Letter Brief in response to Albert Mastro's letter in re OOAH transfer and in support of Plaintiffs Motion for an Order enforcing final Settlement agreement.

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Honorable Eugene D. Serpentelli, A.J.S.C.
Ocean County Court House
CN-2191
Toms River, New Jersey 08754

Re: Haueis, Ochs vs. The Borough of Far Hills, et als.
Docket No. L-73360-80

Dear Judge Serpentelli:

Please accept this letter in lieu of a more formal brief in response to the recent letter brief of Albert Mastro in connection with the Far Hills motion to transfer this matter to the Affordable Housing Council. This letter is also submitted in support of Plaintiff's Motion for an Order enforcing the final settlement agreement between the parties as approved by the Court in the Interim Order and Order of Compliance. At the August 1, 1986 hearing on the motion of Defendant to transfer the case to the Affordable Housing Council and the motion of Plaintiff to enforce the settlement agreement, Your Honor offered Mr. Mastro the opportunity to brief the issue of whether the transcript of the hearing on the Order of Compliance subject to conditions contained any information which would justify the argument that the Order was not final. I would note at the outset that Mr. Mastro's letter does not at any point cite the direct admission by the Borough of Far Hills that the Borough was voluntarily requesting the Order of Compliance and the hearing on the Order of Compliance with the full knowledge that the legislation had been adopted and that the legislation had provided for the formation of the Affordable Housing Council. See 9/4/85 T22-23. The transcript specifically states at page 22-23 as follows...

THE COURT:

...Let me commend counsel for all of their efforts in this matter. I want to commend the municipality for having voluntarily resolved the issue. I should have, at the opening of this proceeding, as I have been doing since the

adoption of the legislation, in essence, read the municipality its rights, but I know that Mr. Mastro is entirely aware of its rights, and we proceeding today at the request of the Township.

Mr. Mastro that's correct, I take it. You are being silent.

MR. MASTRO:

You keep referring to us as a Township.

THE COURT:

I'm sorry. As a request of the Borough. And the Court did not require this proceeding to go forward.

MR. MASTRO:

That's true.

THE COURT:

Yes.

MR. MASTRO:

I represent that to the Court. It was at our request. The Compliance hearing was at our request.

THE COURT:

O.K.

MR. MASTRO:

I would like the record to reflect that the Mayor of Far Hills--Harry Hoffman--is present in the Court.

THE COURT:

Alright. And I am -- I only knew that, because we're very sensitive to the fact that there is legislation, and we're sensitive to the rights created hereunder, and would not want it to appear that the Court has in any way required the municipality to go forward. I also want to commend Mr. Raymond again for his efforts in helping resolve the matter..

POINT I

THE ORDER OF COMPLIANCE SUBJECT TO CONDITIONS AND THE TRANSCRIPT OF THE COMPLIANCE HEARING OF SEPTEMBER 4, 1985 DEMONSTRATE OVERWHELMINGLY THAT THE MATTER WAS SETTLED AND THAT THE ORDER OF COMPLIANCE SUBJECT TO CONDITIONS IS A FINAL ORDER.

Mr. Mastro contends that the conditions of the Order of Compliance justify a conclusion that the Order of Compliance was not final. This argument is not supported by the opinion of the Supreme Court. in The Hills Development Company vs. Township of Bernards (A122-85 hereinafter The Hills Development Co.) In The Hills Development Co., the Supreme Court held that a number of cases which had not yet reached a final settlement would be transferred to the Affordable Housing Council. The Hills Development Co. opinion specifically notes on pages 91 to 92 that there are a number of cases which have reached final settlement before the Mt. Laurel judges. As the Court states at pages 91 and 92

> "The three oldest exclusionary zoning cases in the State have been settled. Judge Gibson, on September 6, 1985, approved a final settlement in Southern Burlington County NAACP vs. Mt. Laurel Township, which gave Mt. Laurel Township a six year judgment of repose. Another of the Mt. Laurel II cases, Urban League of Essex County vs. Township of Mahwah 92 N.J. 158, 332 (1983), which the Court recognized had been going on "for more than a decade," was settled this year, likewise, the Bedminster litigation, filed in 1971, is now resolved; Judge Serpentelli approved the settlement of this case and granted repose in Allen Dean vs. Bedminster N.J. Super Law Div. 1985 (Slip. Opinion at 1). Moreover, as Judge Skillman noted in his transfer decision, the Public Advocate reached settlements with all but two of the 12 Morris County defendants in Morris County Fair Housing Council v. Boonton Township (Law Div. October 28, 1985; (Slip. Opinion at 49)..."

