RULS - AD - 1985 - 300

10/8/85

In Motzenbecker v. Bernardsville

- Letter to Judge Serpentelli
- original + 2 copies of Affidavit of Motzenbecker and Reply Brief in opposition to Borough's Applications

PGS - 43

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REPLY TO:
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RULS - AD - 1985 - 300

October 8, 1985

The Honorable Eugene Serpentelli
Superior Court of New Jersey
Court House
CN 2191
Toms River, New Jersey 08754

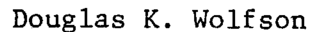
Re: Motzenbecker v. Bernardsville

Dear Judge Serpentelli:

Enclosed please find for filing an original and two copies of Affidavit of Helen Motzenbecker and Reply Brief in opposition to Borough's Applications, returnable October 11, 1985.

Please return one copy of each of these documents marked "filed" to our messenger.

Respectfully submitted.



Douglas K. Wolfson

cc: w/enclosure by Hand
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Plaintiff
HELEN MOTZENBECKER

vs.

Defendant

MAYOR AND COUNCIL OF BOROUGH OF BERNARDSVILLE and BOROUGH OF BERNARDSVILLE

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN COUNTY

Docket No. L-37125-83

CIVIL ACTION

MOUNT LAUREL II

BRIEF OPPOSING DEFENDANTS' MOTION TO TRANSFER MATTER TO AFFORDABLE HOUSING COUNCIL

Douglas K. Wolfson,
Of Counsel and On The Brief

Jeffrey R. Surenian
On The Brief

STATEMENT OF FACTS

On June 21, 1983, Helen Motzenbecker ("plaintiff") filed suit seeking a builder's remedy. On February 9, 1984, this Court approved a stipulation of settlement, which awarded plaintiff a builder's remedy. On November 20, 1984, specific details pertaining to the builder's remedy were memorialized in a further order of this Court. Notwithstanding the fact that the builder's remedy was awarded over a year and a half ago and notwithstanding that this plaintiff is anxious to develop the parcel for Mount Laurel purposes, the remedy has yet to result in the actual construction of any lower income housing. The failure of the remedy to generate housing is the direct consequence of a series of obstacles created by the Borough.

The Borough's request to transfer the within case to the Affordable Housing Council represents yet another blatant attempt by the Borough to (1) renege on the builder's remedy consensually granted on February 9, 1984 and (2) to delay even further the day that lower income housing will actually be provided within the Borough.

The Borough first attempted to interfere plaintiff's-builder's remedy by stating its intent to condemn her parcel.[1]

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1 In this regard, after stating its intent to condemn, the Borough never formally brought a condemnation action even though in Spring of 1985, this Court directed the Borough to proceed "lickety split" with the condemnation if the Borough so intended. Consequently, not only has the Borough effectively

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In addition, the Borough attempted to vacate that remedy. Finally, the Borough has filed this motion to transfer.

Despite the Borough's bare faced attempts to go to any length to thwart this plaintiff and to postpone as long as possible satisfaction of its constitutional obligation, the Borough would urge upon this Court that justice demands a transfer of this case, and that Plaintiff be compelled to renegotiate all of her rights before the Council.

The Borough dares to call out for justice when, in one breath, it proudly points to its settlement efforts with Helen Motzenbecker as evidence of its good faith while, in its next breath, it seeks to take away that which it has given. Similarly, Defendant proclaims that, unlike other recalcitrant municipalities, it has voluntarily moved forward with an innovative compliance program. Yet, if Defendant succeeds in obtaining the transfer it seeks, the net effect would be that not one unit of lower income housing would be built within the Borough for years to come, if at all. See infra at n.16. Not

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(continued from previous page)

prevented the development of the parcel by its threat to condemn, but also Helen Motzenbecker has received no compensation in conjunction with a condemnation. Compare, N.J.S.A. 40:55D-44 (requiring compensation for temporary "freeze"). Unlike the corporate builder, which is more likely to have the financial wherewithall to withstand the expenses generated by such tactics, Plaintiff's resources are far more limited. Thus, absent this Court's resolve to uphold the builder's remedy it awarded on February 9, 1984, the Borough may effectively render meaningless Helen Motzenbecker's award of a builder's remedy.

only is the Borough unable to point to any lower income housing that has emanated from its efforts, but even a "plan" for the creation of lower income housing has yet to be implemented. In short, the Borough has failed to create any realistic opportunity for its fair share of lower income housing as is required by our State's Constitution. In light of this fact, the Borough's tiresome claims of its good faith and its desperate plea to balance the equities is nothing more than a smoke screen reminiscent of those recalcitrant municipalities desirous of precluding lower income housing at all costs.

LEGAL ARGUMENT

POINT I

THIS COURT SHOULD NOT VACATE HELEN MOTZENBECKER'S BUILDER'S REMEDY

In her Brief In Opposition To Defendant's Motion To Vacate Her Builder's Remedy, dated September 6, 1985 [hereinafter "Plaintiff's Brief"], Plaintiff opposed Defendant's motion to vacate her builder's remedy on two grounds. First, Plaintiff asserted what Defendant conceded - that the dispute has been reduced to a settlement. Defendant's Brief In Support Of Motion To Transfer, Dated September 19, 1985 at 8. [hereinafter "Defendant's Transfer Brief"]. In light of the important policies supporting the protection of settlements, in general, and Mount Laurel II settlements, in particular, Plaintiff argued that this Court should, in the exercise of its discretion, protect the within settlement. Plaintiff's Brief at 16-17. Second, Plaintiff emphasized that the settlement has been reduced to an order, and argued that the important public policies supported the inviolability of such an order. Plaintiff's Brief at 17-19.

Defendant does not address Plaintiff's argument regarding the importance of upholding settlements for an obvious reason - there is no basis in law or equity to support Defendant's request to renege on the settlement. Defendant does, however, challenge Plaintiff's argument that the Court

should stand behind its order based on R. 4:50-1(f), the "catch-all" provision of R. 4:50-1, which authorizes a Court to vacate an order for:

> (f) any other reason justifying relief from the operation of the judgment or order."

Relying on this Rule, Defendant urges this Court to "balance the equities." Defendant's Transfer Brief at 12, 14.[2] However, **the appropriate test is not a balancing of the equities test, but an extreme hardship test.** More specifically, this Court should not vacate its order unless it finds the existence of an **exceptional** situation. Hodgson v. Applegate, 31 N.J. 29, 41 (1959). Thus, in Baumann v. Marinaro, 95 N.J. 380, 395, our Supreme Court stated:

> We are mindful that this Court has repeatedly noted the broad parameters of a court's discretion to grant relief in exceptional situations under subsection (f). See Manning Eng'g., Inc., supra, 74 N.J. at 120; Palko, supra, 73 N.J. at 398; Court Invest. Co. v. Perillo, 48 N.J. 334 (1966); Hodgson, supra, 31 N.J. at 41. However, we also note that the importance of the finality of judgment should not be lightly dismissed. Thus, under R. 4:50-1(f) and the identical Fed. R.

