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Memorandum of Law of Bedminster Township in Opposition to Builder's Remedy for Leonard Dobbs and in Support of Settlement Approval

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ALLAN-DEANE CORPORATION, et al.,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SOMERSET COUNTY
Plaintiffs,	:	DOCKET NOS. L-36896-70 P.W. L-28061-71 P.W.
vs.	:	
TOWNSHIP OF BEDMINSTER, et al.,	:	Civil Action
Defendants.	:	
	:	
	:	

MEMORANDUM OF LAW OF BEDMINSTER TOWNSHIP IN OPPOSITION TO BUILDER'S REMEDY FOR LEONARD DOBBS AND IN SUPPORT OF SETTLEMENT APPROVAL

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PRELIMINARY STATEMENT

This Court must determine whether Leonard Dobbs is entitled to a builder's remedy within the context of this case which was instituted and vigorously litigated by Allan-Deane/Hills Development and the Department of the Public Advocate. These parties and Bedminster Township have achieved a settlement of all remaining issues in this case, and Mr. Dobbs seeks to disrupt and overturn that settlement by claiming an entitlement to a builder's remedy. The facts, circumstances, history and present posture of this case provide no justification for withholding approval of the settlement and awarding the extraordinary remedy of a builder's remedy to Mr. Dobbs. The Supreme Court in Mt. Laurel II expanded the availability of builder's remedies, but the Court stopped far short of establishing any automatic entitlement for any developer who offers to construct lower income housing.

The simple fact is that Mr. Dobbs is not a developer-plaintiff who has succeeded in Mt. Laurel litigation against Bedminster Township. To the contrary, Bedminster Township was committed to a program of Mt. Laurel compliance long before Mr. Dobbs belatedly embraced the Mt. Laurel doctrine. One builder's remedy has already been awarded in this case to Allan-Deane/Hills Development based upon its vigorous 14 year prosecution of this litigation. There is simply no justification for bestowing the

same benefits upon Mr. Dobbs at this advanced phase of this case.

This Court should fully reject Mr. Dobbs' contrary arguments, which are based upon a thoroughly one-sided characterization of the relevant facts and Mr. Dobbs' alleged contributions to Bedminster Township's Mt. Laurel compliance. That characterization of the facts ignores the role of the Court, Mr. Raymond and the parties in this process. The clear inference to be drawn from Mr. Dobbs' cavalier treatment of the facts is that the Court, the master and the Department of the Public Advocate would have approved a compliance plan which constituted "paper compliance" absent the participation of Mr. Dobbs. That implicit element of Mr. Dobbs' argument does a grave misservice to the Court, the master and the parties to this litigation. A far much accurate characterization of Mr. Dobbs' role in the rezoning process is provided by Mr. Raymond's report to the Court, dated September 14, 1984.

The builder's remedy is intended to encourage developer-plaintiffs to institute litigation against municipalities which have not met their Mt. Laurel obligations. The builder's remedy is not intended to reward developers, such as Mr. Dobbs, who do not promptly assert Mt. Laurel claims, but instead participate solely in the remedial rezoning process. At that advanced stage in the proceedings, such persons should be in no different position than any other landowner. Mr. Dobbs, like any other

landowner, is entitled to submit his position with respect to the inclusion or exclusion of his property from the Mt. Laurel rezoning, but he has no right to the substantial benefits of a builder's remedy. This Court should so rule as a matter of law.

Mr. Dobbs' alternative argument that this Court should not approve the settlement agreement and the compliance package is equally untenable. This Court's decision with respect to the approval of the settlement should be based upon a determination of whether the settlement is fair and reasonable given the particular facts of this case. The issue is not whether the Dobbs' site could have been zoned for Mt. Laurel housing; rather, the issue is whether the settlement is not fair and reasonable because it does not include the Dobbs' site. Thus, this Court must focus upon the Mt. Laurel zoning plan developed by the Township and approved by both the Public Advocate and the Planning Master; the Court need not, and indeed should not, consider whether the same results might have been achieved in a different way. Unlike situations involving the award of a builder's remedy, in the present litigation context the Court should honor the planning and zoning decisions of the municipality, unless Mr. Dobbs meets the burden of proving them to be contrary to Mt. Laurel II. The testimony and evidence at the settlement hearing will thoroughly demonstrate that Mr. Dobbs cannot meet that burden. Indeed, it will be demonstrated that Mr. Dobbs could not even meet a much lesser

burden, such as proving the possible suitability of the Dobbs' site. Thus, at the conclusion of the settlement hearing, this Court should reject Mr. Dobbs' objections, approve the settlement agreement, and enter a judgment of compliance and repose under Mt. Laurel II.

STATEMENT OF FACTS

In 1980, while Mr. Dobbs was suing Bedminster Township in an attempt to build a massive regional shopping mall, the Township was working with the other parties to this litigation and the planning master to revise its zoning ordinance pursuant Judge Leahy's Order for Remedy, dated March 6, 1980. The result of that lengthy process (over 12 months of complex negotiations) was a zoning ordinance which Judge Leahy found to comply with the Mt. Laurel doctrine by Order for Final Judgment dated March 20, 1981.

The revised zoning ordinance substantially increased the permitted densities for significant areas of the Township, and the Township did not appeal Judge Leahy's orders in an attempt to reduce or eliminate its Mt. Laurel obligations. The Township only opposed the Public Advocate's appeal, which sought a requirement in both the ordinance and the builder's remedy for "affordable" rather than "least cost" housing, since the Township agreed with Judge Leahy that such provisions were not required under the Madison Township decision. Of course, the Public Advocate's appeal was ultimately successful, since the Supreme Court in Mt. Laurel II rejected the "least cost" standard of Madison Township and embraced a new standard of affordability. The Supreme Court in Mt. Laurel II also rejected the "numberless" fair share approach of Madison Township and adopted a quantification

requirement.

In short, the modifications to the Mt. Laurel doctrine by the Mt. Laurel II decision resulted in the remand of this case to this Court. Under these circumstances, the proceedings before this Court during the past year cannot be reasonably characterized as a new Mt. Laurel challenge to Bedminster Township's zoning ordinance; this must be viewed as a continuation of the remedial process previously conducted by the parties under the supervision of Judge Leahy and Mr. Raymond, the master. Indeed, on remand this Court immediately continued Mr. Raymond's appointment as planning master. At that time, Bedminster Township had already proposed zoning amendments in response to the Mt. Laurel II decision, but the Township agreed, at the request of the court and all parties, to withhold adoption of those amendments so that all parties, and the master, could participate in the process of revising the zoning ordinance consistent with the new legal standards.

First priority in the subsequent proceedings was given to the modification of the builder's remedy awarded by Judge Leahy to Allan-Deane/Hills Development so as to satisfy the affordability requirements of Mt. Laurel II. This process involved numerous difficult and complex issues of first impression which had to be resolved without the benefit of prior precedent or experience. All parties expended considerable time and effort in this

innovative process. As a result, the first lower income housing pursuant to the Mt. Laurel II decision is now being constructed in Bedminster Township.

