RULS-AD-1985-360

11/1/85

Letter to Judge Serpentelli + 2 copies of Notice of Motion for Leave to Appeal in Motzenbecker v. Bernardsville.

Pgs. 150

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

November 1, 1985

Honorable Eugene D. Serpentelli
Superior Court of New Jersey
Ocean County Court House
CN 2191
Toms River, New Jersey 08754

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

Dear Judge Serpentelli:

In accordance with Rules of Court, I am enclosing two copies of Notice of Motion for Leave to Appeal the above entitled matter together with two copies of the supporting brief and appendix.

Very truly yours,

Albert Mastro

JAM/jc

encs.

cc/encs. Douglas K. Wolfson, Esq.
Superior Court Clerk, Appellate Division

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

November 1, 1985

Elizabeth McLaughlin, Clerk
Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
CN 006
Trenton, New Jersey 08625

Re: Helen Motzenbecker v Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville - Docket No. L-37125-83

Dear Ms. McLaughlin:

I am enclosing original and four copies of Notice of Motion for Leave to Appeal an Interlocutory Order and Letter Brief and Appendix on behalf of Defendants-Appellants. Also enclosed is check in the amount of $5.00 to cover the fee for the motion. No deposit is enclosed in accordance with R.2:5-2 as it applies to the State or any agency, officer or political subdivision thereof.

Very truly yours,

J. Albert Mastro

JAM/jc
encs.
cc: Honorable Eugene D. Serpentelli
Douglas K. Wolfson, Esq.
Borough of Bernardsville

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

Plaintiff
HELEN MOTZENBECKER,

vs.

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

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY/
OCEAN COUNTY

Docket No. L-37125-83

(MOUNT LAUREL II)
CIVIL ACTION

NOTICE OF MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL

TO: Honorable Eugene D. Serpentelli
Superior Court of New Jersey
Ocean County Court House
CN 2191
Toms River, New Jersey 08754

Douglas K. Wolfson, Esq.
Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein
P. O. Box 5600
Woodbridge, New Jersey 07095

PLEASE TAKE NOTICE that the undersigned Attorney for Defendants, Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville, hereby moves before the New Jersey Superior Court, Appellate Division, for Leave

to File an Interlocutory Appeal to appeal the Order entered on October 25, 1985, denying the Motion of Defendants to transfer the above captioned pending litigation to the Council on Affordable Housing, in accordance with Section 16 of the Fair Housing Act, Chapter 222 P.L. 1985 and vacation of Plaintiff's builder's remedy. Counsel will rely on the attached brief and appendix.

DATED: November 1, 1985

J. ALBERT MASTRO
Attorney for Defendants

Two copies of the within motion and attached brief were mailed this day to:

Douglas K. Wolfson, Esq.
Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein
P. O. Box 5600
Woodbridge, New Jersey 07095

Hon. Eugene D. Serpentelli
Superior Court of New Jersey
Ocean County Court House
CN 2191
Toms River, New Jersey 08754

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 willfully false, I am subject to punishment.

DATED: November 1, 1985

J. ALBERT MASTRO
Attorney for Defendants

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

Plaintiff
HELEN MOTZENBECKER,

vs.

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

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY/
OCEAN COUNTY

Docket No. L-37125-83

(MOUNT LAUREL II)
CIVIL ACTION

NOTICE OF MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL

TO: Honorable Eugene D. Serpentelli
Superior Court of New Jersey
Ocean County Court House
CN 2191
Toms River, New Jersey 08754

Douglas K. Wolfson, Esq.
Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein
P. O. Box 5600
Woodbridge, New Jersey 07095

PLEASE TAKE NOTICE that the undersigned Attorney for Defendants, Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville, hereby moves before the New Jersey Superior Court, Appellate Division, for Leave

to File an Interlocutory Appeal to appeal the Order entered on October 25, 1985, denying the Motion of Defendants to transfer the above captioned pending litigation to the Council on Affordable Housing, in accordance with Section 16 of the Fair Housing Act, Chapter 222 P.L. 1985 and vacation of Plaintiff's builder's remedy. Counsel will rely on the attached brief and appendix.

DATED: November 1, 1985

J. ALBERT MASTRO
Attorney for Defendants

Two copies of the within motion and attached brief were mailed this day to:

Douglas K. Wolfson, Esq.
Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein
P. O. Box 5600
Woodbridge, New Jersey 07095

Hon. Eugene D. Serpentelli
Superior Court of New Jersey
Ocean County Court House
CN 2191
Toms River, New Jersey 08754

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 willfully false, I am subject to punishment.

DATED: November 1, 1985

J. ALBERT MASTRO
Attorney for Defendants

J. ALBERT MASTRO
COUNSELLOR AT LAW
7 MORRISTOWN ROAD
BERNARDSVILLE, N. J. 07924
201-766-2720

November 1, 1985

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

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

Dear Mr. Mayson:

Enclosed is the following document for your attention:

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

With respect to the above please:

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

Very truly yours,

J. Albert Mastro

JAM/jc

Enclosures
cc: Somerset County Clerk's Office

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

Plaintiff
HELEN MOTZENBECKER,

vs.

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

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY/
OCEAN COUNTY

Docket No. L-37125-83

(MOUNT LAUREL II)

CIVIL ACTION

NOTICE OF MOTION FOR STAY OF PROCEEDINGS

TO: Douglas K. Wolfson, Esq.
Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein
P. O. Box 5600
Woodbridge, New Jersey 07095

PLEASE TAKE NOTICE that on Tuesday, November 19, 1985, at 10:00 a.m. or as soon thereafter as counsel may be heard, the undersigned attorney for defendants, Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville, will apply to the Superior Court of New Jersey, Law Division, at the Ocean County Court House in

Toms River, New Jersey for a stay of proceedings in the above entitled matter pending disposition of Defendants' motion for leave to appeal presently pending before the Appellate Division. Defendants will rely on the enclosed Certification. Defendants move for disposition on the papers pursuant to R.1:6-2.

DATED: November 1, 1985

J. ALBERT MASTRO
Attorney for Defendants

Two copies of the within motion and supporting certification were mailed this day to:

Douglas K. Wolfson, Esq.
Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein
P. O. Box 5600
Woodbridge, New Jersey 07095

Honorable Eugene D. Serpentelli
Superior Court of New Jersey
Ocean County Court House
CN 2191
Toms River, New Jersey 08754

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 willfully false, I am subject to punishment.

DATED: November 1, 1985

J. ALBERT MASTRO
Attorney for Defendants

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

Plaintiff
HELEN MOTZENBECKER,

vs.

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

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY/
OCEAN COUNTY

Docket No. L-37125-83

(MOUNT LAUREL II)

CIVIL ACTION

CERTIFICATION OF
J. ALBERT MASTRO

J. ALBERT MASTRO CERTIFIES AS FOLLOWS:

1. I am an attorney at law of the State of New Jersey with offices at 7 Morristown Road, Bernardsville, New Jersey, and represent the defendants in the above entitled matter.

2. On or about September 23, 1985, defendants filed a notice of motion with this Court seeking to transfer the above entitled matter to the Council on Affordable Housing pursuant to Section 16(a) of the Fair Housing Act.

3. On October 25, 1985, an order was entered denying said motion to transfer.

4. On November 1, 1985, defendants filed a motion seeking leave to appeal from said order of denial with the Appellate Division.

5. In the event said motion were granted and the order entered by the Court on October 25, 1985 were reversed any proceedings relative to compliance would be a non-productive utilization of judicial effort as well as that on behalf of all parties involved.

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 willfully false, I am subject to punishment.

DATED: November 1, 1985

J. ALBERT MASTRO
Attorney for Defendants

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

HELEN MOTZENBECKER,

Plaintiff(s)

vs.

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

Defendant(s)

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY/
OCEAN COUNTY

Docket No. L-37125-83

CIVIL ACTION

(MOUNT LAUREL II)

A copy of the within Notice of Motion has been filed with the Clerk of the County of Somerset *at* Somerville Court House, Somerville, *New Jersey*

J. ALBERT MASTRO
Attorney(s) for Defendants

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

J. ALBERT MASTRO
Attorney(s) for Defendants

Service of the within

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

Attorney(s) for

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

Attorney(s) for

PROOF OF MAILING: On *19* *, I, the undersigned, mailed to*

Attorney(s) for
at
by *mail, return receipt requested, the following:*

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

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

Dated: November 1 *19* 85.

J. ALBERT MASTRO
Attorney for Defendants

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

November 1, 1985

Elizabeth McLaughlin, Clerk
Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
CN 006
Trenton, New Jersey 08625

Re: Helen Motzenbecker, Plaintiff-Respondent, v. Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville, Defendants-Appellants
Docket No. L-37125-83
Sat Below: Hon. Eugene D. Serpentelli, A.J.S.C.

LETTER BRIEF IN SUPPORT OF MOTION FOR LEAVE TO TAKE AN INTERLOCUTORY APPEAL FOR DEFENDANTS-APPELLANTS, MAYOR AND COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH OF BERNARDSVILLE

Dear Mrs. McLaughlin:

Please accept this letter brief on behalf of the Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville in support of Motion for Leave to Take an Interlocutory Appeal in lieu of a formal brief pursuant to R.2:6-2(b).

TO THE HONORABLE JUDGES OF THE APPELLATE DIVISION:

TABLE OF CONTENTS

PROCEDURAL HISTORY

On June 20, 1983, Plaintiff, Helen Motzenbecker filed a complaint in lieu of prerogative writ pursuant to Mount Laurel II, alleging the Borough of Bernardsville's zoning ordinance to be exclusionary (Da1 through 10). Defendant Borough filed its answer July 11, 1983 (Da11 through 15). An amendment to the answer was filed July 26, 1983 (Da16 through 18). A motion to strike defendants' separate defenses was heard and partially granted on September 16, 1983. After some negotiation, a Special Master was appointed early in 1984 and a stipulation of partial settlement was executed February 6, 1984, in which plaintiff was awarded a builder's remedy (Da25 through 28). On November 20, 1984, an interim order was entered by Judge Serpentelli which clarified and consolidated various factors presented by the stipulation (Da29 through 34). On February 7, 1985, a second Special Master's report was submitted to Judge Serpentelli to assist in formulating defendants' compliance package (Da35 through 44). On February 4, 1985, defendants' motion to extend time for formulating compliance was entered. On May 6, 1985, repose against defendants was extended from April 30, 1985 until the compliance hearing. On Wednesday, August 21, 1985, plaintiff moved to prohibit defendants from utilizing condemnation as a means towards satisfying its Mount Laurel II obligation. Defendants cross-moved requesting vacation of plaintiff's builder's remedy. Plaintiff's motion was denied.

Defendants' cross-motion was heard in conjunction with a later motion to transfer on October 11, 1985 (Da52 through 53). Defendants' motion to transfer pursuant to the Fair Housing Act was denied (Da113). Defendants presently request leave to appeal from the denied motion to transfer.

STATEMENT OF FACTS

Plaintiff is the owner of some 8.454 acres of land in the northeast corner of the Borough of Bernardsville, Somerset County (Da1 and Da2). Plaintiff instituted suit pursuant to Mount Laurel II without a formal application for a variance and without any indication that a variance would be denied (Da14-5; Da62 and Da63). In negotiation which began after exchange of pleadings, plaintiff always asserted that profitability of her development plan would hinge on density bonuses, etc. Land value increment alone was denied as being a significant profitability factor (Da19 through 23; Da49 through 51). After negotiating a stipulation of partial settlement which granted plaintiff a builder's remedy, defendant Borough studied methods to bring its zoning ordinance into full Mount Laurel compliance. Subsequent to the stipulation with plaintiff, defendants embarked upon a course of unique and positive dimensions. Defendants chose not merely to create a modified ordinance which would provide a realistic opportunity for the construction of lower income housing, rather, defendants

chose to actually construct their full share of lower income housing (Da42 through 44). In locating parcels of land suitable for a municipally sponsered construction initiative, plaintiff's parcel was amongst the more suitable sites (Da36-10).

Since disclosing their newly formulated plan of compliance, defendants have been informed that plaintiff's former meager estimation of her parcel's potential increase in land value alone was incorrect. For a parcel recently estimated at $525,000.000, plaintiff now seeks several millions of dollars in return (Da46 and Da55-20).

As yet, plaintiff has never submitted any construction proposals to defendants. Plaintiff has yet to break ground. Plaintiff's construction would create a total amount of 15 lower income housing units (20% set-asides with 76 total units) (Da36-12). Defendants' plan, if not scuttled by plaintiff's avaricious demands, would assure construction of 178 lower income units. Should the defendants be compelled to purchase plaintiff's parcel at an inflated price due to the presence of her builder's remedy, municipally funded housing will become much less feasible, and the entire compliance package will be jeopardized (Da59-15).

LEGAL ARGUMENT

POINT I

MOUNT LAUREL II'S PROSCRIPTION AGAINST INTERLOCUTORY APPEALS IS INAPPLICABLE TO THE INSTANT MOTION.

In South Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983), (hereinafter Mount Laurel II) the New Jersey Supreme Court sought to deal with the often complex procedure which at that time accompanied Mount Laurel litigation. Writing for the Court, Justice Wilentz stated that:

> The judiciary should manage Mount Laurel litigation to dispose of a case in all of its aspects with one trial and one appeal, unless substantial considerations indicate some other course. 92 N.J. at 218.
>
> The municipality may elect to revise its land use regulations and implement affirmative remedies "under protest." If so, it may file an appeal when the trial court enters final judgment of compliance. Until that time there shall be no right of appeal, as the trial courts determination of fair share and non-compliance is interlocutory. 92 N.J. at 285.

The above cited pronouncements have since been equated as an issuance of a general proscription against interlocutory appeals in Mount Laurel litigation.

This proscription was meant to deal with the problem of unconscionable delay. The Court noted that such delay had

been occasioned by, the judicial nature of a remedy created to fill the legislative void existing since the decision in So. Burlington N.A.A.C.P. v. Mount Laurel Tp., 67 N.J. 151 (1975), (hereinafter Mount Laurel I) 92 N.J. at 199. Undoubtedly, the bar against interlocutory appeals was intended to act as a means by which the remedy, the judicial remedy, could be strengthened, clarified, and made more easy to apply. 92 N.J. at 197.