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2 Defendant does use the words "extreme hardship" to describe the appropriate standard for vacating an order. However, the thrust of Defendant's analysis is that the Court should vacate the order as a result of balancing the equities - not as a result of the extreme hardship to the Borough. Compare, Defendant's Transfer Brief at 9 with Defendant's Transfer Brief at 13-15.

> Civ. P. 60(b)(6), relief is available only when truly exceptional circumstances are present and only when the court is presented with a reason not included among any of the reasons subject to the one year limitation. Manning Eng'g., Inc., supra, 74 N.J. at 120.

(emphasis added)

Were the test for deciding whether to vacate an order to be any less stringent than an extreme hardship test, the law would be thrown into a state of chaos. For example, if the Court were to merely balance the equities, any party to a consent judgment that concluded, in retrospect, that he should not have consented to the judgment because he could presently get a "better deal" would be encouraged to undo the settlement. Since circumstances almost always change with time, one party will inevitably regret having consented to the judgment and thus will wish to reopen the judgment. Thus, the incentives created by Defendant's balancing test would result in an intolerable situation. Further examination of Defendant's argument reveals that Defendant has fallen far short of demonstrating the type of extreme hardship necessary to justify vacation.

Defendant's argument may be reduced to the following statement: if the Borough must permit Plaintiff to implement her builder's remedy, the Borough will be unable to comply with its Mount Laurel obligation because the property is too expensive to acquire by virtue of its increased value. See Defendant's Transfer Brief at 14 (referring to Plaintiff's "veto" of Defendant's compliance plan).

This argument is entirely specious and is totally without merit. First, it was Defendant that selected the condemnation process as its "sole" method of satisfying its Mount Laurel obligation. Defendant could have easily utilized other means of compliance. Second, Defendant has selected nine (9) sites for a rezoning, one of which is Plaintiff's. Defendant could easily have selected numerous additional sites given the vast amount of vacate developable land existing within Bernardsville. Finally, of the nine sites slated for a potential rezoning, Defendant insists that Plaintiff's site is the primary site.

An analysis of the master's April 30, 1985 report reveals the patent falsehood of the proposition that Plaintiff's site is "necessary" in order for the Borough to comply. Assuming that the Court accepts its master's report, Defendant would have to provide for a minimum of 178 units of lower income housing through new construction. Master's Report at 4. In addition to Plaintiff's site, the Borough has designated approximately 19.5 acres on the eight remaining sites as appropriate for a potential condemnation and has proposed that this acreage be developed at densities of between 8 to 20 units per acre. Master's Report, Appendix A at 5. Assuming a moderate density of 10 units per acre, the 19.5 acres would yield 195 lower income units. Thus, the Borough could easily satisfy its obligation to provide 178 units simply

by utilizing the remaining eight sites already slated for a potential condemnation.[3]

Defendant has made several other arguments in an effort to persuade this Court that the equities weigh more heavily in favor of granting its motion to vacate. For example, Defendant repeatedly bemoans the fact that Plaintiff's property has escalated in value since these proceedings began in June of 1983.[4] The fact that the property continues to increase in value while the Borough delays implementation of the builder's remedy can be no source of complaint. Defendant has ironically become the victim of its own recalcitrance.

Defendant also argues that had it been more recalcitrant by litigating rather than settling, it would not now find itself in the bind its in. Defendant mischaracterizes itself. Although the Borough settled rather than litigated, the Borough has managed to prevent any lower income units from being constructed within its borders. Moreover, had the

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[3] Defendant stands in no different position than an applicant for a variance who has created the very hardship for which he seeks relief. The law should look no more favorably on this Defendant than on such an applicant. See generally, Deer Glen Estates v. Board of Adjustment, Fort Lee, 39 N.J. Super. 380 (App. Div. 1956).

[4] In support of its motion to vacate, Defendant deliberately avoided reliance on R. 4:50-1(c), which permits a Court to vacate an order within one year if there has been any "misrepresentation or other misconduct." This decision reveals the obvious - that there has not been even the slightest wrongdoing on Helen Motzenbecker's part, and that the Borough is beyond the one (1) year limitation period for bringing such an application.

Borough selected the litigation route, there is little question that by now Plaintiff would have achieved through litigation that which she achieved through settlement - the award of a builder's remedy because all three elements of the builder's remedy would have been easily satisfied. Plaintiff's Vacation Brief at 19-21. Finally, to the extent that Defendant is arguing that it is being denied due process because it is being treated unfairly relative to municipalities that have not satisfied their Mount Laurel obligations, Mount Laurel II emphasizes that possible inequities between and among municipalities is no excuse for non-compliance. Mount Laurel II at 239.

In Defendant's feeble attempt to analyze the equities, Defendant belatedly accuses Plaintiff of failing to have submitted a preliminary site plan application. There can be no question in light of the Borough's stated intent to condemn Plaintiff's parcel that Helen Motzenbecker would never have been granted preliminary site plan approval had she sought it. To have attempted to obtain such approval under these circumstances would have been a foolish waste of time and money. Furthermore, Defendant insists that Plaintiff "got off easy" because she did not have to litigate to obtain a builder's remedy.[5] Plaintiff should hardly be punished for succeeding in her objective by the means chosen.

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[5] There can be little doubt that successful motion to strike (eliminating virtually all of the Borough's defenses) and her anticipated motion for summary judgment were salient factors in the Borough's decision to concede the inevitable.

In short, Defendant has not shown any hardship, much less the type of "extreme" hardship that is necessary to vacate this court's judgment awarding plaintiff a builder's remedy.

Even were dispositions of this motion to be dependent upon a balancing test as suggested by Defendant, the balance would weigh heavily in plaintiff's favor. Consider the following facts:

> (1) After repeatedly seeking the Borough's approval for various lower income housing projects and after sending a good faith letter upon the publication of Mount Laurel II again seeking the cooperation of the municipality, Bernardsville consistently answered Helen Motzenbecker's requests with flat out denials. This necessitated the filing of a Mount Laurel lawsuit.
>
> (2) After incurring substantial expenses in legal and planning fees to prosecute the within case, and after being rewarded for her efforts with a builder's remedy, the Borough has attempted to take away that which it has given by stating its intent to condemn Plaintiff's site, thereby effectively precluding implementation of the builder's remedy.
>
> (3) The Borough subsequently sought to vacate the builder's remedy.
>
> (4) The Borough now seeks to transfer the within case to a non-existing public entity which apparently lacks the power to give Plaintiff the relief she seeks.
>
> (5) As a result of the Borough's machinations, Helen

Motzenbecker's property has not generated any of the lower income housing opportunities promised.

(6) Furthermore, despite the two years of litigation, the poor are still lacking any housing opportunities within the Borough.

(7) Although the Borough boasts of its innovative compliance package, should the Borough succeed in its efforts to transfer the case, it would guarantee that no lower income housing would be produced within the Borough for years to come.

In short, even if the extreme hardship test of R. 4:50-1(f) were to be replaced by a "balancing" test as urged by defendant, this Court would have little choice but to conclude that the equities strongly favor Helen Motzenbecker.

