maintenance and enhancement of water quality. As such this objective is foremost in any decision related to the provision of sewerage facilities.

The answers to your questions are as follows:

1. The Department bases its decisions on appropriateness of sewer service on the Upper Raritan Water Quality Management Plan and the Upper Raritan Watershed Wastewater Facilities Plan. Any expansion of either the Bedminster-Far Hills or the Environmental Disposal Corporation (E.D.C.) plants, over the design capacities indicated in these plans, would require a plan amendment in accordance with the Water Quality Management Planning and Implementation Regulations (N.J.A.C. 7:15-1 et seq.).

Prior to reviewing such an expansion amendment, the Department would require a report detailing the following information: description of proposed plan, location of plant, location of discharge, name of receiving water, projected design capacity, existing and projected sewer service area, projected treatment process and effluent limitation, anticipated service population, identification of environmentally constrained areas (based on NJDEP defined environmentally sensitive features), and an identification of the owner and operator of the facility.

2. The Department would prefer that flows for these developments go to the Bedminster plant if environmentally and economically feasible. The Department encourages the utilization of private funds to upgrade and expand municipal domestic wastewater treatment facilities. If this is not feasible, expansion of the E.D.C. plant could be considered.

3. As per #2 above, we would prefer that the Township examine expansion of the Bedminster plant first. If this examination shows that such an expansion is not feasible, then resolutions of endorsement would be required from the township governing body, the Bedminster MUA governing body, and the Somerset County Board of Chosen Freeholders (the designated 201 Wastewater Planning Agency), prior to consideration of an E.D.C. expansion amendment.

4,5 & 6. 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.

7 & 8. If a separate plant is considered, its effluent limitation would have to meet the water quality of the receiving stream. In addition, the design capacity would be evaluated on the basis of anticipated population, and would also effect the effluent limitation. Without any supporting documentation, the Department cannot make a determination, at this time, as to the sizing and effectiveness of the proposed plant.

9. As stated in #2 above, the Department prefers expansion of the Bedminster plant first, then expansion of the E.D.C. plant, prior to the consideration of a new treatment facility.

I hope that these responses meet your needs. If you have any further questions please contact me.

Sincerely,

Barry Chalofsky, P.P.
Supervising Planner

cc. Director Gaston
Assistant Director Clark
George Horzepa
Lee Cattaneo

Mt. Laurel II Compliance Agreement

WHEREAS, this litigation was initiated by the filing of a Complaint by the Cieswick plaintiffs in 1971, followed by the consolidation with other litigation in 1973; and

WHEREAS these cases have been vigorously litigated by the parties; and

WHEREAS, Bedminster Township revised its zoning ordinance in 1980 with the assistance of the court-appointed Planning Master, George Raymond, after which an Order for Final Judgment on Issue of Defendant's Zoning Obligation and Order for Specific Corporate Relief was entered by the Honorable Thomas Leahy on March 20, 1981; and

WHEREAS, an appeal was taken from said order by the Cieswick plaintiffs, and the Appellate Division, by decision dated August 3, 1983, remanded the consolidated cases to the Honorable Eugene Serpentelli, specially-assigned Mt. Laurel judge, for consideration of all issues in light of the opinion of the New Jersey Supreme Court in Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 92 N.J. 158 (1983) ("Mt. Laurel II"); and

WHEREAS, Bedminster Township on its own initiative introduced proposed amendments to the zoning ordinance in September 1983 which would replace the "least cost housing" requirements with "affordable housing" requirements for purposes of

complying with the new standards created by the Mt. Laurel II decision; and

WHEREAS, Bedminster Township subsequently tabled action on the proposed amendments at the request of the Cieswick plaintiffs and agreed to enter into discussions with respect to the proposed amendments in order to voluntarily and amicably resolve all issues with respect to Bedminster Township's obligations under Mt. Laurel II; and

WHEREAS, the trial court entered a Case Management Order on November 3, 1983, which authorized and directed George Raymond to continue to function as the court-appointed Master and to (1) review the development application of Hills Development Corporation, successor in title to plaintiff Allan-Deane Corporation, and report to the Court whether the development proposal contained in said application complies with the requirements placed upon a developer receiving a builder's remedy under Mt. Laurel II, (2) review the fair share studies of Bedminster Township, materials submitted by the parties and the relevant planning facts of Bedminster Township and report to the Court on Bedminster Township's appropriate region, regional need, and fair share; and (3) review Bedminster Township's land development regulations, including recently proposed amendments, and report to the Court on whether said regulations make realistically possible the satisfaction of Bedminster Township's fair share; and