Mount Laurel II is also very candid in its recognition that the remedies specified therein are but temporary solutions necessitated by a failure of legislative action.

> [A] brief reminder of the judicial role in this sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is best left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interest involved and because the Legislature has not protected them. We recognize the social and economic controversy (and its political consequences) that has resulted in relatively little legislative action in this field. We understand the enormous difficulty of achieving a political consensus that might lead to significant legislation enforcing the constitutional mandate better than we can, legislation that might completely remove this Court from those controversies. But enforcement of constitutional rights cannot await a supporting political consensus. So while we have always preferred legislative to judicial action in this field, we shall continue - until the Legislature acts - to do our best to uphold the constitutional obligation that underlies the Mount Laurel doctrine. 92 N.J. at 212.

The Fair Housing Act, P.L. 1985, c.222, signed by Governor Kean on July 2, 1985, constitutes precisely the preferred legislative action to which the Court stated it would readily defer, and from which the judicial role might decrease. 92 N.J. at 213.

The instant motion requests leave to appeal a trial court decision denying transfer of an existing Mount Laurel case to the Council on Affordable Housing. The motion below was made pursuant to §16(a) of the Fair Housing Act. The motion below was not made pursuant to any provisions of Mount Laurel II's remedies. Obviously, the proscription cited above prohibiting appeals prior to a judgment of compliance is inapplicable. The bar against interlocutory appeals in Mount Laurel litigation sought to prevent delay where the only available remedy was that provided by our Supreme Court. The motion presently before this Court seeks interlocutory review of a decision below denying application of remedial statutory provisions to existing litigation. This motion does not seek review of a decision concerning any of the many determinations which are components of judgments stemming from Mount Laurel II.

The patent importance of determining applicability of recent remedial legislation removes the outstanding bar against piecemeal review of Mount Laurel issues. In fact, defendants do not seek review of Mount Laurel determinations, rather, they request review of a summary decision denying institution of an administrative remedy which was specifically designed to replace present and future litigation in exclusionary zoning matters.

POINT II

THE INTERESTS OF JUSTICE WILL BEST BE SERVED BY GRANTING DEFENDANTS' MOTION FOR LEAVE TO APPEAL.

Rule 2:2-4 states that "The Appellate Division may grant leave to appeal, in the interest of justice, from an interlocutory order of a court...if the final judgment, decision or action thereof is appealable as of right pursuant to R.2:2-3(a)..." In the present matter, the final judgment below will constitute a final judgment from the Superior Court trial division, thus the denied motion to transfer may be granted interlocutory review. The precise issue posed by defendants' present motion is whether the interest of justice requires immediate review of the Motion to Transfer denied below.

Although written when the standard for granting leave encompassed the less flexible "substantial grounds of appeal" criterion, rather than the present "interest of justice"test, Romano v. Maglio, 41 N.J. Super. 561 (App. Div. 1956) still provides a comprehensive guide as to when discretion properly permits interlocutory review.

> We will not grant leave to appeal in order to correct minor injustices, such as...granting or denying interrogatories or discovery.
>
> However, we may grant leave to appeal where some grave damage or injustice may be caused by the order below, such as when the trial court grants, modifies, refuses or dissolves an injunction...

> We may also be induced to grant leave where the appeal, if sustained, will terminate the litigation and thus very substantially conserve the time and expense of the litigants and the courts, as in the case where the order attacked determines that the court or agency below has jurisdiction of the subject matter or person. 41 N.J. Super. at 567, 568.

It has also be held that an interlocutory appeal is proper:

> When necessary to preserve and maintain the res or status quo pending final judgment and prevent irreparable injury or mischief.
>
> The protection of the res is the very essence of the right of review; a review would be futile if the superintending tribunal were bereft of the power to render an efficacious judgment by the destruction or impairment of the subject matter. Zaleski v. Local 401 of United Electrical R. & M. Wkrs., 6 N.J. 109 (1951).

The trial court in deciding the motion below was dealing with a newly promulgated, remedial statute. Indeed, the Fair Housing Act was drafted in accord with the requests of New Jersey's Supreme Court wherein legislative action was specifically endorsed as the preferable method of remedying the State's housing problems. Among other purposes, the statute seeks to accomplish three objectives: (1) to provide a reasonable opportunity for the construction of lower income housing throughout the State, (2) to remove disputes concerning housing

from the courts, and (3) to place a moratorium on the granting of builder's remedies not already awarded pursuant to a final judgment. The Act sets up a comprehensive plan for the implementation of Mount Laurel's mandate. Within the framework of the Act there exist provisions for the creation of an administrative body (The Council on Affordable Housing) which will supervise an administrative rather than a judicial remedy for lower income housing issues. In order that as many municipalities as possible might be able to participate in the Act's procedures, a moratorium on future builder's remedies is found in §28. Implementation of a moratorium allows presently litigating municipalities to move their cases to the administrative forum, thereby ending expensive, time consuming court battles.

In denying defendants' motion below, the Court was thwarting the very essence of a novel and remedial legislative approach to a pressing public issue. Undoubtedly, the vast majority of prime building locations have already been involved in suit. Denial of transfer to the Council can do nothing but leave the Council a body with little to administer. In short, the result below denies the entire statute an opportunity to work.

In deciding whether or not leave is now appropriate, the standards of Romano v. Maglio and Zaleski supra, weigh heavily in favor of granting interlocutory review. Denial of transfer effectively vitiated the intent of a new statute which

deals with a monumental problem. Certainly, the outcome below was not a "minor injustice." The result clearly involves issues of vast significance to municipalities, their current residents, and present or prospective lower income residents. Review of such serious and weighty issues is warranted at this time.

Additionally, in moving to transfer, defendant Borough was requesting a cessation of the ongoing litigation and vacation of the previously entered interim order granting a builder's remedy. With the passage of the Fair Housing Act, the New Jersey Legislature created a strong public policy favoring an administrative over a judicial forum as the place of primary jurisdiction for deciding exclusionary zoning matters.

A further advantage may be discerned in the fact that the issue of exclusionary zoning and its remedies are already complex. With the inevitable growth in complexity a fair, equitable and uniform treatment of the issues at hand can best be achieved through an exercise of discretion whereby leave to appeal is granted.

When viewed individually, the facts giving rise to defendant Borough of Bernardsville's request for transfer are even more compelling than those of similarly situated municipalities. Prior to the passage of the Fair Housing Act, defendant Borough had condescended to award plaintiff a builder's remedy. The "agreement" was a good faith acknowledgment that the State's highest Court had endorsed such remedies and was initially

made since litigation of plaintiff's right to the same would have been futile. However, recognizing the inevitable fact that literally hundreds of market rate units of housing would have to be built by private developers in order to meet the Borough's fair share, defendants embarked upon a positive, bold and unique plan to aid those individuals formerly injured by past exclusionary zoning. The Borough's choice was to build municipally funded lower income housing in numbers sufficient to meet its obligation. By municipally funding the construction, market place forces would be bypassed and an influx of hundreds of market rate units (which the local infrastructure could not realistically support) would be avoided. Moreover, the Borough's plan does not require private initiative; it does not merely create a realistic opportuniuty for the construction of lower income units. The Borough's plan assures the actual construction of significant numbers of lower income residences.

The motion below was necessitated because of all available tracts in the Borough, plaintiff's ranked high in size and suitability. Plaintiff's parcel certainly remains a key in the Borough's plan. In order to purchase it at a price near to its assessed value, the previously agreed stipulation awarding a builder's remedy was requested to be vacated as per the Fair Housing Act's moratorium and provisions of R.4:50-1(f). With vacation of the remedy and transfer to the Council, the Borough would have an opportunity to pay other

than plaintiff's $2,800,000.00 asking price.

Denial of the motion below acts to preserve plaintiff's builder's remedy, and thus, her windfall profit expection. In so doing, the trial court has effectively removed a key piece of property necessary to effectuate a sure response to the local need for lower income housing. In essence, the preservation of plaintiff's builder's remedy, will very probably permit construction to begin and thereby impair or destroy the very subject of review, see Zaleski, supra, i.e., without plaintiff's key parcel defendants' entire municipal construction proposal - the very reason for transfer - will cease to exist. It is entirely appropriate to grant review at this time, later review may moot the present controvery.

Beyond the aforementioned reasons, one should note that the municipality's self initiated construction plan has mooted the entire rationale for granting a builder's remedy. In Bernardsville's case, private builders are not needed to build lower income housing and thereby vindicate rights of the poor. The defendants herein offer to do what even plaintiff cannot - house the municipality's full fair share of lower income persons.

POINT III

THE TRIAL COURT MISINTERPRETED THE WORDS "MANIFEST INJUSTICE" UNDER SECTION 16(a) OF THE FAIR HOUSING ACT.

Section 16(a) of the Fair Housing Act provides that:

> any party to the litigation may file a motion with the court to seek a transfer of the case to the Council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation.

The Court below, arbitrarily and without reference to source, chose to treat the aforementioned standard very loosely and to utilize manifest injustice as but one of a long list of factors to be considered in deciding a transfer motion (Da106-14ff). The Court did not advance a basis for the genesis of criteria beyond the manifest injustice standard announced in §16(a). Defendants submit that the Court below misinterpreted the standard of §16(a) and in doing so committed harmful error.

It is beyond contention that the Fair Housing Act is intended to be applied retroactively. While courts of New Jersey generally follow a rule of statutory construction that favors prospective application of statutes, where the Legislature has expressed an intent for retroactive application of a statute, courts should apply the statute in effect at

the time of decision. Gibbons v. Gibbons, 86 N.J. 515, 521-522 (1981). The Fair Housing Act is replete with unambiguous intent that its procedures be applied retroactively. Section 3 states that:

> "The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing."

The "manifest injustice" standard is not unknown in the law of New Jersey. In Gibbons, supra, it was held as follows:

> However, even if a statute may be subject to retroactive application a final inquiry must be made. That is, will retroactive application result in "manifest injustice" to a party adversely affected by such an application of the statute? The essence of this inquiry is 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. 92 N.J. at 523, 524.

The standard is two-pronged: (1) The court should determine if the affected party relied to his or her prejudice on the law that is to be changed as a result of retroactive applica-

tion of a new statute, and (2) the court must determine whether the consequences of the reliance are so deleterious and irrevocable that it would be unfair to grant retroactivety.

The law changed by the Fair Housing Act is that body of law created by Mount Laurel II in which builder's remedies were endorsed. The plaintiff herein clearly relied on the prior existing law. In fact, that law precipated plaintiff's actions. However, when one tests for the second prong upon which retroactivity may cause "manifest injustice," it is absent. The consequences of plaintiff's reliance are minor. Plaintiff has done little in reliance but file a complaint, enter into negotiations, and defend the motions brought pursuant to the Fair Housing Act. Plaintiff has broken no ground nor made any proposals for actual construction. Plaintiff has merely recited her ambitions for and expectation of vast profit numbering several millions of dollars. Certainly, the consequences of transfer would not in any conceivable sense be irrevocable or deleterious so as to make transfer an unfair occurance. Were plaintiff in the midst of construction subsequent to a successful compliance hearing, transfer would be inappropriate, but as here, where plaintiff has hardly exerted herself at all, it is beyond one's imagination that transfer could be denied due to "manifest injustice."

Perhaps the patent absence of "manifest injustice" gave rise to the myriad of extra-statatory criteria utilized below.

Nevertheless, defendants submit that the Act's intent to utilize "manifest injustice" as the sole disqualifier of transfer requests can be easily discerned from a comparison of the prior version of §16 with its final wording. Senate Bill No. 2046 contained an earlier version of §16. Therein, it was specified that if lower income housing could not be expedited and facilitated, transfer with its mediation and review process, was not required (Da86 and Da87). The Fair Housing Act as passed into law has the foregoing additional standard removed. Where an obviously additional standard utilized in weighing motions for transfer is excised prior to enactment of a statute, one need not ponder the question of whether additional standards are implied or authorized by the law. Yet, this is exactly what the trial court did.

Defendants, additionally submit that the burden of establishing the existence of "manifest injustice" should have been placed on the party asserting it. The trial court reversed this concept requesting that the municipality demonstrate "manifest injustice" if there is no transfer (Da113-7 through 113-11). When one recognizes the statute's clear preference for transfer with subsequent mediation and review and when the test of Gibbons is utilized, it is obvious that "manifest injustice" is a criterion to be proved by the party seeking to prevent application of the Act's transfer procedure retroactively.

Under the inverted and loosely applied standards utilized below the announced policy of New Jersey's Legislature is being perverted by the trial court responsible for hearing housing matters. Where the plain language and intent of the State Legislature can be tossed aside by cavalier rulings there can be no doubt that the erroneous statutory interpretation must lead to an unjust result. Leave to appeal should be granted; a reversal is warranted. R.2:10-2. Lower income housing is now a legislative matter. Continued intrusion by the Judiciary will only lead to a Constitutional confrontation.

Even when faced with a case in which the procedure and facts are strikingly analogous to the case at bar, the trial court disregarded the same. In Castiglioni v. Castiglioni, 192 N.J. Super. 594 (Ch. Div. 1984), a judgment was sought to be modified pursuant to R. 4:50-1(f). Movant asserted that the passage of the Uniformed Services Former Spouse's Protection Act, which modified the U.S. Supreme Court ruling in McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), (which held military pensions were not subject to equitable distribution) provided grounds for relief from a judgment rendered pursuant to McCarty. The Court in Castiglioni agreed that the remedial statute's passage gave grounds for reopening the Castiglioni judgment. Moreover, the Court therein held that R.4:50-1 applied equally to both a judgment rendered after a full bench trial and one negotiated by settlement.

The instant matter could not be more analogous. As in Castiglioni, Bernardsville negotiated a settlement relying on case law which had come down from the highest court able to hear the matter. Again as in Castiglioni a remedial statute was passed which modified parts of the outstanding case law. Unlike the result in Castiglioni, the Court below did not grant relief from the partial settlement. The obvious identical circumstances were disregarded by the trial court. Defendants respectfully submit that the result below was the product of an arbitrary ruling which ignored existing precedent as it rewrote the plain words of the Legislature's statute.

