RULS-AD-1985-260

9/19/85

- Notice of Motion in Motzenbecker v. Bernardsville (2)
- Letter to Clerk's Office (2)
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J. ALBERT MASTRO
7 MORRISTOWN ROAD
BERNARDSVILLE, N. J. 07924
(201) 766-2720
ATTORNEY FOR Defendants

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN
COUNTY

Plaintiff
HELEN MOTZENBECKER,

vs.

Defendant
MAYOR AND COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH OF BERNARDSVILLE.

Docket No. L-37125-83

CIVIL ACTION
(MOUNT LAUREL II)

NOTICE OF MOTION
(Sec.16 FHA Transfer)

TO: DOUGLAS K. WOLFSON, ESQ.
Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein, Esqs.
Englehard Building
P. O. Box 5600
Woodbridge, New Jersey 07095

PLEASE TAKE NOTICE that on Friday, October 11, 1985, at 9:00 in the forenoon or as soon thereafter as counsel may be heard, the undersigned, attorney for defendants, Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville, shall apply to the Honorable Euguene D. Serpentelli, Ocean County Court House, Toms River, New Jersey, for an Order for transfer of the within matter to the Council on Affordable Housing pursuant to the Fair Housing Act, Chapter 222, P.L. 1985, Section 16.

PLEASE TAKE FURTHER NOTICE that defendants shall rely upon the Certifications of Paul J. Passaro, Jr. and Peter S. Palmer, Brief sumbitted herewith and Brief submitted on August 9, 1985 in support of this Motion.

J. ALBERT MASTRO
Attorney for Defendants

DATED: September 19, 1985

CERTIFICATION

I hereby certify that the within Notice of Motion and supporting documents were served and filed in the manner and within the time prescribed by the Rules of Court.

J. ALBERT MASTRO
Attorney for Defendants

DATED: September 19, 1985

J. ALBERT MASTRO
COUNSELLOR AT LAW
7 MORRISTOWN ROAD
BERNARDSVILLE, N. J. 07924

201-766-2720

September 19, 1985

Superior Court Clerk's Office
CN - 971
Trenton, New Jersey 08625

Re: Motzenbecker v. Borough of Bernardsville, et als. - Docket No. L-37125-83

Dear Mr. Mayson:

Enclosed is the following document for your attention:

_____	Summons	_____	Warrant of Satisfaction
_____	Complaint	_____	Judgment
_____	Answer	_____	Check $_____
_____	Affidavit	_____	Interrogatories
x	Notice of Motion	_____	Answers to Interrogatories
x x	Certification	_____	Deed - for recording & return
x	Order	_____	Mortgage - for recording & return
_____	Crossclaim	_____	Mortgage - endorsed for cancellation
_____	Counterclaim	_____	Self addressed stamped envelope
_____	Release	_____	Realty Transfer Tax Check
_____	Notice of Settlement	_____	Fee

With respect to the above please:

x	File	_____	Consent to and return
_____	File & return filed copy	_____	Sign Order and return
_____	Record & return to me	_____	Acknowledge receipt
_____	Serve defendant & advise when service has been made	_____	Cancel of record & return
		_____	Answer & return 0+1 within the time prescribed by the Rules of Court

Very truly yours,

J. Albert Mastro

JAM/jc

Enclosures
cc: Somerset County Clerk's Office

Attorney(s): J. ALBERT MASTRO, ESQ.
Office Address & Tel. No.: 7 Morristown Road
Bernardsville, New Jersey 07924
Attorney(s) for DEFENDANTS

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN
COUNTY

HELEN MOTZENBECKER, *Plaintiff(s)*

vs.

MAYOR AND COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH OF BERNARDSVILLE. *Defendant(s)*

Docket No. L-37125-83

CIVIL ACTION
(MOUNT LAUREL II)

A copy of the within Notice of Motion has been filed with the Clerk of the County of Somerset ***New Jersey***
at Somerville Court House, Somerville
and Hon. Eugene D. Serpentell, Ocean County Court House, Toms River, New Jersey

J. ALBERT MASTRO
Attorney(s) for Defendants

The original of the within Notice of Motion has been filed with the Clerk of the Superior Court in Trenton, New Jersey.

J. ALBERT MASTRO
Attorney(s) for Defendants

Service of the within

is hereby acknowledged this *day of* *19* .

Attorney(s) for .

I hereby certify that a copy of the within Answer was served within the time prescribed by Rule 4:6.

Attorney(s) for

PROOF OF MAILING: On September 20, *1985* *, I, the undersigned, mailed to*
GREENBAUM, ROWE, SMITH, RAVIN, DAVIS & BERGSTEIN
Attorney(s) for Plaintiff
at P. O. Box 5600, Woodbridge, New Jersey 07095
by regular *mail, ~~return receipt requested~~, the following:*
NOTICE OF MOTION, BRIEF SUPPORTING MOTION, CERTIFICATION OF PAUL J. PASSARO, JR., AND PROPOSED FORM OF ORDER. CERTIFICATION OF PETER S. PALMER

R. 1:5-3 ~~*The return receipt card is attached to the original hereof.*~~

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: September 20, *1985* .

JOAN M. CALELLO
Secretary to J. ALBERT MASTRO

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J. ALBERT MASTRO
ATTORNEY AT LAW
7 MORRISTOWN ROAD
BERNARDSVILLE, NJ 07924
(201) 766-2720

September 19, 1985

RECEIVED
SEP 2 ? 1985

Hon. Eugene D. Serpentelli
Superior Court of New Jersey
Ocean County Court House
CN 2191
Toms River, New Jersey 08753

Re: Motzenbecker vs. Bernardsville

Dear Judge Serpentelli:

I am enclosing the following documents with regard to the above entitled matter:

1. Notice of Motion to Transfer
2. Supporting Brief
3. Certification of Paul J. Passaro, Jr.
4. Certification of Mayor Peter S. Palmer
5. Proposed form of Order

The Motion has been made returnable October 11, 1985 at 9:00 a.m.

Respectfully submitted,

J. Albert Mastro
Attorney for Defendants

JAM/jc
encs.
cc: Douglas K. Wolfson, Esq.

J. ALBERT MASTRO
7 MORRISTOWN ROAD
BERNARDSVILLE, N. J. 07924
(201) 766-2720
ATTORNEY FOR Defendants

Plaintiff
HELEN MOTZENBECKER,

vs.

Defendant
MAYOR AND COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH OF BERNARDSVILLE.

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN
COUNTY

Docket No. L-37125-83

CIVIL ACTION
(MOUNT LAUREL II)

ORDER

THIS MATTER being opened to the Court by Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein, Esqs., attorneys for plaintiff, Helen Motzenbecker (Douglas K. Wolfson, Esq. appearing) in the presence of J. Albert Mastro, Esq., attorney for defendants, on plaintiff's motion to declare defendant Borough may not acquire plaintiff's property through eminent domain proceedings and on defendants' motion to vacate plaintiff's builder's remedy, said matters being argued by telephone conference pursuant to R.1:6-2(e) and the Court having considered the briefs and other accompanying documents submitted by the parties and for good cause shown,

IT IS on this 20 day of September, 1985,

ORDER AND ADJUDGED as follows:

(a) Defendant, Borough of Bernardsville, has power and authority to condemn land for purposes of providing low and moderate income housing in accordance with its Mount Laurel obligation.