WHEREAS, the parties subsequently engaged in extensive settlement discussions, many of which included the participation of the Master; and

WHEREAS, the trial court entered an Order dated May 25, 1984, approving the builder's remedy for Hills Development Company, successor in interest to the Allan-Deane Corporation, and pursuant to said Order construction has already started on two-hundred-sixty (260) lower income housing units; and

WHEREAS, the Court by Order dated May 25, 1984, gave the Ceiswick plaintiffs and Bedminster Township thirty (30) days (subsequently extended for an additional two weeks) to attempt to resolve the remaining issues in the case; and

WHEREAS, the parties subsequently engaged in further settlement discussions with respect to all remaining issues; and

WHEREAS, the "consensus" Lerman methodology produces a fair share number for Bedminster Township of eight hundred nineteen (819); and

WHEREAS, Bedminster Township vigorously asserts that the consensus methodology is flawed in many respects and that its fair share number is substantially less; and that because of the special circumstances of Bedminster Township it should be permitted to phase in its fair share over a longer period than six (6) years; and

WHEREAS, resolution of this litigation will permit the

construction of lower income housing, while prolonged litigation would probably delay such construction and also consume considerable time and resources of the parties and the trial court; and

WHEREAS, the parties have agreed in order to settle this litigation to accept as Bedminster's fair share number six hundred fifty-six (656), which is eighty (80%) percent of eight hundred nineteen (819), and which the parties conclude is reasonable in light of the positions of the parties asserted in this litigation and the risks, uncertainties and delays of litigation; and

WHEREAS, Bedminster Township has proposed further amendments to its land development regulations and zoning map so as to make realistically possible the satisfaction of Bedminster Township's fair share obligation under Mt. Laurel II; and

WHEREAS, Bedminster Township has agreed to enact said amendments into law in accordance with the terms and conditions of this Agreement, upon court approval as set forth in this Agreement; and

WHEREAS, any strategy to meet the fair share number of Bedminster Township will require affirmative action by the New Jersey Department of Environmental Protection ("DEP") through expansion of either the Bedminster-Far Hills plant or the Environmental Disposal Corporation ("EDC") plant, or through approval of one or more new on-site treatment facilities, such as the one proposed by Leonard Dobbs; and

WHEREAS, the Dobbs' site is not readily available for development now because no construction could begin unless DEP granted approval of Dobbs' on-site treatment proposal and there is no indication that said approval could be readily obtained; and

WHEREAS, the Timber Properties' site is not readily available for development now because no construction could begin unless DEP granted approval for a plan for expansion of the Bedminster-Far Hills plant; and

WHEREAS, expeditious approval by DEP of any new project is most likely if there is a concerted effort by all parties to get a single proposal approved by DEP, rather than piecemeal efforts for DEP approval of three separate projects; and

WHEREAS, Bedminster Township has legitimate planning reasons for seeking to channel its future growth into the EDC franchise area; and

WHEREAS, Bedminster Township and EDC are in the process of entering into an agreement providing for cooperation with respect to an expeditious application by EDC to obtain approval for the expansion of the EDC treatment plant and franchise area; and

WHEREAS, all parties have agreed that a concerted cooperative effort by all parties to have DEP approve the expansion of the EDC plant offers the best strategy for most quickly providing sewer capacity to accommodate the construction of Bedminster

Township's entire fair share of low and moderate income housing; and

WHEREAS, the areas chosen by Bedminster Township for lower income housing are consistent with principles of sound land use planning; and

WHEREAS, Bedminster's prior proposal, which is substantially similar to the proposal set forth in this Agreement, was approved by the master, George Raymond, and this Compliance Agreement provides an even stronger likelihood that the fair share will be achieved; and

WHEREAS, this Agreement provides the realistic opportunity for the construction of 900 lower income housing units, which constitutes an overzoning of more than 37% in excess of the agreed upon fair share number;

NOW, THEREFORE, in consideration of the mutual covenants, promises, terms and conditions hereinafter provided, it is agreed by and between the Township and the Cieswick plaintiffs as follows:

1. This agreement is reached after due deliberation by all parties and upon the considered judgment of all parties based upon the advice of counsel and professional planning consultants that it is in the best interest of the public good and welfare to settle the aforesaid litigation upon the terms and conditions contained herein so as to meet the fair share obligation of the Township.