The focus upon the builder's remedy issues in order to speed the actual construction of lower income housing necessarily precluded the parties from devoting full attention to the ordinance revision issues. Nevertheless, the parties did address these issues, which were also issues of first impression. Bedminster Townhsip's compliance plan was refined during this process as a result of evolving planning and legal thinking throughout the State with respect to the new issues of compliance under Mt. Laurel II. Nevertheless, the Township's final compliance proposal is substantially similar to the zoning plan approved by Judge Leahy, as modified by the addition of affordability requirements which were first proposed by the Township in August of 1983. See Report of George Raymond, dated September 14, 1984.

This procedure for the revision of the zoning ordinance and the builder's remedy in response to Mt. Laurel II was established at a case management conference held on October 6, 1983. At that time, it was also decided that Mr. Dobbs would be permitted to informally participate in this process. That decision was based upon express representations by Mr. Dobbs' counsel that although Mr. Dobbs was not a Mt. Laurel litigant seeking a build-

er's remedy,[1] he was concerned that any decision in this case might be subsequently misinterpreted and misapplied to the conventional zoning claims asserted against the Township in the separate Dobbs litigation. That position of Mr. Dobbs' had been previously set forth in writing by his attorneys in August of 1983 when they disputed the contention of Bedminster Township that Mr. Dobbs' was then seeking to assert a Mt. Laurel attack upon the Township.

At the time of the case management conference, the expressed goal of Mr. Dobbs' litigation against Bedminster Township remained unchanged: he wanted to build a regional shopping mall or a major corporate office park. His initial proposal was for approximately 1.2 million square feet of non-residential development. The subsequent revisions to his proposal in 1982 and 1983 included some residential use, but still called for 850,000 to 950,000 square feet of non-residential use, plus perhaps a 250 to 300 room hotel/conference center. Under these proposals, 162 acres would be developed for intensive non-residential uses, compared with 30 or 40 acres for residential use. Indeed, the August 1982 proposal indicated that the residential component would not be developed for at least ten years. Thus, any proposal of Mr. Dobbs to develop housing was a minor aspect of his

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1. Mr. Basralian and Mr. O'Conner both stated to the Court that Mr. Dobbs did no seek a builder's remedy.

overriding interest in developing a major non-residential development. There was absolutely no indication of any serious offer by Mr. Dobbs to address any of Bedminister's current Mt. Laurel obligations.

At the October 6, 1983 case management conference, Mr. Dobbs' attorneys gave absolutely no indication that these non-residential development goals had changed. This understanding of Mr. Dobbs' non-residential development goals continued after the parties had undertaken the process of revising the zoning ordinance and the builder's remedy. Another development proposal by Mr. Dobbs was presented in a report prepared by Wallace, Roberts & Todd, dated January 13, 1984. (See Dobbs' Appendix, Exhibit R). In that proposal, the intensity of non-residential development was increased above that set forth in the prior revised proposals to 1.2 million square feet, the amount originally sought by Mr. Dobbs in 1980. The proposal also included a residential component for lower income housing, but that aspect of the proposal was minor relative to the massive non-residential development proposal. The discussion of the residential component also contained the assertion that the 3,000 new jobs projected for the proposed non-residential development would increase the Township's future fair share obligations by only 19 lower income housing units. (See Dobbs' Appendix, Exhibit R, at p.3). That assertion is patently unreasonable in light of the great emphasis upon employment growth

in all accepted fair share allocation methodologies. In short, the proposal of January 1984 represented an attempt to "piggy-back" a massive non-residential development proposal on some lower income housing units under the Mt. Laurel doctrine.

It was not until February of 1984 that Mr. Dobbs submitted a proposal for residential development only. Even then, that proposal was not submitted at the initiative of Mr. Dobbs; rather, the possibility of residential development was first raised by Mr. Raymond. That proposal was considered and rejected as unnecessary, inappropriate and incompatible with the Township's land use plans and policies. Also, Mr. Dobbs continued to present his predominantly non-residential development plan as an alternative proposal.

In summary, the proceedings to revise the zoning ordinance and the builder's remedy have represented a continuation of the remedial proceedings previously conducted by Judge Leahy. This process was necessitated solely by the new standards introduced by the Mt. Laurel II decision. Bedminster Township willingly entered into these proceedings with the express and often stated purpose of making all necessary changes with the input and assistance of the planning master and the other parties. Mr. Dobbs became an informal, non-party participant in this process based upon his statements to the Court and all parties that he was not seeking a builder's remedy, but merely attempting to protect

his position in his separate lawsuit asserting conventional zoning claims in connection with a massive non- residential development proposal. Under these circumstances, Mr. Dobbs' subsequent assertions that he is now entitled to a builder's remedy are entirely inappropriate and unjustified.

POINT I

LEONARD DOBBS IS NOT ENTITLED TO A BUILDER'S REMEDY BECAUSE HE IS NOT NOW AND NEVER HAS BEEN A PARTY TO THIS LITIGATION

A. Dobbs' Limited Participation in This Case

The participation of Leonard Dobbs in this case during the past year has been governed by the Case Management Order entered on November 3, 1983, which reflected the decisions made at the case management conference of October 6, 1983. That order did not join Mr. Dobbs as a party to this action; he was simply permitted to submit information and documents to Mr. Raymond, pursuant to Paragraph D. Indeed, the order was carefully drawn to reflect his non-party, limited role status. No subsequent orders modified that limited, non-party, participatory role of Mr. Dobbs.

Furthermore, Mr. Dobbs did not formally seek to change his status in the case until May of 1984, when he brought a motion to intervene.[2] That motion was denied without prejudice on May 25, 1984, and an order to that effect was entered on June 11, 1984. That order provided that:

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2. A motion to intervene was concurrently brought by Timber Properties Inc., which was disposed of in the same manner as Mr. Dobbs' motion. Timber Properties has not subsequently either participated in or sought to participate in this case.

> "if there is no settlement within thirty days of the May 25, 1984 hearing, then the Court may reconsider the intervention motions." (Emphais supplied.)

The settlement deadline was subsequently orally extended by the Court, and the final form of the settlement agreement and compliance package were agreed to by all parties and forwarded to the Court and Mr. Dobbs' attorneys on July 6, 1984. The settlement agreement was discussed at a case management conference on August 2, 1984. At that time, the Court established the general procedures for a subsequent hearing for the consideration of the settlement agreement.

The Court did not reconsider Mr. Dobbs' intervention motion at the August 2, 1984 conference, and the Court has not done so since that time. Mr. Dobbs did not formally renew his motion. Instead, the Court merely permitted Mr. Dobbs to file written objections to the settlement. The Court also permitted Mr. Dobbs to submit legal arguments on his claim for a builder's remedy. This procedure did not alter Mr. Dobbs' status with respect to this case: he is a non-party who objects to the settlement and seeks a builder's remedy only on that basis.