Finally, it must be emphasized that the trial court distorted the Mount Laurel doctrine by giving too much deference to plaintiff's builder's remedy. Mount Laurel was never intended to benefit a developer at the expense of a municipality's ability to produce lower income housing. A builder's remedy cannot be evaluated without considering the ultimate impact on lower income households. Developers have no rights outside of this context. For the trial court to have concluded that plaintiff had somehow acquired vested rights with a builder's remedy in view of defendants' compliance package is simply contrary to Mount Laurel principles. The Fair Housing Act must be given an opportunity to work. Given such circumstances principles of estoppel do not apply. State Dept. of Environ. Protect. v. Ventron Corp., 94 N.J. 473 (1983).

CONCLUSION

The motion now before Your Honors seeks immediate review of a denied application which requested transfer of the present litigation to a newly created administrative body. Interlocutory review is not prohibited as per Mount Laurel II simply because the decision appealed concerns a new legislative remedy rather than an existing judicial remedy.

The decision below is worthy of interlocutory review because it involves the implementation of a newly promulgated statute. The statute impacts upon virtually every resident within New Jersey, thus its application or lack thereof is of State-wide importance. The issue presented also involves an area vital to the life of every human being - housing and it's scarcity. Where a lower court has failed to carry forth the manifest intent of a statute which deals with a vital State-wide issue, immediate review should be forthcoming, as a complex problem such as housing necessarily requires early review and uniform treatment.

Above all else, the unique facts giving rise to the instant controversy, weigh heavily in favor of granting leave. Should review await final judgment the very subject matter central to this motion may be irrevocably changed. Should plaintiff's builder's remedy remain and transfer be denied, a truly innovative and courageous plan advanced by defendant Borough would be jeopardized. The Court below based

its denial to transfer on the delay which it perceived would result from transfer, and the concomitant delay in realization of lower income housing (Da111-3). The irony of the trial court's decision lies in the fact that the plaintiff left to her own ends will provide 15 lower income units. Defendants, provided with the opportunity granted in the Fair Housing Act, will build nearly 200 lower income units.

The decision below preserves plaintiff's builder's remedy as if it were a means to an end. The true goal of Mount Laurel II, building lower income housing, will best be served by granting transfer with its moratorium on the builder's remedy. Only with transfer will significant amounts of lower income housing be assured.

Respectfully submitted,

DATED: November 1, 1985

J. ALBERT MASTRO
Attorney for Defendants

GREENBAUM, GREENBAUM, ROWE & SMITH
COUNSELLORS AT LAW

☐ GATEWAY ONE
SUITE 500
NEWARK, N. J. 07102
(201) 623-5600
ATTORNEYS FOR

☒ ENGELHARD BUILDING
P. O. BOX 5600
WOODBRIDGE, N. J. 07095
(201) 549-5600
ATTORNEYS FOR Plaintiff

Plaintiff

HELEN MOTZENBECKER

vs.

Defendant

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

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

Docket No. L-37125-83

CIVIL ACTION

COMPLAINT IN LIEU OF PREROGATIVE WRIT (PURSUANT TO MOUNT LAUREL II)

Plaintiff, Helen Motzenbecker, with offices at 281 Main Street, Millburn, New Jersey, by way of Complaint against the defendants, says:

FIRST COUNT

1. Plaintiff is the owner of certain real property ("the property") comprising approximately 8.1 acres, located in the Borough of Bernardsville (hereafter the "Borough" or "Bernardsville"), in the County

of Somerset and State of New Jersey, which property is identified as Lot 27 in Block 125 on the official Tax Map of the Borough.

2. The property is located on the west side of North Finley Avenue, to the southeast of Route 202. It is bounded by a stream on the south, North Finley Avenue on the east, a Conrail right-of-way on the west, and the rear of commercial properties on Route 202, to the north.

3. Immediately to the north of the property are three (3) single-family homes, which abut the commercial area, containing a variety of retail and commercial establishments. Immediately to the south, beyond the stream, is a tract of land being used as a storage area for construction equipment and vehicular parking.

4. The property lies within an R-3 residential district, permitting only two single-family residential dwellings per acre (20,000 square foot minimum lot size).

5. The property is located within walking distance of shopping and other commercial establishments. It is well served by North Finley Avenue, a major County arterial roadway, and is in close proximity to public transportation (bus service) on Route 202.

6. The property is not presently serviced by sanitary sewers, although trunk lines providing access to a municipal sanitary sewer system with substantial available capacity to handle additional development, are located in close proximity thereto. Public water is readily available.

7. The current master plan of the Borough of Bernardsville shows the property to have no development constraints, with a recommended development density of up to eight (8) units per acre.

8. The defendant Borough, a municipal corporation of the State of New Jersey, has exercised the authority delegated to it pursuant to enabling legislation (N.J.S.A. 40:55D-62; hereafter "the Municipal Land Use Law"), and has adopted zoning and land use regulations regulating the nature, extent and costs of development of lands within the Borough.

9. The zoning ordinance of the Borough contains seven (7) separate residential zones (R-1, R-1A, R-2, R-3, R-4, R-5 and R-8), five of which permit only single family detached dwellings (R-1 through R-4) on excessively large lots ranging from minimums of 11,250 square feet per dwelling unit to 5 acres per dwelling unit. None of the residential zones provides any realistic opportunity for the construction of any low or moderate income housing or least cost housing.

10. The zoning districts permitting attached residential dwellings (R-5 and R-8) are "phantom zones" in that they contain no available land upon which any housing, much less attached low and moderate, or least cost housing, could be constructed.

11. The R-5 zone, purporting to permit attached housing, but at a density of only four (4) units per acre, comprises less than 1.5% of the Borough's land (approximately 120 acres). This land has already been fully developed, or has already been approved for development of upper income residential dwellings.

12. The R-8 zone comprises less than 1/10 of 1% of the Borough's land (approximately 9 acres). This land has been totally developed as well.

13. The intent of the Borough to prohibit lower cost housing is especially evident from the development regulations applicable to the R-8

zone, in that attached housing is a permitted use, but only if built in accordance with a vast array of cost-generating requirements, many of which have been expressly proscribed by constitutional mandate, and are presumptively and facially unconstitutional and unlawful. Such expressly proscribed provisions include but are not limited to restrictions on the number of bedrooms per dwelling unit, restrictions on the number of bedrooms that are permitted per acre, and restrictions requiring that every attached housing project contain not less than 50% one bedroom units.

14. In addition, the Borough's regulations prohibit mobile homes from being constructed or located anywhere within the boundaries of the Borough, despite the existence of many suitable and available sites with significant acreage.

15. The regulations adopted by the Borough are not reasonably necessary for public protection of a vital interest or the public health, safety or general welfare, but rather, are harsh and oppressive, and are artificial constraints which are intended to, and have the effect of, raising the unit rentals and unit sales costs of potential residential dwellings to levels beyond the reach of the low and moderate income population of the Borough and of the region.

16. As the direct and proximate and intended result of the policies effectuated through the Borough's zoning ordinance, building, space and other development regulations, Bernardsville has affirmatively excluded all low and moderate income families and larger families from renting and/or owning residential units anywhere within the Borough of Bernardsville.

17. The Borough has, by its system of land use regulations, violated its presumptive obligation to plan for and provide, by its land use regulations, a realistic opportunity for an appropriate variety and choice of housing within its municipal boundaries, including affordable housing for low and moderate income persons.

18. The development regulations as aforesaid are intended to, and have had the effect of, precluding any realistic opportunity for the construction of low and moderate income housing anywhere within the boundaries of the Borough.

19. The development regulations as aforesaid also preclude the opportunity for the construction of least cost housing anywhere within the boundaries of the Borough.

20. The zoning ordinance and development regulations of the Borough of Bernardsville are presumptively and facially invalid, ultra vires, and contrary to the substantive due process and equal protection guarantees inherent in Article I, Section 1 of the New Jersey Constitution, and are contrary to N.J.S.A. 40:55D-62, due to the failure of the Borough of Bernardsville through its regulations, to provide for a balanced community, and to promote the general welfare.

WHEREFORE, plaintiff demands judgment against the defendants:

(a) Declaring the entire zoning ordinance of the Borough of Bernardsville to be null and void and of no effect, generally and as to the plaintiff's lands, specifically;

(b) Enjoining the Borough of Bernardsville to cease and desist in enforcing its entire zoning ordinance;

(c) Appointing a special master to negotiate, mediate, and assist in developing constitutional zoning and land use regulations in the Borough generally and on plaintiff's property, specifically, with particular emphasis upon meeting the housing needs of low and moderate income persons;

(d) Directing the municipality either to extend sewer lines to the site, or to adopt an ordinance to construct a sewer line to the property as a "special improvement", with benefiting properties to be assessed pursuant to applicable law;

(e) Formulating a "builder's remedy", directing the Borough to re-zone plaintiff's property to permit 20 units per acre or such other average gross density, consistent with principles of sound planning, sufficient to provide a reasonable return to the plaintiff and to assure feasibility of construction of a substantial amount of low and moderate income housing;

(f) In the alternative, if it is determined that the Mount Laurel obligation cannot otherwise be satisfied, then directing the court appointed master to assist in developing zoning and land use regulations which provide a realistic opportunity for the construction of least cost housing in the Borough generally, and on plaintiff's property, specifically;

(g) For such other relief as the Court shall deem just and proper under the circumstances;

(h) For attorneys' fees and costs of suit.

SECOND COUNT

1. Plaintiff repeats the allegations of the First Count, as though more fully set forth herein.

2. The New Jersey State Development Guide Plan has designated substantial portions of the Borough of Bernardsville, including plaintiff's property, specifically, as "growth areas".

3. The existence of a municipal obligation to provide a realistic opportunity for a fair share of the region's present and prospective low and moderate income housing need extends to every municipality, any portion of which is designated by the State Development Guide Plan as a "growth area".

4. The defendant Borough, being located within a "growth area", has, by its land use regulations, failed to satisfy its constitutional obligations to promote the general welfare of all categories of people within the municipality and the region, and to provide its fair share of the region's present and prospective need for low and moderate income housing.

5. The zoning and other development regulations of the defendant, Borough of Bernardsville, are violative of its Mount Laurel obligations, and are contrary to the substantive due process and equal protection guarantees inherent in Article I, Section 1 of the New Jersey Constitution.

WHEREFORE, plaintiff demands judgment against the defendants:

(a) Declaring the entire zoning ordinance of the Borough of Bernardsville to be null and void and of no effect, generally and as to the plaintiff's lands, specifically;

(b) Enjoining the Borough of Bernardsville to cease and desist in enforcing its entire zoning ordinance;

(c) Appointing a special master to negotiate, mediate, and assist the municipal officials in developing constitutional zoning and land use regulations, in the Borough generally and on plaintiff's property, specifically, with particular emphasis upon meeting the housing needs of low and moderate income persons;

(d) Directing the municipality either to extend sewer lines to the site, or to adopt an ordinance to construct a sewer line to the property as a "special improvement", with benefiting properties to be assessed pursuant to applicable law;

(e) Formulating a "builder's remedy" directing the Borough to re-zone plaintiff's property to permit 20 units per acre or such other average gross density consistent with principles of sound planning, sufficient to provide a reasonable return to the plaintiff and to assure feasibility of construction of a substantial amount of low and moderate income housing;

(f) In the alternative, if it is determined that the Mount Laurel obligation cannot otherwise be satisfied, then directing the court appointed master to assist in developing zoning and land use regulations which provide a realistic opportunity for the construction of least cost housing in the Borough generally, and on plaintiff's property, specifically;

(g) For such other relief as the Court shall deem just and proper under the circumstances;

(h) For attorneys' fees and costs of suit.

THIRD COUNT

1. Plaintiff repeats the allegations of the First and Second Counts as though more fully set forth herein.

2. The Constitution of the State of New Jersey requires every municipality to provide by its land use regulations, a realistic opportunity for decent housing for its indigenous poor.

3. The defendant, Borough of Bernardsville, through its zoning ordinance and land use regulations, has failed to provide a realistic opportunity for decent housing for its indigenous poor.

4. The zoning and other development regulations of the defendant, Borough of Bernardsville, are violative of its Mount Laurel obligations, and contrary to the substantive due process and equal protection guarantees inherent in Article I, Section 1 of the New Jersey Constitution.

WHEREFORE, plaintiff demands judgment against the defendants:

(a) Declaring the entire zoning ordinance of the Borough of Bernardsville to be null and void and of no effect, generally and as to the plaintiff's lands, specifically;

(b) Enjoining the Borough of Bernardsville to cease and desist in enforcing its entire zoning ordinance;

(c) Appointing a special master to negotiate, mediate, and assist in developing constitutional zoning and land use regulations, in the Borough generally and on plaintiff's property, specifically, with particular emphasis upon meeting the housing needs of low and moderate income persons;

(d) Directing the municipality either to extend sewer lines to the site, or to adopt an ordinance to construct a sewer line to the property as a "special improvement", with benefiting properties to be assessed pursuant to applicable law;

(e) Formulating a "builder's remedy" directing the Borough to re-zone plaintiff's property to permit 20 units per acre or such other average gross density, consistent with principles of sound planning, sufficient to provide a reasonable return to the plaintiff and to assure feasibility of construction of a substantial amount of low and moderate income housing;

(f) In the alternative, if it is determined that the Mount Laurel obligation cannot otherwise be satisfied, then directing the court appointed master to assist in developing zoning and land use regulations which provide a realistic opportunity for the construction of least cost housing in the Borough generally, and on plaintiff's property, specifically;

(g) For such other relief as the Court shall deem just and proper under the circumstances;

(h) For attorneys' fees and costs of suit.

GREENBAUM, GREENBAUM, ROWE & SMITH
Attorneys for Plaintiff,
Helen Motzenbecker

By: _____
Robert S. Greenbaum

DATED: June 10, 1983

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

Plaintiff

HELEN MOTZENBECKER

vs.

Defendant

MAYOR AND COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH OF BERNARDSVILLE

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

Docket No. L-37125-83

CIVIL ACTION

ANSWER

Defendants, Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville, a political subdivision of the State of New Jersey with its principal office at 166 Mine Brook Road, Borough of Bernardsville, County of Somerset, State of New Jersey and its Governing Body, in answer to the complaint, say:

ANSWER TO FIRST COUNT

1. Defendants admit the allegations of paragraph 1.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 2 and 3.

3. Defendants admit the allegations of paragraph 4.

4. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 5, 6, and 7.

5. Defendants admit the allegations of paragraph 8.

6. In response to the allegations of paragraph 9, defendants make reference to The Borough of Bernardsville Development Regulations Ordinance (1979) for the precise language therein, meaning and intent thereof.

