RULS-AD-1985-350

10/31/85

Appendix for Defendants / Appellants in Hills Dev. Co. v. Township of Bernards.

PGS- 248

Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO.

THE HILLS DEVELOPMENT COMPANY,

Plaintiff/Respondent,

vs.

THE TOWNSHIP OF BERNARDS in the COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS, THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS,

Defendants/Appellants.

CIVIL *ACTION*

ON APPEAL FROM

ORDER OF THE HONORABLE EUGENE D. SERPENTELLI, A.J.S.C.
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NO. L-030039-84 P.W.
SAT BELOW

HONORABLE EUGENE D. SERPENTELLI

RULS - AD - 1985 - 350

~~BRIEF AND~~ APPENDIX
FOR

DEFENDANTS/APPELLANTS

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ATTORNEY(S) FOR Defendants/Appellants

On the Brief:

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APPENDIX

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THE HILLS DEVELOPMENT COMPANY Plaintiff vs. THE TOWNSHIP OF BERNARDS in the COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS, THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS Defendants	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION- SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. CIVIL ACTION ORDER

This matter having been opened to the Court by Farrell, Curtis, Carlin & Davidson, attorneys for Defendants, Township of Bernards, Township Committee of the Township of Bernards and the Sewerage Authority of the Township of Bernards, James E. Davidson, Esq. appearing, and Kerby, Cooper, Schaul & Garvin, attorneys for Defendant Planning Board of the Township of Bernards, Arthur H. Garvin, III, Esq. appearing, and by Brener, Wallack & Hill, attorneys for Plaintiff - The Hills Development Company, Henry A. Hill, Esq. appearing, and the Court having reviewed the Defendants' motion for transfer to the Affordable Housing Council and Plaintiff's cross-motion for a judgment of compliance and the moving and responding briefs and

affidavits submitted with respect to the Defendants' motion and the Plaintiff's cross-motion, and having considered the arguments of counsel;

IT IS on this 16 day of October, 1985

ORDERED that Defendants' motion to transfer this litigation to the Affordable Housing Council be and the same hereby is denied for the reasons set forth on the record of the oral argument on October 4, 1985.

Eugene D. Serpentelli, A.J.S.C.

__ NOTICE OF MOTION RETURNABLE _____

__ MOVANTS' AFFIDAVITS DATED _____

__ MOVANTS' BRIEF DATED _____

__ ANSWERING AFFIDAVITS DATED _____
SUBMITTED ON BEHALF OF _____

__ ANSWERING BRIEF DATED _____
SUBMITTED ON BEHALF OF _____

__ CROSS-MOTION DATED _____
FILED BY _____

__ MOVANTS' REPLY DATED _____

__ OTHER _____

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. L-30039-84 P.W., et al

THE HILLS DEVELOPMENT COMPANY,

Plaintiff,

vs.

BERNARDS TOWNSHIP,

Defendant,

And Consolidated Cases.

TRANSCRIPT
OF
AFTERNOON SESSION

October 4, 1985
Toms River, New Jersey

B E F O R E:

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

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

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

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

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

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

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.

THE COURT: As I said before lunch, I apologize in advance for those of you who are going to hear for the second time some of what I am going to say today, particularly given the fact that we were here for six-and-a-half hours on Wednesday, and you had to stay till five-thirty to hear it.

I feel some of it is necessary to repeat simply to be sure that the thinking of the Court is adequately set forth on the record in the event that anyone seeks review of the decision of the Court. If I could incorporate the record which was made on Wednesday, I would do that, but I understand that that's not an acceptable arrangement.

Just to be clear, the Court is dealing here with transfer motions only. Any other issues raised by the motions or the pleadings are not before the Court. Any other -- any questions concerning the constitutionality of the legislation are not before the Court.

I also want to be clear that I do not intend by this opinion in these three cases to establish an exhaustive definition of meaning of manifest injustice. I consider the cases are

fact-specific. To some extent, the cases today fall into a category, as did the five cases which I heard on October 2nd.

On that day, I heard matters, all of which involved cases which had been fully tried or, in the case of South Plainfield, settled during trial. And all of those cases are presently in a compliance stage, that is, in the process of reaching compliance.

The three cases today did not reach trial; rather, prior to the time that they would have reached trial, they were either settled by consent, or the municipality agreed voluntarily to comply with Mount Laurel II in exchange for an immunity from further builder remedy actions.

I think the next thing that I'd like to do as a preliminary matter is to place the issue of transfer in its proper perspective. When one hears all of the argument that goes on about the provisions of section sixteen, it is wondered whether the section means anything, whether, as the plaintiffs seem to argue, that the transfer, any transfer should be denied because of manifest injustice; and, as the defendants argue, that no transfer should be denied unless there is a clear

manifest showing to -- of a specific injustice to the builder plaintiffs.

The legislation itself, if it is clear with respect to anything, in my view, evidences through section sixteen and elsewhere, including section nineteen, which deals with remand, section twenty-three, which deals with the supervision of phasing by the Court, and section twelve-B, which deals with the interplay between the Court and counsel concerning regional contributions, that the Legislature did not intend to totally exclude the Court from the housing process.

The legislation evidences an effort to strike a balance between the desire to place the housing issue squarely in the legislative-executive arena, and the need to recognize that, in some cases, because of fact-specific circumstances, it would be inappropriate, if not unlawful, to subject those cases to the Housing Council process.

And finally, as part of the overall perspective, something should be said about the oft-stated preference of our Supreme Court to have this matter dealt with in a legislative fashion. Given the fact that the Court has already

denied five motions for transfer, one might wonder if the Court is not abiding by its own words, and whether the trial Court is not heeding what the Supreme Court said with respect to that preference.

First, I reacknowledge that it is clear from Mount Laurel that it was the wish of the Supreme Court, and I can assure you it is the wish of this Court, to give due deference and preference to the legislative process.

I am sure that my own personal wishes are personally motivated; however, the Supreme Court saw clearly in its decision that the housing issue belonged with a legislative solution.

Ten years later, it still is the position of the Court that that is where the resolution of this problem belongs; and as a result of that, it should motivate the trial Court in all appropriate cases to give deference to the legislation, not only with respect to the provisions of section sixteen as they relate to transfer, but in each and every case with respect to the balance of the provisions of the Act, whenever possible.

It has to be noted, however, that the Court's patience and the legislative default has

created some circumstances in which it is no longer viable to vindicate the constitutional obligation by a total abdication to the legislative-executive process; and indeed, section sixteen of the Act recognizes that.

One cannot find any other reason why section sixteen would be in the Act, but for the fact that the Legislature saw that, in certain instances at least, there would be a need to retain some cases in the court system; therefore, preference for the legislative-executive solution cannot in all cases be translated to a circumstance where the constitutional imperative of Mount Laurel would be violated.

At the minimum, the manifest injustice exception must contemplate that we avoid the situation in which transfer would seriously undermine the constitutional imperative which the legislation itself would satisfy if the legislation is not to experience any constitutional infirmity.

To that extent, the terms should be interpreted in such a manner so as to support rather than undermine the fundamental goal of the Act to satisfy a constitutional mandate in a reasonable manner.

Now, something should be said about the literal meaning of section sixteen. We are dealing today with the first portion of the statute, of a section of a statute which has been referred to as section sixteen-A. In actuality, the statute does not have a sixteen-A but, rather, sixteen-B, the A apparently having been inadvertently omitted in the printing of the Act.

But just so we are clear, we are talking about the language which reads, quote: "For those exclusionary zoning cases instituted more than sixty days before the effective date of this Act, any party to the litigation may file a motion with the Court to seek a transfer to the Council. In determining whether or not to transfer, the Court shall consider whether or not the transfer will" -- I'm sorry -- "would result in a manifest injustice to any party to the litigation."

The pertinent section does not define transfer. It does not define manifest injustice, and it does not define party.

Now, the language that I quoted, starting with the words, quote, "Any party to the litigation may file a motion with the Court to seek a transfer," unquote, replaced a different

standard in the prior draft of the Act which read in part, quote, "No exhaustion of the review and mediation procedures established in section fourteen and fifteen of this Act shall be required unless the Court determines that a transfer of the case to the Council is likely to facilitate and expedite the provisions of a realistic opportunity for low-and moderate-income housing."

It is by no means clear what the Legislature intended to accomplish by the change from a standard of facilitating and expediting the provision of low-cost housing to a standard of manifest injustice to any party.

I believe it is fair to say that the final version emphasizes at least more explicitly the interest of the parties, whereas the prior version more explicitly emphasizes expedition in the provision of lower-income housing.

One cannot assume that the change in wording did not intend a change in meaning. Beyond that, however, absent some clear legislative history which is yet to be found, it is extremely difficult to discern whether the Legislature sought to limit or broaden the Court's discretion, or whether it sought to limit or broaden the

potential for transfer of cases which were more than sixty days old.

Now, I would suggest that strong interpretive arguments can be made on both sides. I do not intend by this opinion to either reconcile the language or to give a complete definition of the term, "manifest injustice."

As I noted, the term tends to be fact-specific; and thus, I deem it more appropriate to define it within the context of the cases as they appear before me. Its full meaning will evolve as the transfer motions now pending before this Court and other Mount Laurel judges are heard and decided, and I believe ultimately it will be more fully explored in a written opinion.

In cases at the factual extremes, the term will be relatively easy to interpret, as I indicated on Wednesday. Just like obscenity, to paraphrase Justice Stewart, you should be able to know it when you see it.

And finally, in terms of a definition, as I noted, there is no clear -- there is no definition, in fact, of the term "transfer" or "party."

As to the term, "transfer," that issue

might be relevant to manifest injustice to the extent that if a case is transferred in its present posture, with a full record, and the Council being bound by issues decided by the Court, the potential for delay and the possible cost of litigation might be reduced.

The procedural scheme which is evidenced by the Act does not seem to disclose an intent to bind the Council with what has happened in the Court. The municipalities which have appeared before the Court so far with respect to these transfer motions have stressed the potential under the Act for a fresh, new, comprehensive approach to the housing issue. And I would tend to agree, without deciding the issue, that, on first reading, the Act would give one the impression that that is what the Legislature intended.

In any event, I do not intend to decide that issue today, either.

As to the term, "party," something should be said about the interest of the group which we call lower-income households. One of the defendants in the cases on Wednesday referred to the lower-income people as hidden beneficiaries.

Today we have gone even further and

indicated that lower-income people are not parties to this litigation at all. And it's been indicated that they are, quote, "not here."

It should have long since been clear that the status of lower-income households rises far above the category of a hidden or third-party beneficiary, and that they are very much here. As a matter of fact, they are more here than the plaintiffs themselves, because the plaintiffs themselves are nominal plaintiffs, representing the interests of the class.

Even where an Urban League or other civic or non-builder plaintiff is not involved, the lower-income class must be considered a party to the action. If that were not the case, we would have the anomaly of considering whether there is manifest injustice to the Urban League or to the Public Advocate or to the fair housing groups which have sought relief as plaintiffs, and yet we would not consider that as a manifest injustice to other plaintiffs by a different name who seek the same relief for the same group.

The prospect of a builder's remedy was the genius of the Supreme Court decision, because it brought forth those nominal plaintiffs to

represent the interests of the groups which otherwise would not have been as adequately represented.

The Court saw the limits in the ability of the non-profit organizations to represent the interests of the class, and therefore created the remedies so that they would be, they would in fact be represented.

With all of that, it is incredible to imagine that lower-income people could not be considered as parties to Mount Laurel actions. Our Supreme Court has described Mount Laurel actions as institutional or public law litigation. It is at 92 New Jersey 288, 289, and in Footnote 43.

The actions are brought to vindicate resistance to a constitutional obligation for the affected group. It makes no difference that they're also brought for another reason.

The secondary motive of the plaintiff may be primary to the plaintiff, but it was secondary to the goal of the Court. It was the motive upon which the Court seized to reach its ultimate goal, which was the vindication of the constitutional right.

In that sense, Mount Laurel actions are class actions, and I think Judge Skillman has said it very well in his decision in Morris County Fair Housing Council versus Boonton Township, 197 New Jersey 359, Law Division 1984, at pages 365 and 366, where he said, in part: A Mount Laurel case may appropriately be viewed as a representative action which is binding on non-parties. The constitutional right protected by the Mount Laurel Doctrine is the right of lower-income persons to seek housing without being subject to economic discrimination caused by exclusionary zoning.

The Public Advocate and such organizations as the Fair Housing Council and the NAACP have standing to pursue Mount Laurel litigation on behalf of lower-income persons. Developers and property owners are also conferred standing to pursue Mount Laurel litigation. In fact, the Supreme Court has held that any individual demonstrating an interest in or any organization that has the objective of securing lower-income housing opportunities in a municipality will have standing to sue such municipalities on Mount Laurel grounds.

However, such litigants are granted standing not to pursue their own interests, but rather as representatives of lower-income persons whose constitutional rights are allegedly being violated by exclusionary zoning.

It was this group that the Supreme Court was talking about when, at page 337 of the opinion, it referred to lower-income people as having the, quote, "greatest interest in ending exclusionary zoning." And it is that interest that we are dealing with in these transfer motions and throughout the Mount Laurel process here in court.

Now, before turning to a factual analysis of the three cases here today, something should be said about the consequences of a transfer as it relates to the potential for delay or expedition of the process which leads to the production of lower-income housing, since it should be evident that, I believe, that delay in those terms relates to a definition of manifest injustice.

It seems that the parties here today, as on Wednesday, all agree that speed in the resolution of the housing issues and expediting

lower-income is, in fact, one important element in the definition of manifest injustice.

Clearly, the defendants today and earlier this week maintained that delay alone, in a vacuum, is not enough; and I will address myself to that in a minute.

As a practical matter, if we agree that speed in providing housing is an element of manifest injustice, we are, in effect, reading back into the statute what was in there before the final amendment, that we should consider whether a transfer will facilitate and expedite the provision of the realistic opportunity to build lower-income housing.

In the context of manifest injustice to the parties, we are asking whether or not the transfer will aid the lower-income people by speeding the day when the realistic opportunity for housing will arrive; and, of course, it is at this point where the arguments diverge.

A brief review of the timing and procedure of the Act is appropriate. The Act, of course, became effective on July 2nd, 1985. Section five creates a Council on Affordable Housing which, for the sake of ease, we have all

come to call the Housing Council, or the Council; and section D requires the governor to nominate the members within thirty days of the effective date.

Section eight requires the Council to propose procedural rules within four months after the confirmation of its last member initially appointed, or by January 1, 1986, whichever is earlier.

Given that the Council members have not yet been confirmed, it is likely that the procedural rules will be proposed around May 1st or perhaps a little earlier.

Section nine-A requires any municipality which elects to submit a housing plan to the Council to notify the Council of its intent to participate within four months of the effective date of the Act, so that the notification procedure will certainly not cause any delay in and of itself, since the procedural rules will not be adopted until after the deadline for notification, in any event.

Section seven requires the Council to adopt criteria and guidelines for the housing plan within seven months of the confirmation of

the last member initially appointed, or by January 1st, 1986, whichever is earlier. Assuming confirmation of the membership is accomplished near the end of this year, the Council would have until approximately August 1, '86 to adopt the criteria.

Section nine-A gives the municipality five months from the date of the adoption of the criteria to file its housing element, and if the criteria are not adopted until August 1 of '86, the municipality would have until January 1 of '87.

I realize that in each of these assumptions, there is the possibility that the Council -- whether the municipality might move faster. And as I go through this scenario, I think some of the assumptions I will make will adequately make up for that possibility.

Section thirteen provides that a municipality may file for substantive certification of its plan at any time within a six-year period from filing of the housing element. Nothing seems to expressly require expeditious filing for substantive approval, but if we assume that it is requested, the township has to give public notice

within an unspecified period of the requested certification. Once public notice is given, the forty-five-day objection period begins to run.

It is not clear from the Act that there is a time limit on the Council to respond to the requested certification; thus, though the objection period is forty-five days, the review period could be longer and might be expected not to commence until after the objection period expires.

Assuming, however, the very unlikely scenario of the township petition for substantive certification, a simultaneous public notice that is on the same day, and assuming that the Council does not wait for the objection period to expire before it starts review, the procedure would have to consume forty-five days, since that is the minimum period allowed for objection. That would take us to approximately February 15th, 1987.

As a practical matter, of course, it is highly unlikely. It would seem to be highly inefficient that the Council would start to review a petition for certification before it found out whether or not there were objections to it. But I am assuming for the purposes of my

review that they will do so.

If at the end of the forty-five-day period the Council denies certification, or conditionally approves it, the municipality has sixty days to refile, which would then bring us to April 15th, 1987. And the Council has an unspecified period to review.

Once the Council grants substantive certification, the municipality has forty-five days to adopt its implementing ordinance; and thus, the procedure might extend to June 1, 1987, even allowing for no time for review by the Council.

Of course, in the best of all worlds, at the end of the forty-five-day objection period, if there's no objection and if the Council has reviewed during the objection period, substantive certification could then be granted, and within forty-five days an ordinance could be adopted; and under that scenario, we would have reached April 1, 1987, which appears to be, within any reasonable estimation of times, the earliest date that the procedure could be completed.

If, on the other hand, an objection is filed, it must be done within forty-five days, as

I indicated; and assuming public notice has been given on January 1, 1987, the objections would be completed by February 15th, '87.

Pursuant to section fifteen-A, mediation would then be commenced. No time limit is set for that process. I will assume it would take a minimum of sixty days. I believe if the Council had one case to act on, a minimum of sixty days would be reasonable.

We don't know how many cases they will have, but I am going to assume there are no others, and we are limiting ourself to a single case. The mediation process in these highly complex cases, given the other duties of the Council, would then expire on April 15th, 1987.

If the mediation is unsuccessful, the matter is then referred to an administrative law judge, who has ninety days to issue a decision unless that period is extended for good cause. That procedure would then extend to July 15th, 1987, assuming there is no extension. The administrative law judge's findings would then be forwarded to the Housing Council with the record of the proceedings.

Now, under N.J.A.C. 1:1-165, the Council

then has forty-five days to act on the decision by accepting, rejecting, modifying or remanding the initial decision to the administrative law judge; and assuming no remand, we would then, within a ninety-day period, have reached September 1, 1987, or approximately two years from now. Thereafter, an appeal would lie with the Appellate Division; and presumably, there would be no difference in the time frame than an appeal from the Superior Court, or at least no substantial difference. There is some difference in the rules.

Now, before reaching the ultimate issue in this case, I would like to just review the status of the three cases that are before me today, because I believe that it's pertinent to the decision of whether to transfer or not.

With regard to Manalapan, the suit was filed against the Township in February of 1976. There was an initial trial Court decision invalidating the ordinance in March of 1977. That decision was affirmed in October of '78. A petition for certification was denied in January of '79.

In May of '79, the trial Court invalidated the second ordinance, and the

Appellate Division remanded the case to this Court in light of Mount Laurel II in August of 1983.

Thereafter, there was, as there has been with almost every Mount Laurel case, some extensive case management conferencing; and as a result, the case was settled. A consent order setting the fair share at nine hundred and authorizing the plaintiffs to provide seven hundred eighty-six of those units was entered on May 11th, 1984.

The Court withheld the appointment of a master, since the consent order resolved most of the issues of the case by judgment; but at the request of the municipality, so that it might retain -- obtain repose, the Court appointed a master to review the final details of the compliance ordinance as it related to the remaining one hundred fourteen units and the overall rezoning for Mount Laurel compliance.

The Court responded to the municipal request in that regard when the municipal attorney submitted the town expert's report concerning its compliance plan.

On May 13th, 1985, the successor

township attorney advised the Court that the ordinance, a compliance ordinance had been introduced on first reading on May 8th, 1985. The court expert advised that she could approve, with a few technical changes, the compliance ordinance. She did this on May 29th, 1985.

The plaintiffs in the case apparently submitted applications for development approval to the Planning Board in June of 1985; and I say "apparently," because it is so alleged and it is not refuted.

The plaintiffs negotiated a consent order with the Utilities Authority by which sewer service will be provided, pursuant to an order of August 11th, 1985. The Township Committee thereafter adopted a resolution requesting that the Authority refrain from entering into any consent order until it could meet with the Township with respect to that issue.

Meanwhile, on July 30th, 1985, almost nine years after the first complaint was filed and approximately fourteen months after the entry of a consent order, which was in fact a partial judgment, and three months after the introduction of the compliance ordinance on first reading, the

Township sought to vacate its judgment on the grounds that the township attorney who had entered into the judgment was not authorized to do so.

The plaintiffs responded with an ample record, which demonstrated beyond a shadow of a doubt the authorization and the knowledge of the governing body of the settlement.

The Court rejected the motion, finding that it was totally meritless, that even if there was some factual basis for it, which there was not, that the municipality was subject to estoppel and, finally, that the motion was brought in bad faith.

Now what is left to be done in the Manalapan case is a compliance hearing dealing with the balance of the hundred and fourteen units -- the seven hundred eighty-six are covered in large part by the consent order; the review of sale and resale controls on the seven hundred eighty-six units, and the establishment of controls on the others, of course; and the revision of the ordinance, if necessary.

As indicated, the master has found the ordinance to be satisfactory but for some minor

technical changes, and it would not appear that a Court-ordered revision of the ordinance will be necessary.

By that I mean, the ordinance would apparently be capable of being approved subject to some minor conditions which could, in effect, amend the ordinance itself, or which could be embodied in an amending ordinance. All of this could be accomplished within a ninety-day period.

Now, with regard to Bernards, the complaint was filed by Hills on May 8th. The plaintiff's motion for summary judgment was denied, and the Township thereafter adopted the revised zoning ordinance 704 -- I should have said, of course, May of 1984 -- and the ordinance was adopted in November of '84.

There was correspondence with the Court concerning the entry of an immunity order. The Court at first declined to enter an immunity order, based on the fact that there was not adequate stipulation. Ultimately, it was entered. A master was appointed. And the immunity was extended three times.

The initial order was entered on December 19th, 1984, with an extension on May 15th,

June 15th, to the -- and then to the date of the compliance hearing.

In a further effort to expedite the settlement, the Court further reduced the fair share of the municipality by a hundred and forty-one units, as was indicated earlier, based on its voluntary compliance, based upon the size of its fair share number, and other equities which I need not repeat.

The only thing standing in the way of a rapid resolution of the case at that posture was a suit brought by a property owner included in the compliance package who alleged wrongful exclusion.

With the thought that the matter had been resolved with the Hills plaintiff, the Court allowed the Township to reduce its fair share number by an amount equivalent to the units which would be generated by the parcel to be removed from the package.

In June of 1985, the defendant's counsel wrote to the Court advising that an agreement had been reached, requesting a compliance hearing and an extension of a stay until that time. At or about the same time, the Court-appointed master

wrote to the Court, submitting his report, recommending approval of the ordinance subject to some minor changes.

It is then alleged between the parties -- of course, the Court was not involved in these negotiations, but it does not seem to be disputed that there were drafts of settlement exchanged.

Plaintiff alleges that the draft was acceptable to it, but the Court has no way of knowing what was in it. But today, at least, the plaintiff stipulates that the ordinance in its present form will not be challenged at a compliance hearing.

Ultimately, the Court, because of its prior notification, contacted plaintiff -- defendant's counsel with respect to whether or not the Township wished to proceed before the Court, or wished to file a motion for transfer. Defendant's counsel, after due consultation with his client, advised the Court that a motion for transfer would be filed; and it was in fact filed on September 13th, 1985.

Now, what is left to be done in this case is not totally clear to the Court, in light of the colloquy between the Court and counsel

during oral argument.

It would appear to me that a compliance hearing would be held on Ordinance 704, which the defendant contends is in accordance with Mount Laurel II, which the plaintiff is willing to accept, and which the master approves subject to some minor changes.

Under those circumstances, that could be accomplished very quickly, and there would appear to be no need for revision except for some technical items.

Under those circumstances, the Court would approve the ordinance if it found no major defect itself, subject to the technical revisions, if necessary, being accomplished within a short time span.

The municipality would thereafter have a compliant ordinance. It is -- in effect, it does contain a self-destruct clause, which is not uncommon in Mount Laurel ordinances. I don't fault the municipality for that at all. It has been the procedure in most -- in many of the municipalities to adopt the ordinances contingent upon Court approval in a compliance setting.

In any event, the fact that it does have

a termination date is not at all fatal to its validity. Whether or not the compliance hearing is held before or after its termination date, since the municipality takes the position that the ordinance is compliant, and since the time for it to submit a compliant ordinance has now expired, it would either have to come to a compliance hearing without an ordinance, or with the ordinance that it has adopted, designated 704.

Under all of those circumstances, it would appear that a ninety-day period would be adequate to allow for the completion of this case.

Now, with regard to Watchung, this complaint was filed on December 18th, 1984. My secretary has translated, having here '85, so your complaint hasn't been filed yet. You're free now, when the sixty-day period has not even run.

The consent order in this case was entered on June 19th, 1984, and it was somewhat typical in form to approximately sixteen other orders entered by this Court, in that it gave the municipality an immunity from a builder's remedy suit based upon the conceded invalidity of the ordinance.

It set a fair share, it appointed a master, and it provided, in effect, that if the builder's remedy issue could not be resolved between the parties, it would be resolved by the Court.

The court master then set about establishing a schedule for development of an acceptable compliance ordinance and, under letter of July 19th, 1985, established the deadline for the submission to the Court as September 28th, 1985.

On August 15th, 1985, the Township adopted a resolution of participation under the Housing Act. A month later, this Court entered an order extending the immunity, which is somewhat ironic, until October 4th.

But I say that with just a certain amount of jest, because the reason was that the Township wanted to know whether or not its case would be transferred and, therefore, wanted immunity until that date.

The master, on September 11th, 1985, in recognition of the delays which had occurred, established a new time schedule which was subject to the Court action on the transfer motion. And

the deadline for submission under that schedule is December 1st, 1985. That is the deadline for submission of the compliance ordinance to the Court.

So what is left to be done in Watchung is the submission of the ordinance by December 1st; a compliance hearing thereafter, which would include a hearing with respect to the builder's remedy, if the builder is not satisfied by the compliance ordinance; a revision of the ordinance if the Court does not accept the compliance ordinance; and then an adoption by the municipality of the ordinance, or adoption of the ordinance by Court order, which is, of course, an alternative in each one of these cases.

The Watchung timetable would seem to be somewhat longer than the other two cases here today; but in any event, I would presume that by the end of February or sometime into March, we can extend it to the end of March, the Watchung case could easily be completed.

Now, with that overview of the statute and the review of the procedures under the statute, the time frames and the specific analyses of the progress of each of the cases

before the Court, there remains only the ultimate issue of whether these cases should be transferred to the Council or retained here.

The parties to these motions and others filed with the Court have suggested a host of criteria by which the applications are to be judged. And I listed them the last time, thinking that it would be useful to counsel in future cases; and apparently, it was partially useful, at least, to counsel.

I am going to list them again and expand just slightly on them, because as we go through these cases, new issues are developed, and all of them should be considered.

I emphasize again, however, that I do not list them in order of preference, and clearly with no intention to imply approval or disapproval of any factor which I don't specifically discuss. In any given case, one of them may have greater relevancy than the other, may not apply, or may be the determining factor.

The factors include the age of the case; the complexity of the issues; the stage of the litigation, that is, discovery, pretrial, trial, compliance, settlement; the number and nature of

previous determinations of substantive issues; the relative degree of judicial and administrative expertise on the issues involved.

The need for development of an evidentiary record; the conduct of the parties; the likelihood that the Council determinations would differ from the Court's; the likelihood that Council determinations would have a basis in broader statewide policy.

Whether harm would be caused by a delay in the transfer or, conversely, whether a denial of a transfer would cause a greater delay.

Whether the Council process, absent the ability to impose restraint, would cause the irreparable loss of vacant developable land for Mount Laurel construction; whether the transfer would facilitate or expedite the realistic opportunity for lower-income housing.

Whether a change in the housing market could occur if the venue selected causes delay; the loss of the plaintiff's right to participate in the Council process at least up to the point of mediation; and the loss of alleged rights existing under Court orders.

We are up to fifteen factors at this

point. They may encompass some others which have not been mentioned, and there may be others which have not yet been considered. As noted, I do not see any need to dwell on each factor.

All of the cases today have a certain number of factors in common. They have all settled voluntarily, in the sense that the municipalities have either settled directly with the parties or have chosen to voluntarily comply with Mount Laurel, and the parties have all acted, until recently, in accordance with the provisions of those voluntary orders.

The record in each case is replete with evidence that the parties have, through their own conduct, defined the issues of region, regional need and fair share, just as though a trial had been held in the case.

During the process, all three municipalities have been given much more than the ninety days envisioned by our Supreme Court to revise their ordinances, and indeed much more time than any municipality which had not voluntarily complied, since that municipality or those types of municipalities would have been brought to trial within the time frame consumed

by these cases.

In any event, the compliance ordinances have been accomplished in Manalapan and in Bernards; and in large part, they seem to have the general approval of the master.

In the Watchung case, its ordinance is in progress and is due to be submitted in less than sixty days.

Furthermore, each of the municipalities has received significant fair share reductions because of voluntary compliance. I applaud that. Some have criticized it as a reward for obeying the law.

There are aspects of estoppel in each case. Had the defendants not sought to -- sought entry of consent orders or immunity orders, it is entirely likely that each of these cases would have been tried, the fair share established, certainly in both Manalapan and in Bernards, and a compliance ordinance under review.

In Watchung, we might have been near or would have been completed the trial and been in the compliance stage.

The Court has, in short, been a patient partner with the towns, because they demonstrated

their desire to voluntarily comply. In fact, many plaintiffs have chastized the Court for being too patient.

There are additional factors which are unique to each case, which I need not dwell upon, nor do I give them excessive weight; yet they deserve just brief notice, and they are considered in the total picture.

The Manalapan case is now over nine years old, and it is now within a few months of total resolution. Even without a compliance ordinance, it has a binding Court order which will provide seven hundred eighty-six units of its nine hundred fair share.

The Bernards case was and, from what the Court hears today, is for all intents and purposes settled, and the plaintiff is as ready a builder as the Court has before it.

It's demonstrated that rather conclusively in Bedminster. The evidence in the Bedminster case may be considered in this matter. It is entirely clear that the effort of Hills Development is within a confined area, that it has control of the important aspects of construction which go to making rapid construction

possible. It has control of its sewer plant, it has sewer capacity. It has all of the necessary other infrastructure at hand, and it has the site immediately adjacent to its site in Bedminster.

In Watchung, the immunity order has given the town a two-sided protection somewhat unique to Watchung, does exist in a few other municipalities. It has an opportunity to settle now, and still later seek a reduction of the fair share based on what might happen in the Housing Council. That arrangement rings of fairness to the defendant.

Of predominant importance in these cases is the status of each case and the inevitable delay which will be caused by transfer. As the facts were cited show, each of the cases before the Court are very near to completion. The Court's best estimate is that they could be done in anywhere from three to six months. They could be done even sooner than that.

Even if the estimate is overly-optimistic, the time span is significantly shorter than the minimum period of time which was calculated in the analysis of the Act.

We are not looking at delay in a vacuum,

because as the defendants' counsel have properly pointed out, the Housing Council process must take some time. And at this posture, we have to presume that the Legislature chose a reasonable time frame for cases which belong before the Council.

That presumption is a right to which the legislation is entitled. But in transfer cases, we have to look at delay in relative terms, that is, relative to the status of the case before the Court, because delay before the Council, excessive delay, in relationship to delay before the Court, equates to postponing the day until the realistic opportunity is afforded and housing is built.

In each of these cases, we have builders who are ready to proceed. Indeed, we have builders proceeding in two of the cases, just as builders have moved promptly to get construction under way in other towns where compliance has already occurred.

Of course, avoidance of delay at all costs is not an acceptable goal; however, no one has demonstrated to the Court that the Court does not have the expertise to complete these matters

and to meet the special issues involved.

All the municipalities before the Court today and in other matters have been evaluated based upon statewide planning criteria which have been carefully developed.

I might note that the Act itself does not call for statewide planning; it calls for regional planning. Presumably, they're one and the same, or hopefully they would be one and the same, except for the fact that the Act limits the regions to a maximum of four counties.

In any event, and that is an aside, the methodology which the Court uses leaves room for adjustments based upon the very criteria which the Act itself has adopted. In fact, if one were to read the Act, it would look like a compendium of those issues raised by the defendants in Mount Laurel proceedings.

I don't say that with any criticism. It is entirely appropriate. But section seven-C of the Act calls upon the Council to consider various criteria in reviewing the housing element.

And I believe that a review of them will track the sort of defenses which the Court has dealt with here in the judicial setting and

responded to in that setting.

So the methodology has left room for adjustment based upon vacant land, based upon environmental constraints, the need for preservation of agricultural areas, historic areas, recreational areas, open space, and other special categories of land uses.

The Court has allowed for adjustments of the compliance ordinance based upon prior land use patterns, and thus, as a result, in Freehold Township, reduced the fair share of that community by thirty-five percent because of prior efforts made to provide a variety and mix of housing.

The methodology allows for many other practical and equitable adjustments, as is evidenced indeed in the instance of Bernards and in many other cases in which there has been voluntary compliance.

The determination of the manifest injustice issue is and will be a balancing process in all of the cases. In each case before the Court today, the balance tips heavily in favor of a denial of the motions to transfer.

The statutory test is manifest injustice

to any party. The defendants have failed to demonstrate the slightest injustice to them, whereas the injustice to the lower-income households is entirely evident and manifest.

With respect to the other collateral issue in Manalapan, that is of phasing, the Court will deal with it on the compliance hearing. I suggest that it can be dealt with as to the hundred and fourteen units so as to satisfy the entire phasing issue, and I need not decide the applicability of section twenty-three to the settlement, and adequate phasing of those hundred and fourteen units will accomplish the legislative intent even if it is applicable, which is a substantial doubt.

All right. I will entertain a motion from each plaintiff denying -- I mean an order denying the motion. Anything further?

MR. MURRAY: Judge, in each of the two times you read the -- your opinion, you referred to Judge Skillman's citation as N. J. It probably is N. J. Super.

THE COURT: Did I say that? Well, he deserves to be elevated. Maybe I'm predicting something. I'm sorry. It certainly is New Jersey

Super.

MR. HILL: Technically, in submitting the orders, Your Honor, there was a cross-motion for a hearing on compliance which I think Your Honor spoke to. Should the judgment reflect that that would take place at a date to be set by the Court?

THE COURT: That will happen whether or not you put it in the order.

MR. HILL: I just was wondering how to write the order.

THE COURT: It need not go in the order, but there will be a compliance hearing set. Okay? Gentlemen, have a good day.

ALL ATTORNEYS: Thank you, Your Honor.

(End of proceedings.)

* * * * *

C E R T I F I C A T E

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: 10-16-85

BRENER, WALLACK & HILL
2-4 Chambers Street
Princeton, New Jersey 08540
(609) 924-0808
ATTORNEYS FOR Plaintiff

Plaintiff THE HILLS DEVELOPMENT COMPANY	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION- SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II)
vs.	:	Docket No. L- 030039-84
Defendants THE TOWNSHIP OF BERNARDS in the COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS, THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS	:	CIVIL ACTION COMPLAINT IN LIEU OF PREROGATIVE WRIT

Plaintiff, THE HILLS DEVELOPMENT COMPANY (hereinafter referred to as "HILLS"), a joint venture general partnership existing under the laws of the State of New Jersey with principal offices at 3 Burnt Mill Road, Pluckemin, New Jersey, by way of complaint against the defendants, says:

FIRST COUNT

THE PLAINTIFF

1. HILLS is a joint venture general partnership existing under the laws of the State of New Jersey and is the owner in fee simple of approximately 1,046 contiguous acres of land of which approximately 500 acres are located within the Raritan Watershed and approximately 545 acres are located in the Passaic Watershed, all in Bernards Township, Somerset County, New Jersey.

2. HILLS is the successor in title to the Allan-Deane Corporation, which on March 17, 1980 obtained a Final Judgment in an action entitled The Allan-Deane Corporation v. Township of Bernards et als., Superior Court of New Jersey, Docket No. L-24645-75 P.W., a copy of which is attached hereto as Exhibit A.

THE DEFENDANTS

3. Defendant, THE TOWNSHIP OF BERNARDS in the County of Somerset (hereinafter referred to as "BERNARDS TOWNSHIP"), is a municipal corporation organized and existing under the laws of the State of New Jersey.

4. Defendant, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS (hereinafter referred to as "Township Committee") is the duly constituted governing body of BERNARDS TOWNSHIP which enacted all of the ordinances hereinbelow complained of, including the LAND DEVELOPMENT ORDINANCE of THE TOWNSHIP OF BERNARDS and all amendments thereto (hereinafter referred to as "LAND DEVELOPMENT ORDINANCE" or "ORDINANCE"), the ordinances creating defendants PLANNING BOARD OF THE TOWNSHIP OF BERNARDS (hereinafter "PLANNING BOARD") and SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS (hereinafter "SEWERAGE AUTHORITY") and pursuant to said ordinances makes appointments to the PLANNING BOARD and SEWERAGE AUTHORITY.

5. THE PLANNING BOARD was created by the TOWNSHIP COMMITTEE pursuant to N.J.S.A. 40:55D-23 et seq. and adopted the TOWNSHIP OF BERNARDS MASTER PLAN (hereinafter "MASTER PLAN") pursuant to N.J.S.A. 40:55D-28.

6. Defendant SEWERAGE AUTHORITY was duly created by the TOWNSHIP COMMITTEE pursuant to the Sewerage Authorities Law, N.J.S.A. 40:14A-1 et seq..

REGIONAL SETTING

7. BERNARDS TOWNSHIP is located in a housing region which includes at least portions of Hunterdon, Somerset, Middlesex and Union Counties and is within the Middlesex, Somerset, Hunterdon Primary Metropolitan Statistical Area as defined by the United States Census Bureau.

8. BERNARDS TOWNSHIP is located in the portion of Somerset County which is part of the growth corridor paralleling the Interstate Highway system on the State Development Guide Plan.

9. The nearby municipalities of Bridgewater, Warren, and Bedminster Townships, (within Somerset County), and many municipalities in Morris County have undergone substantial development and growth including much office, industrial, and commercial facilities.

GROWTH AND DEVELOPMENT OF BERNARDS TOWNSHIP

10. The State Development Guide Plan recognizes the appropriateness of future growth and development in BERNARDS TOWNSHIP by designating most of the TOWNSHIP as a growth area.

11. As recognized in the MASTER PLAN, substantial growth pressures began to affect the Township following the construction of Interstate Highways I-287 and I-78.

12. In addition to the excellent state highway system expected to be completed in the near future, the New Jersey Transit Rail Service provides commuter service to the New York Metropolitan area and has two stations in BERNARDS at Lyons and Basking Ridge.

13. Substantial sewage treatment capacity is available to BERNARDS TOWNSHIP in the TOWNSHIP's 2.5 million gallon per day (mgd) treatment plant.

14. A portion of BERNARDS township (and the HILLS' property) is within the franchise area of Environmental Disposal Corporation, a public utility which has or will have substantial sewage treatment capacity.