(b) Defendant Borough's power and authority to condemn plaintiff's land and defendants' cross-motion to vacate plaintiff's builder's remedy as well as any other issues related thereto shall be heard on the return date of defendants' motion to transfer under the Fair Housing Act.

Eugene D. Serpentelli

HON. EUGENE D. SERPENTELLI, A.J.S.C.

J. ALBERT MASTRO
7 MORRISTOWN ROAD
BERNARDSVILLE, N. J. 07924
(201) 766-2720
ATTORNEY FOR Defendants

Plaintiff
HELEN MOTZENBECKER,

vs.

Defendant
MAYOR AND COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH OF BERNARDSVILLE.

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN
COUNTY

Docket No. L-37125-83

CIVIL ACTION
(MOUNT LAUREL II)

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER MATTER TO COUNCIL ON AFFORDABLE HOUSING

DATED: September 19, 1985

STATEMENT OF FACTS

Plaintiff is the owner of approximately 8.5 acres of real estate located within the R-3 residential district under the Development Regulations Ordinance of the Borough of Bernardsville permitting single family residential use on parcels having a minimum lot area of 20,000 sq.ft.. On or about June 21, 1983, plaintiff filed litigation seeking to invalidate zoning regulations of defendant Borough on the grounds that they did not comply with the standards outlined in Mount Laurel II, 92 N.J. 158 (1983). As an integral part of the complaint, plaintiff sought a builder's remedy of 20 units per acre "or such other average gross density consistent with principles of sound planning, sufficient to provide a reasonable return to plaintiff and to assure feasibility of construction of a substantial amount of low and moderate income housing." It is significant to note that the administrative process either through the local Board of Adjustment or Planning Board was not exhausted in regard to such an application by plaintiff.

Two case management conferences were held with the Court on August 3, 1983 and December 20, 1983 respectively, during which period of time the parties communicated in an effort toward exploring settlement of the litigation between them. On or about November 17, 1983, plaintiff submitted to defendants and the Court an economic analysis prepared by Abeles Schwartz Associates, Inc. relative to the required density needed to develop the Motzenbecker tract so as to include 20% low and moderate income housing units within the project. The report observed, at p.(i) that the economic analysis was "based upon the assumption that the developer is entitled to the same rate of return for a Mount Laurel-type development as under a conventional development." The report further concluded that the economics

of such a project were such that the sales projects analysized therein which included affordable family units would not be feasible at densities below 12 units per acre (*i.e. scenarios* 8 and 9), and a density of above 12 units per acre with this form of housing would be difficult to justify from a planning and marketing point of view. Furthermore, sales projects with smaller, less expensive elderly affordable units (scenarios 1 to 3) would be feasible at densities above 10-12 units per acre. Page 2 of the report emphasized an important concept of the Mount Laurel II decision which is that a developer is entitled to a "reasonable economic return" from land and buildings when the project includes a minimum of 20% affordable units. Page 3 of the Abeles report concluded that the current cost of plaintiff's land was $597,500.00 [this figure failed to take into account a sale of a portion of the property for a purchase price of $45,000.00 in 1980]. The report then discounted the present value of two residential structures, including the land on which each was located, and estimated a current production cost of the remaining raw land (approximately 7 acres) at $387,500.00, or $35,200.00 per lot. The July 19, 1984 report of the Court appointed Master made a rather thorough analysis of land value as proposed by each party and reached a conclusion that land value of $525,000.00 would be appropriate under the circumstances (p.7). Clearly, the value placed upon the land by its owner for purposes of supporting her contention as to the minimum density required to permit compliance with the 20% Mount Laurel set-aside is significant in view of later developments. In a recent affidavit submitted by plaintiff dated September 5, 1985, when attempting to resist defendant Borough's attempt to condemn her property, plaintiff boasted an offer contemplating a cash outlay at closing of 2.8 million dollars plus a 19% share of the entire project which would generate an additional 1.14 million dollars profit.

On February 9, 1984, the parties entered into a Stipulation of Partial Settlement which afforded plaintiff a builder's remedy permitting her to develop the property in question "in a manner to be approved by the Court to include a substantial percentage of low and moderate income housing free from the constraints of the present zoning ordinance and zoning maps." A Special Master was appointed in that Order to assist the parties and the Court in designing an appropriate and feasible builder's remedy and to offer testimony if necessary to determine the limited issue of resolving a precise builder's remedy to be awarded to plaintiff in this action. Thereafter, the parties met on numerous occasions and negotiated primarily in the presence of the Court appointed Master toward resolving an appropriate builder's remedy for plaintiff's tract. On November 20, 1984, an Interim Order was entered, consented to as to form by the parties, granting plaintiff a builder's remedy consisting of 9 units per acre for a total of 76 units, 20% of which would be affordable to lower income households. Paragraph 4 of that Order mandated that plaintiff submit a development application incorporating such a builder's remedy to the Planning Board of the Borough of Bernardsville for review. Paragraph 6 of that Order mandated that the parties submit proposals to the Master regarding sale prices for affordable units and the mechanism through which the units would be maintained as affordable. To date, nothing has been done with plaintiff's tract of land nor has plaintiff submitted any development application incorporating a builder's remedy to the Planning Board of the Borough of Bernardsville for input and review.

On or about April 30, 1985, the Court appointed Master submitted his final report to the Court concluding, at p.12

> The plan outlined above seems to meet all Mount Laurel requirements. It is an exciting plan in that it calls for the use of local resources to satisfy a local obligation thus freeing compliance with the constitutional mandate imposed by Mount Laurel II from any reliance on market forces.

On July 2, 1985, the Fair Housing Act, P.L. 1985 c.222, became effective. On August 7, 1985, plaintiff submitted a Motion to declare that the Borough of Bernardsville had no power or authority to condemn plaintiff's tract of land. On or about August 9, 1985, defendants submitted a Cross-Motion seeking to vacate plaintiff's builder's remedy based upon various provisions of the Fair Housing Act. Defendants publicly advertised on August 29, and September 5, 1985, that a hearing would be held before the Court to consider defendants' compliance package scheduled for September 10, 1985. On that date, the Court considered the Motions of both parties and ruled on the limited issue of defendant Municipality's authority to condemn land for Mount Laurel purposes. Defendants indicated that they intended to file a motion for transfer under §16 of the Fair Housing Act, the return date of which was fixed by the Court as October 11, 1985. On September 16, 1985, defendant Borough adopted a Resolution of Participation and directed its municipal attorney to file an appropriate Motion for Transfer with this Court. (Exhibit A attached)

POINT I

ASSUMING ARGUENDO THAT THE STIPULATION OF PARTIAL SETTLEMENT IS EQUIVALENT TO A PARTIAL CONSENT JUDGMENT, THUS NOT APPEALABLE AS OF RIGHT, IT IS STILL, AT BEST, ONLY A PARTIAL DISPOSITION.

Sec.16 of the Fair Housing Act, c.222,, P.L. 1985, permits any party within an exclusionary zoning case to file a motion with the court for transfer of the litigation to the Council on Affordable Housing, provided the suit was instituted more than 60 days before the effective date of the Act. The instant motion seeks just such a transfer. The Act instructs courts ruling upon such motions for transfer to consider whether or not transfer would result in a "manifest injustice" to any party to the litigation.