2. The Township agrees to enact into law, in accordance with the provisions of the Municipal Land Use Law, the amendments to the zoning ordinance and zoning map of the Township as set forth in Exhibit "A" attached hereto and made a part hereof, subject to the conditions set forth in paragraph 10 herein.

3. The zoning amendments provided for by this Agreement include senior citizen housing as a conditional use for certain designated areas, subject to the requirement that all units be affordable to lower income housing. In order to encourage and facilitate the construction of such housing, Bedminster Township agrees to ~~cause~~ form or cause to be formed a nonprofit corporation whose purpose would be to seek funding from federal, state, charitable and other sources for the construction of one or more projects totalling at least 125 lower income housing units for senior citizens.

4. The parties agree that six hundred fifty-six (656) units represents the Township's fair share through the year 1990 and that the settlement permits the construction of nine hundred (900) units of low and moderate income housing.

5. On or before July 1, 1990, the Township shall, through its normal planning process, re-assess its housing needs to determine whether an opportunity for additional low and moderate income units is required pursuant to the then-applicable

statutory and case law and, if so, to take appropriate action in response thereto.

6. In the event that housing affordable to low or moderate income households in excess of the Township's fair share of 656 is constructed in the Township on or before July 1, 1990, or otherwise is added to or identified as a part of the Township's housing stock, the Township shall receive credit for each such additional unit towards satisfaction of any subsequent fair share or other housing obligation.

7. Commencing on the date on which all the conditions set forth in paragraph 10 hereof shall have been satisfied (the "effective date"), and subject to an express determination by the trial court that the Township may lawfully do so, the Township agrees to enact ordinance provisions for the waiver of the following fees for the low and moderate income units in affordable housing developments:

(a) Subdivision and site plan application fees on a pro rata basis based upon the percentage of low and moderate income housing in the development.

(b) Building permit fees, except state fees.

(c) Certificate of Occupancy fees.

(d) Engineering fees on a pro rata basis based upon the percentage of low and moderate income housing in the development.

Provided, however, that the foregoing waiver shall not apply with respect to any fees which have been paid to the Township prior to the effective date or which are due and payable to the Township by any developer or applicant as of the effective date.

8. The Township agrees to require developers to utilize or establish mechanisms and procedures to ensure that units are marketed to and remain affordable by eligible lower income households.

9. The Township agrees to require applicants to provide written notice to the Department of The Public Advocate of any applications for conceptual, preliminary, or final approval by developers in the affordable housing zones, and of any preliminary or final approvals or denials, whether conditional or unconditional.

10. This Compliance Agreement is conditioned upon, and shall not be effective until (1) the approval by the trial court of the within agreement, including an express determination that neither Leonard Dobbs nor Timber Properties (or their successors in interest) is entitled to a builder's remedy or otherwise entitled to zoning for lower income housing; and (2) the entry by the trial court of a final judgment of Mt. Laurel II compliance including a six-year period of repose from Mt. Laurel litigation as provided for by the New Jersey Supreme Court in Southern

Burlington County N.A.A.C.P. v. Mt. Laurel Twp., 92 N.J. 158, 291-2 (1983).

11. Upon the construction and occupancy of sufficient units affordable to low and moderate income households under the ordinance provisions set forth as Exhibit A to satisfy the municipality's fair share of 656 and upon written notice to the Department of The Public Advocate, the Township may repeal or amend the ordinance provisions set forth in Exhibit A.

12. The municipality shall not zone, rezone, grant variances, or grant any preliminary or final site plan approval for townhouses, garden apartments or residential uses at gross densities higher than four (4) units per acre unless:

(a) the development is subject to a mandatory set-aside for units affordable to lower and moderate income households analogous to that contained in Exhibit A, or

(b) the municipality has met its fair share obligation as set forth in this Agreement.