It is noteworthy that the cases cited by the Court as having reached final settlement are in the same category as the Far Hills case. All of the cases reached the level of municipally approved settlement documents, compliance hearings and approval of the compliance packages by the Courts. Indeed, none of the cases which were transferred in The Hills Development Co. opinion in any way

related to matters which had reached final settlements and approval of the settlements by the Courts in a compliance hearing. Perhaps even more importantly, many of the settlements referred to by the Court, particularly the settlements in the Morris County Fair Housing Council v. Boonton Township case included settlement agreements approved by the Court which contained numerous conditions similar to the conditions set forth in the compliance order in this matter. For example, the settlement agreements in Mt. Olive Township require the rezoning of additional tracts if a Federally financed senior citizen housing project is not funded and/or if the site plan approval for the major privately developed Mt. Laurel project does not yield enough low income units to complete Mt. Olive Township's fair share obligation. The settlements and approvals in Montville Township and Hanover Township and Morris Township also contain numerous conditions requiring compliance by both the developers and the municipalities.

Mr. Mastro contends that the conditions of the Order of Compliance somehow result in voiding of the voluntary settlement agreement. This argument is without merit. Clearly, most if not all settlement agreements contain conditions which are subject to later compliance or enforcement. In addition, none of the conditions set forth in the Order of Compliance have in any way been violated by the plaintiffs and most of the conditions can be met or have been met.

For example, with respect to the first condition relating to the requirement that the municipality submit resale and affirmative marketing in monitoring of sale and resale requirements to the Master, there are numerous standard procedures for these requirements in other municipalities and the plaintiff is prepared to abide by any of the reasonable provisions approved by either Judge Serpentelli or Judge Skillman. In fact, it was consistently the expectation of the plaintiffs and the developers, Far Hills Development Co., Inc. to abide by such requirements. With respect to the condition that the Borough adopt a Zoning Ordinance, it is clear that the Borough has adopted the Zoning Ordinance and that the applicant has agreed to comply with the conditions of the Zoning Ordinance. Indeed, the Borough's Zoning Ordinance was developed with the assistance and input of the Court's appointed Master as well as the developer's legal, planning and architectural consultants. Clearly, the adoption of the Zoning Ordinance is one of the key conditions of the order and has been complied with.

The third condition relating to the elimination of restrictions on rental of Mt. Laurel units is totally within the control of the Borough of Far Hills. Nonetheless, this condition is not a problem with respect to this matter since the developer of the townhouses and lower/moderate income condominiums has no intention to rent any of the units.

With respect to the fourth condition that the Borough identify the indiginous need and develop a program for rehabilitation to be submitted to the Court no later than July 1, 1987, this condition can still be fulfilled and, indeed, the Borough contends that it expects to utilize $50,000.00 from a settlement fund pursuant to the settlement for the rehabilitation of indiginous poor units. Moreover, the Borough contends that it has every intention of fulfilling the indiginous need.

The fifth condition imposed by the Court was the inclusion of condominium fees as an element of the calculation of the housing cost component. This condition can be met by our agreement to merely comply with this requirement which was indicated to the Court in a compliance hearing. It is obviously not difficult for the developer to comply with the requirement that the condominium fees be included in the calculation of the housing component. If any changes in ordinances are required this would be a change which is the obligation of the Borough Council and the developer has not failed to comply in any respect.

The sixth condition imposed by the Court relating to the requirement that affordable units be priced to lower income households whose incomes equal 90% of the income ceiling in each income category was also indicated to be acceptable at the compliance hearing. If a change is required in the ordinance, then the Borough is required by the settlement agreement to make such reasonable changes.

The seventh condition was that the Borough acquire property for detention basin, if necessary, to accommodate plaintiff's property and also the entire watershed above plaintiff's property. Contrary to Mr. Mastro's contention, this problem has been resolved. Indeed, an entire drainage study and detailed engineering plan was prepared by the developer and submitted to the Borough Planning Board, engineer, planner, etc., showing the detention basin and property to be acquired for that basin. The defendant municipality -- not the developer -- refused to go along with that drainage plan as contemplated in the Court Order primarily because of an objecting adjoining property owner. In order to accommodate (and "work with") the Borough and its Planning Board, the developer, at tremendous added expense, had its engineer redesign an entirely new drainage system (without a detention pond), and to reroute the drainage via an entirely different route. The alternate plan still provides to the Borough a drainage improvement far beyond the needs of this development and one which the Planning Board and Borough Engineer have, informally at least, indicated is the preferred drainage plan. Surely, this is not a matter for which the Borough can or should claim that it can now obliterate its committed settlement agreement and responsibility to the Court from the sought after and consented to compliance hearings and order.

