

RULS - AD - 1985 - 280

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Transcript of Morning Session in Hills v. Bernards Township

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4 THE HILLS DEVELOPMENT :  
COMPANY,

5  
6 Plaintiff, :

7 vs. :

8 BERNARDS TOWNSHIP, :

9 Defendant, :

10 And Consolidated Cases. :

TRANSCRIPT  
OF  
MORNING SESSION

11  
12 October 4, 1985  
Toms River, New Jersey

13 B E F O R E:

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

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

16 BRENER, WALLACK & HILL, ESQUIRES,  
17 BY: HENRY A. HILL, ESQUIRE  
and  
18 THOMAS J. HALL, ESQUIRE,  
For Hills Development Company;

19 MC DONOUGH, MURRAY & KORN, ESQUIRES,  
20 BY: JOSEPH E. MURRAY, ESQUIRE,  
For Z. V. Associates;

21 FRIZELL & POZCYKI, ESQUIRES,  
22 BY: DAVID J. FRIZELL, ESQUIRE  
and  
23 KENNETH E. MEISER, ESQUIRE,  
For Pozcyki, et als;

24  
25 GAYLE GARRABRANDT, C.S.R.  
Official Court Reporter

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A P P E A R A N C E S (Contd.):

FARRELL, CURTIS, CARLIN & DAVIDSON, ESQUIRES,  
BY: JAMES E. DAVIDSON, ESQUIRE,  
For Bernards Township;

HAROLD G. PIERSON, ESQUIRE,  
For Borough of Watchung;

GAGLIANO, TUCCI, IADANZA & REISNER, ESQUIRES,  
BY: JAMES H. GORMAN, ESQUIRE,  
For Manalapan Township;

JOHN MC DERMOTT, ESQUIRE,  
For Muscarelle.

1 THE COURT: All right. This is the  
2 return date of three motions to seek transfer to  
3 the Council on Affordable Housing, which have  
4 been consolidated only for the purposes of oral  
5 argument. Seems as though it was just an hour ago  
6 I finished five of these and five other  
7 municipalities.

8 What I'd like to do is have all of the  
9 cases argued, and thereafter I will, if I can,  
10 rule on them orally today; otherwise, of course,  
11 reserve decision.

12 All right. Suppose we start with  
13 Manalapan.

14 MR. GORMAN: Your Honor, James Gorman,  
15 representing Manalapan Township. We have asked  
16 for a transfer to the Housing Council; in the  
17 alternative, relief of a phase-in schedule to be  
18 imposed by the Court.

19 I'd like to point out firstly that we  
20 have gotten no opposition papers from Joseph  
21 Muscarelle, one of the named plaintiffs. There's  
22 been no briefs, no affidavits received by our  
23 office. I don't know if any have been filed with  
24 the Court. Makes it a little hard to argue in a  
25 vacuum, but we have not received anything.

1 Under Section 16, the issue is whether  
2 or not a transfer will result in manifest  
3 injustice to a party. Plaintiffs Pozcyki and  
4 Parser, in their reply, go through a number of  
5 different arguments, all of which I believe,  
6 except for one, are irrelevant.

7 The first argument they made, and I am  
8 sure that's been made in the other cases as well,  
9 is that it will cause a delay. The schedule cited  
10 in their brief is the schedule imposed by the  
11 Legislature, and I don't believe that we can really  
12 do much about that. That's the will of the  
13 Legislature.

14 We have been waiting a long time for  
15 the Legislature to act, and there's no argument  
16 made that the provisions for the various scheduling,  
17 the implementation of the Housing Council, are in  
18 any way unconstitutional. It's just that it's  
19 going to cause a delay. We are all stuck with  
20 that. Manalapan Township happens to like being  
21 stuck with that. The plaintiff obviously does  
22 not.

23 THE COURT: You concede that it would  
24 take longer to get it through the Housing Council  
25 than it would be to complete the case here?

1 MR. GORMAN: In Manalapan Township's  
2 case, Your Honor, I think it is fairly clear that  
3 it would take longer.

4 THE COURT: Okay.

5 MR. GORMAN: The other argument made by  
6 them is that the Housing Council has nothing to do.  
7 Well, that argument only makes sense if you assume  
8 that the Housing Council's got to adopt all the  
9 fair share number established in the proceeding  
10 before Your Honor.

11 I don't think that's necessarily the  
12 way the statute reads; and in fact, I think that's  
13 reading a lot into it. The Housing Council, I  
14 believe, could establish a number higher, possibly  
15 lower, and it would have to implement the -- sorry  
16 -- review the housing element. It would have to  
17 look at adjustments of the fair share. I think  
18 all the obligations and the responsibilities of  
19 the Housing Council would come into play in this  
20 case, just like any other case. There's no res  
21 judicata imposed by the Housing Council.

22 THE COURT: There's no transfer of the  
23 record, even, expressly provided for in the Act.  
24 And it appears as though they can start from  
25 scratch in your case.

1 MR. GORMAN: Yes, Your Honor, so that  
2 argument was made by the plaintiffs, and I do not  
3 believe it is relevant.

4 Another argument made is that the age  
5 of the case somehow has something to do with the  
6 transfer. The age of the case, I think, Your  
7 Honor, only is relevant as it applies to the  
8 manifest injustice issue. If it's twenty years  
9 old or two months old, it doesn't really matter,  
10 if there's no injustice. So again, I think that's  
11 a smoke screen.

12 The next argument made is that, somehow,  
13 Manalapan Township is wearing the black hats again,  
14 and they're wearing the white hats. We're  
15 recalcitrant, we're defiant, we are this, we are  
16 that.

17 Your Honor, I don't think that has any  
18 place here. We have a right under the Fair  
19 Housing Act to make the motion. We are seeking  
20 a transfer, and I think the recitation of the  
21 previous years of litigation and what's happened  
22 and what the Appellate Division said and what  
23 Judge Lane said is all irrelevant to this motion  
24 before Your Honor today.

25 Lastly, we come to probably the only

1 issue that has any bearing on the manifest  
2 injustice, and that is the expenditure of funds  
3 by the plaintiffs, specifically Poczycki and  
4 Parser.

5 There's been no allegations and no  
6 evidence submitted that Joseph Muscarelle has  
7 been manifestly injured by, or would be manifestly  
8 injured by, a transfer to the Housing Council.  
9 But as to the affidavit of Mr. Poczycki, Sr., on  
10 the expenditure of funds during this year,  
11 apparently approximately \$200,000 or in excess of  
12 \$200,000 had been expended; and that affidavit  
13 was submitted in a previous motion before Your  
14 Honor last month.

15 There's been no allegation or thought  
16 that the expenditure of funds was in vain. If  
17 they had to spend money to develop this property,  
18 they're going to have to do it whether it's on a  
19 settlement or a judgment by Your Honor, or whether  
20 it's an arbitration-mediation procedure through  
21 the Housing Council. It's going to cost money to  
22 develop the property.

23 The only argument I think that they  
24 have is, they spent the money sooner than  
25 anticipated. There's no real allegation that they



1 have spent money that they will not have to spend  
2 in the future if they go to the Housing Council.

3 The application fees haven't been paid  
4 yet. They have paid some fees for sewer hook-ups.  
5 They have paid engineering planning fees, legal  
6 fees; and all those things are going to have to be  
7 paid whether they develop the property through a  
8 court order or whether they do it through the  
9 mediation process, through the Housing Council.  
10 And I think that sole issue is the only evidence  
11 and the only fact before Your Honor on the issue  
12 of manifest injustice.

13 The other arguments made by the plaintiff  
14 are really smoke screens. You come right down to  
15 it, it's whether or not they have been manifestly  
16 injured, and it's not just a simple injury. It  
17 has to be manifest, and I don't believe we have  
18 one here.

19 There's no proof at all that they  
20 somehow have spent extra money if this case is  
21 transferred. And again, I just want to reiterate  
22 that we have no evidence, no affidavits or briefs  
23 from Muscarelle on that point.

24 In the alternative, Your Honor, if it's  
25 not transferred to the Housing Council, we seek a

1 phase-in pursuant to Section 23. I guess the  
2 initial threshold question is whether or not there  
3 is an action pending.

4 The wording of the statute says: A  
5 municipality which has an action pending. And  
6 it's clear that Manalapan Township still has an  
7 action pending in Superior Court. Maybe the  
8 statute's inartfully drafted, but on the simple  
9 reading of the statute, there's a case pending in  
10 Superior Court.

11 THE COURT: Well, I think you've got to  
12 read the whole phrase, and then it becomes very  
13 clear what it means. It says: A municipality  
14 which has an action pending or a judgment entered  
15 against it.

16 That means there's an action pending  
17 against it. It's not the municipality that's  
18 brought the action, obviously.

19 MR. GORMAN: Well, I guess, Your Honor,  
20 it depends on where you punctuate the sentence.  
21 If you put a comma after "action pending," and  
22 have the phrase "against it" modify "judgment,"  
23 then I believe our argument --

24 THE COURT: Well, the comma isn't there.  
25 The comma is: A municipality which has an action

1 pending or a judgment entered against it after the  
2 effective date of this Act comma. And then it  
3 goes on to talk about a different set of facts.

4 You are suggesting that it's not clear  
5 there that they're intending to deal with somebody  
6 sued the municipality and the action is pending or  
7 a judgment has been entered after the effective  
8 date of the Act?

9 MR. GORMAN: Your Honor, yes. The way  
10 I read that first section, in Section 23, I  
11 believe it has two parts: A municipality which  
12 has an action pending, or a municipality which  
13 has a judgment entered against it. And I think  
14 that's a fair reading of the statute.

15 THE COURT: Okay. Well then, you  
16 wouldn't read it, then, in -- counterposed to  
17 the second scenario, which is a municipality which  
18 had a judgment entered against it prior to the  
19 date, and from which an appeal is pending?

20 The first sentence up to the comma, the  
21 first part of the sentence up to the comma deals  
22 with something happening after the effective date.  
23 And the second part deals with something happening  
24 prior to the effective date. Would you agree  
25 with that?