7. Defendants deny the allegations of paragraphs 10, 11, 12, and 13.

8. In response to the allegations of paragraph 14, defendants make reference to The Borough of Bernardsville Development Regulations Ordinance (1979) for the precise language therein, meaning and intent thereof; defendants deny that there are many suitable and available sites for mobile homes with significant acreage.

9. Defendants deny the allegations of paragraphs 15 through 20.

ANSWER TO SECOND COUNT

1. Defendants repeat their answers to each and every paragraph of the First Count and incorporate them in this Count.

2. In response to the allegations of paragraph 2, defendants make reference to the New Jersey State Development Guide Plan for the precise language therein, meaning and intent thereof.

3. In response to the allegations of paragraph 3, defendants make reference to the decision of what is commonly known as Mount Laurel II for the precise language therein, meaning and intent thereof.

4. Defendants deny the allegations of paragraphs 4 and 5.

ANSWER TO THIRD COUNT

1. Defendants repeat their answers to each and every paragraph of the previous Counts and incorporate them in this Count.

2. In response to the allegations of paragraph 2, defendants make reference to the Constitution of the State of New Jersey for the precise language therein, meaning and intent thereof.

3. Defendants deny the allegations of paragraphs 3 and 4.

FIRST SEPARATE DEFENSE

Plaintiff has failed to exhaust her administrative remedies.

SECOND SEPARATE DEFENSE

Plaintiff has failed to join the Planning Board of the Borough of Bernardsville whose interests may be affected by the within action.

THIRD SEPARATE DEFENSE

The Court is without jurisdiction to engage in the following: (a) participate in rezoning land within the Borough of Bernardsville, (b) formulate a "builder's remedy", (c) impose a "fair share" obligation on defendants to provide for lower cost housing, all of which functions are legislative and executive in nature within the scope of those branches of government under Article III of the Constitution of the State of New Jersey (1947).

FOURTH SEPARATE DEFENSE

The Court is without jurisdiction to direct defendant Borough to construct a sewer line to plaintiff's property as a local improvement since such would deprive its residents of property rights in violation of Article I, Sec. I of the New Jersey Constitution (1947) and Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

FIFTH SEPARATE DEFENSE

Defendants have fully satisfied their Mount Laurel obligations.

WHEREFORE, defendants demand judgment dismissing the complaint.

Dated: July 8, 1983

J. ALBERT MASTRO, Attorney for Defendants

CERTIFICATION

I hereby certify that the within pleading was served within the time period provided by rule 4:6.

J. ALBERT MASTRO, Attorney for Defendants

Dated: July 8, 1983

FILED

JUL 07 1983

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

Plaintiff

HELEN MOTZENBECKER

vs.

Defendant

MAYOR AND COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH OF BERNARDSVILLE

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

Docket No. L-37125-83

CIVIL ACTION

AMENDMENT TO ANSWER

Defendants, Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville, a political subdivision of the State of New Jersey with its principal office at 166 Mine Brook Road, Borough of Bernardsville, County of Somerset, State of New Jersey and its Governing Body, amend their answer by adding thereto the following separate defenses:

SIXTH SEPARATE DEFENSE

The remedial approach in Mount Laurel II deprives defendants as fiduciaries and holders of the public trust and their residents of property rights contrary to Article I, Sec. I of the New Jersey Constitution (1947), Due Process of Law and Equal Protection of the Laws under the Fourteenth Amendment of the United States Constitution.

SEVENTH SEPARATE DEFENSE

The remedial approach in Mount Laurel II encroaches upon powers that are administrative and legislative in nature contrary to Article III of the Constitution of the State of New Jersey (1947), and deprives defendants as fiduciaries and holders of the public trust and their residents of their right to petition for redress of grievances contrary to Article I, Sec. 18 of the Constitution of the State of New Jersey (1947).

EIGHTH SEPARATE DEFENSE

The utilization of density bonuses, mandatory set-asides, "builder's remedy", economic incentives within zoning ordinances, extension of sewer lines and active participation by the judic-

iary in the municipal zoning process (or appointing a special master to do so) as articulated in Mount Laurel II and incorporated in the complaint deprive defendants as fiduciaries and holders of the public trust and their residents of Due Process of Law and Equal Protection of the Laws under the Fourteenth Amendment of the United States Constitution.

WHEREFORE, defendants demand judgment dismissing the complaint.

Dated: July 22, 1983

J. ALBERT MASTRO, Attorney for Defendants

CERTIFICATION

I hereby certify that the within pleading was served within the time period provided by Rule 4:9-1.

J. ALBERT MASTRO, Attorney for Defendants

Dated: July 22, 1983

specific project. It should be noted that the production cost of the raw land may vary significantly from the present market value of that land. As illustrated in the following analysis, the determination of the production costs of the raw land plays a vital role in establishing the rate of return from a conventional development under present zoning as well as from a Mt. Laurel-type development.

The subject property, which consists of land and two improved residential structures, was purchased in 1970 for $180,000. In order to convert this figure into 1983 dollars, a capitalization rate of 9% is used for the 13-year period 1970 to 1983. This translates into a present 'raw' land cost of $552,000. It is further assumed that real estate taxes paid on the tract over the 13-year period are equal to $3,500 per year in current dollars, or approximately $45,500, and that the income derived from the rental of two existing dwellings is equal to all other expenses associated with the land, such as insurance and maintenance. This results in a current cost of $597,500. However, since the subject site was improved with two residential structures at the time of purchase, the present value of these properties must therefore be deducted from the current raw land cost. The estimated present value of the two residences, including the land on which each is located, is estimated by the owner to be $210,000. Thus, the current production cost of the remaining raw land (approximately 7 acres) is established at $387,500.

Although the production cost of the raw land is established at $387,500, the actual fair market value of the 7+ acres may range from a low of $750,000 to a potential high of over $1 million. For example, for moderate density conventional multi-family use, the land could probably generate $750,000 or more. Assuming the site could support an approximately 100,000 square foot office development, the land value could approximate $1.5 million. In order for the Mt. Laurel development to be viable, however, it

CHAPTER I

THE ECONOMIC RETURN FROM THE MOTZENBECKER PARCEL UNDER PRESENT BERNARDSVILLE ZONING REGULATIONS

An important concept in the Mount Laurel II decision is that a developer is entitled to a "reasonable economic return" from land and buildings when the project includes a minimum of 20% of affordable units. It appears to be appropriate to use as a measure of "reasonable economic return", the normal relationship between a traditional investment in land and buildings for a conventional project, and the profit that may be gained from that development effort. In a Mount Laurel-type development, in addition to the reasonable return that would be generated from the conventional units, the costs of "underwriting" or "subsidising" the affordable units must also be incorporated into the calculation. Thus, the sale price or rental of the conventional units must include the total development cost of the conventional units, the amount required to subsidize the affordable units, plus a reasonable economic return on the conventional units.

The purpose of this section is to determine the rate of return that the owner of the Motzenbecker property could anticipate if the parcel were developed under a traditional development scenario (i.e. containing 100% conventional or market price units). For the purposes of analysis, the current zoning designation of the property by the Borough of Bernardsville is assumed to provide the basis for what can be developed on the property.

A. CURRENT COST OF THE TRACT

Before calculating the potential return from the development of the tract, the current production costs of the "raw" land must be derived. The concept of production cost may be defined as the actual cost of the land to the developer for use in a

BREAK-EVEN RENTS OR SALE PRICE FOR CONVENTIONAL UNITS

In Tables 37-45 the total subsidies required to make each of the project scenarios possible were determined. In a Mount Laurel-type development, the source of the subsidies, after all assistance has been provided by the subject municipality (by relaxing cost-generating restrictions and exactions, and providing a tax abatement such as a PILOT) has to be generated from within the project, i.e. by the sale price or rents of the conventional units. Thus, the total subsidy of each project has to be added to the cost of production of each of the conventional units. If that total amount of rent or sales price is equal to or below the anticipated market price of the conventional units, then the project can internally subsidize the affordable units and is possible.

These "break-even" sales prices and rents are calculated below.

FEASIBILITY OF THE NINE SCENARIOS

A summary of the break-even prices for the conventional housing in the nine scenarios are shown compared to the owners' anticipated market price for the units in Table 49. The latter represent the maximum that the owner anticipates obtaining from the conventional units. Thus, where the break-even prices are equal to or less than the market prices, that scenario would be possible.

Table 49 indicates that in four of the nine scenarios the owner's anticipated market price is equal to or greater than the break-even costs. This indicates that in four of the nine scenarios the production of the affordable housing is possible. However, in order for a scenario to be considered worthwhile doing, i.e. feasible, the market price of the conventional units would have to be somewhat higher than the break-even costs. One must remember that if the sales price of the conventional units is only equal to the break-even cost, the developer will only be getting a rate of return equal to that if he or she chose to do a conventional project (i.e. 11 single-family dwelling units). Thus, there would be no incentive to do the Mount Laurel-type project. The developer would not invest more capital or assume the far greater risks associated with a Mount Laurel-type development for the same rate of return. Only where there is a greater return would such risks be considered worthwhile. Thus, in order for the developer to consider a Mount Laurel development feasible, the anticipated market price should be somewhat greater than the break-even price.

The sales scenarios including affordable family units (8 and 9) do not work at any density. A sales project involving affordable elderly units begins to become feasible only at a density of above 10-12 units per acre (scenarios 2 and 3) while the rental projects require higher densities to become feasible - at 16 units per acre it is possible, but not feasible, while at

TABLE 49

FEASIBILITY OF THE NINE SCENARIOS

Scenario No. & Description	Conventional Unit Size and Type	Break-Even Sale or Rent	Owner's Anticipated Market Price	Feasibility
1: Sales with elderly affordable - Density of 6-8 Units/Acre	1,500 S.F. 3 Bedroom Townhouse	$ 138,500 (sales price)	$ 127,500 ($85/S.F.)	No
2: Sales with elderly affordable - Density of 10-12 Units/Acre	1,200 S.F. 2-3 Bedroom Townhouse	$ 93,500 (sales price)	$ 96,000 ($80/S.F.)	Yes
3: Sales with elderly affordable - Density of 14-16 Units/Acre	1,000 S.F. 2 Bedroom Townhouse	$ 75,000 (sales price)	$ 75,000 ($75/S.F.)	Yes
4: Rental with elderly affordable - Density of 12 Units/Acre	1,200 S.F. 3 Bedroom Apartment	$ 1,070 (monthly rent)	$ 950 ($0.95/S.F.)	No
5: Rental with elderly affordable - Density of 14 Units/Acre	1,100 S.F. 2 Bedroom Apartment	$ 990 (monthly rent)	$ 900 ($0.90/S.F.)	No
6: Rental with elderly affordable - Density of 16 Units/Acre	1,000 S.F. 2 Bedroom Apartment	$ 850 (monthly rent)	$ 850 ($0.85/S.F.)	Yes
7: Rental with elderly affordable - Density of 20 Units/Acre	1,000 S.F. 2 Bedroom Apartment	$ 830 (monthly rent)	$ 850 ($0.85/S.F.)	Yes
8: Sales with family affordable - Density of 6-8 Units/Acre	1,500 S.F. 3 Bedroom Townhouse	$ 143,000 (sales price)	$ 127,500 ($85/S.F.)	No
9: Sales with family affordable - Density of 10-12 Units/Acre	1,200 S.F. 2-3 Bedroom Townhouse	$ 99,000 (sales price)	$ 96,000 ($80/S.F.)	No

20 units per acre it becomes feasible. From a planning point of view, due to the small size and location of the parcel (8 acres), it would probably be preferable to keep the density at 16 units per acre or under. With such a constraint in mind, the most preferable project would be a sales project with a density of between 10-12 and 14-16 units per acre.

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

Plaintiff
HELEN MOTZENBECKER,

vs.

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

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

Docket No. L-37125-83

CIVIL ACTION
(Mt. Laurell II)
STIPULATION OF PARTIAL SETTLEMENT

This matter having been opened to the Court on the application of the parties hereto (J. Albert Mastro, Esq., appearing on behalf of the defendants, Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville, and Douglas K. Wolfson, Esq., appearing on behalf of the plaintiff, Helen Motzenbecker), and it apppearing that the parties hereto have reached agreement regarding certain aspects of this matter, and it appearing that the parties have consented to the within stipulation of settlement, they do hereby stipulate and agree, subject to the approval of the Court, as follows:

1. In accordance with the holding of Mt. Laurel II, the parties hereto agree that the plaintiff, Helen Motzenbecker, be and is hereby awarded a builder's remedy which will permit her to develop the property specified in the Complaint in a manner to be approved by the Court to include a substantial percentage of low and moderate income housing free from the constraints of the present zoning ordinance and zoning maps.

2. George M. Raymond is hereby appointed special master to assist the parties and the Court in formulating, planning, designing and negotiating a particular builder's remedy that is both appropriate and feasible for the property in question; or, if the parties are unable to reach an agreement in this regard, to make recommendations to the Court and to offer testimony relative to such builder's remedy, in the context of a trial limited to resolving the issue of the precise builder's remedy to be awarded plaintiff in this action. The special master shall commence his duties at such time as the parties request his participation or the Court on its own motion so determines.

3. The award of a builder's remedy to plaintiff in this action does not constitute an admission of non-compliance with the requirements of Mt. Laurel II for the purposes of any other Mt. Laurel litigation now pending, or hereinafter filed against the Borough of Bernardsville and is, for the purposes of any other such litigation, without prejudice to the Borough of Bernardsville.

4. The award of the builder's remedy to the plaintiff, Helen Motzenbecker, and its implementation in this case does not constitute an "order of compliance" as described in Mt. Laurel II, and does not afford the defendant, Borough of Bernardsville, any repose from other Mt. Laurel litigation which may be now pending, or hereinafter filed against it, unless defendant elects to modify

its development regulations ordinance which the Court determines fulfills its Mt. Laurel obligations.

5. The parties will hereafter meet and determine the parameters within which the special master shall act in formulating and recommending a builder's remedy for the property in question.

6. The special master will complete his task of assisting the parties and the Court in formulating and negotiating a feasible and appropriate builder's remedy for the property in question within a time period to be established and approved by the Court.