The eighth condition states that "plaintiff agrees to improve Sunnybranch Road at its own cost and expense, and that that will be a condition of the site plan approval." Mr. Mastro states that this condition is yet to be implemented. This is not so. The plans for the development indicate that the plaintiff will improve Sunnybranch Road at its own cost and expense as a condition of the site plan approval and as shown specifically on the site plan submitted to the Planning Board. The applicant is not permitted to construct the improvements until the Planning Board approves the site plan. Plaintiff's cross motion seeks approval of that site plan and Your Honor directed from the Bench that the Planning Board expedite that process. Indeed, this application has been subjected to a "holding pattern" by the defendant Planning Board for four months without work sessions or public hearings.

The ninth condition, which Mr. Mastro contends is one of the most important, states that the Borough and the plaintiffs will cooperate in the proposed sewer expansion of the Bedminster Sewage Treatment Plant to accommodate the sewering of plaintiff's property. This condition is currently being complied with. The plaintiffs have paid approximately $10,000.00 towards a fund to study the upgrade and expansion of the plant and the plaintiffs participated in numerous discussions with representatives of Bedminster and the Borough of Far Hills in an effort to insure upgrading and expansion of the plant sufficient to accommodate the plaintiff's project, as well as other Mt. Laurel projects in Bedminister Township. Indeed, the attorney for the Township of Bedminster appeared at the compliance hearing before Judge Serpentelli and confirmed to the Court the Township's acceptance of a condition as stated in paragraph 9 of the Order of Compliance subject to conditions. The Court noted from the Bench on September 4, 1985, page 16, that based on "the representations of counsel for Bedminster, it appears that they are ready, willing and able to cooperate and that the impediments that exist will more likely exist at the State level than at the municipal level and if that occurs, then the Court will deal with that." The statement of the Court was based upon the representation of the attorney for Bedminster that Bedminster would cooperate with Far Hills and the developer in seeking an expansion of the plant and provide sufficient gallonage to serve the Far Hills site second only in priority to the sites J and K of the Bedminster Mt. Laurel settlement. Mr. Mastro contends that this condition somehow prevents the enforcement of the settlement agreement and prevents the finality of the settlement agreement. This argument is without merit.

Mr. Mastro finally argues that a judgment of repose is necessary for the order to be final. I doubt that Mr. Mastro and the Borough of Far Hills believe that the Order of Compliance subject to conditions is no longer providing repose to the municipality. The order on page 3, paragraph 10 specifically states,

> Upon compliance with the above conditions, defendants may submit a judgment of compliance to the court for its review and approval. Interim repose from any further Mt. Laurel litigation heretofore granted shall continue until further order of the court.

The interim repose previously granted and the interim repose as extended specifically excluded a third party, Timber Properties, from continuing its litigation against the Borough of Far Hills. The Borough has benefited for approximately 2 years from the provision of repose in this settlement agreement. If the Borough now contends that the repose was no longer in existence then it should have stated so in writing to the court with notice to all parties including any potential litigants and developers of Mt. Laurel housing. Obviously, this is not the contention nor intention of the Borough of Far Hills -- a community that has rested with peace of mind under the "repose" granted by the Court in this case.

POINT II

THE SETTLEMENT AGREEMENT BETWEEN THE PARTIES IS A FINAL DETERMINATION BETWEEN THE PARTIES WITH RESPECT TO ALL LITIGATED ISSUES.