13. Upon enactment into law, the low and moderate income housing provisions as set forth in Exhibit A shall not be repealed, amended or modified without prior notice to the Department of the Public Advocate, except as provided in paragraph 11 above. The Township agrees to submit any proposed amendments to the Public Advocate for review. If no written objections are received within ten (10) days thereafter, then the Township may

proceed with the adoption of the proposed amendments. If written objections are received within said time period, then the parties agree to attempt to amicably resolve any differences. If agreement cannot be achieved and the Public Advocate believes the proposed amendment will adversely affect the ordinance's compliance with the requirements of law, then the Public Advocate may by motion submit the issue to the trial court.

14. The parties hereto acknowledge and agree that this Compliance Agreement shall in no way be construed by any party in any other case as a model, guide or precedent, since this case reflects unique circumstances and was uniquely positioned as a matter which included many issues which were thoroughly litigated and largely decided prior to Mt. Laurel.

Date:

JOSEPH H. RODRIGUEZ,
Public Advocate
Attorneys for Plaintiffs

By: KENNETH E. MEISER, Deputy Director

Attest:

Township of Bedminster

By:

Date: 10/29/84

PROPOSED ORDINANCE AMEMDMENTS
BEDMINSTER TOWNSHIP, NEW JERSEY

1. Add new Subsections 13-404.1 h. and 13-405.1 h.

"h. Senior Citizen Housing as a conditional use under N.J.S.A. 40:55D-67 (see Section 13.601 for standards).

2. Change 13-601.2 in its entirety to read:

13-601.2 Senior Citizen Housing.

a. No site shall contain less than four acres.

b. The maximum residential density shall not exceed fifteen dwelling units per gross acre.

c. No dwelling unit shall contain more than two bedrooms except that a dwelling unit for a resident manager of the building may contain more than two bedrooms.

d. Individual dwelling units shall meet the minimum design requirements specified by the New Jersey Housing Finance Agency.

e. The maximum building height shall not exceed 35 feet and three (3) stories.

f. A minimum 1.0 parking spaces shall be provided for each dwelling unit except that a lesser number, as determined by the subsidizing governmental authority, can be paved.

g. A land area or areas equal in aggregate to at least 250 square feet per dwelling unit shall be designated on the site plan for the recreational use of the residents of the project; except that where a project is located within 300 feet of any existing or previously approved park or recreational area, the Planning Board may waive this requirement at the time of site plan review.

h. Prior to any Township site plan approval, the following prerequisites shall have been accomplished:

1. Verification that there are or will be adequate utility services and support facilities for the project, including transportation facilities and commercial establishments serving everyday needs, within a one mile walking distance of the proposed site.

2. Assurance that the occupancy of such housing will be limited to households, the single member of which, or the husband and/or wife of which, or any of a number of siblings or unrelated individuals of which, or a parent of children of which, is/are 62 years of age or older, or as otherwise defined by the Social Security Act, as amended, except that this provision shall not apply to any resident manager and family resident on the premises.

3. Verification of conceptual approval of the project by any State or Federal agency which finances or assists the financing or operation of such housing; except that if approval of the project by the subject State or Federal agency requires prior approval by the Township, then the Township may approve the site plan conditioned upon approval of the project by the appropriate State or Federal Agency.

4. A bona fide non-profit or limited dividend sponsor shall have been established and approved by the subsidizing governmental authority to develop the project; except that if the subsidizing governmental authority requires prior approval by the Township, then the Township may approve the site plan conditioned upon the establishment of a bona fide sponsor approved by the governmental authority.

5. Assurance that all dwelling units are rented or sold only to low and moderate income households and that such units will continue to be occupied by low and moderate income households for a period not less than 30 years.

3. Add new Subsection 13-606.1 e. to read:

"e. Single-family clusters are permitted on tracts of land at least fifty acres in area where indicated on the zoning map."

4. Add new Section 134-606.6 to read:

"13-606.6 Single Family Clusters.

a. Principal permitted uses on the land and in buildings.

1. Detached dwelling units.

2. Public playgrounds, conservation areas, parks and public purpose uses.

3. Public utility uses as conditional uses under N.J.S.A. 40:55D-67 (see Section 13-601 for standards).

b. Accessory uses permitted.