POINT II

THIS COURT SHOULD NOT TRANSFER THE CASE TO THE AFFORDABLE HOUSING COUNCIL BECAUSE SUCH A TRANSFER WOULD CAUSE A MANIFEST INJUSTICE TO HELEN MOTZENBECKER AND TO THE POOR REPRESENTED THROUGH THIS LITIGANT

The Fair Housing Act (the Act), Section 16.a. permits a court to transfer a case to the Council only if such transfer will not cause a "manifest injustice". A review of the Act reveals no legislative standard for ascertaining the parameters of this concept. Moreover, no singular definition capable of uniform application can be gleaned from our case law. Rather, the term "manifest injustice" has held a variety of meanings depending upon the various contexts in which it has been applied.[6] Logically, any definitional analysis should

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[6] Pursuant to R. 4:17-7, for example, a party shall be permitted to answer interrogatories out of time if it would not be manifestly unjust. In this context, courts have said that no manifest injustice would result if there was no intent to mislead; there was no element of surprise; the opposing party would not be unduly prejudiced. Westphal v. Guarino, 163 N.J. Super. 140, 146 (App. Div. 1978), Aff'd Mem. on opinion below, 78 N.J. 308 (1978). Similarly, the law permits remittitur if damages awarded by the fact finder would result in a manifest injustice. If a fact finder reaches a result that seems "wrong" through mistake, prejudice or lack of understanding, the court will find there to be a manifest injustice and will allow remittitur. Baxter v. Fairmount Foods Co., 74 N.J. 588, 596 (1977). See also, State v. Taylor, 80 N.J. 353, 365 (1979) (interpretting R. 3:21-1, which permits the withdrawal of a guilty plea at the time of sentencing to correct a "manifest injustice"). See also, Gibbons v. Gibbons, 86 N.J. 515, 523-24 (1981) (identifying when retroactive application of a statute would cause a manifest injustice). See also, State v. Cummins, 168 N.J. Super. 429, 433 (Law Div. 1979) (interpreting R.

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start with the Mount Laurel opinion and ought to draw its meaning from the rights, remedies and purposes sought to be achieved by the Supreme Court.

Mount Laurel II created rights not only for the poor, but also for builders.[7] As to builders, the Court declared that a builder would be entitled to a builder's remedy if that builder (1) succeeded in litigation, (2) proposed a project that would contain a substantial amount of lower income housing, and (3) proposed a project that would be suitable from a planning and environmental perspective. Indeed, the Court created the remedy in part out of a sense of fairness, acknowledging the need to reward builders who have invested substantial time and resources in public interest litigation. Mount Laurel II at 279.[8] As to the poor, by asserting that a

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3:22-1, which allows petitions for a post-conviction relief from incarceration if continued incarceration would be "manifestly unjust". See also N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982) (setting forth under what circumstances requiring exhaustion of administrative remedies would cause a manifest injustice).

7 "Builder" is meant to encompass not only the entity that will build the housing, but also the landowner or developer that might take on the burden of bringing a Mount Laurel action in an attempt to obtain a builder's remedy.

8 Our Courts have long been painfully aware that the fundamental rights of the poor to decent housing would never be vindicated by the poor themselves due to the obvious inability to pursue the expense of such litigation against the firm resolve of exclusionary municipalities. Thus, the need exists to confer standing upon builder/developers and to encourage them to vindicate the rights of the poor. Urb. League New

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growth area municipality has an affirmative immediate obligation to provide for its fair share of the present and prospective regional need for lower income housing, the Court was stating that the poor have the correlative rights (1) to housing opportunities within the municipality in numbers equivalent to the municipality's fair share; and (2) to realize these opportunities in a timely fashion.

In light of the rights thus created by Mount Laurel II, a manifest injustice would clearly result where a proposed "transfer" to the Council substantially affected or impaired either party's legitimate rights and expectations.[9] The rights of builders and the poor would be thus affected in at least the following circumstances:

(1) where the builder is required to perform a futile act;

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Bruns. v. Mayor & Coun. Carteret, 142 N.J. Super. 11, 18 (Ch. Div. 1976); Mount Laurel II at 326-27. J.W. Field v. Township of Franklin (slip opinion at 3-4). Without builder plaintiffs and remedies, these constitutional rights would be irretrievably lost. Mount Laurel II at 279, 309 n. 58, 327 (wherein the Supreme Court expressly encouraged a substantial amount of Mount Laurel litigation). See also, J.W. Field at 3-6 (explaining how critical builders are to the effectiveness of Mount Laurel II in ensuring constitutional compliance).

9 Builders not only represent their own rights, but also the rights of the poor. Mount Laurel II at 289 n. 43. **In fact, builders derive standing to assert their own rights because they are representing the rights of the poor.** Morris Cty. Fair Housing County v. Boonton Twp., 197 N.J. Super. 359, 366 (Law Div. 1984). Therefore, if a transfer would not work manifest injustice to the plaintiff in question, but would work a manifest injustice to the poor represented by that plaintiff, then the Court should still deny the motion to transfer.

(2) where despite an overriding public interest calling for a prompt adjudication of important rights, resolution is unduly delayed; and

(3) where the builder and/or the poor suffer irreparable harm.

Under these circumstances, considerations of justice will relieve a party from exhausting the administrative review and mediation process contemplated by transfer. See generally, N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975); Patrolman's Benev. Assoc. v. Montclair, 128 N.J. Super. 59, 64 (Ch. Div. 1974).

Although these ennumerated items are by no means an exhaustive list,[10] they are illustrative of the type of con-

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[10] In at least two other circumstances, the injustice to a transfer would be manifest: (1) if retrospective application of a statute divested a party of a vested right; and (2) if the party claiming that justice requires transfer itself has unclean hands.

As to retroactive application of statutes, the Courts of our State have long followed the general rule of statutory construction that favors prospective application of statutes. Gibbons v. Gibbons, 86 N.J. 515, 521 (1981). This rule has been more clearly articulated as follows:

> "The essence of this inquiry is whether the affected party relied, to his or her prejudice, on a law that is now to be changed as a result of the retroactive application of the statute, and whether the

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siderations urged by Plaintiff as relevant to a determination of the present motion. As such, they will be more fully analyzed below.

A. Manifest Injustice Would Undoubtly Result When Transferring A Case That Has Been Completely Or Partially Resolved Through Litigation Or Settlement.

Where a case has been at least partially tried or where the plaintiff has obtained the builder's remedy sought, a transfer should be deemed to constitute a manifest injustice, per se. **Short of a trial or the award of a builder's remedy, a manifest injustice should be** presumed **if significant or key**

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> consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively?"

Id. at 523-24. See also, Farrell v. Violator Division of Chemetron Corp., 62 N.J. 111 (1973), Feuchtbaum v. Constantini, 59 N.J. 167 (1971); Townsend v. Great Adventure, 178 N.J. Super. (App. Div. 1981); and Newark v. Padula, 26 N.J. Super. 251 (App. Div. 1953). Applying this standard to the within case, it becomes clear that subjecting Helen Motzenbecker to the Fair Housing Act would have a deleterious and irrevocable effect on her rights because transfer would in all likelihood, deprive her of her builder's remedy.