Presumably, plaintiff will oppose defendants' present request. Plaintiff is recipient of a builder's remedy permitting her to develop the property in question according to specifications of the Stipulation of Partial Settlement and this Court's subsequent Interim Order of November 20, 1984. Opposition to the instant motion can only materialize from a claim of "manifest injustice" growing out of a transfer's vacation of plaintiff's current remedy and application of §28's limited moratorium on future builder's remedies. Sec.28 of the -Act provides for a moratorium on builder's remedies in any exclusionary zoning litigation filed on or after January 20, 1983, unless a final judgment (defined as judgment subject to an appeal of right for which all right to appeal is exhausted) providing for a builder's remedy has already been rendered to the plaintiff. "Manifest injustice" could only arise if a denial of plaintiff's remedy was improperly enacted when evaluated in light of the intervening equities of this particular case.

An analysis of the issues will best provide illumination where facts most favorable to plaintiff are utilized. Assuming arguendo that the Stipulation of Partial Settlement is equivalent to a partial consent judgment, and thus not appealable as of right, Baber v. Hohl, 40 N.J. Super. 526, (App. Div. 1956); Cooper Medical Center v. Boyd, 179 N.J. Super. 53, (App. Div. 1981), it is still, at best, only a partial disposition of the issues at hand. The Stipulation is not a total end to the present litigation, it is not a "final judgment" as envisioned in the Act.

Mount Laurel II, 92 N.J. 158 (1983), is very specific in prescribing requirements necessary for the imposition of a builder's remedy. The test is three prong:

> ...where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning. 92 N.J. at 279-280.

Clearly, a builder's remedy is predicated on: (1) success in Mount Laurel litigation, i.e., proof of an exclusionary ordinance, (2) proposal of at least a minimum of 20% lower income housing for the project, and (3) absence of environmental or other planning impediments. Undoubtedly, the Stipulation, even if considered equivalent to a judgment, is not dispositive of Mount Laurel II's third requirement for a builder's remedy. The Interim Order specifically requires plaintiff to submit a development application to defendants' Planning Board. Environmental consideration would first be addressed in such an application.

By no stretch of the imagination can one deem the Stipulation to have totally settled the present controversy. If the Stipulation was to be considered

a full settlement then defendants should have the benefit of §22's provisions. Pursuant to §22 of the Act a municipality which has settled outstanding litigation is not obligated to take any further action with regard to lower income housing. A six year repose automatically attaches to a total settlement The six year res judicata figure is plainly derived from Mount Laurel II's pronouncement on repose; therein, the Court held that "judgments of compliance" will have a six year res judicata effect despite changed circumstances. 92 N.J. at 291-292. The derivation from Mount Laurel II demonstrates that §22's settlement provisions should only come into effect following a total as opposed to a partial settlement, i.e., following "judgments of compliance." Besides planning concerns, implementation of plaintiff's remedy has yet to be passed upon by this Court in conjunction with defendants' full compliance proposal.

Certainly, defendant Borough does not fit into the parameters of §22. The Stipulation cannot in and of itself be said to terminate Bernardsville's obligation to lower income households. Clearly, the Stipulation is not a §22 settlement, thus, one must look to the provisions of §28 and R.4:50-1(f) for aid in resolving this case.

POINT II

DEFENDANT IS ENTITLED TO RELIEF FROM THE STIPULATION PURSUANT TO R.4:50-1(f).

Should one assume that the provisions of §28 do not by themselves proscribe the carrying forth of plaintiff's builder's remedy, nevertheless, the Fair Housing Act's moratorium would still defeat implementation of plaintiff's remedy as the equities of the instant case demand relief to defendants pursuant to the provisions of R.4:50-1(f). The relevant portions of the rule read as follows:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order for ...(f) any other reason justifying relief from the operation of the judgment or order.

Admittedly, defendants may have waived their right to appeal from the Stipulation's terms due to its consensual nature and absent the Fair Housing Act. See Baber and Cooper Medical Center, supra. Moreover, Stonehurst at Freehold v. Tp. Comm., Tp. Freehold, 139 N.J. Super. 311, 313 (L. Div. 1976) has held that a consent judgment is both in the nature of a contract and a judicial decree; it has equal adjudicative effect as a judgment entered after trial. As such, a consent judgment may only be vacated in accordance with R.4:50-1.

Justice Brennan, writing for the New Jersey Supreme Court stated that "equitable principles are the guide in administering relief to determine whether in the particular circumstances justice and equity require that relief be granted or denied." (emphasis provided) Shammas v. Shammas, 9 N.J. 321 (1952). Two principles may be drawn from Justice Brennan's opinion: first, equity will guide a request as is now made by defendant Borough, secondly, each case should be examined

individually concerning its particular circumstances and its particular facts. See also, Baumann v. Marinaro, 95 N.J. 380 (1984). In examining judgments the power to vacate "should doubtless be freely exercised when enforcement of a judgment would be unjust, oppressive or inequitable as to the party moving to vacate it." (emphasis provided) Wilford v. Sigmund Eisner Co., 13 N.J. Super. 27, 33 (App. Div. 1951).

Beyond individually addressing particular facts with equitable principles, several other legal guidelines are applicable to the instant motion. If events occuring subsequent to the judgment dictate, the relief sought should be granted. Gallanthen v. Postma, 12 N.J. Super. 464 (App. Div. 1951). Although, it has been held that "a mere change in the decisional law will not suffice," In re Estate of Wehrhane, 149 N.J. Super. 41 (Ch. Div. 1977), "if the change is coupled with considerable equity and extreme hardship for the applicant, ground for relief from a judgment under R.R.4:62-2(f) [predecessor to R.4:50-1] can be established." In re Estate of Cory, 98 N.J. Super. 208 (Ch. Div. 1967). "Such a case would constitute an 'exceptional situation' envisioned by R.R.4:62-2(f)." id. The one year time limit prescribed by sections (a), (b) and (c) of R.4:50-1 is not applicable to motions made pursuant to section (f) where R.4:50-2 limits time only in terms of reasonableness. Clearly, "the very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundries are as expansive as the need to achieve equity and justice." Court Invest. Co. v. Perillo, 48 N.J. 334, 342 (1966). The instant motion presents just such an exceptional situation.

As noted by plaintiff in her preceding brief, at the time litigation was initiated there existed little doubt that Bernardsville's zoning ordinance was defective. According to the newly expanded mandate of Mount Laurel II, which

cast aside distinctions between developing municipalities and non-developing municipalities such as defendants', the mandate for provision of a regional fair share extended to all municipalities within SDGP growth areas. Rather than litigate the obvious, Bernardsville attempted to cooperate with its newly introduced obligation to house a fair share of the region's lower income households. Thus, after discovery and pretrial conferences, the Borough agreed to Stipulation of Partial Settlement. Although Mount Laurel II directed that but one appeal would be permissible in exclusionary zoning litigation, it is probable that defendants' consent to the Stipulation's terms constitutes a waiver of appeal as to such terms. However, attention is directed to the position that §28 of the Act and granting of a moratorium against a builder's remedy would apply absent the finality of disposition as discussed above.