1. Private residential swimming pools in rear yard areas only (see Section 13-514).

2. Private residential tool sheds not to exceed 15 feet in height.

3. Boats on trailers and campers to be parked or stored and located in rear or side yards only. Their dimensions shall not be counted in determining total building coverage, and they shall not be used for temporary or permanent living quarters while situated on a lot.

4. Usual recreational facilities.

5. Off-street parking and private garages (see Section 13-508).

6. Fences and walls not exceeding six feet in height in rear and side yard areas and three feet in height in front yard areas (see Section 13-503).

7. Signs (see Section 13-512).

8. Residential agriculture (see Section 13-201 for definition).

9. Home office occupations (see Section 13-201 for definition).

c. Maximum building height. No detached dwelling shall exceed 35 feet and two and one-half stories in height.

d. Maximum number of dwelling units permitted. The number of dwelling units permitted within a single-family cluster is equal to one dwelling unit per acre of non-critical land on the tract plus a transfer of an additional one-fifth dwelling unit per acre from the critical lands within the tract to the non-critical areas.

e. Area and yard requirements.

Principal Building Minimum	
Lot area	14,500 sq. ft. minimum and 33,000 sq. ft. maximum, with an average lot size no less than 22,000 sq. ft.
Lot frontage	100'
Lot width	100'
Lot depth	125'
Side yard (each)	20', except 10' for an attached garage
Front yard	40'
Rear yard	30'
Accessory Building Minimum	
Distance to side line	10'
Distance to rear line	15'
Distance to other buildings	10'
Maximum	
Building coverage of principal building	10%
Building coverage of accessory building(s)	2%

f. Minimum off-street parking.

1. Each detached dwelling unit shall be provided with no less than two off-street parking spaces and no parking space or driveway shall be located within six feet of any property line.

2. See Section 13-508 for additional standards.

g. Permitted signs.

1. Detached dwelling: Information and direction signs as defined in subsection 13-512.1e.

2. See Section 13-512 for additional standards.

h. Open space requirements. See subsection 13-606.5 hereinabove.

5. Change Subsection 13-606.3.i. in its entirety to read:

i. Low and moderate income housing requirements. At least twenty percent (20%) of the total number of residential dwellings within a development shall be subsidized or otherwise made affordable to low and moderate income households as discussed and defined in the "Mt. Laurel II" Supreme Court Decision (So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N. J. 158 (1983). The applicant shall submit, with the application for development, a narrative description of the mechanism to be used to insure that the required affordable dwelling units are rented or sold only to low and moderate income households and that such units will continue to be occupied by low and moderate income households for a period not less than 30 years. In addition to such description, actual samples of language to be included in the nature of covenenants shall be submitted. The submitted description shall detail the entity or entities responsible for monitoring the occupancy of the low and moderate income units and shall provide a detailed discussion concerning resales, permitted increases in price, pre-qualification of occupants, etc. Every affordable unit shall be sold at a monthly carrying cost (including mortgage, taxes, owners association fees and insurance, but excluding utilities) not exceeding 28% of the earning limits calculated for low and moderate income households or rented at a monthly carrying cost (including utilities) not exceeding 30% of those earning limits; provided that the sales prices and rent levels shall be set so that units shall be affordable not only by households at the ceiling income for low income households and moderate income households, respectively, but by a reasonable cross-section of households within each category. For purposes of this Ordinance, "low income households" are those earning less than 50% of the median income calculated for the 11 northern New Jersey counties, utilizing HUD median family income data weighted by the number of

families in each county, exclusive of any area outside of New Jersey, and adjusted for household size. "Moderate income households" are those earning between 50% and 80% of the calculated median income figure.

1. At least 25 percent of the required 20 percent shall be rental units subsidized in accordance with available subsidy programs authorized and regulated by the Federal Department of Housing and Urban Development or the New Jersey Housing Finance Agency. If no subsidy programs are available, this fact shall be certified to the Planning Board, and the rental units shall be restricted in size to be no larger than 15 percent greater in area than the minimum net habitable floor area as specified by H.U.D. as a minimum for a particular unit. In any case, the developer shall insure that 50% of said rental units shall be provided for low income households and 50% for moderate income households. Moreover, not less than 20 percent (20%) of the units shall have three (3) bedrooms, and at least one-third (1/3) of these three (3) bedroom units shall be set aside for occupancy by low income households.