As to the second principle, it is a fundamental principle of equity that he who seeks equity must come with clean hands. A. Hollander & Sons, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 246 (1949). Surely a municipality such as Bernardsville, that has continuely exhibited bad faith by doing all in its powers to renege on its agreement with Helen Motzenbecker and to postpone satisfaction of its constitutional obligation should not be heard to claim that justice requires transfer.

issues have been substantially resolved either through settlement, stipulation or adjudication.[11] Under such circumstances, the Court should shift the burden of proof to the municipality to demonstrate that a transfer would not cause an injustice.

Analogous support for this proposed standard can be found in the Supreme Court's decision regarding the presumption of validity that normally attaches to a municipality's land use regulations. The Court emphasized that

> Given the importance of the societal interest in the Mount Laurel obligation and the potential for inordinant delay in satisfying it, presumptive validity of an ordinance attaches but once in the face of a Mount Laurel challenge.... It is not fair to require a poor man to prove you were wrong the second time you slammed the door in his face.

Mount Laurel II at 306. Similarly, a builder that has tried all or part of an exclusionary zoning case, or has, through stipulation or adjudication resolved key issues relative

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[11] Defendant repeatedly suggests that this Court should not transfer the within case because "no issues have been adjudicated". Defendant's Brief in Support of Motion to Transfer at 19, 21. Such an argument is far from **persuasive**. It suggests that Plaintiff should suffer the consequences of **transfer** because she achieved her builder's remedy **through settlement** rather than "an adjudication." By **settling**, **Plaintiff fulfilled a fundamental objective of** Mount Laurel II **and the Fair Housing Act - that parties achieve through settlement what would otherwise be achieved through litigation.** Mount Laurel II **at 214; Fair Housing Act, Section 3. Thus,** Plaintiff's conduct should be rewarded, not punished. Defendant also mysteriously omits any reference to the fact that virtually all of its defenses were stricken by this court on plaintiff's motion.

thereto, ought not have to prove that the municipality was "wrong the second time."

Interests of judicial economy and the Court's goal of minimizing litigation while maximizing the production of lower income housing, lend still further support to the standard urged by Plaintiff. Were this matter to be transferred, all the energy that this Court and counsel have invested in the within case to bring the case to the eve of compliance would be for naught. To require a duplication of the entire procedure up to the point of the Borough's presentation of its compliance package would be patently counterproductive because it would force time, energy and money to be channeled into further process, rather than into the refinement of the Borough's existing compliance proposal and the implementation of Helen Motzenbecker's builder's remedy.

Applying the proposed standard to the instant case, no transfer can be permitted. This case is over. Plaintiff filed suit seeking a builder's remedy and obtained what she sought on February 9, 1984. At that point, the Borough consciously chose to forego its opportunity to obtain repose at that time. Only after a change of heart, late in the proceedings, did the Borough decide to pursue repose. Having obtained the relief sought, Plaintiff's consent to keep the complaint active was merely an accommodation to the Borough, which wished to remain

under this Court's jurisdiction and obtain a judgment of compliance.[12]

Thus, under either a per se rule, or a standard creating a presumption against transfer (with an attendant shifting of the burden of proof) Bernardsville transfer motion should be denied.

B. Transfer Of The Partially Tried Matter Or One In Which Key Issues Have Been Resolved Will Lead To Duplicative Expense and Undue Delay Over And Above That Incident To The Act.

Since there is no question as to Helen Motzenbecker's right to a builder's remedy, she would clearly produce lower income housing more quickly than in a case in which the review and mediation process must start anew.[13] Thus, the key to evaluating whether or not any particular delay accompanying transfer will be manifestly unjust should reasonably depend to

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[12] It is important to note that when this Court signed the "interim" order on November 20, 1984, this Court's declaratory relief procedure had not yet been formulated. By that procedure, the Borough might have obtained repose without the presence of a plaintiff. That procedure did not formally become available until January 3, 1985 when this Court decided the J.W. Field case. J.W. Field at 8. Thus, the Borough needed Plaintiff's presence, if only nominally, in order to maintain the Court's jurisdiction and obtain repose. In short, without Plaintiff's presence it was procedurally impossible for the Borough to obtain repose.

[13] This proposition assumes that this Court will remove the obstacles to Plaintiff's builder's remedy by denying Defendant's motions to vacate the builder's remedy and by granting Plaintiff's motion to prohibit condemnation of her track. If this Court should permit vacation and condemnation, housing will still be produced more quickly than if the case were transferred for the simple reason that the delays created by transfer exceed the delays created by a publicly produced housing project.

some degree upon how far along the case has progressed.[14] With regard to the instant case, the case is complete as to Helen Motzenbecker and housing production is close at hand.[15] In stark contrast, if this Court transfers the case, lower income

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[14] The legislature was undoubtedly aware of and likely intended some of the delays that are inherent in the administrative review process. It is thus unlikely that the legislature intended that the "manifest injustice" exception to transfer would result in the Court's retaining all cases. However, if a case has been largely resolved through settlement or litigation, the delays inherent in the Act are magnified and plainly result in a manifest injustice.

[15] A manifest injustice would also result in the event that this Court retained the case and did not declare the builder's remedy moratorium unconstitutional. Fair Housing Act, Section 28 imposes a moratorium on the courts' ability to award a builder's remedy. A builder's remedy is defined as

> a court imposed remedy for a litigant who is an individual or profit making entity in which the court requires a municipality to utilize zoning techniques such as mandatory set asides or density bonuses which provide for the economic viability of a residential development by including housing which is not for low and moderate households.

Since the moratorium only applies to builder's remedies, as opposed to other inclusionary developments wherein the municipality has imposed a mandatory set aside, Section 28 creates an anamolous and harsh result. More specifically, although the court has the authority during the moratorium period to require the municipality to rezone parcels other than the builder/plaintiff's, the court does not have the authority during the moratorium period to require the municipality to rezone the builder/plaintiff's parcel. Thus, the entity responsible for creating the pressure on the municipality to comply is the entity that is punished. Moreover, landowners that made no efforts to pursue a rezoning, will reap the benefits thereof while at the same time, be excluded from the provisions of the

(footnote continued on next page)

housing will likely be delayed for many years.[16]

By denying a transfer, not only will this Court save the way for the implementation of Helen Motzenbecker's builder's remedy, but also this Court will be in a position to test the Borough's compliance package. Any defects can be identified and remedied so that the Borough's regulations promptly create the realistic opportunity for its full fair share.

(continued from previous page)

moratorium. Such a result is not only fundamentally unfair and thus violative of the due process clause, but also violates the constitutional guaranty to equal protection under the law.