7. Compensation of the special master shall be the joint responsibility of the plaintiff and the defendant, each party being required to pay one-half of the fees charged by the master for his assistance in formulating, planning, designing, and negotiating a feasible and appropriate builder's remedy for the property in question. To the extent that the special master is requested by either party to perform any studies or activities other than those contemplated in connection with the formulation and implementation of a builder's remedy, such as revisions to the zoning ordinance of the Borough of Bernardsville, calculations of the regional need for low and moderate income housing, or calculation of a fair share allocation of low and moderate income housing, compensation for such additional activities shall be the sole responsibility of the party making such request in writing.

8. After the special master has fulfilled his responsibilities and has made his recommedations to the parties and to the Court, a case management conference will be scheduled by the Court. If no agreement regarding the builder's remedy has been reached, a pretrial and trial date will be assigned by the Court

and the matter will proceed to trial on the issue of the builder's remedy only, and not as to the compliance with Mt. Laurel II.

DATED: January 31, 1984

J. ALBERT MASTRO, ESQ.
Attorney for Defendants,
Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville

GREENBAUM, GREENBAUM, ROWE, SMITH, BERGSTEIN, YOHALEM & BRUCK
Attorneys for Plaintiff,
Helen Motzenbecker

DATED: February 6, 1984

By: Douglas K. Wolfson

The within Stipulation of Partial Settlement is hereby approved.

Dated: 2/9/84

EUGENE D. SERPENTELLI, J.S.C.

Filed 11/20/84

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

Plaintiff
HELEN MOTZENBECKER,

vs.

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

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY/
OCEAN COUNTY

Docket No. L-37125-83

CIVIL ACTION

INTERIM ORDER

This matter having come before the Court on the joint application of the parties for the entry of a Consent Judgment, and the parties having earlier entered into a stipulation of partial settlement dated and filed in this cause on February 9, 1984, and the parties having consulted with the Special Master, George M. Raymond, who was appointed by this Court, and with his aid having reached agreement on the nature of the builder's remedy to be incorporated in this Judgment entered by consent of the parties, and it appearing to the Court that there is good cause for the entry of this Judgment,

IT IS on this 20th day of December, 1984,

ORDERED AND ADJUDGED:

1. That notwithstanding any land use or zoning regulation to the contrary, plaintiff, Helen Motzenbecker, be and is hereby granted a builder's remedy by which she may lawfully develop the lands and premises described in the Complaint, consisting of 8.454 acres in the Borough of Bernardsville, County of Somerset, State of New Jersey, shown as Block No. 125, Lot 27, on the official tax map of the Borough, for multi-family purposes and in a manner consistent with the terms and conditions of this Judgment. All references in this Order to plaintiff or to Helen Motzenbecker shall be deemed to include her grantees, heirs or assigns.

2. The builder's remedy awarded to plaintiff by this Judgment is the right to build multi-family housing units on the property at a density of nine (9) units per acre (76 units). Twenty (20%) percent of the units to be constructed (15 units) will be affordable to lower income households, with priority to be given to qualifying senior citizens. Plaintiff will provide all units on a "for-sale" rather than a "for-rental" basis.

3. Of the fifteen (15) units that will be affordable to lower income households, eight (8) units will be affordable to moderate income households and seven (7) units will be affordable to low income households.

4. Plaintiff shall submit a development application incorporating her builder's remedy to the Planning Board of the Borough of Bernardsville for its input and review. This process, however, may not be utilized by the Planning Board to delay or hinder the project or to reduce the proposed number of dwelling units, or otherwise to prevent plaintiff from developing its multi-family development at densities of nine (9) units per acre. Furthermore, neither the Planning

Board nor the municipality may impose any exactions or restrictions upon this plaintiff or her proposed project that are not necessary for health and safety.

5. The phasing schedule for the construction of the lower income units relative to the market units shall be as follows:

PERCENTAGE OF TOTAL MARKET HOUSING UNITS	MINIMUM PERCENTAGE OF LOWER INCOME HOUSING UNITS
25	0
50	25
75	75
100	100

6. Subesquent to the signing of this Order, the parties will submit proposals to the master regarding.

(a) the price at which the units must be sold to be affordable to low and moderate income households; and

(b) the mechanisms that will be implemented to ensure that the units remain affordable to lower income households for an appropriate period of time.

7. Following the submissions specified in subparagraphs (a) - (b) of paragraph 6 above, the parties will attempt to agree on the appropriate solutions to these problems. If the parties are unable to agree, the parties will abide by the determinations of the Court.

8. The Borough of Bernardsville shall be given a period of ninety (90) days from the date of this Order to submit to the Court for its review and approval, revised zoning ordinances and land use regulations which provide a realistic opportunity for the construction of two hundred ninety (290) units of lower income housing, representing the Borough's fair share of the region's present

and prospective needs calculated by the Borough of Bernardsville in accordance with the AMG analysis attached to this Order. For purposes of this settlement, plaintiff does not oppose the fair share calculation. The Borough of Bernardsville shall have the right to seek readjustment of its fair share allocation by presenting evidence to the Court demonstrating less indigenous need, or credits for existing and adequate lower income housing, or such other factors warranting same.

9. The Borough of Bernardsville shall be granted repose from any further Mount Laurel litigation during the ninety (90) day period aforesaid.

10. Notwithstanding provisions 8 and 9, if for any reason, the municipality is unable to satisfy the Court that it has fully complied with its Mount Laurel obligations, such failure shall neither affect the terms and provisions of this Order nor Helen Motzenbecker's right to the builder's remedy awarded hereby.

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

Consented as to Form and Entry:

J. ALBERT MASTRO
Attorney for Defendant,
Mayor and Council of the Borough of
Bernardsville and the Borough of Bernardsville

GREENBAUM, ROWE, SMITH, RAVIN,
DAVIS & BERGSTEIN

By
DOUGLAS K. WOLFSON,
Attorney for Plaintiff, Helen Motzenbecker

CALCULATION OF FAIR SHARE HOUSING OBLIGATION BASED ON CONSENSUS (LERMAN) FORMULA

I PRESENT NEED

A. INDIGENOUS NEED

1. Overcrowded units	11
2. Units lacking complete plumbing	13
3. Units with inadequate heating	42
	66
	x 82%
Total Units Low and Moderate	54

B. REALLOCATED REGIONAL NEED

$$\frac{\text{1982 Munic. Emp.}}{1{,}843} \div \frac{\text{1982 Reg. Emp.}}{1{,}244{,}632} = \text{Factor } .0015$$

$$\frac{\text{Munic. Growth Area}}{2{,}740} \div \frac{\text{Reg. Growth Area}}{699{,}163} = \text{Factor } .0039$$

$$\frac{\text{Munic. Med. Income}}{30{,}558} \div \frac{\text{Reg. Med. Income}}{24{,}177} = \text{Factor } 1.2639$$

$$\frac{.0015 + .0039}{2} = .0027 \times 1.2639 = .0034$$

$$\frac{.0015 + .0039 + .0034}{3} = .0029 \times 35{,}014 = 102$$

$102 \div 3 = 34$

$34 \times 1.2 \times 1.03 = 42$

C. TOTAL PRESENT NEED

42 + 54 (indigenous) = 96

II PROSPECTIVE NEED

Commutershed Region = Essex, Hunterdon, Middlesex, Morris, Somerset and Union

1982 Munic. Emp.	÷ 1982 Reg. Emp.	=	Factor
1,843	734,179		.0025
Munic.Growth Area	÷ Reg.Growth Area	=	Factor
2,740	491,209		.0056
Munic. Emp. Growth	÷ Reg. Emp. Growth	=	Factor
23	21,932		.0010
Munic. Med. Income	÷ Reg. Med. Income	=	Factor
30,558	24,177*		1.2639

$$\frac{.0025 + .0056 + .0010}{3} = .0030 \times 1.2639 = .0038$$

$$\frac{.0025 + .0056 + .0010 + .0038}{4} = .0032 \times 49{,}004 = 157$$

157 x 1.2 x 1.03 = 194

*The median income for the 11-county present region is used in calculating prospective need. The median income for the prospective need is not readily available and considerable time to make the calculation would be involved. This effort seems unjustified since experience elsewhere reveals very little difference between median incomes of present and prospective regions.

III TOTAL NEED SUMMARY

A. Present Need			
1. Indigenous	54		
2. Reallocated	42		
		96	
B. Prospective Need		194	
C. Total Need		290	

ambiguous and may have led to an over-estimation of heating deficiencies. (Please see Appendix D.)

These representations serve to strengthen my conviction that the Borough's request (Compliance Report, p.3) for permission to develop, over a one year period, a program specifically tailored to deal with the actual deficiencies, if any, present in the municipality is sound.

C. The Borough's Mount Laurel Obligation

The Borough is requesting (Compliance Report, pp. 3-4) that its fair share be reduced by 20 percent in recognition of its willingness to comply with Mount Laurel II without having been forced to do so as a result of litigation. I believe that this adjustment would be consistent with already-established precedents in similar cases. The resulting total obligation would be reduced to 206 units, of which 28 may be satisfied by means of an appropriate rehabilitation program and 178 would have to be provided through new construction.

D. Mechanism for the Provision of New Units

The Borough proposes to assume the financial responsibility for any subsidies that may be required to make possible the provision of all the required new units on a one-to-one

basis. The necessary funds would be provided as needed by means of issuance of long-term municipal bonds.

E. Housing Sites

On March 21, 1985, the Borough's Planning Board amended its Master Plan to include a number of sites which are deemed suitable for the construction of higher density housing. (Please see Appendix E.) The sites, all of which are in or near the heart of the Borough and in the SDGP growth area aggregate some 28 acres which is more than sufficient to accommodate 178 units. One of these sites is the 8.4 acre Motzenbecker site the capacity of which, at 9 units per acre, was established at 76 units by a previous Court order. The probability is that only some of the remaining sites will be required for the 102 units constituting that portion of the rest of the Borough's Mount Laurel obligation which depends upon new construction.

The inclusion of the extra lands was prompted not by any desire to overzone--which concept is not applicable to instances where the municipality proposes to act directly, as in this case--but in an effort to, among other things, (1) introduce an element of competition to help prevent any inordinate escalation in land prices; and (2) allow for the possible attrition of the proposed package due to

inordinately high land costs, local opposition, etc. (In this connection, it is worthy of note that three sites are located in Commercial zoning districts with the consequent likelihood of high prices and the possible need for densities exceeding those discussed so far.) Should the proposed sites be insufficient for whatever reason, the Borough has stated its intention to add others to the list (Compliance Report, p.4).

A field inspection of all sites shown on the map appended to the Planning Board's Resolution reveals them to be suitable for the construction of housing. All sites are either served by, or within easy reach of, sewers and water lines. (Please see Water Supply and Sewer System maps following this page.) No effort was made to rate the suitability of the sites in comparison with some ideal norm on the theory that a municipality has the right to plan its own future and that judicial intervention would only be warranted if any or all of the proposed sites were to be so unsuitable as to cast doubt on their being put to the intended use. This is not the case with respect to any of the sites based on their physical or locational characteristics.

While the proposed sites are not now zoned to permit higher density housing, the Borough is committing itself to rezone

them following their being acquired for densities ranging between 8 and 20 units per acre in two or three story buildings. This course of action seems entirely appropriate since zoning for higher densities prior to acquisition may cause an escalation in their value and consequent higher expenditures of public funds. Nor does it appear necessary to deal now with the detailed development standards and requirements since the Borough's commitment to produce the needed housing will cause it to tailor the land development ordinance provisions to make it possible for it to do so.

F. Site Acquisition and Housing Production Schedule

The Compliance Report (on p.6) commits the Borough to complete the acquisition of all sites needed for the production of housing to meet its entire fair share obligation, less any rehabilitated units, by the end of 1987. The actual production of the new lower income housing is proposed to be phased over three 3-year periods. To permit the first third to be completed by the end of 1988 it is essential that the acquisition of the site(s) therefor be completed not later than the middle of 1987. In effect, since the process must envision the possible inevitability of condemnation, this means that the proceedings leading to the acquisition of the first site should commence

immediately upon acceptance of the Borough's plan and the granting of repose.

As indicated above, one of the sites proposed to be acquired is the Motzenbecker site which has been rezoned for higher density housing with a Mount Laurel set-aside pursuant to a prior Court order. The site has a capacity of 76 units which the Borough may or may not wish to utilize fully. (During the negotiations leading to the previous settlement, the Borough expressed its belief that the site should not be developed at a density exceeding 8 units per acre.) The value placed on the land by its owner for purposes of supporting its contention as to the minimum density required to permit compliance with the 20 percent Mount Laurel set-aside is on the record. This value may have to be adjusted due to the passage of time and other factors which may have to be taken into consideration in condemnation proceedings.

The builder's remedy granted to Helen Motzenbecker on November 20, 1984 made the subject parcel available for the immediate provision of lower income housing. Any delay in the implementation of the declared intention by the Borough to acquire that land would, in effect, preclude its use for an indeterminate period. This would contravene the thrust

of Mount Laurel II in the direction of elimination of any obstacles to the provision of the necessary housing. In my opinion, therefore, approval of the Borough's compliance package should include a requirement that acquisition of the Motzenbecker parcel be set in motion forthwith and be prosecuted diligently. This would be in accordance with the Borough's apparent intent since funds were appropriated by the Borough Council on April 15, 1985 for an appraisal of the property (Please see Appendix F).

G. Phasing

The Borough's proposed phasing (Compliance Report, p. 6) would result in the following housing being provided in each of the 3-year periods subsequent to approval of its plan:

By the end of 1988:

28 rehabilitated units

47 new units

Total: 75, or 36.4% of the Mount Laurel obligation

By the end of 1991:

83 additional new units, for a cumulative total of 158 units, or 76,7% of the Mount Laurel obligation

By the end of 1994:

48 additional new units which would complete the housing needed to satisfy the Borough's obligation.

All new housing is proposed to be evenly divided between low- and moderate income units in each phase.

While the phasing exceeds a six year projection period by some two years, this seems entirely justified by the fact that the Borough is willing to assume directly the entire financial responsibility for the necessary subsidies (Please see Appendix G). This approach, which has never been tried, is worthy of being encouraged since, if successful, it would chart, for those municipalities that wish to avoid having to permit the construction of excessive numbers of market rate units in relation to their size and capacity to absorb growth, an alternative way in which they could satisfy all or a portion of their Mount Laurel obligation. The magnitude of the burden upon Bernardsville of a rate of bonding sufficient to cover the entire cost of the program in six years may discourage others from following this path.

regulations acceptable to the Court not later than January 1, 1987.