2. At least 25 percent of the required 20 percent, and such additional units as may be required to achieve the low and moderate income housing requirements within the development, shall be dwellings for sale. The developer shall insure that 50% of said sale units shall be provided for low income households and 50% for moderate income households. Moreover, not less than twenty percent (20%) of the units shall have three (3) bedrooms, and at least one-third (1/3) of these three (3) bedrooms shall be set aside for occupancy by low income households.

3. If the Planning Board determines, upon proofs submitted by the applicant, that low and moderate income housing units are more likely to be produced by the waiver of the mix requirements set forth in subsections 13-606.3i.1. and 13-606.3i.2. hereinabove, the Planning Board may, subject to such appropriate conditions as it may impose, permit the applicant to provide only rental or only sale units; provided, however, that if only sale units are proposed, the applicant shall propose a program for eliminating the neccessity of down payments on up to twenty-five percent (25%) of the affordable units.

4. A developer may request the Planning Board and/or the Township to waive or modify requirements of the land development Ordinance (except with respect to permitted densities), or to take other actions authorized by law, if the developer believes that such actions are necessary to provide the twenty percent (20%) 'low' and 'moderate' income housing. If

such relief is sought, a developer must choose one of three impartial housing experts from a list prepared by the Planning Board and have the expert make recommendations, at the expense of the developer, on the necessity for the proposed waivers, modifications or other actions. The designated housing expert may, if necessary, utilize the services of an accountant, housing economist or similar professional, also at the expense of the developer. The developer shall provide the Township, Planning Board and the expert, and any persons assisting the expert, Township or Planning Board, with copies of, and full access to, all the developer's information and records, including, but not limited to, all financial records, actual costs and projections concerning the proposed development. The expert shall conduct an investigation and make findings with respect to the following:

a. The financial feasibility of the proposed development without any modifications of the applicable regulations or other municipal action.

b. The potential for cost savings through modifications to the proposed development plan which would not require the waiver or modification of applicable regulations or other municipal action.

c. The potential for cost savings through the waiver or modification of any applicable regulations to the extent not necessary to protect public health or safety or through other municipal actions permitted by law.

d. The relationship, under the circumstances, between sound principles of land use planning and any potential modifications of the development plan and/or the applicable regulations.

The expert shall prepare a preliminary report setting forth the preceding findings and recommending any modifications of the development plan or the applicable regulations or any other actions deemed necessary in order to provide the twenty percent (20%) lower income housing units. Said recommendations shall give preferance to any actions or modifications by the developer before recommending any municipal waivers or actions. The developer, Planning Board and Township may review and comment upon the preliminary report, and the expert may revise the report and recommendations or conduct further studies in response to any comments or criticisms received. In the event that the expert determines that, even after any recommended actions, it is not economically feasible for the developer to provide the full amount of affordable 'low' and 'moderate' income units, the expert may recommend that the developer provide twelve percent (12%)

moderate income and eight percent (8%) low income units. Such a modification in the 'low' and 'moderate' income obligation shall not be approved unless the Planning Board, Township and developer have substantially complied with the recommendations to reduce costs. The recommendations shall not be binding upon the Township or Planning Board, but in the event that the Planning Board or Township declines to accept one or more recommendations of the expert, it shall detail its reasons in writing. All the costs and expenses of the housing expert and consultant(s) employed by the expert shall be paid by the applicant.

6. Change subsection 13-606.4j. in its entirety to read:

j. Low and moderate income housing requirements. See Subsection 13-606.3 i. for requirements.

7. Add a new subsection 13-404.7 to read:

13-404.7. Low And Moderate Income Housing Requirements. See Subsection 13-606.3 i. for requirements.

8. Add a new footnote "(4)" to the "Floor area ratio" portion of the chart within Section 13-406.4, Area and Yard Requirements for the 'OR' District, to read as follows, and change the existing footnote "(4)" to become footnote "(5)":

"(4) A developer may increase the square footage of the office/research space on any tract in excess of twenty (20) acres in size zoned "OR", provided that for every additional 7,623 square feet (0.175 F.A.R. X's 43,560 sq. ft. [1 ac.]) of space, an acre of land adjacent to the subject "OR" tract is dedicated to the Township for "public purpose uses" and, provided further, that no less four (4) such acres, nor more than six (6) such acres, be dedicated in this manner.