[16] The Act gives the Council the ability to complete its mediation and review process between Bernardsville and Helen Motzenbecker as late as October 2, 1986 - over two years after Bernardsville consensually agreed to this Court's award of a builder's remedy to Plaintiff on February 9, 1984. Fair Housing Act, Section 19. The Borough will not be required to file its housing element pursuant to Fair Housing Act, Section 9.a, until January 1, 1987. Therefore, it is likely that the mediation process cannot realistically begin until the municipality has submitted its housing element. Consequently the Council is more likely to complete its mediation procedure by July 1, 1987 rather than October 2, 1986. If the mediation efforts fail to culminate in a settlement, the Act directs the Council to transfer the case to the Office of Administrative Law for proceedings before an administrative law judge. Fair Housing Act, Section 15.c. Although the Act requires the administrative law judge to complete a complete evidentiary hearing and to submit his findings to the Council within 90 days, the Act authorizes an extension of the 90 day period "for good cause shown". Fair Housing Act, Section 15.c. Moreover, the Act does not specify how long the Council will have to make a decision regarding whether to issue a substantive certification once it has received the recommendations of the administrative law judge. In fact, even after the issuance of the substantive certification, the municipality still has an additional forty-five days within which to adopt land use regulations to implement the housing element. Fair Housing Act, Section 14.b. Thus, the Act creates a substantial likelihood that there will be years of delay in the production of housing.

In addition to the unconscionable delay that would accompany transferring a completed case, the need to engage in additional proceedings before the Council will substantially intensify the expense of litigation. The Fair Housing Act conflicts so sharply with the fundamental underpinnings of Mount Laurel II that innumerable legal issues will inevitably arise, each of which will undoubtedly require extensive litigation.[17] To force Helen Motzenbecker to pay twice for what has already been an expensive lesson is unconscionable. The legislature could not have intended so harsh a result. This Court should not permit the Borough to continue the procedure indefinitely.[18]

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17 Compare Mount Laurel II at 352 and AMG at 74 to Fair Housing Act, Section 4.j. (wherein the Act undermines the Court's interpretation of what constitutes the prospective need). Compare Countryside Properties v. Borough of Ringwood at 15-16 to Fair Housing Act, Section 7.c.(1) (wherein the Act again undermines any credit standard accepted by any court to date). Compare Mount Laurel II at 218-19 to Fair Housing Act, Section 7.c.(2)(b) and Section 23 (wherein the Act substantially dilutes the constitutional obligation established by Mount Laurel II through an established pattern defense and through a phasing provision). Compare Mount Laurel II at 263-64 and AMG at 70 to Fair Housing Act, Section 11.d (wherein the Act substantially reduces a municipality's obligation when that municipality seeks a reduced obligation based on lack of infrastructure).

18 The law is well settled that if an overriding public interest exists calling for a prompt judicial decision, one need not exhaust his administrative remedies. N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975); and Patrolman's Benev. Assoc. v. Montclair. 128 N.J. Super. 59, 64 (Ch. Div. 1974). In this case, as in any other Mount Laurel case, an overriding public interest calling for a prompt judicial decision clearly exists and would be unduly delayed were

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As the Court is well aware, a lengthy delay will encourage non-Mount Laurel development to flourish, which will, in turn, strain existing infrastructure and eliminate suitable lower income housing sites. The need for housing will be further exacerbated since no housing is presently being produced to satisfy that need.[19]

(continued from previous page)

this Court to grant Defendant's transfer motion. Mount Laurel II at 306-7.

The need for prompt, actual construction of lower income housing is part of the vary fabric of the constitutional obligation. It was precisely this sense of urgency that motivated the Supreme Court to develop innovative procedural devices to hasten the process and to ensure the early construction of lower income housing. Mount Laurel II at 293. In addition, the Supreme Court modified the traditional time of decision rule in the context of Mount Laurel litigation in order to expedite production of lower income housing. Mount Laurel II at 306-7. Finally, the Court guaranteed that the housing would be produced more quickly by expressly eliminating the exhaustion requirement as a prerequisite to bringing a Mount Laurel lawsuit:

> If a party is alleging that a municipality has not met its Mount Laurel obligation, a constitutional issue is presented that local administrative bodies have no authority to decide. Thus, it is entirely appropriate for a party claiming a Mount Laurel violation to bring its claim directly to court. See, e.g., Nolan v. Fitzpatrick, 9 N.J. 477 (1952) (holding that no exhaustion of administrative remedies is required where only a question of law is at issue).

19 In this regard, it is important to note that the current litigation was brought on June 21, 1983. If through Mount Laurel II procedures, the actual construction of lower income housing does not begin until 1986, the years of delay will have been a substantial price to pay for the end of exclusionary land use policies in the Borough of Bernardsville. If through transfer, however, the production date is extended even further, the manifest injustice to the poor will be intolerable.

C. The Transfer Of The Case Would Cause A Manifest Injustice To Helen Motzenbecker Because A Transfer Would Force Helen Motzenbecker To Conduct A Futile Act.

The transfer would undeniably result in a manifest injustice to Helen Motzenbecker due to the futility of the available administrative process. Under the Act, neither the Council nor the administrative law judge appear to have any authority to grant a builder's remedy[20] such as has been obtained by Helen Motzenbecker in the current litigation. The Council's authority includes only the power to grant, deny or conditionally approve a municipality's housing element in

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20 The lessons of history are clear. When a builder sues a municipality for its exclusionary zoning, the municipality is generally not grateful for the reminder that it has not satisfied its moral and legal obligation to maintain compliant ordinances. Rather, an exposed municipality typically resents the litigant that called the municipality's regulations to the Court's attention and, consequently, the municipality usually attempts, with great resolve, to prevent that builder from obtaining a rezoning. The psychological dynamics of the situation understandably lead to this result. Municipalities simply resent the infringement on their home rule represented by a builder's remedy. Therefore, if given a choice regarding how to comply once a builder has demonstrated to a Court that the municipality is exclusionary, the municipality would undoubtedly select sites other than the plaintiff's for a rezoning. It is precisely this phenomenon that lead to the ineffectiveness of Mount Laurel I in achieving any significant construction of lower income housing. That is, because a builder could succeed in litigation only to have other parcels rezoned, builders had little interest in spending the enormous time and money necessary to prosecute a Mount Laurel lawsuit.

To place Helen Motzenbecker in the position of a successful Mount Laurel I litigant after she has accepted the Supreme Court's Mount Laurel II invitation to bring a lawsuit in the quest of a builder's remedy, would plainly result in a manifest injustice. Mount Laurel II at 279-80, 309 n. 58.

response to a municipality's request for substantive certification. Section 14. Similarly, by the terms of the Act and by the traditional relationship between an administrative agency and an administrative law judge, the administrative law judge is empowered only to make recommended findings of facts and conclusions of law. Fair Housing Act, Section 15.c.; N.J.S.A. 52-14B et seq. To the extent that neither the administrative law judge nor the Council have any express authority to grant a builder's remedy, the specific remedy cannot be said to be "clearly available, clearly effective, and completely adequate to right the wrong complained of". Patrolman's Benev. Assoc. v. Montclair, 128 N.J. Super 59, 64 (Ch. Div. 1974). Inasmuch as an administrative procedure is futile unless the specific remedy sought is "clearly available," the review and mediation process afforded by the Act is definitionally futile.[21]

Finally, Defendant has openly and repeatedly attempted to thwart the implementation of Helen Motzenbecker's builder's remedy through the threat of condemnation and through motions

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21 One of the primary goals of requiring exhaustion of administrative remedies is to prevent the need for resorting to the courts where an agency decision may satisfy the parties. City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979). This fundamental purpose of the exhaustion rule could never be satisfied since the Council apparently lacks the authority to award a builder's remedy. Rather than minimizing litigation, the Act merely postpones it. During the delay period, substantial costs are generated, reducing the likelihood that the builder will ever be able to provide lower income housing.

to vacate the builder's remedy and transfer the case. Under these circumstances, Helen Motzenbecker could not hope to achieve any possible relief in a procedure wherein Defendant decides how it will comply. The injustice under these circumstances could not be any more manifest.