15. Substantial water supplies are available to BERNARDS TOWNSHIP through the Commonwealth Water Company.

16. According to the MASTER PLAN, BERNARDS TOWNSHIP'S median housing price in 1980 was $120,200, nearly double the State's median of $61,400 and substantially higher than the Somerset County average of $ 77,800.

17. BERNARDS TOWNSHIP currently has 2,554 acres of land in public, quasi-public and open space uses, which includes a golf course and Lord Sterling Park within its borders.

BERNARDS TOWNSHIP LAND USE CONTROLS

18. Land use control is exercised in BERNARDS TOWNSHIP by virtue of the administration and enforcement of the LAND DEVELOPMENT ORDINANCE of BERNARDS TOWNSHIP and the MASTER PLAN.

19. According the the BERNARDS TOWNSHIP MASTER PLAN, "the keynote to Bernards Township current housing policies, as expressed in its land development ordinance is 'flexibility': allowing developers to respond to markets and to site constraints, minimizing land development costs, and providing

opportunities for greater variety in the types of housing constructed within the Township."

20. The BERNARDS TOWNSHIP MASTER PLAN alleges that the LAND DEVELOPMENT ORDINANCE eliminates unnessary restrictions within the development process.

21. Although the BERNARDS TOWNSHIP MASTER PLAN alleges that it is conceivable that as many as 5800 multi-family housing units could be built in the undeveloped portions of Bernards Township, it does not suggest that any of these units will be affordable to low and moderate income households.

22. The BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE fails to provide any realistic opportunity for the production of the TOWNSHIP'S fair share of low and moderate income housing because undeveloped land in the TOWNSHIP is predominantly zoned for single family homes at low gross densities of between two acres per dwelling unit and one-half acre per dwelling unit.

23. The BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE fails to provide any realistic opportunity for the production of the TOWNSHIP's fair share of low and moderate income housing through the residential cluster option since the cluster option permits the development of single family homes at the same gross densities as the "as of right" zoning and at net densities ranging between .33 and 1.33 dwelling units per acre.

24. The BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE fails to provide any realistic opportunity for the production of the TOWNSHIP's fair share of low and moderate income housing through the Planned Residential Development (PRD) option, and in fact, merely creates the illusion of a higher density multi-family option because:

a. PRD-1, permitted in the R-2 and R-4 zones, has a 600 dwelling unit limit which has already been reached.

b. The PRD-2, PRD-3 and PRD-4 options which are permitted in the R-5 zone, R-3 zone and R-8 zone, respectively, permit the development of some multifamily housing within developments at very low gross densities and subject to high open space requirements.

25. The BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE fails to provide any realistic opportunity for the production of the TOWNSHIP's fair share of low and moderate income housing because the ORDINANCE is replete with cost-generating provisions which are not related to public health and safety standards.

26. The following cost generative standards illustrate the nature of the cost-generative LAND DEVELOPMENT ORDINANCE provisions which make it difficult, if not impossible, for builders to supply, in a cost-effective manner, low and moderate income housing on vacant land in BERNARDS TOWNSHIP:

a. All standards listed in the Second Count as violative of the Municipal Land Use Law since they force developers to choose between complying with an illegal requirement and litigation over the requirement;

b. All standards listed in the Third Count as impermissibly vague and indefinite since they force a developer to redo designs and engineering when a standard takes on an unexpected meaning:

c. Development application and associated fees, which bear no relationship to the TOWNSHIP's costs in reviewing applications for development;

d. Street standards, including the requirements for at least a 50 foot right-of-way on all public streets;

e. Standards applicable to the PRD option including minimum tract sizes, the 600 unit limit in the PRD-1 zone, the required mix of single family and multifamily units, gross and net densities and open space requirements;

f. The prohibition against tree removal which effectively requires a tree survey prior to approval;

g. The requirement that package treatment plants be provided in areas where public sewers are intended to be installed but are not yet available, coupled with the requirement that such package treatments plants must be discontinued when the public system is available;

h. Excessive buffer requirements;

i. The requirement for pedestrian and bicycle circulation paths separated from motor vehicle circulation paths;

j. The eight (8) dwelling units per building limit on multi-family buildings;

k. The prohibition against building heights greater than two and one-half stories;

l. The excessive detail required for preliminary plan submissions including, detailed engineering reports, descriptions of architectural treatment of buildings and aesthetic and socio-economic impact analyses.

LACK OF AFFIRMATIVE INCLUSIONARY MEASURES

27. BERNARDS TOWNSHIP has failed to implement effective affirmative measures to afford a realistic opportunity for the construction of lower income housing, including at least the following affirmative measures:

a. Requiring developers to set aside a portion of their development for lower income housing;

b. Providing effective zoning incentives for the production of lower income housing;

c. Zoning vacant land for mobile home development;

d. Adopting a resolution of need for lower income housing;

e. Adopting a resolution granting tax abatement for projects including governmentally subsidized lower income housing.

HILLS' QUALIFICATION FOR A BUILDER'S REMEDY

28. The New Jersey Supreme Court held in Mount Laurel II that a successful developer-litigant is entitled to a builder's remedy for a proposed project providing a substantial amount of lower income housing unless the municipality establishes that the proposed development is contrary to sound planning principles or represents a substantial environmental hazard.

29. The allegations stated in this Count demonstrate the facial invalidity of BERNARDS TOWNSHIP'S LAND DEVELOPMENT ORDINANCE under Mount Laurel II.

30. HILLS has requested that the PLANNING BOARD amend its MASTER PLAN to comply with the Mount Laurel II mandate and THE PLANNING BOARD has refused or failed to so amend the MASTER PLAN.

31. HILLS has requested that the TOWNSHIP COMMITTEE amend its LAND DEVELOPMENT ORDINANCE to comply with the Mount Laurel II mandate and the TOWNSHIP COMMITTEE has refused or failed to so amend the ORDINANCE.

32. The HILLS property generally has no substantial development constraints, has adequate road access and is near two major interstate highways.

33. HILLS can arrange for the provision of adequate sewage treatment and public water supply to serve the needs of its proposed development.

34. HILLS, pursuant to the attached certification, has committed to providing a substantial amount of the housing in its development as presented to the Planning Board by way of concept plan forwarded by letter dated April 10, 1984, as housing which will be affordable to lower income families.

35. Development of the HILLS' property as a planned development at an overall gross density of 10 dwelling units per acre in the Raritan Watershed and 6 units per acre in the western portion of the Passaic Watershed, including lower income housing, would contribute to the alleviation of the housing shortage in the housing region which includes BERNARDS TOWNSHIP and would enable persons who cannot presently afford to buy or rent housing in BERNARDS TOWNSHIP to live there.

36. Housing can be constructed on HILLS' property in an environmentally responsible manner and in price ranges affordable to a variety of people who might desire to live there, including those of lower income, if BERNARDS TOWNSHIP by its land use regulations, made such development reasonably possible.

WHEREFORE, HILLS demands judgment as follows:

1. Declaring the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE invalid in its entirety;

2. Appointing a special master to revise the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE and to supervise the TOWNSHIP with respect to the implementation of any builder's remedy in order to insure prompt and bona-fide review by defendants of all applications by HILLS for development approvals;

3. Ordering the revision of the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE in order to bring it into compliance with the MOUNT LAUREL II mandate;

4. Ordering a builder's remedy for HILLS in the form of court approval of a Concept Plan application to be submitted by HILLS conditioned upon the provision of a substantial amount of dwelling units as housing affordable to lower income people;

5. Ordering that all development applications for development which includes a substantial amount of lower income housing be "fast tracked", that is, approved within shorter time periods than provided for in the Municipal Land Use Law and that Environmental Impact Assessments or Statements and Community Impact Assessments or Fiscal Impact Reports not be required for such developments;

6. Ordering that all fees, including but not limited to application fees, inspection fees, engineering fees, building permit and certificate of occupancy fees be waived for a sufficient and appropriate amount of housing within developments which include a substantial amount of lower income housing;

7. Ordering that only performance and maintenance guarantees essential to protect public health and safety be required for on-tract or off-tract improvements associated with developments which include a substantial amount of lower income housing;

8. Ordering that mobile homes and midrise apartment units be permitted in any development which includes a substantial amount of lower income housing;

9. Ordering BERNARDS to plan and provide for, out of municipal tax revenues, reimbursement to developers for the construction of sewer, water,

roads, other utilities and open space facilities required for developments which include a substantial amount of lower income housing;

10. Ordering BERNARDS to accept all open space, recreational facilities, roads and other infrastructure which may be dedicated in connection with development which includes a substantial amount of lower income housing;

11. Ordering BERNARDS to pay for the costs of a nonprofit entity to:

a. Subsidize land, site improvement, construction and financing costs for lower income housing, particularly Mount Laurel II housing;

b. apply for all available governmental subsidies for lower income housing; and

c. screen applications for and sponsor and maintain lower income housing, particularly Mount Laurel II housing in BERNARDS TOWNSHIP.

12. Ordering BERNARDS to adopt a resolution of need and grant tax abatement where necessary;

13. Restraining Defendant PLANNING BOARD from approving any application for development of land in BERNARDS TOWNSHIP until a final judgment is entered which finds that BERNARDS TOWNSHIP has met its fair share of regional housing needs;

14. Ordering Defendant BERNARDS TOWNSHIP to pay HILLS' counsel fees and costs of suit; and

15. Granting HILLS such further relief as the Court deems just and proper.

SECOND COUNT

1. HILLS repeats the allegations of the First Count and incorporates them as if set forth herein at length.

VIOLATIONS BY BERNARDS TOWNSHIP OF THE MUNICIPAL LAND USE LAW

2. For at least the following reasons set forth in the remainder of this Count, the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE is invalid as contrary to the general welfare and in violation of the New Jersey Constitution and the Municipal Land Use Law, N.J.S.A. 40:55D-1 et. seq.

3. The provisions of the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE which violate the Municipal Land Use Law are unduly cost-generative and thus bar the provision of lower income housing because they require a developer to choose between compliance with an illegal standard or litigation over such standard.

4. The TOWNSHIP COMMITTEE revised and adopted the current LAND DEVELOPMENT ORDINANCE on May 13, 1982.

5. The PLANNING BOARD adopted the current MASTER PLAN on December 13, 1982.

6. The failure of the TOWNSHIP COMMITTEE to readopt the LAND DEVELOPMENT ORDINANCE after the new MASTER PLAN was adopted in December of 1982 violates N.J.S.A. 40:55D-62 and effectively invalidates the entire ORDINANCE.

7. The ORDINANCE provision delegating substantial decision-making authority to the Technical Coordinating Committee violates N.J.S.A. 40:55D-20.

8. The ORDINANCE provision containing conditional use standards violates N.J.S.A 40:55D-67;

9. The ORDINANCE standards governing modifications of design standards violates N.J.S.A. 40:55D-51.

10.. The ORDINANCE fails to require the PLANNING BOARD to make required findings of fact for residential cluster development in violation of N.J.S.A. 40:55D-45;

11. The ORDINANCE requires a developer to enter into a "Developer's Agreement" with the TOWNSHIP which allows the TOWNSHIP COMMITTEE to retain approval over development in violation of N.J.S.A 40:55D-37a and 40:55D-76b which grant the Planning Board and Board of Adjustment site plan and subdivision approval powers, and N.J.S.A. 40:55D-20, which vests such powers exclusively in those Boards.

12. Ordinance No. 655 which was enacted on November 1, 1982 governs assessments for off-tract improvements and violates the Municipal Land Use Law in at least the following manner:

a. ORDINANCE No. 655 mandates contributions for off-tract improvements without regard to whether or not such improvements are "reasonable and necessary" , "necessitated or required by construction or improvements within such development", and without any determination that such improvements bear any rational nexus to the impact of the specific development on the community's infrastructure, in violation of N.J.S.A. 40:55D-42;

b. ORDINANCE No. 655 requires the developer to execute a contract or " Developer's Agreement" with the TOWNSHIP as a condition of approval, thereby forcing a waiver of rights provided by the Municipal Land Use Law, including the right provided by N.J.S.A. 40:55D-42 to make payment under protest so as to preserve rights for later judicial determination as to the fairness and reasonableness of the fees;

c. ORDINANCE No. 655 provides that the off-tract improvement fee charged to a developer can be raised after preliminary approval to reflect "current construction costs", despite the provisions of N.J.S.A. 40:55D-42 to the contrary;

d. ORDINANCE No. 655 sets forth a determination of the costs for improvements thoughout the municipality without regard to the rights of a developer to prove whether or not any specific improvement has any benefit to or impact on the specific development, in violation of N.J.S.A. 40:55D-42.

e. Ordinance No. 655 requires payments towards traffic improvements, such as the rehabilitation of two railroad stations, an off-street commuter parking facility and County roads and bridges, not authorized by N.J.S.A 40:55D-42.

WHEREFORE, HILLS demands judgment as follows:

1. Declaring the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE invalid in its entirety;

2. Appointing a special master to revise the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE and to supervise the TOWNSHIP with respect to the implementation of any builder's remedy in order to insure prompt and bona-fide review by defendants of all applications by HILLS for development approvals;

3. Ordering the revision of the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE in order to bring it into compliance with the MOUNT LAUREL II mandate;

4. Ordering a builder's remedy for HILLS in the form of court approval of a Concept Plan application to be submitted by HILLS conditioned upon the provision of a substantial amount of dwelling units as housing affordable to lower income people;

5. Ordering that all development applications for development which includes a substantial amount of lower income housing be "fast tracked", that is, approved within shorter time periods than provided for in the Municipal

Land Use Law and that Environmental Impact Assessments or Statements and Community Impact Assessments or Fiscal Impact Reports not be required for such development;

6. Ordering that all fees, including but not limited to application fees, inspection fees, engineering fees, building permit and certificate of occupancy fees be waived for a sufficient and appropriate amount of housing within developments which include a substantial amount of lower income housing;

7. Ordering that only performance and maintenance guarantees essential to protect public health and safety be required for on-tract or off-tract improvements associated with developments which include a substantial amount of lower income housing;

8. Ordering that mobile homes and midrise apartment units be permitted in any development which includes a substantial amount of lower income housing;

9. Ordering BERNARDS to plan and provide for, out of municipal tax revenues, reimbursement to developers for the construction of sewer, water, roads, other utilities and open space facilities required for developments which include a substantial amount of lower income housing;

10. Ordering BERNARDS to accept all open space, recreational facilities, roads and other infrastructure which may be dedicated in connection with development which includes a substantial amount of lower income housing;

11. Ordering BERNARDS to pay for the costs of a nonprofit entity to:

a. Subsidize land, site improvement, construction and financing costs for lower income housing, particularly Mount Laurel II housing;

b. apply for all available governmental subsidies for lower income housing; and

c. screen applications for and sponsor and maintain lower income housing, particularly Mount Laurel II housing in BERNARDS TOWNSHIP.

12. Ordering BERNARDS to adopt a resolution of need and grant tax abatement where necessary;

13. Restraining Defendant PLANNING BOARD from approving any application for development of land in BERNARDS TOWNSHIP until a final judgment is entered which finds that BERNARDS TOWNSHIP has met its fair share of regional housing needs;

14. Ordering Defendant BERNARDS TOWNSHIP to pay HILLS' counsel fees and costs of suit; and

15. Granting HILLS such further relief as the Court deems just and proper.

THIRD COUNT

1. HILLS repeats the allegations of the First and Second Counts and incorporates them as if set forth herein at length.

2. For at least the reasons set forth in the remainder of this Count, the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE is impermissibly vague and indefinite.

3. The provisions of the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE which are impermissibly vague and indefinite are unduly-cost generative and thus bar the provision of low and moderate income housing because they force developers to redo costly site designs and engineering when an ambiguous standard takes on a new meaning through PLANNING BOARD interpretation.

4. The following sections of the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE grant excessive and unlimited discretion to either the TOWNSHIP engineer or defendant PLANNING BOARD and are illustrative of provisions which fail to set forth adequate standards to guide these township officials in the exercise of discretion:

a. Street type definitions;

b. Business type definitions, such as the limitation that a business be "designed and intended to serve the need of residents in the immediate vicinity";

c. The requirement that "monotonous repetition of elements shall be avoided;

d. The requirement that multi-family units within a Planned Residential Development be "attractive";

e. a general prohibition against development which would create "impractical, unsafe or unsatisfactory conditions...";

f. a requirement that any proposed conditional use " will conform as much as possible to surrounding buildings and to such other development as permitted by right within the zone";

g. a requirement that the Board consider, for residential cluster, whether or not the design furthers " the amenities of light and air, recreation and visual enjoyment."

h. The provision which allows the Board to grant modifications from design standards at the Board's discretion;

WHEREFORE, HILLS demands judgment as follows:

1. Declaring the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE invalid in its entirety; Da 63a

2. Appointing a special master to revise the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE and to supervise the TOWNSHIP with respect to the implementation of any builder's remedy in order to insure prompt and bona-fide review by defendants of all applications by HILLS for development approvals;

3. Ordering the revision of the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE in order to bring it into compliance with the MOUNT LAUREL II mandate;

4. Ordering a builder's remedy for HILLS in the form of court approval of a Concept Plan application to be submitted by HILLS conditioned upon the provision of a substantial amount of dwelling units as housing affordable to lower income people;

5. Ordering that all development applications for development which includes a substantial amount of lower income housing be "fast tracked", that is, approved within shorter time periods than provided for in the Municipal Land Use Law and that Environmental Impact Assessments or Statements and Community Impact Assessments or Fiscal Impact Reports not be required for such developments;

6. Ordering that all fees, including but not limited to application fees, inspection fees, engineering fees, building permit and certificate of occupancy fees be waived for a sufficient and appropriate amount of housing within developments which include a substantial amount of lower income housing;

7. Ordering that only performance and maintenance guarantees essential to protect public health and safety be required for on-tract or off-tract improvements associated with developments which include a substantial amount of lower income housing;

8. Ordering that mobile homes and midrise apartment units be permitted in any development which includes a substantial amount of lower income housing;

9. Ordering BERNARDS to plan and provide for, out of municipal tax revenues, reimbursement to developers for the construction of sewer, water, roads, other utilities and open space facilities required for developments which include a substantial amount of lower income housing;

10. Ordering BERNARDS to accept all open space, recreational facilities, roads and other infrastructure which may be dedicated in connection with development which includes a substantial amount of lower income housing;

11. Ordering BERNARDS to pay for the costs of a nonprofit entity to:

a. Subsidize land, site improvement, construction and financing costs for lower income housing, particularly Mount Laurel II housing;

b. apply for all available governmental subsidies for lower income housing; and

c. screen applications for and sponsor and maintain lower income housing, particularly Mount Laurel II housing in BERNARDS TOWNSHIP.

12. Ordering BERNARDS to adopt a resolution of need and grant tax abatement where necessary;

13. Restraining Defendant PLANNING BOARD from approving any application for development of land in BERNARDS TOWNSHIP until a final judgment is entered which finds that BERNARDS TOWNSHIP has met its fair share of regional housing needs;

14. Ordering Defendant BERNARDS TOWNSHIP to pay HILLS' counsel fees and costs of suit; and

15. Granting HILLS such further relief as the Court deems just and proper.

FOURTH COUNT

1. HILLS repeats the allegations of the First through Third Counts and incorporates them as if set forth herein.

2. The HILLS property includes substantial property within a growth area designated on the State Development Guide Plan.

3. The HILLS property has excellent access via the Interstate Highway system.

4. The HILLS property is bounded by Somerville, Liberty Corner, Mount Prospect and Layton Roads, and such roadways provide an adequate circulation network to serve the proposed development.

5. The HILLS has made arrangements with Environmental Disposal Corp., a public utility with a franchise area which includes a portion of the HILLS property, to provide adequate sewage service to permit development of its property as proposed herein, and can make contractual arrangments for an adequate water supply to serve such development.

6. The BERNARDS LAND DEVELOPMENT ORDINANCE currently zones the HILLS property for R-8 development with a PRD-4 option in the Raritan Watershed, and for R-3 development with a PRD-3 option in the Passaic Watershed.

7. The current zoning of the HILLS property would permit 1,275 dwelling units and 50,000 sq. ft. of commercial uses on 1,046 acres at a gross density of approximately 1.2 units per acre.

Da 66a

8. The densities permitted on the HILLS property do not reflect the high environmental suitability of the property and the availability of sewer, water and road infrastructure to serve high density development.

9. The classification of the HILLS property for R-3 and R-8 uses violates the requirement of N.J.S.A. 40:55D-62a that the zoning ordinance be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses in order to encourage the most appropriate use of land.

10. The restrictions imposed upon the HILLS property by virtue of the R-3 and R-8 zoning are arbitrary, capricious, unreasonable and are not justified by the natural features of the property, its location with respect to existing sewer, water, road and other facilities, its Master Plan and State Development Guide Plan designation.

12. The classification of the HILLS property for relatively low intensity uses is arbitrary and unreasonable since it bears no reasonable relation to the public health, safety and welfare of the present and future residents of the TOWNSHIP.

13. For the reasons set forth hereinabove, the zoning ordinance designation of the HILLS' property violates the Municipal Land Use Law and constitutes an unnecessary and excessive restriction on the use of property, thus depriving HILLS of its property without due process of law and said designation is therefore unconstitutional and null and void.

WHEREFORE, Hills demands judgment as follows:

1. Declaring the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE invalid in its entirety;

2. Appointing a special master to revise the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE and to supervise the

TOWNSHIP with respect to the implementation of any builder's remedy in order to insure prompt and bona-fide review by defendants of all applications by HILLS for development approvals;

3. Ordering the revision of the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE in order to bring it into compliance with the MOUNT LAUREL II mandate;

4. Ordering a builder's remedy for HILLS in the form of court approval of a Concept Plan application to be submitted by HILLS conditioned upon the provision of a substantial amount of dwelling units as housing affordable to lower income people;

5. Ordering that all development applications for development which includes a substantial amount of lower income housing be "fast tracked", that is, approved within shorter time periods than provided for in the Municipal Land Use Law and that Environmental Impact Assessments or Statements and Community Impact Assessments or Fiscal Impact Reports not be required for such developments;

6. Ordering that all fees, including but not limited to application fees, inspection fees, engineering fees, building permit and certificate of occupancy fees be waived for a sufficient and appropriate amount of housing within developments which include a substantial amount of lower income housing;

7. Ordering that only performance and maintenance guarantees essential to protect public health and safety be required for on-tract or off-tract improvements associated with developments which include a substantial amount of lower income housing;

8. Ordering that mobile homes and midrise apartment units be permitted in any development which includes a substantial amount of lower income housing;

9. Ordering BERNARDS to plan and provide for, out of municipal tax revenues, reimbursement to developers for the construction of sewer, water, roads, other utilities and open space facilities required for developments which include a substantial amount of lower income housing;

10. Ordering BERNARDS to accept all open space, recreational facilities, roads and other infrastructure which may be dedicated in connection with development which includes a substantial amount of lower income housing;

11. Ordering BERNARDS to pay for the costs of a nonprofit entity to:

a. Subsidize land, site improvement, construction and financing costs for lower income housing, particularly Mount Laurel II housing;

b. apply for all available governmental subsidies for lower income housing; and

c. screen applications for and sponsor and maintain lower income housing, particularly Mount Laurel II housing in BERNARDS TOWNSHIP.

12. Ordering BERNARDS to adopt a resolution of need and grant tax abatement where necessary;

13. Restraining Defendant PLANNING BOARD from approving any application for development of land in BERNARDS TOWNSHIP until a final judgment is entered which finds that BERNARDS TOWNSHIP has met its fair share of regional housing needs;

14. Ordering Defendant BERNARDS TOWNSHIP to pay HILLS' counsel fees and costs of suit; and

15. Granting HILLS such further relief as the Court deems just and proper.

Da 69a

FIFTH COUNT

1. Hills repeats the allegations of the First through Fourth Counts and incorporates them as if set forth herein.

2. Following litigation with THE TOWNSHIP OF BERNARDS captioned as The Allan-Deane Corporation v. The Township of Bernards and docketed L-25645-P.W., a FINAL JUDGMENT was entered by the Law Division of Superior Court on March 17, 1980 which required re-zoning of the HILLS property to permit 1,275 units of mixed housing types and 50,000 square feet of commercial uses.

3. The March 17, 1980 FINAL JUDGMENT ordered BERNARDS to adopt specific provisions with respect to the HILLS property within 90 days, including the following:

a. Allow the 1002 housing units to be constructed on the Raritan Basin to be sewered through a sewer plant to be located in Bedminster;

b. Permit the clustering of a variety of types of housing units under flexible performance standards;

c. Contain no floor area ratios (F.A.R) limitations or coverage requirements nor attempt to regulate maximum net densities, lot areas or bedroom mixes in the residential areas;

d. Be designed to insure road and public facilities of durable quality at minimum cost;

e. Allow public roads at a grade of up to 8% and shall require pavement widths of no more than 30 feet for collector roads and 24 feet for other public roads;

f. Allow private roads;

g. Permit alternate methods of drainage such as swales and natural drainage courses which meet the Township's performance criteria;

h. Comply with the Municipal Land Use Law;

i. Not be unduly cost generating or be inconsistent with any provision of this Order.

4. The March 17, 1980 FINAL JUDGMENT dismissed the action "without prejudice to Allan-Deane's right to later challenge any existing or later adopted Land Use Ordinance which is inconsistent with the terms of this Order or the letter agreement of February 1, 1980" and required the TOWNSHIP to comply with the terms of the Order and letter agreement.

5. The Allan-Deane Corp. objected on numerous occasions to specific provisions of Ordinance drafts during the period in which the ordinance was being prepared as well as after it was introduced and adopted.

6. Prior to adoption of the Ordinance, numerous memoranda were submitted by representatives of Allan-Deane to BERNARDS TOWNSHIP which stated that the proposed Ordinance contained numerous provisions which were contrary to the Final Judgment.

7. The LAND DEVELOPMENT ORDINANCE adopted on June 2, 1980 contained many of the provisions objected to by Allan-Deane as violating the FINAL JUDGMENT.

8. Amendments to the LAND DEVELOPMENT ORDINANCE. adopted on October 7, 1980, were responsive to only a few of Allan-Deane objections, and BERNARDS was so advised by letter of November 13, 1980 which letter reserved to Allan-Deane the right to challenge the ORDINANCE at any time in order to bring it into conformance with the FINAL JUDGMENT.

9. The PLANNING BOARD violated the FINAL JUDGMENT by requiring road widths greater than twenty-four feet on the HILLS property in a subdivision approval memorialized on October 8, 1981.

10. On December 14, 1982, the HILLS filed a prerogative writ action entitled The Hills Development Company v. The Mayor and Township Committee of Bernards Township and docketed L-021602-82 which action challenged an ordinance amendment adopted November 1, 1982 governing assessments for off-tract improvements.

11. On January 25, 1984 a consent judgment was entered in the HILLS action cited above, which judgment dismissed the action without prejudice to HILLS' right to reinstate the challenge to any off-tract improvement requirement in the event that "any attempt is made to impose such an obligation upon any portion of the lands owned by the Hills Development Company in Bernards Township without benefit of authorizing ordinance provisions".

12. On January 24, 1984, the PLANNING BOARD advised HILLS' counsel that it intended to require HILLS to provide some percentage of its housing to lower income households without a density increase or other ordinance revision.

13. The BERNARDS LAND DEVELOPMENT ORDINANCE and off-tract amendments regarding improvement assessments were adopted with knowledge of the fact that numerous provisions violated the Final Judgment, and the PLANNING BOARD's action in adopting approval conditions in violation of the FINAL JUDGMENT further indicates the TOWNSHIP's willful disregard of judicial orders.

WHEREFORE, HILLS demands judgment as follows:

1. Declaring the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE invalid in its entirety;

2. Appointing a special master to revise the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE and to supervise the TOWNSHIP with respect to the implementation of any builder's remedy in order to insure prompt and bona-fide review by defendants of all applications by HILLS for development approvals;

3. Ordering the revision of the BERNARDS TOWNSHIP LAND DEVELOPMENT ORDINANCE in order to bring it into compliance with the MOUNT LAUREL II mandate and the March 17, 1980 Final Judgment;

4. Ordering a builder's remedy for HILLS in the form of court approval of a Concept Plan application to be submitted by HILLS conditioned upon the provision of a substantial amount of dwelling units as housing affordable to lower income people;

5. Ordering that all development applications for development which includes a substantial amount of lower income housing be "fast tracked", that is, approved within shorter time periods than provided for in the Municipal Land Use Law and that Environmental Impact Assessments or Statements and Community Impact Assessments or Fiscal Impact Reports not be required for such developments;

6. Ordering that all fees, including but not limited to application fees, inspection fees, engineering fees, building permit and certificate of occupancy fees be waived for a sufficient and appropriate amount of housing within developments which include a substantial amount of lower income housing;

7. Ordering that only performance and maintenance guarantees essential to protect public health and safety be required for on-tract or off-tract improvements associated with developments which include a substantial amount of lower income housing;

8. Ordering that mobile homes and midrise apartment units be permitted in any development which includes a substantial amount of lower income housing;

9. Ordering BERNARDS to plan and provide for, out of municipal tax revenues, reimbursement to developers for the construction of sewer, water, roads, other utilities and open space facilities required for developments which include a substantial amount of lower income housing;

10. Ordering BERNARDS to accept all open space, recreational facilities, roads and other infrastructure which may be dedicated in connection with development which includes a substantial amount of lower income housing;

11. Ordering BERNARDS to pay for the costs of a nonprofit entity to:

a. Subsidize land, site improvement, construction and financing costs for lower income housing, particularly Mount Laurel II housing;

b. apply for all available governmental subsidies for lower income housing; and

c. screen applications for and sponsor and maintain lower income housing, particularly Mount Laurel II housing in BERNARDS TOWNSHIP.

12. Ordering BERNARDS to adopt a resolution of need and grant tax abatement where necessary;

13. Restraining Defendant PLANNING BOARD from approving any application for development of land in BERNARDS TOWNSHIP until a final judgment is entered which finds that BERNARDS TOWNSHIP has met its fair share of regional housing needs;

14. Ordering that BERNARDS waive all requirements of Ordinance 655 as they apply to any developer providing substantial amounts of housing for persons of low and moderate income.

15. Ordering Defendant BERNARDS TOWNSHIP to pay HILLS' counsel fees and costs of suit; and

16. Granting HILLS such further relief as the Court deems just and proper.

SIXTH COUNT

1. HILLS repeats the allegations of the First through Fifth Counts and incorporates them as if set forth herein.

2. A portion of The HILLS property is within the Passaic Basin and served by the BERNARDS TOWNSHIP SEWERAGE AUTHORITY.

3. Environmental Disposal Corporation, a public utility which provides sewer service for HILLS in the Raritan Basin, applied to the BERNARDS TOWNSHIP SEWERAGE AUTHORITY for permission to extend its franchise to serve the Passaic Basin on February 14, 1984.

4. The BERNARDS TOWNSHIP SEWERAGE AUTHORITY in violation of the Open Public Meeting Act, N.J.S.A. 10:4-6 et seq., held closed sessions on March 6, 1984 and again on March 22, 1984 to consider the application of Environmental Disposal Corporation to provide limited sewage and septic management services to HILLS property in the Passaic watershed.

5. The BERNARDS TOWNSHIP SEWERAGE AUTHORITY refused to grant the franchise extension (to serve HILLS) to Environmental Disposal Corporation on April 13, 1984.

6. The BERNARDS TOWNSHIP SEWERAGE AUTHORITY is controlled by the TOWNSHIP COMMITTEE by virtue of the appointment of members of the TOWNSHIP COMMITTEE to the AUTHORITY.

7. The actions of the SEWERAGE AUTHORITY in deliberating in closed session and denying Environmenta' Disposal Corp. a sewer franchise extension to serve HILLS were taken in furtherance of a civil conspiracy with the TOWNSHIP COMMITTEE to prevent the use of the HILLS property for high density residential development, including lower income housing.

WHEREFORE, HILLS demands judgment as follows:

1. Invalidating the SEWERAGE AUTHORITY's action in denying Environmental Disposal Corp. a franchise extension to serve HILLS;

2. Ordering the SEWERAGE AUTHORITY to grant the franchise extension requested by the Environmental Disposal Corp;

3. Ordering the SEWERAGE AUTHORITY to turn over the minutes and any tape recording or transcript of its March 6, 1984 and March 22, 1984 meetings to HILLS:

4. Ordering defendant SEWERAGE AUTHORITY to pays HILLS' Counsel fees and costs of suit;

5. Granting HILLS such further relief as the Court deems just and proper.

BRENER, WALLACK & HILL
Attorneys for Plaintiff

By: _____
Henry A. Hill

CERTIFICATION IN SUPPORT OF BUILDER'S REMEDY

1. I am President of Hills Development Company and submit this certification in support of the Complaint in Lieu of Prerogative Writ to be filed by Hills Development Company against the Township of Bernards and other defendants.

2. I have read the Complaint to be filed by Hills Development Company and have been advised by legal counsel of the requirement pursuant to the Mount Laurel II case that a developer commit to providing a substantial amount of lower income housing in his proposed project in order to qualify for a Court ordered builder's remedy.

3. Hills Development Company hereby commits to providing a substantial amount of lower income housing and said commitment is accurately set forth in the First Count of its Complaint against the Township of Bernards.

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

John H. Kerwin, President
Hills Development Company

DATED: May 7, 1984

EXHIBIT A

MASON, GRIFFIN & PIERSON
201 NASSAU STREET
PRINCETON N J 08540
(609 921-6543
ATTORNEYS FOR Plaintiff, The Allan-Deane Corporation

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NO. L-25647-P.W.

THE ALLAN-DEANE CORPORATION, a Delaware Corporation qualified to do business in the State of New Jersey,	)	
Plaintiff,	)	Civil Action
vs.	)	FINAL JUDGMENT
THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, et al.,	)	
Defendant.	)	

This matter having come before the Court by way of an action in lieu of prerogative writ, instituted by Plaintiff-Landowner in 1976 to attack the Land Use Ordinances of Defendant-Municipality on the grounds that they were exclusionary and that the then-zoning of Plaintiff's property was arbitrary and

capricious, and the Court having heard the testimony of the Plaintiff's and Defendant's consultants with regard to the substantial revisions of the Land Use Ordinances in Bernards enacted since the institution of this litigation and proposed to be enacted, and having concluded as follows:

1. Since the institution of this litigation, Bernards Township has substantially revised those sections of its Zoning Ordinance regulating residential densities so as to make affirmatively possible a substantial quantity of multi-family housing.

2. Bernards Township is now affirmatively providing for its fair share of the regional housing need for least cost housing.

3. Defendant-Municipality and Planning Board have authorized their attorneys to represent to the Court that the Township is now in the process of revising its Master Plan and is now prepared to rezone those portions of the Township, including the Allan-Deane property which are located within a zoning district where the only uses now permitted are single-family detached dwellings on three-acre lots of a regulated configuration, so as to permit planned unit developments with flexible standards, at a gross density of up to .5 dwelling units per acre in the Passaic Watershed and gross density of 2 dwelling units per acre in the Raritan

Watershed. These proposed revisions are consistent with the regional planning for the area, reasonably balance the land use goal of maintaining low gross residential densities in the area with the municipal obligation to allow landowners an economically feasible use, and will provide for a greater variety and choice of housing for all income groups.

4. The flexibility of the Township's proposed revisions, moreover, is reasonable because:

a. Low density use of land is achieved without imposition of arbitrary lot size requirements.

b. Clustering makes possible low density housing at minimum public improvement costs and thus removes the cost generating features normally associated with low density.

c. By being able to cluster on their best land, developers have an economic incentive not to attempt development on land least suitable for development.

d. The opportunities for extensive amounts of open spaces are provided, thus preserving most of the natural landscape.

5. Plaintiff, Allan-Deane Corporation, owns approximately 1,040 acres in Bernards Township, of which approximately 500 acres are located in the Raritan

Watershed on the border of Bedminster Township and 54[illegible] acres are located in the Passaic Watershed.

It is on this 17th day of March, 1980, ORDERED as follows:

1.(a) The Township of Bernards shall revise its Land Use Ordinances within ninety (90) days of the date hereof so as to permit 1,275 units of mixed housing types and 50,000 square feet of commercial uses on the Allan-Deane property in Bernards Township which shall be allocated as follows and as set forth in the letter agreement dated February 1, 1980 attached hereto;

1. In the Raritan Watershed (501 acres x 2 dwelling units per acre) - 1002 units of housing.

2. In the Passaic Watershed (545 acres x .5 dwelling units per acre) - 273 units of housing.

3. The number of units permitted to be constructed in each watershed and the total number of units to be constructed on land presently owned by the Allan-Deane Corporation shall not be increased or decreased due to any later engineering determination which may change the total acreage or the acreage within either watershed.

(b) The Township of Bernards shall update or revise its Master Plan to reflect the changes in its development regulations resulting from the implementation of this Order and the letter agreement dated February 1, 1980 within twelve (12) months of the date hereof.

2. The Land Use Ordinances regulating development on the Allan-Deane property shall:

a. Allow the 1002 housing units to be constructed on the Raritan Basin to be sewered through a sewer plant to be located in Bedminster.

b. Permit the clustering of a variety of types of housing units under flexible performance standards.

c. Contain no floor area ratios (F.A.R.) limitations or coverage requirements nor attempt to regulate maximum net densities, lot areas or bedroom mixes in the residential areas.

d. Be designed to insure road and public facilities of durable quality at minimum cost.

e. Allow public roads at a grade of up to 9% and shall require pavement widths of no more than 30 feet for collector roads and 24 feet for other public roads.

f. Allow private roads.

g. Permit alternate methods of drainage such as swales and natural drainage courses which meet the Township's performance criteria.

h. Comply with the Municipal Land Use Law.

i. Not be unduly cost generating or be inconsistent with any provision of this Order.

3. Notwithstanding any other provision in this Order, the Township may require that up to 35% of the total units constructed by Allan-Deane shall be single-family and/or two-family attached units.

4. The Health Ordinances for Bernards Township shall be amended by the Board of Health in order to permit the construction within the Township of all systems approved by the State and the Township shall support alternative onsite sewage disposal technology.

5. The Allan-Deane Corporation shall be required, as a condition of final site plan approval, to deed to Bernards Township a park site of approximately 100 acres, within the Passaic [illegible], the boundaries of which shall be determined during the site plan application process. Allan-Deane shall also be required, as a condition for site plan approval, to provide the Township with a school site of approximately 20 acres. None of the above acreage to be deeded to the Township shall be at the expense of the Township nor shall they reduce the number of units of development permitted under the terms of this Order. Such donated acreage may be included by Allan-Deane in the computation of open space.

6. This action is dismissed, upon the stipulation of the parties, without prejudice to Allan-Deane's right to later challenge any existing or later adopted Land Use Ordinance which

is inconsistent with the terms of this Order or the letter agreement of February 1, 1980 attached hereto and Plaintiff and Defendant, The Township of Bernards, are directed to comply with the terms of this Order and the letter agreement of February 1, 1980.