The settlement agreement constitutes a final determination of the issues in the case between the parties. A judgment was not imposed by order of the Court, rather, the Borough of Far Hills on the express request entered into a settlement agreement and requested that the Court approve the settlement agreement after a compliance hearing. See 9/4/85 T21-22. When a matter is settled before the Superior Court it is not essential that a final judgment be drafted for the settlement agreement to be enforceable by a party. Such an argument is not supported in any way by the rules or by practice before the Superior Court. Indeed, it is common practice to enter into a settlement agreement by proceeding on motion for enforcement of a settlement agreement or for a motion in aid of litigant's rights. If the Borough of Har Hills actually believed that the settlement agreement was not final, then the Borough of Far Hills was obligated to inform the Court at the hearing that it did not wish to proceed with the setlement agreement, that it wished to appeal any determinations of the Court which were unacceptable to the Borough. No appeal was taken by the Borough of Far Hills nor was any objection made by the Borough of Far Hills at any time to either the conditions stated in the decision from the Bench after the compliance hearing or in the Order of Compliance subject to conditions. Indeed, the Order of Compliance was prepared by the attorney for the Borough of Far Hills, Mr. Mastro and was not objected to by the plaintiffs.

Mr. Mastro cites various cases contending that a final judgment is required to dispose of all litigated issues between the parties. None of the cases cited by Mr. Mastro in any way relate to settlement agreements. It is undisputed and nearly axiomatic that settlement agreements constitute a final disposition of all litigated issues. Indeed, there is no issue remaining as to the calculation of fair share, the zoning density, the number of units, the number of low and moderate income units to be constructed by the developer, the region, the extent of the growth area or the validity of the Far Hills ordinance. Clearly, the Borough is not contending that the zoning ordinance of Far Hills is still subject to a challenge by the plaintiffs, Ochs & Haueis, or other developers. It is also doubtful that the Borough of Far Hills believes that for the past two years its 10 acre zoning has been subject to an ongoing challenge and is still subject to a challenge by the plaintiffs in this litigation. Clearly not. The case is over. The Order of Compliance sets forth the means to carry out the requirements of the settlement and the order itelf.

Plaintiffs in this litigation entered into a settlement agreement and by the terms of that settlement agreement released any continuing claims against the defendant relating to the litigation in exchange for the settlement agreement voluntarily entered by the municipality.

Mr. Mastro cites again the sewage condition in an attempt to argue that Bedminster needs to be a party in order for the order of compliance to have disposed of all issues between the parties. This argument is without merit since the Township of Bedminster actually appeared at the compliance hearing and indicated its voluntary willingness to cooperate both with the developoer and the Borough of Far Hills, its sister community, in helping the Borough of Far Hills comply with Mt. Laurel. It was Mr. Mastro and his clients direct representation to our clients and to us that the Borough of Far Hills would cooperate with the Township of Bedminster in seeking an extension of the plant to serve the property. The settlement agreements, both the interim order and the order of compliance subject to conditions, make this voluntary cooperation clear.

Nearly all of the settlement agreements, including the compliance order in Bedminster contain conditions relating to expansion of treatment facilities or provision of allocating existing gallonage to Mt. Laurel sites. This type of condition does not in any way invalidate the finality of the settlement agreements. Such an argument would essentially allow the reopening of settlements in nearly all zoning litigation, including all of the Mt. Laurel settlements.

In the last paragraph of Point I, Mr. Mastro contends that the interim repose is not adequate to render a final settlement agreement. If Mr. Mastro was so convinced of this problem he should

have objected at the hearing before the court. He did not. In fact, the Borough benefitted for nearly two years from the interim repose. In addition, the Borough, upon compliance with the conditions will obtain the six years of repose.

Rule 4:42-2 cited by Mr. Mastro does not in any way relate to settlement agreements, but merely relates to judgment upon multiple claims.

POINT III

THE ORDER OF COMPLIANCE SUBJECT TO CONDITIONS ENTERED ON OCTOBER 4, 1985 IS THE EQUIVALENT OF A FINAL JUDGMENT UNDER THE FAIR HOUSING ACT SINCE IT IS A FINAL SETTLEMENT AGREEMENT WHICH WAS NOT APPEALED.

Mr. Mastro argues on behalf of the Borough of Far Hills that the Order of Compliance subject to conditions was not a final judgment and it is therefore possible for the Borough to transfer the case in accordance with Section 16 (a) of the Fair Housing Act and obtain a moratorium against builders remedy pursuant to Section 28 of the Fair Housing Act. This position is not supported by the case law relating to settlement agreements.