To compound the injustice, the primary goal of the Act is to create alternatives to litigation through the establishment of a procedure involving negotiations. By successfully negotiating a settlement, the Borough has fulfilled the primary objective of the Act in precisely the manner the Act seeks to achieve its objective. In light of this fact, it is ironic indeed that now Defendant seeks to take advantage of the Act's review and mediation procedure.

Courtrooms have often echoed with the maxim that justice delayed is justice denied. It is precisely this sentiment that motivated our Supreme Court to state:

> Our warning to Mount Laurel-<u>and to all other municipalities-</u>that if they do 'not perform as we expect, further judicial action may be sought...,'' <u>Id</u>. at 192, will seem hollow indeed if the best we can do to satisfy the constitutional obligation is to issue orders, judgments and injunctions that assure never ending litigation but fail to assure constitutional vindication.

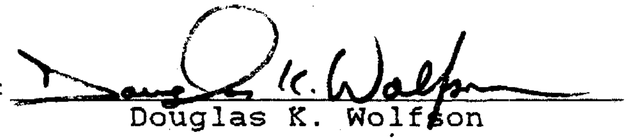
<u>Mount Laurel II</u> at 289-90 (emphasis added). In short, the Court was tired of the "paper, process, witnesses, trials and appeals." <u>Mount Laurel II</u> at 199. The Court wanted to see actual construction of lower income housing. <u>Mount Laurel II</u>

at 352. In light of these objectives and the facts of this case, the transfer will cause a manifest injustice to the poor by depriving them of the housing opportunities which exclusionary municipalities such as Bernardsville have denied them for so long.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that this Court deny the Borough of Bernardsville's motion to transfer this case to the Affordable Housing Council.

GREENBAUM, ROWE, SMITH, RAVIN,
DAVIS & BERGSTEIN
Attorneys for Plaintiff Helen
Motzenbecker

By: 
Douglas K. Wolfson

DATED: October 8, 1985

GREENBAUM, ROWE, SMITH, RAVIN, DAVIS & BERGSTEIN
COUNSELLORS AT LAW

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ATTORNEYS FOR	ATTORNEYS FOR	ATTORNEYS FOR

Plaintiff
HELEN MOTZENBECKER

vs.

Defendant

MAYOR AND COUNCIL OF BOROUGH OF BERNARDSVILLE and BOROUGH OF BERNARDSVILLE

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN COUNTY

Docket No. L-37125-83

CIVIL ACTION

AFFIDAVIT OF
HELEN MOTZENBECKER

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MIDDLESEX)

HELEN MOTZENBECKER, of full age, being duly sworn according to law, upon her oath, deposes and says:

1. I am the owner of an approximately eight and one-half (8½) acre tract in the Borough of Bernardsville which was the subject of a complaint in the above captioned matter.

2. I purchased the property in question in 1970.

3. In November of 1978, I appeared informally before the Planning Board suggesting that the Planning Board revise its Master Plan and recommend to the Mayor and Council that the property in question be rezoned from half-acre residential zone to a zone that permits multiple family dwellings. The Planning Board rejected my request. The subsequent Master Plan revision did not alter the current treatment of the property in question.

4. Thereafter, on June 19, 1980, a planner employed by the Planning Board, John Rakos from Catlin Associates, recommended to the Planning Board that it revise the Master Plan and recommend to the Council that the property be rezoned to permit, as a conditional use, a senior citizen project, which could be developed at a density of 12 units per acre. See generally, Exhibit A. Again, despite the Planning Board planner's recommendations, the land was never rezoned as suggested.

5. In 1981, the Planning Board once again proposed to the Borough Council that the property be rezoned to permit a senior citizen project to be developed at a density of 12 units per acre. The Borough Council once again failed to act on the Planning Board's recommendation.

6. In November, 1982, I again sought to meet with the Planning Board in an effort to obtain a zone change that would permit the property in question to be developed for

senior citizen housing and other multi-family uses. My proposed project was to be financed through HUD and would have included a substantial number of low and moderate income housing units. Although the Planning Board met with me and my representatives, no further action was taken.

7. Between December 27, 1982 and February, 1983, I again approached the Planning Board seeking to obtain its support for a senior citizen, lower income housing project. In one of the Planning Board meetings, Mr. Hugh Fenwick, a Planning Board member and the head of the committee for Senior Citizen Housing, asked me, "Mrs. Motzenbecker, do you live in Bernardsville? Are you going to ruin Bernardsville for a buck?" Mr. Fenwick went on to say that it would be "over his dead body" that such housing be allowed in Bernardsville.

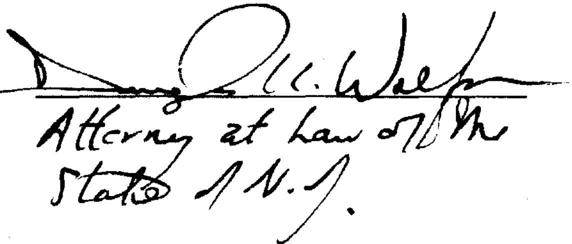
8. Shortly after January 20, 1983, when Mount Laurel II was decided by our Supreme Court, I reviewed the opinion in detail. I subsequently approached the Greenbaum firm seeking advice as to the potential development of the site in question in accordance with the Mount Laurel opinion.

9. On March 17, 1983, my attorneys wrote to the assistant administrative officer for the Borough of Bernardsville to propose a meeting with the Planning Board in order to discuss the potential development of the property for Mount Laurel housing. Only after it became clear that the Borough had no intention of permitting the site to be developed

for <u>Mount Laurel</u> purposes, that I instructed my attorneys to institute suit seeking a builder's remedy.

HELEN MOTZENBECKER

Sworn to and subscribed
before me this 7th day
of October, 1985.



Mike

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ROBERT T. CATLIN
ROBERT O'GRADY
RUSSELL MONTNEY
JOHN J. RAKOS

MEMORANDUM

TO: Bernardsville Planning Board
FROM: Robert Catlin & Associates - John Rakos, Planning Consultant
SUBJECT: Senior Citizen Housing
DATE: June 19, 1980

Pursuant to your request, I have reviewed the suitability of Borough Tax Map Block #125, Lot #27 for the development of Senior Citizen Housing.