In short, Mr. Dobbs' status is no different than that of any other person or entity, such as a property owner or public interest group, which might appear in opposition to a Mt. Laurel settlement. The fact that Mr. Dobbs had the added benefit of

being permitted to provide input into this process does not alter his status or vest his arguments with any greater weight. Nothing precluded Mr. Dobbs at any time from actively seeking to become a party to this litigation, yet his efforts at that goal were limited to the belated and unsuccessful motion to intervene in May of 1984. He could have sought to intervene much earlier in the proceedings; indeed he had the opportunity to intervenue as early as December 1979, when he first approached the Township about the rezoning of his property. See infra. He could have sought to appeal the denial of his intervention motion. He could have sought reconsideration of his intervention motion. None of those actions were taken. In the face of that inaction on the part of Mr. Dobbs and his obvious willingness to accept his non-party status, there was simply no reason for Bedminster to take any further action to oppose Mr. Dobbs. Bedminster was prepared at all times to vigorously oppose any intervention by Mr. Dobbs, and Bedminster did so in response to the single attempt at intervention. The onus was on Mr. Dobbs to vigorously seek party status, if he wanted it, and he simply failed to do so.

B. Dobbs' Own Action Against Bedminster Township in Which He Sought a Regional Shopping Center

On November 5, 1980, Mr. Dobbs filed his own action against Bedminster Township, which sought to compel Bedminster Township to allow Mr. Dobbs to construct a regional shopping

center on the property on which he had an option. In the Third Count of that complaint, Mr. Dobbs advanced the following novel legal theory:

> As a developing municipality, defendant Township has the obligation not only to make possible an appropriate variety and choice of housing, but also to make possible, within its boundaries, an adequate and broad variety of facilities which would serve the needs of the defendant's present and prospective population and that of its immediate region."

Mr. Dobbs must be given credit for an ingeneous, though perverted, legal theory. Not only must a municipality provide for a fair share of the regional need for lower income housing, but it must provide a fair share of needed regional shopping centers also.

Conspicuous in that complaint is a reference to the Allen-Deane litigation. See Count I, paragraph 3. In that count Mr. Dobbs lays out his challenge to the rezoning which had been accomplished and indeed approved by Judge Leahy under Mt. Laurel I; Mr. Dobbs did not like it because it did not give him his shopping center. At that time, and for almost four years thereafter, Mr. Dobbs complained only of the fact that he was not receiving permission to build a shopping center, and he never complained about the failure of the Court or the Township to zone the land on which he had an option for Mt. Laurel compliance housing, either for least cost housing under Mt. Laurel I, or for

affordable housing under Mt. Laurel II.[3]

The early posture of Mr. Dobbs' action against the Township was that of a builder seeking permission to build a shopping center. This posture remained unchanged until the middle of 1984, when he first sought a builder's remedy for Mt. Laurel housing, once he became convinced that he would be unsuccessful in his quest for a regional shopping center. His decision was to maintain his own suit for a shopping center and not participate in any way in the Mt. Laurel suit going on before Judge Leahy and subsequently assigned to this Court.

Mr. Dobbs' steps in his own lawsuit prove this. He did not object to the stay requested by intervening landowners and ultimately ordered by Judge Gaynor on July 17, 1981. Mr. Dobbs never moved for a vacation of the stay entered by Judge Gaynor on July 17, 1981. In short, Mr. Dobbs was content to let his shopping center action sit in the Appellate Division while the various intervention appeals were considered by that court.

The consolidated appeals on intervention were scheduled for argument in the Appellate Division for June 7, 1983. One or two days before the oral argument, Mr. Dobbs' attorneys submitted

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3. Mr. Dobbs did propose a very minor form of "tag-along" or supplemental lower income housing, if he were to be awarded a shopping center, in a revised proposal which was first put forward in June 1983.

a consent order in which Mr. Dobbs reversed his position and consented to the intervention of those landowners who had been denied intervention before, and at the same time he dropped his opposition to the intervention of the Hills Development Company in his lawsuit seeking a shopping center. See Consent Order, July 6, 1983. In short, Mr. Dobbs let the appeals sit in the Appellate Division for two years, and just before they were about to be heard, abandoned his position. He had succeeded in delaying any substantive action on his litigation seeking a shopping center for two years.

What purpose could Mr. Dobbs' have had to actively encourage such an inordinate delay and nonactivity in a case, if he wanted to prosecute what he thought were his legal rights, and achieve a result which he desired? The answer is simple: He wanted to be able to attend every planning board and township committee meeting in Bedminster Township which considered any land use issue and present his development proposal for a shopping center, carrying with him the club of a party in litigation with the Township. He wanted to present the posture of: "I am suing you; I will litigate forever; only if you give me what I want, will I drop my lawsuit against you."

All during this time Mr. Dobbs was obviously well aware of, and indeed had recited in his pleadings in his own action, the Mt. Laurel suit before Judge Leahy and the very extensive rezoning

process which had gone on as a result of the order for remedy in that lawsuit. Mr. Dobbs made a deliberate and conscious decision not to participate in the ongoing Mt. Laurel proceeding before Judge Leahy, but instead chose to pursue (and delay when convenient) his own lawsuit seeking a shopping center. He could have sought to intervene before Judge Leahy at any time during 1980 and the remedy process.[4] In short, Mr. Dobbs was very content with his status as a non-party to the Mt. Laurel litigation and with the status as a party to his own shopping center litigation. This status has been maintained to the present time, and present attempts by Mr. Dobbs to somehow convert that nonparticipant, non-party status in the Mt. Laurel case to a builder's remedy appear all the more singularly inappropriate. Indeed, at the case management conference in the Allan-Deane case on October 6, 1983, Mr. Dobbs consented to the continuation of the stay of his own shopping center lawsuit. This is reflected in the case management order of November 3, 1983. Therefore, in the only case in which he is an actual party against Bedminster Township, Mr. Dobbs has made no effort to lift that stay in order to pursue Mt. Laurel claims against Bedminster.

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4. In fact, he did write Mr. Raymond a letter in which he requested that Mr. Raymond consider during the remedy process his request for a shopping center. Mr. Raymond replied that Mr. Raymond felt constrained by Judge Leahy's order to focus on lands within the court ordered development corridor, and suggested that Mr. Dobbs' appropriate course of action was to apply to Judge Leahy. Mr. Dobbs never did so; Mr. Dobbs did not want to do so.

* * *

In conclusion, Mr. Dobbs is not now and never has been a party in the Allan-Deane litigation in which Mt. Laurel relief was the principal issue, both at the trial on the merits and in the subsequent remedy phases. Mr. Dobbs has been content with the inactive status of his own separate litigation in which he sought only a shopping center. Given his near total and obviously intentional inaction and failure to vigorously intervene and become a party in the Mt. Laurel action, any present contention by Mr. Dobbs that he either is or should be a party must be summarily rejected. His status and participation in this litigation is limited to that of a non-party objector, and all arguments and objections presented by Mr. Dobbs must be viewed from that perspective.

Because of his non-party status, and his own deliberate inaction with respect to his own lawsuit, Mr. Dobbs cannot be considered the winner of a successful Mt. Laurel litigation. He is therefore not entitled to a builder's remedy.

POINT II

LEONARD DOBBS IS BARRED FROM ANY MT. LAUREL RELIEF BY HIS IMPROPER USE OF THE MT. LAUREL DOCTRINE AS A BARGAINING CHIP

The Supreme Court in Mt. Laurel II recognized that the increased availability of builder's remedies created the potential for "Mt. Laurel blackmail" by potential developer-plaintiffs. The court expressed its concern as follows:

> Care must be taken to make certain that Mount Laurel is not used as an unintended bargaining chip as builder's negotiations with the municipality, and that the courts not be used as the enforcer for the builder's threat to bring Mount Laurel litigation if municipal approvals for projects containing no lower income housing are not forthcoming. Proof of such threats shall be sufficient to defeat Mount Laurel litigation by that developer.