1 MR. GORMAN: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. GORMAN: Your Honor, if under our  
4 reading of the statute Manalapan Township clearly  
5 has an action pending in Superior Court, the  
6 phase-in schedule is mandatory under the Act, the  
7 plaintiffs Poczycki and Parser, taken separately,  
8 have more than a six-year phase-in period for  
9 certificates of occupancy, which are slightly  
10 different than the final approvals phase-in in  
11 the Act.

12 However, the plaintiff Muscarelle only  
13 has a four-year phase-in, and if you combine the  
14 two, which is really the way that the application  
15 is being presented to Manalapan Township, it comes  
16 out to be less than a six-year phase-in, and the  
17 Act requires as a minimum that you have a six-year  
18 phase-in for the number of units that has been  
19 established as the fair share of Manalapan  
20 Township.

21 So whether you combine them as a whole  
22 and say they're less than six years, or whether  
23 you look at the two plaintiffs individually and  
24 find that Muscarelle's less than six, Poczycki's  
25 more than six, either way, Manalapan Township

1 believes that there's a need to phase in the units  
2 over a longer period of time.

3 And the language in the Act, if our  
4 interpretation of the way that Section 23 is  
5 phrased is correct, the mandatory phase-in would  
6 require, I believe, a plenary hearing to  
7 establish some of the factors listed in Section  
8 23A.

9 THE COURT: Well, can we agree in this  
10 case that there was a consent order for partial  
11 judgment entered prior to the effective date of  
12 the Act?

13 MR. GORMAN: Your Honor, I think that's  
14 been established.

15 THE COURT: Okay. Then how does that  
16 fit into the statute? It would appear that the  
17 statute doesn't cover phasing in those  
18 circumstances, because it didn't want to deal with  
19 some very difficult legal, maybe constitutional,  
20 issues, which would have related to the judgments  
21 of the Courts and divesting of rights of parties  
22 under judgments prior to the effective date of the  
23 Act.

24 As to Muscarelle and Poczycki and Parser,  
25 as opposed to the balance of the fair share in

1 Manalapan, hasn't Manalapan committed itself, by  
2 a judgment which has not been appealed, to a  
3 phasing schedule prior to the effective date of  
4 the Act?

5 MR. GORMAN: Your Honor, I think that's  
6 something for you to decide. We have not appealed  
7 the consent order. We filed motions last month  
8 and were heard. The consent order was upheld.  
9 There's an action pending, and that's the basis  
10 for Manalapan Township's request for a phase-in.

11 THE COURT: If the balance of the fair  
12 share of Manalapan of a hundred and fourteen units,  
13 I think, over and above that which is consumed by  
14 the partial judgment, was phased until, let's say,  
15 1992, would the average phasing of the entire  
16 nine hundred fair share be six years?

17 MR. GORMAN: If the balance of the one-  
18 fourteen has to be after 1990; is that --

19 THE COURT: Yeah.

20 MR. GORMAN: I think that the average  
21 is, if I had a pen and paper to work it out,  
22 probably, very close or over six years.

23 THE COURT: All right. Let me just  
24 explore two other areas briefly. You say that  
25 the age of the case should have nothing to do with

1 it. This is now the -- I think it's correct to  
2 say that it's the second-oldest Mount Laurel  
3 litigation in the state and, if not, it may be  
4 the third. I don't know. But it's right up there.

5 You don't see that the fact that it's  
6 been pending for nine years, or in that vicinity,  
7 is related to the question of manifest injustice  
8 to the extent that it can be resolved in court  
9 within X period of time, and can be resolved in  
10 the Housing Council in Y period of time?

11 You don't see that the age is related  
12 in that fact and, B, that one can make a  
13 reasonable assumption that a case that is nine  
14 years old has taxed the resources of all of the  
15 parties involved, municipality and the plaintiff,  
16 there's been an extraordinary amount of money  
17 spent on it, that that's not related to injustice?

18 MR. GORMAN: Your Honor, that there  
19 might be a relationship? I'm not arguing that.  
20 Sure, obviously, the longer something goes on,  
21 you might be able to show a longer period that  
22 you have been harmed or you have spent money.

23 I'm just saying that the pure  
24 chronological age of this case has nothing to do  
25 with whether or not -- has nothing to do with the

1 issue of injustice. There was nothing raised at  
2 that point in their brief, other than the case is  
3 old.

4 If you want to argue that the case is  
5 old and we have spent money, or if you want to  
6 argue something deriving from the age of the case,  
7 fine. But just the fact that it's old has nothing  
8 to do with whether or not there's an injustice.

9 THE COURT: The only other question I  
10 have is, I didn't hear any mention of the interests  
11 of the third parties to the Mount Laurel case.

12 MR. GORMAN: Your Honor --

13 THE COURT: I mean, we talked about the  
14 plaintiff. We talked about the defendant  
15 municipality. We didn't talk about the most  
16 important party.

17 MR. GORMAN: Your Honor, we didn't talk  
18 about that, because the Legislature didn't talk  
19 about that. In Section 16, the issue is whether  
20 there's any manifest injustice to a party. And  
21 clearly, there's no third party represented in  
22 this case representing interests of other people.  
23 There are no third-party beneficiaries entitled  
24 to standing under that section of the Act.

25 The Act clearly says: Injustice to a



1 party. And the only parties here are the  
2 developers and Manalapan Township.

3 THE COURT: In other words, Manalapan  
4 takes the position that lower-income people are  
5 not parties to Mount Laurel litigation.

6 MR. GORMAN: Your Honor, they are not a  
7 party to this litigation. They may have an  
8 interest in it, and if they had wanted to, I am  
9 sure that an organization representing those  
10 persons could have intervened.

11 But there is no -- there is no party in  
12 this action here other than the plaintiffs and --  
13 the plaintiff developers and the defendant  
14 municipality.

15 THE COURT: The only reason they're in  
16 court is because the Court, the Supreme Court,  
17 has induced them to bring an action on behalf of  
18 those parties and to represent their interests;  
19 otherwise, the Court wouldn't have given them the  
20 prospect of builder's remedy. Why give such a  
21 windfall to the developers unless they wanted to  
22 accomplish the vindication of a constitutional  
23 obligation?

24 MR. GORMAN: Your Honor, I think by  
25 looking at the prior proposed wording of the Act,

1 and looking at the Act as it got adopted, I think  
2 draws that distinction.

3 The Act as it was originally proposed  
4 had language in Section 16 which said that the  
5 transfer will be denied -- let me go back --  
6 transfer shall be required unless the Court  
7 determines that a transfer of the case to the  
8 Council -- I got my negatives wrong again. Let  
9 me start again.

10 It refers to the realistic opportunity  
11 for low- and moderate-income housing. And I  
12 think under that wording of the Act, you could  
13 look at whether or not, independent of -- third-  
14 party beneficiaries would be harmed or helped by  
15 a transfer.

16 But under the wording of the statute as  
17 it was enacted, it says it would result in a  
18 manifest injustice to any party. And clearly,  
19 there are no other parties to this litigation.

20 Also, I must point out that that is not  
21 an issue that was stressed or, I believe, even  
22 mentioned in the brief of Poczycki and Parser. I  
23 don't believe that they have raised that issue.  
24 And clearly, no one else has.

25 I understand Your Honor's position, and

1 I can see the rationale for it; however, it's not  
2 the Act that was adopted.

3 THE COURT: Well, Mount Laurel itself,  
4 Mount Laurel II, says in a rather lengthy  
5 discussion and footnote that this litigation is  
6 class action litigation, essentially, public  
7 interest litigation brought on behalf of a class.

8 I mean, it says that expressly. Are we  
9 to assume that the Legislature said we are going  
10 to ignore that?

11 MR. GORMAN: I think by looking at the  
12 proposed language and the adopted language for  
13 Section 16, that inference is clear, that the  
14 language referring to the realistic opportunity  
15 for housing to be built was dropped.

16 THE COURT: It seems to me if you take  
17 that argument to its logical extreme, you have  
18 just rendered the statute unconstitutional,  
19 because then it's not answering the needs of the  
20 class which the Court says, as a minimum, any act  
21 must.

22 This isn't an act that protects the  
23 rights of municipalities and plaintiff builders,  
24 or deals with that. It deals with the rights of  
25 lower-income people. That was the purpose of

1 requiring legislation, to define their rights.

2 And if you take the position that the  
3 whole question revolves around the rights of the  
4 plaintiffs and defendants, then the Act has missed  
5 its mark totally, and you've -- I don't know how  
6 a Court could sustain it, if that's the case.

7 I am not suggesting for a moment that  
8 you are right in your position, nor that I think  
9 that the Act is not constitutional. But I think  
10 that kind of argument will certainly lend to a  
11 conclusion like that. Okay? Anything further?

12 MR. GORMAN: No, Your Honor.

13 THE COURT: Thank you. All right. Mr.  
14 Meiser, I guess.

15 MR. MEISER: Your Honor, I think this  
16 case is unique in one important feature. Last  
17 night, we were before the Planning Board, as part  
18 of the consent order and part of the ongoing  
19 process, to get preliminary or general concept  
20 plan approval for the 886 low- and moderate-  
21 income units which were agreed to by the consent  
22 order.

23 I don't think there's any case in the  
24 state in which a motion to transfer is made in  
25 which we are actually mid-stream, not of

1 litigating, but of going through the administrative  
2 process to get the housing built.

3 Assuming that the motion to transfer is  
4 denied, according to our time schedule, we are to  
5 have the decision of the Planning Board by the  
6 end of the year, and then go immediately to the  
7 process for preliminary and final approvals.

8 So I think the situation really is  
9 unique, in addition to the fact that it's the  
10 second-oldest case in the state. So if the Court  
11 is going to balance the question of how quickly  
12 low-income housing would be provided through this  
13 method versus going to the administrative agency,  
14 there's simply no question the housing is imminent,  
15 perhaps more imminent than any other town in the  
16 state where this type of motion is made.

17 I think the second thing that is unique  
18 about this case is that the plaintiffs have  
19 expended \$208,000 in getting sewer applications  
20 for the number of units permitted by the consent  
21 order and in their general development plan. If  
22 the town is right, if there were a transfer, we  
23 start all over, it's conceivable that the Council  
24 could say: No, we want you to build up in  
25 northern Manalapan, and don't provide a single

1 unit of low-income housing down in southern  
2 Manalapan.