The site fronts on and is located west of North Finley Avenue and southeast of Morristown Road (Route 202) and is in the R-3 Residence District, which permits single-family residences with a minimum lot area of 20,000 square feet. The property generally slopes from northwest to southeast. The highest elevation is in the northwest corner of the property approximately 390 feet above sea level with the lowest elevation of approximately 340 feet above sea level in the southeast corner of the property. A stream generally parallels the entire southerly property line from the Conrail railroad right-of-way to and under North Finley Avenue. The property is presently undeveloped and predominantly wooded except for four existing single-family residences located along North Finley Avenue.

Directly across from the site and south of the site, along North Finley Avenue are single-family residences also located in the R-3 Residence District. In the C-1 District adjoining the site to the north there are a number of commercial establishments fronting on Route 202. Several office buildings, a bus company and a shopping center directly abut the northern boundary of the site while the Conrail right-of-way abuts the western boundary of the site.

Presently, the site is provided with potable water from the Commonwealth Water Company. The 1977 Bernardsville Comprehensive Master Plan Background Analysis Report indicated that, as of December 31, 1976, the Commonwealth Water Company supply in Bernardsville was being utilized at only 22 percent of system capacity, indicating sufficient room for further expansion.

EXHIBIT A

There is no sanitary sewer service to the site at the present, however, due to the relatively high intensity of residential uses the area of North Finley Avenue there is a primary need to expand sewer service to this area, as noted in the 1978 Master Plan. The expansion of the sewer system, as noted above, is crucial to the proposed utilization of the site for Senior Citizen Housing.

We find no other major obstacles or objections to utilizing this particular site for Senior Citizen Housing. Among the positive attributes of the site are its close proximity to shopping areas and public transportation on Route 202, and its location with regard to being a potentially suitable transitional use between the commercial uses on Route 202 and the moderate density residential uses on North Finley Avenue.

In the event the Borough wishes to adopt the necessary regulations and controls permitting Senior Citizen Housing, we suggest that the Planning Board first amend the Master Plan, in an appropriate fashion, which is a prerequisite under the provisions of the New Jersey Municipal Land Use Law. Provisions of the Master Plan may then be implemented by suitably amending the Development Regulations Ordinance. For the method to best accomplish this objective it is recommended that a new R-3A Zone District be established as shown on the accompanying illustration. This district should be designed to accommodate the same uses with the same required conditions as does the R-3 Zone District, provided, however, that it would also permit as a conditional use, housing development for elderly persons. The establishment of a new Zone District will limit the area of potential development for multi-family use, while the provision for a conditional use permit will afford maximum control over any such development for the Planning Board.

Pursuant to the above, we have prepared draft amendments to the Master Plan and Development Regulations Ordinance of the Borough of Bernardsville. These are enclosed for your consideration.

Please notify us of any questions or comments that you may have in connection with any of the above.

John Rakos

JR/sas

RESOLUTION OF MASTER PLAN AMENDMENT
BOROUGH OF BERNARDSVILLE
SOMERSET COUNTY, NEW JERSEY

WHEREAS, in accordance with Municipal Land Use Law (CH. 291, Laws of N.J. 1975) the Planning Board of the Borough of Bernardsville has made careful and comprehensive surveys and studies of present conditions and the prospects for future growth in the Borough of Bernardsville in the preparation of a Master Plan; and

WHEREAS, the Planning Board has published a report entitled "Master Plan Borough of Bernardsville, Somerset County, N.J." dated November, 1978, wherein are presented the objectives, assumptions, standards and principles upon which the Master Plan is based and including therein that portion of the Master Plan covering streets, parks, playgrounds and school sites, public land use and the intensity and pattern for future land uses in the Borough of Bernardsville; and

WHEREAS, the Planning Board has held a public hearing thereon as required by law, at which hearing all those desiring to be heard were afforded an opportunity to express their views thereon; and

WHEREAS, the Planning Board has, by unanimous vote on adopted said Plan as the Master Plan of the Borough of Bernardsville; and

WHEREAS, subsequent considerations and current needs have justified certain changes to be effected on said Master Plan; and

WHEREAS, said changes were presented by the Planning Board at a public hearing on , as required by law, at which hearing all those desiring to be heard were afforded an opportunity to express their view thereon; and

WHEREAS, the Planning Board has given due consideration to the comments, suggestions and petitions made before and during the public hearing;

NOW, THEREFORE, BE IT RESOLVED, that the Planning Board of the Borough of Bernardsville does hereby amend the Master Plan of the Borough of Bernardsville as prepared by Candeub Fleissig and Associates by supplementing the Land Use Plan Element with the addition of the following on page 16 of the Report as appropriate:

POLICIES AND PRINCIPLES.

To recognize the needs of those senior citizens who have lived in the Borough for years and have raised their families and who want to remain as residents but do not wish to maintain their large single-family residences.

PROPOSALS.

To make provisions for adequate and affordable housing for senior citizens in compact areas at densities not to exceed 12 dwelling units per acre.

IMPLEMENTATION.

It is recommended that the Zoning Ordinance be amended to permit Senior Citizens Housing developments at suitable locations as a conditional use.

NOTE: The location of the subject area should also be indicated on the Land Use Plan map as a conditional residential high density use by amending same.

FIRST DRAFT
June 18, 1980

AN ORDINANCE TO SUPPLEMENT AND AMEND THE BOROUGH OF BERNARDSVILLE DEVELOPMENT REGULATIONS ORDINANCE 1979, BEING ORDINANCE NO. 581, ADOPTED JANUARY 30, 1979.

BE IT ORDAINED, by the Mayor and Common Council of the Borough of Bernardsville, County of Somerset and State of New Jersey, as follows:

1. The aforesaid Ordinance No. 581 adopted January 30, 1979, as heretofore supplemented and amended, is further supplemented and amended as follows:

(a) Subsection 1-3.2 entitled "Definitions" is supplemented and amended by adding thereto (in appropriate alphabetical order) the following:

1-3.2 Definitions.

HOUSING FOR THE ELDERLY. A building or group of buildings designed to accommodate more than two dwelling units within a single structure and which is designed so that the group of dwelling units utilize such common facilities as pedestrian walks, parking and garage areas, open space, recreation areas and utility and service facilities wherein not less than 80 percent of the total number of dwelling units in a development qualify at all times as "housing units for the elderly."

HOUSING UNIT FOR THE ELDERLY. A housing unit for the elderly shall be a single dwelling unit intended and designed to be occupied by a single individual 52 years of age or older; a married couple, at least one of whom is 52 years of age or older; two closely related persons united by blood or legal adoption when both persons are 52 years of age or older; one person under the age of 52, but over the age of 20, may reside in a dwelling unit with an elderly person or persons as permitted above, if the presence of said person is essential for the physical care or economic support of the elderly person or persons. Children may reside with a parent or parents as permitted above.