B. Thomas Leahy, J.S.C.

We hereby consent to the form and entry of the within Order.

For The Allan-Deane Corporation

MASON, GRIFFIN & PIERSON

By: _____
Henry A. Hill, Jr.

HANNOCH, WEISMAN, STERN & BESSER

By: _____
Dean A. Gaver

For The Township of Bernards, The Township Committee of The Township of Bernards, The Planning Board of the Township of Bernards

McCARTER & ENGLISH

By: _____
Alfred L. Ferguson

FARRELL, CURRIE, CARLIN & DAVIDSON

By: _____
James E. Davidson

I hereby consent to the form of the within Order.

For the Somerset County Planning Board

_____
John F. Richardson

Answer to Complaint
Filed June 5, 1985

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
Post Office Box 145
Morristown, New Jersey 07960
(201) 267-8130
Attorneys for Defendants, Township of Bernards, Township Committee of the Township of Bernards and the Sewerage Authority of the Township of Bernards

THE HILLS DEVELOPMENT COMPANY, Plaintiff, -vs- THE TOWNSHIP OF BERNARDS in the COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS, THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET/OCEAN COUNTIES Docket No. L-030039-84 P.W. Civil Action ANSWER TO COMPLAINT AND FIRST AMENDED COMPLAINT AND COUNTERCLAIM

Defendants, the Township of Bernards in the County of Somerset, the Township Committee of the Township of Bernards and the Sewerage Authority in the Township of Bernards, by way of Answer to the Complaint and First Amended Complaint in Lieu of Prerogative Writ filed in the within matter, say:

AS TO THE FIRST COUNT

1. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained

in paragraph 1 of the First Count of the Complaint except defendants admit that the records of the Township of Bernards indicate that Hills Development Company owns certain real estate located in the Township of Bernards.

2. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 2 of the First Count of the Complaint except defendants admit that Hills is the successor in title to the Allan-Deane Corporation and that a final Judgment dated March 17, 1980 was entered in an action entitled The Allan-Deane Corp. v. Township of Bernards, et als., Superior Court of New Jersey, Docket No. L-24645-75 P.W. Defendants state further that the copy of said Judgment attached to the Complaint served on these Defendants is incomplete, in that it omits a letter agreement of February 1, 1980, which was attached to and incorporated as part of said Judgment.

3. The Defendants admit the allegations contained in paragraph 3 of the First Count of the Complaint.

4. The Defendants admit the allegations contained in paragraph 4 of the First Count of the Complaint.

5. The Defendants admit the allegations contained in paragraph 5 of the First Count of the Complaint.

6. The Defendants admit the allegations contained in paragraph 6 of the First Count of the Complaint.

7. The Defendants admit that the Township of Bernards is located in Somerset County and is in a region which may include portions of Hunterdon, Somerset, Middlesex and Union Counties for some purposes, but have insufficient knowledge to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 7 of the First Count of the Complaint.

8. The Defendants deny each and every allegation contained in paragraph 8 of the First Count of the Complaint except Defendants admit that part of the lands located in the Township of Bernards are shown as being in the "Growth Area" on the State Development Guide Plan.

9. In answer to paragraph 9 of the First Count of the Complaint, Defendants admit that nearby municipalities of Bridgewater, Warren and Bedminister Townships (within Somerset County) and many municipalities in Morris County have undergone development and growth but have insufficient knowledge to form a belief as to the truth or falsity of the remaining allegations contained therein.

10. The Defendants deny each and every allegation contained in paragraph 10 of the First Count of the Complaint except Defendants admit that part of the lands located in the Township of Bernards are shown as being in the "Growth Area" on the State Development Guide Plan.

11. In answer to paragraph 11 of the First Count of the

Complaint, Defendants admit that some growth pressures have affected the Township following the construction of interstate highways I-287 and I-78 and that the present Master Plan of Bernards Township speaks for itself, but deny each and every remaining allegation thereof.

12. In answer to paragraph 12 of the First Count of the Complaint, Defendants admit that commuter rail service is provided to the New York metropolitan area and that two stations are located in the Township of Bernards, but deny each and every remaining allegation thereof.

13. The Defendants deny each and every allegation contained in paragraph 13 of the First Count of the Complaint except that Defendants admit that an expanded sewerage treatment plant with an expected capacity of 2.5 m.g.d. is scheduled to be completed within the near future.

14. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 14 of the First Count of the Complaint except Defendants admit that a portion of Bernards Township is within the franchise area of Environmental Disposal Corporation.

15. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 15 of the First Count of the Complaint except Defendants admit that Bernards Township, or part of it, is serviced by the Commonwealth Water Company.

16. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 16 of the First Count of the Complaint except that Defendants admit that the Master Plan speaks for itself.

17. The Defendants admit the allegations contained in paragraph 17 of the First Count of the Complaint.

18. The Defendants admit the allegations contained in paragraph 18 of the First Count of the Complaint.

19. The Defendants admit the allegations contained in paragraph 19 of the First Count of the Complaint and refer to the Master Plan for a complete statement of its provisions.

20. The Defendants admit the allegations contained in paragraph 20 of the First Count of the Complaint and refer to the Master Plan for a complete statement of its provisions.

21. Defendants deny each and every allegation contained in paragraph 21 of the First Count of the Complaint, except Defendants admit that the present Master Plan of Bernards Township speaks for itself.

22. The Defendants deny each and every allegation contained in paragraph 22 of the First Count of the Complaint.

23. The Defendants deny each and every allegation contained in paragraph 23 of the First Count of the Complaint.

24. The Defendants deny each and every allegation contained in paragraph 24 of the First Count of the Complaint.

25. The Defendants deny each and every allegation contained in paragraph 25 of the First Count of the Complaint.

26. The Defendants deny each and every allegation contained in paragraph 26 of the First Count of the Complaint.

27. The Defendants deny each and every allegation contained in paragraph 27 of the First Count of the Complaint.

28. The Defendants make no answer to paragraph 28 of the First Count of the Complaint because the same sets forth a conclusion of law.

29. The Defendants deny each and every allegation contained in paragraph 29 of the First Count of the Complaint.

30. In answer to paragraph 30 of the First Count of the Complaint, Defendants admit receipt of a letter on behalf of Plaintiff directed to the Planning Board dated April 10, 1984 together with enclosures all of which speak for themselves. The Defendants deny the remaining allegations set forth therein.

31. In answer to paragraph 31 of the First Count of the Complaint, Defendants admit receipt of a letter on behalf of Plaintiff directed to the Planning Board dated April 10, 1984 together with enclosures all of which speak for themselves. The Defendants deny the remaining allegations set forth therein.

32. The Defendants deny each and every allegation contained in paragraph 32 of the First Count of the Complaint.

33. The Defendants have insufficient knowledge to form a

belief as to the truth or falsity of the allegations contained in paragraph 33 of the First Count of the Complaint.

34. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 34 of the First Count of the Complaint.

35. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 35 of the First Count of the Complaint.

36. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 36 of the First Count of the Complaint.

AS TO THE SECOND COUNT

37. The Defendants repeat their answers to the allegations of the First Count in answer to the allegations contained in paragraph 1 of the Second Count of the Complaint as if set forth at length herein.

38. The Defendants deny each and every allegation contained in paragraph 2 of the Second Count of the Complaint.

39. The Defendants deny each and every allegation contained in paragraph 3 of the Second Count of the Complaint.

40. The Defendants admit the allegations contained in paragraph 4 of the Second Count of the Complaint.

41. The Defendants admit the allegations contained in paragraph 5 of the Second Count of the Complaint.

42. The Defendants deny each and every allegation contained in paragraph 6 of the Second Count of the Complaint.

43. The Defendants deny each and every allegation contained in paragraph 7 of the Second Count of the Complaint.

44. The Defendants deny each and every allegation contained in paragraph 8 of the Second Count of the Complaint.

45. The Defendants deny each and every allegation contained in paragraph 9 of the Second Count of the Complaint.

46. The Defendants deny each and every allegation contained in paragraph 10 of the Second Count of the Complaint.

47. The Defendants deny each and every allegation contained in paragraph 11 of the Second Count of the Complaint.

48. The Defendants deny each and every allegation contained in paragraph 12 of the Second Count of the Complaint and states that Ordinance #655 has been repealed.

AS TO THE THIRD COUNT

49. The Defendants repeat their answers to the allegations of the First and Second Counts in answer to the allegations contained in paragraph 1 of the Third Count of the Complaint as if set forth at length herein.

50. The Defendants deny each and every allegation contained in paragraph 2 of the Third Count of the Complaint.

51. The Defendants deny each and every allegation contained in paragraph 3 of the Third Count of the Complaint.

52. The Defendants deny each and every allegation contained in paragraph 4 of the Third Count of the Complaint.

AS TO THE FOURTH COUNT

53. The Defendants repeat their answers to the allegations of the First, Second and Third Counts in answer to the allegations contained in paragraph 1 of the Fourth Count of the Complaint as if set forth at length herein.

54. The Defendants deny each and every allegation contained in paragraph 2 of the Fourth Count of the Complaint except the Defendants admit that some of Plaintiff's property may be within the growth area designated on the State Development Guide Plan.

55. The Defendants deny each and every allegation contained in paragraph 3 of the Fourth Count of the Complaint.

56. The Defendants deny each and every allegation contained in paragraph 4 of the Fourth Count of the Complaint except that Defendants admit that the Hills property is contiguous to the roadways stated.

57. The Defendants have insufficient knowledge to form a

belief as to the truth or falsity of the allegations contained in paragraph 5 of the Fourth Count of the Complaint.

58. The Defendants admit the allegations contained in paragraph 6 of the Fourth Count of the Complaint.

59. The Defendants admit the allegations contained in paragraph 7 of the Fourth Count of the Complaint.

60. The Defendants deny each and every allegation contained in paragraph 8 of the Fourth Count of the Complaint and state that the Plaintiff (by and through its predecessor in title) consented to the zoning now complained of as the same was set forth in the Final Judgment between the parties dated March 17, 1980 in the matter entitled The Allan-Deane Corp. v. Township of Bernards, et als., Superior Court of New Jersey, Docket No. L-24645-75P.W.

61. The Defendants deny each and every allegation contained in paragraph 9 of the Fourth Count of the Complaint and state that the Plaintiff (by and through its predecessor in title) consented to the zoning now complained of as the same was set forth in the Final Judgment between the parties dated March 17, 1980 in the matter entitled The Allan-Deane Corp. v. Township of Bernards, et als., Superior Court of New Jersey, Docket No. L-24645-75P.W.

62. The Defendants deny each and every allegation contained in paragraph 10 of the Fourth Count of the Complaint

and state that the Plaintiff (by and through its predecessor in title) consented to the zoning now complained of as the same was set forth in the Final Judgment between the parties dated March 17, 1980 in the matter entitled The Allan-Deane Corp. v. Township of Bernards, et als., Superior Court of New Jersey, Docket No. L-24645-75P.W.

63. [The Fourth Count of the Complaint contains no paragraph 11.]

64. The Defendants deny each and every allegation contained in paragraph 12 of the Fourth Count of the Complaint and state that the Plaintiff (by and through its predecessor in title) consented to the zoning now complained of as the same was set forth in the Final Judgment between the parties dated March 17, 1980 in the matter entitled The Allan-Deane Corp. v. Township of Bernards, et als., Superior Court of New Jersey, Docket No. L-24645-75P.W.

65. The Defendants deny each and every allegation contained in paragraph 13 of the Fourth Count of the Complaint and state that the Plaintiff (by and through its predecessor in title) consented to the zoning now complained of as the same was set forth in the Final Judgment between the parties dated March 17, 1980 in the matter entitled The Allan-Deane Corp. v. Township of Bernards, et als., Superior Court of New Jersey, Docket No. L-24645-75P.W.

AS TO THE FIFTH COUNT

66. The Defendants repeat their answers to the allegations of the First, Second, Third and Fourth Counts in answer to the allegations contained in paragraph 1 of the Fifth Count of the Complaint as if set forth at length herein.

67. The Defendants admit the allegations contained in paragraph 2 of the Fifth Count of the Complaint, and state further that Plaintiff (by and through its predecessor in title) consented to the form and entry of said Final Judgment.

68. The Defendants admit the allegations contained in paragraph 3 of the Fifth Count of the Complaint.

69. The Defendants admit the allegations contained in paragraph 4 of the Fifth Count of the Complaint.

70. The Defendants deny each and every allegation contained in paragraph 5 of the Fifth Count of the Complaint except the Defendants admit that Allan-Deane Corp., or its representatives, indicated that they objected to some provisions of the proposed ordinance.

71. The Defendants deny each and every allegation contained in paragraph 6 of the Fifth Count of the Complaint except Defendants admit that Allan-Deane Corp., or its representatives, stated in writing that the proposed ordinance was contrary to the final Judgment.

72. The Defendants have insufficient knowledge to form a

belief as to the truth or falsity of the allegations contained in paragraph 7 of the Fifth Count of the Complaint.

73. In answer to paragraph 8 of the Fifth Count of the Complaint, Defendants state that an amendment to the Township's Land Development Ordinance adopted October 7, 1980 and Plaintiff's letter of November 13, 1980 speak for themselves, and deny the remaining allegations set forth therein.

74. The Defendants deny each and every allegation contained in paragraph 9 of the Fifth Count of the Complaint.

75. The Defendants admit the allegations contained in paragraph 10 of the Fifth Count of the Complaint.

76. The Defendants admit the allegations contained in paragraph 11 of the Fifth Count of the Complaint and state that the Judgment referred to speaks for itself.

77. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 12 of the Fifth Count of the Complaint.

78. The Defendants deny each and every allegation contained in paragraph 13 of the Fifth Count of the Complaint.

AS TO THE SIXTH COUNT

79. The Defendants repeat their answers to the allegations of the First, Second, Third, Fourth and Fifth Counts in answer to the allegations contained in paragraph 1 of the Sixth Count

of the Complaint as if set forth at length herein.

80. The Defendants admit the allegations contained in paragraph 2 of the Sixth Count of the Complaint.

81. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 3 of the Sixth Count of the Complaint except that Defendants admit that Environmental Disposal Corporation forwarded a letter to the Bernards Township Sewerage Authority requesting permission to extend its franchise to serve the Passaic Basin on February 14, 1984.

82. The Defendants deny each and every allegation contained in paragraph 4 of the Sixth Count of the Complaint.

83. The Defendants deny each and every allegation contained in paragraph 5 of the Sixth Count of the Complaint except Defendants admit that the Bernards Township Sewerage Authority did not extend the Environmental Disposal Corporation franchise.

84. The Defendants deny each and every allegation contained in paragraph 6 of the Sixth Count of the Complaint.

85. The Defendants deny each and every allegation contained in paragraph 7 of the Sixth Count of the Complaint.

AS TO THE SEVENTH COUNT

86. As to the Seventh Count, set forth in the First Amended Complaint in Lieu of Prerogative Writ, the Defendants repeat their answers to the allegations of the First, Second, Third, Fourth, Fifth and Sixth Counts of the Complaint in answer to the allegations contained in paragraph 1 of the Seventh Count of the First Amended Complaint as if set forth at length herein.

87. The Defendants deny each and every allegation contained in paragraph 2 of the Seventh Count of the First Amended Complaint except the Defendants admit that four members of the Bernards Township Sewerage Authority are also members of the Township Committee of the Township of Bernards.

88. The Defendants admit the allegations contained in paragraph 3 of the Seventh Count of the First Amended Complaint.

89. The Defendants admit the allegations contained in paragraph 4 of the Seventh Count of the First Amended Complaint.

90. The Defendants deny each and every allegation contained in paragraph 5 of the Seventh Count of the First Amended Complaint except the Defendants admit that the Bernards Township Sewerage Authority was granted the sole franchise for the entire Township of Bernards in 1961 by the Township

Committee of the Township of Bernards, and the Environmental Disposal Corporation was granted a franchise for the area of the Township of Bernards located in the Raritan River Basin with the consent of the Bernards Township Sewerage Authority and the Board of Public Utilities.

91. The Defendants admit the allegations contained in paragraph 6 of the Seventh Count of the First Amended Complaint.

92. The Defendants admit the allegations contained in paragraph 7 of the Seventh Count of the First Amended Complaint.

93. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 8 of the Seventh Count of the First Amended Complaint.

94. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 9 of the Seventh Count of the First Amended Complaint.

95. The Defendants deny each and every allegation contained in paragraph 10 of the Seventh Count of the First Amended Complaint and further state that the Environmental Impact Statement for the Upper Passaic Watershed Area speaks for itself.

96. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 11 of the Seventh Count of the First Amended Complaint.

97. The Defendants deny each and every allegation contained in paragraph 12 of the Seventh Count of the First Amended Complaint.

98. The Defendants deny each and every allegation contained in paragraph 13 of the Seventh Count of the First Amended Complaint.

99. The Defendants deny each and every allegation contained in paragraph 14 of the Seventh Count of the First Amended Complaint.

100. The Defendants deny each and every allegation contained in paragraph 15 of the Seventh Count of the First Amended Complaint.

101. The Defendants deny each and every allegation contained in paragraph 16 of the Seventh Count of the First Amended Complaint except Defendants admits that some areas of the Passaic Watershed are environmentally sensitive and cannot sustain high-density development.

102. The Defendants deny each and every allegation contained in paragraph 17 of the Seventh Count of the First Amended Complaint.

103. The Defendants deny each and every allegation contained in paragraph 18 of the Seventh Count of the First Amended Complaint.

104. The Defendants have insufficient knowledge to form a belief as to the truth or falsity of the allegations contained in paragraph 19 of the Seventh Count of the First Amended Complaint.

FIRST SEPARATE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE

Plaintiff lacks standing to bring this action.

THIRD SEPARATE DEFENSE

Plaintiff is not entitled to a builder's remedy, density bonus, appointment of a master or other relief requested in the Complaint.

FOURTH SEPARATE DEFENSE

Plaintiff is guilty of laches and this Complaint is, therefore, barred.

FIFTH SEPARATE DEFENSE

Defendants Township of Bernards and Township Committee of the Township of Bernards have been and are in the continuing process of complying with its obligations under the Municipal Land Use Law and Mt. Laurel II in accordance with the intent and purposes thereof.

SIXTH SEPARATE DEFENSE

By virtue of the Final Judgment of March 17, 1980, in the matter entitled The Allan-Deane Corp. v. Township of Bernards, et als., Superior Court of New Jersey, Docket No. L-24645-75 P.W., and the findings recited therein, and by virtue of the consent of Plaintiff (by and through its predecessor in title) to the form and entry of said Final Judgment, Plaintiff's rights, if any, to seek an increase in the permissible densities for residential development of Plaintiff's property, to challenge the zoning of its property as allegedly arbitrary, capricious, unreasonable, and unjustified, to challenge the uses and intensity of uses permitted upon its property, and otherwise to challenge the Land Use Ordinance and the Master Plan of the Township of Bernards are:

(a) barred by waiver;

(b) barred by estoppel;

(c) barred by res judicata; and

(d) barred by collateral estoppel.

COUNTER-CLAIM

By way of Counter-Claim against Plaintiff, The Hills Development Company, the Defendants, Township of Bernards, Township Committee of the Township of Bernards and the Sewerage Authority of the Township of Bernards, say:

1. As alleged in paragraph 2 of the First Count of the Complaint, Plaintiff is the successor in title to the Allen Deane Corporation, who was a party to an action entitled The Allan-Deane Corp. v. Township of Bernards, et als., Superior Court of New Jersey, Docket No. L-24645-75P.W.

2. The Complaint in that action alleged, among other things, that the Defendants had failed to provide for housing under Mt. Laurel I and that in order to provide for such housing Plaintiff needed, among other things, an increase in the density for the tract of land which is the subject matter of this suit.

3. The purpose of such suit as alleged therein by the Plaintiff and as further represented to the other parties and the Court was, to obtain a realistic opportunity for the production of low and moderate income housing as described in Mt. Laurel I and thereafter least-cost housing as described in a case entitled Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977).

4. As indicated in the Final Judgment in the Allan-Deane Corp. action (entered more than four (4) years ago on March 17,

1980), the tract of land in question owned by the Plaintiff in that case (the same tract as is in issue in this action) had been zoned (prior to the 1980 action) to permit one dwelling unit for every three acres. That zoning would produce approximately 300 dwelling units on the tract of land in question.

5. As a result of the Judgment in that action, Plaintiff was permitted a substantial density increase so as to make it possible and feasible to construct a substantial quantity of a variety of housing so that Bernards Township could affirmatively provide for its fair share of the regional housing need for least-cost housing. Such Judgment provided for gross densities up to 0.5 dwelling units per acre in the Passaic River Basin and 2 dwelling units per acre in the Raritan River Basin which more than tripled the amount of housing permitted on the property in question.

6. Notwithstanding this increase in zoning density and other provisions of the revised Zoning Ordinance which were enacted to permit flexibility and least-cost housing, the Plaintiff and its successor in interest (Plaintiff in this suit) have failed to apply for or provide any least-cost housing or any other housing which helps provide for either low and moderate housing or least-cost housing.

WHEREFORE, Defendants demand judgment as follows:

1. Vacating the Final Judgment in the action entitled The Allan-Deane Corp. v. Township of Bernards, et als., Superior Court of New Jersey, Docket No. L-24645-75P.W.

2. Dismissing the present action.

3. Declaring that the Township of Bernards may zone the land in question in accordance with the laws so made and provided in the State of New Jersey free and clear of any obligation set forth in the aforesaid Final Judgment in the action entitled The Allan-Deane Corp. v. Township of Bernards, et als., Superior Court of New Jersey, Docket No. L-24645-75P.W.

FARRELL, CURTIS, CARLIN & DAVIDSON

By: _____
James E. Davidson, Esq.
Attorneys for Defendants, the Township of Bernards in the County of Somerset, the Township Committee of the Township of Bernards and the Sewerage Authority of the Township of Bernards.

CERTIFICATION

We hereby certify that copies of the within Answer have been served upon the Plaintiff's attorney within the time period allowed by the Rules of Court.

FARRELL, CURTIS, CARLIN & DAVIDSON

DATE: June 4, 1984 By: _____
James E. Davidson, Esq.

An Ordinance of the Township of Bernards Amending the Land Use Ordinance - Ordinance #704

Bernards Twp.

ORDINANCE #704

AN ORDINANCE OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS AMENDING THE LAND USE ORDINANCE OF THE TOWNSHIP OF BERNARDS

BE IT ORDAINED by the Township Committee of the Township of Bernards in the County of Somerset and State of New Jersey that

WHEREAS, the Supreme Court of New Jersey, in the case known as Mount Laurel II, has announced a rule of law requiring that every municipality in New Jersey must provide a realistic opportunity for the construction of its fair share of a regional need for low and moderate income housing; and

WHEREAS, litigation is pending against the Township of Bernards in which it is alleged that the present Land Development Ordinance of the Township of Bernards fails to comply with the mandates of Mount Laurel II, and

WHEREAS, through prior enactments the Township of Bernards has provided density bonuses to developers and has otherwise provided a realistic opportunity for the construction of low and moderate income housing, and

WHEREAS, it is found to be in the best interests of the Township of Bernards to amend its Land Development Ordinance so as to further ensure the actual construction and availability of a fair share of low and moderate income housing in the Township of Bernards

NOW THEREFORE, BE IT ORDAINED that the Land Development Ordinance of the Township of Bernards be amended as follows

1. There is added to said Land Development Ordinance a new Article 1100, as set forth in Appendix A to this amendatory Ordinance

2. Section 202, Definitions, is amended in the following manner:

(A) Inserting, after Subsection 122, Lot Width, the following new subsections:

122.A Lower Income Household: A household meeting the income eligibility limits for a household designated as low and very low contained in H.U.D. Section 8 Rental Assistant Program Income by Family Size for the appropriate housing region for various size households, or other generally accepted state or federal agency standards

122.B Lower Income Housing: Those dwelling units which are affordable to purchase or rent by a lower income household using not more than 28 percent of the family income for sales housing and 30 percent for rental housing.

(B) Inserting, after Subsection 180, Retail Sales and Service, the following new Subsection:

180.A Reviewing Body: The Planning Board, except where otherwise required by N.J.S.A. 40:55 D-1 et seq.

3. Section 405, Conditional Uses, Subsection C, Specific Requirements, paragraph 6, Commercial Development — PRD-4 only, is amended by deleting paragraph f. and replacing the same with the following.

f. The maximum development shall be limited to 30,000 square feet of gross leasable floor area for the first 600 dwelling units of the PRD-4 and 1000 square feet of gross leasable floor area for each additional 20 dwelling units of the PRD-4 thereafter, not to exceed an overall total of 50,000 square feet of gross leasable floor area, and provided that the Board shall find that the intent of the proposed commercial uses, singularly and in combination, serve a local and not a regional market

4. Section 405, Conditional Uses, Subsection 10, Apartment within a single family residence, is amended in the following manner:

(A) Deleting paragraph a. in its entirety, and replacing the same with the following:

a. The number of apartments within a single-family residence shall be limited to one, and shall be located within the principal building or an out-building existing at the time of passage of this amendment.

(B) Deleting paragraph b. in its entirety

(C) Deleting paragraph e. in its entirety, and replacing the same with the following:

e. The exterior appearance of the principal structure shall not be substantially altered or its appearance as a single-family residence changed

f. The minimum size of apartments shall conform to FHA minimum unit size by bedroom count.

5. The Zoning Map of the Township of Bernards, Somerset County, New Jersey, dated June 2, 1980, and revised through December 14, 1982, Map 1 of 2, is hereby amended in the manner shown in the attached Appendix B to the amendatory ordinance, and the map attached as said Appendix B is hereby adopted and is declared to be part of the Land Development Ordinance of the Township of Bernards

BE IT FURTHER ORDAINED that if any part of this Ordinance is declared invalid, such invalid part shall not affect or invalidate the remainder of this Ordinance, PROVIDED, however, that in the event that any provision for a mandatory set-aside, as specified in Section 1110.A., is declared invalid all property owners to whom such provision was intended to apply shall nonetheless be required to include a reasonable number of lower income dwelling units as part of any development on such property

BE IT FURTHER ORDAINED that this Ordinance shall take effect immediately upon final passage and publication, provided, however, that the provisions of this Ordinance shall expire one year from its effective date, unless further extended by ordinance, unless on or before such expiration date a Mt. Laurel II judgment of repose is entered by the Law Division of the Superior Court of New Jersey with respect to the Land Development Ordinance of the Township of Bernards.

APPENDIX A

ARTICLE 1100 — REGULATIONS APPLICABLE TO THE R-5 AND R-8 ZONING DISTRICTS PROVIDE AND LOW AND MODERATE INCOME HOUSING

1101 Purpose

The purpose of this Article 1100 is to establish procedures for approving PRD developments in the R-5 and R-8 zoning districts in order to comply with the provisions of Mt. Laurel II. The regulations and controls contained in this Article shall be interpreted to assure the construction of lower income housing which meets the standards and guidelines set forth in Mt. Laurel II. Any provisions of any other ordinances or Articles in conflict with this Article 1100 and which imposes restrictions or limitations not related to health and safety shall be inapplicable to developments under this Article 1100

It is also the intent of this Article to provide a realistic opportunity for the construction of a variety of housing types and income levels in the Township, including housing for lower income households, and to encourage the development of such lower income housing, and other housing, by providing specific land use regulations addressing those needs. These regulations are designed to meet the mandate of Mt. Laurel II.

1102. Regulations Applicable to the R-5 and R-8 Zones as Part of the PRD-2 and PRD-4 Options

A. Application Procedure

1. Applicant shall submit required plans and documents to the Planning Board for review and approval. The Planning Board shall distribute the plans to those agencies required by law to review and/or approve development plans and to Township agencies which normally review development plans

2. The Planning Board shall hold a public hearing in accordance with N.J.S.A. 40:55D-46.1 on the application. The initial hearing shall be held not less than thirty (30) days nor more than forty-five (45) days from the date of submission of a complete application

3. Applicants with 10 or more acres may elect to submit a Concept Plan in accordance with Section 707 as part of a PRD application in any R-5 or R-8 zone. In the alternative, applicant may follow procedures for subdivision and site plan approval set forth elsewhere in this ordinance. Once a GDP is approved, applicant shall proceed as provided in this ordinance for subdivision and/or site plan approval

1103 Use Regulations.

A. Permitted Uses

1. Dwelling, One-Family
2. Townhouse
3. Dwelling, Two-Family
4. Dwelling, Multi-Family
5. Public parks, playgrounds, conservation areas, and municipal facilities
6. Common Open Space
7. Planned Development

B. Accessory Uses

1. Personal recreational facilities
2. Accessory buildings
3. Off-street parking and garages
4. Fences
5. Signs

C. Conditional Uses

1. Essential Services
2. Nursery schools
3. Private recreation uses with lights
4. Retail and service commercial under PRD-4 option in accordance with Section 405 requirements

1104. Minimum Tract Size and Gross Density

1. Minimum Tract Size. The minimum tract size for other than single or two-family development in either zone shall be 10 acres

2. The maximum number of dwelling units shall be as follows:

R-5; PRD-2: 5.5 dwelling units/acre on lands defined as Drylands in Article 200 and 1.0 dwelling unit per acre on lands defined as lowlands in Article 200, which is transferable pursuant to this ordinance and subject to a maximum of 6.5 dwelling units/acre of dry land

R-8; PRD-4: 5.5 dwelling units/acre, up to maximum of 2,750 dwelling units in the zone.

1105 Minimum Tract Setback

All development shall maintain a 50-foot minimum buffer to all exterior property lines. Said buffer shall be bermed or landscaped and remain unoccupied except for entrance roads or utilities. Buffers may include minimum yard

requirements for all single-family, two-family and townhouse development

1106. Schedule of Area, Bulk and Yard Requirements

Permitted Uses	Minimum Lot Area (sq. ft.)	Minimum Lot Width	Minimum Yards: Front	Side one/both	Rear	Maximum Building Coverage	Maximum Height
Dwelling, One-Family	5,000	50'	25'	10'/15'	25'	20%	35'
Townhouse	N/A	16'	25'	N/A	20'	60%	35'
Dwelling, Two-Family (horizontally separated)	6,000	60'	25'	10'/15'	25'	40%	35'
Dwelling, Two-Family (vertically separated)	3,000 unit	30'	25'	0/10'	25'	40%	35'
Dwelling, Multi-Family	N/A	N/A	N/A	N/A	N/A	35%	35'

1107. Distance Between Buildings

The minimum distance between townhouses and multi-family buildings shall be as follows:

A. Windowless wall to windowless wall	20 feet
B. Window wall to windowless wall	30 feet
C. Window wall to window wall	
Front to front	75 feet
Rear to rear	50 feet
End to end	30 feet
D. Any building face to right-of-way	25 feet
E. Any building face to collector street curb	40 feet
F. Any building face to arterial street curb	50 feet
G. Any building face to common parking area	12 feet

The Planning Board may reduce the above distances by not more than 20 percent if there is an angle of 20 degrees or more between buildings and if extensive landscaping and buffers, which provide necessary screening and shielding, are placed between buildings, and further provided that the reductions assist in meeting the objective of this Article and do not create any adverse negative impacts

1108. Minimum Off-Street Parking Requirements

1. Off-street parking shall be provided as follows.

Dwelling unit with one (1) bedroom or less: 1.5 spaces

Dwelling unit with two (2) bedrooms or more: 2.0 spaces

2. An additional ten (10) percent (of that computed in #1 above) off-street parking shall be provided for visitors.

3. All common off-street parking shall be located within 300 feet of the dwelling unit served.

1109. Minimum Floor Area for Dwelling Units

1 bedroom:	550 square feet
2 bedroom:	680 square feet
3 bedroom:	850 square feet

1110. Lower Income Housing Requirements

A. Number of Lower Income Dwelling Units Required

All developments on contiguous parcels of land totalling ten (10) acres or more as of 10/2/84 in the R-5 and R-8 zones shall be developed in accordance with the PRD requirements and shall be required to provide twenty (20) percent of all dwelling units to be affordable for lower income households, except as provided below:

1. A minimum of 15 percent moderate income housing only shall be required in developments which have received conceptual approval prior to July 1, 1984, and which have not received preliminary or final approval.

2. A minimum of 12 percent moderate income housing only shall be required in developments where the maximum sales price of any housing unit will not exceed $100,000 per unit (in 1983 dollars)

As used in this Section A, a parcel is considered "contiguous" even though it is traversed by one or more roadways, so long as the land on both sides of the roadway is in common ownership. Lands acquired after 10/2/84 may not be combined to form a new contiguous parcel and may not be added to, or considered a part of, a contiguous parcel which existed on or before that date.

B. Eligibility Standard

1. Except as provided above, one-half of all lower income units shall meet HUD Section 8, or other assisted housing programs, eligibility requirements for very low income and one-half shall meet HUD eligibility requirements for lower income.

2. Applicant may substitute alternate comparable standards (other than HUD) where appropriate and to the satisfaction of the Planning Board.

C. Housing Cost Component

In computing the eligibility of purchasers or renters for sales or rental housing, not more than 30 percent of family income may be used for rent and not more than 28 percent of family income may be used for purchase of sales housing. The following costs shall be included:

Rental Units: Gross Rent

Sales Unit: Principal and Interest

Insurance

Taxes

Condominium or homeowners association fees

D. Subsidies

Government subsidies may be used at the discretion of the applicant to fulfill the requirements of the section. The lack of said subsidies shall in no way alter or diminish the lower income requirements of this ordinance.

E. Sale and Resale and Rental of Lower Income Housing

1. All lower income dwelling units shall be required to have covenants running with the land to control the sale or resale price of units or to employ other legal mechanisms which shall be approved by the Planning Board Attorney and will, in his opinion, ensure that such housing will remain affordable to persons of lower income.

2. The owner of all rental units shall provide legal documentation to be approved by the Planning Board Attorney to assure that rental units will remain affordable to persons of lower income.

3. In the event no low or moderate income purchaser is found within 60 days from the day a unit is offered for sale or resale, the low income unit may be sold to a moderate income purchaser or, if none is available, to any interested purchaser, and the moderate income unit, to any interested purchaser at a price which meets the eligibility requirements as described above. Resale controls shall remain in effect for any subsequent resales.

4. The Township and the applicant may develop reasonable qualifications for occupants of lower income housing. Selection procedures shall be directed and administered by a Township official appointed each year as the Housing Administrator by the Township Committee. The Township Committee may arrange for third party administration of resale, and tenant selection of lower income housing.

5. The developer shall formulate and implement a written affirmative marketing plan acceptable to the Planning Board. The affirmative marketing plan shall be realistically designed to ensure that lower income persons of all races and ethnic groups are informed of the housing opportunities in the development, feel welcome or seek or buy or rent such housing, and have the opportunity to buy or rent such housing. It shall include advertising and other similar outreach activities.

6. Sales prices and rents may be increased in accordance with the annual Metropolitan New York Regional Consumer Price Index for Housing of the Department of Labor plus reimbursements for documented monetary outlays for reasonable improvements and reasonable costs incurred in selling the unit.

7. Rental units may be converted to condominium units after 15 years, but the sales price shall meet Mt. Laurel II guidelines and be priced to allow persons meeting low and moderate income eligibility standards to purchase such unit.

F. Phasing of Lower Income Housing

1. Lower income housing shall be phased in accordance with the following schedule:

Percentage of Total Dwelling Units	Minimum Percentage of Lower Income Dwelling Units
25	0
50	25
75	100
100	—

The above percentages shall refer to the percentage of total dwelling units having certificates of occupancy.

2. Any development int he R-5 and R-8 zoning districts for which a conceptual plan, subdivision, or site plan has been approved shall be considered a single development for purposes of this paragraph "F" regardless of whether parts or sections are sold or otherwise disposed of to persons or legal entities other than the one which received approval. All such approvals and conditions of approvals shall run with the land

G. Waiver of Fees

Notwithstanding any ordinance requirement of the Township of Bernards, the applicable approving agency shall waive the following fees for every unit designated as lower income housing in the R-5 zoning district:

1. Subdivision and site plan application fees,
2. Building permit fees, except State and third party fees;
3. Certificate of occupancy fees;
4. Pro-rated part of the engineering fees, applicable to lower income housing;
5. Off-tract improvement fees.

In addition, the applicable approving agency shall waive off-tract improvement fees for every unit designated as lower income housing in the R-8 zoning district

1111. Common Open Space Requirements

A. A minimum of twenty (20) percent of the land area of any development other than single or two-family housing and which may include environmentally restricted land, shall be designated for conservation, open space, recreation and/or other common open space.

B. All property owners and tenants shall have the right to use the common open space.

C. Common open space may be deeded to the Township, if accepted by the Governing Body, or to an open space organization or trust, or to a private non-profit organization charged with the provision of recreation activities for the residents of the development.

D. All common open space deeded to an open space organization, trust, or private organization, shall be owned and maintained as provided for in N.J.S.A. 40:55D-43.

1112. Engineering and Construction Design

A. Drainage

1. Where non-structural means of controlling surface runoff, such as swales, is feasible and adequate such non-structural means shall be considered.

2. The system shall be adequate to carry off the storm water and natural drainage water which originates not only within the lot or tract boundaries but also that which originates beyond the lot or tract boundaries at the time of development. No storm water runoff or natural drainage water shall be so diverted as to overload existing drainage systems or create flooding or the need for additional drainage structures on other private properties or public lands without proper and approved provisions being made for taking care of these conditions.

3. Techniques for computing water runoff shall be as indicated in Sections 511 and 613 of the Bernards Township Land Development Ordinance.

4. Where required by the Township and as indicated on an improved development plan, a drainage right-of-way easement shall be provided to the Township where a tract or lot is traversed by a system, channel or stream. The drainage right-of-way easement shall conform substantially with the lines of such watercourse and, in any event, shall meet any minimum widths and locations as shown on any official map and/or master plan.

B. Lighting

1. Street lighting shall be provided for all street intersections, parking areas, and anywhere else deemed necessary for safety reasons.

2. Any outdoor lighting such as building and sidewalk illumination, driveways with no adjacent parking, the lighting of signs, and ornamental lighting, shall be shown on the lighting plan in sufficient detail to allow a determination of the effects upon adjacent properties, roads, and traffic safety from glare, reflection, and overhead sky glow in order to recommend steps needed to minimize these impacts.

3. The maximum intensity of lighting permitted on roadways shall be as required in Section 612 of this Ordinance.

C. Sanitary Sewers

Where required and where a public or private treatment and collection system is provided, the developer shall design and construct such facilities in accordance with the N.J.D.E.P. permit requirements and in such a manner as to make adequate sewage treatment available to each lot and structure within the development from said treatment and collection system. If a public or private treatment and collection system is included as part of a development application, the developer shall install sewers, including connections to each home to be constructed.

D. Streets

1. All developments shall be served by paved streets in accordance with the approved subdivision and/or site plan, all such streets shall have adequate drainage.