3 In essence, every penny that's been  
4 spent in reliance on this consent order could be  
5 wiped out. So we think, just like the cases on  
6 Wednesday, this is the one end of the spectrum in  
7 which there can be no doubt there is manifest  
8 injustice.

9 On the second point, as to what Section  
10 23 means, now I think the best that Manalapan can  
11 come up with is that there's two possible ways of  
12 construing the statute. I mean, I think that's  
13 the best you can make out of their argument.

14 Assuming for the moment that the statute's  
15 ambiguous, which we don't concede, I think you do  
16 need to analyze that in the light of the underlying  
17 policy. I think the underlying policy is not to  
18 undo what has already been done, not to undo the  
19 consent orders that have already been entered  
20 into.

21 I think in Section 22, the Legislature  
22 thought about cases that have been settled and  
23 said: Let's give them first priority in the state  
24 moneys that are being appropriated as part of this  
25 Act, and let's make sure that the judgment of

1                   repose is airtight.

2                                 And I think those are the benefits by  
3                   Section 22 that were given to towns such as  
4                   Manalapan.

5                                 If we get to the point that the statute  
6                   is ambiguous in twenty-three, I think policy  
7                   insists that it be read in a meaningful way. I  
8                   don't think it is a meaningful way to read this  
9                   section to undo a consent order that the Township  
10                  voluntarily, knowingly and willingly entered into  
11                  last year.

12                                I also don't think there's an ambiguity.  
13                  I think "against us," as the Court points out,  
14                  applies to both situations, actions pending and  
15                  to judgments. And I think that's the clear  
16                  meaning of the language.

17                                Finally, I would point out that it was  
18                  circulated throughout the State Administrative  
19                  Office of the Courts' summary of the cases. I  
20                  think one reason that Section 22 was put in there  
21                  was that through the Administrative Office of the  
22                  Courts' direct release and through other sources,  
23                  people knew the cases had been settled. And  
24                  those settled cases which, according to the  
25                  Administrative Office of the Courts, did include

1 Manalapan, were the cases that were being  
2 provided for in Section 22.

3 Finally, I point out my opinion on the  
4 remainder of this case. The Town did agree to  
5 rezone a certain amount of units that are not  
6 provided for through the Poczycki and the  
7 Muscarelle developments. We think that the Court  
8 does have power to allow a phasing schedule for  
9 those remaining units.

10 We think, though, that it should be  
11 done not according to Section 23, but according  
12 to the Court's inherent jurisdiction. And the  
13 Court has granted phasing schedules in Bedminster.  
14 We know it's been considered in Cranbury.

15 I think the Court has all the discretion  
16 in the world to say eight years or nine years or  
17 whatever the Court chooses. But we don't feel  
18 that a phasing schedule's imposed by Section 23,  
19 because we don't feel that Section 23 applies to  
20 any part of this Act.

21 So when we are suggesting that we don't  
22 care, we don't have an opinion as to what the  
23 phasing schedule should be, I am sure the master  
24 may have an opinion. But we think the Court  
25 should make it clear it's doing so according to



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its own inherent powers.

THE COURT: You don't think that the hundred and fourteen units fall under this section?

MR. MEISER: No, I don't. And the reason I don't is this, that we believe that the Town consented to rezone those one hundred fourteen units, and that there's no action pending to force them to rezone those units. That's also something the Town voluntarily agreed to do.

We are not coming into court and saying we insist for full satisfaction that there need be a hundred, two hundred other units. We are saying that there was a voluntary, willing consent agreement, and as part of its bargain, as part of a contract the Town is free to enter into, it said: We will do one more thing.

In view of that, I think again the Court would be stretching the language of twenty-three to say that there is an action pending as to that matter. I think that what, really, Section 23 applies to does not apply to any part of this Manalapan case.

Finally -- and this is just for the Court's information, because it's not crucial to the issue, but the Court should note the word in

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1 23D -- more than six years is not mandatory. 23D  
2 states: The Court shall consider whether to --  
3 I'm sorry. Let me get the exact section.

4 It says in 23D that the Court shall  
5 consider a phasing schedule. Then in 23E, it  
6 shall -- it says that the following time periods  
7 shall be guidelines, and it's referring to, on E,  
8 below Subsection 3, the first paragraph, the  
9 following timetables shall be guidelines.

10 So that's a key word, I think,  
11 "guidelines." It's certainly something that the  
12 Court should take into consideration. But if you  
13 go down the actual language within the section,  
14 first we have -- that's just a guideline. Then  
15 we get a town which has an obligation between  
16 500, 999, shall be entitled to consideration.  
17 And that's a key word.

18 It doesn't say it's entitled to get a  
19 certain number of years. It's entitled to  
20 consideration of a phase-in schedule, at least  
21 six years.

22 What that means to me, that word,  
23 "consideration," is that the Court could decide  
24 six years, could decide eight years, but it also  
25 could decide under certain factors that: Well,

1 yes, I have considered more than six years, but  
2 under the circumstances I decided five years or  
3 four years.

4 I think it's clear that, in most cases,  
5 the Court will come out with at least six years  
6 under these situations; but the point I am making  
7 is, it's not required to do so even if this  
8 applied.

9 So what we are saying is that in this  
10 case, Section 23 does not apply either to our  
11 part of the agreement or to the remainder of the  
12 case, and that the Court should have the master  
13 make its own recommendation as to what's  
14 appropriate. And twenty-three simply isn't  
15 applicable to any part of this case.

16 THE COURT: The ordinance which was  
17 introduced on first reading, did it do anything  
18 about phasing the hundred and fourteen units?  
19 Either one of you.

20 MR. GORMAN: No, Your Honor.

21 THE COURT: No.

22 MR. MEISER: It did not. And, you know,  
23 the Township's position back in May was, it was  
24 satisfied, just let us get that adopted. The  
25 master had very minor changes, none of which

1 applied to phasing, and said: You do that, and  
2 I'll recommend six-year repose. And nothing has  
3 happened since.

4 THE COURT: All right, thank you. Mr.  
5 McDermott, I understand that you are relying upon  
6 the argument of Mr. Meiser.

7 MR. MC DERMOTT: That's true, Your  
8 Honor.

9 THE COURT: Okay, thank you. That  
10 covers Manalapan. All right. Should we take  
11 Watchung next, Mr. Pierson?

12 MR. PIERSON: Your Honor, Harold  
13 Pierson appearing for the Borough of Watchung.  
14 Initially, I want to point out to the Court that  
15 Watchung, the Watchung case is a relatively new  
16 case as I view it, based upon what I've been able  
17 to determine.

18 The complaint was filed, I understand,  
19 the latter part of December of 1984. The Borough  
20 was served in mid-January of 1985.

21 And in reading the Act, we have two  
22 basic categories of cases under Section 16 when  
23 we get into the question of transfer to the  
24 Council, and -- those that are filed within sixty  
25 days of the effective date of the Act, and those

1 that are subsequent or, in any event --

2 THE COURT: Excuse me.

3 (Brief interruption.)

4 MR. PIERSON: The Watchung case is  
5 probably less than a hundred eighty days from the  
6 effective date of the Act, would be the date of  
7 filing. I am not going to get into the subjective  
8 standard that is set up in the Act about manifest  
9 injustice, other than to point out to the Court  
10 that I can't think -- if the Watchung case can't  
11 fit into a category that was envisioned by the  
12 Legislature for transfer, then I don't know what  
13 case could.

14 Certainly, there may be some element of  
15 injustice that could be argued. But I suspect  
16 that manifest injustice means something that is  
17 elevated beyond that.

18 There would be, under the time schedules  
19 that are set forth in the Act, perhaps a further  
20 delay to the plaintiff and some, perhaps, minimal  
21 expense. I have no idea what expense the  
22 plaintiffs have incurred, but I don't envision  
23 they could be a very substantial one.

24 Nevertheless, the time frame, if we are  
25 able to argue that, is a time frame that is

1 established by the Legislature itself, and it also  
2 is the -- in the same Act, we have the test or the  
3 criteria set up of manifest injustice, so that I  
4 don't think you can relate one to the other in  
5 terms of saying that manifest injustice is  
6 predicated upon that.

7 What I am more concerned with, Your  
8 Honor, in this case a consent order was entered  
9 on June 19th, 1985; and at that time, the parties  
10 envisioned a possible transfer of this case,  
11 because although neither myself or my adversary,  
12 Mr. Murray, had any drafts or any inside  
13 information, the word was out that this was in  
14 the works.

15 THE COURT: Something was cooking.

16 MR. PIERSON: And with that in mind, we  
17 provided in paragraph eight of the consent order  
18 as follows, and I will read, if Your Honor --

19 THE COURT: I know what you are going  
20 to read, and I think you should read it for the  
21 record. But I have to tell you, I don't think  
22 that envisioned a transfer. I think it envisioned  
23 an adjustment of your number based upon the  
24 Council being there and maybe coming down in some  
25 future time with numbers.

1 But go ahead.

2 MR. PIERSON: I was going to develop  
3 that as part of my argument this morning, Your  
4 Honor.

5 THE COURT: Yeah.

6 MR. PIERSON: From paragraph eight of  
7 the consent order entered June 19th, 1985, this  
8 follows: "The affirmative obligations of the  
9 Borough of Watchung to amend its land development  
10 ordinances as herein provided shall be without  
11 prejudice to its right to apply to the Court for  
12 approval for modification of the provisions of  
13 this order pertaining to the Borough's fair share  
14 obligation, or the determination or the  
15 implementation thereof, to conform to legislative  
16 enactments subsequent to the date hereof, upon a  
17 showing of good cause for said modification.

18 "In the event, however, that the  
19 Borough does elect to pursue such modification,  
20 the rights of the plaintiff herein to a builder's  
21 remedy as set above shall not be impaired or  
22 removed from the jurisdiction of this Court."

23 I think what I had contemplated, and I  
24 think I had conversations with Mr. Murray  
25 concerning this, was a possible dual-forum

1 resolution or bifurcation of the proceeding  
2 whereby the, conceivably, the Court would retain  
3 jurisdiction of that portion of the case dealing  
4 specifically with this plaintiff, and that the  
5 implementation of Mount Laurel as far as the  
6 Borough would then be left to the Council.