(b) Section 12-2.1 entitled "Zone Districts" is amended to read as follows:

12-2.1 Zone Districts. For the purpose of this Ordinance the Borough of Bernardsville is hereby divided into thirteen zone districts known as:

a. R-1 Residence District

b. R-1A Residence District

c. R-2 Residence District
d. R-3 Residence District
e. R-3A Residence District
f. R-4 Residence District
g. R-5 Residence District
h. R-8 Single-Family Attached Residence District
i. B-1 Business District
j. O-B Office Building District
k. C-1 Commercial District
l. I Industrial District
m. H-D Highway Development District

(c) Article 12 entitled "Zoning" is supplemented and amended by adding thereto a new Section 12-8A to read as follows:

12-8A <u>R-3A RESIDENCE DISTRICT.</u>

12-8A.1 <u>Primary Intended Use.</u> This zone district is designed for single family residential use but also permits any use as permitted and regulated in the R-1 Residence District, except that conditional uses shall be limited to:

a. Professional Uses
b. Institutional Uses
c. Public Utilities
d. Housing for the Elderly

12-8A.2 <u>Prohibited Use.</u> Any use other than those listed in 12-5.1 and 12-8A.1 is prohibited.

12-8A.3 <u>Required Conditions.</u> The following requirements must be complied with in the R-3A District: for uses other than conditional uses:

a. <u>Height.</u> No building shall exceed a maximum of two and one-half stories or 35 feet in height, whichever is the lesser.

b. <u>Front Yard.</u> There shall be a front yard of not less than 50 feet, except that where the existing buildings on the same side of the street and within 300 feet from each side line, exclusive of streets or private roads, form an irregular setback line, new buildings may conform to the average of such irregular setback lines, provided that no new building may project closer than 40 feet to the street or road property line nor need setback more than 50 feet from said property line. A less than required setback line

for an existing principal building may be extended laterally along said line, provided that the front yard toward the street property line is not further encroached upon and that the side line requirements are observed.

c. Side Yards. There shall be two side yards, and no side yard shall be less than 15 feet, provided, however, that the aggregate width of the two side yards combined must equal at least 35 percent of the lot width at the building line. These requirements shall apply for a new building and for an alteration to an existing building.

d. Rear Yard. There shall be a rear yard of at least 50 feet. This requirement shall apply for a new building and for an alteration to an existing building.

e. Minimum Lot Area. There shall be a minimum lot area, as defined, of 20,000 square feet; the lot shape shall be such that the minimum area can be measured within 200 feet of the front lot line, or in the case of non-rectangular lots, within 200 foot radii from the front corners of the lot; no lot shall have a front lot line less than 50 feet in length.

f. Minimum Floor Area. Every dwelling house hereafter erected shall have a minimum floor area of 1,000 square feet.

(d) Section 12-19 entitled "Conditional Uses" is supplemented and amended by adding thereto a new Subsection 12-19.2(f) entitled "Housing for the Elderly" to read as follows:

f. Housing for the Elderly. No housing for the elderly, as defined in Article 1, shall be considered except in accordance with the following restrictions and conditions:

1. Minimum Lot Area. The site shall have a minimum lot area of 8 acres.

2. Density. The gross density for any development of housing for the elderly shall not exceed 12 dwelling units per acre. The maximum number of dwelling units for any project shall be determined by multiplying the total area of the tract in acres exclusive of any abutting public streets by 12. Any fractional number of units shall be deleted.

3. Height. No building shall exceed 2-1/2 stories or 35 feet in height, whichever is the lesser.

4. Setbacks. No building or structure shall be located closer than 50 feet to any property line.

5. Buffer Areas. The setback areas required in 12-19.2(f)(4) above shall be landscaped with plant material as approved by the Planning Board and shall not contain any building, structure or improvements other than access into the interior of the tract as approved by the Planning Board. Off-street parking is permitted within the setback required in paragraph 4 above provided said parking is not closer than 25 feet from any property line.

6. Off-Street Parking. At least one and one-half (1-1/2) off-street parking spaces are required for each dwelling unit.

7. Open Space. There shall be a minimum distance of 30 feet between all structures containing dwelling units.

8. Landscaping. A landscaping plan shall be submitted and be subject to review and approval by the Planning Board at the same time as the Site Plan. The landscaping plan will show in detail the location, size, and type of all plantings including lawns to be used on the site. All areas not used for buildings or off-street parking shall be included in the landscaped plan. All parking and service areas shall be so screened that said areas are shielded from residential areas adjacent to the site.

9. Access. The location and alignment of all ingress and egress streets and driveways shall be approved by the Planning Board to assure convenience and safety of traffic.

10. Lighting. Yard lighting shall be provided during the hours of darkness to provide illumination for the premises and all interior sidewalks, walkways and parking areas thereon. All wiring shall be laid underground and all lighting fixtures shall be arranged so that the direct source of light is not visible from any residential areas adjacent to the site.

11. Architecture and Construction. The architecture employed shall be aesthetically in keeping with the surrounding area and shall be subject to approval by the Planning Board. All buildings shall be constructed in accordance with the Building Code and shall comply with the following requirements:

(a) The exterior of each building wall of structures housing the elderly shall be wood, brick or stone facing, solid brick or stone, or some other acceptable durable material. Asbestos shingle and cinder or concrete block as exterior finishes are prohibited. The applicant shall submit to the Planning Board for review and approval, in

addition to any and all other documents required by any other Ordinance concerning Site Plan Review, floor plans, elevation drawings, color rendering and detailed finish schedules.

(b) The exterior of accessory structures shall harmonize architecturally with and be constructed of materials of a like charcter to those used in principal structures.

12. Utilities. Every dwelling unit must be connected to the public sanitary sewer and water systems as approved by the Borough Engineer. All utilities shall be installed underground. Every dwelling unit shall be serviced by a fire hydrant within 500 feet of said unit which hydrant shall be connected to a six inch main. If more than one fire hydrant is required, said hydrants shall be connected to an eight inch main.

13. Roads. All roads and driveways within the project shall be private roads constructed and maintained by the developer pursuant to specifications prepared by the Borough Engineer and subject to approval by the Planning Board.

14. Fees. At the time of filing an application for Site Plan Approval, the applicant will file with the Borough Clerk a fee of $75 per dwelling unit within the project. Said fees shall be used to defray the cost of processing said application. No part of the application fee is refundable. At such time as the Site Plan is approved by the Planning Board but prior to the issuance of a Building Permit, the applicant shall file with the Borough Clerk an inspection fee equal to or not less than 5 percent of the estimated costs of all improvements on site exclusive of the dwelling structures. Said fee shall be determined by the Borough Engineer and will be used to defray any engineering inspections made by the Borough. Any part of said fee that is not used as above outlined will be returned to the developer after approval by the Borough Council.

15. Easements. Any easements as required by the Planning Board, after review by the Borough Engineer, shall be shown on the Site Plan and said easements shall be given to the Borough at such time as said Site Plan is approved. Said easements may include but are not necessarily limited to utility lines, public improvements, and ingress and egress for emergency vehicles.

16. Guarantees. The developer shall furnish to the Borough as a condition of Site Plan Approval such guarantees, covenants, Master Deed or Builder's Agreement, which shall satisfy the requirements of the Planning Board for the construction and maintenance of common areas, landscaping, recreational areas,

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