The Borough proposes to take advantage of any lawful means that may become available as a result of judicial rulings or legislative action to reduce its obligation or modify the criteria for determining eligibility standards "and other relevant matters."

The Compliance Ordinance

The Compliance Ordinance embodies in every respect the provisions of the Compliance Report. The Borough's estimated fair share in the Ordinance was based on an earlier report from its consultants. The figure was modified downward in the process of preparation of the Compliance Report. This discrepancy in the overall estimate is also responsible for the Borough's committed number of new units in the Ordinance being considerably higher (245 units) than the number required (178 units).

Conclusion

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

not be equally realistic in all communities since the composition of the local tax base and ability to finance major expenditures out of local tax revenues vary widely. Implementation of the Bernardsville plan will reveal the actual costs to the municipality of subsidizing lower income housing and will permit comparisons with the real public costs associated with those other approaches which seem to be preferred because they appear to require little, if any, outlay of public funds.

The principal functional difference between this plan and plans that rely on 20 percent Mount Laurel set-asides in privately built developments is that, in the case of the latter, the actual realization of the mandated units within the projection period is determined by the market dynamics unleashed by the density bonus made available through rezoning. In Bernardsville's case, the construction of the units will be totally at the discretion of the local government. Even if the land acquisition program were to proceed on schedule, there is no guarantee that construction of the units will be prosecuted diligently.

For this reason, it would seem desirable that the Court retain jurisdiction to the extent necessary to assure itself that the provision of the Mount Laurel units required to satisfy the Borough's obligation will proceed in accordance with the Borough's proposed schedule. Continued jurisdiction is also

necessary to assure that the criteria governing the administration of the affordable housing program which will be adopted by the proposed affordable housing agency will meet all Mount Laurel II requirements.

Respectfully submitted,

George M. Raymond, AICP, AIA
Chairman

GMR:kfv

Filed 8/15/85

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

Plaintiff

HELEN MOTZENBECKER

vs.

Defendant

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

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY
OCEAN COUNTY

Docket No. L-37125-83

CIVIL ACTION

(MOUNT LAUREL II)
CERTIFICATION OF J. ALBERT MASTRO IN SUPPORT OF DEFENDANTS' MOTION

J. ALBERT MASTRO CERTIFIES AS FOLLOWS:

1. I am an attorney at law of the State of New Jersey with offices at 7 Morristown Road, Bernardsville, New Jersey, and represent defendants, the Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville in the above entitled matter. I submit this Certification in support of defendants' cross-motion to set aside the builder's remedy previously granted to plaintiff.

2. Within the past few months I discussed sale price of the Motzenbecker tract (Lot 27, Block 125) with two developers that expressed an interest in acquiring said tract for development at the density and in accordance with the builder's remedy granted to plaintiff. Both developers had negotiated with the owner, presumably at arms length and in good faith.

3. I was informed by one of the developers that plaintiff was asking in excess of $2,000,000.00 for said tract.

4. In his memorandum of July 19, 1984, the Special Master evaluated all aspects of the pre-Mount Laurel market value of plaintiff's property (including a professional appraisal of Krauser, Welsh, Sorich and Cirz) and concluded that $525,000.00 was appropriate (see attached pages 3 thru 7).

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.

J. ALBERT MASTRO
Attorney for Defendants

DATED: August 9, 1985.

B. Basis for Figures Presented in this Report

Several of the June 22 figures were questioned, as explained below:

1. Number of Lots

Based on an engineer's layout, the plaintiff proved to the satisfaction of the Borough's planning consultant that it is possible to create 13--rather than the previously used number of 12--lots that would comply with the zoning regulations.

2. Land Value

The Borough's appraiser agrees that $65,000 is a reasonable estimate of the probable current sales price[1] of an improved lot conforming to the Borough's zoning requirements. He points out, however, that what is being valued is not an approved and improved subdivision, but a raw land tract of 8.4 acres. If the tract were to be sold to a land developer whose objective is to subdivide and improve the land and then retail the 13 lots at a profit, the price which could be realized would equal the aggregate sales value of all lots less the sum of the following:

---

[1] The appraiser assumes that during the early stages of the 18-month sales period the lots will being $65,000, but that their sales price will increase to $68,000 during the second six-month period and to $71,000 in the final six months.

(a) Cost of Improvements

(b) Cost of financing the land acquisition and improvements

(c) Taxes and Insurance during the sales period

(d) Marketing and Administrative Costs (@ 8%)

(e) Profit (@ 15%)

The resulting figure would have to be discounted by a further 15% due to the fact that the positive cash flow will be fully realized over a period of 18 months.

The table which follows is extracted from the appraiser's letter to the Borough Attorney (see Appendix B).

RETAIL SALES
CASH FLOW ANALYSIS
ASSUMING 13 BUILDING LOTS

Unit Distribution	Period 1	Period 2	Period 3	Total
Units Sold	3	7	3	13
Average Unit Price	25%	50%	25%	100%
Average Unit Price	$ 65,000	$ 68,000	$ 71,000	$ 68,000
Revenue				
Unit Sales	$195,000	$476,000	$213,000	$ 884,000
Loan Proceeds	440,000	---	---	440,000
Total Revenue	$635,000	$476,000	$213,000	$1,324,000
Expenses				
Development Costs	$260,000	---	---	$ 260,000
Loan Payback/Interest	256,000	211,000	---	467,000
Taxes/Insurance	3,100	4,100	1,000	8,200
Marketing/Administrative (8%)	15,600	38,100	17,100	70,700
Profit (15%)	29,300	71,400	32,000	132,700
Total Expenses	$564,000	$324,600	$ 50,000	$ 938,400
CASH FLOW BEFORE DISCOUNT	$ 71,000	$151,000	$163,000	$ 385,400
DISCOUNT RATE 15%				
DISCOUNT VALUE				$ 328,300
DISCOUNT VALUE PER LOT	$ 25,200			

Note: Periods represent 6 months.

(Source: Michael S. Sorich, MAI)

If the owner is assumed to also be the subdivider and developer of the final product (13 houses), the land can be valued at the price which a subdivider would be willing to pay plus the profit which could be realized from the subdivision and improvement of the land. The addition of this profit to the basic land value assumes

that the land has been improved in the process of its generation. This, in turn, precludes the inclusion of road and infrastructure costs in addition to the inflated land value in the computation of the production cost of the resulting development.

Using the Borough appraiser's figures, the 13-lot undiscounted basic land value is $385,400. Adding a $132,700 profit brings the total to $518,100.[2]

From this analysis, it appears that the 12-lot, $553,250 value used in the June 22 revised scenario was arrived at somewhat simplistically. Using that figure, however, the plaintiff's planner suggests that, for 13 lots, the land value should be increased to $603,250.

Clearly, depending upon the built-in assumptions, it is possible to construct any number of scenarios purporting to establish the hypothetical value of the subject land. The plaintiff's figure of $603,000 rests on a flawed base. The Borough appraiser's figures (discounted and undiscounted) average $490,000. Using the high estimate of $38,300 per lot presented in his original report produces a value of about $498,000 for

---

[2] Discounting the basic land value by 15% would change the total to $461,000.

a raw land tract with a 13-lot capacity that lacks subdivision approval. His previously offered high estimate of $42,000 per lot with preliminary approval would produce a total value of $546,000. Given the amount of study from which the subject tract has already benefited, a mid-point value of around $525,000 seems to be appropriate. This value would closely approximate the $518,000 value derived in the appraiser's revised study based on the undiscounted value of the prospective cash flow. It substantially exceeds the value placed on the land by the plaintiff in the original Abeles report (13 x $35,200 = $457,600).

Based on the above, I have used $525,000 as the value of the land in this report.

3. Real Estate Taxes

In both, the May 22 and June 22 reports I used $993 and $1,161 as the annual real estate taxes for affordable studio and one-bedroom units, respectively, in a 7 DU/acre development. I have been informed that I used an erroneous source and that the correct amounts can be computed by multiplying the unit production cost by 1.0407 (the ratio of assessed to true value) times the Borough tax rate of 1.83. This produces the following modifications:

Filed 9/23/85

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

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN
COUNTY

Plaintiff
HELEN MOTZENBECKER,

vs.

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

Docket No. L-37125-83

CIVIL ACTION
(MOUNT LAUREL II)

NOTICE OF MOTION
(Sec.16 FHA Transfer)

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

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

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

J. ALBERT MASTRO
Attorney for Defendants

DATED: September 19, 1985

CERTIFICATION

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

J. ALBERT MASTRO
Attorney for Defendants

DATED: September 19, 1985

Filed 9/23/85

EXHIBIT B

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

Plaintiff
HELEN MOTZENBECKER,

vs.

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

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN
COUNTY

Docket No. L-37125-83

CIVIL ACTION
(MOUNT LAUREL II)

CERTIFICATION

HON. PETER S. PALMER Certifies as follows:

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

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

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

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

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

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

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

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

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

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

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

HON. PETER S. PALMER

DATED: September 19, 1985

Filed 9/23/85

EXHIBIT C

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

Plaintiff
HELEN MOTZENBECKER,

vs.

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

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN
COUNTY

Docket No. L-37125-83

CIVIL ACTION
(MOUNT LAUREL II)
CERTIFICATION

PAUL J. PASSARO, JR. Certifies as follows:

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

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

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

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

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

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

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

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

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

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

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

PAUL J. PASSARO, JR.

DATED: September 19, 1985

SCHDEULE I

Mt. Laurel Comparison

230 units vs 1150 units

	230 units		1150 units	
Growth		9.8%		49%
Assessed Value Increase				
Market units		---		$115,000,000
Subsidized units		13,800,000		13,800,000
Population increase		667		3,335
Tax Revenue Increases	303,600		2,833,000	
Borough portion @ 20%		60,720		566,600
Miscellaneous Revenue		20,000		100,000
		80,720		666,600
Sewer Costs	667,000		5,835,000	
Debt Service Costs 9%, 20 years		79,076		691,723
Other Capital	230,000		1,150,000	
Debt Service Costs 9%, 20 years		27,267		136,337
Land Acquisition and development	2,000,000			

Filed 10/8/85

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

☐ GATEWAY ONE
SUITE 500
NEWARK, N. J. 07102
(201) 623-5600
ATTORNEYS FOR

☐ ENGELHARD BUILDING
P. O. BOX 5600
WOODBRIDGE, N. J. 07095
(201) 549-5600
ATTORNEYS FOR

☐ PARKWAY TOWERS
P. O. BOX 5600
WOODBRIDGE, N. J. 07095
(201) 750-0100
ATTORNEYS FOR

Plaintiff
HELEN MOTZENBECKER

vs.

Defendant
MAYOR AND COUNCIL OF BOROUGH OF BERNARDSVILLE and BOROUGH OF BERNARDSVILLE

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN COUNTY

Docket No. L-37125-83

CIVIL ACTION

AFFIDAVIT OF HELEN MOTZENBECKER

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

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

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

2. I purchased the property in question in 1970.

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

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

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

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

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

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

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

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

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

HELEN MOTZENBECKER

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

Attorney at Law of the
State of N.J.

robert catlin and associates • city planning consultar
2 VALLEY ROAD, DENVILLE, NEW JERSEY 07834 * TEL. (201) 627-39
ROBERT T CATLIN,
ROBERT O'GRADY,
RUSSELL MONTNEY,
JOHN J RAKOS.

MEMORANDUM

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

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

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

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

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

EXHIBIT A

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

We find no other major obstacles or objections to utilizing this particular site for Senior Citizen Housing. Among the positive attributes of the site are its close proximity to shopping areas and public transportation on Route 202, and its location with regard to being a potentially suitable transitional use between the commercial uses on Route 202 and the moderate density residential uses on North Finley Avenue. 1

In the event the Borough wishes to adopt the necessary regulations and controls permitting Senior Citizen Housing, we suggest that the Planning Board first amend the Master Plan, in an appropriate fashion, which is a prerequisite under the provisions of the New Jersey Municipal Land Use Law. Provisions of the Master Plan may then be implemented by suitably amending the Development Regulations Ordinance. For the method to best accomplish this objective it is recommended that a new R-3A Zone District be established as shown on the accompanying illustration. This district should be designed to accommodate the same uses with the same required conditions as does the R-3 Zone District, provided, however, that it would also permit as a conditional use, housing development for elderly persons. The establishment of a new Zone District will limit the area of potential development for multi-family use, while the provision for a conditional use permit will afford maximum control over any such development for the Planning Board. 2

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

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

John Rakos

JR/sas

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

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

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

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

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

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

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

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

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

POLICIES AND PRINCIPLES.

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

PROPOSALS.

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

IMPLEMENTATION.

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

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

FIRST DRAFT
June 18, 1980

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

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

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

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

1-3.2 Definitions.

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

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

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

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

a. R-1 Residence District

b. R-1A Residence District

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

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

12-8A R-3A RESIDENCE DISTRICT.

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

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

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

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

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

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

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

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

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

e. Minimum Lot Area. There shall be a minimum lot area, as defined, of 20,000 square feet; the lot shape shall be such that the minimum area can be measured within 200 feet of the front lot line, or in the case of non-rectangular lots, within 200 foot radii from the front corners of the lot; no lot shall have a front lot line less than 50 feet in length. 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET No. L-54998-84P.W.

GIDEON ADLER, etc., et al,

Plaintiff,

vs.

MAYOR & COUNCIL OF TOWNSHIP OF HOLMDEL,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET No. L-67502-84P.W.

TOWNSHIP OF HAZLET,

Plaintiff,

vs.

MAYOR & COUNCIL OF TOWNSHIP OF HOLMDEL,

Defendant.

Ocean County Courthouse
Toms River, New Jersey
October 11, 1985

B E F O R E:

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

ROSEMARY FRATANTONIO, C.S.R.
Official Court Reporter
Ocean County Courthouse
Toms River, New Jersey

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

DOUGLAS WOLFSON, ESQUIRE,
Attorney for Plaintiff Motzenbecker.

CARL BISQAIER, ESQUIRE,
Attorney for Plaintiff Real Estate Equities.

PETER SOKOL, ESQUIRE,
Attorney for Plaintiff Gideon Adler.