7 Certainly, we had a master appointed in  
8 this, and I would assume if that resolution would  
9 be acceptable to the Court, then the Court would  
10 have the benefit of a master's report as it  
11 applied to this plaintiff, and whatever resolution  
12 that the Borough makes with respect to this would  
13 then be subject to Your Honor's review and  
14 approval or rejection, as far as the overall  
15 picture is concerned.

16 That essentially is what I am asking  
17 Your Honor to do at this time, is to transfer the  
18 action subject, however, to the provision that is  
19 set forth in the consent order that there would be  
20 a retention of jurisdiction as far as this  
21 plaintiff is concerned on that limited basis.

22 THE COURT: That language, though, seems  
23 to say the opposite thing, doesn't it? It seems  
24 to say that the matter will stay here subject to  
25 your having a right to show that if you were



1 before the Housing Council, you would have done  
2 better, and then ask the Court in its discretion  
3 to lower you.

4 And I wouldn't vouch for the fact that  
5 we discussed it in this case, but typically, I  
6 recall that while the legislation was pending,  
7 having seen drafts of it, I used to say that it  
8 wasn't clear to me at all if we were going to  
9 include this kind of language, that the Housing  
10 Council was going to have a number down there for  
11 your town or for any other town, and that maybe  
12 it was just language without a meaning; that the  
13 legislation as it was developing and as, in fact,  
14 it was passed, at least on the face of it, appears  
15 to not authorize or encourage the Council to  
16 develop fair share numbers for each town but,  
17 rather, to react on an ad hoc basis to  
18 applications for certification.

19 Now, how they can do that, I'm not sure.  
20 But, theoretically at least, I suppose we could  
21 go for many, many years before we would know what  
22 Watchung's number was unless you applied, unless  
23 they're going to become a body which issues a  
24 housing allocation report like we had in 1978,  
25 and then everybody is given a number, most of

1 which were higher than the numbers we are dealing  
2 with today. And then it would be a different  
3 story.

4 But as I understood the provision of  
5 that in your order -- and that's in a couple of  
6 other orders -- of settlement, the idea was that  
7 if you could demonstrate you would have done better  
8 before the Housing Council, then this Court should  
9 consider that.

10 And I think that's fair under the  
11 circumstances, given the fact that you would  
12 voluntarily settle. But the phrasing of it seems  
13 to very squarely presume that it's not going to  
14 be transferred, that it's going to stay here,  
15 doesn't it?

16 MR. PIERSON: Well, it was probably --  
17 if that is the interpretation that the Court would  
18 place upon it, I'd have to plead guilty to --

19 THE COURT: That may be hindsight on my  
20 part.

21 MR. PIERSON: Poor draftsmanship.

22 THE COURT: No. I think maybe that's  
23 hindsight, but it -- my understanding of its  
24 meaning was, we've got it settled, but, Judge, we  
25 don't want to have to explain to our people that

1 by being good guys and settling it, we did so to  
2 their detriment, and we want to be able to come  
3 back and show you that we might have done better  
4 before the Housing Council, and we want you to be  
5 reasonable and treat us fairly if that happens.

6 And that's how I understood that  
7 provision. One thing about the time schedule,  
8 your case is somewhat different than some of the  
9 others in terms of its length. It's one of the  
10 newer cases. But the question arises in my mind  
11 as to why that's relevant.

12 If age isn't relevant if it's very old,  
13 why should it be relevant if it's new, if, aside  
14 from the cost factors involved, forgetting that,  
15 if the case is essentially in the same posture as  
16 a case that's been litigated for nine years?

17 In other words, Manalapan's at a point,  
18 after nine years, where you are after a year.  
19 What's the difference? If your case can be  
20 resolved quickly and fairly, what difference  
21 should it make that you should then, in effect,  
22 start all over again and take another route that  
23 may take a good deal longer?

24 MR. PIERSON: Well, I raise the time  
25 issue essentially because it was developed here

1 on the opposite end, and the indication was that  
2 it perhaps does have some meaning in trying to  
3 determine what the Legislature intended.

4 We are trying to find out what it meant  
5 when it, in Section 16, it sets forth if it's --  
6 time must be important if they're saying in one  
7 instance that if this case was filed within sixty  
8 days of the effective date of this Act, you're in.  
9 If it's more than sixty days, you file a motion.  
10 And, okay, you're going to get it, provided there  
11 isn't manifest injustice.

12 THE COURT: Do you have any idea why  
13 they picked sixty days?

14 MR. PIERSON: I have no idea. I wish  
15 they'd picked a hundred and eighty.

16 THE COURT: Your lobby isn't what it  
17 used to be.

18 MR. PIERSON: But I don't know if I can  
19 answer it any clearer than that, Your Honor.

20 THE COURT: There's a portion of that  
21 Act, if you look at it closely, that you could  
22 almost write a town name in next to it, you know,  
23 as you go through it. But you can't write  
24 Watchung in next to the sixty days.

25 MR. PIERSON: Unfortunately.

1 THE COURT: Okay. Anything else, Mr.  
2 Pierson?

3 MR. PIERSON: That's all I have, Your  
4 Honor.

5 THE COURT: Thank you. Mr. Murray.

6 MR. MURRAY: Your Honor, with respect to  
7 Watchung, we have somewhat a substantial difference  
8 between it and its neighboring community, Warren  
9 Township. As of this moment, in Watchung,  
10 pursuant to David Kinsey's recommended schedule,  
11 the date of December 1 is a date on which John  
12 Chadwick, the municipal planner, has agreed that  
13 he can have its full compliance ordinance in  
14 place for review by the master.

15 That would put us within a timetable of  
16 completion of this matter no longer than that  
17 projected for Warren Township, because the  
18 remaining items, that period being indicated on  
19 Wednesday of four months or five months, we are  
20 in the same position of completion, of satisfying  
21 the objective of having this party, the people  
22 that we are involved with, not only the developer,  
23 but the ability to put into place the housing  
24 that is going to be the goal on this case, as we  
25 all recognize it to be here, a lot sooner than

1 any other methodology that's enacted within the  
2 statute.

3 I have indicated in my brief the problems  
4 with the best-scenario timetable of yours, which  
5 took us to September 1987, could it take us  
6 conceivably to not even participating in the  
7 mediation process if this matter is transferred.

8 We have capsulized in this case, with  
9 the aid of the Court, the twenty-one days of  
10 trial in that methodology situation, and come up  
11 with a settlement discussion and conference and  
12 agreement to a figure. And I do recognize and  
13 recall now that at the time the statute was being  
14 put together in the spring, the parties on both  
15 sides were concerned as to what that statute was  
16 going to do to the figures, not so much as to  
17 what it was going to do with where we were going  
18 to complete this case.

19 And it's for that reason that the  
20 modification language in paragraph eight of this  
21 consent order, I believe, was inserted. In fact,  
22 when we had our meeting with David Kinsey in  
23 August, I think the parties all recognized that  
24 we are going to be dealing with the guidelines  
25 of that Council, not even before -- I mean, even

1 before they're put together, that Mr. Kinsey's  
2 going to incorporate it in his report, some of  
3 the features of the stated guidelines in the  
4 statute, notwithstanding the absence of further  
5 guidelines by the Council.

6 THE COURT: I -- just to interrupt you  
7 on that point, I was interested to see that Mr.  
8 Kinsey, who, by the way, if his work is as good  
9 generally as is evidenced by what's in the --  
10 your brief, appendix to your brief, I take some  
11 credit for having appointed him.

12 But I was interested to see that in his  
13 directive to the parties in terms of categories  
14 or criteria to be considered in developing the  
15 ordinance, he said, obviously, the Mount Laurel  
16 principles; and then he said environmental factors,  
17 utilities and infrastructure, location and  
18 accessibility, sort of overall planning factors  
19 that we indicated -- it was argued on Wednesday  
20 that a Court couldn't handle, and this is  
21 essentially what the master was telling you to do.

22 He was on the right track, as far as I  
23 am concerned.

24 MR. MURRAY: Yes. He's indicated to  
25 John Chadwick to come up with an alternate figure

1 if you utilize solely the state guidelines that  
2 are set forth in the statute. And I think if Mr.  
3 Kinsey does that, the Borough of Watchung now has  
4 the benefit of both worlds to a great degree,  
5 plus, as it should be stated, the ability to do  
6 this in a much shorter period of time.

7 I do argue in my brief the claim of  
8 vested rights arising out of that order. I don't  
9 think we can bifurcate this matter with any  
10 reasonableness unless we take it in the reverse  
11 situation, which I discussed with Mr. Pierson on  
12 the way down, I had Mr. Kinsey complete his report  
13 submitted here, and then make your motion at that  
14 time to transfer to the Council, rather than make  
15 your motion now.

16 But I can't see any case being held in  
17 two different forums concurrently. It would just  
18 be too much. Therefore, it is our request that  
19 this matter not be transferred; that the  
20 opportunity being at hand to get this completed  
21 efficiently with a community that has worked to  
22 date in good faith to expedite this matter, which  
23 it has evidenced by that consent order, let's  
24 keep them where we can do the best in this  
25 situation.



1 THE COURT: What about the notion that  
2 if this, being one of the youngest cases in the  
3 court, if I don't transfer this one, I'm not going  
4 to transfer any of them?

5 MR. MURRAY: That doesn't follow,  
6 because we may have a case that is even older  
7 than this one wherein the parties -- and  
8 particularly in the Morris County areas, with  
9 Judge Skillman. He isn't working on the consent  
10 orders as effectively as maybe other Courts are  
11 doing -- but even if we have clients that may not  
12 want to enter into consent orders, wherein the  
13 parties now have to move for summary judgment to  
14 get to that stage.

15 The age of the case versus the activity  
16 in the case I think is important. A case may be  
17 nine years old where both sides have sat and done  
18 nothing, but -- I can't see that happening, but  
19 two or three years old with nothing done.

20 We have eliminated the need for  
21 discovery. We have eliminated the need for gearing  
22 up to argue the elements that would have to be  
23 proven in the Watchung case. They have conceded  
24 the invalidity of the ordinance.