Compare defendants' above scenario with the following contrasting facts. Suppose, defendant Borough had resisted, as have many intransigent communities. Resistance to plaintiff's suit would doubtless have resulted in an adjudication of the ordinance's invalidity by this Court. Since but one appeal is permissible in a Mount Laurel case, no waiver of appeal as to the ordinance's validity and the subsequent builder's remedy would have occured. A resisting community, otherwise identical to Bernardsville, would absolutely qualify for protection against a builder's remedy offered in §28 of the Act. No barrier would exist had Bernardsville resisted the Constitutional mandate. The moratorium would permit implementation of its total fair share of lower income housing; plaintiff's key property would not have to be purchased at an inflated remedy-laden price. Yet today, because the Borough chose to acknowledge and implement its constitutional responsibilities, rather than ignore its obligation, the benefit of relief offered by the Act is threatened.

Defendants submit that the disparity in treatment between a cooperating municipality and a resisting one constitutes just the "exceptional situation" envisioned for granting of relief from a judgment pursuant to R.4:50-1(f).

Surely, enforcement of the terms of the Stipulation, which is the equivalent of a partial consent judgment, would be unjust, oppressive and inequitable. Wilford, supra. When discerning the individual and particular facts of the present case avoiding an unjust result [the goal of R.4:50-1(f)] would require vacation of plaintiff's remedy. Maintaining the remedy would create a vast disparity of treatment between Bernardsville, a cooperating municipality, and every intransigent defendant in other litigation as well as those municipalities not yet involved in suit. Otherwise identically situated communities would be treated in a vastly disparate fashion. An enormous financial burden would be thrust upon Bernardsville, a burden not borne by resisting or non-litigating municipalities. Communities not yet sued and those resisting would be able to employ the non-litigious remedies of the Fair Housing Act. Bernardsville which cooperated with its consititutional obligation would continue in litigation and very possibly see its proposal for municipally constructed housing vitiated.

Although the intervening Fair Housing Act might not provide an exceptional situation justifying relief by itself, the inequity created by permitting plaintiff's remedy to stand surely should rise to the "exceptional" level envisioned by R.4:50-1(f). In re Cory's Estate, supra. Certainly, there has been no fault or failure of requisite diligence on the Borough's part which would preclude equity from relieving the movant from the terms of the Stipulation. See Eclipse Pioneer Division of Bendix A. Corp. v. Minter, 35 N.J. Super. 430 (App. Div. 1955). On the contrary, defendants' actions have been in full cooperation with the Mount Laurel mandate.

A balancing of the equities herein will demonstrate that the present case is one in which this Court's powers to grant relief should be freely exercised. The nature of Mount Laurel II and its mandate left no reason for defendants not to cooperate. Defendants recognizing the same, acted in utmost good faith negotiating a partial settlement with plaintiff. The good faith negotiation of defendants avoided costly litigation so seriously upbraided by Justice Wilentz. Defendants' defective ordinance was acknowledged as such and a revised ordinance has been promulgated. Recognizing the ultimate objective of Mount Laurel II, i.e., building housing, the Borough developed a plan by which its total obligation for lower income housing would be definitely satisfied through the construction of Borough initiated housing. As per the Interim Order defendants have submitted their proposals concerning projected housing prices and mechanisms to keep the housing affordable. Maintenance of plaintiff's remedy has inflated her asking price on the property in question to a point where the property and profits jointly approach some four million dollars for 8.4 acres of real estate. Should defendants be forced to pay a substantial sum to acquire the parcel so as to enact their own building plan, the entire compliance package would be threatened due to prohibitive price demands. As a result, a bona fide proposal for actual construction of the Borough's total amount of lower income housing would be defeated to permit plaintiff's construction of but 15 lower income units.

On the other hand, it is plaintiff's actions that appear to lack good faith. Plaintiff has never been called upon to expend funds for a costly trial. Plaintiff's suit was filed without ever submitting proposals to defendants' Planning Board. (Plaintiff has repeatedly maintained that she first attempted to gain approval for her proposals prior to suit, yet her appendix submitted with the prior motion is

devoid of any such indication.) Plaintiff has never complied with the Interim Order calling for submission of a development application to defendants' Planning Board. Plaintiff has never complied with the Interim Order requiring submission of proposals to the Master on price and price maintenance. No ground has been broken, nor has any other physical modification been made to the real estate.

Despite all this, plaintiff would have this Court believe that maintenance of her profits are of paramount importance. Plaintiff contends that permitting a diminution of her expected windfall would deprive future developers of the initiative to undertake additional Mount Laurel projects, thereby, lessening construction of new lower income housing. Her argument is fallacious. Plaintiff chooses to ignore the Fair Housing Act and its obvious impact. The Act provides for a non-litigious method of resolving exclusionary zoning disputes. With the elimination of the substantial cost of law suits the rationale behind permitting private builders to reap enormous profits becomes moot. With litigation costs removed, builder's will not need the incentive of high profits to initiate Mount Laurel type projects. The Act minimizes a developer's litigation risks.

Should the moot profit incentive argument of plaintiff be accepted then the builder's remedy would cease to be what it was intended: a means to an end, not an end in intself. The builder's remedy was never endorsed as a judicial tool in order to provide plaintiff several million dollars in financial returns. The builder's remedy was approved as an interim method of providing lower income housing where there would otherwise be little or none. In Bernardsville, a plan has been devised to provide the very housing of which Mount Laurel speaks. Moreover, the municipal plan will provide the entire fair share number calculated by the Special Master. Plaintiff's parcel is a key to successful actualization of the Borough's compliance package.

By insisting upon maintaining her rights to a builder's remedy and its concomitant profits, plaintiff is essentially attempting to exercise a veto power against defendants' compliance and in favor of her financial windfall. In a similar situation it has been held that a builder may not veto a compliance plan simply to maintain its right to a builder's remedy. Morris Cty. Fair Hous. Council v. Boonton Tp., 197 N.J. Super. 359 (L. Div. 1984) indicated that where a municipality proposed a plan of compliance (via settlement with a builder) another developer could not insist upon his builder's remedy and veto the compliance because the second builder would not be in a position to "succeed" in his Mount Laurel litigation. Although there are not two developers involved herein, the Borough's self-initiated compliance package in effect creates an analogous situation. Prior to final judicial approval of plaintiff's remedy, Bernardsville has adopted a compliance plan which like Morris Township's settles the Mount Laurel issues within. Defendants urge this Court not to allow a lone developer to veto a full compliance plan simply to preserve her profit.

After weighing the equities within the exceptional situation outlined above it is clear that the only method of avoiding an unjust result is to vacate plaintiff's remedy. Vacating the Stipulation shall vitiate any claims of manifest injustice which would prevent a tranfer to the Council. Yet, plaintiff may still invoke the Act's provisions providing for objection to defendants' plan, resulting in subjsequent mediation and review. Maintaining plaintiff's remedy provides her with two bites at the apple. Plaintiff has expended little in pursuing the allure of her nearly four million dollars profit. She has not borne the expense of a trial; she has not expended large sums on preparation for construction; the parcel remains today as it was prior to suit; plaintiff has not even complied with the Interim Order.

Conversly, defendants have prepared a good faith plan to cure any existing exclusionary zoning in the Borough, both theoretically and with actual construction directly benefiting that class of persons for whom Mount Laurel's relief was targeted. Relief pursuant to R.4:50-1(f), is truly warranted; to do otherwise would constitute an imposition of an irrationally based classification favoring intransigent municipalities over those which cooperated with the pronouncement of our Supreme Court. Had defendants resisted plaintiff's suit, there would be no question of §28's applicability. Application of the Act in such a way as to draw irrationally based distinctions between defendants and resisting communites will not only reap the unjust result R.4:50-1(f) seeks to avoid, but in all probability it would constitute an unconstitutional application of the Fair Housing Act.