SCOTT F. JAMISON, ESQUIRE,
Attorney for Plaintiff Hazlet.

J. ALBERT MASTRO, ESQUIRE,
Attorney for Defendant Borough of Bernardsville.

RONALD L. REISNER, ESQUIRE,
Attorney for Defendant Township of Holmdel.

-AFTERNOON SESSION-

THE COURT: All right. I'm prepared to rule on these two matters. I might say that it would be my preference in these two cases to write an opinion. Reality is that these are the ninth and tenth transfer motions that have been heard in three weeks -- I'm sorry, strike that -- in two weeks, and before we're finished, we're going to be well over a baker's dozen. And given our discussion about the prolonged nature of this litigation, and given the fact that there are many other issues out there relating to the Act itself, as well as continued business of the Court concerning those cases not transferring, I don't believe it's in the best interest of the parties, nor is it possible for the Court to do the job that it would like to do with respect to written opinions; and, therefore, I will decide them based upon this oral opinion.

It is clear to all of the parties we're faced only with the issue of propriety of the

application for transfer, and that the Court will not pass upon any constitutional issues. To the extent I may make reference to the Act, and comment thereupon the Act, none of the comments should be taken as the Court's view of the constitutionality or nonconstitutionality of the Act as a whole.

Furthermore, it should be clear that in these two cases, just as in the previous cases, I do not intend to establish any exhaustive definition of manifest injustice. To some extent, today's cases represent one each of the categories of cases that have previously been before the Court.

On October 2nd I considered five cases that had been fully tried or; with respect to one of those cases,partially tried and settled during trial.

Holmdel, of course, has been through a fair share trial of some length and nonconformance of the ordinance at the time of the adoption of the amendment was conceded by the order of oral argument.

On October 4th I considered three cases in which settlement had been arrived at, or the

municipalities had agreed to voluntarily comply in exchange for a court ordered immunity.

Bernardsville has entered into an interim settlement agreement and has also received immunity from the Court.

In each of the previcus cases I had denied transfer on facts, specific circumstances, not their consistency is the important issue, because I'm reminded that consistency is the hobgoblin of little minds.

The case that is before me must be placed in the proper perspective. The arguments which have been made in them, and have been made in the prior motions for transfer, range from the extreme that transfer is manifest injustice because of vested rights, and because of delay to the arguments made by the municipalities that there should be transfer of all cases, because of the need for statewide uniformity, because of great speed in the legislative executive process, because of the Supreme Court's stated preference for a legislative solution, and because of the alleged disparity of treatment which will occur between the cases that are transferred and the cases not transferred

and the disparity between the towns which have resisted and the towns which have voluntarily complied.

The fact of the matter is that the legislation clearly evidences through Section 16 and elsewhere, including Section 19 dealing with the remand provisions, Section 23 dealing with court supervision of phasing, Section 12B relating to the interplay between the Court and Council concerning regional contribution agreements that the Legislature did not intend to totally exclude the Court.

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 the fact specific circumstances, it would be appropriate -- rather, it would be inappropriate, if not unlawful, to subject those cases to the Housing Council process.

The clear intent that some cases would stay in the court also leads me to comment on the argument that has been raised in the cases before the Court today, and others, as well as

by the public utterances and some public officials concerning a disparaging treatment of municipalities.

In the first instance, as I noted, the legislation has expressly provided for disparied treatment, if one defines that as having cases continued in two jurisdictions.

Secondly, there is nothing to demonstrate their staying here in court or going to the Council automatically benefits the municipalities involved.

I take it that there is a presumption that some have engaged or an assumption that that be the case but no one knows that at this point.

Thirdly, in those cases seeking transfer, so far, there's been no disparity created. That's because all of the motions have been denied.

In factually similar circumstances it is likely, indeed very likely, that there are cases on the court docket in which a motion for transfer would be granted if made. The mere granting of a motion under those circumstances would not create a disparity in tribute; it

means only in the cases staying here there was manifest injustice found and in the cases transferred there was not.

Clearly, the Legislature intended a different treatment of the two types of cases. But that is seen as being fair by the framers of the legislation. It adds nothing to the disposition of the -- on the merits to call this dual system created by the Legislature a disparied treatment; instead it is two alternate means of disposition, both of which are seen as being fair to the parties under the peculiar circumstances.

To the Council, if there's no manifest injustice, and in the Court, if there is. In short, the different or disparied treatment argument begs the question which remains, and that is should this case be treated differently from that case because of the principles or absence of manifest injustice.

Finally, as part of placing the issue in perspective, something should be said about the emphasis by the defendants in this case, in all other motions previously heard, that our Supreme Court has stated a preference that the

housing issue be relegated to the Legislative and Executive arena.

First, of course, it is clear there from what Mount Laurel says that it was the Court's wish. Both the Supreme Court, that is, the capital C and also the little C. Ten years later it still is and it should motivate all appropriate deference to the legislation. However, it must be noted that the Court's patience and the legislative default has created some circumstances in which it may no longer be viable to vindicate the constitutional obligation by total abdication to the legislative-executive process, and, indeed, Section 16 of the Act recognizes that fact.

Preference for a legislative-executive solution cannot, in all cases, be translated to a circumstance where the constitutional imperative of Mount Laurel will be violated. At a minimum, the manifest injustice exception must contemplate that we avoid a circumstance in which transfer would seriously undermine the constitutional imperative which the legislation itself must satisfy if it is not to experience constitutional impairment. To that extent, the

term "manifest injustice" should be interpreted in such a manner as to support the fundamental goal of the legislation, and that is to satisy the constitutional mandate in a reasonable manner.

As a minimum test, the legislation must create the realistic opportunity for housing which is found to be the constitutional core of Mount Laurel II. The Court should, in interpreting the doctrine of manifest injustice, seek to help the legislation to meet that test.

Now, with respect to the definition of "manifest injustice" and, in particular, Section 16, something should be said.

First of all, let's be clear that for the record we are talking here about the first portion of Section 16 of Chapter 222 of the Laws of 1985, commonly referred to as Section 16A but not referred to in the Act by a subletter characterization. That is to say, there is a 16B in the Act but there is no 16A. We're dealing with a portion that is unprecedented and reads:

"For those exclusionary zoning cases instituted more than 60 days before the effective

date of this Act, any party to the litigation may file a motion with the Court to seek a transfer to the Council. In determining whether or not to transfer, the Court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation."

It should be noted that the Act does not clearly establish whether manifest injustice is the only standard. I noted that only in passing because the cases before the Court today will be determined based upon that, but it shouldn't be taken from what the Court said that I have reached a conclusion that it is the understanding. It should also be known that the section doesn't define "transfer," doesn't define "manifest injustice"; obviously, if it did, we might spend less time with these arguments. And it doesn't define the term "party."

Now, the language that I quoted, starting with the words, "Any party to the litigation may file a motion with the Court to seek a transfer," replaced different wording in a prior draft of the Act which read in part:

"No exhaustion of the review and mediation procedures established in Section 14 and 15 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 changing the literal wording of "facilitating and expediting the provision of low cost housing" to a standard of manifest injustice to any party. I believe that it is fair to say that the final version emphasizes more explicitly the interests of the parties, as where the prior version more explicitly emphasizes expedition of the provision of housing. One cannot assume that the change in wording didn't intend a change in meaning. Beyond that, however, absent some clear legislative history, it's 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 more than 60 days old. I know that the assumption is that it intended to further limit the Court's discretion, but I suggest strong interpretive arguments can be made on both sides.

It is interesting to note that, although the statute itself omitted specific reference to expedition, the Senate Committee statement which accompanied the amendment made on February 28, 1985, to the bill is inconsistent with the language of the bill itself. While the bill deleted specific reference to the expedition standard, the code standard emphasizes that at this time -- or the code statement emphasizes that it should continue to be considered along with manifest injustice.

That statement of the same date reads as follows:

"Section 5 established that a Court, in determining whether to transfer pending lawsuits to the Council, must consider whether or not 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."

That sounds like a dual test was intended. Of course, even under the present wording, it can be strongly argued that the manifest injustice test is not the sole consideration, and that the statute read literally makes it one consideration.

I don't intend to try to reconcile this language, nor, as I indicated, do I intend to try to define "manifest injustice." I know there's been an attempt in various briefs filed in this case and in other matters to find a definition for that term. I think it's in the nature of us lawyers to try to identify "manifest injustice," manifest injustice came from Rule 4:69 or it came from an utterance of the Supreme Court, or it came from a rule of discovery, Rule 4:17, that the Legislature must have been smart enough to know that it meant manifest injustice in terms of some specific prior authority. I don't think any of those arguments are demonstrable, although one may be somewhat stronger than the other. The fact of the matter is that its meaning will evolve as all of the transfer motions now pending before this Court and the other Mount Laurel judges

are heard.

As I said before, and I apologize to those who had to sit through this tirade before in cases at the factual extremes, the term will be relatively easy to interpret. Just like "obscenity," to paraphrase Justice Stewart, you should be able to know it when you see it.

Finally, in terms of definition, as noted above, the statute does not define what is meant by the terms "transfer" or "party." As to 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, the potential for delay and the possible cost of relitigation might be reduced.

The procedural scheme evidenced by the statute, which I will shortly discuss, does not seem to disclose an intent to bind the Council with what has happened in the court before it. The defendant municipalities have consistently stressed that the statute represents an opportunity for a fresh, new, comprehensive approach. Indeed, the Governor's statement indicates that

the statute gives a breathing period. And if there's a failure to agree on a housing element, mediation replaces litigation pursuant to Section 17.

The Act seems to ring of a new approach unencumbered by prior court rulings. In any event, in the cases before me, I do not have to reach that issue today.

As to the term "party," something should be said about the interests of the group we call lower income households. It should have long been clear that the status of the lower income household in Mount Laurel litigation rises far above the category of a hidden or third-party beneficiary. Even where an urban league or other civic or non-builder plaintiff is involved, the lower income class must be considered a party to the action. The prospect of a builder's remedy is offered as the quid pro quo to sue on behalf of those persons for whom the remedy will benefit.

Our Supreme Court has described Mount Laurel litigation as institutional or public law litigation at Pages 288, 289 of the opinion in Footnote 43. These cases are brought to vindicate

resistance to a constitutional obligation to the affected group. In that sense, they are class actions and the class is very much a party. Judge Skillman has passed upon this issue in his decision in Morris County Fair Housing Council vs. Boonton Township, 197 New Jersey Super. 359, where, at Pages 365, 366, he says:

A Mount Laurel case may appropriately be viewed as a representative action which is binding on nonparties. The constitutional right protected by the Mount Laurel doctrine is the right of lower income persons seeking housing without being subjected to discrimination. The public advocate in such organizations as 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 the municipality will have standing to sue such municipality on

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

In light of the representative character of exclusionary zoning litigation, the term 'party to the litigation' in Section 16 must be construed to include the lower income persons whose interests are being asserted in the litigation, as well as the nominal plaintiffs. Any other interpretation would effectively support the Mount Laurel decisions and statutes, and the statute itself, for it would result in decisions being made without regard to any potential injustice to the lower income persons whose interests are, in reality, at stake in the proceedings and who are bound by the judgments which are entered in these proceedings. They are at the very interests which our Supreme Court describes at Page 337 of its opinion as the greatest interests in ending exclusionary zoning.

The decision of whether the class is a

party cannot turn on the name of the plaintiff. If the Court would consider manifest injustice for lower income persons in cases involving the Urban League or the Public Advocate, should it not do so in cases where those same lower income people are represented by builders who clearly also had other motives.

There was, as we referred to earlier, the genius of the builder's remedy. Therefore, the Court must look at such considerations as further delays in the rights of the public. The fact that they remain in substandard housing as the debate continues and for some time thereafter, certainly for some period after resolution until housing is built. The fact that there is a further burden that might be created on lower income people in enforcing their rights, either by containing the case here or transferring it, any argument that lower income people will be relegated to exclusive reliance on voluntary compliance by municipalities for an extended period of time.

Now, before turning to a factual analysis of each case 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. This issue has been briefed at some length in previous cases, has not been addressed at a great deal of length here, but it is clearly relevant to appropriate decision in the case, the cases before the Court today.

The timing and procedure under the Act is as follows: The Act became effective on July 2, 1985. Section 5A creates the Council on Affordable Housing, and Section 5D requires the Governor to nominate the members within 30 days of the effective date. The nominations have been made and are awaiting confirmation. Section 8 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 the Council members have not been confirmed, and given our proximity to November 5th, it is likely that the procedural rules will be adopted somewhere around May 1, 1986, the assumption being that the confirmation will occur near the end of this year.

Section 9A 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.

Section 7 requires the Council to adopt criteria and guidelines for the housing plan within seven months of confirmation of the last member initially appointed, or January 1, 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, 1986, to adopt criteria.

Section 9A gives the municipality five months from the date of the adoption of the criteria to file its housing element. If the criteria were not adopted until August 1, 1986, the municipality would then have until January 1, 1987.

Now, I should say before continuing in the process that one may ask why would the Court assume that the full time period in each of these cases will be utilized. And, of course, it may not. But as will be seen in a moment, the Court's going to make an assumption with respect

to other time periods which will certainly compensate for any overassumption which has already been made.

Section 13 provides that the municipality may file for substantive certification of its plan at any time within a six-month period from the -- I'm sorry. A six-year period from the filing of the housing element. Nothing seems to expressly require expeditious filing for substantive approval; but assuming it is requested, the Township has to give public notice within an unspecified period of the requested certification. Once again public notice is given, that is, once public notice is given, the 45-day period begins to run. It is not clear from the Act that there is a time limit on the Council to act on the requested certification, thus, the objection period is 45 days. The review period could reasonably be expected not to commence until after the 45-day objection period has terminated. One would not expect any deliberative body would start to consider the validity of a proposal to it before it has heard the objections, and the objections, of course, may be filed at any time within 45 days.

