6-6-84

AMG

letter re: request for argument

- w/ letter brief in opposition to motion to consolidate
- Exhibit A, Ds brief in support for SJ

pgs: 20

Pi # 3214

AM000148B

KUNZMAN, COLEY, YOSPIN & BERNSTEIN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
15 MOUNTAIN BOULEVARD
WARREN, NEW JERSEY 07060
(201) 757-7800

EDWIN D. KUNZMAN
JOHN E. COLEY, JR.
HARRY A. YOSPIN
STEPHEN J. BERNSTEIN

*ADMITTED IN NEW YORK ONLY:
HAROLD J. LEVY*
JOHN V. BIVONA*
SIDNEY COHEN*

ASSOCIATED WITH:
LEVY, BIVONA & COHEN
A PARTNERSHIP OF NEW YORK ATTORNEYS
10 EAST 40TH STREET
NEW YORK, NEW YORK 10016
(212) 889-2520

ADDITIONAL OFFICES:
LOS ANGELES, CA
(213) 553-4114
PHILADELPHIA, PA
(215) 735-2890
WASHINGTON, D.C.
(202) 466-6044

June 6, 1984

Honorable Eugene D. Serpentelli
Superior Court of New Jersey
CN 2191
Toms River, New Jersey 08753

Re: Shainee Corporation vs. Township of Warren, et al.
Docket No. L-034351-84

Dear Judge Serpentelli:

As I mentioned to you on the telephone the other day, I believe that the Shainee Motion for Consolidation is of monumental importance to Warren Township, other municipalities, and the Court. For that reason, I ask the Court to schedule this Motion for oral argument at your Court House.

Attached is my letter brief in opposition to Plaintiff's Motion for Consolidation.

Thank you for your considerations.

Respectfully yours,

JOHN E. COLEY, JR.

JEC: eg
encs.
cc: All counsel

RECEIVED
JUN 8 1984
JUDGE SERPENTELLI'S CHAMBERS

KUNZMAN, COLEY, YOSPIN & BERNSTEIN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
15 MOUNTAIN BOULEVARD
WARREN, NEW JERSEY 07060
(201) 757-7800

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ADDITIONAL OFFICES:
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(213) 553-4114
PHILADELPHIA, PA
(215) 735-2890
WASHINGTON, D.C.
(202) 466-6044

June 5, 1984

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

Re: Shainee Corporation vs. Township of Warren, et al.
Docket No. L-034351-84

Dear Judge Serpentelli:

On behalf of the Defendant in the within action, the Township of Warren, (hereinafter referred to as the "Township") please accept this letter memorandum in opposition to the application of Shainee Corporation for consolidation of the within case with the following currently consolidated cases of AMG Realty v. Township of Warren, Docket No. L-23277-80 P.W., and Timber Properties Corp. v. Township of Warren, Docket No. L-67820-80 P.W. (hereinafter these two cases shall be collectively referred to as the "consolidated case").

FACTS

Upon information and advice from Brener, Wallack & Hill, Attorneys for Plaintiff, Shainee Corporation (hereinafter referred to as "Shainee") a Mt. Laurel II action against inter alia, the Township of Warren and the Township Committee of the Township of Warren was filed by Shainee on May 25, 1984 in the Superior Court of New Jersey.

The consolidated case is presently pending before the Superior Court and, in fact, trial with respect to the issues of the applicability of Mt. Laurel, the constitutionality of the current Zoning Ordinance of the Township of Warren and the Township's fair share of Mt. Laurel housing has been completed and a ruling on the same is imminent. Notwithstanding the completion of the same, Shainee now seeks an Order of Consolidation from the Court, which will in effect allow Shainee to participate in the compliance phase of this action and, more particularly, allow Shainee to seek a "builder's remedy" against the Township.

ARGUMENT

I. CONSOLIDATION OF ACTIONS IS APPROPRIATE ONLY IN THOSE INSTANCES IN WHICH SUCH CONSOLIDATION WILL PROMOTE JUDICIAL EFFICIENCY AND ECONOMY IN CONNECTION WITH THE RESOLUTION OF DISPUTES.

Rule 4:38-1(a) of the New Jersey Rules of Court provides in pertinent part:

> "When actions involve a common question of fact or law arising out of the same transaction or series of transactions are pending in the Superior Court, the Court on a party's or its own motion may order the actions consolidated."