Defendants urge this Court to utilize its inherent equitable powers and vacate plaintiff's builder's remedy.

POINT III

THE MOUNT LAUREL II DECISION WAS INTENDED TO PROVIDE AN INTERIM REMEDY UNTIL SUCH TIME AS THE LEGISLATURE ACTED.

The power to enact general laws concerning zoning and to control the use of land was granted to the Legislature by the New Jersey Constitution of 1947:

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature. Art. 4, §6, ¶2.

The Mount Laurel II decision recognized the constitutional authority of the Legislature in matters relating to zoning and the use of land and justified the expanded role of the Judiciary in this area only because the Legislature had failed to act:

> [A] brief reminder of the judicial role in this sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is best left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interest involved and because the Legislature has not protected them. We recognize the social and economic controversy (and its political consequences) that has resulted in relatively little legislative action in this field. We understand the enormous difficulty of achieving a political consensus that might lead to significant

> legislation enforcing the constitutional mandate better than we can, legislation that might completely remove this Court from those controversies. But enforcement of constitutional rights cannot await a supporting political consensus. So while we have always preferred legislative to judicial action in this field, we shall continue - until the Legislature acts - to do our best to uphold the constitutional obligation that underlies the Mt. Laurel doctrine. So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158, 212 (1983).

On July 2, 1985, Governor Thomas Kean signed The Fair Housing Act into law which provides a comprehensive plan to assure affordable housing in a manner approved by the elected representatives of the citizens of New Jersey. The Fair Housing Act is the Legislature's response to the Mount Laurel II decision. The Supreme Court recognized that were this to happen, the judicial role "could decrease as a result of [such] legislative and executive action." id. at 213. The time has now come to implement the Legislature's plan.

Since the Supreme Court has acknowledged that "powerful reasons suggest" that exclusionary zoning matters are "better left to the Legislature" id. at 212, and the Legislature has now acted, it is essential that the instant matter be transferred to the Fair Housing Council so that the issue of affordable housing in Bernardsville, a municipality which has cooperated with the Mount Laurel mandate, may be resolved in a manner not irrationally disparite from the way in which resisting communities' obligations are treated. In essence, defendants ask that this Court recognize that partial stipulation is equitably no different from a judicial decree of ordinance invalidity.

The Legislature has established the Council on Affordable Housing "which shall have primary jurisdiction for the administration of housing obligations

in accordance with sound regional planning considerations in this State." P.L. 1985, c.222, §4(f). Because the Supreme Court and the Legislature are in agreement that implementation of the Mount Laurel mandate is properly the province of the Legislature, it is only appropriate that this case be transferred to the Council according to the procedures established by the Legislature.

POINT IV

THE LEGISLATURE CLEARLY INTENDED THAT THE FAIR HOUSING ACT REPLACE THE INTERIM MEASURES PROVIDED BY MOUNT LAUREL II.

The Fair Housing Act was intended to replace the judicially created system of upholding the Mount Laurel obligation, except in the most limited circumstances, as evidenced by the legislative findings and declarations in the preamble to the Act and by the statutory scheme itself. In its findings, the Legislature noted that:

> The State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this Act and not litigation, and it is the intention of this Act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing (emphasis added). P.L. 1985, c.222, §2(g)(3).

This language clearly evidences an intent on the part of the Legislature to replace the judicial forum presently deciding Mount Laurel issues with a new process for the mediation and review of present and future disputes arising under Mount Laurel I and II.

Pursuant to this intention, the Act contains express provisions for transferring ongoing litigation to the jurisdiction of the Council on Affordable Housing. P.L. 1985, c.222, §16(a). The instant case, one in which no issues have yet been adjudicated, should therefore be transferred in accordance with the Legislature's directives. Although the judicial role in these cases has not been eliminated, the judiciary no longer has primary jurisdiction over Mount Laurel claims. The proper forum for resolution of the present case now is the Council on Affordable Housing, and the defendants request that their case be so transferred. Moreover, as outlined above, compelling reasons exist for vacating the present stipulation of partial settlement, thus, it should not stand as an impediment to transfer.

POINT V

TRANSFER TO THE COUNCIL ON AFFORDABLE HOUSING IS APPROPRIATE IN THE INSTANT CASE

A. Transfer to the Council on Affordable Housing is mandatory unless it is clearly shown that there will result a manifest injustice to a party.

The Fair Housing Act provides that "For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, any party to the litigation may file a motion with the court to seek a transfer of the case to the Council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation." P.L. 1985, c.222, §16(a). The motion for transfer to the Council on Affordable Housing must be granted unless such transfer would result in a mani-

fest injustice to any party. The standard the court is to apply here is that enunciated by R.4:69-5. This Rule specifically provides that an action in lieu of a Prerogative Writ is not maintainable so long as an avenue of administrative review exists. The Rule acknowledges the sound and firmly established policy of judicial deference to administrative bodies having jurisdiction over a matter and having expertise in the field. This and other rules thus require the exhaustion of administrative remedies unless the interests of justice manifestly require otherwise.

In Central R.R. Co. v. Neeld, 26 N.J. 172 (1958), cert. den. 357 U.S. 928 (1958), the New Jersey Supreme Court ruled that R.R. 4:88-14 (the source rule of R.4:69-5) must be applied to dismiss an action pending in the courts "unless there is a manifest showing that the interests of justice require otherwise." at 181. In enacting the Fair Housing Act, the Legislature envisioned that even as to pending cases, the Council on Affordable Housing is the most appropritate primary forum. Only where the transfer would result in manifest injustice to one party might the transfer be denied.

The requirement of administrative exhaustion set forth in R.4:69-5, and in the Fair Housing Act's provision regarding transfer, serves several purposes.

> [T]he rule ensures that claims will be heard, as a preliminary matter, by the body having expertise in the area. This is particularly important where the ultimate decision rests upon factual determination lying within the expertise of the agency or where agency interpretations of relevant statutes or regulations are desirable. Paterson Redevelopment Agency v. Schulman, 78 N.J. 378, 386 (1979).

Even the presence of constitutional implications in the issues presented does not suffice to abrogate the exhaustion requirements. id. at 387.

The New Jersey courts are familiar with situations where, after exercising jurisdiction over a matter, they must, pursuant to the doctrine of primary jurisdiction, refer factual issues to an administrative body for its review. See Boss v. Rockland Electic Co., 95 N.J. 33 (1983). In Boss, property owners sought to enjoin an electric utility's proposed selective tree removal program on an easement. Although the trial court had carefully considered the Bureau of Public Utilities regulations affecting right-of-way maintenance, had made factual findings, and had even walked the terrain over which the easement extended, our Supreme Court determined that the necessary factual finding should have been made by the Bureau of Public Utilities and remanded the case to trial court for referral of the factual issues to the agency.