9. Change Section 13-805.3.h. to read:

h. In the case of "MF", "PRD" and "PUD" developments only, final approval shall not be granted for any section of the development unless the following phasing plan for the construction and occupancy of required 'low' and 'moderate' income units to market dwelling units has been adhered to (see Subsection 13-606.3.i.):

1. The developer may construct and occupy up to twenty-five percent (25%) of the total number of market units within the development prior to constructing any 'low' or 'moderate' income units.

2. The developer may thereafter construct and occupy an additional twenty-five percent (25%) of the market units

within the development, provided that at least twenty-five percent (25%) of the 'low' and 'moderate' income units are being constructed.

3. The developer may thereafter construct and occupy an additional twenty-five percent (25%) of the market units within the development, provided that an additional fifty percent (50%) of the 'low' and 'moderate' income units are being constructed.

4. The developer may thereafter construct and occupy the remaining twenty-five percent (25%) of the market units within the development, provided that the remaining twenty-five percent (25%) of the 'low' and 'moderate' income units are under construction and, provided further, that an equal percentage of 'low' and 'moderate' income units versus market units shall have received certificates of occupancy at any time.

10. The Zoning Map is changed as attached herewith and dated June 1984.

FAIR SHARE REPORT

URBAN LEAGUE OF GREATER NEW BRUNSWICK
v.
CARTERET ET AL.

Prepared by Carla L. Lerman, et al.[1]

Preface

During February and March, 1984, three day-long sessions were held with planners and housing experts who are involved directly or indirectly in the case of Urban League of Greater New Brunswick v. Carteret to determine if consensus could be reached on the most appropriate methodology for determining region and fair share as set forth in the New Jersey Supreme Court decision known as Mt. Laurel II.

These three sessions provided the opportunity to review all aspects of the fair share methodologies that had been used to date in fair share reports, and to evaluate their appropriateness. The participants also reviewed the Rutgers study, Mt. Laurel II: Challenge and Delivery of Low Cost Housing, written by the Center for Urban Policy Research. Drs. Robert Burchell and David Listokin, who of the project leaders, were invited to address the group at its first session.

The results of those meetings, as well as many hours of telephone conferences, and total cooperation and sharing in the

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[1]See participant list in Preface.

data-gathering effort, are summarized in this report. Appendix A explains the methodology in detail; Appendix B includes the tables containing most of the basic data for the fair share numbers.

Although the methodology offers a well-conceived, reasonable and professional approach, given available reliable data, to devising a Fair Share number as required by the Court, no participant involved with this consensus methodology is forfeiting 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 the existing conditions will have an impact on compliance.

All of the planners and housing experts involved have felt that the lack of reasonably accurate data on land availability presents a serious problem. There was general agreement that as soon as this information is available, a reevaluation of all formulas would be in order.

This report has been limited to the issues of region, regional need, allocation and fair share methodology. It has not addressed issues of compliance, although there has been considerable discussion of many aspects of that subject, and acknowledgement of its great importance in achieving any of the goals of Mt. Laurel II. Clearly, when a municipality is assigned its fair share number, there will be need and opportunity to evaluate that share in light of particular conditions within that

town; that will be the appropriate time to raise questions of feasibility, credit to be given for previous efforts and accomplishments, staging and alternative means of meeting goals.

Although the participating planners and housing experts are listed below, and their participation and contributions are an integral part of this report, I assume full responsibility for the accuracy and validity of materials and information presented herein.

Carla L. Lerman, P.P.

April 2, 1984

Peter Abeles
Philip Caton
John T. Chadwick, IV
Richard Coppola
David H. Engel
James W. Higgins
Carl Hintz
Lee Hobaugh
Carla L. Lerman
John J. Lynch
Alan Mallach
Harvey S. Moskowitz
Michael Mueller
Lester Nebenzahl
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ATTORNEYS FOR PLAINTIFFS
LYNN CEISWICK ET AL.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY

ALLAN-DEANE CORPORATION et al., Plaintiffs vs. TOWNSHIP OF BEDMINSTER Defendants	Dockets No. L-36896-70 P.W. L-2801-71 P.W.
	AFFIDAVIT OF ALAN MALLACH

MERCER COUNTY)
) :ss:
NEW JERSEY)

ALAN MALLACH, of full age, being duly sworn according to law, deposes and says:

1. I have been retained by the New Jersey Department of the Public Advocate to advise them with regard to resolution of the remaining issues in the case of Allan-Deane et al v. Township of Bedminster. In that capacity, I have reviewed the sites

through which the Township proposes to comply with Mount Laurel II, the proposed compliance ordinance, and the reports submitted by various experts with regard to these matters.