The obvious rationale underlying the aforesaid Rule is the goal achieving judicial efficiency and economy by permitting related actions to be disposed of together, thus avoiding duplicity of litigation. Judson v. People's Bank & Trust Company of Westfield, 17 N.J. Super. 143, 145 (Ch. Div. 1951). Accordingly, all other factors being equal, in instances in which a duplicity of parties, evidence, testimony and legal issues exist the Trial Court may in its discretion find consolidation of the action warranted. See, e.g. Judson, supra., 17 N.J. Super at 145. Nevertheless, it should be borne in mind that other considerations are to be taken into account before allowance of consolidation, the most important of which is the attainment of justice.

> "The object of consolidating two or more actions is, among other things, the attainment of justice with the least expense and vexation to the parties litigant."

Judson, supra., 17 N.J. Super. at 145-146 citing Mutual Securities Corp. v. G.T. Harris Corp., 100 N.J. Eq. 365 (Ch. 1926). Shainee's application for consolidation clearly comes at a most inopportune and unfair hour from the point of view of all parties to the consolidated case. To date, lengthy proceedings addressing the issues of the constitutionality of the current Warren Township Zoning Ordinance, applicability of Mt. Laurel, the Township's fair share of low and moderate income housing have been completed and a ruling on the same is imminent. More importantly, given the limited nature of the relief sought by Shainee, the proceedings to date have also involved the presentation of evidence and examination of the question of builder's remedies in general and the Township of Warren's environmental and

planning defenses with respect to the same, pursuant to Mt. Laurel II (See So. Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 158 279-280 (1983)(hereinafter referred to as "Mt. Laurel II") with respect to the same. The addition of a new party at this stage of the litigation would only serve to require the reopening and expansion of a path already travelled by the parties to the consolidated case. R. 4:38-1's quest for judicial economy certainly would not appear to be served by the proposed joinder at this juncture. While consolidation is a most appropriate organizational mechanism in those instances where the issues in evidence in common have yet to be presented in the individual actions, thus providing a single forum for disposition of common questions, its utility stems from its use as a prospective organizational mechanism. There is no justification or rationale for consolidation after the fact, particularly in the within action when such consolidation would by necessity disrupt the progress of the consolidated case. This matter can fairly continue in its regular course to final resolution without the inclusion of Shainee without either prejudicing Shainee nor frustrating the mandates of Mt. Laurel II. In event that the Township of Warren is ultimately required to revise its Zoning Ordinance in order to meet the requisites of Mt. Laurel, Shainee along with any other builder-developer not a party to the consolidated case, will have its opportunity to propose and offer its property for development and construction of low to moderate income housing. The denial of Shainee's participation in the consolidated case would not serve to permanently foreclose that party from pursuing development of its property.

The Court should further bear in mind that the consolidated case is not without a history regarding joinder of additional parties. Prior to commencement of trial two (2) parties: Esposito Enterprises, Inc. and Henry Evans sought to intervene in the consolidated case. On December 8, 1983, this Court entered an Order denying the motions of those parties. The intervention of those parties would only have served to further complicate and unnecessarily burden an already complicated matter. Similarly, consolidation of Shainee's action with the consolidated case would only serve to further complicate the disposition of the consolidated case. The public interest in making municipality's face their Mt. Laurel obligation has been duly served by the plaintiffs in the consolidated case. The addition of Shainee adds nothing to achievement of that goal and thus is unnecessary.

II. SHAINEE IS NOT ENTITLED TO THE RELIEF SOUGHT

Trial with respect to the consolidated case has progressed through the completion of the first phase of the three litigation stages of a Mt. Laurel action. Shainee now seeks to assume the "risk" of the Court's decision with respect to those issues litigated to date in return for participation in the compliance stage and, more particularly for inclusion of its property in a

builder's remedy. It is patently clear, as will be set forth below, that in event of a adverse decision with respect to the municipality, Shainee would not qualify as a litigant duly entitled to the limited relief it is now seeking.