However, I'm going to assume for the moment that the municipal petition for substantive certification and the public notice are done simultaneously in one day, and I'm going to assume that the Council does not wait for objections -- for the objection period to expire, but that it starts immediately to review the housing element and fair share plan. That procedure would, nevertheless, have to consume 45 days because the objection period must be permitted to run and, therefore, would take the process to approximately February 15, 1987. Now, if at the end of that 45-day period the Council is prepared to grant substantive certification, the town must adopt its ordinance in 45 days or by April 1, 1987. That would appear under any stretch of the imagination to be the minimum elapsed time before an ordinance would be in place creating realistic opportunity. If at the end of the 45-day period the Council denies certification, or conditionally approves it, the municipality has 60 days to refile, and that would take us to April 15, 1987. And the Council has an unspecified period of time thereafter to review

it. Once the Council gives substantive certification, the municipality has 45 days to adopt its implementing ordinance and, under that set of assumptions, or that procedure, the deadline would extend to June 1, 1987, assuming that the Council reviewed the matter in one day, which would be a first for any governmental body, including the Court. If, on other hand, an objection is filed, it must be done within 45 days of public notice, in accordance with Section 14. Assuming public notice has been given by January 1, 1987, objections must be filed by February 15, 1987.

Pursuant to Section 15A, mediation and review is commenced if an objection is received. No time limit is set on that process. I will assume that it takes 60 days in which event we will have reached April 15, 1987. That assumption, of course, has many unknowns. The question remains as to how many cases will be before the Council and the size of its staff, its capacity to mediate and review. The assumption I am making is based upon a single case scenario; that is, the Council not having to deal with all the other pressures that might be

upon it to deal with many other cases. Mediation is, by any gauge, a time-consuming process. If mediation is unsuccessful, that matter is then referred to an administrative law judge, who has 90 days to issue a decision, unless that period is extended for good cause. This procedure could then extend to July 15, 1987, assuming there is no extension. The administrative law judge findings are then forwarded to the Housing Council, with the record before the administrative law judge, and under N.J.A.C. 1:1-16.5, the Council has 45 days to act on the decision by accepting, rejecting, modifying or remanding the case to the administrative law judge. And absent a remand, the procedure then would extend to, or could extend to, September 1, 1987.

I believe that under the scenario of a, if we can call it, contested proceeding before the Council, that date, in all likelihood, is the minimum date by which there could be a conclusive decision before the Council. Thereafter, presumably, and if there is an appeal, it would proceed along the same time track as an appeal from this court, while there may be

slightly different rules, the time before the Appellate Division and beyond presumably we can't say.

Now, before reaching a conclusion concerning the two motions to transfer, I think it is important to briefly summarize the status of each case before the Court.

With regard to the Bernardsville case, the plaintiffs filed on June 21, 1983. There were case management conferences on August 3, 1983, and December 20, 1983. A stipulation of partial settlement was entered on February 9, 1984, granting the plaintiff a builder's remedy, appointing a special master to help fix the details of the remedy. An interim order was entered in November, on November 20th of 1984, which grants a builder's remedy to the plaintiff at nine units per acre, for a total of 76 units. It provides that the master is appointed to assist in the terms of a complete compliance package, and it grants the Township an immunity from any further builder's remedy actions. The Township's compliance package was presented at public meetings on January 14, 1985, and March 18, 1985. The Township apparently adopted its

ordinance on March 18, 1985.

Mr. Raymond, the court-appointed expert, submitted his report on April 30, 1985. The report is generally supportive of the compliance package.

There were motions to declare that the Township did not have a right to condemn the plaintiff's tract, a cross-motion to vacate the plaintiff's builder's remedy. The first motion was disposed of by the Court, the second one remains undisposed of as of today.

During a telephone conference on September 10, 1985, the Court advised that the condemnation of the Motzenbecker tract would be looked at in the context of the entire compliance package. The immunity which was granted on November 20, 1984, for a period of 90 days has been extended three times.

On February 4, 1985, it was extended until April 1, 1985. On April 4th it was extended until April 30th. And on May 6th it was extended indefinitely to the date of a compliance hearing. So that, in effect, Bernardsville has been under immunity now for 11 months.

A compliance hearing was scheduled for this case on September 10, 1985. The Court was ready to proceed, but at that stage the legislation had intervened and the municipality, as is its right, chose to move for transfer.

What is left to be done in this case, in this court, if it is not transferred, is to reschedule that compliance hearing, which would take a very brief period of time, given the master's approval, given the absence of objection, except for, of course, the issue of builder's remedy, and the revision of any ordinance, any portion of the ordinance which is necessary.

With regard to the builder's remedy issue, the Court has already indicated that it believes that the town has a right to condemn this parcel; and if that is the case, then there is no imperative or there is no obstacle to the approval of the ordinance if it otherwise meets approval. The ordinance has already been adopted, assuming it had to be revised, the -- a reasonable estimate time to complete this case would be two to three months.

Now, with respect to the Holmdel Township

case, Real Estate Equities filed a complaint on February 28, 1984. The New Brunswick case was filed on May 16th. And after the Court consolidated those two actions June 7, 1984. the Township adopted an ordinance on August 27, 1984, as was referred to in oral argument. Trial began on October 15, 1984. At that time the Court was feeling pretty good about the standing of the cases, and I think the trial continued, and I don't have this in my notes, but my recollection is for a period of approximately eight to 10 days. The trial was by and large limited to the issue of region, regional need, and the entire fair share issue.

At the end of the case the Court appointed a special master to assist the Court with respect to clarification. Some of the basic data needed to establish a fair share number under the methodology under this Court, under AMG vs. Warren, blank New Jersey Super., blank -- I used to say heretofore unreported -- and the master was directed to calculate such things as the amount of growth area, employment figures, commuter shed question, all of which seem to have been pro forma. The report still

has not been filed.

The Court also was faced with the determination of some possible revision to the methodology, particularly with respect to the question calculation of present need, because the same issue was involved in the case of Field vs. Franklin pending before the Court at about the same time and tried at about the same time. And the Court withheld issuance of an opinion until it had the opportunity to receive the data under both of the cases that was requested by the Court.

The standing master was asked to provide the same information provided in the Field case in this case. Neither of the information having been filed, the Court released an opinion yesterday on the question of modification of the present-need approach. And based upon that opinion, one can calculate now the present need for both Holmdel and, of course, for Franklin Township.

What remains to be done is to do the manual work necessary to provide the Court with the information requested of the expert, for the Court to respond to any suggested modifica-

tion in a prospective need methodology, which the Court is prepared to do on a very short notice, and then to fix fair share.

Thereafter, a compliance ordinance will either have to be prepared by Holmdel or it has the option, under the pretrial order, to rely upon the ordinance which it adopted on August 27th.

I'm going to assume for the purposes of estimating elapsed time that the Township would choose the right to take 90 days to either reevaluate its present ordinance or to amend it; thereafter, a compliance hearing would be held and revisions which are required by the Court would then be undertaken and an ordinance adopted. It is likely that that procedure could be completed within a six-month period or less.

Now, having taken a general overview of the statute's meaning, a more detailed review of its procedures and time frames, and a specific analysis as to the progress and status of each case before the Court today, there remains only the ultimate issue of whether these cases should be transferred to the Council or

retained here in court.

The parties to these motions and to others filed with the Court have suggested a host of criteria by which the application of transfer should be judged.

As I have in the other oral opinions, I believe it's useful to list them for the benefit of the Bar and for any reviewing court, not necessarily in order of preference and clearly with no intention to imply approval of any of the factors which I mentioned. I list them to preserve them for consideration in future matters.

Clearly, in these cases, and in others, certain factors predominate and others have little relevance. The factors include the age of the case, the complexity of the issues, the stage of the litigation -- that is, whether it is at discovery, pretrial, trial compliance, settling -- 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 the development of an evidentiary record, the conduct of the parties, which I've mentioned

earlier in this argument is not a factor in the Court's view in these cases; the likelihood that 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 transfer or, conversely, whether a denial of 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. And related to that, the argument made by Mr. Bisqaier today that there may be a lot of infrastructure availabability; sewer capacity, water capacity; would the transfer facilitate or expedite the realistic opportunity for lower income housing; the possible change in the housing market which would occur if the venue -- that is, the Council or the Court -- selected cause delays; the loss of the plaintiff's right to participate in the Council process up to the point of medication; and the loss of alleged rights under existing orders.

Without repeating the facts of each case,

both of these cases have certain things in common and some individual characteristics. They've both been arduous, complex cases which have taxed the resources of all involved. To repeat even a portion of the process before the Council seems unnecessarily burdensome and unfair to the parties, even if the municipalities are willing to do that.

There have been substantive determinations of noncompliance in both. A determination of fair share in Bernardsville and, as indicated, a determination of fair share in Holmdel awaits only the report of this master or a substituted master.

With the decision of the Court in Field vs. Franklin, the moment of arriving at a fair share for Holmdel moves a good deal closer. The evidentiary record is complete, or virtually complete, concerning region, regional need, and fair share either by trial or by stipulation.

In the Bernardsville case, mention should be made of its argument that it deserves transfer because of its voluntary compliance. It argues that it has not dug in its heels like others. It does not acknowledge, however, that it has

had the benefit of an immunity order for almost a year. But for that order, and the concomitant protection that goes with it, and the concomitant commitment to compliance, Bernardsville would have been treated as a municipality that had, in its own terms, dug in its heels, and it would have been brought to trial a long time ago and the Court would have been -- would not have been as lenient in the compliance time allowed. It asked to be treated specially because it's obeyed the law. In fact, it received every consideration for voluntary compliance, both in terms of a reduction of its fair share number, a lengthy compliance. It has now adopted the compliance ordinance, which has been, as indicated, generally approved by the master and within a very short period of receiving the approval. It has been dealt with fairly; in fact, extremely fairly. I make those comments not by way of any criticism because I believe that it is through the efforts of its counsel that Bernardsville has taken a very intelligent hand to compliance; but at this stage of the litigation it can't have it both ways.

Holmdel has taken a different course.

It has vigorously preserved every right to which it's entitled under the law, but it, too, has reached a stage where in a relatively brief period of time it will be called upon to submit a compliance ordinance absent approval of the motion to transfer.

Most importantly, and indeed of predominant importance in the cases, is the status of each case and the inevitable delay which must be caused by transfer.

As the facts recited above show, each of these cases are near completion. The Court's best estimate is that they could be done in anywhere from three to six months. And even if that estimate is overly optomistic, the time span is significantly shorter than the minimum of 18 months processing through the Council, which more realistically will take two years or more. We're not looking at delay in a vacuum because, certainly, the Housing Council process must take some time. And at this posture we have to assume that the Legislature chose a reasonable time frame for cases which belong before the Council. But in transfer cases we have to look at delay in relationship to the

status of the case before the Court. Delay equates to postponing the day until the realistic opportunity is afforded and houses are built. In each case we have builders ready to proceed, just as builders have moved promptly to get construction underway in other towns where compliance already has occurred.

In the case of Bernardsville, we have an even more desirable situation being that the municipality itself is ready, by its own admission, to build available housing. Of course, avoidance of delay at all costs is not the goal. However, no one has demonstrated that the Court does not have the expertise, the ability to meet these matters and, at the same time, also meet the special issues that can be involved in these cases.

Both the municipalities before the Court today, and in other matters, have been evaluated on a regional statewide planning basis which has been carefully developed. That's not to say that it is a more thorough, more appropriate basis than others might develop. It is to say that it is comprehensive and, in the Court's view, clear. The methodology also leaves room for adjustments

which are based upon the absence of vacant land, environment constraints, need for preservation of agricultural, historical, recreational or other special categories of land uses, prior land use patterns, prior efforts, and providing housing variety and many other practical and equitable situations which would or could effect the fair share number which would be produced by a literal application of the methodology. The methodology, of course, incorporates the mandate of Mount Laurel II and its instructions with respect to radical transformation. It allows the Court to face, even without the legislation, and to take in effect the impact of the planning impact of whatever the court order may be with respect to fair share minimum.

In short, it appears to me that the methodology before the Court meets the same type of planning criteria on a regional and statewide basis as met by the legislation. I can comfortably conclude in these cases that not only is it manifestly unjust to the plaintiffs to transfer these cases, but there is no significant unjustice, or injustice, to

the municipalities to retain them. The determination of manifest injustice is and will be a balancing process in all cases.

In each case before the Court today, the balance tips dramatically in favor of the denial of these motions. The statutory test is manifest injustice to any party. Defendants have failed to demonstrate the slightest injustice to them; whereas, the injustice to lower income households and the plaintiffs in both cases is, indeed, manifest.

And I would ask counsel for plaintiffs to submit an order in accordance with the opinion.

MR. MASTRO: If you don't mind, may I submit the order?

THE COURT: Yes.

MR. MASTRO: It's my motion.

THE COURT: What remains in the Motzenbecker issue is the vacating of the remedy matter. I will get to that. That does not excuse, as far as I'm concerned, compliance. So there'll be compliance. If the town is thinking about modification of its compliance package, it should proceed.

(Whereupon, the matter concludes.)

- C E R T I F I C A T E -

I, ROSEMARY FRATANTONIO, do hereby certify that the foregoing is a true and accurate transcription of the within proceeding, as taken by me stenographically on the date and place hereinbefore set forth.

Rosemary Fratantonio

ROSEMARY FRATANTONIO, C.S.R.
Official Court Reporter

DATE: 10/22/85

filed 10/25/85

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

☐ GATEWAY ONE
SUITE 500
NEWARK, N. J. 07102
(201) 623-5600
ATTORNEYS FOR

☒ ENGELHARD BUILDING
P. O. BOX 5600
WOODBRIDGE, N. J. 07095
(201) 549-5600
ATTORNEYS FOR Plaintiff

☐ PARKWAY TOWERS
P. O. BOX 5600
WOODBRIDGE, N. J. 07095
(201) 750-0100
ATTORNEYS FOR

Plaintiff

HELEN MOTZENBECKER,

vs.

Defendant

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

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMMERSET/OCEAN
COUNTY
Docket No. L-37125-83

CIVIL ACTION
(MOUNT LAUREL II)
ORDER TO TRANSFER

THIS MATTER having been opened to the Court by J. Albert Mastro, attorney for Defendants, and the Court having considered the Certifications and Briefs in support of said application; and the Court having also considered the Briefs and Affidavit in Opposition to said application; and the Court having considered the oral arguments of J. Albert Mastro on behalf of Defendants and Douglas K. Wolfson on behalf of Plaintiff; and for good cause shown,

IT IS on this 25thday of October, 1985

ORDERED AND ADJUDGED that for the reasons set forth in the Court's oral opinion on October 11, 1985 Defendants motion to transfer the within case to the Affordable Housing Council be and is hereby denied.

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