25 A case that is two months old and has

1 reached the point that we have, I don't think is  
2 any different, if you look at the objective of  
3 both the statute and Mount Laurel to put the  
4 housing in place.

5 Age of the case is a factor only if  
6 what has occurred in that case is an aid to  
7 getting to that goal. If nothing's occurred,  
8 irrespective of the age of the case, then I think  
9 you can consider the absence of activity versus  
10 the activity.

11 THE COURT: All right. Thank you. All  
12 right, and Bernards, Mr. Davidson.

13 MR. DAVIDSON: James E. Davidson,  
14 Farrell, Curtis, Carlin and Davidson, for Bernards  
15 Township.

16 Your Honor, I don't want to repeat all  
17 the arguments that you have heard today as well  
18 as the ones you heard Wednesday, basically much  
19 of which are the same thing with regard to the  
20 legislative intent to bring cases before the  
21 Administrative Agency and the Court.

22 The only exception to transfer motions,  
23 as we read the statute, is manifest injustice to  
24 a party. I don't want to argue. I heard your  
25 ruling. I'm a party already, so I don't want to

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argue too much.

I don't agree with it, and I don't think that a party -- limiting a party in this instance in transfer motions makes that constitutional or even gets close to it.

As far as I am concerned, you already ruled on that. I don't think that should make any difference in my case. The time period contemplated by the Act -- excuse me. Yeah. The time period contemplated by the Act, be it eighteen months or two years, whatever it takes to get the agency going and hearing cases, is not -- should not arise to manifest injustice by itself.

The Act contemplated that would occur. And manifest injustice has to mean something much greater than that. I think the prior case law, the Gibbons case, Ventron case, all those other cases, clearly indicate that manifest injustice has to be some irrevocable harm that can't be cured. Our case --

THE COURT: Let me just interrupt you at that point, because this is the, I would say, the main area of defense by the municipalities that I have heard repeatedly.

1 I mean, I think they all have said:  
2 Look, if it's going to take eighteen months,  
3 that's what the Legislature -- the Legislature  
4 knew it, or whether it's sixteen months or two  
5 years, whatever. And that can't equate to a  
6 reason not to transfer. They contemplated it.

7 But didn't the Legislature also  
8 contemplate that there may be cases that were --  
9 that shouldn't be transferred because of manifest  
10 injustice? The answer to that is clearly yes,  
11 that's what the statute says.

12 And how -- we know the Legislature  
13 didn't contemplate, as between those two items,  
14 that there might be cases unnecessarily delayed,  
15 so why do we assume that the time schedule under  
16 the Act could not form a part of manifest  
17 injustice?

18 MR. DAVIDSON: I don't assume that. I  
19 say, in and of itself, it's not manifest injustice.  
20 If you have a case like five cases you heard on  
21 Wednesday, which were all going to be over in two,  
22 three, four months, and you compared them with  
23 two years, I think the argument can be made that  
24 that's manifest injustice.

25 But I -- just because it's going to take

1 two years under the Act, and if we go through the  
2 Court proceeding, which I am not so sure that's  
3 so fast, either, it's going to take a year-and-a-  
4 half; and therefore, there is manifest injustice.  
5 That's what I am saying.

6 THE COURT: Okay.

7 MR. DAVIDSON: Not a flat-out rule that  
8 it's going to take -- you can't if it's going  
9 to take two years.

10 THE COURT: I think we are on line  
11 there. I certainly would agree with that. That's  
12 the legislative prerogative. If -- I mean, if we  
13 start a case at point one today in the courts,  
14 and point one in the Council, even putting aside  
15 the provision dealing with anything within sixty  
16 days, I would agree with you.

17 MR. DAVIDSON: The case in the Bernards  
18 case, it started in May of '84. Issue was joined,  
19 I believe, in July of '84. Motions were heard in  
20 July of '84. Case was stayed in December of '84.  
21 We have been working on serious settlement  
22 negotiations since that period of time.

23 We adopted an ordinance in November of  
24 1984. The ordinance has not been challenged by  
25 any pleading.

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1                   The case, insofar as the Court  
2 proceedings go, is really nowhere. We have had  
3 interrogatories. We have had no depositions.  
4 Again, we have nothing with regard to Ordinance  
5 704.

6                   THE COURT: It's a fact, though, that  
7 the Court called to set up a compliance hearing  
8 date on this. I think that's --

9                   MR. DAVIDSON: That's correct.

10                  THE COURT: So that when you say it's  
11 nowhere, we were ready to put the compliance  
12 package through.

13                  MR. DAVIDSON: Well, on a -- on the  
14 basis of a proposed settlement, yes.

15                  THE COURT: Yes, I understand. I think  
16 the reporter got my, "yes." And you go ahead.

17                  MR. DAVIDSON: Okay. And when Russ  
18 Peschieri called me, I indicated to him that; and  
19 it was after the Act had been passed. And the  
20 question he asked me, of course, is: Do we still  
21 want to settle, because the Act was passed?

22                  Maybe that wasn't the one you told him  
23 to ask me, but it was one of the ones he did ask  
24 me. I said I wasn't sure, I would have to get  
25 back to him.

1                   It took, you know, two or three calls  
2 before I became more sure that it was getting  
3 pretty doubtful, and --

4                   THE COURT: My point only was, Mr.  
5 Davidson, that we called each municipality who  
6 had notified us that they wanted a compliance  
7 hearing, and said: Do you still wish to proceed?  
8 Because with each compliance hearing we held in  
9 August, I read them their rights, so to speak,  
10 because I didn't -- you know, there's an Act, and,  
11 you know, you have a right to make a motion for a  
12 transfer, and do you still, nonetheless, want to  
13 proceed? And the five of you did put through --  
14 waived their rights, so to speak. And that's  
15 the same calling that you got.

16                   But the point was that this case would  
17 be over now, but for the fact that Bernards  
18 decided not to proceed.

19                   MR. DAVIDSON: That's correct, if we had  
20 reached the settlement.

21                   THE COURT: Well, you advised the Court  
22 you had a compliance ordinance.

23                   MR. DAVIDSON: Well, I think my  
24 ordinance does comply. That's not everything  
25 that was involved in the settlement, though. In

1 fact, that's very little of what was involved in  
2 the settlement.

3 If we wanted to settle on Ordinance 704,  
4 we could have settled in January. We didn't have  
5 to go till July, August, September.

6 THE COURT: But in July -- in June,  
7 when you wrote to me, you said: We've got a  
8 compliance ordinance. We're ready for a hearing.

9 MR. DAVIDSON: That's correct.

10 THE COURT: And at that point, if I  
11 had a hearing and I approved your ordinance, in  
12 August or September, we would have been done.

13 MR. DAVIDSON: Well, Your Honor, what  
14 happened, of course, is that -- is that, obviously,  
15 was overly-optimistic. I sent up a proposed  
16 agreement to them. They sent it back to me. It  
17 was all changes all over it. I sent it back to  
18 them, those changes weren't what we want, so on,  
19 so forth. Didn't settle.

20 THE COURT: Well, I don't care about the  
21 plaintiff for a minute, okay? I'm not concerned  
22 about that. You said: We have a compliance  
23 ordinance that we thought, we think, we still  
24 think, is compliant, and we want a hearing, and  
25 tough if the plaintiff doesn't like it. We want



1 a hearing.

2 And I would have said, and was -- not  
3 would have said. We did say, let's go if you'd  
4 still like to go.

5 At that point, we would have had a  
6 hearing, and Hills would have jumped up and down  
7 about what was wrong with the ordinance. And I  
8 would have heard it, and you would have told me  
9 it was okay.

10 And then I would have either approved  
11 it, rejected it, or approved it with conditions,  
12 which has been the most usual result, the last  
13 result, approval with conditions.

14 So we would have, theoretically, by  
15 today, been done. Not theoretically. I think  
16 actually been done.

17 MR. DAVIDSON: Okay. That's really not  
18 what my letter meant, if that's the procedure you  
19 had in mind, and the difference being that Hills  
20 had a number of other things, okay, that were very  
21 important to them, presumably, that were part of  
22 the package, so to speak.

23 Okay. Now, I was assuming that until  
24 those things were worked out, and when those  
25 things were worked out, and we were very close to

1 working them out, that all those would be part of,  
2 and certainly Hills wanted this part of, your  
3 ultimate judgment in the case.

4 Now, of course, what happened, on July  
5 2nd, the new statute was passed. No question  
6 about that. I assume if the new statute hadn't  
7 passed, we would have had probably a very good  
8 chance of completing it. But at this stage, the  
9 case is a long way from trial or compliance or  
10 whatever it is.

11 As you say, Hills is going to jump up  
12 and down.

13 THE COURT: Well, so what? They jump  
14 up and down a lot. They've been doing it for  
15 years in this court. Why can't we schedule the  
16 compliance hearing for your matter in the next  
17 few weeks, and you present me Ordinance 704, which  
18 you say complies, and let me so determine?

19 MR. DAVIDSON: Well, because right now  
20 I don't want to be bound by Ordinance 704.

21 THE COURT: Okay.

22 MR. DAVIDSON: I have another -- I mean,  
23 I'm not saying that as a fact. I'm saying that  
24 as a possibility. I mean, we have our planner  
25 working on a new housing element. We may or may

1 not come up with an ordinance that's slightly  
2 different than 704, might be a lot different than  
3 704. I don't know. I still think 704 complies,  
4 though.

5 THE COURT: Okay.

6 MR. DAVIDSON: I was here on Wednesday,  
7 and you ran through a number of factors that  
8 people had raised, some of them relevant, some  
9 not relevant.

10 They included age of the case;  
11 complexity of litigation; stage of the litigation;  
12 number and nature of previous dates.

13 THE COURT: Number and nature of what?

14 MR. DAVIDSON: Dates. That's what my  
15 notes have.

16 THE COURT: No. It's number and nature  
17 of previous determinations of substantive issues.

18 MR. DAVIDSON: Okay. Number five I  
19 couldn't -- number five I couldn't read at all.  
20 Six was need for record; conduct of parties;  
21 likelihood of -- I couldn't read that, either;  
22 statewide policy; harm by delay; will it cause  
23 great delay; will we lose the land for Mount  
24 Laurel housing; will it tend to facilitate or  
25 expedite housing.