2. Based on this review, and subject to certain considerations which I will provide below, I believe that the following sites, and lower income units, have a realistic possibility of development during the forthcoming six year fair share period:

Site A	Hills PUD (under construction)	260
Site B	Hills PUD Highlands	180
Site C	Hills PUD out-parcel	34
Site D	Ray	35
Site E	Ellsworth	120
Site G	AT&T	90
	Senior Citizens Housing (site to be determined)	90
		809

The following sites, which have been zoned to provde for added lower income units, may result in development during this period, but I do not consider that to be as likely:

Site F	Multiple Owners	51
Sites H/I	Bedminster Village	±40

3. In order that all of the above sites, excluding sites F, H, and I, can be considered realistic possibilities, the following conditions must be met:

a. The franchise area for the sewer system run by the Environmental Disposal Corporation (EDC) must be expanded to include site G.

b. The treatment capacity of the EDC facility must be expanded to accomodate all of the above sites in the Pluckemin area.

To accomplish these objectives, the Township must be committed to support EDC actively in pursuing the necessary approvals for

expansion of the EDC francise area, and expansion of the EDC sewerage treatment facility. It is my understanding that such a commitment by the Township is part of the proposed settlement.

c. Limited Federal funds for senior citizen housing, potentially available either through the HUD Sec.202 program, or the Farmers Home Administration Sec.515 program, must be actively and energetically pursued.

Since at this time there is no established and experienced non-profit corporation in place, nor has a site been obtained, it is necessary for the Township to provide the initial support so that a credible funding application package, including a specific site, can be prepared.

4. I believe that there are a number of circumstances under which a housing goal smaller than the fair share number, as it may be determined through a formula approach, should be acceptable, even if there is adequate vacant land within the municipality on which to accomodate the larger number:

a. The benefits of a settlement, in my opinion, enough outweigh those of a court order entered at the end of an extended period of litigation to justify a substantial reduction in the fair share number, or target, for the municipality. As a result of a voluntary settlement, which the municipality has participated in framing, the process of development is likely to begin substantially sooner, and to proceed significantly more smoothly. It is my understanding that this premise has been recognized by the courts in a substantial number of settlements, including those in the Morris County Fair Housing Council litigation, the Urban

league litigation, and a number of other cases involving single municipalities, such as West Windsor Township.

b. In Mount Laurel II, the Supreme Court suggested that trial courts may choose to phase-in a municipality's fair share goal more gradually, where the full production of the fair share goal "might result in the immediate construction of lower income housing in such quantity as would radically transform the municipality overnight (at 219)". In 1980, Bedminster contained a total of 884 occupied housing units; full development of the 809 lower income units cited in paragraph 2 would result in an increase of 3,700 total housing unit in the Township, for a 419% increase. The scope of this increase suggests that consideration be given to arguments that some part of Bedminster's 1990 fair share goal can reasonably be phased in over a more extended period.

5. Notwithstanding my general conclusion that the proposed compliance plan is a reasonable one, and the sites selected are suitable for the purpose, it is my opinion that this proposed settlement would be definitely enhanced by incorprating a fall-back provision in the event that assiduous efforts by the Township fail either to obtain funding for senior citizen housing, or to obtain a site on which such housing can be built. A fall back provision would specify that, after some period such as three or four years, if either had failed to take place, the Township would take appropriate actions, which actions can take a wide variety of forms. Such a provision would increase the likelihood of these units (which will not trigger four times their number in market rate units) being built, and thus enhance the sound-

ness of the proposed settlement, without imposing any greater impact on the Township of Bedminster.

6. In conclusion, I believe that the proposed settlement represents a reasonable approach, which I believe can reasonably be approved by the court.

ALAN MALLACH

Sworn to before me this 28th day
of August, 1984

Kenneth E. Meyer
Attorney at Law
of New Jersey