Although the builder's remedy has been hailed as an essential mechanism for the insurance of compliance with Mt. Laurel, see Mt. Laurel II, supra., 92 N.J. at 279, Mt. Laurel II in no way suggests that such relief is a blanket remedy to be awarded to every builder-developer who commences a Mt. Laurel action against a municipality. See J. Albert Mastro, Brief in Support of Motion for Summary Judgment, at pp. 4-6, annexed hereto as Exhibit A (hereinafter referred to as Mastro) Mt. Laurel II's mandate with respect to the award of builder's remedies provides:

> "Builder's remedies will be afforded to plaintiffs in Mt. Laurel litigation where appropriate, on a case by case basis. Where the plaintiff has acted in good faith, attempted to obtain relief without litigation, and thereafter has vindicated the constitutional obligation in Mt. Laurel type litigation, ordinarily a builder's remedy will be granted, provided that the proposed project includes an appropriate portion of low and moderate income housing, and provided further that it is located and designed in accordance with sound zoning and planning concepts, including its environmental impact." (emphasis added) supra., 92 N.J. at 218.

Accordingly, a litigant is required to meet a two-fold criteria in order to qualify for a builder's remedy:

> (i) Litigant must demonstrate a history of good faith interaction with a municipality to obtain the relief sought before resorting to litigation; and
>
> (ii) The litigant must have vindicated the municipal constitutional obligation in a Mt. Laurel type action.

The circumstances surrounding the within matter are palpably void of even the slightest suggestion that Shainee can meet the Court mandated preconditions for a builder's remedy. Attempts by Shainee to resolve its grievance with the Township through municipal administrative channels prior to institution of the suit are noticably lacking. Furthermore, any claim on Shainee's part of vindication of the Mt. Laurel obligation through its participation in the consolidated case would merely be pro forma, for that party has been content to leave the fight to other litigants. Shainee's letter memorandum in support of its application for consolidation bespeaks of its passivity with respect to the constitutional issue involved, for this party is content to bind itself to the outcome of the first

phase of litigation without the slightest expression of concern regarding those issues litigated to date.

The importance of the above-cited criteria for builder's remedies constitutes a recognition that a balance must be struck between the important goals of insuring compliance with Mt. Laurel while preserving the municipality's right to local self-government in the area of zoning. As a mechanism for promoting compliance with Mt. Laurel, the builder's remedy acts as an incentive or reward to the builder-litigant who, after a good faith exhaustion of administrative processes assumes the expense and responsibility of challenging the municipality in Court. However, the imposition of these criteria serves as a limitation to preserve the municipality's equally important right of "home rule". See Mastro, supra., p 7-10, annexed hereto as Exhibit A. Accordingly, the criteria preserve a degree of municipal control with respect to the complex questions of planning and allocation of Mt. Laurel housing as against the rest of the world. To allow Shainee to latch onto the consolidated case at this juncture in time, in the face of Shainee's unexplained and noticeable inaction to date, is clearly an unwarranted infringement on the municipality's consitutionally protected right of "home rule".

It should be borne in mind that there are two competing public interests here -- the right to affordable housing and the municipality's right to prudently and soundly regulate the use private property. Shainee premises its application on the ground that its property will add to the amount of land available for development of low to moderate income housing in Warren and thus aid in meeting the legal requirements for such housing as per Mt. Laurel. In fact, further consolidation in this matter will not serve to further this public interest in any material way, for the litigation is well under way and a ruling with respect to the first phase of the same expected imminently. Upon disposition of that first phase, Shainee will have its opportunity for input with respect to whatever revisions to the municipality's zoning ordinance are required during the "master stage" of this litigation. To the extent that the public interest is served by Mt. Laurel type action, that interest has already been effectively furthered by other parties. Consolidation and grant of a builder's remedy to Shainee in fact would prove detrimental to the second area of public interest involved in this action by infringing on the municipality's right to regulate and plan the use of private property by unnecessarily tying the hands of the municipality with respect to possible planning alternatives for meeting its Mt. Laurel obligations.