The defendant, Borough of Far Hills entered into a voluntary settlement agreement approved by the court after a contested hearing and said settlement agreement constitutes a final determination in this matter which is binding upon the parties. See 15A Am Juris 2d, Section 25 Compliance and Settlement and Bartholdi v. Dumbeky, 37 N.J. Super 418 (App.Div.1955). Indeed, there were three contested hearings in this litigation -- the first for seven weeks under Mt. Laruel I, the second for 1-1/2 weeks under Mt. Laurel II (and later submitted to Judge Serpentelli for review and approved), and the third, the compliance hearing which was contested by another developer. It is black letter law that a settlement agreement is the equivalent of a final judgment that is not appealed. Thus, contrary to the Borough's arguments, the final settlement is precisely the equivalent of a final judgment. There are no remaining issues or claims in dispute between the parties. Quite to the contrary, all issues and claims have been resolved; it is now the obligation of both parties to proceed to comply with the conditions of the settlement and Order of Compliance. Failure to comply with the conditions of the settlement and Order of Compliance could subject either party to enforcement proceedings before Superior Court.

The Borough cites R:4:42-2 relating to judgment upon multiple claims as a basis for the argument that the settlement agreement is not final. This rule is totally inapplicable and relates only to judgments, not settlement agreements, and only to judgments involving multiple claims. The two issues of repose and sewers are clearly not claims which have not been resolved but are merely conditions of a settlement agreement which the parties must fulfill.

POINT IV

THE SETTLEMENT AGREEMENT BETWEEN THE PARTIES IS THE EQUIVALENT OF A FINAL JUDGMENT AND IS NOT TRANSFERRABLE TO THE COUNCIL ON AFFORDABLE HOUSING.

Contrary to the Borough's arguments, the Borough of Far Hills has more than merely a moral responsibility to carry out the terms of the settlement agreement. It has a complete legal and contractual obligation. After multiple contested hearings the Borough of Far Hills entered into an approved settlement agreement, approved by the Governing Body of Far Hills, the Mayor of Far Hills, with a recommendation from Borough Attorney and Special Counsel and the Planning Board of Far Hills. The Borough voluntarily and at its own request proceeded before the court to seek approval of the settlement agreement. The hearing was contested by another property owner, Timber Properties, who objected to the proposed zoning amendments. Based upon the Borough's representations of its intentions to carry out the conditions of the settlement agreement, the court approved an Order of Compliance subject to conditions which were prepared by the Borough's own attorney and consented to by the Borough of Far Hills and by the plaintiff. Plaintiff has proceeded with its efforts to comply in all respects with the terms of the agreement.

The Borough contends that it is in the same position as Bernards Township and Denville and Randolph in the Mt. Laurel III decision. This argument is without merit, particularly in view of the significant fact that none of the Towns in the Mt. Laurel III decision formally approved their settlements and sought approval of the settlements before the court. Neither Denville, nor Randolph nor Bernards Township actually gave final approval to a settlement and obtained the approval from the court of the settlement in a compliance hearing. In fact, all of these municipalities retracted their approvals and proceeded with their appeals.

In this case, the developers, Far Hills Development Company, reasonably relied upon the final settlement agreement and proceeded with significant cost and expenses in connection with the site plan application, sewer expansion, drainage studies and other courses necessary to proceed with the development. The facts of this case are readily distinguishible from any of the cases transferred by the Supreme Court. Based upon the facts set forth in the affidavit of Bruce Bocina, plaintiffs are entitled to an order denying the Borough's motion for transfer and enforcing the settlement agreement. The facts in this case, at a minimum, indicate that the plaintiffs would suffer manifest injustice if the case is transferred within the meaning of Section 16A of the Fair Housing Act. In addition, the plaintiffs are entitled to the relief requested based upon common law principles and vested rights, contract enforcement and estoppel.

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POINT V

PLAINTIFFS ARE ENTITLED TO AN ORDER DIRECTING THE PLANNING BOARD TO DECLARE THE APPLICATION COMPLETE AND SCHEDULE PUBLIC HEARINGS TWICE A MONTH UNTIL THE APPLICATION IS APPROVED

Contrary to the order of the Court from the Bench on August 1, 1986, the Borough of Far Hills appears to be refusing to schedule a public hearing in connection with the site plan application. The plaintiff respectfully urges the court to obtain the confirmation from the Borough of Far Hills that it will schedule the public hearings at least two times per month until the application is complete. If the Borough refuses to confirm this arrangement, then the plaintiff respectfully urges the court to enter an order directing review of the site plan by the Special Master with approval by the court subject to conditions outlined by the Special Master and the court.

Respectfully yours,

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