1 I think we come out on the good side of  
2 all those issues. And to reiterate the same  
3 question -- and I heard Mr. Neisser here the  
4 other day and some other gentleman here the other  
5 day trying to answer the question of what cases  
6 should be transferred and what cases shouldn't be  
7 transferred.

8 The dates they suggested -- one of the  
9 items they suggested, they thought was very  
10 serious, should be -- should be considered, was:  
11 Had the case been tried?

12 I don't know if that's an ultimate  
13 determination or not. I certainly think it's  
14 relevant. As you obviously are trying to point  
15 out, it's -- you are trying to weigh the time,  
16 how much more time is it going to take, versus  
17 how much time is it going to take.

18 I'm not so sure that that should be the  
19 total basis for a ruling; however, in our case,  
20 again, if you can't transfer our case, I don't  
21 think you can transfer them. Our case is just --  
22 it's nowhere.

23 THE COURT: Let me be clear, Mr.  
24 Davidson. Suppose I deny the motion for transfer  
25 and schedule you on a compliance hearing. Since

1 the immunity that you are granted is up to the  
2 time you have a compliance hearing, and I schedule  
3 you for a compliance hearing in the end of this  
4 month or November, are you going to come in and  
5 say, we do not support Ordinance 704?

6 MR. DAVIDSON: No, but I come in and  
7 argue that you can tell me that Ordinance 704  
8 complies, but we are going to want to amend it.

9 THE COURT: Okay. So you are going to  
10 say: We think it complies, but here's the change  
11 we'd also like to make.

12 MR. DAVIDSON: Probably.

13 THE COURT: So we really are somewhere.  
14 I'm going to say: Well, I find Ordinance 704  
15 does or does not comply. I find that you do or  
16 do not have the right to make those changes.

17 And if I find you comply, it's academic.  
18 And if you thereafter make the changes, then I  
19 assume if they're detrimental to somebody, I'll  
20 hear from them. And we are done, aren't we?

21 MR. DAVIDSON: I assume if they're  
22 detrimental to somebody, it's a 16B case. I  
23 don't see why it comes back here.

24 THE COURT: I don't understand that kind  
25 of --

1 MR. DAVIDSON: Well, if Ordinance 704  
2 is good, and we want to amend Ordinance 704, and  
3 somebody doesn't like it, he's got to bring an  
4 action. He's under 16B.

5 THE COURT: I'm not going to pass on  
6 that issue.

7 MR. DAVIDSON: I know you're not. I  
8 know you're not. But --

9 THE COURT: What you are saying is if,  
10 once the Court has completed Mount Laurel  
11 litigation and then the Town, the next day,  
12 changes its ordinance and puts in cost generation  
13 and removes all of the exclusionary nature of the  
14 ordinance, it's then a Housing Council case?

15 MR. DAVIDSON: Well --

16 THE COURT: You have to test me on that  
17 one, because I won't entertain that.

18 MR. DAVIDSON: I'm not saying that.  
19 I'm not saying that.

20 THE COURT: All right. Well then, I'm  
21 not sure where we are at. My understanding --  
22 and this is why I think it is very important that  
23 we clarify where we are on this case. I would  
24 agree, if we are nowhere, if we are at point one,  
25 and point ten is the end, then probably the case

1 should be transferred. But my impression was  
2 that if I deny your transfer motion, I can set a  
3 compliance hearing.

4 MR. DAVIDSON: Well, let me go into  
5 your compliance hearing, Your Honor. I don't  
6 know what Hills thinks is the matter with  
7 Ordinance 704. I don't know if they think  
8 anything's the matter with Ordinance 704. If  
9 they do, I want to have discovery on it.

10 THE COURT: It's too late. The game is  
11 over at this point. You had a certain period of  
12 time within which to develop an ordinance,  
13 extended three times, as I recall, by Court --

14 MR. DAVIDSON: We developed an ordinance  
15 last November.

16 THE COURT: Let me finish. And you  
17 developed it, and Mr. Raymond has submitted a  
18 report almost concurrent with your letter asking  
19 for a hearing, saying the ordinance is okay, with  
20 some changes, nothing that I saw that -- to be  
21 devastating to the essential nature of the  
22 ordinance.

23 So the next logical step, if I had the  
24 time in July, I would have heard you. Now, how  
25 can we be nowhere under those circumstances?

1 I say all right, if I deny this motion  
2 today, I'll hear you on Ordinance 704, which you  
3 are satisfied with, which you'd like to change,  
4 but which you still think complies. I assume  
5 you're not going to change it not to comply.

6 MR. DAVIDSON: No, I would hope not.

7 THE COURT: Okay. Well, then --

8 MR. DAVIDSON: We try not to do that.

9 THE COURT: It would make it more  
10 compliant. So I'm going to say to you, you don't  
11 need to make it more compliant if it's compliant;  
12 and if you are making those changes, I'll consider  
13 them anyhow. You know what Hills' objections are,  
14 based upon their red-lining of your stipulation.  
15 They may be wrong or right.

16 I mean, I assume they're always going  
17 to try to get as much as they can. But they can  
18 continue to object as long as they want, as long  
19 as you've got a compliant ordinance. So why  
20 can't we complete this case before the end of the  
21 year, at least?

22 MR. DAVIDSON: Well, what you are doing,  
23 it seems to me, is -- I don't know where Hills is  
24 on -- you know, you're settling a case. I don't  
25 think the parties, you are saying, have compliance.



1 THE COURT: I'm not settling it. The  
2 heck with Hills, if I can put it in the vernacular.  
3 I'm not settling.

4 You have said to the Court -- you know,  
5 this has happened before. It's happened in  
6 several other municipalities. The plaintiff hasn't  
7 been satisfied. They just say seven's not enough,  
8 or six isn't enough, or whatever.

9 I -- too bad. I'm not looking for  
10 settlement. I'm looking for a compliance  
11 ordinance. And I would be happy if you settled  
12 it. Make it much easier. Then I won't have to  
13 listen to a lot of acrimony.

14 But the point is that if you complied  
15 and you did so in accordance with the law, by that  
16 I mean if you're subject to builder's remedy, you  
17 have recognized it reasonably; and if you are not,  
18 then it doesn't make any difference. Then the  
19 fact that Hills has objections and may continue to  
20 object for ad infinitum really is irrelevant.

21 MR. DAVIDSON: Well, okay.

22 THE COURT: So I think what you are  
23 saying to me is, because you can give us a  
24 compliance ordinance in a relatively short period  
25 of time, that may be determinative of whether or

1 not to transfer.

2 MR. DAVIDSON: Ordinance 704 is on the  
3 books. It's been on the books since November.  
4 They haven't done anything. They have built not  
5 one house of any kind or put any application of  
6 any kind.

7 We have people that are building on --  
8 under our ordinance now. I don't need a compliance  
9 hearing to have people building housing in my  
10 town. They're building now. What do I need it  
11 for?

12 THE COURT: Because you were sued.

13 MR. DAVIDSON: They haven't said  
14 anything about 704.

15 THE COURT: But you need it because you  
16 were sued, and you're subject to a builder's  
17 remedy here if -- under Mount Laurel II, and you  
18 are under a court order to revise, and you're  
19 under a court order to submit a compliant  
20 ordinance. And that's why you need it.

21 MR. DAVIDSON: But the determination  
22 you are making is whether or not -- you're -- I  
23 assume you think that because it will get done  
24 earlier here, they'll start building their  
25 housing there earlier. I don't think that's a

1 valid assumption at all. They're not going to  
2 like the ordinance, why are they going to rush  
3 out and do it?

4 THE COURT: No, that's not the  
5 assumption I am making. The assumption I am  
6 making is that the Mount Laurel Doctrine will have  
7 then been vindicated more rapidly, and that the  
8 opportunity for Hills or anybody else is there to  
9 build housing.

10 MR. DAVIDSON: The opportunity is there  
11 to build housing now, and it's been there since  
12 November.

13 THE COURT: Good. Then why do you want  
14 to transfer it?

15 MR. DAVIDSON: The statute says I can  
16 transfer it unless there's manifest injustice to  
17 a party. There is no manifest injustice to a  
18 party.

19 THE COURT: I mean, if you're happy  
20 with the ordinance, why would you want --

21 MR. DAVIDSON: I didn't say I was happy  
22 with the ordinance, Your Honor. I said the  
23 ordinance complied.

24 THE COURT: Okay. All right.

25 MR. DAVIDSON: But you can't assume

1 that they're going to rush out and build housing  
2 for lower- and moderate-income people. We've got  
3 people that are doing it, though, under that  
4 ordinance.

5 THE COURT: Let me say that whether  
6 Hills will build or not in this matter does have  
7 some relevancy, but it's of relatively minor  
8 importance.

9 MR. DAVIDSON: The determination is  
10 whether or not a party's going to suffer manifest  
11 injustice.

12 THE COURT: Of course.

13 MR. DAVIDSON: And they're not.

14 THE COURT: Yeah. The party I'm talking  
15 about is the lower-income people.

16 MR. DAVIDSON: They're not, either.

17 THE COURT: If I could find as a  
18 certainty, for example, that somebody was going  
19 to build, regardless of -- be it Hills or  
20 otherwise, by the more rapid adoption of the  
21 compliance ordinance, that would be very relevant  
22 to manifest injustice.

23 And you're telling me there's people  
24 out there doing it now. That tells me that if I  
25 transfer this case to the Housing Council, you

1 can withdraw Ordinance 704, and the people out  
2 there doing it for the lower-income people can no  
3 longer do it.

4 MR. DAVIDSON: They came in and got  
5 preliminary, final subdivision approval.

6 THE COURT: But the traditional people  
7 under 704 who come in and build for lower-income  
8 people. I mean, it seems to me you have argued  
9 for the proposition that if you leave 704 in  
10 place, forgetting Hills, we are going to get  
11 lower-income housing. You said: We're getting it.