92 N.J. at 280.

By the preceding passage, the Supreme Court sounded a clear warning to the Mt. Laurel plaintiffs' bar. Consequently, potential developer-plaintiffs with competent legal counsel were on notice to exercise extreme caution in dealing with municipal officials in order to avoid any overt threats of Mt. Laurel litigation for non-Mt. Laurel purposes. That is what Mr. Dobbs tried to do; he will argue that Bedminster cannot directly point to the "smoking gun" or an overt and unequivocal threat of Mt. Laurel litigation for non-Mt. Laurel purposes. To accept this argument, however, would be to elevate form over substance. The

proper inquiry must focus upon the entire course of conduct of Mr. Dobbs and the context of his actions. Once that is done, it is clear that Mr. Dobbs has engaged in a carefully crafted strategy of improperly using the Mt. Laurel doctrine to obtain the non-residential zoning which he has been seeking since December of 1979. These actions are in substance no different than overt Mt. Laurel blackmail, and they should preclude any Mt. Laurel relief for Mr. Dobbs pursuant to the clear and important policy enunciated by the Supreme Court in Mt. Laurel II.

The record demonstrates that since the end of 1979 Mr. Dobbs has devoted his efforts toward the goal of obtaining rezoning for a major non-residential development. During the course of his pursuit of that objective, he has used a variety of tactics in an attempt to persuade the Township to give him such zoning. He has instituted litigation, bombarded the Township with reports from experts and attempted to buy the zoning with offers of donations of land and multi-million dollar contributions for road improvements. Like a chameleon Mr. Dobbs' development proposals have gone through subtle changes and variations in response to what he has perceived to be the latest area of community concern, or in response to changes in the legal environment, but throughout these changes the animal has remained the same: a proposal for a huge non-residential development. The Township has simply been unpersuaded and unintimidated by Mr.

Dobbs' litigation and proposal, since the requested rezoning was entirely incompatible with the Township's planning and zoning.

The latest phase of this strategy began in February of 1983, shortly after the release of the decision in Mt. Laurel II. Mr. Dobbs appeared at the Township Committee meeting of February 4, 1983 and read a lengthy, one-sided statement which reviewed his efforts since December, 1979 to obtain non-residential zoning. Mr. Dobbs concluded by noting his frustration and impatience after 3 1/2 years of effort, and expressed his position as follows:

> After 3 1/2 years, however, it does not seem to me that we are close to a satisfactory resolution. I am accordingly exploring with my attorneys a number of options in the event the property is not presently rezoned for appropriate use.
>
> One of the options is, of course, resumption of litigation, in light of your new Master Plan and the most current legal developments in the State. You and I have until now regarded litigation as the wrong means of resolution of the future development of the property and I have requested my attorneys to make one more effort, in which I would join with them to achieve early settlement. I request that you join now in the effort. (Emphasis supplied).

The reference to the "most current legal developments in the State" can only be read as referring to the Mt. Laurel II decision, which was released two weeks earlier on January 20, 1984. These words were obviously very carefully selected, since Mr. Dobbs opened his statement by noting that it had been prepared

80 lower income housing units, as part of a development which would also include over 300 market-sale housing units, a 850,000 to 950,00 square foot shopping mall (or a corporate office park of similar intensity) and additional non-residential development on 20 acres previously proposed for a 250 to 300 room hotel/ conference center.

Mr. Dobbs' inclusion in the June 1983 proposal of some lower income housing represented a perversion of the Mt. Laurel doctrine. In order to superficially respond to the Supreme Court's discussion of builder's remedies and Mt. Laurel blackmail, a "substantial percentage" of lower income housing was proposed. This percentage, however, applied only to the 40 acres proposed for residential use; it did not apply to the 132 acres to be devoted to intensive non-residential development. The residential component of the proposal cannot be considered separately, since Mr. Dobbs indicated in his proposal that the lower income units would be subsidized in part by the commercial section of the development. This was clearly a package proposal, as were all the previous proposals. Regardless of the percentage, the lower income housing component could not even approach being "substantial" relative to the massive non-residential component of the proposal. Thus, this proposal utterly failed to respond to the Supreme Court's discussion of developer proposals including a substantial amount of lower income housing. To the contrary, the

with the assistance and advice of counsel. Mr. Dobbs' attorneys were certainly aware of the landmark Mt. Laurel II decision, its expansion of the builder's remedy and its prescription on Mt. Laurel blackmail. Thus, they knew to avoid any express threat of Mt. Laurel litigation. The intended meaning was very clear: if Mr. Dobbs' demands were not met, then there would be new or expanded litigation concerning new legal claims; such litigation could only be litigation under Mt. Laurel II.

That reading of Mr. Dobbs' litigation threat of February 4, 1983 is confirmed by subsequent actions taken by Mr. Dobbs after Bedminster Township again refused to alter its zoning in response to Mr. Dobbs' threat. In June of 1983 Mr. Dobbs submitted a revised development proposal, which revisions responded to the Mt. Laurel II decision; it did not address any other "current legal developments." The revised proposal paid only token homage to the Mt. Laurel II decision. Forty acres were to be devoted to residential use. This would involve 400 housing units, based upon the prior proposed residential density of 10 units per acre. A "substantial percentage" would be lower income housing units. Although it was not stated, the proportion of lower income units would presumably be 20%, based upon the example provided by the Court in Mt. Laurel II, 92 N.J. at 279 n37, which was subsequently almost universally adopted in the Mt. Laurel arena. In short, Mr. Dobbs proposed the construction of perhaps

Dobbs sought in late July of 1983 to resume his dormant litigation against Bedminster. He proposed to file an amended complaint which expressly referenced the June 1983 proposal and characterized it as being responsive to Bedminster's Mt. Laurel II obligations. Bedminster read that allegation as an attempt by Mr. Dobbs to become a Mt. Laurel litigant, but Mr. Dobbs' attorneys expressly and unequivocally denied that. (See Basralian letter brief, August 22, 1983). Similar express denials that Mr. Dobbs sought either to become a Mt. Laurel litigant or to obtain a builder's remedy were made at the case management conference before this Court on October 6, 1983.

Thus, Mr. Dobbs continued his strategy of pursuing major non-residential rezoning while paying token homage to Mt. Laurel II. Mr. Dobbs obviously did not want to make a firm commitment to Mt. Laurel II, since he did not want to abandon his longstanding non-residential objectives. He did, however, want to preserve his options with respect to Mt. Laurel litigation. This constituted an improper use of the Mt. Laurel doctrine as a bargaining chip in Mr. Dobbs' efforts to obtain major non-residential rezoning.

It was only after the present proceedings with respect to the revision of Bedminster's zoning were well underway that Mr. Dobbs changed his posture. He apparently concluded at some point that his efforts to "piggy-back" his massive non-residential development proposal on a relatively minor component of lower

Supreme Court clearly intended that the lower income housing should be substantial relative to the entire project and that the entire project would be residential. 92 N.J. at 279 n37. The Supreme Court did not want the Mt. Laurel doctrine to be used to further non-residential development objectives.