2. Local streets shall be planned so as to discourage through traffic.

3. The minimum public street right-of-way and cartway and the minimum private street cartway shall be in accordance with the following schedule:

	R.O.W.	Cartway
a. Collector street (no parking on either side	50'	26'
b. Local street with parking on one side only	50'	26'
c. Local street with no on-street parking	40'	24'
d. Local street with on-street parking on both sides	50'	30'

4. Street design and construction standards shall be as required in Sections 509, 607, and 608 of this Ordinance except as noted below:

a. Cul-de-sacs shall be no more than 1,250 feet in length and shall provide access to no more than 80 dwelling units. A turnaround shall be provided at the end of the cul-de-sac with a paved turning radius of 40 feet and a R.O.W. radius in the case of public streets of 50 feet.

b. The pavement standard for all roads shall be a base course of four (4) inches of Bituminous Stabilized Base, Mix No. 1 placed on a compacted, unyielding subgrade, with a surface course of two (2) inches of Bituminous Concrete, type F.A.B.C. — 1, Mix #5 applied in accordance with State highway specifications. If sub-base material is unsatisfactory, four (4) inch stone, sub-base material may be required.

E. Water Supply

Where public water is available, adequate water service, in terms of adequacy of flow and pressure, shall be made available to each lot or building within the development. The system shall be designed and constructed in accordance with the requirements and standards of the agency or authority having water supply jurisdiction.

1113. Waivers

Notwithstanding any provisions set forth elsewhere in this Article, the Planning Board may waive any engineering and construction design requirements contained in this Article, in order to achieve the objectives of this Article, provided that the Planning Board shall be satisfied that such a waiver does not jeopardize the public health and safety, and the same is consistent with the intent and purpose of this ordinance.

Passed on first reading October 2, 1984

PUBLIC NOTICE

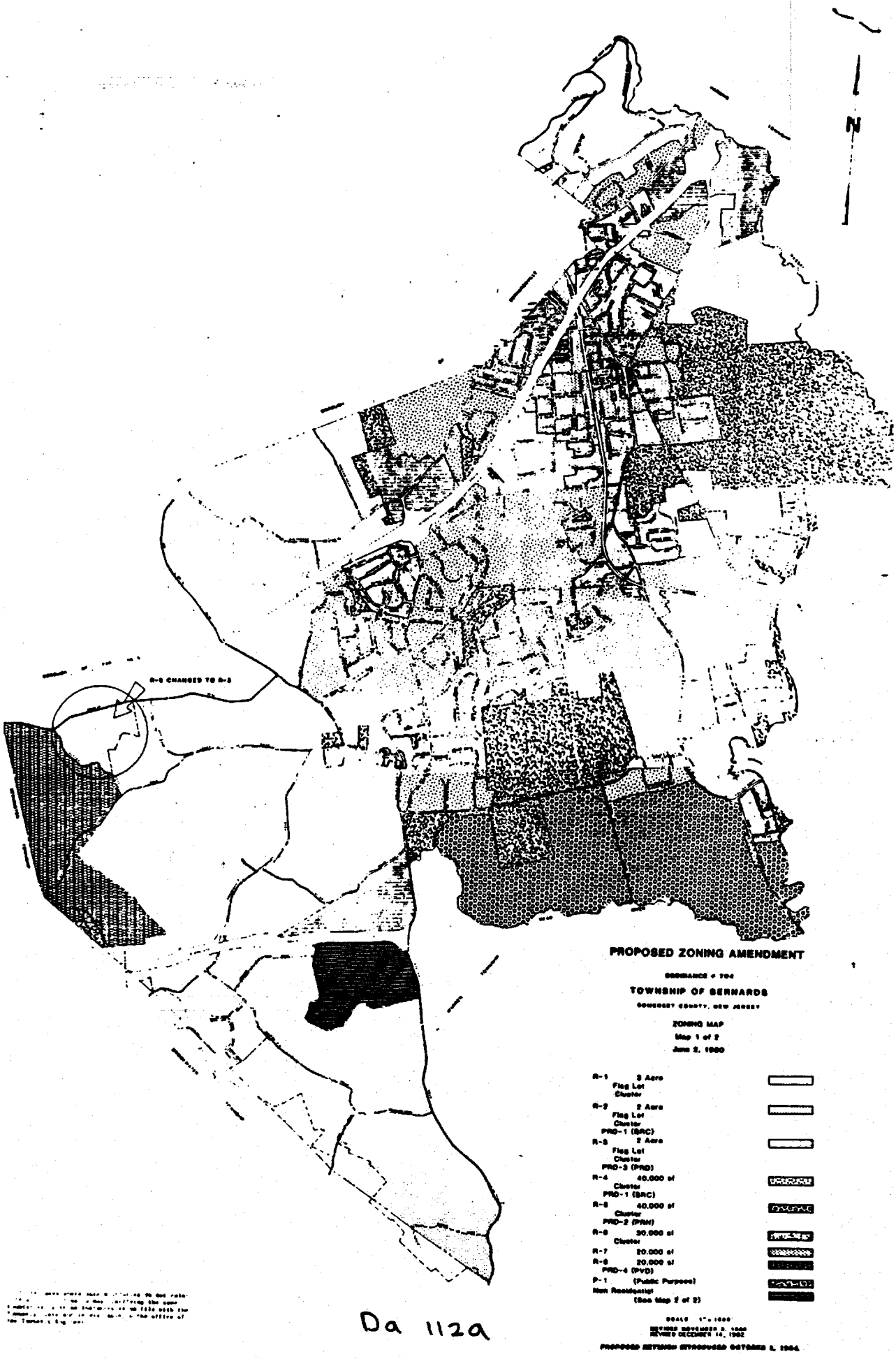
Notice is hereby given that the above ordinance was duly read and passed on final reading and adopted at a meeting of the Township Committee of the Township of Bernards in the County of Somerset, held on the 12th day of November one thousand nine hundred and eighty four.

Bernards Township Committee
William B. Wahl
Mayor

Attest:
James T. Hart
Township Clerk

11/22/T1

Da 111a


N
R-6 CHANGED TO R-5
PROPOSED ZONING AMENDMENT
ORDINANCE # 704
TOWNSHIP OF BERNARDS
SOMERSET COUNTY, NEW JERSEY
ZONING MAP
Map 1 of 2
June 2, 1980
R-1 3 Acre
Flag Lot
Cluster
R-2 2 Acre
Flag Lot
Cluster
PRD-1 (SRC)
R-3 2 Acre
Flag Lot
Cluster
PRD-3 (PRD)
R-4 40,000 sf
Cluster
PRD-1 (SRC)
R-5 40,000 sf
Cluster
PRD-2 (PRH)
R-6 30,000 sf
Cluster
R-7 20,000 sf
R-8 20,000 sf
PRD-4 (PVD)
P-1 (Public Purpose)
Non Residential
(See Map 2 of 2)
SCALE 1" = 1000'
REVISED DECEMBER 3, 1980
REVISED DECEMBER 14, 1982
PROPOSED REVISION INTRODUCED OCTOBER 3, 1984

Da 112a

Report of George Raymond
Dated June 12, 1985

Master's Report
Re: **Hills Development Corporation v. Township of Bernards**

Prepared for
Hon. Eugene D. Serpentelli, J.S.C.
New Jersey Superior Court
Ocean County Court House
Toms River, New Jersey 08753

June 12, 1985

by
George M. Raymond, AICP, AIA, P.P.
Chairman
Raymond, Parish, Pine & Weiner, Inc.

RPPW

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EDITH LANDAU LITT AICP
PHILIP M MICHALOWSKI AICP
JOHN J SACCARDO
JOHN L SARNA P.E.
DAVID B SCHEFF AICP
STUART I TURNER AICP

PATRICIA KELLY
NOEL SHAW JR AIA
CSABA TEGLAS AICP CIP

GEORGE M RAYMOND AICP AIA
NATHANIEL J PARISH P.E. AICP
SAMUEL W PINE AICP
MICHAEL WEINER AICP

Services:
Community Development
Comprehensive Planning & Zoning
Economic Development
Environmental
Housing
Land Development
Real Estate Economics
Revitalization
Transportation, Traffic & Parking

June 12, 1985

The Honorable Eugene D. Serpentelli, J.S.C.
Superior Court of New Jersey
Ocean County Court House
Toms River, New Jersey 08753

Re: Hills Development Corporation v. Township of Bernards

My dear Judge Serpentelli:

Pursuant to your Order dated 19 December, 1985 appointing me as special master to review the Amended Land Use Ordinance of Bernards Township as to its compliance with Mount Laurel II and to assist in the resolution of any outstanding issues, I am pleased to report as follows:

1. Fair Share

   a. Indigenous Need - In calculating its indigenous need in accordance with the consensus methodology,[1] the Township used 82 percent of the 1980 deficient and overcrowded units as constituting those likely to be occupied by lower income households.[2] The Rutgers

[1] The Township's Fair Share Analysis and Compliance Package was set forth in a memorandum addressed to me from Harvey S. Moskowitz, P.P., the Township's planning consultant, dated March 29, 1985, and hereinafter referred to as the Moskowitz Memorandum (see Appendix A).

[2] Ibid., p.3.

University refinement of the methodology, using the actual percentage of deficient units that are occupied by income-eligible households in the North Somerset County sub-region established 50 percent as appropriate for use in Bernards Township. This reduces the indigenous need from 42 to 26 units. Of these, 8 units are overcrowded.

b. Prospective Need - I concur with the Township's determination of 1,314 units.

c. Present (reallocated) Need - I concur with the Township's determination of 506 units, with 169 units to be provided within the six-year projection period.

The total resulting fair share amounts to 1,509 units. Relying upon prior Court-sanctioned 20 percent fair share reductions in cases of voluntary settlement, the Township has requested a reduction which, using the revised fair share would amount to 302 units.[3] A further reduction of 141 units is made pursuant to a

[3] Ibid., p. 10.

prior Court order.[4] This brings the Township's total obligation down to 1,066 units. I have accepted these adjustments in reviewing the adequacy of the proposed compliance package.

2. Compliance Package

The Township has offered the following package toward the satisfaction of its fair share:

(a) Rehabilitation of Heating- and Plumbing-Deficient Units

The Township is willing to undertake the rehabilitation of those units which the 1980 Census reported to be in that condition.[5] Using the revised method for determining the indigenous need, of the 35 deficient units only 50 percent are deemed to be occupied by income-eligible households. The Township's responsibility would thus be to find and rehabilitate 18 such units. I recommend that the Court allow the Township one year in which to develop a realistic program to that end, including an identification of sources of funding.

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[4] Ibid., p. 10.

[5] Ibid., p. 13.

(b) New Construction[6]

The Township has rezoned or otherwise provided incentives to developers sufficient to assure the production of 839 units, as follows:

(1) Hills Development Co. The Hills owns 1,046 acres of land in the Township of which 501 acres are located in the Raritan River Basin and 545 acres are located in the Passaic River Basin. The Township has rezoned the Raritan Basin lands, which are located in its Growth Area, to permit a total of 2,750 units with a 20 percent, or 550-unit, Mount Laurel set aside.

(2) Hovnanian (Society Hill). The 130-acre Hovnanian tract has been rezoned to permit 830 units with a 12 percent set aside for moderate income units, only. This project will therefore produce 101 units of that type. The Township has not imposed a full 20 percent set aside requirement and has

---

[6] Ibid., p. 13-14.

not required the developer to provide any low income units in this instance because the land had been rezoned for 6.5 units per acre before Mount Laurel II in response to the Mount Laurel I doctrine which was in effect at the time. The retrofitting of this development with a full Mount Laurel II set aside requirement would have required an additional density bonus which the Township felt would be excessive, particularly since adjacent developments, which were granted their 6.5 unit/acre zoning subsequent to Mount Laurel II, are quite able to provide a full low/moderate set aside of 20 percent.

In the abstract, I would normally view a density limit somewhat above 6.5 units per acre to be acceptable. In this instance, however, I believe the proposed maximum to be justified. The market rate portion of this particular development is designed to sell in the $70-100,000 range, which will serve a lower segment of the above-moderate income class than any of the several other developments that have been built or are programmed to be built in the Township (see Table 2). As such, the ability of the market-rate

portion of the development to provide the subsidies required for the economic feasibility of low-income units is limited, at best.

To achieve the 12 percent moderate income housing set aside without a density bonus that the Township has given the developer substantial inducements in the form of waivers of fees and standards.[7]

(3) Several other tracts located in the same vicinity as the Hovnanian tract were mapped in the same zoning district, which permits 6.5 units per acre, subsequent to Mount Laurel II for the express purpose of helping the Township satisfy its enhanced housing obligation. Consequently, these tracts are all subject to the full 20 percent lower income housing set aside, evenly split between low- and moderate-income units. These include the following:

[7] See Mount Laurel II Fair Share Analysis for Bernards Township, Somerset County, N.J., Harvey S. Moskowitz, July 1, 1984, pp. 23-25.

Tract	Total Capacity	Set Aside	
		Low	Moderate
Kirby	510	51	51
Weymouth Capital	100	10	10
Wagner	162[(a)]	16	16
Geyer	172[(a)]	17	17

[(a)] These two tracts were rezoned along with the Kirby and Weymouth sites but were inadvertently not counted in the Moskowitz Memorandum. The capacity of the Geyer property was adjusted to reflect the presence of major wetlands on the tract.

In summary, the total provision which has been made for the production of new lower income housing in Bernards Township amounts to the following:

Development	Lower Income	
	Low	Moderate
Hills	275	275
Hovnanian	—	101
Kirby	51	51
Weymouth Capital	10	10
Wagner	16	16
Geyer	17	17
Sub-Total	369 units	470 units
Total	839 units	

Of the above developments, Hovnanian is under construction, Hills has made a preliminary conceptual plan submission (which cannot be processed prior to settlement), and Kirby is undergoing conceptual review. Every indication, therefore, points to the probable

realization of some 753 units as soon as permitted by the area's market rate housing dynamics.

Deducting that portion of the 1,066 unit fair share which will be satisfied through rehabilitation and the new construction offered by the Township leaves a 209-unit balance. Part of this deficiency will be satisfied by an increase in the 550-unit lower income housing set aside on the Raritan River Basin lands of the Hills Development Corporation by 68 units to a total of 618.

Hills' Passaic Basin lands, which are located in a Limited Growth Area, are zoned for 0.5 units per acre, with a capacity of 273 units. These lands, which are unsewered, cannot be developed with on-site septic tanks due to poor soil conditions. Hills has requested that the Township permit the sewering of this area by including it in an expanded Environmental Disposal Corporation franchise area. The Township originally refused tc allow this out of concern that its acquiescence in the provision of sewers in a portion of its Limited Growth Area may eventually be used by other developers of adjacent vacant lands as a wedge to undermine the integrity of the remainder of the Limited

Growth designation. In response to Hills's request that I intervene I stated that the sewering of a tract zoned for single family houses on lots averaging more than two acres was outside the area of my concern. I suggested, however, that an offer by Hills to expand its Mount Laurel set aside in the Raritan Basin by 25 percent of the number of units it proposes to build in the Passaic Basin would bring that portion of the project within the Mount Laurel orbit.

Hills has subsequently offered to build an additional 68 lower income units on its Raritan Basin lands in exchange for the Township's support of the application for expansion of the EDC franchise area.

It should be noted that this solution would avoid the placement of densely developed housing outside the SDGP Growth Area and would retain the existing zoned density of the Hills lands in the SDGP Limited Growth Area. It would also be environmentally superior to the sewering of the single family houses by means of individual septic tanks. At the same time, it would help the Township reduce substantially its deficit in meeting its fair share obligation.

The additional 68 units would increase the overall density on the Raritan Basin tract from 5.49 to 5.62 units per acre. To permit this to occur the current zoning of this area, which was enacted as part of the Township's effort to comply with Mount Laurel II, and which now limits density to a maximum of 5.5 units per acre, would have to be slightly adjusted.

The Township's concerns regarding the potential use by others of the sewer lines provided in the Limited Growth Area to service the Hills development could be resolved through the sizing of pipes to avoid the creation of excess capacity and through legal instruments acceptable to the Township.

In recognition of the rapid rate of growth which Bernards Township will experience in response to Mount Laurel II I recommend that these additional 68 lower income units be permitted to be phased in during the period 1991-1994.

Credits vs. Phasing

The above modification in the new construction portion of the compliance package would reduce the unsatisfied portion of the Township's fair share obligation to 141

units. I believe that the Township should be credited for the following prior housing initiatives in an amount sufficient to satisfy this portion of the overall lower income housing need.

Ridge Oak Section 8 Senior Citizen Project. This large, 248-unit project was completed in 1977 in response to Mount Laurel I. It serves exclusively lower-income households in compliance with the applicable guidelines of the U.S. Department of Housing and Urban Development. This project is experiencing an annual turnover of between 15 and 18 units.

Market Rate Multi-Family Developments Permitted in Response to Mount Laurel I. In 1979-1980, the Township rezoned 1,480 acres of land which has led to the development of projects with an ultimate capacity of 1,820 units of "least cost" multi-family housing at varying densities, as follows:

Table 1

MOUNT LAUREL I "LEAST COST" DEVELOPMENTS
Bernards Township, New Jersey

Development	Area (In Acres)	Capacity (in Units) Before Rezoning	Capacity (in Units) After Rezoning	Status[1] (as of 5/85)
The Ridge	20	104	104	B.P. 70 C.O.
The Barons	25	132	82	B.P. 51 C.O.
Countryside Manor	30	150	150	B.P. 150 C.O.
Lord Stirlingville Vill.	15	150	120	B.P. 1 C.O.
Maple Run	20	64	breaking ground	
Spring Ridge	190[2]	1,220	256	B.P. No C.O.
Total	300	1,820	612	B.P. 272 C.O.

[1] B.P. = Building Permit.
C.O. = Certificate of Occupancy

[2] Probable maximum capacity based on environmental considerations.

While none of these units meet the Mount Laurel II test of affordability (see Table 2, below), they do constitute evidence of the Township's cooperative attitude in meeting its obligations under Mount Laurel I, which was the law applicable at the time.

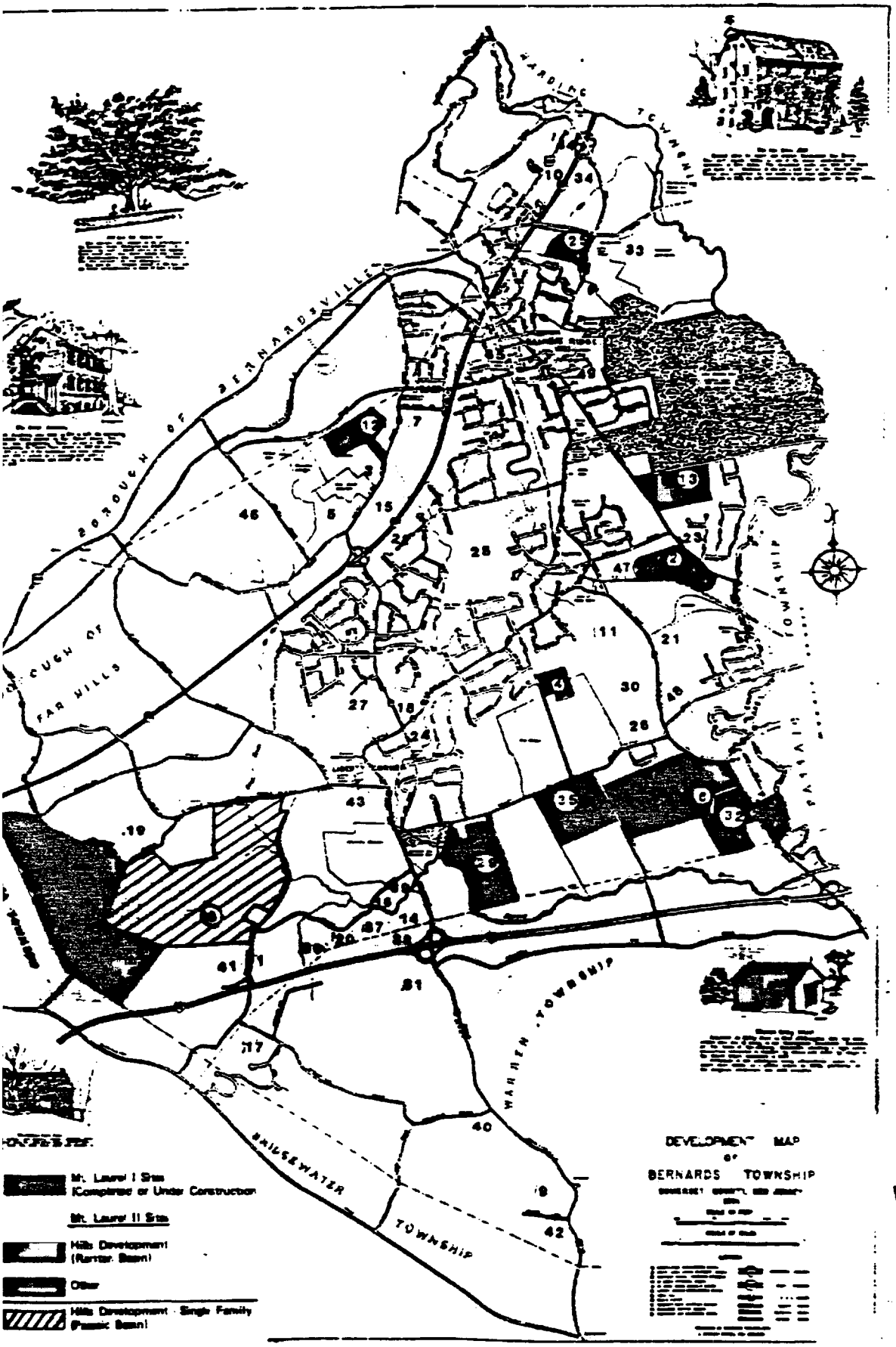
Table 2

SALES PRICES
Mount Laurel I "Least Cost" Developments
Bernards Township, New Jersey

Development		Unit Sales Prices
The Ridge		$140,000-160,000
The Barons		$180,000-280,000
Countryside Manor	88 units @	$100,000-125,000
	62 units @	$125,000-150,000
Lord Stirling Village		$170,000-200,000
Maple Run		$200,000+
Spring Ridge	610 units @	$100,000-125,000
	610 units @	$125,000+

Source: Bernards Township.

In recommending that the Township be given credit for its prior efforts as described above I am also cognizant that, in attempting to meet its housing obligation, the Township has already rezoned a grand total of 1,480 acres which, after density adjustments in response to Mount Laurel II, make realistically possible the construction of 4,518 multi-family units. The 273 low density market rate units on Hills's Passaic Basin land and the accompanying 68 Mount Laurel units in the Raritan Basin will also have been made possible by a Mount Laurel-motivated expansion of EDC's franchise area. (See map following.)


BOROUGH OF BERNARDSVILLE
BOROUGH OF FAR HILLS
HARDING TOWNSHIP
WARREN TOWNSHIP
BASKING RIDGE
Mt. Laurel I Site
(Completed or Under Construction
Mt. Laurel II Site
Hills Development
(Former Basin)
Other
Hills Development - Single Family
(Passaic Basin)
DEVELOPMENT MAP
OF
BERNARDS TOWNSHIP

Da 1279

At 2.5 persons per household, this number of units will house approximately 12,000 persons. This will almost double the Township's 1980 population of 12,920. As the Court noted (Allan-Deane v. Township of Bedminster, at p.8), while

> "numbers alone cannot justify a finding of radical transformation...the statistics do provide some broad guidance in assessing the projected growth rates. The Supreme Court demonstrated its concern for the quantity of construction which could occur within a short time (at 219). Thus the numbers can play some role in the court's determination."

According to the U.S. Census, since 1960 only six of the 146 New Jersey communities with 10,000 or more residents doubled in population over a ten year period (see Table 3). All of these experienced this extraordinary growth rate between 1960 and 1970. Only one of the six, Willingboro Township, was in Bernards Township's 10,000-15,000 population class, and its growth was due to the establishment of Levittown in response to the location in the area of a major steel plant in the early post-World War II period of universal seriously pent-up housing demand.

Table 3

POPULATION GROWTH
Selected Municipalities with 10,000+ Population

Municipality	1960	1970	% Growth
Brick Township (Ocean Co.)	16,299	35,057	115%
Cherry Hill Township (Camden Co.)	31,522	64,395	104%
Dover Township (Ocean Co.)	17,414	43,751	151%
Old Bridge Township (Middlesex Co.)	22,772	48,715	114%
Parsippany-Troy Hills Twp. (Morris Co.)	25,557	55,112	116%
Willingboro Township (Burlington Co.)	11,861	43,386	266%

Note: No municipality in the State of New Jersey with a population in excess of 10,000 persons experienced a growth rate of 100% or more during the 1970s.

I wish to emphasize that the basis for my recommendation that credit for prior programs be given is not the actual eligibility of any of the resulting units toward the satisfaction of any portion of the housing need as defined in Mount Laurel II and as derived according to the AMG methodology. Rather, based on reasoning similar to that which underlies a 20 percent reduction in the local fair share in recognition of a municipality's willingness to comply voluntarily, I feel that a municipality which, prior to Mount Laurel II and unlike its neighbors, did as much as Bernards Township to help alleviate the housing

problem of the less affluent, is entitled to judicial recognition of its efforts.[8]

I wish to emphasize also that, in my opinion, such recognition is only justified now, during the initial round of implementation of Mount Laurel II. After 1990, the only units which should be considered for credit should be those, if any, that have been constructed or authorized since Mount Laurel II in excess of the local obligation for the particular projection period. In cases of future overloads (i.e. disproportionate rates of growth that would result from the accommodation of the full fair share in one projection period) it would seem to me appropriate to resort to phased compliance rather than reduced fair shares.

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[8] The ineligibility, on a unit for unit basis, of housing, which does not meet pricing eligibility requirements or the affordability of which is not guaranteed into the future, is clear. I am also particularly wary of qualifying turnover in existing eligible housing built prior to the commencement of the need projection period. If such turnover in units built before 1980 were to be considered eligible now, logic would require that turnover in Mount Laurel II units built in the 1980s be considered eligible toward the satisfaction of future Mount Laurel obligations. But even apart from the latter consideration, existing lower income units, by definition, serve a need that is already present in the municipality. As a unit becomes vacant, an already present eligible household can be assumed to need it. In the calculation of fair share, except for the narrowly defined indigenous need, the AMG methodology includes only units that are needed to accommodate income-eligible households that are not yet living in the municipality.

Supplementary Apartments. The Township also proposed to use the apartments which will result from its recent amendment of Section 405C.10 of its zoning ordinance to allow accessory apartments as conditional uses in one-family dwellings in all districts. The Township estimates that such apartments may be created in 3 percent, or 114, of the existing 3,785 one family detached units. No detailed method of assuring the affordability of these apartments, initially and over time, has been proposed. In addition, in my opinion it would be unrealistic to expect that such units, which would be located in private homes, can be assured of being eligible and available on the open basis contemplated by Mount Laurel II short of their becoming part of the low/moderate income housing supply administered by the municipality. It is my further view that the ability of the municipality to impose its affordable housing program standards on those homeowners who may initially wish to participate in the program on the terms that would make the units eligible is most doubtful.

For these reasons, I do not believe that this type of apartment would meet the standards of Mount Laurel II

even if the initial affordability issue were to be resolved.

2. The Land Development Ordinance

On November 12, 1984, the Township Committee adopted Ordinance #704 (see Appendix B) which embodies the Township's effort to bring its Land Development Ordinance into compliance with Mount Laurel II. I find the ordinance to be acceptable with a few exceptions, as follows:

Article 1100

Section 1103. The Use Regulations in the R-5 and R-8 Zones as Part of the PRD-2 and PRD-4 Options permit "Planned Development." The definition of "planned development" in Article 200 includes both "planned employment development" which is intended to accommodate "employment uses" and "planned residential development" which is intended to include the type of development contemplated in fulfillment of the Township's Mount Laurel obligation. The reference to "Planned Development" should be modified to preclude the use of any of the lands zoned as part of the Township's compliance package for "employment uses."

Section 1104. The compliance package assumes that all lands zoned for higher density housing will be used for residential purposes. The ordinance should clarify that the number of units on each tract will not be affected should the Township approve the use of any of the tract area for permitted non-residential purposes (i.e., schools, municipal facilities, retail and service commercial uses, etc.).

Section 1110. E. Sale and Resale and Rental of Lower Income Housing

Subsection 5. The ordinance requires each developer to

> "formulate and implement a written affirmative marketing plan acceptable to the Planning Board. The affirmative marketing plan shall be realistically designed to ensure that lower income persons of all races and ethnic groups are informed of the housing opportunities in the development, feel welcome to seek or buy or rent such housing, and have the opportunity to buy or rent such housing. It shall include advertising and other similar activities."

Since the Township's compliance package includes a number of potential developments, it would appear desirable that more precise guidelines for such a marketing plan be laid down by the Township. At the

least, such a plan should be required to include advertising in newspapers of general circulation serving metropolitan centers and lesser urban aid municipalities in the Township's present need region.

Sub-Section 6. There seems to be no good reason why conversion of rental units to condominium ownership should be prohibited for 15 years following their construction so long as the pricing of such units follows the Mount Laurel guidelines.

Section 1112.

Sub-Section A. Drainage. The development's drainage system should not be required to accommodate storm or natural drainage water which originates outside the boundaries of the tract if such water would continue to flow over undeveloped portions thereof.

The ordinance has been in effect for more than six months and has been applied to Mount Laurel set aside developments in the conceptual planning stage without raising objections on the part of the developers involved. It has also been reviewed thoroughly by the Hills Development Corporation's professional advisers who have found it to be reasonable and free of unnecessarily cost generating provisions.

I recommend that the Court accept Ordinance #704 if amended as set forth above.

3. Administration of the Affordable Housing Program

Ordinance #704 places the responsibility for the direction and administration of occupant selection procedures upon a Housing Administrator to be appointed annually by the Township Committee. Despite the fact that the first development which will produce Mount Laurel units has broken ground, such an official has not been appointed as yet and no rules to govern the process--including the establishment of priorities, if any, among applicants--have been formulated.

I understand that the Township has considered the possibility of using the Bedminster Hills Housing Corporation but has found it preferable to devise a different vehicle for the purpose. An ordinance to that effect is currently being prepared. According to the Township Administrator, the marketing of the Mount Laurel units in the first development expected to materialize (Hovnanian) will commence in August, 1985. I recommend, therefore, that the Court require that the Township establish the necessary administrative structure within 30 days and that it submit to the Court the rules and

regulations intended to govern the administration of the affordable housing program and a report on the provisions made for financing the operating expenses connected therewith by July 31, 1985.

4. Fee Waivers and Relaxation of Design and Construction Standards

As an inducement for acceptance by Hovnanian of a 12 percent moderate income housing set aside without the benefit of a density bonus, the Township offered the following (in addition to a relaxation of design and construction standards that have since been incorporated into Ordinance #704):

1. Fast tracking of applications
2. Waiver of fees

The same consideration is appropriate in the case of projects that are granted a density bonus but that offer a full 20 percent set aside that includes low- as well as moderate-income units.

I, therefore, recommend that the Court require the Township to adopt the following application processing schedule:[9]

ACTIVITY	TIMETABLE
1. Application made to the Planning Board	0 day
2. Planning Board provides developer with written determination as to whether application is complete.	14 days
3. Developer furnishes the Planning Board with required additional material. Planning Board forwards copy of applications to municipal agencies. Application is deemed complete.	14 days*
4. Interested municipal agencies file their reports with the Planning Board. All documentation is made available to the public.	21 days
5. Planning Board holds public hearing.	14-28 days
6. The Planning Board grants or denies preliminary approval.	7 days
Total Time	95 days

*In the event that the required additional material is not submitted within the prescribed time period, the Planning Board should be entitled to stop the timetable "clock" until five working days following the date of receipt thereof.

[9] This schedule was determined to be appropriate by the Court in Urban League of Essex County v. Township of Mahwah on the basis of extensive expert testimony from both the plaintiff developer and the Township.

Waiver of Fees

The Planning Board application fees should be waived for all low- and moderate-income units, whether provided as a set aside or separately from any other units.

Respectfully submitted,

George M. Raymond, AICP, AIA, P.P.
Chairman

GMR:kfv

cc: Henry A. Hill, Esq.
James E. Davidson, Esq.

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
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Attorneys for Defendants, The Township of Bernards, et al.

THE HILLS DEVELOPMENT COMPANY, Plaintiff, vs. THE TOWNSHIP OF BERNARDS, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. Civil Action AFFIDAVIT OF PETER MESSINA

State of New Jersey:
ss:
County of Morris :

PETER MESSINA, of full age, being duly sworn according to law, deposes and says:

1. I am the Township Engineer for the Township of Bernards and have been so since 1978. I am personally familiar with this litigation and the facts giving rise thereto and events which have happened since the inception of same.

2. At the present time the Planning Board of Bernards Township has approved, both preliminary and final, 100 lower income housing units on the tract owned by Hovnanian Company. Construction of these units is literally taking place at this time on the site.

3. Additionally, the tract known as the Kirby property being developed under the name of "the Cedars", has a conceptual approval from the Planning Board of Bernards Township for 90 lower income housing units.

4. There are additional projects in the PRN zone in Bernards Township which have not yet received approval in any form but which will produce additional lower income housing units.

5. During the course of the process resulting of the Bernards Township Committee's adoption of Ordinance 704, the Planning Board of Bernards Township ask that the Township Planner Dr. Harvey S. Moskowitz and I prepare a study of all sites available within the Township for the development of lower income housing. The results of that study were set forth in a memorandum by Dr. Moskowitz prior to the adoption of Ordinance 704. This memorandum could be made available at any time. The study showed that there were numerous additional sites within the township, including some property already owned by the township, which could be developed as lower income housing sites, but which were believed to be less appropriate for such

development than the sites set forth and at that time proposed under Ordinance 704.

6. I have been personally involved with the Hills engineering and technical representatives with respect to certain changes and modifications which Hills sought to be made to Ordinance 704. I am aware that there are statements contained in Affidavits submitted by plaintiff which would lead one to believe that such changes had either been completely resolved or were diminuous issues if not resolved.

7. While there were some consensus positions reached by myself and Dr. Moskowitz with plaintiff's representatives, no resolutions of such ordinance changes sought by Hills were ever specifically authorized by either the Planning Board or the Township Committee. In fact, I know that the following areas, which are of importance to Hills, still remain unresolved:

(1) Housing design -- patio homes with zero lot lines;

(2) The elimination of maximum housing size in a cluster development;

(3) Maximum building coverage;

(4) Building height restrictions;

(5) Curbing location and design standards;

(6) Building permit fees;

(7) Certain design waivers;

(8) Certain engineering standards; and

(9) The roadways covered by Hills' off-tract transportation contribution and the specific dollar allocations to such roadways. I was informed by Mr. Davidson that Hills had presented him with a list of road improvements which they indicated would be constructed as part of the Bernards Township Off-tract Improvement Program. The list included seven (7) improvements. Contrary to their assertion, four (4) of the improvements were not to be improved by the Township but were to be the sole obligation of Hills. These included: Schley Mountain Road; the intersection of Schley Mountain Road and Douglas Road; Layton Road; and, Douglas Road from Far Hills Road to the Hills entrance. One of the other improvements, Mt. Prospect Road is only partially in the improvement program. The other two, Allen Road and the Somerville Road extension are part of the off-tract improvement program.

8. In the Affidavit of Mr. Kerwin, he makes reference to a conceptual plan. Two representatives of Hills brought a conceptual plan to the Technical Coordinating Committee purportedly to solicit candid comments fromthe members of the Technical Coordinating Committee. The Technical Coordinating Committee found the concept plan contained numerous enginering and design deficiences and was substantially insufficient even

as a concept plan. No other concept plan has been submitted to date.

Peter G. Messina
PETER MESSINA

Sworn to and subscribed
before me this 1st day of
October, 1985

Marion C. Nixon

MARION C. NIXON-NOTARY PUBLIC OF N.J.
My Commission Expires September 20, 1988

Da 143a

Certification of Nancy Ferguson
Dated September 12, 1985
Filed September 13, 1985

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
Morristown, New Jersey 07960
(201) 267-8130
Attorneys for Defendants, The Township of Bernards, et al.

THE HILLS DEVELOPMENT COMPANY, Plaintiff, vs. THE TOWNSHIP OF BERNARDS, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. Civil Action CERTIFICATION OF NANCY FERGUSON

I, NANCY FERGUSON, certify as follows:

1. I am Secretary to the Planning Board of the Township of Bernards. In that position I have access to the records of the Planning Board.

2. The minutes and other records of the Planning Board show, with respect to Hills Development Company ("Hills") and the property owned by it in Bernards Township, that:

a. Hills received preliminary approval for 29 large-lot, single family dwelling units, designated as Section 1A, on October 8, 1981;

b. Hills received final approval for Section 1A, and preliminary approval for an additional 35 large-lot, single family dwelling units (Section 1B) on September 6, 1984;

c. Hills has not filed any applications for zoning approvals from at least November 1984 (when Township Ordinance 704 was enacted) to date;

d. Hills did present a conceptual map to the Planning Board's Technical Coordinating Committee ("TCC") showing 2,750 proposed dwelling units, which was reviewed by the TCC and discussed with representatives of Hills on March 19, 1985, and as to which the Technical Coordinating Committee had serious design questions regarding portions of the plan.

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

Nancy C. Ferguson
NANCY FERGUSON

Dated: September 12, 1985

Affidavit of Kenneth John
Mizerny
Dated September 18, 1985

BRENER, WALLACK & HILL
2-4 Chambers Street
Princeton, New Jersey 08540
(609) 924-0808
ATTORNEYS FOR Plaintiff

THE HILLS DEVELOPMENT COMPANY, Plaintiff, vs. THE TOWNSHIP OF BERNARDS in the COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS, THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. CIVIL ACTION AFFIDAVIT IN OPPOSITION TO MOTION TO TRANSFER AND IN SUPPORT OF CROSS-MOTION FOR JUDGMENT OF COMPLIANCE

STATE OF PENNSYLVANIA)
) SS:
COUNTY OF PHILADELPHIA)

Kenneth John Mizerny, of full age, having been duly sworn according to law upon his deposes and says:

1. I am a professional planner licensed by the State of New Jersey and a landscape architect, employed by the planning and design firm of Sullivan & Arfaa, with principal offices at 2314 Market Street, Philadelphia, Pennsylvania, 19103. The purpose of this affidavit is to do the following:

a. To review Ordinance #704 and the remainder of the Land Development Ordinance currently in effect in Bernards Township, with respect to its potential compliance with Mt. Laurel II standards;

b. To outline steps which the Hills Development Company has taken to apply for development rights under that Ordinance; and

c. To indicate the consequences to the delivery of lower income housing if Bernards Township is allowed to delay the construction of the Hills project, through devices such as transfer to the Affordable Housing Council or permitting Ordinance #704 to expire.

Ordinance Review

2. I have been employed as a consultant to The Hills Development Company, with particular responsibilities for planning and coordination of The Hills Development Company's projects in Bedminster and Bernards Townships, New Jersey.

3. As part of my responsibilities, I have familiarized myself with ordinances, within and outside the State of New Jersey, and particularly those which have been adopted pursuant to the Mount Laurel mandate.