12 Now, if I transfer this to the Housing  
13 Council, you withdraw 704, as is your right, but  
14 at that point, am I not free to ask whether there  
15 isn't manifest injustice to the lower-income  
16 people? Would they have, would any loss --

17 MR. DAVIDSON: I don't think the issue  
18 is whether whether or not we withdraw Ordinance  
19 704 is a manifest injustice; it's whether you  
20 transfer it is a manifest injustice.

21 I'm truncating the argument. The  
22 argument is, you're -- the Court should transfer  
23 these cases unless they can show manifest  
24 injustice to a party.

25 Your assuming that your transferring it

1 is, one, we are going to withdraw 704 and nobody's  
2 going to build low- and moderate-income housing,  
3 there's no basis for that.

4 THE COURT: Well, I take it you intend  
5 to submit a different housing element.

6 MR. DAVIDSON: That's correct. I don't  
7 know what the housing element is. I don't know  
8 that it will have any effect at all on our low-  
9 and moderate-income housing.

10 I am sure it will be intended to comply  
11 with the statute that was passed by the Legislature  
12 as to what our low- and moderate-income housing  
13 ought to be. And that's our right.

14 THE COURT: See, on one hand, I know  
15 for sure we've got an ordinance that's going to  
16 produce lower-income housing now; and, on the  
17 other hand, I don't know what's going to happen  
18 when you go to the Housing Council.

19 MR. DAVIDSON: Yes. Okay. Assume  
20 that's true. But that's what they're there for,  
21 and they're to give us the low -- the amount, the  
22 type, whatever it may be, of lower/moderate  
23 income housing that's proposed under the statute.

24 What you are saying is, Mount Laurel II,  
25 we get more; therefore, I won't transfer it.

1 THE COURT: No, I didn't say we get  
2 more. I said we're getting it immediately.

3 MR. DAVIDSON: Well --

4 THE COURT: You may end up with a  
5 higher number before the Housing Authority.

6 MR. DAVIDSON: Absolutely.

7 THE COURT: So I'm not talking about  
8 that. I'm talking about the immediacy of it.  
9 And to me, that relates to manifest injustice.

10 MR. DAVIDSON: Well, you're just reading  
11 out the whole statute, then.

12 THE COURT: Okay. Tell me how.

13 MR. DAVIDSON: Because the statute  
14 gives them two years to set up. If that was the  
15 only criterion, then the manifest injustice is  
16 out. That's not the only criterion. Manifest  
17 injustice to a party.

18 You're saying and assuming that we are  
19 going to get this housing sooner, necessarily.  
20 That's just not so. So if we change 704, we're  
21 not going to remove 704 and remove all low- and  
22 moderate-income housing from the town.

23 Again, again -- can't remember where I  
24 was now.

25 THE COURT: Let me interrupt you so you

1 can remember. I'm not assuming anything. You  
2 were the one who told me that the Town has people  
3 building now under 704, which I assume means that  
4 you are getting lower-income housing.

5 MR. DAVIDSON: That's correct.

6 THE COURT: So I'm not assuming a thing.  
7 I would be assuming, if you went to the Housing  
8 Council, that there would be some potential delay  
9 involved, if you wished. Not necessarily. You  
10 may be right and leave 704 in place. I don't  
11 know. But if you wish, there could be some delay.

12 MR. DAVIDSON: Let me assume that's  
13 true. But you could assume that.

14 THE COURT: Okay.

15 MR. DAVIDSON: I don't think that's  
16 even close to manifest injustice, if you assume  
17 there could be delay.

18 THE COURT: Okay. Anything further?

19 MR. DAVIDSON: No. That's enough.

20 THE COURT: All right. Going to be Mr.  
21 Hill, or people who really know what the brief  
22 says?

23 MR. HILL: I'll give it a try, Your  
24 Honor. I have read it.

25 Your Honor, the last sentence of



1 Ordinance 704 says: This ordinance shall take  
2 effect immediately upon final passage and  
3 publication, provided, however, that the  
4 provisions of this ordinance shall expire one  
5 year from its effective date unless further  
6 extended by ordinance, unless on or about such  
7 expiration date, a Mount Laurel II judgment of  
8 repose is entered by the Law Division of the  
9 Superior Court of New Jersey with respect to the  
10 land development ordinance of the Township of  
11 Bernards.

12 That was in the ordinance when it was  
13 passed, and we believe it was passed on November  
14 12th, 1984 and, under its terms, will expire on  
15 November 12th, 1985.

16 There is confusion as to the publication  
17 date. It may be November 20th. But it does  
18 expire, like a Mission Impossible tape, if this  
19 Court hasn't passed on it, sometime in November.

20 As we have been listening to the  
21 argument, Mr. Kerwin, who is the president of  
22 Hills, has handed me a couple of notes. You know,  
23 he wants to make it very clear to me that Hills  
24 is satisfied with Ordinance Number 704. We told  
25 Mr. Davidson that in September.

1                   The densities -- 704 increases our  
2 density from two units per acre with no low and  
3 moderate, to five-and-a-half units per acre with  
4 twenty percent low and moderate. And Hills has  
5 agreed and still agrees in this court to build  
6 five hundred and fifty low and moderate units,  
7 fifty percent low, fifty percent moderate. And  
8 that's thirty-one percent on incremental units.

9                   We have also agreed on another piece of  
10 property, which is zoned one unit for every two  
11 acres, that if, as part of this settlement, that  
12 if Bernards will allow us to sewer it with our  
13 own sewer plant, with our own sewer pipes, we  
14 would pay twenty percent or add an additional  
15 sixty-eight units.

16                   So Hills has agreed to build six  
17 hundred eighteen low- and moderate-income units;  
18 and, as our affidavits show, we have been in  
19 discussion with Bernards. We have prepared plans  
20 and concept plans, which is the preliminary to  
21 submitting formal applications for preliminary  
22 and final approval. And those plans have come  
23 back with comments and have been revised, and the  
24 plan attached to the affidavit and to the court  
25 submission is the latest revision, hopefully

1 responsive to Bernards' request.

2 The changes that have been negotiated  
3 -- there's only one fact that isn't before this  
4 Court. We received new papers day before  
5 yesterday -- in fact, I received them when I came  
6 back from oral argument, and watching you on the  
7 earlier cases -- were allegations that these  
8 negotiations were held without authority of the  
9 Municipality.

10 And in speaking with Mr. Raymond, who  
11 told me this before, and I called him --

12 MR. DAVIDSON: Object, Your Honor. I  
13 don't want to hear anything about what somebody  
14 else said.

15 MR. HILL: Mr. Raymond is the Court-  
16 appointed master.

17 MR. DAVIDSON: Hearsay.

18 THE COURT: He can't have any  
19 communications with -- even with me indirectly,  
20 under the decision, so it would be inappropriate  
21 for you to tell me what he said.

22 MR. HILL: Well, I believe that all  
23 portions of this package have been accepted. The  
24 affidavits before Your Honor show that we were  
25 summoned to a meeting, we attended a meeting with

1           Bernards, where we were informed that their fair  
2           share in August was considerably less than the  
3           numbers that they had agreed to and that which are  
4           provided in the master's report. That number, I  
5           believe, is 1,509, plus a -- minus a credit for  
6           settling of 302, minus a credit which this Court  
7           apparently gave Bernards in some related litigation,  
8           Zirinsky or Spring Ridge, which credit I assume  
9           Mr. Davidson takes the position he could take with  
10          him to the -- if this case were transferred, to  
11          the Affordable Housing Council.

12                   THE COURT: Well, no. Let me interrupt  
13          you on that. I don't know if that's fair to say.  
14          You seem not to have knowledge of that.

15                   MR. HILL: I have had hearsay knowledge.

16                   THE COURT: Let me just place on the  
17          record what occurred. The plaintiff -- Spring  
18          Valley, isn't it?

19                   MR. DAVIDSON: Ridge.

20                   THE COURT: -- Spring Ridge, was  
21          included in the rezoning and took the position  
22          that they were already developing, and it would  
23          be impossible for them to have a mandatory set-  
24          aside in light of the fact that they were in  
25          construction.

1           The Township denied that and took the  
2 position that the ordinance, which required a  
3 lesser set-aside for them, was proper. And at a  
4 management conference, I suggested that, given the  
5 magnitude of the construction that was going to  
6 occur in Bernards, and given the fact that I would  
7 have considered phasing their fair share in any  
8 event, given the fact that they were voluntarily  
9 complying, and some other factors of equitable  
10 considerations, that I would permit them simply to  
11 delete Spring Ridge from their zoning ordinance  
12 and delete from their fair share the amount of  
13 units Spring Ridge would have produced.

14           And so their fair share was reduced by  
15 one hundred and forty-one units. The order is  
16 unsigned, because it was contingent upon the  
17 compliance package going through.

18           And it was submitted to this Court in  
19 July, and it sits unsigned. It's signed by all  
20 of the parties, but unsigned by me. That's the  
21 status of the case.

22           MR. HILL: Well, the master's report  
23 which has been submitted to Your Honor assumes a  
24 fair share, with that credit and that twenty  
25 percent credit for compliance, of 1,066 units.

1 The master says that Ordinance 704 provides 839  
2 hard units.

3 Judge Skillman sometimes refers to units  
4 as hard versus soft units, which are done through  
5 rehabilitation and a program that turns existing  
6 housing into several units through variances or  
7 whatnot.

8 But there are 839 hard units in this  
9 package, of which Hills proposes to provide six  
10 hundred eighteen units. And Mr. Kerwin -- the  
11 second one of Mr. Kerwin's notes is that if we  
12 could have a judgment, Hills is prepared to  
13 guarantee that five hundred fifty of those units  
14 will be built before the year 1990, it has  
15 terminated.

16 Hills has not been sleeping on its  
17 rights. Hills expects to deliver in Bedminster  
18 over eight hundred units in the year 1985, two  
19 hundred sixty of which are Mount Laurel units,  
20 out of which a hundred eighty-five are presently  
21 occupied, and all but five of the rest are under  
22 contract and have scheduled closings.

23 So Hills' organization, the affidavits  
24 say, can now produce over a thousand units a year,  
25 and at our present rate of sales and construction,

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we will have completed the -- all dev  
all lands owned by Hills in Bedminst  
in 1986, and we expect by then to be  
Bernards and begin delivering units at a rate  
at least a thousand units per year in Bernards.