The preceding unequivocally demonstrates that the June, 1983 proposal represented an improper attempt by Mr. Dobbs to "have it both ways" with respect to the Mt. Laurel doctrine. On the one hand, some lower income housing was included in a superficial and belated effort to protect Mr. Dobbs' rights as a potential Mt. Laurel litigant. On the other hand, the amount of lower income housing was so inconsequential relative to the remainder of the proposed development that there was only a de minimus change to the basic non-residential character of the development proposal. Mr. Dobbs sought by this strategy to continue the vigorous pursuit of his non-residential development objective, while at the same time paying lip service to the Mt. Laurel doctrine. The message to the Township was clear: Mr. Dobbs was fully aware of the Mt. Laurel doctrine and he was prepared to assert it if the Township did not yield to his demands for a major non-residential development (with perhaps a token lower income housing component).

This same two-faced strategy continued until well after Mr. Dobbs became involved in the present proceedings. First, Mr.

income housing would not succeed in the context of the Allan-Deane case. Bedminster Township simply refused to give in. The Mt. Laurel club which Mr. Dobbs had been holding over the Township finally came down. In a report dated February 7, 1984, Mr. Dobbs for the first time proposed an exclusively residential development including lower income housing, which complied with the dictates of Mt. Laurel II. Even then, Mr. Dobbs retained his "piggy-back" proposal as an alternative. Mr. Dobbs continued his attempts to sell his "piggy-back" alternative to the Township by sending a letter, dated March 2, 1984, to the Township explaining that alternative. Furthermore, when Mr. Dobbs unsuccessfully moved to intervene in this case in May of 1984, the proposed complaint included an alternate claim for a builder's remedy for his "piggy-back" development proposal.

Mr. Dobbs' strategy can be easily summarized:

(1) Leave his shopping center case pending, but do not diligently prosecute it. The claim for relief (the shopping center) remains the same. If the Township ever decides to throw in the towel on the shopping center, the Dobbs litigation will be a convenient vehicle to accomplish it. Alternatively, if Dobbs loses here, he can always resume his own litigation.

(2) Participate as a non-party "friendly objector" in the Allan-Deane litigation, with the outward demeanor of concern for lower income housing.

(3) Hire experts to object to and sabotage whenever possible any agreement reached by the Public Advocate, Hills Development, and the Township, on whatever grounds may be available: a high fair share number, site selection, sewer technology, etc.

(4) Hope that the settlement pressure (from crowded Mt. Laurel trial dockets, the Master, the Court, the Public Advocate) would convince the Township to give up.

(5) Be ready to settle for a shopping center at a moments' notice.

(6) Take a position in court expressly disclaiming a builder's remedy; and

(7) Clothe the whole charade with a patina of offers of help in solving the Mt. Laurel problems, and at the last minute propose an all residential development and ask for a builder's remedy.

* * *

In conclusion, a careful analysis of Mr. Dobbs' long standing efforts to obtain major non-residential zoning, his separate litigation and his informal involvement in the present proceedings demonstrate that he has improperly used Mt. Laurel as a bargaining chip with Bedminster Township. He has straddled the fence and attemped to have it both ways: vigorous pursuit of major non-residential development with token homage to Mt. Laurel. Under these circumstances, he simply waited too long before he

abandoned his non-residential proposal and embraced the Mt. Laurel doctrine.[5] He did so only after his prior actions which both explicitly and implicitly threatened Mt. Laurel litigation failed to coerce the Township into giving him zoning for his non-residential development proposal. His prior conduct must accordingly be held to bar his present claim for Mt. Laurel relief, consistent with the clear policies enunciated by the Supreme Court in Mt. Laurel II. A contrary decision would eviscerate the doctrine of Mt. Laurel blackmail.

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5. Indeed, even now Mr. Dobbs has not truly abandoned his non-residential development objectives, since he most certainly will resume his separate conventional zoning litigation if he fails to get Mt. Laurel relief. Thus, he has positioned himself so that he can have a "second bite of the apple" against Bedminster Township.

POINT III

LEONARD DOBBS IS NOT ENTITLED TO A BUILDER'S REMEDY

The New Jersey Supreme Court in Mt. Laurel II determined that builder's remedies should be made more readily available to encourage Mt. Laurel compliance. 92 N.J. at 279. The Court did not, however, authorize a builder's remedy for any developer requesting one; instead the Court established clear requirements for builder's remedies which Mr. Dobbs cannot satisfy.

The Court summarized its ruling with respect to builder's remedies as follows:

> Builder's remedies will be afforded to plaintiffs in Mt. Laurel litigation where appropriate, on a case-by-case basis. Where the plaintiff has acted in good faith, attempted to obtain relief without litigation, and thereafter vindicates the constitutional obligation in Mt. Laurel-type litigation, ordinarily a builder's remedy will be granted, provided that the proposed project includes an appropriate portion of low and moderate income housing, and provided further that it is located and designed in accordance with sound zoning and planning concepts including its environmental impact.

92 N.J. at 218.

A review of the relevant facts demonstrates that Mr. Dobbs cannot satisfy these requirements. First, Mr. Dobbs is not a successful Mt. Laurel litigant. Indeed, he has been neither a Mt. Laurel litigant nor successful. The alternative argument that

this requirement was satisfied by his alleged "substantial contribution" to the Township's compliance is simply factually unsupported and legally deficient. Second, Mr. Dobbs has not acted in good faith to obtain Mt. Laurel relief without litigation, since he initially proposed to construct Mt. Laurel housing only within the context of a massive non-residential development proposal and while separate litigation was pending concerning his claims for non-residential rezoning. Mr. Dobbs did not propose a conventional residential development, including lower income housing, until after settlement negotiations and the process of revising Bedminster's zoning ordinance were well underway. Finally, it must be emphasized that the Supreme Court vested the Mt. Laurel trial judges with some discretion on this issue, and the sound exercise of that discretion provides an independent basis for refusing to grant a builder's remedy to Mr. Dobbs based upon the unique circumstances of this case.

A. Mr. Dobbs is not a Successful Mt. Laurel Litigant.

In simple terms, Mr. Dobbs is not a successful Mt. Laurel litigant. The only successful Mt. Laurel litigants in this case are Allan-Deane/Hills Development and the Cieswick plaintiffs, represented by the Public Advocate, who have been litigating since 1970. Their successful litigation resulted in substantial rezoning with the assistance of a master, followed by

the award of a builder's remedy to Allan- Deane/Hills Development in 1981. The more recent proceedings before this Court constitute a continuation of that litigation; these proceedings do not constitute a new and independent Mt. Laurel action.

Further proceedings in this action were necessitated by the Appellate Division's decision in August of 1983 on the appeal brought by the Public Advocate. The Appellate Division remanded this case to this Court for reconsideration in light of the Mt. Laurel II decision. At that time, all parties acknowledged that Mt. Laurel II required modifications to both the builder's remedy and the zoning ordinance.[6] The parties, including Bedminster Township, agreed that the necessary revisions could best be made by a cooperative effort, including the assistance of Mr. Raymond. Thus, the proceedings in this case during the past year hardly constitute the type of litigation which might serve as the basis for a builder's remedy. The true litigation in this case took place some years ago; the more recent proceedings were of a clearly different character. The fact that Mr. Dobbs informally participated as a non-party in this process hardly qualifies him as a Mt. Laurel litigant for purposes of entitlement to a builder's remedy.