While appreciating the importance of the builder's remedy as a mechanism for compliance, the Court in the Mt. Laurel II also recognized the potential dangers of the same and cautioned that:

"Trial courts should guard the public interest carefully to insure that plaintiff developers do not abuse the Mt. Laurel doctrine."

supra., 92 N.J. at 281. To allow consolidation in this instance in order to afford Shainee the opportunity to participate in the compliance phase and seek its "builder's remedy" would do little more than ram an undeserving litigant down the municipality's throat. Shainee's motivation in commencing this action and now seeking consolidation of the same with the consolidated case is obvious. This party is seeking to use R. 4:38-1 as a device for obtaining an advantage, at the cost of the plaintiffs in the consolidated case and to the detriment of all builders-developers who are not parties thereto, to which it is not entitled; and is further seeking to frustrate the policy underlying the Court-mandated modification of res judicata in Mt. Laurel cases. See Mt. Laurel II, 92 N.J. Super. at 291 and Mastro, supra., at 5-6.

CONCLUSION

Inasmuch as Shainee would not, in fact, be entitled to the relief that it seeks, it is clear that there is no common question of law or fact in this instance. In light of the same, to allow consolidation and potentially reopen litigation of issues already addressed would prove to be a needless usurpation of the time and resources of the Court and the parties to the consolidated case. Accordingly, it is respectfully submitted that Plaintiff, Shainee Corporation's application for consolidation of the above-referred case with the consolidated case be denied.

Respectfully submitted,

JOHN E. COLEY, JR.

JEC:eg
encs.

cc: Joseph E. Murray, Esq.
Leib, Kraus & Grispin, Esqs.
John T. Lynch, Esq.
Raymond E. Trombadore, Esq.
J. Albert Mastro, Esq.
Eugene W. Jacobs, Esq.
Brener, Wallack & Hill, Esqs.
Warren Township Committee

EXHIBIT A

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

DOCKET NO. L-23277-80PW,
L-67820-80PW

Plaintiffs, AMG REALTY COMPANY, et als.,
vs
Intervenors, JOAN H. FACEY, et als,
vs
Defendants, THE TOWNSHIP OF WARREN,

Consolidated with:

Plaintiff, TIMBER PROPERTIES, etc.,
vs
Defendants, TOWNSHIP OF WARREN, et als.

CIVIL ACTION

(MT. LAUREL II)

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
BY DEFENDANT, WARREN TOWNSHIP SEWERAGE AUTHORITY

J. ALBERT MASTRO
Attorney for Defendant,
Township of Warren
Sewerage Authority
7 Morristown Road
Bernardsville, N.J. 07924

Dated: November 17, 1983

STATEMENT OF FACTS

On or about December 31, 1980, AMG Realty Company ("AMG") filed a prerogative writ action against the Township of Warren corporate entity in the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-23277-80, alleging exclusionary zoning (Mt. Laurel I attack). On or about May 19, 1981, an order was entered granting Skytop Land Corp. ("Skytop") leave to intervene. Thereafter, Skytop participated in the AMG litigation resulting in a judicial determination on May 27, 1982, that defendant Township of Warren's zoning was exlusionary and contrary to Mt. Laurel I.

On or about July 27, 1981, plaintiff, Timber Properties ("Timber"), filed a separate prerogative writ action in the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-67820-80, against the Township of Warren, its Planning Board and the Sewerage Authority, alleging, among other things, that the Township's zoning ordinance was exclusionary and contrary to Mt. Laurel I. On or about July 7, 1982, an order was entered by the Superior Court which, among other things, placed said litigation on the inactive list. On May 11, 1983, an order was entered by the Superior Court restoring the Timber litigation to the active trial list.

In March 1983, an order was entered allowing Joan H. Facey, et als ("Facey") and Mykola Bojczuk, et ux ("Bojczuk"), the right to intervene for limited purposes.

On or about July 29, 1983, an order was entered consolidating all of the above cases.

POINT I

THE BUILDER'S REMEDY CONCEPT IS FOR THE SOLE PURPOSE OF ACHIEVING COMPLIANCE WITH MT. LAUREL.

Defendant Sewerage Authority's motion must be evaluated in the context of Mt. Laurel litigation. More precisely, this context initially should address the nature of the "builder's remedy." So. Burlington Cty. N.A.A.C.P. v Mt. Laurel Twp., 92 N.J. 158 (1983) ["Mt. Laurel II"], discussed the competing interests, purpose, latitute and judicial approach to the builder's remedy (at p. 279, 280). One dimension of the builder's remedy was further refined in Orgo Farms & Greenhouses, Inc. v Township of Colts Neck, Superior Court of N.J., Law Division, Monmouth County, Docket Nos. L-13769-80P.W. and L-3299-78P.W., decided October 7, 1983 ("Orgo Farms").