4. Hills Development Company (hereinafter "Hills"), has been actively involved in construction of a planned unit development (PUD) in the Township of Bedminster, adjacent to the Township of Bernards.

5. I have been actively involved in the planning for the Bedminster PUD, and have worked closely with Bedminster Township Planning Officials with respect to ordinance drafting, ordinance interpretation, and filing development applications in accordance with the ordinances.

6. I am also familiar with ordinance standards applicable in other New Jersey jurisdictions.

7. I have examined numerous ordinance standards for cost generative and ambiguous interpretations, inasmuch as these standards can create costly difficulties for developers.

8. As part of my responsibilities, I reviewed Bernards Township's Ordinance #704 in October, 1984. Based on previous analyses which I had performed for other municipalities, I examined the then-proposed ordinance to see if it contained cost generative standards. I applied two standards:

a. was the standard in the ordinance in excess of that necessary to protect the public health, safety and welfare; and

b. did the standard contain subjective or arbitrary provisions which could cause multiple interpretations and which would thereby extend the process of subdivision or site plan review or require the expenditure of additional money on redesigning and reengineering the development.

9. I also reviewed Ordinance #704 in light of its ability to permit the use of housing products which had been successfully built by Hills in Bedminster Township. Inasmuch as an ordinance which failed to permit the use of proven products would cause expensive work to be done in architectural redesigns and engineering, and inasmuch as Bedminster's ordinance had worked well to provide opportunities to build lower income housing, and since Bedminster was immediately adjacent to Bernards, such an ordinance comparison was deemed necessary.

10. I provided my review of Ordinance #704 via Memoranda, dated October 15, 1984 and November 28, 1984 addressed to John Kerwin, President of The Hills Development Company. I also requested the engineering firm of Lynch, Carmody, Guiliano and Karol, P.A. do an independent review of the engineering standards which was completed on March 4, 1985. Copies of these Memoranda are set forth as Exhibits V, W and X. (All Exhibit references are to Appendix).

11. In summary, while I found Ordinance #704 to be generally acceptable, I had objections concerning the setbacks, height limitations, the building separations, and similar bulk and yard requirements. In my view, modification of these standards would enable a developer to be more flexible, and provide more efficient and less costly planning and development. This is of particular importance in a development providing lower income opportunities.

12. The November 28, 1984 Memorandum was one of several discussed during a meeting held on January 16, 1985 and attended by representatives of the Bernards Township Committee and Planning Board, representatives of The Hills Development Company and the Special Planning Master, George Raymond.

13. At the January 16 meeting, Bernards Township agreed to make certain changes in Ordinance #704, reflecting the concerns contained in my Memorandum. Those changes and the concerns discussed by Hills and the Township are summarized in a January 23, 1985 Memorandum, drafted by the Township's Planning Consultant, Dr. Harvey S. Moskowitz, P.P. (Exhibit P).

14. Despite the initial agreement between the parties, however, it required several months of additional discussion before ordinance changes were drafted by Dr. Moskowitz and were designed to be incorporated in a revised ordinance prepared by Dr. Moskowitz. These proposed changes are described in Exhibit Y. I am not aware, to date, whether those ordinance amendments have been introduced by the Bernards Township Committee.

15. I also reviewed the Bernards Township Land Development Ordinance in light of New Jersey state law, and particularly the general purposes of the Municipal Land Use Law.

16. One of the purposes of the Municipal Land Use Law is to ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and state as a whole.

17. The Hills Development Company has property in Bernards Township bordering Bedminster Township. The Bedminster Township zoning adjacent to the site permits development ranging from ten dwelling units per acre to eight dwelling units per acre, with the eight dwelling unit per acre zoning immediately adjacent to the Hills project in Bernards Township.

18. It is my strong belief that the zoning provided for in Ordinance #704 is superior, in terms of sound planning and the Municipal Land Use Law, then was the case prior to the passage of Ordinance #704. The transition between eight dwelling units per acre and two dwelling units per acre as provided for in the prior ordinance was too abrupt and was not in accord with general planning principles. Ordinance #704, which provides for 5.5 dwelling units per acre on the site adjacent to the Hills Bedminster development, provides a far superior transition from a planning perspective.

19. On October 30, 1984, the Bernards Township Planning Board adopted amendments to the land use element of the master plan which recommended that the Raritan Basin portion of the Hills property be zoned at a density of 5.5 dwelling units per acre.

20. If Ordinance #704 were to expire, the Raritan Basin portion of Hills' property would be zoned at the prior zoning (one dwelling unit per 0.5 acre) or in the alternative, left with no zoning. Therefore, from a planning perspective, if Ordinance #704 were to expire, the resulting land use pattern would be clearly contrary to the land use element, a violation of soundly established planning principles and the Municipal Land Use Law.

21. Thus, it is my opinion as a professional planner that Ordinance #704, with the corrections as indicated in the Dr. Moskowitz Memorandum of May 21, 1985, and with the zoning providing the 5.5 dwelling units per acre adjacent to Bedminster represents sound planning and a compliance package which is in fundamental accord with what I understand to be the requirements of Mount Laurel II.

Steps Taken By Hills in Reliance on Ordinance #704

22. It is my understanding that Bernards Township has raised the issue of Hills' failure to file a development application under the provisions of Ordinance #704. Hills has not yet filed a formal application for the following reasons:

a. Hills believed that it was important to achieve certain changes that it regarded as desirable in the Ordinance before a full plan could be developed. Submission of a plan based on existing ordinance standards could mean the loss of certain building product types as well as loss of flexibility which had served both the public and the client well in prior development situations.

b. Notwithstanding this caution, Hills authorized the preparation of preliminary concept plans, to be done in accordance with the requirements of Section 707 of the Bernards Township Land Development Ordinance.

c. It was our clear understanding that Bernards Township would be hostile to any piecemeal submissions of development plans, without an overall approval of a concept plan. Hills wished to have Township approval before it spent substantial sums on engineering and other infrastructure investments for roads and utilities.

d. On March 18, 1985, representatives of the Hills met with members of the Bernards Township Technical Coordinating Committee (T.C.C.) to discuss a concept plan map on a preliminary, informal basis.

e. Members of the T.C.C. expressed reservations about certain aspects of the proposed plan, and indicated that their consultants would sit down with Hills' consultants to indicate what changes they thought desirable.

f. At a meeting held on May 3, 1985, between Harvey S. Moskowitz and Peter Messina, representing the Township of Bernards, and John Kerwin and myself representing Hills, we reviewed the entire Hills concept plan. Hills was asked to do the following things:

i. To redraw the plan to show intersections a minimum of 200 to 250 feet apart on collector roads;

ii. To provide better access to open space;

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iii. To provide additional access to multi-family areas, so that no more than 80 dwelling units would be on any cul de sac or single road system;

iv. The loop road should be redrawn to show it as a loop road;

v. There should be deeper lots for lots fronting on collector streets;

vi. The plan should show additional buffer on properties next to single family areas where the property borders land not owned by Hills.

23. We took those comments, and based on our understanding of what the Township desired, began work on a revised concept plan, preparatory towards making a full development plan submission as soon as possible.

24. As part of my planning responsibilities, I have been coordinating preparation of community impact studies, transporation studies, environmental impact studies, and all the related studies which are required by Section 707 of the Ordinance.

25. It is my understanding that Hills Development intends to apply for a concept plan on approval for its entire Raritan and Passiac Basin project prior to October 1, 1985, inasmuch as its anticipated build out of units within Bedminster Township needs to be phased in accordance with its construction of infrastructure improvements in Bernards Township. The most recent concept plan containing the most recent revisions requested by the Planning Board is set forth as Exhibit J.

26. Withdrawal of the underlying zoning, as set forth in Ordinance #704, would make all of those plans worthless, despite the many hours of effort spent in preparation of them, since development of the properties at densities other than 5.5/acre would require totally different planning.

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Consequences of Transfer to the Affordable Housing Council

27. Inclusionary development under Mt. Laurel is a recent phenomenon, but it certainly requires a healthy building market in order to survive.

28. The New Jersey building market has been characterized as a "boom and bust" building cycle, and it is problematic whether the current building cycle will survive more than another two years at its present pace.

29. In the event of a slowdown in the housing market, it will be more difficult for all builders providing inclusionary housing to continue to build at the current pace.

30. The only real effect of a transfer to the Affordable Housing Council would be to delay a project for at least two years, making it possible for a building "bust" to set in and rendering it impossible for a developer to be able to construct housing of any sort, much less affordable housing.

31. Similarily, even in a profitable building cycle, a developer needs to continuously plan and project for continuous activity on the part of his work crews, his suppliers, and his subcontractors. Failure to continue a building process, even during a healthy growth market, can render a specific project unfeasible.

32. Thus, if Hills were forced to turn away from development of the Bernards property, it would undoubtedly have to employ its planning, technical, and financial expertise elsewhere in order to keep the organization functioning during the healthy economy.

33. Ultimately, this would mean development of the Bernards project at lower density, without a mandatory inclusion of lower income units, at a later date than would result under Ordinance #704.

I certify that the foregoing statements made by me are true. I understand that if any statement contained herein is wilfully false, I am subject to punishment.

Kenneth John Mizerny

Kenneth John Mizerny

Sworn to and subscribed before me
this 15th day of Sept , 1985

Veronica M. Komansky

VERONICA M. KOMANSKY, NOTARY PUBLIC
PHILADELPHIA, PHILA. PHILADELPHIA COUNTY
MY COMMISSION EXPIRES DEC. 2[illegible] 1987
Member, Pennsylvania Association of Notaries

Da 154a

BRENER, WALLACK & HILL
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ATTORNEYS FOR Plaintiff

THE HILLS DEVELOPMENT COMPANY, Plaintiff, vs. THE TOWNSHIP OF BERNARDS in the COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS, THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. CIVIL ACTION AFFIDAVIT IN OPPOSITION TO MOTION TO TRANSFER AND IN SUPPORT OF CROSS-MOTION FOR JUDGMENT OF COMPLIANCE

STATE OF NEW JERSEY)
) SS:
COUNTY OF SOMERSET)

John H. Kerwin, of full age, having been duly sworn according to law upon his oath deposes and says:

1. I am President of The Hills Development Company ("Hills"), a major builder and developer in Somerset County, a resident of Bedminster, New Jersey, and a member of the Somerset-Morris Homebuilders Association. I am responsible for the day-to-day operations of Hills, am familiar with the requirements of Mount Laurel II,

and have been actively involved in the decisions of Hills with respect to the development of that portion of the Hills' property located in Bernards Township ("Bernards").

Background to the Litigation

2. The Bernards portion of Hills' property comprises in excess of 1,046 acres, with 501 acres located in the Raritan Basin portion of Bernards Township and the remainder being located in the Passaic Basin portion of the Township.

3. Hills filed a lawsuit under Mount Laurel II against Bernards Township in May, 1984. At that time, the operative zoning of Hills' property in the Raritan Basin was two dwelling units per acre; and in the Passaic portion, one dwelling unit per two acres and no lower income housing was required in either zone under existing ordinances. In that lawsuit, we requested that our Raritan Basin lands be rezoned to allow 10 units per acre and that the Passaic portion of our property be rezoned to a gross density of 6 units per acre which rezoning would have allowed us to develop over 7,500 units on the property.

4. In response to the lawsuit, Bernards modified its zoning to provide 5.5 dwelling units per acre for the portion of Hills' property which lay in the Raritan Basin, and imposed a mandatory 20% setaside for lower income housing on the lands in the Raritan Basin portion of Hills' property. This zoning amendment, Ordinance #704, did not alter the zoning of the Passaic Basin portion of the Hills' land. This rezoning permitted the construction of a total of 2,750 units in the Raritan Basin plus the 273 units previously permitted in the Passaic Basin.

5. Bernards did not consult with Hills about specific ordinance language prior to the introduction and passage of Ordinance #704.

Hills rationale for settlement

6. Following the adoption by Bernards Township of Ordinance #704, Hills Management reviewed the advisability of settling the lawsuit on the basis of Ordinance #704.

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7. The previous zoning, which was two to the acre, would have permitted us to build 1,002 units completely free of any obligation to build lower income housing, and the proposed new zoning would have permitted us an additional 1,250 market units along with 550 lower income units.

8. This was a higher ratio of low and moderate income units to market units than Mt. Laurel developers had previously found acceptable, but there were important considerations which led the management of Hills to favorably review the possibilities and recommend to the Board of Hills that we accept the terms of the Bernards offer.

9. During the development of the Bedminster portion of the Hills project, the management of Hills had developed a large and efficient organization, capable of producing housing in volume, thereby enabling Hills to meet the demands of the marketplace as quickly as possible. Prolonged litigation would cause major difficulties, both with the Hills' Bedminster development as well as the Hills' Bernards project, and, it was felt that it would place the effectiveness of the entire organization in jeopardy if the Hills completed the build-out in Bedminster and could not proceed in Bernards.

10. The Board of the Hills Development Company concurred with our analysis, and authorized the Hills' management on September 25, 1985 to settle with Bernards at the densities allowed in Ordinance #704. However, the Hills' management was requested to solve in the settlement the following issues affecting the development.

Issues of concern to Hills:

11. Deficiencies in Ordinance #704:

When Ordinance #704 was initially adopted by Bernards Township, there had been an attempt made not to involve the Hills, inasmuch as Bernards was facing

political pressure not to "give in to the developers". Therefore, the Ordinance was designed without our input, and, from our perspective, was deficient in the following ways:

(a) The design standards contained a number of ambiguous or unnecessary and cost-generative standards and had little relationship to the product types which Hills had been constructing in its inclusionary development on adjacent land in Bedminster Township;

(b) The Ordinance did not reflect any of the cost-reducing accelerated time frames for Planning Board review of projects which include lower income housing which "fast-track" provisions have been incorporated in many Mount Laurel II ordinances;

(c) There was no provision within the Ordinance for fee waivers for lower income housing, a standard element in Mount Laurel II ordinances which also offers a substantial cost-saving to inclusionary developers.

12. In addition, there were other important legal issues affecting Hills and Bernards which were negotiated (and ultimately resolved) so that the production of housing, including lower income housing, could begin promptly. These included:

(a) The Bernards "off-tract" improvements ordinance which our attorneys regarded as illegal (and which was ultimately declared illegal in litigation in which Hills was not involved). See New Jersey Builders Association v. The Mayor and Township of Bernards, decided February 25, 1985, Superior Court of New Jersey, Docket No. L-043391-83 P.W.

(b) Hills had hoped to begin a single-family lot program in the Passaic Basin portion of Bernards Township, for which it had received municipal approval, but for which a solution to a sewer issue had to be found. We wished to explore alternative ways of sewering that proposed development with Bernards, and regarded that portion of the development as an integral part of the overall Bernards project and as an important source of revenue, capable of assisting to offset costs incurred in other areas;

(c) As a result of what Hills believed to be an Assessor's error in 1982, the land within the lot program had been improperly assessed, and there was litigation pending against Bernards to correct the error.

It was the opinion of the parties that it would be desirable, in a settlement with Bernards, to dispose of all issues which were in dispute between the Township and Hills, and we devoted substantial time to resolving our differences with

the Township in the negotiations which took place between September, 1984 and July, 1985.

13. Hills, its attorneys and consultants met with the Township's attorneys several times during January, February and March 1985, and expended considerable effort, both in Hills' staff time and Hills' - paid consultant time, to meet with NJDEP, the Township, the court-appointed Master and other parties to resolve all issues which were considered to be directly or indirectly related to the Mount Laurel II case.

14. In March, 1985, the issues had been sufficiently crystalized to enable preparation of a draft Stipulation of Settlement and this Stipulation was the focal point of discussions during March-May, 1985.

15. By the end of May, 1985, all major issues of contention between the parties were resolved. It was agreed that the final draft Stipulation of Settlement would be prepared by Bernards' attorney, and drafting began on that document in June, 1985. Bernards Township's attorney advised Hills on June 5, 1985 that he considered all issues resolved and, on June 12, 1985, in fact wrote to the court to advise that agreement had been reached and requested from the court a hearing date for that settlement to be approved.

16. Despite the fact that all issues had been resolved and the settlement finalized, in early August of 1985 my attorneys advised me that Bernards had refused to execute the settlement documents presented to them, that the Bernards Township attorney had been instructed to prepare a "counter-offer" and that Bernards officials had threatened to seek transfer of this matter to the Affordable Housing Council in the event they could not reach agreement with Hills with respect to a substantial down-zoning of the Hills property.

17. Subsequent to Bernards' decision to refuse to execute the settlement documents, I was informed by Steven Wood, Bernards Township Administrator, that

an application submitted by Hills with regard to a concept plan will be logged in but somehow found to be incomplete, and no decision will be rendered prior to the expiration of the Ordinance on November 12, 1985.

18. Nevertheless, Hills intends to file a complete concept plan, in conformance with the Ordinance, as soon as final planning is complete.

Actions Taken in Reliance upon Ordinance #704 and Bernards' Representations.

19. In light of the adoption of Ordinance #704 and the Township's continuous representations to the Court and Hills that the Township wished to settle (and, in fact, that this matter was settled) Hills undertook a series of extremely costly actions in preparation for construction of the Bernards development. Actions taken by Hills in reliance on the adoption of Ordinance #704 and the Township's representations include the following:

(a) As a result of our original understanding with Bernards, we withdrew our suit in tax court against the Township with regard to the assessment of the property in the lot program, and did not file a protest against the 1985-86 assessment since, pursuant to our agreement, the underlying dispute would become moot;

(i) The statutory deadline to file an application under the Farmland Assessment Act and the general time for appeal of tax assessments have passed, all to the detriment of Hills;

(ii) There is no way that Hills can undertake meaningful construction on the lot program during this building season after September, 1985 and, therefore, Hills will be paying taxes at full development level on property which will be undeveloped, a scenario which would cost Hills many thousands of dollars which otherwise would not have been assessed;

(b) On the basis of the existing zoning, Hills has agreed to obtain additional sewage capacity from the Environmental Disposal Corp. (EDC) sewage plant. That additional demand makes financially possible the expansion of the plant and the expansion of the plant is mandated by this Court in the Bedminster case.

The EDC plant is financed through a N.J.E.D.A. bond issue in the amount of approximately $6,380,000, secured by property in Bernards. Failure to go forward with the Bernards development at the zoning provided for by Ordinance #704 would imperil the financing of the sewage plant and, hence, the investments of the numerous bondholders;

(c) Hills has also made substantial financial commitments for the reconstruction of Schley Mountain Road, which has been designed to be a four lane, main collector road to serve the entire Raritan Basin development, including the Bedminster Highlands at eight (8) dwelling units per acre and the Bernards property at the 5.5 dwelling unit per acre density. The design work has already been done, the approvals have been obtained and the contracts have been awarded. In order to expand the road, Hills was compelled to purchase three tracts of property in their entirety. It would not be necessary to totally reconstruct the road, at a cost of approximately $1,600,000, in the absence of the Bernards development. In the opinion of our traffic engineers, a road suitable for the demands of Hills/Bedminster traffic could be constructed for no more than $800,000;

(d) On the basis of the existing zoning, Hills has arranged to mortgage portions of its Raritan Basin project in order to obtain financing for the needed infrastructure development. The financing arranged in reliance on Ordinance #704 is in the amount of $6,500,000. The financing and security is based on the densities provided by the existing zoning of 5.5 units per acre. If Ordinance #704 were allowed to expire or is withdrawn, the security upon which the financing for much of the basic infrastructure for development is dependent would be substantially impaired;

(e) Pursuant to Ordinance #704 and the Stipulation of Settlement, Hills has expended many thousands of dollars for traffic engineering, transportation and improvement studies on surrounding roads including Routes 202/206, Allen Road and Schley Mountain Road, architectural design, storm water engineering, wetlands engineering and mapping (including a series of meetings with the Army Corps of Engineers) and market research, all of which will have been expenditures in vain if Ordinance #704 were to expire;

(f) Part of the draft Stipulation included the preparation of a concept plan for the development of the Bernards properties. In accordance with the provisions of Ordinance #704, Hills began work on the detailed concept planning. To date, hundreds of thousands of dollars have been expended in drafting a land use plan, a utilities plan, a circulation and traffic plan, and all other related documents, plans and studies, including an environmental impact statement and a community impact statement which are required by the Ordinance, and which will become useless in the event the Ordinance is allowed to expire;

(g) In anticipation of commencement of construction of its Bernards development, Hills has expanded its internal organization including the leasing of office space, expansion of its computer facilities and the development of a full-time, in-house construction staff. Hills presently has approximately 185 full time employees, the retention of which Hills may not be able to

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assure if Hills is unable to commence construction of its Bernards development, all to the detriment of Hills, its employees and the lower income households which would benefit from Hills' inclusionary development;

(h) Hills had designed and obtained approval from Bridgewater Township for a water storage tank designed to serve The Hills projects without the Bernards additional units. It has now, in reliance on Ordinace 704, designed and is seeking approval from Bridgewater Township for a water tank which has been sized to serve the Bernards development. Without the additional Bernards units, Hills could have saved thousands of dollars in design, application and related fees.

In summary, Hills has expended a sum in excess of $500,000 on "planning and pre-start" in reliance upon Ordinance #704 and the Township's representations. If Ordinance #704 is permitted to expire, this money may have been spent in vain.

Most significantly, in reliance upon Ordinance #704 and the Township's representations that it wished to settle all issues arising due to this and other litigation, and our information that Bernards would not be receptive to "piecemeal" applications, Hills refrained from filing any formal development application following the November 12, 1984 adoption of Ordinance #704. It appeared to be the Township's earnest wish to cooperate with Hills to work out all problems, and we, in turn, had looked forward to a long-term cooperative relationship and did not want to prejudice that with any premature applications.

Now, the Township Administrator has advised me that any development application which Hills may file hoping to obtain vesting prior to the expiration of Ordinance 704 is most likely to be "incomplete".

Effect on Hills and Lower Income Households if Bernards were permitted to transfer to the Affordable Housing Council and if Ordinance #704 were to expire.

20. At the present time, there is a strong housing market, and it is feasible for Hills or other developers providing lower income housing opportunities to go forward with their inclusionary housing developments.

21. If Bernards is allowed to withdraw from its agreement with the Hills and if the expiration of Ordinance #704 is permitted, the ability of Hills to construct an inclusionary development would be seriously jeopardized. I believe the proposed transfer to the Affordable Housing Council is likely to cause two years of delay while the Township prepared its plan and the Housing Council prepared their regulations. My attorneys advise me that such a period of delay could easily be longer than two years. During this period of delay, the present housing market could well undergo a downturn. Such delay would make it far more difficult—probably impossible--for Hills to provide adequate numbers of lower income housing units to assist Bernards to meet its fair share obligation by 1990.

22. If Hills is permitted to commence construction pursuant to Ordinance #704 and the terms and conditions of the agreement as negotiated, Hills could complete the planning process, continue the process of installation of infrastructure, and commence the housing development process as early as 1986, with a view towards providing Bernards with significant numbers of lower income housing units by 1990. In fact, barring catastrophic developments, Hills would be prepared to guarantee the construction of all 550 lower income housing units required by the Ordinance by 1990.

23. If Ordinance #704 were permitted to expire or if Bernards were allowed to transfer to the Council, and Hills' ability to construct an inclusionary development were cast into doubt, Hills would be faced with carrying costs on the Bernards property of up to $10,000 per day, in addition to weekly cash flow obligations and payroll expenses for remaining employees.

24. At the present time, Hills has created a strong, effective construction and marketing organization. In order to keep an organization functioning, there must be a constant flow of work. In the event Ordinance #704 were to expire and Bernards were permitted to abrogate the agreement, Hills could not feasibly be "put on hold" while the issue of Mount Laurel zoning was settled.

Hills would have to assess the business consequences of waiting for the Affordable Housing Council, and there would be very strong economic pressure to begin the process of constructing on the Bernards property at two dwelling units per acre (assuming that this would be the underlying zoning on the site) without the construction of affordable housing (since, if Ordinance #704 were allowed to expire, there would be no ordinance requiring a mandatory set-aside of affordable housing, and it is economically unfeasible to build such affordable housing at a density of two dwelling units per acre).

25. Bernards has chosen to place the bulk of its affordable housing obligation on Hills. Other developers, including those with higher density zoning (6.5 dwelling units per acre) have either no obligation at all (Spring Ridge) or a very minor obligation (Hovnanian, a 12% setaside for moderate income housing only).

26. If Ordinance #704 is allowed to expire, not only would Hills suffer grave financial loss, it would also be impossible for Bernards to meet any substantial housing goal for lower income households, since:

(a) no exisiting developer, other than Hills, has any significant obligation to produce lower income housing; and

(b) if Hills is left with no choice but to build at two dwelling units per acre, it cannot provide lower income housing.

27. I am not aware of any other sizable tract of land in Bernards, other than Hills, which is in the "growth area" and which has sewerage available, which the Township could look to to provide substantial quantities of lower income housing. I am, frankly, at a loss to see how Bernards intends to provide its fair share of lower income housing without Hills, nor can I understand how Hills could provide lower income housing under the conditions which would result from the abrogation of the draft settlement.

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

John H. Kerwin

Sworn to and subscribed before
me this 16th day of September, 1985

Notary Public

My Commission Expires 10-26-88

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

(decided October 28, 1985)
Honorable Stephen Skillman
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY/
MIDDLESEX COUNTY
(MOUNT LAUREL II LITIGATION)
DOCKET NO. L-6001-78 P.W.
L-42898-84 P.W.
L-55343-85 P.W.
L-29176-84 P.W.
L-38694-84 P.W.
L-86053-84 P.W.

MORRIS COUNTY FAIR HOUSING COUNCIL, MORRIS COUNTY BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE and STANLEY C. VAN NESS, PUBLIC ADVOCATE OF THE STATE OF NEW JERSEY,

Plaintiffs,

v.

BOONTON TOWNSHIP, CHATHAM TOWNSHIP, CHESTER TOWNSHIP, DENVILLE TOWNSHIP, EAST HANOVER TOWNSHIP, FLORHAM PARK BOROUGH, HANOVER TOWNSHIP, HARDING TOWNSHIP, JEFFERSON TOWNSHIP, KINNELON BOROUGH, LINCOLN PARK BOROUGH, MADISON BOROUGH, MENDHAM BOROUGH, MENDHAM TOWNSHIP, MONTVILLE TOWNSHIP, MORRIS TOWNSHIP, MORRIS PLAINS BOROUGH, MOUNTAIN LAKES BOROUGH, MOUNT OLIVE TOWNSHIP, PARSIPPANY-TROY HILLS TOWNSHIP, PASSAIC TOWNSHIP, PEQUANNOCK TOWNSHIP, RANDOLPH TOWNSHIP, RIVERDALE BOROUGH, ROCKAWAY TOWNSHIP, ROXBURY TOWNSHIP and WASHINGTON TOWNSHIP,

Defendants.

AFFORDABLE LIVING CORPORATION, INC., a New Jersey Corporation,

Plaintiff,

v.

MAYOR AND COUNCIL OF THE TOWNSHIP OF DENVILLE,

Defendant.

Civil Actions

O P I N I O N

ANGELO CALI,

Plaintiff,

v.

THE TOWNSHIP OF DENVILLE, in the County of Morris; a municipal corporation of New Jersey, THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF DENVILLE, AND THE PLANNING BOARD OF THE TOWNSHIP OF DENVILLE,

Defendants.

SIEGLER ASSOCIATES, a partnership existing under the laws of the State of New Jersey,

Plaintiff,

v.

MAYOR AND COUNCIL OF THE TOWNSHIP OF DENVILLE,

Defendant.

MAURICE SOUSSA and ESTHER H. SOUSSA,

Plaintiff,

v.

THE TOWNSHIP OF DENVILLE, a Municipal Corporation of the State of New Jersey, situate in Morris County, and THE DENVILLE TOWNSHIP PLANNING BOARD,

Defendants.

STONEHEDGE ASSOCIATES,

Plaintiff,

v.

THE TOWNSHIP OF DENVILLE, in the COUNTY OF MORRIS, a Municipal Corporation of the State of New Jersey, THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF DENVILLE & THE PLANNING BOARD OF THE TOWNSHIP OF DENVILLE

Defendants.

JOHN G. VAN DALEN, on his own behalf and as co-trustee with JOHN P. CHESTER of CHESTER and VAN DALEN ASSOCIATES, INC., EMPLOYEES' RETIREMENT TRUST and CHESTER and VAN DALEN ASSOCIATES, a New Jersey Partnership,

Plaintiffs,

v.

WASHINGTON TOWNSHIP, a municipal corporation of the State of New Jersey, located in Morris County, New Jersey,

Defendant.

LAW DIVISION: MORRIS COUNTY/ MIDDLESEX COUNTY
DOCKET NO. L-45137-83 P.W.

RANDOLPH MOUNTAIN INDUSTRIAL COMPLEX, a New Jersey Partnership,

Plaintiff,

v.

THE BOARD OF ADJUSTMENT OF THE TOWNSHIP OF RANDOLPH and THE TOWNSHIP OF RANDOLPH, a municipal corporation of the County of Morris, State of New Jersey,

Defendants.

LAW DIVISION: MORRIS COUNTY/ MIDDLESEX COUNTY
DOCKET NO. L-59128-85 P.W.

ROBERT E. RIVELL,

Plaintiff,

v.

TOWNSHIP OF TEWKSBURY, a municipal corporation located in Hunterdon County, New Jersey,

Defendant.

LAW DIVISION: HUNTERDON COUNTY/ MIDDLESEX COUNTY
DOCKET NO. L-40993-84 P.W.

ESSEX GLEN, INC.

Plaintiff,

v.

MAYOR AND COUNCIL OF THE BOROUGH OF ROSELAND and THE BOROUGH OF ROSELAND

Defendants.

LAW DIVISION: ESSEX COUNTY/ MIDDLESEX COUNTY
DOCKET NO. L-52513-85 P.W.

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Decided: October 28, 1985

Stephen Eisdorfer, Assistant Deputy Public Advocate, for plaintiff Morris County Fair Housing Council et al. (Alfred E. Slocum, Acting Public Advocate, attorney).

Arthur Penn for plaintiff Affordable Living Corporation.

Dennis A. Murphy for plaintiff Angelo Cali (Harkavy, Goldman, Goldman and Caprio, attorneys).

Douglas K. Wolfson and Jeffrey R. Surenian for plaintiffs, Siegler Associates and Essex Glen, Inc. (Greenbaum, Rowe, Smith, Ravin, Davis and Bergstein, attorneys).

Barney K. Katchen for plaintiffs, Maurice Soussa and Esther H. Soussa (Citrino, Balsam, DiBiasi and Daunno, attorneys).

Guliet D. Hirsch for plaintiff Stonehedge Associates (Brener, Wallack and Hill, attorneys).

Carl S. Bisgaier for plaintiffs John G. Van Dalen and Van Dalen Associates, Inc. (Bisgaier and Pancotto, attorneys).

Richard T. Sweeney for plaintiff Randolph Mountain Industrial Complex (Sears, Pendleton, and Sweeney, attorneys).

Thomas J. Beetel for plaintiff Robert E. Rivell.

Edward J. Boccher, Deputy Attorney General, for Intervenor State of New Jersey (Irwin I. Kimmelman, Attorney General; Michael R. Cole, First Assistant Attorney General and Deborah T. Poritz, Deputy Attorney General, of Counsel; Michael J. Hass, Christine Steinberg and Nancy B. Stiles, Deputy Attorneys General, on the brief).

Stephen C. Hansbury for defendant Township of Denville (Harper and Hansbury, attorneys).

Alfred J. Villoresi and Debra K. Donnelly for defendant Washington Township (Villoresi and Jansen, attorneys).

Edward J. Buzak for defendant Township of Randolph.

Richard Dieterly for defendant Township of Tewksbury (Gebhardt and Kiefer, attorneys; Sharon Handrock Moore on the brief).

Alan Schussel for defendant Borough of Roseland (Shanahan and Schussel, attorneys).

Lewis Goldshore for amicus curiae Shongum Union Hill Civic Association (Goldshore and Wolf, attorneys).

Outline of Opinion

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SKILLMAN, J.S.C.

On July 2, 1985, Governor Kean signed into law the "Fair Housing Act" ("the Act"). L. 1985, c. 222; N.J.S.A. 52:27D-301 et seq. This statute acknowledges, as determined by the Supreme Court of New Jersey in Southern Burlington Cty. NAACP v. Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II"), that "every municipality in a growth area has a constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families." L. 1985, c. 222, §2(a). The primary change made by the statute is the establishment of an administrative framework for determining the extent of a municipality's Mount Laurel obligation and the manner in which it will be satisfied. Primary responsibility for administration of the statute is conferred upon a newly established state administrative agency called the Council on Affordable Housing ("the Council").

This court has before it motions based upon the Act which have been filed by five municipal defendants in pending Mount Laurel cases. Denville, Tewksbury, Randolph and Washington seek transfer of the cases against them to the Council and Roseland seeks dismissal. Some plaintiffs have responded to these motions by attacking the constitutionality of the Act, contending that certain sections are facially invalid and that those sections are so central to the overall operation of the Act that it must be declared invalid in its entirety.[1] In the alternative, all plaintiffs argue that, assuming the

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1 The constitutionality of the Act is directly challenged by the plaintiff in Essex Glen v. Roseland and two of the developer plaintiffs with cases against Denville, Stonehedge Associates and Siegler Associates. The brief for plaintiff in Van Dalen v. Washington Township states that "[t]he Act contains numerous apparent flaws, internal inconsistencies and loopholes" but "to the extent possible" it should be interpreted "in an effort to save it," and that it "can be interpreted to be a constitutional and valid exercise of the police power." The Public Advocate concludes that "it is reasonably foreseeable that transfer to the Affordable Housing Council will inevitably result in a failure to provide housing opportunities substantially equivalent to the municipality's constitutional fair share," but

constitutionality of the Act, this court should exercise the discretion conferred upon it by the Act to deny transfer or dismissal and proceed to a judgment on the merits. All pending motions which seek transfer to the Council or dismissal have been consolidated solely for the purpose of briefing and argument and the issuance of a decision as to the constitutionality of the Act and, if valid, its impact upon the pending cases.

This court concludes, for the reasons set forth in Part I of this opinion, that the Act is constitutional on its face and that to the extent individual sections raise constitutional problems, those sections either are susceptible to interpretations which would preserve their constitutionality or, if unconstitutional, would be severable from the remainder of the Act. This court further concludes, for the reasons set forth in Part II, that it should retain jurisdiction over the cases against Denville, Randolph and Washington but that the complaints against Tewksbury and Roseland should be transferred to the Council.

I

Constitutionality of the Fair Housing Act

A. Background: The Mount Laurel Doctrine and the Legislative Response

In Southern Burlington Cty. NAACP v. Mount Laurel, 67 N.J. 151 (1975) ("Mount

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he too declines to challenge the Act's constitutionality. The Attorney General has intervened to defend the constitutionality of the Act.

The motions on behalf of Denville, Randolph and Washington could be decided without considering the constitutionality of the Act, since "manifest injustice" would result from transfer of the cases against those municipalities to the Council. However, the constitutional issues must be considered in connection with the Tewksbury and Roseland motions, since no "manifest injustice" would result from requiring the exhaustion of administrative remedies in these cases.

Laurel I"), the Court held that under Article I, paragraph 1 of the New Jersey Constitution a zoning ordinance which forecloses any opportunity of housing for lower income persons is not, absent unusual circumstances, in furtherance of the general welfare and is therefore invalid. Accordingly, the Court held that a municipality must provide an opportunity through its zoning for lower income housing, "at least to the extent of the municipality's fair share of the present and prospective regional need therefor." 67 N.J. at 174.

In Mount Laurel II the Court reaffirmed the constitutional analysis on which its decision in Mount Laurel I had been based:

> The constitutional basis for the Mount Laurel doctrine remains the same. The constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and, as such, must be exercised for the general welfare. When the exercise of that power by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare-in this case the housing needs-of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality. Municipal land use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional. In particular, those regulations that do not provide the requisite opportunity for a fair share of the region's need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection. [92 N.J. at 208-209].

The Court in Mount Laurel II also concluded that eight years experience with Mount Laurel I had demonstrated a need for more effective judicial remedies to enforce the constitutional rights recognized by its earlier decision. Therefore, it established an elaborate procedural framework for the adjudication of Mount Laurel cases. It appointed three judges to hear all Mount Laurel cases, who would be able to develop expertise in the subject matter, to provide some degree of consistency in trial court decisions, and to

assign appropriate priority to this important area of public litigation. 92 N.J. at 216-217, 292-293. The Court also rejected decisions after Mount Laurel I which had held that "'fair share' allocations need not be 'precise' or based on 'specific formulae' to win judicial approval" (92 N.J. at 206), and held that there must be "a determination by the court of a precise region, a precise regional present and prospective need, and a precise determination of the present and prospective need that the municipality is obliged to design its ordinance to meet." 92 N.J. at 257; see also 92 N.J. at 215-216. Recognizing that public interest organizations lack the resources to bring a sufficient number of cases to provide effective enforcement of Mount Laurel obligations, it sought to increase the incentive for developers to pursue Mount Laurel litigation by holding that "where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." 92 N.J. at 279-280; see also 92 N.J. at 218. The Court attempted to reduce the time needed to bring municipal zoning into compliance with Mount Laurel by specifying that the remedial stage should result in the adoption (even under protest) of a compliant zoning ordinance. 92 N.J. at 218, 285-291. It also held that compliance with Mount Laurel may require adoption of zoning which provides affirmative measures to encourage construction of housing affordable to lower income families, such as requiring a certain percentage of units to be set aside for those families. 92 N.J. at 217, 260-274. The Court made a variety of other rulings, all with the common purpose of simplifying Mount Laurel litigation and promoting more effective enforcement of this constitutional obligation. For example, it required municipalities to take all reasonable steps to assist developers in obtaining subsidies (92 N.J. at 217, 262-265), and it held that a municipality's obligation to zone for a fair share of the regional need for lower income housing turns on whether it is located partly or wholly within a "growth area" designated by the New Jersey

Department of Community Affairs in its State Development Guide Plan ("SDGP"). 92 N.J. at 215, 223-248.

While issuing these rulings to improve judicial administration of the Mount Laurel doctrine, the Court expressed in emphatic terms the desirability of legislative action addressed to the problem of exclusionary zoning. It stated that "we have always preferred legislative to judicial action in this field." 92 N.J. at 212. The Court also noted that its "deference" to certain limited legislative and executive initiatives in the field could be "regarded as a clear signal of our readiness to defer further to more substantial action." 92 N.J. at 213. However, it concluded that " [i]n the absence of adequate legislative and executive help, we must give meaning to the constitutional doctrine in the cases before us through our own devices, even if they are relatively less suitable." 92 N.J. at 213-214 (emphasis added). Consequently, certain of the rulings set forth in Mount Laurel II may be viewed not as constitutional imperatives in themselves but rather as "devices" to promote more effective judicial enforcement of the Mount Laurel doctrine until such time as the Legislature might address the problem in another manner.