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6. Although Allan-Deane/Hills Development never formally conceded that its development could be lawfully subjected to the affordability requirements of Mt. Laurel II, as insisted by the Township, it nevertheless agreed to modify its development plan in full compliance with Mt. Laurel II.

B. Mr. Dobbs' Belated Assertion of Mt. Laurel Constitutes a Lack of Good Faith.

A good faith effort by Mr. Dobbs to obtain Mt. Laurel relief without litigation is also lacking. Since 1980, Mr. Dobbs has been vigorously seeking the rezoning of his property for a massive non-residential development. Until very recently, Mr. Dobbs expressed absolutely no interest in asserting the rights of lower income persons under the Mt. Laurel doctrine. To the contrary, Mr. Dobbs watched from the sidelines while this case was litigated before Judge Leahy by Allan-Deane/Hills Development and the Public Advocate. Mr. Dobbs' belated attempt in June of 1983 to embrace the Mt. Laurel doctrine constituted nothing more than an improper attempt to "piggy-back" his huge non-residential development proposal on top of the Mt. Laurel doctrine by including some lower income housing. There is absolutely no indication that the Supreme Court intended the Mt. Laurel doctrine to be asserted by developers in order to coerce or compel a municipality to rezone for massive non-residential developments. The proposal of June 1983 cannot be viewed as a bona fide good faith offer to provide lower income housing without litigation.

This characterization of Mr. Dobbs' June 1983 proposal is fully confirmed by subsequent events which transpired when Mr. Dobbs sought to file an amended complaint in his separate lawsuit in late July of 1983. Bedminster Township read the proposed amended complaint as revising the original complaint so as to

assert for the first time a direct Mt. Laurel attack against the Township. Bedminster argued in opposition to the amended complaint that the original action should be dismissed and that any Mt. Laurel claims should be set forth as new causes of action, so that the Township could directly respond to them. A copy of the Township's letter brief on this issue to Judge Leahy, dated August 5, 1983, is provided in Bedminster's Appendix as Exhibit A. Counsel for the intervenors in the Dobbs suit, Hills Development and the individuals Henderson, Englebrecht and Pillon, also read the proposed amended complaint as asserting new and independent Mt. Laurel claims. Counsel for the intervenors accordingly opposed the amended complaint and/or urged that the motion be referred to the specially-assigned Mt. Laurel judge. Copies of the letter briefs submitted to Judge Leahy on behalf of the intervenors, both dated August 5, 1984, are provided in the Bedminster Appendix as Exhibits B and C.

The response on behalf of Mr. Dobbs to these arguments is noteworthy. Mr. Dobbs' position is presented in a letter brief, dated August 22, 1983, a copy of which is provided in the Bedminster Appendix as Exhibit D.[7] In the letter brief, Mr.

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7. It is interesting to note that while the proposed amended complaint was included in the Dobbs' Appendix, this letter brief which more fully explains the proposed amended complaint and Mr. Dobbs' position was omitted.

Basralian clearly stated that, "The proposed changes to plaintiff['s] complaint do not represent a Mt. Laurel II attack on the ordinance and master plan of defendant municipality." (at pp. 2-3) Accordingly, Mr. Basralian opposed any transfer of the motion to this Court; rather, he suggested "limited intervention by plaintiff [Dobbs] before Judge Serpentelli with respect to those issues to be determined by Judge Serpentelli [in the Allan-Deane litigation] which will impact upon plaintiff's plan." (pp. 7-8) Thus, Mr. Dobbs expressly and unequivocally disclaimed any intent to pursue Mt. Laurel litigation against Bedminster Township.

The eventual outcome of those arguments was that the motion was adjourned, and this Court held a joint status conference for the Allan-Deane and Dobbs cases. At that time, Mr. Dobbs' attorneys once again represented to the Court and the parties that Mr. Dobbs was not asserting Mt. Laurel claims or seeking a builder's remedy; rather, he was simply concerned that a decision in this case approving certain areas of the Township for high density residential development for Mt. Laurel housing might be subsequently misconstrued by a different judge as impairing or precluding his independent claims which were for high density non-residential development. Thus, it was evident that Mr. Dobbs' objective continued to be the obtaining of zoning to permit a major non-residential development. Any offer to include some

lower income housing was insignificant relative to the massive scale of the proposed non-residential development and the significant new employment which it would create, with a resulting demand for significant additional housing, including lower income housing. The Court agreed to Mr. Dobbs' informal, non-party participation in the process to revise the builder's remedy awarded to Hills Development and the zoning ordinance based upon those express representations and understandings with respect to Mr. Dobbs' objectives and his disclaimer of Mt. Laurel claims or a builder's remedy.

Mr. Dobbs did not submit a proposal exclusively for residential development, including lower income housing, until February of 1984. Even then, this proposal was made only after Mr. Raymond suggested this possibility. The settlement discussions and the modification of the zoning ordinance were well underway by that time. It was even later in these proceedings before Mr. Dobbs indicated that a builder's remedy might be sought if his proposal was not accepted by the Township. A formal motion to intervene in order to assert Mt. Laurel claims and seek a builder's remedy was not brought until May of 1984.

These circumstances negate any finding that Mr. Dobbs acted in good faith in asserting the Mt. Laurel doctrine so as to seek a builder's remedy and oppose the Township's compliance plan. To the contrary, the history of Mr. Dobbs' involvement with

Bedminster Township since 1980 reveals a continuing effort to obtain major non-residential rezoning through litigation and other actions. The direct assertion of Mt. Laurel claims was expressly denied by Mr. Dobbs in August and October of 1983. In January of 1984, Mr. Dobbs was offering to construct lower income housing only by "piggy-backing" such housing upon a massive non-residential development. Under these circumstances, this Court should not countenance Mr. Dobbs' subsequent eleventh hour attempt to claim the status of a Mt. Laurel litigant and reap the substantial benefits of a builder's remedy. Mr. Dobbs had ample prior opportunities to assert Mt. Laurel claims, yet he choose instead to pursue his claims for non-residential zoning, even as an informal participant in the present case. This Court should not now relieve Mr. Dobbs of the consequences of that decision. His request for a builder's remedy should be denied as untimely and inappropriate within the context of this case. Mr. Dobbs' will, of course, be free to continue his litigation seeking non-residential zoning.

C. Mr. Dobbs was not a "Substantial Factor" in Bedminster Township's Mt. Laurel Compliance

Mr. Dobbs seeks to circumvent the fact that he is not a successful Mt. Laurel litigant (i.e., he did not file suit and obtain a judgment of non-compliance) by arguing that he successfully challenged the zoning amendments proposed by Bedminster in

August of 1983. (See Dobbs' Brief, pp. 30-32) In making that argument, Mr. Dobbs relies upon an opinion by Judge Skillman concerning the settlement of Mt. Laurel litigation involving Morris Township. That argument misinterprets Judge Skillman's opinion and ignores the subsequent decision which held that it was unnecessary to actually reach the "substantial factor" issue under the facts of that case. The facts of the present case provide an even weaker basis for reaching this issue.