Plaintiff-developers maintain: (a) such remedies are essential to maintaining Mt. Laurel litigation and the only effective method of enforcing compliance, (b) it is only fair to compensate developers for the time and expense in bringing such litigation; (c) the builder's remedy approach is the most likely means of insuring actual construction of lower income housing. Defendant municipalities maintain that they should be allowed to determine how and where their fair share obligation will be met. In essence, municipalities argue a "home rule" position.

In Oakwood at Madison, Inc. v Township of Madison, 74 N.J. 470 (1977), the Court discouraged builder's remedies by indicating "such relief will ordinarily be rare" (at 551-52). The experience since Oakwood

at Madison toward generating lower income housing was sufficient to convince the Mt. Laurel II Court that the remedy must be made more available to achieve compliance with Mt. Laurel objectives. Thus, the overriding purpose of the builder's remedy is to serve as a vehicle toward compliance with Mt. Laurel. In this respect, the plaintiff-developer not only serves his own interests of constructing high density multiple family housing, but also serves a public interest toward insuring that lower income housing will actually be constructed. Thus, absent environmental or other substantial planning concerns, a builder's remedy should ordinarily be granted. Indeed, a builder's remedy should not be denied soley because a municipality prefers some other location for lower income housing, even if it is in fact a better site.

Of significance, is the fact that the Mt. Laurel II Court cautioned that "care must be taken to make certain that Mt. Laurel is not used as an unintended bargaining chip in a builder's negotiations with the municipality" (at p. 280). Furthermore, the Court instructed trial courts to insure that the municipal planning board is closely involved in the formulation of the builder's remedy.

Finally, the Mt. Laurel II Court cautioned that:

> Trial courts should guard the public interest carefully to be sure that plaintiff-developers do not abuse the Mt. Laurel doctrine (at p.281).

Orgo Farms stands for the proposition that a builder's remedy is not precluded as a matter of law in a limited growth area.(1) In the course of its opinion, the trial court concluded that it had some measure of freedom

in dealing with the builder's remedy. Reference was made to the "spirit of the opinion" and the importance of "Mt. Laurel goals." Clearly, the builder's remedy device was intended as the vehicle to achieve Mt. Laurel goals. To make the precess work, it had to be applied somewhat liberally.

Thus, in this give and take approach to this socio-economic process the various competing interests must again be examined. In the instant matter, the first plaintiff-developer appearing in the Warren Mt. Laurel landscape was AMG. There is nothing to suggest that the goals of achieving substantial lower income housing will not be adequately pursued by that plaintiff-developer. AMG's letter brief touches the very nerve of Mt. Laurel litigation: a general Mt. Laurel attack on zoning must be adequately represented. How many plaintiff-developers (or intervenors) are required to constitute "adequate representation"? A corollary issue: how many and what size prejects are needed to provide a "substantial" amount of lower income housing? The key issue presented to the court is the viability and fundamental fairness of "tag along" or "gang attacks" by multiple plaintiff-

(1) The Orgo Farms holding is not particularly helpful (or even germaine) to the issues raised herein, however, its reasoning is. It might be noted in passing that the holding in Orgo Farms is solid - the analysis of the Supreme Court in Caputo v. Chester dictates the result. If the results were otherwise, a municipality entirely within the limited growth area could then ignore its Mt. Laurel obligation to its "indigenous" poor. The only potential inconsistency between the Orgo Farms holding and Mt. Laurel II is as to the prospective need (Mt. Laurel II, at p.244). Perhaps the trial court in Orgo Farms should have distinguished "present" from "prospective" need thereby preparing complex terms for somewhat easier definition in the future. However, when addressing the prospective need in a municipality having some growth area, it should be channeled entirely into the growth area, and if not, the burden should be on the plaintiff-developer to establish the reasons therefor. Obviously, one of the significant factors participating in this process is whether or not there is adequately suitable land for such purposes located within the growth area. If there is, too many factors militate against granting a builder's remedy outside the growth area.