The Fair Housing Act is the legislative response to the Court's encouragement of legislative initiatives to address the problems of housing for lower income families. The legislative findings include a declaration that " [t]he interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to this constitutional obligation." L. 1985, c. 222, § 2(c). The central role in providing this comprehensive response is assigned to the Council on Affordable Housing. The Council has the responsibility to determine housing regions, to estimate the present and prospective need for low and moderate income housing and to adopt "criteria and guidelines" for a municipality's determination of its present and prospective fair share of the housing need in its region.

Id. at § 7. A municipality may elect to participate in the administrative procedures established by the Act by notifying the Council of that intention by November 2, 1985 and filing a "housing element" and "fair share housing ordinance" within five months after the Council's adoption of its criteria and guidelines. Id. at §9. Thereafter, a municipality may petition the Council for approval of its housing element and implementing ordinance, which is called "substantive certification." Id. at §13. The Council also has the responsibility to "engage in a mediation and review process" if there is an objection to a municipality's petition for substantive certification or upon the request of a party to pending Mount Laurel litigation. Id. at§ 15(a). A party which has filed a Mount Laurel case within 60 days of the effective date of the Act must exhaust the procedures for mediation and review. Id. at§ 16(b). A party to a case filed more than 60 days before enactment of the Act also may seek transfer to the Council, but the court may deny such an application if "transfer would result in a manifest injustice to any party to the litigation." Id. at §16(a). If mediation is unsuccessful, the dispute may be referred to the Office of Administrative Law for hearing as a "contested case" pursuant to the Administrative Procedures Act. N.J.S.A. 52: 14B-1 et seq. The Act further provides that until expiration of the statutory period for the filing of municipal housing elements, " [n] o builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation which has been filed on or after January 20, 1983, unless a final judgment providing for a builder's remedy has already been rendered to that plaintiff." L. 1985, c. 222, §28.

The constitutional challenges to the Act are premised solely upon the Mount Laurel doctrine. No party contends that the Act offends any provision of the United States Constitution or any provision of the New Jersey Constitution other than the part of

Article I, paragraph 1 on which the Mount Laurel doctrine rests.[2] Rather, plaintiffs argue that individual sections of the Act, considered either independently or in combination, so fundamentally undermine the Mount Laurel doctrine that the Act must be declared unconstitutional in its entirety.

The general principles which govern judicial consideration of any attack upon the constitutionality of legislation were described as follows in New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972):

> One of the most delicate tasks a court has to perform is to adjudicate the constitutionality of a statute. In our tripartite form of government that high prerogative has always been exercised with extreme self restraint, and with a deep awareness that the challenged enactment represents the considered action of a body composed of popularly elected representatives. As a result, judicial decisions from the time of Chief Justice Marshall reveal an unswerving acceptance of the principle that every possible presumption favors the validity of an act of the Legislature. As we noted in Roe v. Kervick, 42 N.J. 191, 229 (1964), all the relevant New Jersey cases display faithful judicial deference to the will of the lawmakers whenever reasonable men might differ as to whether the means devised by the Legislature to serve a public purpose conform to the Constitution. And these cases project into the forefront of any judicial study of an attack upon a duly enacted statute both the strong presumption of validity and our solemn duty to resolve reasonably conflicting doubts in favor of conformity to our organic charter. Moreover, the conclusions reached in such cases demonstrate that in effectuating this salutary policy, judges will read the questioned statute as implying matters requisite to its constitutional viability if it contains terms which do not exclude such requirements.

There are a number of corollaries to the presumption of validity of legislative

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[2] The constitutionality of conferring authority upon an administrative agency in the executive branch of government to adopt regulations and to conduct administrative hearings to enforce constitutional rights is not questioned. See Matter of Egg Harbor Assocs. (Bayshore Centre), 94 N.J. 358 (1983); Robinson v. Cahill, 69 N.J. 449 (1976); Jenkins v. Morris Tp. Dist. and Bd. of Ed., 58 N.J. 483 (1971); see also Mount Laurel II, 92 N.J. at 250-251.

enactments which are pertinent to this case. One is that "a challenged statute will be construed to avoid constitutional defects if the statute is 'reasonably susceptible' of such construction." New Jersey Board of Higher Ed. v. Shelton College, 90 N.J. 470, 478 (1982); Schulman v. Kelly, 54 N.J. 364, 370 (1969). Therefore, "where a statute is capable of two constructions, one of which would render it unconstitutional and the other valid, that which will uphold its validity must be adopted." Ahto v. Weaver, 39 N.J. 418, 428 (1963). Another is that a court may engage in "judicial surgery" or narrow the construction of a statute to preserve its constitutionality. Town Tobacconist v. Kimmelman, 94 N.J. 85, 104 (1983); New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 75 (1980). A further principle of judicial restraint is that challenges to the constitutionality of legislation "will not be resolved unless absolutely imperative in the disposition of the litigation." Ahto v. Weaver, supra, 39 N.J. at 428.

The case applying these principles which is most analogous to the present case is Robinson v. Cahill, 69 N.J. 449 (1976). In both Robinson v. Cahill and Mount Laurel the Court had determined that a long-established part of the system of local government violated the New Jersey Constitution. In Robinson v. Cahill the Court had held that statutes which governed the financing of local schools violate the guarantee of a "thorough and efficient" system of public education. In Mount Laurel the court had held that municipal zoning ordinances which failed to provide a realistic opportunity for the construction of lower income housing violate equal protection and due process guarantees. In each case the Court had urged the Legislature to respond to the deficiencies it found in existing laws. In each case, the Legislature, after prolonged debate, enacted comprehensive legislation providing for enforcement by a state administrative agency of the constitutional rights involved— by the Commissioner of Education in Robinson v. Cahill and by the Council on Affordable Housing in this case. In Robinson v. Cahill, as in

this case, plaintiffs pointed to a host of problems with the interpretation and implementation of the new law. See Robinson v. Cahill, supra, Chief Justice Hughes concurring at 468-475, Judge Conford concurring at 476-511, and Justice Pashman, dissenting at 512-562. Nonetheless, a majority of the Court concluded that faithfulness to the presumption of validity of legislative enactments required it to sustain the validity of the law on its face and to afford the Commissioner an opportunity to administer its provisions in a manner which would fulfill the constitutional guarantee of a "thorough and efficient" system of public schools. See also Abbott v. Burke, 100 N.J. 269 (1985). This court is convinced that a similiar approach should be followed in reviewing the constitutionality of the Fair Housing Act.

There are two primary categories of challenges to the Act. First, plaintiffs claim that requiring parties with pending Mount Laurel claims to utilize the administrative procedures of the Act will result in unconstitutional delay in enforcement of Mount Laurel obligations. Second, plaintiffs claim that the provisions for the determination of regions, regional need for lower income housing, fair share allocations and credits fail to satisfy the requirements of Mount Laurel. Plaintiffs' claims that the Act will unconstitutionally delay enforcement of Mount Laurel obligations are considered in Parts IB and IC and their substantive challenges in Parts ID through IK.

B. Delay in Enforcement of Mount Laurel Obligations Under the Administrative Procedures of the Act.

A central theme of the Mount Laurel II opinion is that vindication of the constitutional right recognized in Mount Laurel I had been thwarted by unjustifiable delays in the litigation process. The Court stated that:

> The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience,

> however, that unless a strong judicial hand is used, Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals. [92 N.J. at 199].

At another point it observed that:

> Confusion, expense and delay have been the primary enemies of constitutional compliance in this area. [92 N.J. at 292] .

The Court conceived that the various procedural rulings set forth in its Mount Laurel II opinion would simplify and thereby reduce the time required to litigate Mount Laurel claims:

> The remedies authorized today are intended to achieve compliance with the Constitution and the Mount Laurel obligations without interminable trials and appeals. Municipalities will not be able to appeal a trial court's determination that its ordinance is invalid, wait several years for adjudication of that appeal, and then, if unsuccessful, adopt another inadequate ordinance followed by more litigation and subsequent appeals. We intend by our remedy to conclude in one proceeding, with a single appeal, all questions involved. [92 N.J. at 290] .

Plaintiffs argue that exhaustion of the administrative procedures established by the Act will take so long to complete and will produce such uncertain results that the delay and confusion condemned by the Court in Mount Laurel II will be reestablished — this time in the administrative rather than the judicial process. This argument is made most forcefully by plaintiffs with pending cases now close to completion.

The initial step in the administrative process is the Council's determination of housing regions and present and prospective need for lower income housing, and the adoption of "criteria and guidelines" for individual municipalities to determine their fair shares. L. 1985, c. 222, § 7. The Council has seven months after either January 1, 1986 or the confirmation of its last member, whichever date is earlier, to discharge this responsibility. Ibid. Once the Council acts, any municipality which has elected to participate in the administrative process has five additional months within which to file a

housing element and an implementing fair share housing ordinance. Id. at §9(a). The next step in a case transferred from the courts to the Council is "review and mediation." Id. at § 15(a)(2).[3] It is unclear whether this process may occur simultaneously with municipal consideration of its housing element or only after submission of the housing element.[4] In any event, it would appear that mediation cannot be completed until the housing element is filed, since that is when a municipality will determine the contents of its Mount Laurel compliance plan. If mediation is unsuccessful, the next step in the administrative process is transfer of the matter to the Office of Administrative Law. Id. at § 15(c).[5] The

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[3] The review and mediation sections of the Act present a number of difficult problems of interpretation. For example, sections 15(a) and 16(b) confer explicit authority to seek mediation and review only upon a party who has either instituted litigation less than 60 days before the effective date of the Act or filed an objection to a petition for substantive certification pursuant to section 14. However, it is implicit in section 16(a) that a case filed more than 60 days before the effective date of the Act, which is transferred to the Council, also will be subject to review and mediation. In fact, the order of transfer properly may be treated as a request for mediation and review.

[4] The Act does not indicate when mediation and review of a transferred case is to begin. Section 15(d) of the bill originally enacted by the Legislature provided that " [t] he mediation process shall commence as soon as possible after the request for mediation and review is made, but in no case prior to the council's determination of housing regions and needs pursuant to section 7 of this act." This would have meant that mediation could have begun when the Council adopted its "criteria and guidelines," which would be no later than August 1, 1986. However, the changes recommended by the Governor in his conditional veto message and later accepted by the Legislature deleted this sentence. The conditional veto message did not provide an explanation for this change. However, the most reasonable explanation is that it was contemplated that the timing of review and mediation would be determined by the Council in its procedural rules to be adopted pursuant to section 8. Although a number of parties assume that mediation cannot begin until a municipality files its housing element, it is arguable that the most propitious time for mediation is while a municipality is developing its housing element. It may be anticipated that the Council will address this issue at an early date.

[5] The Act may be read to limit referral to the Office of Administrative Law and the administrative steps which follow to situations where a municipality has filed a petition for substantive certification. The term "mediation efforts" in section 15(c) seems to refer back to the preceding section, 15(b), which deals solely with mediation at the request of an objector to a petition for substantive certification. Furthermore, sections 15(c) and 14(b), read together, seem to indicate that the outcome of a case referred to the Office of Administrative Law will be the grant or denial of substantive certification. Therefore, it is possible to read the Act as permitting "review and mediation" to be completed in a transferred case without referral to the Office of Administrative Law if a

Administrative Law Judge must issue an "initial decision" within 90 days. Ibid. The Council has an additional 45 days within which to accept, reject or modify this initial decision. N.J.S.A. 52:14B-10(c). If the Council denies or conditionally approves a municipality's fair share plan, the municipality has another 60 days within which to refile its plan with changes satisfactory to the Council. L. 1985, c. 222, §14(b). The municipality then has another 45 days within which to adopt the fair share housing ordinance approved by the Council. Ibid. If the maximum period permitted by statute were taken at each of these steps, exhaustion of the entire administrative process would take more than two years from enactment of the Act, that is, until September 1, 1987.[6]

Plaintiffs further note that various uncertainties in the administrative process could result in an even longer period of time elapsing. For example, the time for issuance of an initial decision by an Administrative Law Judge may be extended by the Director of Administrative Law "for good cause shown." Id. at § 15(c). Plaintiffs express skepticism

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municipality does not petition for substantive certification. However, it may be anticipated that most municipalities will petition for substantive certification once a request for mediation and review is filed. In addition, it is possible, as urged by the Attorney General, to treat a motion for transfer to the Council as the equivalent of a petition for substantive certification.

[6] This calculation for transferred cases is made as follows:

(1) Commencement of period for Council to devise criteria and guidelines (§ 7) —	January 1, 1986
(2) Deadline for adoption of criteria and guidelines by Council (§ 7)—	August 1, 1986
(3) Deadline for municipality to file housing element (§ 9(a))— (If mediation is not concluded when the housing element is filed, this date would have to be extended accordingly.)	January 1, 1987
(4) Issuance of an initial decision by an Administrative Law Judge (§ 15(c))—	April 1, 1987
(5) Issuance of a final decision by the Council (N.J.S.A. 52:14B-10(c))—	May 15, 1987
(6) Corrective action by the municipality if required by the Council (§ 14(b))—	July 15, 1987
(7) Adoption of an ordinance which complies with Mount Laurel (§ 14(b))—	September 1, 1987

whether a decision can be rendered within 90 days in a matter as complex as a Mount Laurel case, and consequently they fear that the power to extend the time for issuance of an initial decision will be liberally exercised. The Act also fails to specify what consequences would flow from a failure to meet one of the statutory deadlines.[7]

If every party with a pending Mount Laurel case, including one close to conclusion, were required to exhaust the rather lengthy administrative procedures established by the Act, its constitutionality would be difficult to defend. However, the Legislature has not imposed such a requirement. Rather, it has demonstrated an awareness of the danger of undue delay by requiring trial courts to determine, on a case by case basis, whether cases filed more than 60 days prior to the effective date of the Act should be transferred to the Council. In determining whether to transfer, the trial courts are directed to "consider whether or not the transfer would result in manifest injustice to any party to the litigation." Id. at § 16(a). The legislative intent in including this provision in the Act is discussed in detail in Part II of this opinion. However, consistent with the principle that a statute should be construed so as to preserve its constitutionality (Ahto v. Weaver, supra), this exception to the requirement of exhaustion of administrative remedies should be read as broadly as is needed to avoid a declaration that the statute

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7 Several parties point out that under section 13 the filing of a petition for substantive certification lies within the sole discretion of the municipality and that it may file a petition at any time within six years after filing its housing element. They argue that if Council review of a petition is a prerequisite to resort to the courts, exhaustion of administrative remedies could be delayed for more than seven years. However, it is possible, reading sections 14, 15 and 16 together, to conclude that a request for review and mediation or transfer under section 16 activates the procedure for substantive certification under section 14. In any event, the expiration of the period for exhaustion of administrative remedies is keyed not to Council action on a "petition for substantive certification" but rather to "review and mediation," and that process must be completed within six months. Id. at § 19; see also id. at §18 (which sets forth alternative conditions for satisfaction of the exhaustion requirement). Furthermore, any exhaustion of administrative remedy requirement which might take up to seven years to complete would be unreasonable, and therefore the Act should be read to avoid such a requirement.

unconstitutionally delays adjudication of pending Mount Laurel cases.

The Legislature provided for retention of jurisdiction by the courts only in cases filed more than 60 days before the effective date of the Act. L. 1985, c. 222, §16. Therefore, it is necessary to consider separately whether the administrative procedures of the Act will cause unconstitutional delay in connection with Mount Laurel cases filed after that cut-off date. The danger of unconstitutional delay in such cases may be easily avoided by invoking R. 4:69-5, which provides that administrative remedies need not be exhausted "where it is manifest that the interest of justice requires otherwise...." Whatever may have been the intent of the Legislature, this court rule could be found applicable to cases filed within 60 days of enactment of the Act if that were necessary to preserve its constitutionality.

Furthermore, the use of the procedures established by the Act should not cause undue delay in cases filed within 60 days of enactment. Experience has demonstrated that Mount Laurel litigation, even under the simplified procedures set down in Mount Laurel II, is extremely time consuming. Detailed expert reports still must be prepared and lengthy discovery conducted before a case is ready for trial. The trials, which often have been bifurcated to simplify consideration of issues, have taken from a few weeks to a month. Moreover, the process of rezoning in conformity with Mount Laurel generally has taken much longer than the 90 days envisioned in Mount Laurel II.[8] Therefore, if mediation under the act is successful, cases may be brought to a conclusion by the Council sooner than if they were fully litigated before the courts. In addition, while some delay in

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[8] One problem experienced both by litigants in preparing Mount Laurel cases for trial and by the courts in supervising rezoning in conformity with Mount Laurel has been the unavailability of planning experts with experience in dealing with Mount Laurel issues. Such experts have been difficult to retain, and their heavy workloads often have resulted in substantial delays in the submission of reports.

bringing cases to trial will occur if mediation is unsuccessful, that delay should not be unduly lengthy because much of the review and analysis in the administrative process is the same as normal pretrial preparation.

In any event, the mere fact that the Act may cause some delay in final disposition of some Mount Laurel claims does not render the Act unconstitutional on its face. As former Chief Justice Hughes observed in his concurring opinion in Robinson v. Cahill:

> In the area of judicial restraint and moderation there is room for accommodation to the exigencies of government, as pointed out by Judge Conford, in the consideration of practical possibilities of accomplishment. Brown v. Board of Educ. of Topeka, 349 U.S. 294, 300-01, 75 S. Ct. 753, 756, 99 L. Ed. 1083, 1106 (1955). This Court has exercised this restraint in the timing of required accomplishment of a constitutional goal, without abandoning its eventual enforcement. [69 N.J. at 474-475] .

C. Moratorium on Judicial Award of Builder's Remedies.

Section 28 provides in relevant part:

> No builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation which has been filed on or after January 20, 1983, unless a final judgment providing for a builder's remedy has already been rendered to that plaintiff. This provision shall terminate upon expiration of the period set forth in subsection a. of section 9 of this act for the filing with the council of the municipality's housing element.

This moratorium could remain in effect until January 1, 1987.[9]

There are two exceptions to the moratorium. First, it is inapplicable to cases filed before January 20, 1983. Second, the definition of "builder's remedy" limits its operation to "a court imposed remedy for a litigant who is an individual or a profit-making entity."

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9 The moratorium expires on the date when municipalities must file their housing elements which, as indicated in footnote 6, may be as late as January 1, 1987.

L. 1985, c. 222, §28. Therefore, the moratorium is inapplicable to litigation brought by a non-profit public interest organization.

Section 28 raises substantial constitutional issues. The Court in Mount Laurel II determined that the municipal obligation to provide a realistic opportunity for the construction of its fair share of lower income housing may require affirmative governmental measures to make that opportunity realistic, such as density bonuses for developers who construct lower income housing or requirements that a certain percentage of housing units be set aside for lower income households. 92 N.J. at 260-274. It also determined that a developer who prevails in Mount Laurel litigation and is prepared to provide a substantial amount of lower income housing should be awarded a builder's remedy, that is, its land should be rezoned or its project approved, unless that remedy would be "clearly contrary to sound land use planning." Id. at 279-281. In the nearly three years since Mount Laurel II almost all new exclusionary zoning suits have been filed by developers. Furthermore, every plan for compliance with Mount Laurel, whether by court order or in settlement, has included mandatory set-asides. See, e.g., Allan Deane Corp. v. Bedminster Tp., _____ N.J. Super. _____ (Law Div. 1985); Urban League of Essex Cty. v. Mahwah, _____ N.J. Super. _____ (Law Div. 1984). In short, the availability of builder's remedies and the imposition of mandatory set-asides have been the cornerstones of achieving compliance with Mount Laurel through litigation.

Section 28 appears to prohibit a court from awarding either of these remedies, for a period as long as 18 months, in any case to which it applies. Since there is substantial doubt whether a satisfactory Mount Laurel compliance plan can be devised, at least in most municipalities, without the use of mandatory set-asides, the practical effect of the moratorium, if valid, would be to prevent a court from awarding any effective

remedy.[10]

Judicial remedies are secured against legislative interference by the Judicial Article (Article VI) of the 1947 New Jersey Constitution. Hager v. Weber, 7 N.J. 201 (1951). This constitutional restraint is applicable to actions in lieu of prerogative writs challenging the validity of municipal zoning ordinances. As stated in Fischer v. Bedminster Tp., 5 N.J. 534 (1950):

> By the clearest language, the Constitution commits to the Supreme Court the regulation of the new remedies provided in lieu of prerogative writs. Review, hearing and relief shall be had on such terms and in such manner as the Supreme

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[10] The Attorney General, noting that section 28 defines a "builder's remedy" as "a court imposed remedy for a litigant" (emphasis added), takes the position that the moratorium only prohibits court ordered rezoning of a developer-plaintiff's property, thereby permitting rezoning of other properties with mandatory set-asides or density bonuses. A literal reading of section 28 may support this interpretation. However, this would place a property owner who had brought a Mount Laurel suit in a worse position than every other property owner in a municipality; only the plaintiff's property would be disqualified from being rezoned for Mount Laurel housing. It would be difficult to ascribe any purpose to such a provision other than penalizing a party for having filed a Mount Laurel action. Therefore, while section 28 would have a more limited role under the Attorney General's interpretation than is assumed in this opinion and hence would leave more room for a rezoning to achieve compliance with Mount Laurel during the moratorium period, it also would raise additional due process and equal protection issues by placing the entire onus of the moratorium on parties who file Mount Laurel actions.

Another possible reading of section 28 is that it allows rezoning with density bonuses or mandatory set-asides of even a developer-plaintiff's property, so long as no special preference is extended to that developer-plaintiff in the comprehensive rezoning of a municipality to achieve compliance with Mount Laurel. In Mount Laurel II, the term "builder's remedy" refers to a court order directing approval of the project or rezoning of the property of a developer-plaintiff who succeeds in Mount Laurel litigation. 92 N.J. at 279-280. In other words, the term refers to a preference for using the property of a successful developer-plaintiff in rezoning to achieve compliance with Mount Laurel. On the other hand, the definition of a "builder's remedy" in section 28 may apply literally to any court ordered rezoning which includes what are referred to in Mount Laurel II, 92 N.J. at 265-274, as "inclusionary zoning devices," i.e., either an authorization or a mandate for a developer to construct market priced units at a higher density than otherwise allowable in exchange for constructing a certain percentage of units affordable to lower income persons. However, if the constitutionality of section 28 can be preserved by reading it only to impose a moratorium upon the special preference extended successful developer-plaintiffs in Mount Laurel II rather than any rezoning with mandatory set-asides or density bonuses, it may be so interpreted.

> Court alone may provide by rule. In the administration of these remedies, there is to be no division of authority. It may well be that the framers of the Constitution were guided by what they considered the lessons of experience; but, whatever the reason, the provision is to be read and enforced in accordance with the plain terms of the grant. No distinction is made between the substantive jurisdiction to afford the relief theretofore available through the prerogative writs and the mode and manner of the exercise of the power. The whole is within the exclusive jurisdiction of the Supreme Court. Neither the exercise of the power inherent in the old Supreme Court by means of the prerogative writs nor the regulation of the remedy is subject to legislative control. [5 N.J. at 541].

Regardless of how it may be interpreted, section 28 appears to regulate remedies in Mount Laurel cases. Indeed, it appears to impose an absolute prohibition upon the award of certain judicial remedies for a specified period of time. Therefore, it is difficult to see how section 28 can be reconciled with the prohibition of the New Jersey Constitution against legislative interference with judicial remedies.

However, it is firmly established that "a court should not reach and determine a constitutional issue unless absolutely imperative in the disposition of the litigation." Donadio v. Cunningham, 58 N.J. 309, 325-326 (1971); accord Ahto v. Weaver, supra, 39 N.J. at 428. Consequently, if possible, the pending motions should be decided without passing on the constitutionality of section 28.

Section 28 may never adversely impact upon the only two parties in the pending cases who seek to challenge its constitutionality, Stonehedge and Siegler. Both are developers who have filed Mount Laurel actions against Denville. However, the prime mover in the challenge to Denville's zoning ordinance has been the Public Advocate. Since the Public Advocate's action was filed on October 13, 1978 and both the Public Advocate and the other groups he represents are public interest organizations, his suit is not subject to section 28. This means that in providing relief to the Public Advocate and

his clients the court can order any property in Denville, including the property owned by Stonehedge and Siegler, to be rezoned with mandatory set-asides. Such rezoning at the behest of the Public Advocate would obviate the need to address the claims of Stonehedge and Siegler for "builder's remedies." Furthermore, since the primary burden of the attack on Denville's zoning ordinance has been carried by the Public Advocate, there is doubt whether any of the developer-plaintiffs who have filed suits against Denville will be found to have "succeeded" in Mount Laurel litigation and hence to be eligible for a builder's remedy. Allan Deane Corp. v. Bedminster Tp., supra, _____ N.J Super. at _____ (slip opinion at 39-46); J.W. Field Co. v. Franklin Tp., _____ N.J. Super. _____, (Law Div. 1985) (slip opinion at 14). If the property owned by Siegler and Stonehedge is rezoned in connection with the Public Advocate's suit or if these plaintiffs are found to be ineligible for a builder's remedy, there could be a complete and final disposition of the claims against Denville without the court ever having to consider the constitutionality of section 28.

The constitutionality of the moratorium on builder's remedies probably will have to be decided before there can be a final judgment in Van Dalen case, but Van Dalen has taken the position that this issue should be addressed at the compliance hearing rather than in connection with the pending motion to transfer. Consequently, the only party who clearly has a stake in the validity of section 28 has refrained thus far from mounting his challenge.

A further reason for not determining the constitutionality of section 28 at this time is that the issue has not been briefed in sufficient depth. Only two pages of Stonehedge's brief and three pages of Essex Glen's reply brief are devoted to the issue. The Attorney General's brief discusses section 28 at greater length but fails to address the most serious of the constitutional issues it raises. He cites the line of cases which

have upheld temporary legislative moratoriums on development. See, e.g., Deal Gardens, Inc. v. Board of Trustees of Loch Arbour, 48 N.J. 492 (1967); Kingston East Realty Co. v. State, 133 N.J. Super. 234 (App. Div. 1975); Meadowland Regional Dev. Agency v. Hackensack Meadowlands Dev. Comm'n, 119 N.J. Super. 572 (App. Div. 1972), certif. den. 62 N.J. 72 (1972). However, the most serious problem with section 28 is not that it will cause a temporary delay in some development projects but that it purports to restrict the remedies which may be awarded by the courts. Therefore, section 28 appears comparable not to legislation which would impose a moratorium on development but rather to legislation which would prohibit the courts from enjoining such a moratorium even if it were determined to be unconstitutional. Such a statute undoubtedly would be held unconstitutional on the authority of Hager v. Weber, supra, and Fischer v. Bedminster Tp., supra. The Attorney General's brief does not discuss these cases or the substantial constitutional issue they present.

The constitutionality of section 28 would have to be determined now if a holding of unconstitutionality of that section would result in an invalidation of the entire Act. However, section 28 would be severable, leaving the remainder of the Act intact, even if it were unconstitutional. Section 32 states that " [i]f any part of this act shall be held invalid, the holding shall not affect the validity of remaining parts of this act." This section raises a presumption that any section of the legislation is severable, if found to be invalid. This presumption may be overcome only by a showing that the invalidated section is essential to the overall legislative plan. State v. Lanza, 27 N.J. 516, 527-528 (1958); see also Newark Superior Officers Ass'n v. Newark, 98 N.J. 212, 231-232 (1985); Right to Choose v. Byrne, 91 N.J. 287, 311-312 (1982); Inganamort v. Borough of Fort Lee, 72 N.J. 412, 421-424 (1977); Affiliated Distillers Brands Corp. v. Sills, 56 N.J. 251, 264-265 (1970), mod., 60 N.J. 342 (1972). As stated in Affiliated Distillers:

> Severability is a question of legislative intent.... The governing principle is whether it can be fairly concluded that the Legislature designed that statute to stand or fall as a unitary whole. In reaching this conclusion, we must determine whether the objectionable feature can be excised without substantial impairment of the principal object of the statute.... An entire statute will not be invalidated when one clause is found to be unconstitutional unless that clause is so intimately interconnected with the whole that it can be reasonably said that the Legislature would not have enacted the statute without the offending clause.... [56 N.J. at 265; citations omitted]

Section 28 could be excised without substantial impairment of the principal objective of the Act, which is to replace existing judicial remedies for enforcement of the constitutional rights recognized by Mount Laurel with administrative remedies which have the same ultimate goal. However, section 28 does not apply to proceedings before the Council. It applies only to Mount Laurel cases which remain within the judicial system. Furthermore, it does not apply to cases filed before January 20, 1983 or to cases brought by public interest organizations. Therefore, the moratorium would be operative only under limited circumstances — cases filed by profit making entities after January 20, 1983 in which the court concludes that a transfer to the Council would cause "manifest injustice." Furthermore, even in those cases, the section expires by its own terms within a maximum of 18 months. Therefore, section 28 would be severable from the remainder of the Act, even if ultimately found to be unconstitutional.

Under these circumstances, it is unnecessary to determine the constitutionality of section 28 in passing on the pending motions.

D. Regions

In Mount Laurel II, the Court said:

> [W]e indicated in Madison [Oakwood at Madison Inc. v. Madison, 72 N.J. 481 (1977)] our general approval of Judge

> Furman's definition of region (72 N.J. at 537), slightly modified, as "that general area which constitutes, more or less, the housing market area of which the subject municipality is a part, and from which the prospective population of the municipality would substantially be drawn, in the absence of exclusionary zoning...." A trial court's acceptance of any variant of this definition should be premised on special circumstances. [92 N.J. at 256].

On the other hand, section 4(b) of the Act defines "housing region" as

> a geographic area of no less than two nor more than four contiguous, whole counties which exhibit significant social, economic and income similarities, and which constitute to the greatest extent practicable the primary metropolitan statistical areas as last defined by the United States Census Bureau prior to the effective date of this act.

Plaintiffs claim that this definition violates Mount Laurel II because it (1) limits housing regions to between two and four counties; and (2) requires significant social, economic and income similarities within the region. Plaintiffs also point out that, except for Van Dalen v. Washington Tp., _____ N.J. Super. _____ (Law Div. 1984) (slip opinion at 14-18), every trial court decision since Mount Laurel II has recognized that the applicable housing region or regions was larger than four counties. See, e.g., AMG Realty Co. v. Warren Tp., _____ N.J. Super. _____ (Law Div. 1984) (slip opinion at 11-14, 28-37).

There is an element of arbitrariness in any method of delineating housing regions for the purpose of determining a municipality's regional fair share obligation.

The method which would appear to follow most closely the definition of region set forth in Mount Laurel II, that is, "the housing market area of which the subject municipality is a part," (92 N.J. at 256) delineates individual commutershed regions for each municipality. This method requires determining the time within which a person reasonably may be expected to commute to work and drawing a line around all municipalities which may be reached within that time. See Center for Urban Policy Research, Rutgers— The State University of New Jersey, Mount Laurel II: Challenge &

Delivery of Low-Cost Housing, at 36-44 (1983) ("Rutgers Report I"). However, there are serious practical problems in delineating commutershed regions. There is debate among the experts whether 30 minutes, 45 minutes or some other commuting time should be used in delineating such regions. Id. at 37-41. Moreover, once a reasonable commuting time is established, it must be determined how far a person can travel within that time during commuting hours. Id. at 41-42. The process of establishing a commutershed for purposes of Mount Laurel is further complicated by the fact that certain data which is required to determine the extent of regional need for lower income housing, such as population projections, is available only at the county level. Therefore, the courts which have addressed the issue since Mount Laurel II, as well as scholarly commentators, all have agreed that Mount Laurel housing regions must be composed of whole counties. Van Dalen, supra, _____ N.J. Super. at _____ (slip opinion at 17); AMG Realty, supra, _____ N.J. Super. at ____ (slip opinion at 28-37); Rutgers Report I, at 46-70; Center for Urban Policy Research, Rutgers— The State University of New Jersey, Response to the Warren Report: Reshaping Mount Laurel Implementation, at 6-28 (1984) ("Rutgers Report II"). However, the use of whole county regions can have the effect of expanding the size of a region beyond the reasonable commuting distance on which the commutershed is premised. Furthermore, adjoining municipalities in the same county may be located in significantly different regions, if the few miles distance between them results in their individual commutersheds being drawn to include different counties. There is also a serious conceptual problem with commutershed regions. As convincingly demonstrated by the Center for Urban Policy Research at Rutgers, the total fair share obligations of all municipalities calculated on the basis of commutershed regions does not equal the total Mount Laurel housing need of the State. Rutgers Report II, at 15-16.

The alternative to delineating individual commutershed regions for each municipality is to use fixed regions. Such regions avoid the need for determining an

individual commutershed region for each municipality. Such regions also avoid the conceptual problem noted by the Center for Urban Policy Research. On the other hand, it is difficult to reconcile fixed regions with the definition of region set forth in Mount Laurel II. A municipality at the outer edge of a region may be a substantial distance from another municipality at the opposite end of the region and at the same time immediately adjoin a neighboring municipality which is outside the region. Therefore, a fixed region may not accurately reflect the housing market of a constituent municipality on the perimeter of the region. Furthermore, any attempt to address this problem by expanding the size of a region may result in a region which is much larger than the housing market of any of its constituent municipalities. Rutgers Report II, at 8-9, 18-19.

In short, every approach to the delineation of regions for the purpose of establishing fair share housing obligations raises practical and conceptual problems. But as the court noted in AMG Realty, supra, "while the defining of regions is of paramount importance in designing a method to distribute fair share, it is only a vehicle toward accomplishing the ultimate goal — satisfaction of the constitutional obligation." _____ N.J. Super. at ____ (slip opinion at 28). Therefore, the issue is whether it is possible for the Council to establish regions in accordance with section 4(b) which will satisfy the constitutional obligation.

Plaintiffs claim that the statutory requirement that the counties within a region "exhibit significant social, economic and income similarities" (L. 1985, c. 222, § 4(b)) will lead the Council to draw regions which place urban counties and suburban counties in separate regions, thereby preventing satisfaction of lower income housing needs in urban counties. It is doubtful whether regions consisting solely of urban counties, such as a Hudson-Essex region, would be compatible with the goals of the Mount Laurel doctrine; the combination of a substantial need for lower income housing and the lack of available vacant

land in these counties would make it unlikely that the total need for lower income housing could be satisfied. However, the general legislative directive that counties within a region "exhibit significant social, economic and income similarities" neither compels the inclusion of multiple urban counties in a single region nor prohibits the combination of urban and suburban municipalities. Moreover, this legislative directive must be read in light of the further legislative directive that regions "constitute to the greatest extent practicable the primary metropolitan statistical areas as last defined by the United States Census Bureau." Ibid. Some primary metropolitan statistical areas (PMSAs) mix urban and suburban counties: for example, the Newark PMSA consists of Essex, Union, Morris and Sussex counties. Rutgers Report I, at 58-61. Therefore, it may be assumed that the Legislature did not consider an area which includes both urban and suburban counties to be inconsistent with the statutory definition of region.

It is also significant that the legislative directives for defining regions appear fully consistent with the regions proposed by the Center for Urban Policy Research. The Center recommended the use, for the purpose of determining Mount Laurel obligations, of fixed regions composed of no less than two and no more than four whole counties which are to a substantial extent congruent with the PMSAs. Rutgers Report I, at 51, 58-61. Furthermore, the center viewed each of the regions it recommended as being "tied by social and economic linkages." Rutgers Report I, at 67. Therefore, the adoption by the Council of the Mount Laurel regions proposed by the Center would be consistent with section 4(b).

The rationale for use of those regions is set forth in two detailed, scholarly reports prepared by the Center. Rutgers Report I, at 46-70; Rutgers Report II, at 6-18. In brief, these reports conclude that the Rutgers regions reflect actual housing markets within the State, are sufficiently large to permit satisfaction of each region's lower income housing

need and also enable each municipality to determine its fair share obligation more readily than the regions adopted by the court in AMG Realty. These conclusions are supported by expert testimony presented in the Public Advocate's suit against Denville, which showed that the fair shares of Denville and of other selected municipalities did not vary significantly when the Rutgers regions were substituted for the regions accepted by the court in AMG Realty.[11] Therefore, the regions proposed by the Center may be found to be consistent with the objectives of Mount Laurel, and plaintiffs' attack upon the constitutionality of section 4(b) must be rejected.

E. Prospective Need

The basic definition of "prospective need" contained in the Act is:

> a projection of housing needs based on development and growth which is reasonably likely to occur in a region or a municipality, as the case may be, as a result of actual determination of public and private entities. [L. 1985, c. 222, § 4(j)] .

Plaintiffs do not challenge this basic definition,[12] but rather limit their challenge to the further legislative directive that in making a projection of housing need,

> consideration shall be given to approvals of development applications, real property transfers and economic projections prepared by the State Planning Commission....

Plaintiffs argue that if only a small number of development applications have been

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[11] The comparison in fair share numbers was as follows:

	Rutgers regions	AMG Realty regions
Denville	1017	944
Parsippany Troy-Hills	3027	2916
Norwood	261	245
Elmwood Park	466	462

[12] Although not in issue on these motions, it is doubtful whether a projection of housing needs of a municipality, as distinguished from a region, would ever be required in a fair share determination.

approved in a region because of past exclusionary practices, municipalities would be rewarded by this legislative directive for practices which violate Mount Laurel.

However, all the Legislature has said is that "consideration" should be given to "development applications" in making projections of housing needs. It has not specified how development applications are to be considered or what weight should be assigned to them. It is noteworthy that the experts for Van Dalen relied upon building permit data to validate use of an average of two sets of county population projections prepared by the Office of Demographic and Economic Analysis in the New Jersey Department of Labor to determine prospective need. The Council may make similar use of data relating to development applications. The ultimate obligation of the Council, as stated in the first sentence of the definition, is to determine future lower income housing need "based on development and growth which is reasonably likely to occur." Therefore, it would be inappropriate for this court to assume in advance that the Council will make inappropriate use of "development application" data in determining prospective need.

F. Adjustments to and Limitations of Fair Share Obligations

Section 7(c)(2) imposes a duty upon the Council to

> [a]dopt criteria and guidelines for... [m]unicipal adjustment of the present and prospective fair share... whenever:
>
> (b) The established pattern of development in the community would be drastically altered,
>
> . . . .
>
> (g) Adequate public facilities and infrastructure capacities are not available, or would result in costs prohibitive to the public if provided....

Plaintiffs draw attention to the Supreme Court's direction that "formulas that have the

effect of unreasonably diminishing the share because of a municipality's successful exclusion of lower income housing in the past shall be disfavored." 92 N.J. at 256. Plaintiffs contend that because the magnitude of a municipality's current housing or population frequently will reflect past exclusionary zoning, any reduction in a municipality's fair share based upon "[t]he established pattern of development" would violate this direction. Plaintiffs also draw attention to a passage from Mount Laurel I which states that neither impact upon the local tax rate nor lack of infrastructure absolve a municipality of the responsibility of zoning for lower income housing. 67 N.J. at 185-186.