Within the instant matter there has been no resolution of any factual issues posed by plaintiff or defendants. Any determinations upon which the Stipulation was predicated were the product of negotiation and interaction with the Master. No lengthy trial with a myriad of conflicting factual witnesses has ever been undergone. The argument in favor of transfer to the Council on Affordable Housing is far more compelling here than in Boss where, even though the trial court had made factual findings, the Supreme Court remanded for referral to the administrative agency with primary jurisdiction. The present case offers no possible duplication of fact finding. The instant motion to transfer must be granted unless it is clearly shown that the transfer would result in a manifest injustice to any party.

POINT VI

THERE EXISTS NO MANIFEST INJUSTICE UPON WHICH TO DENY TRANSFER AND EXHAUSTION OF REMEDIES.

As outlined above, the Act requires exhaustion of its specified administrative remedies unless transfer will result in a manifest injustice to any party.

While some measure of discretion appears to lie with the Court hearing a matter sought to be transferred to the Council, a careful reading of this section indicates that such discretion is extremely limited, being restricted to a determination of whether or not such a transfer will result in a manifest injustice to any party to the litigation. Unless such a "manifest injustice" can be clearly demonstrated by the party objecting to the transfer, the transfer must be allowed.

There exists no danger of "manifest injustice" resulting to any party by the transfer of the instant matter to the Council on Affordable Housing. While the Act contains no definition of what would constitute a "manifest injustice" which would prohibit the transfer of an action to the Council, the phrase "manifest injustice" has generally been used to described a withholding or denial of justice which is obvious, directly observable, overt and not obscure. Black's Law Dictionary 1113 (4th rev. ed. 1979) defines the word "manifest" to mean:

> evident to the senses, obvious to the understanding, evident to the mind, not obscure or hidden, and synonomous with open, clear, visible , unmistakable, indubitable, indisputable, evident and self-evident.

The standard of "manifest injustice" is a recognized standard in law. It is essentially the equivalent of a denial of due process. see State v. Oats, 32 N.J. Super. 435 (App. Div. 1954); State v. Cummins, 168 N.J. Super. 429 (L. Div.

1979); and State v. Blanchard, 98 N.J. Super. 22 (L. Div. 1967). In Howe v. Strelecki, 98 N.J. Super. 513 (App. Div. 1968), the phrase manifest injustice was described as a term "closely akin to fundamental unfairness and possibly confined to deprivation of due process." In U.S. v. Cruso, 536 F. 2d 21, 26 (3rd Cir. 1976), the Court stated, "where there is a denial of due process there is 'manifest injustice' as a matter of law." Manifest injustice is also the standard used in granting post-conviction relief pursuant to R.3:22-1 et seq. In other jurisdictions, judgments may be set aside if they are so manifestly injust as to be "shocking to the conscience." Price v. Sinnot, 460 P.2d 152 (Alaska App. 1983). Manifest injustice has also been held to result from an error in jury instructions of such a magnitude as to constitute reversible error. Joba Const. Co., Inc. v. Burns & Roe Inc., 329 N.W. 2d 760, 121 Mich. App. 615 (1982).

Thus, there is in reality but one issue presently in need of resolution: Will transfer of this case to the Council deny plaintiff due process or subject plaintiff to some other manifest injustice so great as to be shocking to the conscience? No elaborate, lengthy and obfuscating fact finding need be made to weigh the equities necessary to determine a manifest injustice. Plaintiff's many contentions concerning the effectiveness of private as opposed to publicly constructed housing, etc., need not be analyzed herein. Any attempt to do so would merely be providing plaintiff with two bites at the apple. Balancing of equities after a thorough detailed fact determination will be afforded plaintiff pursuant to the Legislature's administrative remedies.

A motion to transfer may be properly denied only if plaintiff is able to demonstrate a reliance or change in circustances, resulting from the negotiation

of the Stipulation, which is so prejudicial as to constitute a denial of due process or a manifest injustice. Defendants contend that no such denial of due process would occur if a transfer was granted. Sections 16(a), 13, 14, and 15 of the Act provide that a municipality may petition for substantive certification of its proposed housing element; that individuals such as plaintiff may object; review and mediation are triggered by objection; and if mediation fails an administrative law judge would next hear the matter. Certainly, the process due plaintiff does not exceed that outlined above. All issues relevant to plaintiff's case may be addressed on the administrative level.

A transfer of the instant matter to the Council on Affordable Housing would be neither fundamentally unfair to plaintiff nor would it deprive plaintiff of due process of law. Nor would plaintiff be "overtly or unmistakably" denied justice.

The Legislature has put forth a new, comprehensive planning and implementation response to the Mount Laurel obligation. The essential ingredients of this response are the establishment of reasonable fair share housing guidelines and standards, the preparation of municipal fair share plans in conformity with these guidelines, state review of these municipal fair share plans and continuous state funding for low and moderate income housing to replace the federal housing subsidy programs which have been virtually eliminated. Fair Housing Act §2(d). The State Legislature has proclaimed a moratorium on the builder's remedy so that this program can be implemented. id. at §28. The Legislature has provided a mechanism so that existing and future disputes can be resolved with reference to the new guidelines and standards. id. at §16. The Legislature wants all municipal-

ities to enact legislation in conformity with these new guidelines id. at §§9, 29, 30. It is only fitting, then, that this case then proceed in accordance with that legislative plan. Plaintiff will not be denied due process thereby. Plaintiff is not denied her opportunity to be heard or to enforce and protect her rights under the law. There is no fundamental unfairness to plaintiff in bringing this action before the Council on Affordable Housing, the body which will be charged with the responsibility for determining the housing regions and needs for the State, which will guide municipal determinations of fair share obligations and will have the authority to substantively certify municipal housing elements and ordinances which comply with those elements and ordinances that comply with those obligations. Rather, it would be fundamentally unfair and unjust to defendants to permit this action to continue without due regard and deference to the Council's determinations concerning the Borough's comprehensive plan for compliance, in relationship to determinations of region, state and regional need for low and moderate income housing, the municipal determination of fair share and adjustment for fair share based upon vacant and developable land, infrastructuré, environmental or historic preservation factors. It is defendant who would be subject to a denial of due process should the Stipulation be regarded as fundamentally different from a judicial decree adjudicating the Borough ordinance exclusionary. Cooperation with a constitutional mandate should not create a waiver of due process.

Perhaps most important of all, the people of New Jersey, particularly those of lower income, would be subjected to a vast injustice if transfer were not granted. The very goal of Mount Laurel II is to create an opportunity for housing not litigation. Preservation of plaintiff's remedy would vitiate the present compli-

ance plan of defendants. A sure opportunity for hundreds of lower income persons to receive housing would be lost only to benefit a builder providing but 15 units of lower income housing. Clearly, the Council's ability to thoroughly determine relevant facts would best serve those intended beneficiaries of this representative action.

POINT VII

IN VIEW OF THE FAIR HOUSING ACT, THE MOST APPROPRIATE DISPOSITION OF THE PRESENT MATTER CAN BEST BE ACCOMPLISHED THROUGH THE ADMINISTRATIVE PROCESS OUTLINED THEREIN.

In the event defendants' Motion to Transfer is granted in the within matter, §9(a) of the Fair Housing Act requires that the municipality prepare and file a housing element and ordinance. Thereafter, the municipality may petition the Council for a substantive certification of its housing element and ordinance in accordance with §13 of the Act. Notice thereof must be published and at that time any objections will be entertained by the Council. If an objection is made, then the Council is obligated to engage in a mediation and review process in accordance with the mandate of §15. Defendants have engaged in an extensive, searching process to formulate a compliance package which would best fulfill their Mount Laurel obligations and at the same time preserve the rural character of the community. This process required significant effort on behalf of municipal officials and staff personnel which included a number of public hearings as articulated more fully in the Certification of Mayor Palmer (Exhibit B attached). The plan that evolved obligated the Borough to produce the lower income housing which it would

undertake to fund. Such a plan was imaginative, encouraged by the Fair Housing Act [§2(h)], and described by the Court appointed Master as an "exciting plan."