developers (or intervenors) in a single Mt. Laurel case. It is submitted that neither the express language or the spirit of Mt. Laurel anticipated such an approach toward accomplishing its goals. To the contrary, Mt. Laurel II cautions trial courts to guard the public interest carefully to be sure that developers do not abuse the Mt. Laurel doctrine. It is further submitted that gang attacks do violence to the public interest. In support of this position and for illustrative purposes, two scenarios are suggested: (a) Assume one plaintiff-developer with numerous parcels of land randomly located throughout the municipality, and (b) multiple palintiff-developers with a single tract of land each randomly located throughout the municipality. Is the plaintiff-developer in (a) entitled to a builder's remedy on all tracts of land within the municipality? Are the plaintiff-developers in (b) all entitled to builder's remedy on each respective tract of land? It is submitted that the response to both inquiries should be absolutely not. There are two significant reasons for this conclusion. The first lies in the Court's attempt to strike a proper balance between plaintiffs' and defendants' interests in Mt. Laurel litigation. That balance requires modification of the role of res judicata in these cases (Mt. Laurel II, at p.291). Thus, in Mt. Laurel cases judgments of compliance will have a res judicata effect, despite changed circumstances, for a period of six years. It was the intent that municipalities be free of litigious interference with the normal planning process for that period of time after having once satisfied their Mt. Laurel obligation. Clearly, the promise of this six year period of "repose" would be seriously diluted if Mt. Laurel litigation becomes top

heavy with plaintiff-developers all seeking relief at the same time. The net effect of this approach is equivalent to allowing repeated Mt. Laurel litigation during the proposed six year period of repose (indeed, in many circumstances Mt. Laurel litigation during the six year period may be better for municipalities than a single gang attack)[Ø].

The second reason for rejection of a multi plaintiff-developer Mt. Laurel attack relates to the much more serious issue of "home rule" preservation - the very heart of local government. This issue is addressed in some detail in Point II.

[Ø] Thus, for example, the planning process, both in terms of time needed and reliability of data utilized would be better served if a municipality could address lower income housing needs over a period of years rather than a single, multi-plaintiffed (or multi-parcel), broadside attack.

POINT II

MT. LAUREL II SHOULD NOT BE APPLIED AS TO INTERFERE UNDULY IN THE RIGHT OF A MUNICIPALITY TO LOCAL SELF GOVERNMENT

There are two principles of Constitutional magnitude that affect the "home rule" concept in a Mt. Laurel context. The first, and most common, deals with municipal home rule authority as it relates to the State Legislature. States differ widely in their various relationships with their respective municipalities, ranging from rather complete control over municipalities to somewhat limited control with municipal authority emanating directly from the State Constitution. The second principle is much more substantial and much more vital to the preservation of the home rule concept - encroachment in that area by the judiciary. This latter principle is sensitive, delicate and of overwhelming concern to municipalities. When two principles of Constitutional dimension require balancing (i.e., housing for the poor and municipal home rule) the process must be approached with an appreciation of the high stakes that are involved. A meaningful discussion might start with a brief historical overview of municipal authority to regulate the use of private property.

The initial Constitutional sanctioning municipal regulation of private property occurred in a 1927 amendment to the New Jersey Constitution which authorized the Legislature to enact general laws under which municipalities (not counties) could adopt zoning ordinances regulating buildings and other structures. N.J. Const., Art. IV, Sec. VI, par.5. This power was

expanded to encompass regulation to the uses of land in the 1947 revision of the New Jersey Constitution. Const. of N.J. (1947), Art. IV, Sec. VI, par.2. Of significance to the judiciary is the language appearing in Art. IV, Sec. VII, par.11 of the 1947 revision which urges that:

> The provisions of this Constitution and of any laws concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

As was noted by two authors:

> The area where constitutional authorization of home rule powers is most obvious is in the regulation of the use of private property. This may have developed because such activities were less common and accepted in earlier years, and required more explicit constitutional authorization. Zoning for the construction of buildings and the use of land, clearance of blighted areas, and the power of eminent domain all have gained constitutional recognition as appropriate local functions, although to have effect they require legislative implementation.(3)

So much for historical perspective. Now for application of the above principles to the zoning process generally and to Mt. Laurel and Warren Township in particular. First of all it must be acknowledged that Mt. Laurel II presents unprecedented judicial supervision over parameters of local zoning. There is very little about Mt. Laurel II litigation that can be classified as ordinary - indeed, in so many respects it is both complex and extraordinary. The scope of remedies was likened to those in

(3) Ernest C. Reock, Jr. and Raymond D. Bodnar, Home Rule in New Jersey: A Survey, appearing in Governing New Jersey Municipalities, published by Rutgers the State University of New Jersey, Bureau of Government Research (available December 1983).