Mr. Dobbs' citation to Judge Skillman's opinion erroneously implies that Judge Skillman had actually determined that the "substantial factor" claim was a valid claim. To the contrary, Judge Skillman merely indicated that the objector could attempt to pursuade the court that such a claim for a builder's remedy should be recognized. This reading of Judge Skillman's opinion is confirmed by Judge Skillman's bench opinion of July 6, 1984, in which he conditionally approved the Morris Township settlement. (A copy of a portion of the transcript of Judge Skillman's bench opinion of July 6, 1984 is provided in Bedminster's Appendix as Exhibit E.) Judge Skillman expressly stated that it was unnecessary to actually decide the "substantial factor" issue. (See Exhibit E, T10-25 to T11-13)

Judge Skillman's reasons for concluding that the objector was not a "substantial factor" are instructive. First, Judge Skillman noted that the objector's Mt. Laurel suit was not filed

until approximately five years after the institution of the Public Advocate's "well publicized" lawsuit. (Exhibit E, T11-13 to 23) Judge Skillman also emphasized that by the time the objector first raised the issue of Mt. Laurel compliance, the municipality was "well underway in conducting an intensive review of its zoning ordinance in order to bring itself into compliance with Mt. Laurel." (Exhibit E, T11-24 to T12-9) Judge Skillman concluded by finding that the municipality's compliance was due to the Public Advocate pending lawsuit, rather than the actions of any private developers. (Exhibit E, T12-22 to T13-11)

The link between the municipality's Mt. Laurel compliance and the actions of the objector is more remote in the present case than in the case involving Morris Township. First, as in Morris Township, many years transpired between the institution of Mt. Laurel litigation by the Public Advocate and Allan-Deane/Hills Development and Mr. Dobbs' attempt to assert Mt. Laurel claims against Bedminster.[8] Indeed, unlike the Morris Township litigation, the prior proceedings in this case included two trials on the merits, rezoning with the assistance of a master, the award of a builder's remedy and the entry of a judgment of compliance under Mt. Laurel I and Madison Township. In short, the present

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8. Although the complaint was filed in 1970, the present proceedings arise most directly from the entry of an order to show cause on April 19, 1978.

remand proceedings under Mt. Laurel II constitute a far more advanced stage of litigation than that addressed by Judge Skillman.

The record of the present case also amply supports a finding that Bedminster Township was well underway in its Mt. Laurel II compliance effort when the objector Dobbs first attempted to assert Mt. Laurel claims. In August of 1983 the Township prepared proposed zoning amendments for Mt. Laurel II compliance. In October of 1983 the Township voluntarily agreed, at the request of The Public Advocate and the Court, to delay immediate implementation and to enter into settlement discussions with the Public Advocate and Hills Development, so that any necessary revisions could be made to the Township's compliance proposal within the context of the actual construction of Hill's Project.

In short, by the late summer and fall of 1983, the Township had clearly demonstrated its intent to bring its zoning into compliance with Mt. Laurel II, and concrete actions were undertaken toward that objective. At that time, Mr. Dobbs was still expressly disclaiming any interest or intent in asserting Mt. Laurel claims or seeking a builder's remedy. Thus, any subsequent actions of Mr. Dobbs cannot be reasonably found to constitute a substantial factor in Bedminster Township's Mt Laurel compliance; rather, credit for causing compliance must properly be attributed

to the Public Advocate and Allan-Deane/Hills Development, who have dilligently pursued this litigation over the course of many years. Indeed, credit should also be rightfully given to the Township itself, since Bedminster has cooperated with the parties in the rezoning and remedial process since 1980.

As demonstrated by the preceding, this Court need not reach the legal issue of the potential entitlement to a builder's remedy based upon actions which are a "substantial factor" in causing Mt. Laurel compliance, since the record of this case provides absolutely no basis for such a factual finding. The primary purpose of the builder's remedy is to reward developer-plaintiffs who succeed in invalidating zoning ordinances on Mt. Laurel grounds. That purpose can best be achieved by rewarding those developers who take the lead in pursuing Mt. Laurel litigation. This same reward should not be equally bestowed upon developers, such as Mr. Dobbs, who attempt to assert Mt. Laurel claims only at the last minute, after watching other parties vigorously pursue such claims against the same municipality for many years.

Finally, while the Supreme Court in Mt. Laurel II noted that the expenditure of considerable funds by a developer-plaintiff was not essential, 92 N.J. at 280, the converse should be equally true. Thus, the alleged expenditure by Mr. Dobbs of considerable effort and resources during the past year should not

provide a legitimate basis for disregarding the context of Mr. Dobbs' participation and the posture of this case. The parties were engaged in remedial proceedings on remand from the Appellate Division after extensive prior proceedings. The Township clearly expressed its intent to comply and demonstrated that intent by its actions. This Court accordingly authorized this process to be conducted through settlement negotiations with the assistance of a planning master. Mr. Dobbs was permitted to participate based solely upon his expressed concerns about potential adverse consequences upon his separate litigation for non-residential rezoning. During the subsequent process, input was exchanged among all parties with respect to the novel issues of compliance under Mt. Laurel II.

In such a give and take process, it is foolish to attempt to allocate credit among the participants for various aspects of the resulting product. See Raymond Report, dated September 14, 1984. Thus, Mr. Dobbs' flow charts, 4 1/2 pound appendix[9] and protracted arguments simply miss the point. Bedminster Township's initial compliance proposal was refined in response to evolving planning and legal thinking with respect to Mt. Laurel II compliance and input from a variety of sources. The final product was necessarily required to be scrutinized by the

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9. 4 pounds, 9 ounces according to our postal scale.

parties, the master and this Court before the entry of a judgment of compliance, regardless of Mr. Dobbs' participation. Thus, the implicit assertion by Mr. Dobbs that this Court would have approved mere "paper compliance" is erroneous and insulting. In short, Mr. Dobbs' participation in this remedial process was not a substantial factor in causing Bedminster Township's compliance under Mt. Laurel II, since compliance was begun well before Dobbs' embraced the Mt. Laurel doctrine and would have resulted in any event.

POINT IV

THE SETTLEMENT AGREEMENT AND BEDMINSTER'S COMPLIANCE PACKAGE SHOULD BE APPROVED AS FAIR AND REASONABLE

Upon the remand of this action by the Appellate Divison the Public Advocate proposed that the necessary revisions to the builder's remedy and the zoning ordinance be achieved through a settlement process, rather than engaging in further protracted trial proceedings. This Court approved that procedure and continued the appointment of George Raymond as planning master to assist in that process. All compliance issues were subsequently resolved in a manner acceptable to all parties, as well as the master. Bedminster Township and the Public Advocate now seek this Court's approval of the settlement agreement and compliance package and the entry of a final judgment of compliance, so that this litigation can finally be put to rest.

The appropriate procedures and standards for the judicial review and approval of settlements of Mt. Laurel litigation were addressed at length by Judge Skillman in his unreported opinion of May 25, 1984 in Morris Co. Fair Housing Council v. Boonton Township (L-6001-78 P.W.) and Charles Develoment Corp. v. Township of Morris (L-54599-83 P.W.). Judge Skillman's opinion contains a thorough and comprehensive review and analysis of the relevant case law and the relevant policies of Mt. Laurel II,

which need not be repeated.