During the formulation of the plan by defendants, a financial analysis was performed by the municipal administrator which evaluated the impact on the Borough's tax rate in order to assess its feasibility. (Exhibit C attached) A key to the entire compliance package submitted by defendants was the acquisition by the Borough of plaintiff's tract of land in order to construct 76 affordable units. It is by far the largest tract of land available to the Borough and well suited in its location to shopping areas, transportation and utilities. Plaintiff has recently submitted a land value approaching three million dollars which, if credible, would seriously jeopardize defendants in the implementation of the compliance package as anticipated. Clearly, facts affecting both the interests of the plaintiff, the interests of defendants and the issue of how best to produce lower income housing must be examined and evaluated. It is submitted that this objective can best be accomplished through the administrative process established under the Fair Housing Act. Financial as well as other resources will be available to address these issues in depth and all parties will be afforded a full opportunity to be heard.

Defendants have attempted in good faith and with a substantial amount of effort to formulate a compliance package that will function regardless of market forces. In balance, it would be tragic indeed if implementation of this plan should fail because of unrealized economic expectations of plaintiff in this matter. It is respectfully urged that the respective positions of the parties be ventilated thoroughly in an administrative forum designed for that very purpose.

CONCLUSION

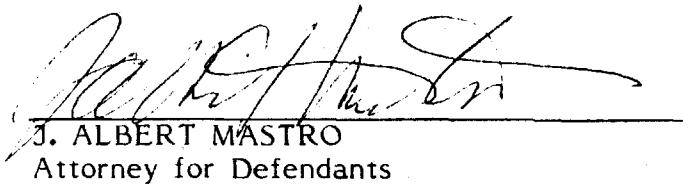
Clearly, defendants' request to vacate the Stipulation of Partial Settlement, falls within the parameters of relief afforded by R.4:50-1(f). The disparity which would be created by enforcing the Stipulation's terms and denying defendants' application of §28 of the Fair Housing Act certainly rises to the "exceptional situation" level contemplated by R.4:50-1(f). Defendants'ordinance revision and their cooperation with the Constitution's requirements should not now bar the Fair Housing Act's application to this existing case; any such bar would thwart the unequivocal intent of the Legislature.

Plaintiff has made many accusations in an attempt to preserve her great expectations of profit and prevent defendant Borough from carrying out its comprehensive compliance package. Plaintiff has contended that publicly initiated housing is unworkable in implementation; she has maintained that publicly initiated housing would never be built on time; plaintiff's proposed mixture of 20% lower income units to 80% market rate units has been asserted as preferable in a planning-socio-economic sense. Plaintiff asserts that the Borough's package is but a plan for delay, a plan overtly underfunded. On the other hand the Borough contends that its plan is just what it appears: a bona fide device for providing the municipality's full fair share of lower income housing. A plan which addresses important issues of planning which arose in a community such as Bernardsville. The Borough views its package as superior to relying on an inundation of market rate units as the sole means of providing any lower income housing. The Borough recognizes its obligation.

Notwithstanding the above, both parties' contentions require considerable fact finding, a function best left to an appropriate administrative agency. Prior to the Act's promulgation, the courts were the forum of first resort. However, the Act has provided a comprehensive method of administrative review. Only where a "manifest injustice" would result should this Court continue to exercise primary jurisdiction. The foregoing factual accusations do not rise to a level of "manifest injustice." At best, plaintiff may be deprived of her great expectations, however, deprivation of great expectations is not deprivation of due process. Factual issues are best left to the administrative fact finder; plaintiff may present her case there.

Concerning the issue of condemnation, defendants incorporate their argument contained in the brief previously submitted this Court on August 9, 1985 and make it a part hereof.

Respectfully submitted,



J. ALBERT MASTRO
Attorney for Defendants

DATED: September 19, 1985

EXHIBIT A JAM 9/9/85

BOROUGH OF BERNARDSVILLE

RESOLUTION NO._____

WHEREAS, the Borough of Bernardsville is presently in litigation entitled Helen Motzenbecker vs Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville, Superior Court of New Jersey, Docket No. L-37125-83, which litigation was filed on or about June 20, 1983, seeking relief under Mount Laurel II, 92 N.J. 158 (1983); and

WHEREAS, Sec. 9(a) of the Fair Housing Act which became effective on July 2, 1985, permits a municipality which so elects to notify the Council created thereunder of its intent to submit a fair share housing plan by a duly adopted resolution of participation; and

WHEREAS, the Borough of Bernardsville has not had a final judgment entered against it in the pending litigation described above; and

WHEREAS, Sec. 16(a) of the Fair Housing Act permits a municipality to file a motion with the Superior Court of New Jersey seeking to transfer pending Mount Laurel litigation to the Council on Affordable Housing; and

WHEREAS, the Mayor and Council of the Borough of Bernardsville are of opinion that it is in the best interests of the Borough that they seek to transfer the above pending Mount Laurel litigation to the said Council.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and Council of the Borough of Bernardsville in the County of Somerset and State of New Jersey as follows:

1. The Borough of Bernardsville does hereby notify the Council on Affordable Housing of its intent to submit to said Council its fair share housing plan all in accordance with Sec. 9(a) of the Fair Housing Act, P.L. 1985 c.222.

2. The within resolution is intended to be a Resolution of Participation within the meaning and intent of Sec. 9(a) of the Fair Housing Act.

3. The Planning Board of the Borough of Bernardsville is hereby requested to prepare a housing element based upon standards and guidlelines prepared by the Council on Affordable Housing for review and approval by the Governing Body.

4. The Municipal Attorney is hereby authorized and directed to file the appropriate Motion for Transfer with the Superior Court of New Jersey seeking a transfer of the above described litigation to the Council on Affordable Housing in accordance with the provisions of Sec. 16 of the Fair Housing Act.

5. The Municipal Clerk is hereby directed to forward a copy of this resolution to the Council on Affordable Housing.

EXHIBIT B

J. ALBERT MASTRO
7 MORRISTOWN ROAD
BERNARDSVILLE, N. J. 07924
(201) 766-2720
ATTORNEY FOR Defendants

Plaintiff
HELEN MOTZENBECKER,

vs.

Defendant
MAYOR AND COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH OF BERNARDSVILLE.

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN
COUNTY

Docket No. L-37125-83

CIVIL ACTION
(MOUNT LAUREL II)

CERTIFICATION

HON. PETER S. PALMER Certifies as follows:

1. I am Mayor of the Borough of Bernardsville and have been a member of the Governing Body for the past 17 years. Prior thereto I served on the Board of Education for 6 years.

2. I am currently employed by Mutual Benefit Life Insurance Co. as Vice President and Actuary/Investment Strategy Director. I have been employed by Mutual Benefit for the past 20 years.

3. I have lived in the Borough of Bernardsville all my life and am intimately familiar with its social, political and economic characteristics.