"institutional " or "public law" litigation. As the police power of municipal legislation should never exceed the need therefor, so should the scope of judicial remedies in Mt. Laurel cases be scrupulously restricted to the housing objectives outlined therein. Thus, if one plaintiff-developer can fulfill the role structured in Mt. Laurel II, two plaintiff-developers should not be permitted. This issue requires a somewhat more expanded exploration.

Referring again to the single plaintiff-developer with multiple tracts of land or the several plaintiff-developers with single tracts of land respectively, how is the delicate balance of constitutional concerns threatened? The land use planning process is a methodology requiring, among other things, data collection, surveys, map preparation, etc. The Municipal Land Use Law, N.J.S.A. 40:55D-1, et.seq., sets forth in detail the various subject matters requiring planning attention and the role of the Planning Board in this process. In many ways the builder's remedy fashioned in Mt. Laurel II adumbrates this process and requires planning around the plaintiff builder's tract. The standard to be applied is clear: as to the plaintiff-developer, absent substantial environmental or other planning considerations, it is no defense for the municipality to desire lower cost housing elsewhere or even at a better site. How many plaintiff-developers (or intervenors) are entitled to such extraordinary relief? It is one thing for a municipality to zone for lower cost housing with due deference to a single tract that will produce substantial lower cost hous-

ing; it is quite another thing for a municipality to zone and plan for lower income housing with due deference to a number of tracts of land located randomly throughout the municipality. Should the municipality evaluate one plaintiff's tract against another plaintiff's tract? Should they be taken in order of filing complaints? Should one plaintiff be afforded 100% relief and other plaintiffs share in the balance of allocation until it is fulfilled? Do multiple plaintiff-developers attack each other for the privilege of producing lower income housing? The questions appear endless and so contrary to the spirit of Mt. Laurel and the public interest. The conclusion to be drawn from the above analysis is clear: to accomodate one plaintiff-developer with a single tract of land is warranted in the interests of fulfilling the Constitutional mandate of providing housing for the poor; to accomodate the interests of several plaintiff-developers (or several tracts of land) is an unwarranted intrusion into the home rule power of a municipality. To condone this latter process would be an abuse of the Mt. Laurel doctrine. The planning process is by definition a positive one - it should not be denigrated to that of "crisis diplomacy," i.e., planning that responds to multiple party or multiple tract attacks. This approach does violence to the home rule concept and the public interest.

POINT III

INTERVENTION INTO MT. LAUREL LITIGATION SHOULD BE EXTREMELY LIMITED.

The latitude provided by R.4:33-1 as to intervention can hardly be criticized in ordinary litigation. As pointed out previously, Mt.Laurel litigation is extraordinary in both its substance and its remedial approach. As in institutional or public law, Mt. Laurel litigation has as its polestar the public interest objective of providing housing for the poor. There cannot be the slightest doubt that plaintiff-developer interests and, indeed, those referred to in R.4:33-1 must be secondary. The only intervention anticipated in Mt. Laurel litigation is that of municipalities limited to the issues of region and regional need.

The intricacy and complexity of Mt. Laurel litigation should not be compounded by permitting intervention of parties not needed to resolve the issue of a municipality's compliance with a Mt. Laurel obligation. The spirit of the decision is to streamline and finely tune the litigation so it can proceed expeditiously without unnecessary side trips. The detailed direction incorporated in the Remedial Stage and Judicial Management of Mt. Laurel II would be unduly restricted. Mt Laurel litigation should have one driver (plaintiff-developer) and one vehicle (tract of land) - anything more will impede the paramount public purpose of providing housing for the poor. It would be a serious error to allow intervention of parties that address issues detracting from that objective.

CONCLUSION

It is respectfully submitted that the present litigation proceed with AMG only as plaintiff-developer and that all other party plaintiffs (or intervenors) be dismissed as to Mt. Laurel issues or their matters be severed for trial, if clearly not Mt. Laurel in scope.

Respectfully submitted,

J. ALBERT MASTRO
Attorney for Warren Township
Sewerage Authority

Dated: November 17, 1983