The grant of power to the Council to authorize municipalities to adjust their fair shares poses potential problems. However, the Council has not adopted "criteria and guidelines" implementing section 7(c) and no municipality has submitted a fair share housing plan which contains an adjustment of its fair share. Therefore, it is impossible at this point to determine how these sections actually will be implemented.

Furthermore, the Supreme Court has not said that the extent of existing development and infrastructure or the cost of expanding infrastructure may play no part in fair share determinations. On the contrary, the significant role assigned "growth area" designations under the SDGP in determining the scope of Mount Laurel obligations suggests that these may be relevant factors. Under Mount Laurel II, only municipalities located partly or wholly in a "growth area" have any responsibility to zone for a fair share of the regional need for lower income housing. 92 N.J. at 223-248. Furthermore, under the methodology accepted by Judge Serpentelli in AMG Realty, supra, _____ N.J. Super. at _____ (slip opinion at 49-51), and by this court, with certain modifications, in both Van Dalen and in the Public Advocate's suit against Denville, the extent of growth area in a municipality is one factor to be considered in determining the magnitude of its fair share

obligation. And the criteria for determining whether an area should be designated "growth" under the SDGP include the existing concentration of population and the existing sewer, water and roadway infrastructure. SDGP, at 33-41, 47 (1980). Therefore, it is at least possible that any adjustments for existing patterns of development and infrastructure capacity pursuant to the Council's guidelines and criteria will result in fair share determinations which do not differ materially from those previously approved by the courts.[13]

Plaintiffs also challenge section 7(e), which provides that the Council:

> [m]ay in its discretion, place a limit, based on a percentage of existing housing stock in a municipality and any other criteria including employment opportunities which the council deems appropriate, upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing.

It is urged that limiting a municipality's Mount Laurel obligation to a percentage of its existing housing stock would reward past exclusionary zoning policies.

The short answer to this claim is that the Council's powers under this section are purely discretionary. Therefore, it must be assumed that the Council will refrain from exercising these powers in a manner which would violate Mount Laurel.

G. Credits

The part of the Act relating to fair share obligations which raises the most serious

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[13] One question the Council will need to address in administering this section is whether a method can be devised by which any downward adjustment in one municipality's fair share can be offset by an increase in construction or rehabilitation of Mount Laurel units elsewhere in the same housing region.

constitutional problems is its treatment of credits for existing lower income housing. Section 7(c)(1) provides:

> Municipal fair share shall be determined after crediting on a one to one basis each current unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households.

Plaintiffs argue that if the total extent of present need for lower income housing is determined from 1980 census data, but municipalities may claim a credit for every housing unit of adequate quality occupied by a lower income household, there would be an unacceptable dilution in municipal fair share obligations. See Countryside Properties, Inc. v. Ringwood, ____ N.J. Super. ____ (Law Div. 1984) (slip opinion at 15-16). The Public Advocate has submitted a memorandum prepared by his housing expert, Alan Mallach, which concludes that there are 295,020 housing units of adequate quality in New Jersey occupied by lower income persons who do not pay an excessive amount for housing. He assumes that all these units would qualify for the credit provided by section 7(c)(1). Mallach further notes that, depending on which fair share methodology is used, the total present and prospective need through 1990 for lower income housing in New Jersey is between 217,727 and 278,808 units. Therefore, he contends that literal application of the credits section of the Act would result in recognition of credits which far exceed total statewide present and prospective need.

If the credits section of the Act were interpreted as plaintiffs fear, its constitutionality would be difficult to sustain. However, such an interpretation is not compelled. On the contrary, section 7(c)(1) poses a number of substantial problems of interpretation which this court must assume the Council will resolve in conformity with Mount Laurel.

First, the Act does not prescribe the method for determining present need. It does not indicate whether present need is to be determined as of 1985, 1980, or some earlier date. It does not indicate what data should be examined nor does it set any standard for determining present need. For example, it does not specifiy whether present need consists solely of lower income households which occupy physically inadequate housing, or also includes those which occupy physically adequate housing but pay a disproportionate percentage of their income for housing. Under these circumstances, it is appropriate to assume that the Council will develop a methodology for determining the present need for lower income housing which is compatible with the methodology it uses for determining credits pursuant to section 7(c)(1).

The second major problem in interpreting section 7(c)(1) is that its key term, "current unit of low and moderate income housing of adequate standard," is not defined. If this term were construed to include every physically adequate housing unit occupied by a lower income person, it is possible, as concluded by Mr. Mallach, that regional present and prospective need would be offset completely by credits and that indigenous need would be minimal. However, this term could also be construed to include only units occupied by lower income families for which housing costs are not disproportionate to income and which are subject to appropriate controls upon rent or sales price.

Both the courts and a state agency such as the Council have an obligation to construe legislation in a manner which will preserve its constitutionality. See State v. Genesis Leasing Corp., 197 N.J. Super. 284, 294 (App. Div. 1984). Therefore, the court must assume that the Council will adopt an interpretation of the credits section which does not unconstitutionally dilute the Mount Laurel obligation.

H. Regional Contribution Agreements

The Act establishes an administrative framework by which up to 50% of a municipality's fair share obligation may be transferred to another municipality. L. 1985, c. 222, § 12. Plaintiffs contend that these provisions are inconsistent with the prescription in Mount Laurel II that "if sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor." 92 N.J. at 211.

There are three reasons why this attack upon the validity of the Act must be rejected. First, the transfer provision is limited to a maximum of 50% of a municipality's fair share obligation. Therefore, it does not permit a municipality to remain solely an enclave for the rich and middle class. Second, the Court has never said that a municipality's fair share obligation may not be transferred to another municipality. Indeed, it intimated in Mount Laurel I that such a transfer might be appropriate:

> Frequently it might be sounder to have more of such housing, like some specialized land uses, in one municipality in a region than in another, because of greater availability of suitable land, location of employment, accessibility of public transportation or some other significant reason. But, under present New Jersey legislation, zoning must be on an individual municipal basis, rather than regionally. So long as that situation persists under the present tax structure, or in the absence of some kind of binding agreement among all the municipalities of a region, we feel that every municipality therein must bear its fair share of the regional burden. [67 N.J. at 189].

This view of the Mount Laurel doctrine was cited with apparent approval in Mount Laurel II. 92 N.J. at 237-238. Therefore, the transfer provisions of the Act may be considered an authorization for "binding agreements" between municipalities which may result in a regional zoning plan for lower income housing which is "sounder" than such zoning "on an individual municipal basis." Third, any proposal to transfer part of a municipality's Mount Laurel obligation to another municipality must be approved by the Council, which must

determine that "the agreement provides a realistic opportunity for low and moderate income housing within convenient access to employment opportunities, and ... is consistent with sound comprehensive regional planning." Id. at§ 12(c). It must be assumed that the Council will exercise this approval power in a manner which appropriately implements the objectives of the Mount Laurel doctrine.

I. Past Settlements and Repose

Section 22 of the Act provides:

> Any municipality which has reached a settlement of any exclusionary zoning litigation prior to the effective date of this act, shall not be subject to any exclusionary zoning suit for a six year period following the effective date of this act. Any such municipality shall be deemed to have a substantively certified housing element and ordinances, and shall not be required during that period to take any further actions with respect to provisions for low and moderate income housing in its land use ordinances or regulations.

Stonehedge claims that this provision is invalid because it would apply literally to any settlement of a Mount Laurel case, regardless of whether the settlement had been approved by a court or had resulted in any rezoning for lower income housing.

If section 22 were read to confer six years immunity from Mount Laurel litigation upon a municipality which had settled a Mount Laurel case without rezoning for any significant amount of lower income housing, its constitutionality would be difficult to defend. However, this is not the only possible interpretation, particularly if a narrower interpretation is required to preserve the constitutionality of this section. This court takes notice that the overwhelming majority of settlements in Mount Laurel cases have been submitted for court approval pursuant to the procedures outlined in Morris Ctv. Fair Housing Council v. Boonton Tp., 197 N.J.Super. 359 (Law Div. 1984). The Legislature may be presumed to have been aware of these procedures for judicial approval of Mount

Laurel settlements. Cf. Quaremba v. Allan, 67 N.J. 1, 14 (1975). Therefore the reference in section 22 to " a settlement of any exclusionary zoning litigation" should be construed to mean a settlement which has received court approval embodied in a judgment of compliance.

Plaintiffs also claim that section 22 unconstitutionally expands the res judicata effect of a judgment of compliance recognized in Mount Laurel II by conferring six years immunity from further Mount Laurel litigation upon a municipality even if it subsequently undergoes a "substantial transformation." However, it is doubtful whether the passing comment in footnote 44 of the Mount Laurel II opinion that " [a] substantial transformation of the municipality... may trigger a valid Mount Laurel claim before the six years have expired" (92 N.J. at 292) was intended to be a holding of constitutional dimension. In any event, the issue is purely hypothetical, since there is no indication that any municipality which has settled a Mount Laurel case has subsequently undergone a substantial transformation. Therefore, it is unnecessary at this time to determine whether the "substantial transformation" exception to the six years of repose obtained by a judgment of compliance is constitutionally mandated.

J. Absence of Authority of the Council on Affordable Housing to Award Builder's Remedies

The Court in Mount Laurel II concluded that "builder's remedies must be made more readily available to achieve compliance with Mount Laurel." 92 N.J. at 279. Accordingly it held that "where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." 92 N.J. at 279-280. Plaintiffs point out that the Act contains no comparable provision specifically

authorizing the award of builder's remedies by the Council, and they urge that without this incentive for builders to participate in proceedings before the Council, the administrative process will not produce compliance with Mount Laurel.

There are three reasons why this attack upon the Act must be rejected. First, other than section 28 moratorium discussed in Part IC of this opinion, the Act imposes no constraint upon the judicial award of builder's remedies if a municipality fails to participate in the administrative procedures established by the Act or if those administrative procedures are exhausted. See Id. at §§9(b), 16, 18, 19. Second, the Act provides inducements other than the threat of builder's remedies to encourage adoption of Mount Laurel compliance plans. Most significantly, a municipality which receives substantive certification of its compliance plan may obtain grants or loans of State money for lower income housing, which will reduce the municipality's burden in achieving compliance with Mount Laurel. Id. at §§20, 21. Third, the Council may in the exercise of its regulatory powers determine that it has the power to award builder's remedies or to encourage in some other way participation by builders before the Council. The Attorney General's brief correctly notes that:

> plaintiffs offer no support for their proposition that the Council may not award a builder's remedy as a condition for granting substantive certification, and, in fact, no such prohibition exists. Implicit in the Act is the expectation that in approving a municipal housing element, the Council may require that techniques be implemented which will have an effect comparable to that achieved by a builder's remedy, but accomplished within the context of regional planning and not simply as a reward for a successful litigant.

In short, it is a matter of conjecture whether the procedures established by the Act will be more or less successful than those set forth in Mount Laurel II in providing a realistic opportunity for the construction of lower income housing. Therefore, like many of the other attacks upon the Act, the claim that the Act is unconstitutional because it

does not specifically authorize the award of builder's remedies by the Council is premature.

K. Conclusion

It is fair to say that the Council will find itself walking through a constitutional minefield when it undertakes, in conformity with the Act, to establish housing regions, to determine regional needs for lower income housing, to adopt "criteria and guidelines" for determining municipal fair share allocations and to review municipal petitions for substantive certification of housing elements. However, appropriate respect for the legislative branch of government, and the Council, precludes the court from assuming that the Council will be unsuccessful in traversing the difficult course which lies before it. Rather, the proper allocation of responsibility among the coordinate branches of government requires the courts to defer to the Council until it has been afforded an adequate opportunity to perform its responsibilities under the Act in a manner which conforms with the constitutional mandate of Mount Laurel. Therefore, this court holds that the Fair Housing Act is on its face constitutional.

II

Exhaustion of the Administrative Remedies Provided by the Act

The Act contains two different requirements for exhaustion of administrative remedies. Exhaustion is mandatory with respect to cases filed within 60 days of the effective date of the Act. L. 1985, c. 222, § 16(b). Discretion is conferred upon the trial courts in determining whether exhaustion should be required in cases filed more than 60 days before the effective date of the Act. Id. at § 16(a). The case against Roseland was

filed within 60 days of the Act's effective date; hence, on the face of the Act, exhaustion would be required. The cases against the other defendants were filed before the 60 day cut-off date; hence, the court is required to exercise discretion in determining whether exhaustion would be appropriate in those cases. This part of the opinion considers first in Part IIA the general intent of the statutory exhaustion of administrative remedy requirement, and second in Parts IIB through IIF the appropriateness of requiring exhaustion in the individual cases which are the subjects of the pending motions.

A. The Meaning of "Manifest Injustice"

The section dealing with the transfer of pending cases to the Council was changed several times during the legislative process. As introduced in Senate Bill No. 2046, it provided that:

> Any court of competent jurisdiction shall have discretion to require the parties in any lawsuit challenging a municipality's zoning ordinance with respect to the opportunity to construct low or moderate income housing, which lawsuit was instituted either on or before June 1, 1984, or prior to six months prior to the effective date of this act, to exhaust the mediation and review procedure established in section 13 of this act. No exhaustion of remedies requirement shall be imposed unless the municipality has filed a timely resolution of participation. In exercising its discretion, the court shall consider:
>
> (1) The age of the case;
>
> (2) The amount of discovery and other pre-trial procedures that have taken place;
>
> (3) The likely date of trial;
>
> (4) The likely date by which administrative mediation and review can be completed; and
>
> (5) Whether the transfer is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing. [section 14(a)].

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Senate Bill No. 2046 was combined by the Senate Revenue, Finance and Appropriations Committee with another bill dealing with lower income housing, Senate Bill No. 2334, which resulted in adoption of a Senate Committee substitute for the two bills. The transfer section was changed to provide:

> For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, no exhaustion of the review and mediation procedures established in this act shall be required unless the court determines that a transfer of the case is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing.

The substitute bill passed the Senate in this form but was amended in the Assembly to its final form, which states:

> For those exclusionary zoning cases instituted more than 60 days before the effective date of the act, any party to the litigation may file a motion with the court to seek a transfer of the case to the Council. In determining whether or not to transfer, the court shall consider whether or not a transfer would result in a manifest injustice to any party to the litigation. [L. 1985, c. 222, § 16(a)].

The Assembly committee majority stated that the intent of the change was to:

> [E]stablish that a court in determining whether to transfer pending lawsuits to the council must consider whether or not a manifest injustice to a party to the suit would result, and not just whether or not the provision of low and moderate income housing would be expedited by the transfer.

The majority statement is not particularly illuminating as to the meaning of the "manifest injustice" standard. However, the dissenting members of the committee expressed in emphatic terms their dissatisfaction with the majority's failure to require all pending cases to be transferred to the Council:

> This bill does not prevent the courts from continuing in their current direction. Pending Mount Laurel cases may continue to be litigated.... The Republicans also offered an amendment that required the courts to transfer all pending litigation to the Housing Council. The language, as amended, is a step in the right direction, but does not go far enough. It is patently unfair to set up two bodies which can establish two separate housing standards. This bill could create that very situation.

There are a number of conclusions which may be drawn from this legislative history. First, the Legislature eliminated a detailed list of criteria for determining whether to transfer a case and substituted the single general standard of "manifest injustice." Second, while the standard under the Senate committee amendment would have been whether transfer would be "likely to facilitate and expedite the provision of lower income housing," the standard under the final version is whether transfer would cause "manifest injustice to any party to the litigation."[14] Third, while the bill in its final form expresses a stronger preference than earlier versions for transfer of pending cases to the Council, it contemplates that some pending cases will continue to be litigated within the judicial system. Fourth, neither the Act nor the accompanying legislative statement provides a definition of the term "manifest injustice" or any other guidance as to its interpretation. Therefore, it is the responsibility of the courts to interpret this term in a manner which is consistent with the overall intent of the Act and which will not undermine the constitutional rights protected by the Mount Laurel doctrine.

The parties correctly point out that the term "manifest injustice" is used in a number of different contexts in the New Jersey Court Rules and judicial decisions. In urging a restrictive interpretation of "manifest injustice," the defendant municipalities point out that this term is used in R. 3:21-1, which governs the withdrawal of guilty pleas in criminal cases after sentencing. In that context it has been defined as "closely akin to 'fundamental unfairness' and possibly confined to a deprivation of due process." Howe v. Strelecki, 98 N.J. Super. 513, 521 (App. Div. 1968). Defendants also point out that this

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[14] Section 16(a) does not, by its literal terms, require a court to transfer a pending case unless a finding of "manifest injustice" is made. It only requires a court "to consider" whether there will be "manifest injustice" if a case is transferred. However, "manifest injustice" is the only standard set forth in section 16(a) for making a transfer determination. Therefore, it is reasonable to conclude that this was meant to be the governing standard. Furthermore, this standard is sufficiently flexible to take into account all pertinent considerations relating to a transfer determination.

term has been used in setting the outer boundaries of the Legislature's power to enact statutes which apply retroactively. In that context the existence of "manifest injustice" depends on "whether the affected party relied, to his or her prejudice, on the law that is now to be changed as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively." Gibbons v. Gibbons, 86 N.J. 515, 523-524 (1981); see also Department of Environmental Protection v. Ventron Corp., 94 N.J. 473, 498-499 (1983). The Public Advocate, in arguing for a more expansive interpretation, points out that avoidance of "manifest injustice" is one of the tests under R. 4:17-7 for permitting amendments of answers to interrogatories within 20 days of trial, and in that context findings of "manifest injustice" are readily made to serve "the overriding objective of giving the defaulting party his day in court...." Westphal v. Guarino, 163 N.J. Super. 139, 146 (App. Div.), aff'd, 78 N.J. 308 (1978); see also Pressler, N.J. Court Rules, Comment to R. 4:17-7. It is evident from these examples that the term "manifest injustice" does not have a single, constant meaning. Rather, its meaning varies with the context in which it is used.

The subject addressed in section 16 is the circumstances under which a party with a Mount Laurel claim is required to exhaust administrative remedies. Indeed, section 16(b) specifically states that upon timely adoption by a municipality of a "resolution of participation," a party "shall exhaust the review and mediation process of the council before being entitled to a trial on his complaint." Even more explicitly, section 18 refers to "the obligation to exhaust administrative remedies," section 19 refers to "the duty to exhaust administrative remedies" and section 9(b) refers to "exhaustion of administrative remedy requirements pursuant to section 16."

"Manifest injustice" and substantially similar terms are frequently used in the New

Jersey courts to describe the circumstances under which a party will be relieved of the obligation to exhaust administrative remedies. The rules governing prerogative writ actions use a nearly synonymous phrase in defining the exception to the general requirement of exhaustion:

> Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted. R. 4:69-5 (emphasis added).

Our courts also have repeatedly stated that the trial courts are vested with discretion "to determine whether the interests of justice require that the administrative process be by-passed." Durgin v. Brown, 37 N.J. 189, 203 (1962); see also Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 141 (1962).

The New Jersey Legislature is presumed to be familiar with the rules of court and case law. Cf. Quaremba v. Allan, supra. Therefore, it must be assumed that the Legislature was aware when it enacted section 16(a) that the standard of "manifest injustice" contained therein was essentially the same standard as the courts have long used in determining when exhaustion of administrative remedies is required. It also must be assumed that the Legislature intended section 16(a) to be interpreted in light of the well-established body of case law governing exhaustion of administrative remedies.

The New Jersey courts have frequently discussed the considerations which determine whether administrative remedies should be exhausted. For example, in Roadway Express, Inc. v. Kingsley, supra, the Court said:

> [W]e... are concerned with underlying considerations such as the relative delay and expense, the necessity for taking evidence and making factual determinations thereon, the nature of the agency and the extent of judgment, discretion and expertise involved, and such other pertinent factors (cf. 3 Davis, Administrative Law § 20.03 (1958)) as may fairly

> serve to aid in determining whether, on balance, the interests of justice dictate the extraordinary course of bypassing the administrative remedies made available by the Legislature. [37 N.J. at 141] .

There have been a variety of circumstances in which the "interests of justice" have been found to require the bypassing of administrative remedies. See, e.g., N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); Atlantic City v. Laezza, 80 N.J. 255, 265-266 (1979); Durgin v. Brown, supra, 37 N.J. at 202-203; Swede v. Clifton, 22 N.J. 303, 314-315 (1956); Nolan v. Fitzpatrick, 9 N.J. 477 (1952); Exxon Corp. v. East Brunswick Tp., 192 N.J. Super. 329, 337-339 (App. Div. 1983), certif. den. 96 N.J. 312 (1984); East Orange v. Livingston Tp., 102 N.J. Super. 512, 519-521 (Law Div. 1968), aff'd, 54 N.J. 96 (1968). Therefore, the pending motions to transfer must be assessed in light of the considerations recognized in the cases dealing with exhaustion of administrative remedies.

Before discussing the individual motions to transfer, one additional point should be addressed. As stated previously, section 16(a) directs the court to "consider whether transfer would result in a manifest injustice to any party to the litigation." (emphasis added). The defendant municipalities argue that only the impact upon the named parties to the litigation, generally developer plaintiffs and municipal defendants, may be considered in determining whether transfer to the Council will cause manifest injustice. On the other hand, plaintiffs argue that the interests of lower income persons also must be taken into account in making this determination.

This court has previously determined that a Mount Laurel case, whether brought by a public interest organization or a developer, should be viewed as a representative action brought on behalf of lower income persons whose constitutional rights allegedly have been denied by exclusionary zoning:

> The constitutional right protected by the Mount Laurel doctrine is the right of lower income persons to seek housing without being subject to the economic discrimination caused

> by exclusionary zoning.... The Public Advocate and organizations such as the Fair Housing Council and N.A.A.C.P. have standing to pursue Mount Laurel litigation on behalf of lower income persons.... Developers and property owners with land suitable for lower income housing are also conferred standing to pursue Mount Laurel litigation.... In fact, the Court held that "any individual demonstrating an interest in, or any organization that has the objective of, securing lower income housing opportunities in a municipality will have standing to sue such municipality on Mount Laurel grounds...." However, such litigants are granted standing not to pursue their own interests, but rather as representatives of lower income persons whose constitutional rights allegedly have been violated by exclusionary zoning. [Morris Cty. Fair Housing Council v. Boonton Tp., supra, 197 N.J. Super. at 365-366; citations omitted].

Since Mount Laurel cases are representative actions, lower income persons must be treated as parties to all such litigation. It follows that "manifest injustice" determinations must take into consideration the impact of transfer not only upon the named parties but also upon lower income persons.

B. Morris County Fair Housing Council v. Denville; Seigler Associates v. Denville; Affordable Living Corp. v. Denville; Stonehedge Associates v. Denville; Cali v. Denville; Soussa v. Denville.

These cases have had a long and tortured history. On October 13, 1978, the Public Advocate filed suit on behalf of himself, the Morris County Fair Housing Council and the Morris County branch of the NAACP against Denville and twenty-six other municipalities in Morris County, alleging that the zoning ordinances of the defendant municipalities were unconstitutional because they failed to provide a realistic opportunity for the construction of lower income housing. An appeal was taken by Denville and several other defendants challenging the Public Advocate's determination to file the lawsuit. His determination was affirmed in Morris Plains v. Department of Public Advocate, 169 N.J. Super. 403 (App. Div. 1979), certif. den. 81 N.J. 411 (1979). Extensive discovery was conducted by

all parties, numerous motions were filed, case management conferences were held and on March 19, 1980 the case was pretried. Subsequently, the Supreme Court stayed trial proceedings pending a decision in the Mount Laurel cases then before it. After the Mount Laurel II opinion was issued the case was assigned to this court in June 1983. Numerous additional case management conferences were held, further discovery was conducted and another pretrial conference was held on June 14, 1984. Settlements were reached before trial between the Public Advocate and nine of the remaining twelve defendant municipalities,[15] the Public Advocate having previously dismissed his claims against the other defendants. On July 2, 1984, trial commenced against Denville, as well as Randolph and Parsippany-Troy Hills, on all issues relating to calculation of the fair share obligations of those defendants. The trial continued for ten days until July 25, 1984, when the parties announced that they had reached a tentative settlement. This court determined that there was a reasonable likelihood this settlement would be finalized and would receive court approval. Since tentative settlements also had been reached with Randolph and Parsippany-Troy Hills, trial proceedings were suspended. However, on December 16, 1984, the governing body of Denville voted to repudiate the tentative settlement agreement. Therefore, the trial resumed on January 11, 1985 and was completed that same day. On January 14, 1985, this court issued an oral opinion which concluded that Denville's Mount Laurel obligation is 924 lower income housing units. The court later determined that Denville was entitled to a credit for 41 units previously made available and that its unmet Mount Laurel obligation was therefore 883 units. On March 14, 1985 an order was entered embodying this determination and directing Denville to rezone within 90 days of January 31, 1985. David Kinsey was appointed Advisory Master to assist Denville in rezoning and to provide recommendations to the court concerning the

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[15] Seven of these settlements have been approved by the court in accordance with the procedures set forth in Morris Cty. Fair Housing Council v. Boonton Tp., supra. The other two still have not been presented to the court for approval.

adequacy of the steps taken to achieve compliance with Mount Laurel. Between April and June 1985 Mr. Kinsey met on numerous occasions with all parties, including officials and representatives of Denville. His final report, submitted on August 13, 1985, states that Denville has not revised its zoning ordinance as required by the order of March 14, 1985. Although Denville prepared a Mount Laurel compliance plan, the Master concluded that this plan is deficient in numerous respects. Consequently, the Master prepared his own proposed compliance plan and drafted an ordinance which would implement that plan.

While the Public Advocate's action was pending, five developers also filed Mount Laurel actions against Denville—Siegler Associates (filed April 26, 1984); Affordable Living Corp., Inc. (filed July 2, 1984); Stonehedge Associates (filed December 31, 1984); Maurice and Esther H. Soussa (filed May 31, 1984); and Angelo Cali (filed July 9, 1985). These actions were all consolidated with the Public Advocate's action on the condition that the developer plaintiffs would not participate in the hearing to determine Denville's fair share and would accept the results of that hearing. The developer plaintiffs participated actively in the meetings and discussions with the Master, and an analysis of the suitability of each of their sites for Mount Laurel housing is included in his report. Siegler Associates' motion for partial summary judgment declaring Denville's zoning ordinance unconstitutional on Mount Laurel grounds was granted by order dated November 9, 1984.

The principles which govern the requirement of exhaustion of administrative remedies all strongly point to the conclusion that it would be a "manifest injustice" to the plaintiffs and to the lower income persons they represent to require exhaustion in this case. First, the history of this case, including Denville's withdrawal from the tentative settlement reached with the Public Advocate, indicates that use of the mediation process established by the Act would be unlikely to result in a settlement and hence would be

futile. Second, while the issues involve a significant element of expertise, it is doubtful whether the newly established Council will have greater expertise than this court, which has been hearing similar cases for more than two years, or the Master, who has spent more than four months evaluating Denville's compliance. Third, exhaustion of the administrative procedures set forth in the Act would cause substantial delay. While this litigation probably can be brought to final judgment in a few months, the administrative process established by the Act might take nearly two years to complete and even then the result probably would be simply a return to the courts for further litigation. Fourth, the parties might be required upon transfer to the Council to incur substantial and unwarranted expense in relitigating before an Administrative Law Judge the same issues already litigated for twelve days before the court.[16] Such relitigation would be inconsistent with one of the primary objectives of administrative adjudication, which is to provide a forum that is less time consuming and less expensive than the courts.[17] Finally and most importantly, there is a need for a prompt decision in the public interest and a denial of immediate judicial relief would result in irreparable harm to lower income persons. As noted previously, the Court stated repeatedly in Mount Laurel II that unduly protracted legal proceedings had thwarted efforts to solve the problem of exclusionary

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[16] It is a fundamental legal principle, embodied in the doctrines of collateral estoppel and law of the case, that once an issue has been fully and fairly litigated, it ordinarily is not subject to relitigation between the same parties either in the same or in subsequent litigation. Hackensack v. Winner, 82 N.J. 1 (1980); Gonzalez v. State, 75 N.J. 181, 186 (1977); State v. Powell, 176 N.J. Super. 190, 195-196 (App. Div. 1980), certif. den. 87 N.J. 333 (1981). However, there is an established exception to this principle where there has been an intervening change in the law. State Farm Mutual Ins. Co. v. Duel, 324 U.S. 154, 162, 65 S. Ct. 573, 89 L.Ed.2d 812 (1944); State v. Sarto, 195 N.J. Super. 570 (App. Div. 1984). Therefore, a party to a Mount Laurel case transferred to the Council may argue that enactment of the Act is a change in the law which requires relitigation of every issue already decided by this court.

[17] Consistent with this objective, motions to dismiss for failure to exhaust administrative remedies ordinarily should be filed early in litigation rather than after substantial trial proceedings already have been conducted. Boss v. Rockland Elec. Co., 95 N.J. 33, 40 (1983); East Orange v. Livingston Tp., supra, 102 N.J. Super. at 521.

zoning in the years following the Mount Laurel I decision.[18] To avoid a similar outcome here, this seven-year-old case must be brought to a conclusion.

C. Morris County Fair Housing Council v. Randolph; Randolph Mountain Industrial Complex v. Randolph

Randolph is one of the other defendants in the Morris County exclusionary zoning suit brought by the Public Advocate. Through July 20, 1984, the history of the case against Randolph is the same as the case against Denville. On that date a tentative settlement was reached between the Public Advocate and Randolph. Upon this court concluding that there was a reasonable likelihood that the settlement would be finalized and receive court approval, it suspended trial proceedings against Randolph.

The reasons why the tentative settlement with Randolph was not finalized are more complicated than the breakdown of the Public Advocate's settlement with Denville. While Denville simply withdrew from its tentative settlement, Randolph contends that it was prepared to conclude its settlement but was prevented from doing so by the delays of the Public Advocate. Counsel for Randolph has submitted an affidavit which asserts that a proposed stipulation of settlement and draft ordinance to implement the settlement were forwarded to the Public Advocate on August 31, 1984. The Public Advocate advised him orally in mid-September that there were some minor modifications to the ordinance

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[18] Denville argues that even if the court orders it to rezone in conformity with Mount Laurel, it has serious sewage disposal problems which will prevent the early construction of lower income housing. Denville's sewage disposal problems appear to be real and substantial. However, the Master has suggested a number of means by which those problems may be addressed. Furthermore, a property owner whose land has been rezoned for development in conformity with Mount Laurel would have an incentive to pursue solutions to these problems which would not exist so long as this case is mired in legal proceedings. Therefore, it cannot be assumed that Denville's sewage disposal problems pose an insurmountable barrier to construction of lower income housing.

which had to be made and that these would be prepared by the Public Advocate. However, these proposed revisions of the settlement documents were never submitted despite various telephone calls from counsel for Randolph to the Public Advocate, as well as conferences with the court in which assurances were given that these documents would be completed shortly.

Randolph also contends that the delay in finalizing the settlement caused by the Public Advocate's lack of diligence will impair its capacity to implement the settlement. Specifically, it alleges that a site which Randolph had planned to acquire from the State for the construction of 70 moderate income units has become unavailable because the State has decided to use the site for a motor vehicle inspection station. Randolph also alleges that the owner of one Mount Laurel housing site, Mal, Inc., has indicated it does not intend to construct lower income housing, and another, Randolph Mountain Industrial Complex, has said it cannot construct Mount Laurel housing at the density contemplated by the settlement. On the other hand, the Public Advocate contends that the delay in finalizing the settlement has not been caused by his failure to draft minor changes in the settlement documents but rather by the substantial problems which arose in connection with the motor vehicle inspection station, Randolph Mountain and Mal sites.

This court accepts Randolph's contention that some responsibility for the delay in finalizing the settlement rests with the Public Advocate. However, the court cannot conclude that the delay has impaired Randolph's capacity to implement the tentative settlement. Every settlement agreement entered into by the Public Advocate provides that if any site rezoned for Mount Laurel housing becomes unavailable due to governmental acquisition, the municipality must rezone an additional site to take its place. Therefore, even if this settlement had been finalized before the State decided not to convey the motor vehicle inspection site to Randolph, the municipality would have been

in the same position as it is now; it would have been required to find a substitute site. With respect to the two private sites, this court in reviewing proposed settlements of Mount Laurel cases routinely seeks some indication of an interest in constructing lower income housing from the owners of properties proposed to be rezoned. Therefore, the Public Advocate and the court presumably would have become aware of the problems with the Mal and Randolph Mountain sites before approval of the settlement, even if the Public Advocate had proceeded more expeditiously with his responsibilities under the settlement agreement. Furthermore, the possibility that one or more of the sites included in the settlement might become unavailable for Mount Laurel housing was specifically mentioned when the tentative settlement was placed on the record. Counsel for Randolph stated that the Public Advocate's expert had visited one 80- to 90- acre "back-up site" and that there were other possible back-up sites available.

This court is satisfied that under these circumstances manifest injustice to the Public Advocate, plaintiff public interest organizations and lower income persons would be caused by transfer to the Council. While the Public Advocate's case against Randolph has not reached as advanced a stage as the one against Denville, there have been lengthy trial proceedings, and the remainder of the case could be completed within a relatively short time. Therefore, transfer to the Council would cause significant delay. In addition, the parties probably would be put to substantial expense and effort in relitigating before an Administrative Law Judge the same issues already litigated before this court. Most importantly, there is the same need in Randolph as in Denville for the early conclusion of this seven-year-old litigation.

Furthermore, the Act appears to recognize that the Public Advocate's claims against Denville and Randolph are entitled to special judicial consideration. As discussed previously, section 28 excludes suits brought by public interest organizations or filed

before January 20, 1983 from the moratorium on the award of builder's remedies. Therefore, whether or not the builder's remedy moratorium is constitutional and however it may be interpreted, the exceptions to that moratorium reflect a legislative recognition that there should be no obstacle to the complete and final disposition within the judicial system of cases brought by public interest organizations or filed before January 20, 1983. The Public Advocate's suit falls within both of these classes of cases.

There is one additional issue raised by the cases against Denville and Randolph. One of the developer complaints against each municipality, the Cali complaint against Denville and the Randolph Mountain complaint against Randolph, was filed less that 60 days before the effective date of the Act. Denville and Randolph argue that these complaints are subject to mandatory transfer to the Council pursuant to section 16(b) even if the Public Advocate's suit and the suits by other developers continue to be litigated before this court. This raises the specter of the same issues being litigated simultaneously before this court and the Council, with the possibility of inconsistent results. However, it is a basic principle of statutory interpretation that a statute should be construed reasonably and in conformity with its underlying intent. Fairlawn Shopper, Inc. v. Director, Div. of Taxation, 98 N.J. 64, 74 (1984). Here , no reasonable legislative purpose would be served by simultaneous litigation of the same issues before two separate tribunals. Furthermore, the Cali suit has been consolidated with the Public Advocate's suit, and the Randolph Mountain suit is also subject to consolidation with that suit. Since consolidation is designed to serve the policies of economy and efficiency in litigation and "fuses the component cases into a single action" (Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 477 (1969)), section 16 should be construed to permit all consolidated cases against a municipality to be heard by the court if manifest injustice would be caused by transfer of any one of the cases.

For these reasons, justice requires that all Mount Laurel litigation against Randolph and Denville should be permitted to proceed to a conclusion before this court.

D. Van Dalen v. Washington

This case is in substantially the same procedural posture as the Denville case. A six day trial was held to determine the boundaries of the growth area in Washington established in the SDGP and the validity of the SDGP designations within Washington. A further ten day trial was held to determine the magnitude of Washington's fair share obligation and whether its existing zoning satisfied that obligation. This resulted in a 38-page written opinion which concluded that Washington has a total fair share of 227 units and that its existing zoning fails to provide a realistic opportunity for the construction of that number of lower income housing units. Van Dalen, supra. A Master was thereafter appointed to assist Washington in rezoning and to make recommendations to the court concerning the award of a builder's remedy to the plaintiff. The Master's report, submitted on August 9, 1985, evaluates the suitability of plaintiff's sites and the three other sites selected by Washington for Mount Laurel housing. This case is thus ready for a final hearing on Washington's plan for compliance with Mount Laurel.

For essentially the same reasons as in the Denville case, it would be a manifest injustice for Van Dalen v. Washington to be transferred. As in that case, there is no basis for optimism that the mediation processes of the Council would be successful. Nor can it be said that the Council has greater expertise than this court in dealing with Mount Laurel compliance in Washington. Furthermore, transfer would cause substantial delay. Sixteen days of trial time have been consumed litigating to conclusion every issue in the case, except for the compliance with Mount Laurel of Washington's proposed rezoning and plaintiff's entitlement to a builder's remedy. The final stage of the case could be

concluded within a short time. On the other hand, transfer to the Council probably would extend this controversy — and the date of Washington's compliance with Mount Laurel— several more years. It also would impose a substantial added expense upon plaintiff if he were required to relitigate before an Administrative Law Judge essentially the same issues already litigated before this court. Finally, and most importantly, while this case has not been pending as long as the Public Advocate's suit, there is a comparable need here for a prompt decision in the public interest to avoid irreparable harm to lower income persons. Therefore, Washington's motion to transfer will be denied.

E. Rivell v. Tewksbury

This is the most difficult of the pending motions. The complaint was filed on June 19, 1984. Thereafter, several case management conferences were held with the court, comprehensive expert reports were prepared and discovery was conducted. Trial was scheduled for July 23, 1985, but was adjourned because of pending settlement discussions and passage of the Act. Those settlement discussions have been unsuccessful and the case could be rescheduled for trial within a short time.

Plaintiff contends that it has incurred substantial expense in preparing for trial and that, but for the bad faith of Tewskbury in conducting settlement discussions without a serious intent of attempting to resolve the controversy, the case would already have been tried. It also contends that the sole purpose of Tewksbury in seeking transfer to the Council is to further delay compliance with Mount Laurel.

It should be noted that the Council is now functioning. Six nominees to the Council have been confirmed by the Senate and appointed, and the three remaining positions on the Council have been temporarily filled by the Governor by ad interim appointments

pursuant to Article V, section I, paragraph 13 of the New Jersey Constitution. Furthermore, Tewksbury has filed a notice of intention to participate in the procedures established by the Act. Therefore, the administrative process is now operative with respect to Tewksbury.

Under these circumstances this court concludes that respect for the administrative mechanism established by the Legislature for implementing Mount Laurel requires transfer to the Council and that transfer will not cause "manifest injustice" to plaintiff or to lower income persons. Although this case is ready for trial, a significant period of time would be required to complete the litigation. The trial probably would be lengthy and expensive, since plaintiff not only seeks a determination of the size of Tewksbury's Mount Laurel obligation and the conformity of its zoning with that obligation, but also attacks the delineation in the SDGP of the extent of growth area within Tewksbury.[19] If Tewksbury's zoning were found not to comply with Mount Laurel, a further significant period of time would be required to complete the rezoning, and if there were disagreement concerning the adequacy of that rezoning or plaintiff's entitlement to a builder's remedy, a second trial would have to be held on those issues. Therefore, substantially more time and money would be required to complete this case than the cases against Denville, Washington and even Randolph. Furthermore, whereas the Public Advocate's suit against Denville and Randolph is seven years old and the Van Dalen suit is more than two years old, this case was filed only a little over a year ago. Therefore, there is less danger in this case that transfer to the Council would result in

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[19] It has been the experience of this court that both fair share determinations and challenges to the SDGP ordinarily require lengthy trial court proceedings. The trials relating to fair share determinations have taken from four to twelve days and the challenges to the SDGP have taken from two to eleven trial days. No significant trial time has been required to determine the lack of compliance of current zoning ordinances with Mount Laurel, since that issue either has been the subject of successful pretrial motions for summary judgment or has been conceded at trial.

intolerably protracted legal proceedings.