If Your Honor will look at the map, you  
will see that in order to get our sewer and our  
water and the roads up to the top of the hill in  
Bedminster, we have to go through Bernards, and  
that -- and that that part of the development,  
the infrastructure, is being built today. Once  
it's in, the whole of the organization's efforts  
can be turned to building in Bernards and the top  
of the hill in Bedminster.

And we expect to continue at the rate  
of at least a thousand units a year, 200 of which  
in all cases would be low- and moderate-income  
units, so that we feel that we have a ready,  
willing, able developer, that delay factor --  
that the most important indicia of manifest  
injustice, if the Court reads in as one of the  
parties the low- and moderate-income population  
awaiting to be sheltered, that the Court's  
handling of this case could result in occupied  
units before the Affordable Housing Council would

1 be prepared, would be set up and prepared to  
2 begin studying the zoning issues in Bernards.

3 We don't understand, frankly, Bernards's  
4 position in their last brief. They say they're  
5 happy with Ordinance 704. We have always been  
6 happy with the densities in Ordinance 704.

7 There are a package of amendments which  
8 everybody worked out, which are -- and which have  
9 been recommended for packaging by the Planning  
10 Board to the Township Committee as part of this  
11 settlement, which settlement went on the rocks  
12 purely because of some perception that there were  
13 better deals to be had before some other agency.

14 The first we knew of it -- and this is  
15 also in the affidavits, Your Honor -- we went to  
16 this meeting, and we were told, with a master  
17 present, that the Town believed their fair share  
18 was considerably lower than these numbers which  
19 were on file with the Court at that time, and  
20 which the Court was proposing to -- had it  
21 adjourned, a hearing on -- or no hearing on it  
22 had been set, and were asked to bargain for some  
23 lower numbers.

24 And the master objected, said he had no  
25 authority to even get involved in that



1 conversation, that he was --

2 MR. DAVIDSON: Excuse me, Your Honor.  
3 Henry Hill's statement of the facts should not be  
4 before Your Honor. It's not accurate. It's  
5 hearsay. It's irrelevant.

6 THE COURT: Yeah, only to the extent  
7 that it's in an affidavit filed with the motions.

8 MR. HILL: Anyway, we -- as a result of  
9 that hearing, everybody retreated, and this  
10 motion, you know, which was threatened at the  
11 time, was brought.

12 And we feel that this case can be  
13 settled promptly, in fact, was settled, and that  
14 if this Court could see fit to have a hearing on  
15 Ordinance Number 704 before it self-destructs by  
16 its own terms, that the issue may, you know --  
17 that all, all the disputes between the parties  
18 could be at an end.

19 The ordinance is analyzed, the suggested  
20 recommendations in order to make it compliant are  
21 all before Your Honor, in the master's report.

22 And we, as Your Honor's aware -- and  
23 I'm not sure whether that motion is before Your  
24 Honor or not -- we have a subsidiary motion to  
25 have the matter heard of what Bernards has

1 tendered, brought before Your Honor. And Hills  
2 is prepared, if necessary, to -- to do what they  
3 can to bring the Town into compliance so that they  
4 don't lose Ordinance 704.

5 THE COURT: Let me ask you, so I'm  
6 clear. You're happy and can live with Ordinance  
7 704. If I scheduled a compliance hearing on  
8 Monday, I'd hear no objection from Hills?

9 MR. HILL: You would -- Your Honor,  
10 that's correct. We would live with 704. We  
11 think that in order to bring Bernards into  
12 compliance, some additional things need to be  
13 done, and part of the settlement package was that  
14 he would do them in return for additional  
15 permission to do certain things in Bernards.

16 THE COURT: Yeah, but that's negotiations.  
17 That's not what I am asking you. I am saying if  
18 we had a hearing on Monday, would I hear you  
19 object to any aspect of 704?

20 MR. HILL: No, Your Honor.

21 THE COURT: Okay. And --

22 MR. DAVIDSON: We would.

23 THE COURT: Are you -- do you find  
24 acceptable the recommended changes which Mr.  
25 Raymond has made to the --

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MR. HILL: Yes, Your Honor.

THE COURT: You wouldn't disagree with them?

MR. HILL: We don't disagree with anything that he proposes.

THE COURT: So you would sit passively and not say a word about the ordinance in terms of objection?

MR. HILL: That's correct, Your Honor.

THE COURT: My goodness, that's enough to persuade me right there. Okay. Anything further, Mr. Hill?

MR. HILL: No. Thank you, Your Honor.

THE COURT: Mr. Davidson, you wish to be heard?

MR. DAVIDSON: Well, not much. The question you asked Mr. Hill, though, I assume that we would object. I'd say the number's too high. I would object to some of the -- one of the things that -- and Mr. Hill stated it in a way today that was not anywhere near my recollection.

One of the things that Mr. Raymond has is a consideration for extra units for sewers. Consideration for extra units for sewers was never

1 part of anything but George's methodology of  
2 trying to get extra units, never a consideration  
3 of ours. Any sewers -- that extension was  
4 directed by or handled by us directly on its own  
5 merits, without regard to getting any extra units  
6 out of Hills.

7 We didn't want any extra units out of  
8 Hills, and they didn't want to give us any extra  
9 units.

10 THE COURT: All right. Just --

11 MR. DAVIDSON: When you hold your  
12 compliance hearing, Your Honor, I'm going to come  
13 in and, I assume, and argue that you shouldn't do  
14 it because the ordinance, the number in the  
15 ordinance is higher than we would expect it to be.

16 THE COURT: All right. Well, let me  
17 just follow the scenario for a minute. Assuming  
18 I find today that there would be manifest  
19 injustice, for whatever reason, and I set a  
20 compliance hearing, you're going to come in and  
21 say: We are not ready to proceed, because we  
22 don't believe our ordinance complies to what?

23 MR. DAVIDSON: I'm saying, Your Honor,  
24 that I am not going to say it doesn't comply.  
25 It does comply. But I am going to be arguing to

1 you that you can't, you shouldn't foreclose me  
2 from going under the Act just because it complies.

3 THE COURT: No, no. I said assuming I  
4 have denied your right to go under the Act today,  
5 and I set a compliance hearing.

6 MR. DAVIDSON: What you said is, you  
7 denied my motion to transfer. I'm going to argue  
8 before you that you have to follow the Act also.

9 THE COURT: Oh, on the number, you  
10 mean? Of course, the Act doesn't set numbers.  
11 It doesn't even have a methodology.

12 MR. DAVIDSON: It defines the terms,  
13 though, that I think are now the law.

14 THE COURT: So you would be looking for  
15 a hearing on what? I don't understand.

16 MR. DAVIDSON: I'm not looking for a  
17 hearing. I mean, I would come in and argue to  
18 you, Your Honor, that the number that we have in  
19 1704 (sic) complies, okay? However, we want to  
20 use the Act substantively and direct our planning  
21 as the Act makes us, and that the number that we  
22 should be stuck with is a lesser number.

23 THE COURT: Okay. Suppose I conclude  
24 that you don't have a right to do that, that the  
25 Act either says you stay here or you go there.

1 You can't do it both ways. And suppose I conclude  
2 that.

3 Are you then going to withdraw 704, or  
4 are you going to offer it as your compliant  
5 ordinance?

6 MR. DAVIDSON: I don't know. I don't  
7 know the answer to that question.

8 THE COURT: Because it seems to me if  
9 you withdraw it, then the, under -- the normal  
10 scenario would be that I would direct a master to  
11 prepare one for us, which would be 704, with some  
12 modifications.

13 MR. DAVIDSON: If I may --

14 THE COURT: And we would be back where  
15 we were.

16 MR. DAVIDSON: If I can assume what I  
17 would do, if I decided to withdraw 704, I'd  
18 replace it.

19 THE COURT: I don't think you can.  
20 That's the point. The time's up. And either you  
21 go with what got you here, or you don't have a  
22 compliant ordinance.

23 In other words, there was a time  
24 limitation under your immunity orders, and --

25 MR. DAVIDSON: For me to do what, Your

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Honor?

THE COURT: The time limitation said: Submit a compliant ordinance within X amount of days, and that was extended three times. And you really had two choices, not to submit or to submit. And you chose to submit.

Now, I would not preclude your right to withdraw it; but on the other hand, I wouldn't give you the right over and above that to say: Now I want some more time to draw a new one.

MR. DAVIDSON: I'm not suggesting that, Your Honor, and -- but I will suggest to you, sir, that until you make certain findings, and even if you do, you cannot prevent me from passing legislation.

THE COURT: Okay.

MR. DAVIDSON: I am suggesting that one of the things that might occur is, we would amend 704 to be what we think is going to be proper under the Act.

THE COURT: Okay.

MR. DAVIDSON: Then again, we might not. I don't know the answer to the question that you asked, what would we do.

THE COURT: All right. Anything further?

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All right. I don't believe that I have to withhold the rendering of a decision in this matter. I am going to render an oral opinion. It's going to take about an hour, and I apologize in advance to those of you who have heard a portion of it at least. But for the purposes of the record, I am going to have to repeat it.

Since it's going to take that amount of time, and we have been going for well over an hour-and-a-half, I think the best thing to do would be to break for lunch, and we will start up right after one o'clock.

(Whereupon the luncheon recess was taken.)

(End of morning session.)

\* \* \* \* \*

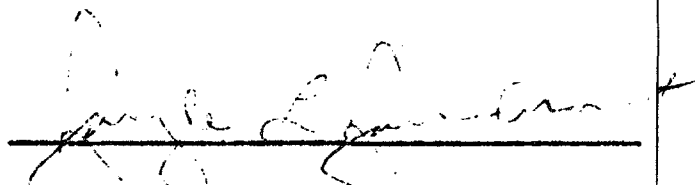
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I, GAYLE L. GARRABRANDT, Certified Shorthand Reporter and Notary Public of New Jersey, do certify the foregoing to be a true and accurate transcript of my original stenographic notes taken in the above matter to the best of my knowledge and ability.

  
\_\_\_\_\_  
GAYLE L. GARRABRANDT, C.S.R.  
License No. XI00737

DATED: 10 31 65

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