In brief, Judge Skillman held that the approval of Mt. Laurel settlements should be governed by procedures similar to those applicable to the approval of class actions and other representative lawsuits. Id., slip op. at p. 11. The standard governing this approval process is a determination that the settlement is "fair and reasonable." Id. This determination is to be made at a hearing, at which any interested person may be heard in opposition to the settlement. As in class actions, however, the hearing need not be a full plenary hearing resulting in a precise adjudication of the fair share issue. As noted by Judge Skillman:

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

Morris County Fair Housing Council, slip op. at 13.

The critical requirement is that the court have sufficient information before it in order to determine whether the settlement should be approved as fair and reasonable. The court should exercise its sound discretion in striking an appropriate balance between receiving sufficient information and preventing the hearing from becoming a burdensome and unnecessary plenary trial on the merits. In appropriate cases, the court may choose

to appoint a planning master to assist it in this process.

In the present case, this Court has substantial information before it with respect to the settlement agreement and compliance package. This Court has carefully monitored the settlement process and received periodic reports from the planning master. In addition, the parties have submitted a number of expert reports. Under these circumstances, this Court should exercise its discretion to significantly limit and control the testimony presented at the hearing. Mr. Dobbs has had ample opportunity to present his objections, and he has done so at some length. The Court and the parties should not be unduly burdened by extensive repetitious testimony or the assertion of substantially new objections at the hearing.

The grounds for approving the settlement as fair and reasonable are set forth in the various reports and other materials submitted on behalf of Bedminster Township, and they need not be repeated at length in this brief. In summary, the information before this Court fully demonstrates that the settlement agreement and the compliance package will provide a realistic opportunity for the construction of lower income housing in satisfaction of the Township's Mt. Laurel obligations. Mr. Dobbs' contention that the property to which he holds an option must be included is without merit. The expansion of sewerage treatment facilities will be required to accommodate the

significant additional development, regardless of where it goes. There is no showing that the Dobbs' site can be serviced more quickly. To the contrary, the Dobbs' sewerage treatment proposal would probably take longer, assuming it to be feasible at all, which is highly questionable. At best, Mr. Dobbs' objections are nothing more than a challenge to a discretionary land use planning decision of the Township. Absent clear evidence to the contrary, of which there is none, this Court should honor the more than reasonable planning judgments of the municipal officials as to the locations designated for Mt. Laurel compliance zoning.

Finally, some discussion is appropriate with respect to the fair share number agreed to in the settlement. First, it must be emphasized that Judge Skillman concluded that an independent fair share determination was unnecessary under the class action case law and the policies relevant to Mt. Laurel settlements. Id., slip op. at 12-13. Indeed, Judge Skillman held that such a requirement would be inconsistent with the settlement process. Instead, Judge Skillman held that the reasonableness of the agreed upon fair share number should be evaluated based upon various considerations such as the possible range of fair share numbers and the positive consequences of the settlement. Id.

The parties to the settlement have stipulated to a fair share number of 656, which is less than the number which would result from automatic application of the methodology recently

approved by this Court in AMG Realty Co. v. Warren Township (Docket Nos. 1-23277-80 P.W. and L-67820-80 P.W., decided July 16, 1984). The difference between these two numbers should not, however, preclude the approval of the settlement and the fair share number contained therein. It must be emphasized that the approval of the settlement number should not be viewed as a determination on the merits, pursuant to Judge Skillman's analysis and holding. Thus, approval should not be deemed to be inconsistent in any respect with the Warren Township decision. To the contrary, a number of factors justify the approval of a different fair share number within the present settlement context.

First, the Warren Township opinion itself recognizes that the methodology approved therein is not written in stone, but rather represents the beginning of a refinement process. Id., slip op. at 78. Similarly, the Supreme Court in Mt. Laurel II expressed the view that a consistent methodology would evolve over time from the cases before the three Mt. Laurel judges; there is no indication that Supreme Court intended that the first fair share decision would end this issue. See Mt. Laurel II, 92 N.J. at 254-255. Indeed, Judge Skillman adopted a different method for calculating indigenous housing need in the case of Countryside Properties, Inc., v. Borough of Ringwood (Docket NO. L-42095-81, decided July 25, 1984). In short, the issue of fair share determination is far from being a closed issue.

It should also be noted that there are various actions pending on the legislative front which could impact either directly or indirectly upon the issue of fair share determinations. While no legislation has yet been enacted, there is considerable activity and discussion which creates some uncertainty in this area.

Thus, if this case were fully litigated rather than being settled, Bedminster would present arguments in opposition to various aspects of the Warren Township methodology. The Township might also appeal any fair share determination. This Court need not determine that Bedminster would ultimately prevail in those arguments; rather, it is sufficient to note that some change in the fair share methodology might result.

In addition, the important policies furthered by the settlement of Mt. Laurel litigation should not be overlooked in this context. Such settlements eliminate appeals and delay and expedite the implementation of the Mt. Laurel doctrine. A reasonable reduction in the fair share number by settlement is justified in return for these important benefits. This is particularly true given the existence of various uncertainties concerning fair share issues, as discussed above.

Finally, the settlement fair share number may be additionally and alternatively justified under the particular circumstances of this case as being appropriate to somewhat

mitigate the development impacts and prevent a radical transformation of Bedminster. See Mt. Laurel II, 92 N.J. at 219. Bedminster Township's planner has already provided the Court with information on and a discussion of this issue, and it need not be repeated. It is sufficient to note that construction is already well underway pursuant ot a builder's remedy on a 1287-unit development, including 260 lower income housing units, which in and of itself will more than double the Township's housing stock, and which will in fact provide the first lower income housing build as a result of the Mt. Laurel doctrine. Considerable additional residential development will occur pusuant to the compliance package. Under these circumstances, the settlement fair share number is not inappropriate or unreasonable.

In conclusion, this Court should approve the settlement agreement as fair and reasonable and reject the objections of Mr. Dobbs. Bedminster Township's Mt. Laurel obligations through the year 1990 will be met under this plan. These obligations will simply be met where the Township has reasonably determined they should be met, and not where Mr. Dobbs contends that they should be so that he can reap an economic windfall. This reasonable planning judgment by the duly elected municipal officials, concurred in by the Public Advocate, should be fully honored by this Court, and their settlement decision should be approved. Bedminster Township has fully and voluntarily complied with the

Mt. Laurel doctrine, and this litigation should finally be put to rest. The Township is entitled to a judgment of compliance and repose so that it can get on with the important tasks facing it in order to accommodate the tremendous development which is already occurring in Bedminster pursuant to the Mt. Laurel doctrine.

CONCLUSION

For the foregoing reasons, this Court should deny the application of Leonard Dobbs for a builder's remedy, reject the objections of Leonard Dobbs to the settlement, approve the settlement and enter a final judgment of compliance and repose for Bedminster Township.

Respectfully submitted,

McCarter & English, Esqs.
Attorneys for Bedminster Township

By: _____
Alfred L. Ferguson
A Member of the Firm

Dated: November 2, 1984