Finally, Tewksbury's projected Mount Laurel obligation is relatively small. Unless plaintiff were to succeed in his challenge to the SDGP delineation of "growth area" in Tewksbury (and no such challenge has succeeded thus far in this court), Tewksbury's Mount Laurel obligation would be 136 units in the opinion of plaintiff's expert and 37 units in the opinion of Tewksbury's expert. If this court adheres to the methodologies accepted in Van Dalen v. Washington, supra, and Countryside v. Ringwood, supra, it appears from an initial review of the expert reports that Tewksbury's fair share would be around 100 lower income housing units. Therefore, viewed from the perspective of lower income persons, there is less to gain from the early conclusion of this litigation than in cases where the defendant municipality has a more substantial projected Mount Laurel obligation.

For these reasons, Tewksbury's motion to transfer will be granted.

F. Essex Glen, Inc v. Roseland

This case was filed on June 27, 1985, which is within 60 days of the effective date of the Act. Since Roseland has filed a notice of participation in the procedures provided under the Act, plaintiff is required by section 16(b) to exhaust the review and mediation process before being entitled to a trial on its complaint.

Essex Glen argues that although the exhaustion requirement of section 16(b) is phrased in mandatory terms, it is subject to the exception provided by R. 4:69-5 "where it is manifest that the interest of justice requires otherwise." However, section 16(a) provides in language nearly identical to R. 4:69-5 that in cases filed more than 60 days before the Act's effective date, the administrative processes of the Act need not be

exhausted if "manifest injustice" would result to any party to the litigation. This exception to the exhaustion requirement would be superfluous if the Legislature had intended the same exception to be applicable in cases filed after the 60-day cut-off date. Therefore, it must be concluded that the Legislature intended exhaustion of administrative remedies to be mandatory in section 16(b) cases.

Essex Glen argues that if section 16(b) is construed to be mandatory, it is unconstitutional because the exception to the requirement of exhaustion of remedies provided by R. 4:69-5 is of constitutional dimension and may not be overridden by legislation. Requiring a litigant to exhaust administrative remedies, even if manifestly unjust, would raise substantial constitutional issues, particularly in a case involving the constitutionality of a municipal ordinance. Some of these constitutional problems are similiar to those alluded to previously in discussing the moratorium on the award of builder's remedies. Since the New Jersey Constitution provides for judicial review of the validity of governmental action "in the manner provided by the rules of the Supreme Court, as of right" (N.J. Const. (1947), Art. VI, §V, par. 4), the right to such review may not be impaired by the Legislature. See In re Senior Appeals Examiners, 60 N.J. 356, 363-366 (1972); Swede v. Clifton, 22 N.J. 303 (1956); Fischer v. Bedminster Tp., 5 N.J. 534, 540 (1950). However, it is unnecessary to decide the constitutionality of a mandatory exhaustion requirement because even assuming R. 4:69-5 were applicable, Essex Glen has failed to demonstrate that manifest injustice would result from requiring exhaustion of administrative remedies.

The complaint was filed only a few months ago. As far as is disclosed by the papers filed with the court, the only pretrial preparation completed thus far is a synopsis of a fair share analysis written by plaintiff's housing expert. Therefore, expert reports must be prepared and discovery conducted before this case could be ready for trial. This

means that the case could not be tried until the Spring of 1986 at the earliest. In addition, even if Roseland's present zoning were held to be unconstitutional, a further significant period of time would be required to complete rezoning in compliance with Mount Laurel. Consequently, it is a matter of conjecture whether judicial proceedings could be completed in a substantially shorter time than the administrative procedures provided by the Act. And if there is undue delay in the administrative process, Essex Glen may seek to have jurisdiction revert to the court as early as October 2, 1986.[20] It is also noteworthy that the Department of Environmental Protection has imposed a moratorium on new sewer connections in the Roseland area and that Essex Glen owns only 16 acres of property. These circumstances raise doubts whether Essex Glen would be able to develop its property with lower income housing within a short period of time even if it were to succeed in this litigation. It further appears that Essex Glen could build, at the very

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20 Section 19 provides that:

> If the council has not completed its review and mediation process for a municipality within six months of receipt of a request by a party who has instituted litigation, the party may file a motion with a court of competent jurisdiction to be relieved of the duty to exhaust administrative remedies. In the case of review and mediation requests filed within nine months after this act takes effect, the six-month completion date shall not begin to run until nine months after this act takes effect.

The Attorney General argues that there is an inconsistency between section 9(a), which may allow a municipality to wait until as late as January 1, 1987 to file its housing element (see footnote 6), and the last sentence of section 19, which would permit the court to relieve a party of its duty to exhaust administrative remedies as early as October 2, 1986, and that the last sentence of section 19 should therefore be disregarded. However, it is not self-evident that mediation must be delayed until after a municipality files its housing element (see footnote 4) or that a municipality which is a defendant in Mount Laurel litigation will require the maximum time period allowed by statute to complete its housing element. In any event, section 19 simply authorizes a party to seek relief from the obligation to exhaust administrative remedies, and it may be assumed that a court would deny that relief if further administrative proceedings would be in the public interest and fair to interested parties.

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Governor Thomas H. Kean
Conditional Veto

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

ASSEMBLY BILL NO. 3117

To the General Assembly:

Pursuant to Article V, Section I, Paragraph 14 of the Constitution, I herewith return Assembly Bill No. 3117 with my recommendations for reconsideration.

Assembly Bill No. 3117 increases the realty transfer fees. This bill provides the funding mechanism for the Fair Housing Trust Fund set up pursuant to Senate Bill No. 2046 (Lipman), the Fair Housing Act.

In order to raise the revenues received by the State from this fee, the bill graduates the existing realty transfer fee as follows:

a. $1.75 for each $500.00 of consideration up to $150,000.00; and

b. $2.50 per each $500.00 of consideration in excess of $150,000.00.

Since the current realty transfer fee is $1.75 per each $500 of consideration, this change in the fee schedule will only affect sales of greater than $150,000.00.

Assembly Bill No. 3117 also raises State revenues by limiting the new construction exemption currently allowed under law to a $1.00 exemption per each $500.00 of consideration up to $150,000. Currently, the exemption is $1.25 per each $500.00 of consideration and also applies to sales above $150,000.00.

The sections dealing with the State/county allocation are amended so that the counties receive the same portion of the fee that they did in the past and the State receives all of the new revenue generated by the bill.

The bill appropriates the entire State portion of the tax to the Fair Housing Trust Fund established by the Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334. This appropriation is estimated to be approximately $38 million, $30 million in existing State revenue and $8 million from the changes in the fee schedule.

I propose to amend Assembly Bill No. 3117 to appropriate only the increase in fees. This will be accomplished in two ways. First, by appropriating the

.75¢ increase in the realty transfer fee for sales above $150,000.00 and second, by appropriating the additional revenue raised by the change in the new construction exemption.

Until the Council is in operation, it will be very difficult to evaluate new funding programs. Accordingly, rather than set up a new housing funding mechanism, I am amending this bill to appropriate these new revenues to the existing Neighborhood Preservation Program in the Department of Community Affairs. I am also conditionally vetoing the Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334 so that the housing funds in that bill are administered by the New Jersey Housing and Mortgage Finance Agency and the Neighborhood Preservation Program.

The Neighborhood Preservation Program will be appropriated in total approximately $10 million to assist municipalities in Mt. Laurel housing programs. This will be accomplished by dedicating the increase in the realty transfer fee proposed by Assembly Bill No. 3117 to the fund and an appropriation of $2 million from the General Fund to bring the sum up to $10 million.

These funds will be used in Neighborhood Preservation areas for such things as rehabilitation, accessory conversions and conversions, acquisition and demolition costs, new construction, costs for technical and professional services associated with the project, assistance to qualified housing sponsors, infrastructure and other housing costs.

Housing units assisted by this program would be required to remain affordable for a twenty year period unless a shorter period is necessary to assure the financial feasibility of the project.

Accordingly, I herewith return Assembly Bill No. 3117 and recommend that it be amended as follows:

Page 3, Section 3, Lines 12 and 13:	Omit "shall be credited to the Fair Housing Trust Fund Account"; insert "in payment of the additional fee of $0.75 for each $500.00 of consideration or fractional part thereof recited in the deed in excess of $150,000.00 shall be credited to the Neighborhood Preservation Nonlapsing Revolving Fund"

STATE OF NEW JERSEY
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Page 4, Section 4, after Line 33: Insert new subsection d. as follows:

"d. The balance of the fees collected on transfers subject to exemption under subsection b. of this section shall be remitted to the State Treasurer and shall be credited to the Neighborhood Preservation Nonlapsing Revolving Fund established pursuant to P.L. , c. (C.) (now pending before the Legislature as Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334), to be spent in the manner established under section 20 thereof (C.)."

Respectfully,

GOVERNOR

Attest:

Chief Counsel

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STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

SENATE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 2046 AND SENATE BILL NO. 2334

To the Senate:

Pursuant to Article V, Section I, paragraph 14 of the Constitution, I herewith return Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334 with my recommendations for reconsideration.

This bill sets forth a "Fair Housing Act" which addresses the New Jersey Supreme Court rulings in South Burlington County NAACP v. Mount Laurel, 67 N.J. 151 (1975) and South Burlington County NAACP v. Mount Laurel, 92 N.J. 158 (1983). It is designed to provide an administrative mechanism to resolve exclusionary zoning disputes in place of protracted and expensive litigation. The expectation is that through these procedures, municipalities operating within State guidelines and with State oversight will be able to define and provide a reasonable opportunity for the implementation of their Mt. Laurel obligations.

To accomplish this the bill establishes a voluntary system through which municipalities can submit plans for providing their fair share of low and moderate income housing to a State Council on Affordable Housing which would certify the plan. This certification would give the plan a presumption of validity in court. The presumption would shift the burden of proof to the complaining party to show that the plan does not provide a realistic opportunity for the provision of the fair share before a builder's remedy could be instituted.

In addition, the bill would permit regional contribution agreements whereby a municipality could transfer up to one-third of its fair share to another municipality within the same region. The bill also provides for a phasing schedule giving municipalities a time period, in some cases more than 20 years, to provide for their fair share.

The bill establishes a Fair Housing Trust Fund to provide financial assistance for low and moderate income housing. The Fund would be financed with a $25 million appropriation from the General Fund and with realty transfer tax revenues. This bill is tied to Assembly Bill No. 3117 which would increase the realty transfer tax revenues and places the State's portion of the realty transfer tax revenues in the Fair Housing Trust Fund account. The two bills are linked together through an effective date provision in Senate Bill No. 2046

which provides that Senate Bill No. 2046 will remain inoperative until Assembly Bill No. 3117 is enacted.

The bill also places a 12-month moratorium on the implementation of judgments imposing a builder's remedy. The Attorney General is required to seek a determination of the constitutionality of this provision in a declaratory judgment action to be filed within 30 days from the effective date of the act. If the action is not brought within that time frame, the moratorium expires. In addition, the bill contains a severability clause providing that if one portion of the act is found invalid, the remaining severable portions shall remain in effect.

This bill represents the Legislature's first attempt to address Mt. Laurel and reflects its desire, in which I heartily concur, of taking the issue out of the courts and placing it in the hands of local and State officials where land u planning properly belongs. While I am in accord with the basic approach set forth in this bill, I am compelled to return it for necessary amendments.

It is essential that the temporary moratorium on the builder's remedy be constitutionally sustainable in order to enable municipalities to take advantage of the procedures in this bill. The builder's remedy is disruptive to development and planning in a municipality. A moratorium for the planning period in this bill is needed. Unfortunately, the moratorium proposed by this bill would affect court judgments which have already been entered. This may represent an unconstitutional intrusion into the Judiciary's powers. I question whether the Legislature can, in effect, undo a court judgment in this way. Accordingly, I am recommending an amendment to make this moratorium prospective only by directing the courts not to impose a builder's remedy during the moratorium period in any case in which a judgment providing for a builder's remedy has not been entered. I recommend that the moratorium commence on the effective date of this act and expire at the end of the time period in which municipalities have to file their housing element pursuant to section 9.a., a period of 12 months from the date the Council is confirmed.

I am also deleting the provision requiring the Attorney General to seek a declaratory judgment on the constitutionality of the moratorium. This provision suggests that the Legislature has some question about the constitutionality of

this provision. The change I have suggested should remove that uncertainty. In addition, a provision such as this is peculiar, since the Legislature should not be enacting laws which it believes might be unconstitutional.

In place of the Fair Housing Trust Fund and its $25 million appropriation from this bill, I propose at this time to work with existing programs, namely the New Jersey Housing and Mortgage Finance agency and the Neighborhood Preservation Program in the Department of Community Affairs. Until the Council is in operation and municipalities start receiving substantive certification and entering into regional contribution agreements, it is difficult to evaluate new funding programs. Accordingly, rather than set up a new housing funding mechanism, I believe it would be more administratively and economically efficient to work with existing State programs to provide housing for low and moderate income households. I propose to fund this Mt. Laurel housing program with $100 million of bond funds, and a total of $25 million from the General Fund.

The New Jersey Housing and Mortgage Finance Agency will set up a Mt. Laurel housing program to help finance Mt. Laurel housing projects. The Agency's programs will include assistance for home purchases and improvement through interest rate, down payment and closing cost assistance as well as capital buy downs; rental programs including loans or grants for projects with low and moderate income units; moderate rehabilitation of existing rental housing; congregate care and retirement facilities; conversions, infrastructure assistance, and grants and loans to municipalities, housing sponsors and community organizations for innovative affordable housing programs.

The Agency's program will be funded with a set aside of 25% of the Agency bond revenues; the set aside is estimated to be $100 million per year. I am also recommending a State appropriation of $15 million to the New Jersey Housing and Mortgage Finance Agency for its Mt. Laurel housing program.

The Neighborhood Preservation Program would be appropriated in total approximately $10 million to assist municipalities in Mt. Laurel housing programs. I propose to dedicate the increase in the Realty Transfer Tax proposed by the companion bill, A-3117, to the Neighborhood Preservation Program. An outright appropriation of $2 million from the General Fund is intended to bring the total to $10 million.

These funds would be used in neighborhood preservation areas for such things as rehabilitation, accessory conversions and conversions, acquisition and demolition costs, new construction, costs for technical and professional services associated with a project, assistance to qualified housing sponsors, infrastructure and other housing costs.

In addition, assistance would be limited to housing in municipalities with substantive certification of their housing elements or housing subject to a regional contribution agreement. However, in order that programs can get underway immediately, an interim provision is inserted to enable the funds to be used for Mt. Laurel housing before these determinations are made for a 12-month period following the effective date with the Council having the power to extend this time frame.

The amendments I have proposed for funding low and moderate income housing far exceeds the amounts appropriated in the original bill while utilizing existing State programs and agencies.

One key element in determining a municipality's "fair share" of low and moderate income housing is the estimate of "prospective need" in the region and municipality. This bill requires the Council to estimate the prospective need for the State and regions and to adopt criteria and guidelines for municipal determination of prospective need. When preparing its housing element, a municipality must determine its fair share of prospective and present need. Its housing element must provide a realistic opportunity for the provision of this fair share. Despite its importance, nowhere in the bill is a definition of "prospective need" provided. Accordingly, I am inserting such a definition which is designed to help assure that the prospective need numbers are realistic and not based on theoretical or speculative formulas.

The bill currently permits a municipality's fair share figure to be adjusted based upon "available vacant and developable land, infrastructure considerations or environmental or historic preservation factors." I would like to strengthen this language to assure that adjustments are provided in order to preserve historically or important architecture and sites or environmentally sensitive lands and to assure that there is adequate land for recreational, conservation, or agricultural and farmland preservation purposes and

open space. In addition, adjustments should be provided where there is inadequate infrastructure capacity and where the established pattern of development in the community would be drastically altered, or the pattern of development is contrary to the planning designations in the State Development and Redevelopment Plan prepared pursuant to P.L. c. (now pending before the Legislature as S-1[illegible] of 1984).

As an additional check on excessive fair share numbers which would radically change the character of a community, I propose to authorize the council, in its discretion, to place a limit on a municipality's fair share. The limit would be based on a percentage of the municipality's housing units and any other relevant criteria, such as employment opportunities, selected by the council.

Another key element in determining a municipality's "fair share" of low and moderate income housing is an estimate of the condition of existing housing stock to determine the amount of substandard housing throughout the State. In order to achieve an accurate determination of the present and prospective housing needs of all the regions in the State, a thorough housing inventory should be performed by every municipality in the State. To require housing elements which include accurate housing inventories from only municipalities in growth areas, is to obtain only a limited picture of New Jersey's true housing needs. I am therefore recommending an amendment to the Municipal Land Use Law to require municipalities to prepare a thorough and accurate housing inventory as part of the housing element in their master plan.

The current Municipal Land Use Law requires municipalities to prepare master plans which may contain a housing element. I am recommending that the Municipal Land Use Law be amended to incorporate the housing element prepared under this statute. In this way, the housing element under the Municipal Land Use Law will be identical to the housing element prepared pursuant to this act. In addition, the Municipal Land Use Law requires that a municipality have a land use element in its master plan in order to have a valid zoning ordinance. I am adding to this requirement that the municipality have a housing element. In this way, every municipality in order to have a valid zoning ordinance would have to put together a housing element as defined in this act.

To assist municipalities in obtaining numbers that are realistic, I also suggest that language be inserted in the bill to enable the municipality when conducting its housing inventory to have access on a confidential basis to the local assessor's records. I am advised that statutory authorization is needed for this.

I am also recommending that certain language changes be made in the findings section of the bill. We should state that rehabilitation of existing housing stock in the urban centers must be encouraged. I also believe we should note that the Mt. Laurel obligation is limited to changes in land use regulations and clarify that municipalities need not expend their resources for Mt. Laurel housing.

The membership on the Council on Affordable Housing consists of four local officials (one of whom must be from an urban area and no more than one representing county interests), three representatives of households in need of low and moderate income housing (one of whom shall be a builder of low and moderate income housing) and two representing the public interest.

In order to have adequate representation of the public interest, I recommend that three members represent the public interest and two the needs of low and moderate income households. I also suggest that the executive director of the New Jersey Housing and Mortgage Finance Agency hold one of the positions in the latter category, due to the expertise of that Agency in low and moderate income housing finances and the numerous responsibilities the Agency is given in this bill.

The Council is required to adopt rules and regulations within four months from the bill's effective date. In addition, within seven months from the bill's effective date, the Council must: (a) determine the State's housing regions, (b) establish the present and prospective need estimates for the State and the regions, (c) adopt guidelines and criteria for municipal fair share determinations, adjustments to fair share and phasing, and (d) provide population and household projections. However, the Council cannot begin its work until its membership is confirmed. Since I am given 30 days to make the nominations and the Senate must thereafter confirm the nominations, the Council's time to perform these functions will be significantly eroded by the appointment

process. Accordingly, I am proposing amendments to provide that these time periods run from the date the Council members are confirmed or January 1, 1986, whichever is earlier.

With respect to pending litigation, the bill permits a party in current litigation to request the court to transfer the case to the Council on Affordable Housing for mediation procedures. When reviewing such a request, the courts must consider whether or not the transfer would result in a manifest injustice to one of the litigants.

The bill as currently drafted creates a novel mediation and review process and specifically provides that the review process should not be considered a contested case under the Administrative Procedure Act, subject to the procedures of that act and a hearing by an administrative law judge. If mediation and review by the housing council is unsuccessful, the matter will be heard in the trial court of the Superior Court.

I recommend, in place of the special procedures set forth in this bill, the regular administrative law procedure. Under this approach, if the mediation by the council is unsuccessful, the dispute will be transferred to the Office of Administrative Law as a contested case for a hearing pursuant to its rules. The ultimate decision will be made by the council and appeals will be taken from the council's decision to the Appellate Division of the Superior Court.

If a municipality receives substantive certification, its housing elements and ordinances are presumed valid. I am concerned that after going through the administrative process in this bill and receiving substantive certification, a municipality still may not have sufficient protection from a builder's remedy. I am therefore recommending that the presumption of validity be buttressed by an amendment providing that it may only be rebutted with "clear and convincing" evidence.

Senate Bill No. 2334 originally provided that a municipality could transfer up to one-half of its fair share to another municipality. In order to provide municipalities with more flexibility in their preparation of regional contribution agreements, I recommend that the one-third figure be returned to the original one-half number previously recommended by Senator Lynch, the sponsor of Senate Bill No. 2334.

In addition, I recommend that a municipality which has reached a settlement in Mt. Laurel litigation be granted a period of repose from further litigation and be deemed to have a substantively certified housing element. This period of repose will run six years from the bill's effective date.

I recommend the deletion of the provision in this bill which allows a municipality to employ condemnation powers to acquire property for the construction and rehabilitation of low and moderate income housing. I question the authorization of such a drastic power without some evidence of its necessity in resolving our State's housing needs.

The Senate Committee Substitute as originally drafted required the Council to report to the Governor and the Legislature in the implementation of this act within two years from its effective date. The Assembly amendments place this reporting requirement upon the New Jersey Housing and Mortgage Finance Agency rather than the Council. I recommend having both the Council and Agency report to the Governor and Legislature on an annual basis.

Accordingly, I herewith return Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334 and recommend that it be amended as follows:

Page 1, Section 2, Line 6: After "provide" insert "through its land use regulations"

Page 2, Section 2, after Line 43: Insert new subsection as follows:

"g. Since the urban areas are vitally important to the State, construction, conversion and rehabilitation of housing in our urban centers should be encouraged. However, the provision of housing in urban areas must be balanced with the need to provide housing throughout the State for the free mobility of citizens.

h. The Supreme Court of New Jersey in its Mount Laurel decision demands that municipal land use regulations affirmatively afford a reasonable opportunity for a variety and choice of housing including low and moderate cost housing, to meet the needs of people desiring to live there. While provision for the actual construction of that housing by municipalities is not required, they are encouraged but not mandated to expend their own resources to help provide low and moderate income housing."

Page 3, Section 4, After Line 43: Insert new subsection as follows:

"j. 'Prospective Need' means a projection of housing needs based on development and growth which is reasonably likely to occur in a region or a municipality, as the case may be, as a result of actual determination of public and private entities. In determining prospective need consideration shall be given to approvals of development application, real property transfers and economic projections prepared by the State Planning Commission established by P.L. c. (now pending before the Legislature as S-1464 of 1984)."

Page 3, Section 5, Line 10: Omit "three" and insert "two"

Page 4, Section 5, Line 11: After "housing" omit "at least"

Page 4, Section 5, Line 14: After "issues" insert "and one of whom shall be the executive director of the agency, serving ex-officio"; and omit "two" and insert "three"

Page 4, Section 5, Line 20: Omit "four" and insert "three"

Page 4, Section 5, Line 25: After "members" insert "excluding the executive director of the agency"

Page 5, Section 7, Line 2: Omit "effective date of this act" and insert "confirmation of the last member initially appointed to the council, or January 1, 1986, whichever is earlier"

Page 5, Section 7, Line 14A: After "factors" insert " and adjustments shall be made whenever:

(a) The preservation of historically or important architecture and sites and their environs or environmentally sensitive lands may be jeopardized,

(b) The established pattern of development in the community would be drastically altered,

(c) Adequate land for recreational, conservation or agricultural and farmland preservation purposes would not be provided,

(d) Adequate open space would not be provided,

(e) The pattern of development is contrary to the planning designations in the State Development and Redevelopment Plan prepared pursuant to P.L. c. (now pending before the Legislature as Senate Bill No. 1464 of 1984),

(f) Vacant and developable land is not available in the municipality, and

(g) Adequate public facilities and infrastructure capacities are not available, or would result in costs prohibitive to the public if provided"

Page 5, Section 7, After Line 18: Insert new subsection as follows:

"e. May in its discretion, place a limit, based on a percentage of existing housing stock in a municipality and any other criteria including employment opportunities which the council deems appropriate, upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing."

Page 6, Section 7, Lines 31 through 32: Delete "the Fair Housing Trust Fund Account established in Section 20 of this Act or"

Page 6, Section 7, Line 33: Delete "other"

Page 6, Section 8, Line 1: Omit "effective date of this act" and insert "confirmation of the last member initially appointed to the council, or January 1, 1986, whichever is earlier"

Page 6, Section 9, Line 7: Omit "adopted" and insert "fair share housing"

Page 6, Section 9, Line 8: Omit "revisions" and insert "introduced and given first reading and second reading in a hearing pursuant to C.40:49-2" and omit "implement" and insert "implements"

Page 6, Section 10, Line 8: After "households" insert "and substandard housing capable of being rehabilitated, and in conducting this inventory the municipality shall have access, on a confidential basis for the sole purpose of conducting the inventory, to all necessary property tax assessment records and information in the assessor's office, including but not limited to the property record cards"

Page 8, Section 11, Lines 31 through 32: Delete "the Fair Housing Trust Fund Account established pursuant to Section 20 of this Act or"

Page 8, Section 11, Line 33: Delete "other"

Page 8, Section 12, Line 1: Delete "33 1/3%" insert "50%"

Page 9, Section 12, Lines 53 through 56: On line 53 delete "The", delete lines 54 and 55 in entirety and on line 56 delete "the regional contribution agreement."

Page 11, Section 12, Line 112: After "years" insert "and may include an amount agreed upon to compensate or partially compensate the receiving municipality for infrastructure or other costs generated to the receiving municipality by the development"

Page 12, Section 14, After Line 24: Insert "Once substantive certification is granted the municipality shall have 45 days in which to adopt its fair share housing ordinance approved by the council."

Page 12, Section 15, Lines 11 through 16: Delete "then the council" on line 11, delete lines 12 through 15 in entirety, delete "but the review process shall not be considered" on line 16 and insert "the matter shall be transferred to the Office of Administrative Law as"

Page 12 to 13, Section 15, Lines 19 through 53: Delete in entirety and insert:

"The Office of Administrative Law shall expedite its hearing process as much as practicable by promptly assigning an administrative law judge to the matter; promptly scheduling an evidentiary hearing; expeditiously conducting and concluding the evidentiary hearing; limiting the time allotted for briefs, proposed findings of fact, conclusions of law, forms of order or other disposition, or other supplemental material; and the prompt preparation of the initial decision. A written transcript of all oral testimony and copies of all exhibits introduced into

evidence shall be submitted to the Council by the Office of Administrative Law simultaneously with a copy of the initial decision. The evidentiary hearing shall be concluded and the initial decision issued no later than 90 days after the transmittal of the matter as a contested case to the Office of Administrative Law by the Council, unless the time is extended by the Director of Administrative Law for good cause shown."

Page 14, Section 17, Line 7: After "demonstrate" insert "by clear and convincing evidence"

Page 14, Section 17, Line 16: After "demonstrate" insert "by clear and convincing evidence"

Pages 14 and 15, Section 20, Lines 1 through 34: After "20." delete in entirety and insert:

"The Neighborhood Preservation Program within the Department of Community Affairs' Division of Housing and Development, established pursuant to the Commissioner of the Department of Community Affairs' authority under P.L. 1975, c. 248, Section 8 (C.52:27D-149), shall establish a separate Neighborhood Preservation Nonlapsing Revolving Fund for monies appropriated by Section 33 of this act.

a. The Commissioner shall award grants or loans from this Fund to municipalities whose housing elements have received substantive certification from the Council, to municipalities subject to builder's remedy as defined in Section 31 of this act or to receiving municipalities in cases where the Council has approved a regional contribution agreement and a project plan developed by the receiving municipality. The Commissioner shall assure that a substantial percentage of the loan or grant awards shall be made to projects and programs in those municipalities receiving State aid pursuant to P.L. 1978, c. 14 (C.52:27D-178 et seq.).

b. The Commissioner shall establish rules and regulations governing the qualifications of applicants, the application procedures, and the criteria for awarding grants and loans and the standards for establishing the amount, terms of conditions of each grant or loan.

c. During the first twelve months from the effective date of this act and for any additional period which the council may approve, the Commissioner may assist affordable housing programs which are not located in municipalities whose housing elements have been granted substantive certification or which are not in furtherance of a regional contribution agreement; provided that the affordable housing program will meet all or part of a municipal low and moderate income housing obligation.

d. Amounts deposited in the Neighborhood Preservation Fund shall be targeted to regions based on the region's percentage of the State's low and moderate income housing need as determined by the Council. Amounts in the Fund shall be applied for the following purposes in designated neighborhoods:

(1) Rehabilitation of substandard housing units occupied or to be occupied by low and moderate income households;

(2) Creation of accessory apartments to be occupied by low and moderate income households;

(3) Conversion of nonresidencial space to residential purposes provided a substantial percentage of the resulting housing units are to be occupied by low and moderate income households;

(4) Acquisition of real property; demolition and removal of buildings; and/or construction of new housing that will be occupied by low and moderate income households;

(5) Grants of assistance to eligible municipalities for costs of necessary studies, surveys, plans and permits, engineering, architectural and other technical services, costs of land acquisition and any buildings thereon, and costs of site site preparation, demolition and infrastructure development for projects undertaken pursuant to an approved regional contribution agreement;

(6) Assistance to a local housing authority, nonprofit or limited dividend housing corporation or association for rehabilitation or restoration of housing units which it administers which: (a) are unusable or in a serious state of disrepair; (b) can be restored in an economically feasible and sound manner; and (c) can be retained in a safe, decent and sanitary manner, upon completion of rehabilitation or restoration; and

(7) Such other housing programs for low and moderate income housing, including infrastructure projects directly facilitating the construction of low and moderate income housing not to exceed a reasonable percentage of the construction costs of the low and moderate income housing to be provided.

e. Any grant or loan agreement entered into pursuant to this section shall incorporate contractual guarantees and procedures by which the Division will ensure that any unit of housing provided for low and moderate income households shall continue to be occupied by low and moderate income households for at least 20 years following the award of the loan or grant except that the Division may approve a guarantee for a period of less than 20 years where necessary to ensure project feasibility."

Pages 15 to 17, Section 21, Lines 1 through 87: After "21." delete in entirety and insert:

"The agency shall establish affordable housing programs to assist municipalities in meeting the obligation of developing communities to provide low and moderate income housing.

a. Of the bond authority allocated to it under Section 24 of P.L. 1983, c. 530 (C.55:14K-24) the agency will allocate, for a reasonable period of time established by its board, no less than 25% to be used in conjunction with housing to be constructed or rehabilitated with assistance under this Act.

b. The agency shall to the extent of available funds, award assistance to affordable housing programs located in municipalities whose housing elements have received substantive certification from the council, or which have been subject to a builder's remedy or which are in furtherance of a regional contribution agreement approved by the council. During the first twelve months from the effective date of this act and for any additional period which the council may approve, the agency may assist affordable housing programs which are not located in municipalities whose housing elements have been granted substantive certification or which are not in furtherance of a regional contribution agreement provided the affordable housing program will meet all or in part a municipal low and moderate income housing obligation.

c. Assistance provided pursuant to this section may take the form of grants or awards to municipalities, prospective home purchasers, housing sponsors as defined in P.L. 1983, c. 530 (C. 55:14K-1 et seq.), or as contributions to the issuance of mortgage revenue bonds or multi-family housing development bonds which have the effect of achieving the goal of producing affordable housing.

d. Affordable housing programs which may be financed or assisted under this provision may include, but are not limited to:

(1) Assistance for home purchase and improvement including interest rate assistance, down payment and closing cost assistance, and direct grants for principal reduction;

(2) Rental programs including loans or grants for developments containing low and moderate income housing, moderate rehabilitation of existing rental housing, congregate care and retirement facilities;

(3) Financial assistance for the conversion of nonresidential space to residences;

(4) Such other housing programs for low and moderate income housing, including infrastructure projects directly facilitating the construction of low and moderate income housing; and

(5) Grants or loans to municipalities, housing sponsors and community organizations to encourage development of innovative approaches to affordable housing, including:

(a) Such advisory, consultation, training and educational services as will assist in the planning, construction, rehabilitation and operation of housing; and

(b) Encouraging research in and demonstration projects to develop new and better techniques and methods for increasing the supply, types and financing of housing and housing projects in the State.

e. The agency shall establish procedures and guidelines governing the qualifications of applicants, the application procedures and the criteria for awarding grants and loans for affordable housing programs and the standards for establishing the amount, terms and conditions of each grant or loan.

f. In consultation with the council, the Agency shall establish requirements and controls to insure the maintenance of housing assisted under this Act as affordable to low and moderate income households for a period of not less than 20 years; provided that the agency may establish a shorter period upon a determination that the economic feasibility of the program is jeopardized by the requirement and the public purpose served by the program outweighs the shorter period. Such controls may include, among others, requirements for recapture of assistance provided pursuant to the Act or restrictions on return on equity in the event of failure to meet the requirements of the program. With respect to rental housing financed by the agency pursuant to this act or otherwise which promotes the provision or maintenance of low and moderate income housing, the agency may waive restrictions on return on equity required pursuant to P.L. 1983, c. 530 (C.55:14K-1 et seq.) which is gained through the sale of the property or of any interest in the property or sale of any interest in the housing sponsor.

g. The agency may establish affordable housing programs through the use or establishment of subsidiary corporations or development corporations as provided in P.L. 1983, c. 530 (C.55:14K-1 et seq.). Such subsidiary corporations or development corporations shall be

eligible to receive funds provided under this act for any permitted purpose."

Pages 17 to 18, Section 22, Lines 1 to 32: After "22." delete in entirety and insert:

"Any municipality which has reached a settlement of any exclusionary zoning litigation prior to the effective date of this act, shall not be subject to any exclusionary zoning suit for a six year period following the effective date of this act. Any such municipality shall be deemed to have a substantively certified housing element and ordinances, and shall not be required during that period to take any further actions with respect to provisions for low and moderate income housing in its land use ordinances or regulations."

Page 21, Section 25, Line 2: Delete "condemn or otherwise acquire" and insert "lease or acquire by gift"

Page 22, Section 26, Line 1: Delete "24" insert "12"

Page 22, Section 26, Line 2: Delete "two years" insert "year" and after "agency" insert "and the council" after "report" insert "separately"

Page 22, Section 26, Lines 5 through 9: Delete "The report shall give specific" on line 5, delete lines 6 through 8 in entirety and on line 9 delete "not been sufficient in promoting this end." and on line 9 delete "report" and insert "reports"

Page 22, Section 26, Line 11: Delete "believes" and insert "and the council believe"

Pages 22 and 23, Section 28, Lines 1 through 15: After "28." delete in entirety and insert new section as follows:

"No builder's remedy shall be granted in any exclusionary zoning litigation which has been filed on or after January 20, 1983, unless a judgment has been rendered providing for a builder's remedy. This provision shall terminate upon the expiration of the period set forth in section 9.a. of this act for the filing with the council of the municipality's housing element.

For the purposes of this section 'exclusionary zoning litigation' shall mean lawsuits filed in courts of competent jurisdiction in this State challenging a municipality's zoning and land use regulations on the basis that the regulations do not make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people living within the municipality's housing region, including those of low and moderate income, who may desire to live in the municipality.

For the purpose of this section 'builder's remedy' shall mean a court imposed remedy for a litigant who is an individual or a 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 income households."

Page 23, Section 28, After Line 15: Insert new section 29 as follows:

"29. Section 19 of P.L. 1975, c. 291 (C.40:55D-28) is amended as follows:

19. Preparation; contents; modification.

a. The planning board may prepare and, after public hearing adopt or amend a master plan, or component parts thereof, to guide the use of lands within the municipality in a manner which protects public health and safety and promotes the general welfare.

b. The master plan shall generally comprise a report or statement and land use and development proposals, with maps, diagrams and text, presenting where appropriate, the following elements:

(1) A statement of objectives, principles, assumptions, policies and standards upon which the constituent proposals, for the physical, economic and social development of the municipality are based;

(2) A land use plan element (a) taking into account the other master plan elements and natural conditions, including, but not necessarily limited to, topography, soil conditions, water supply, drainage, flood plain areas, marshes, and woodlands, (b) showing the existing and proposed location, extent and intensity of development of land to be used in the future for varying types of residential, commercial, industrial, agricultural, recreational, educational and other public and private purposes or combination of purposes, (c) showing the existing and proposed location of any airports and the boundaries of any airport hazard areas delineated pursuant to the "Air Safety and Hazardous Zoning Act of 1983," P.L. 1983, c. 260 (C.6:1-80 et seq.), and (d) including a statement of the standards of population density and development intensity recommended for the municipality;

(3) A housing plan element pursuant to section 10 of P.L. , c. (C.) (now pending before the Legislature as Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334), including but not limited to, residential standards and proposals for the construction and improvement of housing;

(4) A circulation plan element showing the location and types of facilities for all modes of transportation required for the efficient movement of people and goods into, about, and through the municipality;

(5) A utility service plan element analyzing the need for and showing the future general location of water supply and distribution facilities, drainage and flood control facilities, sewerage and waste treatment, solid waste disposal and provision for other related utilities;

(6) A community facilities plan element showing the location and type of educational or cultural facilities, historic sites, libraries, hospitals, fire houses, police stations and other related facilities, including their relation to the surrounding areas;

(7) A recreation plan element showing a comprehensive system of areas and public sites for recreation;

(8) A conservation plan element providing for the preservatio. conservation, and utilization of natural resources, including, to the extent appropriate, open space, water, forests, soil,

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Page 23, Section 28, After Line 15: Insert new section 31 as follows:

"31. Until August 1, 1988, any municipality may continue to regulate development pursuant to a zoning ordinance in accordance with section 49 of the "Municipal Law Use Law," P.L. 1975, c. 291 (C.40:55D-62) as same read before the effective date of this act."

Page 23, Section 29, Line 1: Delete "29." insert "32."

Page 23, Section 30, Line 1: Delete "30." insert "33."

Page 23, Section 30, Line 3: Delete "to the Fair Housing Trust Fund Account"

Page 23, Section 30, Lines 4 and 5: After "sum of" delete remainder of line 4 and line 5 in entirety and insert "$17,000,000 to be allocated as follows:

"a. $2,000,000 to the Neighborhood Preservation Fund established pursuant to the Maintenance of Viable Neighborhoods Act (N.J.S.A. 52:127D-146 et seq.) which shall be used to effectuate the purposes set forth in section 20 of this act. b. $15,000,000 to the Housing and Mortgage Finance Agency to be used to effectuate the purpose of section 21 of this act.

Of the amounts herein appropriated a reasonable sum, approved by the Treasurer may be expended for the administration of this act by the Department of Community Affairs and the agency."

Page 23, Section 31, Line 1: Delete "31." insert "34."

Respectfully,

GOVERNOR

Attest:

Chief Counsel

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