4. Subsequent to Mount Laurel II and the above litigation a committee composed of the Borough Administrator, Planning Board Chairman, Planning Board Professional Planner, the Borough Attorney and myself was formed to address the most appropriate means of fulfilling the Borough's fair share allocation of lower income housing. This committe met for exhaustive sessions on at least 20 occasions between August 1983 and March 1985. In addition during that period of time there was constant dialogue with and between the Governing Body and Planning Board. Various alternatives were reviewed and suitable building sites were examined and evaluated.

5. On January 14, 1985, a proposed plan of compliance was presented to the public utilizing the financial analysis prepared by the Borough Administrator. Acquisition of plaintiff's property was anticipated utilizing figures that were substantially in accord with land value in the Abeles Economic Report of November 1983 (p.3). There was further public hearing on March 18, 1985.

6. There were extensive negotiations with plaintiff in an effort to reach an equitable solution in a builder's remedy scenario. Plaintiff took the position that land value appreciation would not provide a reasonable return with densities of less than 9 units per acre. Plaintiff also took the position that sales prices of market units at densities of 6 to 8 units per acre would not command sufficient return to make such projects feasible (Abeles Report, p.57). Plaintiff's recent affidavit suggests a land value of 2.8 million plus an additional 1.14 million profit from the project. There indeed seems to be a gross injustice should the Borough be faced with such unconscionable figures.

7. In an attempt to select the most suitable sites for lower income units, officials canvassed the entire municipality. Many factors were considered:

Borough owned land, acquisition cost, site location, availability of utilities, transportation, etc. Plaintiff's site was deemed suitable for such purposes and considered a key site in the ultimate plan developed by the Borough. It seems highly unlikely that the compliance plan could work without the Motzenbecker tract.

8. The Governing Body justified funding 100% of its Mount Laurel obligation because its financial analysis demonstrated a financial impact no worse than coping with a 20% set-aside approach. If an inflated purchase price were required for the Motzenbecker tract, an increase of 7 points in the tax rate would place the Borough's plan in serious jeopardy, both economically and politically.

9. At the very least, the Motzenbecker tract land value should be thoroughly examined in the context of the Borough's compliance plan to more appropriately evaluate fulfilling the Mount Laurel objectives.

10. I certify that the foregoing statements by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

HON. PETER S. PALMER

DATED: September 19, 1985

EXHIBIT C

J. ALBERT MASTRO
7 MORRISTOWN ROAD
BERNARDSVILLE, N. J. 07924
(201) 766-2720
ATTORNEY FOR Defendants

Plaintiff
HELEN MOTZENBECKER,

vs.

Defendant
MAYOR AND COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH OF BERNARDSVILLE.

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN
COUNTY

Docket No. L-37125-83

CIVIL ACTION
(MOUNT LAUREL II)
CERTIFICATION

PAUL J. PASSARO, JR. Certifies as follows:

1. I am the Administrator and Engineer for the Borough of Bernardsville and have served in those capacities continuously since 1974. Prior to that time I had served as the Administrator and Engineer for the Borough of Leonia from June 1970 until assuming my duties with the Borough of Bernardsville.

2. I am a graduate of the Citadel (1960) with a Bachelor's Degree in Civil Engineering and have a Master's Degree in Civil Engineering from Polytechnic Institute of Brooklyn. I am also a licensed professional engineer in both New York and New Jersey. I also have a Master's Degree in Business Administration from Fairleigh Dickinson University and have attended numerous courses offered by Rutgers in various matters affecting municipal affairs including financial management.

3. As Engineer for the Borough of Bernardsville, I am also advisor to the Planning Board and I am intimately familiar with the physical characteristics of the Borough, its demographic characteristics, its economic texture, as well as all areas of local government, including the Borough's operating budget and capital budget.

4. I was personally involved with both the Planning Board and the Governing Body of the Borough of Bernardsville when both were engaged in an exhaustive process of evaluating alternatives of how best to meet the municipality's obligation toward complying with the Mount Laurel II mandate. I was a member of a committee that met regularly in an effort to evaluate the various alternatives available to the Borough on how best to fulfill its Mount Laurel obligation.

5. During that lengthly evaluation process, I prepared a financial analysis designed to compare tax impact of fulfilling the Borough's fair share obligation through the device of a mandatory set-a-side or density bonus with a 20% requirement of affordable units and the Borough funding its fair share lower income units. For the purposes of that analysis a fair share number of 230 new units was utilized.

6. The analysis incorporated such factors as population growth, assessed value increase, tax revenue increases, sewer and other capital costs, debt service costs, construction subsidy for lower income units, increase in operating costs, salaries and other expenses, and additional school costs. In the analysis the Borough had anticipate utilizing some land owned by it for construction of lower income units and acquisition of other lands deemed to be suitable for such purposes. Land acquisition cost and development was anticipated to be approximately $2,000,000.00. The study did not incorporate additional school capital cost that would be made necessary through increased pupil enrollment.

7. The financial analysis revealed that the tax impact of the Borough funding 100% of its fair share of lower income units would increase the tax rate by 23.52 cents per $100.00 of assessed value (60%) increase. Utilization of a 20% set-a-side approach would increase the tax rate by 25.12 cents per $100.00 of assessed value (63% increase).

8. The above financial analysis was presented to members of the public at a public hearing on January 14, 1985 and largely relied upon by both members of the public and governing officials in support of the position that the Borough fund 100% of its fair share allocation of lower income units.

9. In the event the land acquisition costs to the Borough in funding 100% of its lower income fair share allocation were to be increased by approximately 2.5 million dollars, the tax rate increase for each $100.00 of assessed value would be further increased by an additional 7 cents to 30.52 cents per $100.00 of assessed value. It can be readily observed that the preferred approach of the Borough funding 100% of the affordable units becomes far less attractive as a result of substantial increase in land acquisition costs which would undoubtedly jeopardize the entire compliance package prepared by the Borough.

10. The comparison financial analysis appears as Schedule I attached to this certification.

11. I certify that the foregoing statements by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

PAUL J. PASSARO, JR.

DATED: September 19, 1985

SCHDEULE I

Mt. Laurel Comparison

230 units vs 1150 units

9-23-85

		230 units		1150 units
Growth		9.8%		49%
Assessed Value Increase				
Market units		---		$115,000,000
Subsidized units		13,800,000		13,800,000
Population increase		667		3,335
Tax Revenue Increases				
	303,600		2,833,000	
Borough portion @ 20%		60,720		566,600
Miscellaneous Revenue		20,000		100,000
		80,720		666,600
Sewer Costs	667,000		5,835,000	
Debt Service Costs 9%, 20 years		79,076		691,723
Other Capital	230,000		1,150,000	
Debt Service Costs 9%, 20 years		27,267		136,337
Land Acquisition and development	2,000,000			
Debt Service Costs 9%, 20 years		237,108		--
Construction Subsidy	3,220,000			
Debt Service Costs 9%, 20 years		381,744		--
Increase in Operating Costs				
Salaries		115,253		576,268
Other Expenses		98,088		490,442
Additional Pupils -	86		431	
Additional cost @ 4,000		344,000		1,724,000
Total Annual		1,282,536		3,618,770
Total Revenue		247,700		2,224,750
Net increase in cost		1,034,836		1,394,020
Tax impact		23.52		25.12 +school capital costs

N/M; Bag
9-23-85