Letter Brief re enforcement of final judgment

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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:

On August 1, 1986, at the hearing on defendant Borough of Far Hills' Motion to Transfer this case to the Council on Affordable Housing, the Court invited additional legal argument on the issue of the finality of the Order of Compliance Subject to Conditions which was entered on October 4, 1985. This letter brief addresses that issue.

At the compliance hearing of September 4, 1985, the Court indicated its intention to dispose of the matter at that time. The Court took the position that the compliance package as submitted would be approved subject to a series of conditions (9/4/85 T13-5*). The first condition that was imposed was an obligation on the municipality to submit to the Master, and thereafter to the Court, acceptable provisions relating to sale and resale, affirmative marketing, and monitoring of the sale and resale of Mount Laurel units (T13-12). This has not yet been accomplished. On May 13, 1985, the Borough of Far Hills adopted a revised zoning ordinance providing for low and moderate income housing in a Mount Laurel density bonus context which was included as Appendix "C" in the Master's Report of June 11, 1985 and submitted to the Court. The third condition imposed by the Court was to require the elimination of restrictions on rental of Mount Laurel units incorporated in that revised zoning amendment (T14-5). The elimination of such condition has not yet been accomplished. The fourth condition imposed by the Court was identification of indigenous need and development of a program for rehabilitation which was to be submitted to the Court no later than July 1, 1987 (T14-8). This condition has not yet been fulfilled. The fifth condition imposed by the Court was the inclusion of condominium fees as an element of the calculation of the housing cost component (T14-24). This condition has not yet been fulfilled. The sixth condition imposed by the Court was a requirement that affordable units be priced to lower income households whose incomes equal 90% of the income ceiling in each income category (T15-4). This condition has not yet been implemented.

*All references to the transcript relate to the compliance hearing of September 4, 1985.

The seventh condition was that the Borough was to acquire property for a detention basin which, among other things, would accomodate plaintiffs' proposed development (T15-9). This problem is yet to be resolved. The eighth condition requires the plaintiffs to improve Sunnybranch Road (T15-13). This condition is yet to be implemented. The ninth condition (and one of the most important) was that the Borough participate with plaintiffs in the proposed sewer plant expansion in Bedminster to accomodate the sewering of plaintiffs' project (T15-17). In the course of discussing this rather important issue, the Court indicated that in the event a problem should arise relative to adequate sewers for plaintiffs' project through the Bedminster plant, "I would expect that we would have to have this matter back before the Court (T15-24). It was anticipated that the Master would monitor the sewer issue to be certain that Bedminster was proceeding in good faith (T16-2). The Court pointed out that the most common problem in providing Mount Laurel housing was the absence of sewerage (T16-6). The Court further pointed out that,

> There couldn't (sic) come a time that perhaps an issue might be joined in terms of ordering Bedminster to do something. I don't think that that is an appropriate alternative at this point (T16-15).

The Court further pointed out that there could indeed be a problem at the State level in regard to sewers but that the Court would deal with that problem when it occurred (T16-22). Finally, an inquiry was made in regard to the granting of six years repose, in response to which the Court indicated that, "Clearly, upon compliance with these conditions, a judgment of repose can be submitted to the Court" (T18-6).

## POINT I

### A final Judgment is one that is final as to all issues and to all parties.

The test of a "final" (as opposed to "interlocutory") judgment is one in which judicial attention to all issues is complete. Thus, a final judgment is one that ends the action so that no further questions remain for future determination by the Court. An "interlocutory" judgment, on the other hand, leaves

material issues for future determination by the Court. Accordingly, if what remains to be done or decided will require consideration by the Court before the rights involved in the action can be fully and finally disposed of, the judgment is interlocutory in nature. The significant aspect of the continuing interlocutory nature of an Order is its amenability to the trial Court's control until entry of final judgment without interposition of consideration appropriate to finality. Ford v. Weisman, 188 N.J. Super. 614 (App. Div. 1983). Final judgment, on the other hand, means disposition of all litigated issues between the parties. Frantzen v. Howard, 132 N.J. Super. 226 (App. Div. 1975); Delbridge v. Jann Holding Company, 164 N.J. Super. 506 (App. Div. 1978); Ibberson v. Clark, 182 N.J. Super. 300 (App. Div. 1982).

The Order of Compliance Subject to Conditions which was entered on October 4, 1985, incorporated the conditions outlined by the Court at the compliance hearing of September 4, 1985.

Paragraph 9 of that Order provided:

> The Township of Bedminster will pursue upgrading or expansion of the joint sewer plant located in Bedminster Township and servicing Far Hills in good faith and as expeditiously as possible to a capacity of 270,000 g.p.d. said upgrading or expansion will be pursued within the guidelines of the Allan Deane decision and under the supervision of the Court appointed Special Master. Site J/K in Bedminster would be given first priority in the plant expansion and the Far Hills site second priority. The Court does hereby find and determine that the plant expansion is necessary in the public interest to accomodate Mount Laurel housing and as such is considered to be a critical part of the within Order.

Quite obviously the Order directed action by the Township of Bedminster relative to a critical factor in achieving compliance. Also quite obviously, the Township of Bedminster was not a party to the above litigation. It would appear quite elementary that the Order of Compliance could not possibly have disposed of all issues as to all parties, particularly a material and critical issue regarding sewers as to a governmental entity that was not a party to the above litigation. Thus, the issue of sewers, which the Court acknowledged as being primary in Mount Laurel cases, could not have received final disposition. Indeed, the Court anticipated that further action on its part may be required in this important area, and if not related to the Township of Bedminster, then related to the New Jersey Department of Environmental Protection.

A second critical issue which has not been finally determined between the parties is that related to repose. In this respect, paragraph 10 of the Order of Compliance provided that when there had been compliance with the preceeding nine conditions defendants would be permitted to submit a Judgment of Compliance to the Court for its review and approval. Interim repose was continued until further order by the Court. Clearly the language and the intent of paragraph 10 communicates that a "final" Judgment of Compliance which would include six years repose had yet to be submitted and approved. Paragraph 10 again clearly made reference to the continuance of "interim" repose. The amenability of the compliance order to the trial Court's control appears obvious and has all indications of the continuing interlocutory nature of that Order. See Pressler, Current New Jersey Court Rules, comment to R. 4:42-2.

## POINT II

### The Order of Compliance Subject to Conditions entered on October 4, 1985 is not a "final judgment" under the Fair Housing Act.

Although §16(a) of the Fair Housing Act indicates a sole barrier to transfer of "manifest injustice," §28 is much more specific in its definition of "final judgment." The definition becomes important since a decision whether to transfer with or without conditions encompasses a decision of whether to permit a builder's remedy. Thus, unless a final judgment providing for a builder's

remedy has already been granted to a plaintiff prior to the Fair Housing Act, it would not otherwise be available during the time interval provided in the moratorium. Under the Act "final judgment" is defined as a judgment subect to an appeal as of right for which all right to appeal is exhausted. Clearly, under the terms of §28 of the Act, the Legislature has mandated that there is no "final judgment" unless there is a judment subject to an appeal as of right. If there was any point in time where defendant Borough had an appeal as of right, presumably it would have been subsequent to the entry of the Order of Compliance Subject to Conditions. However, this raises a number of other inquiries some of which appear in the previous Point. Was the Order of Compliance a "complete adjudication" of all issues as to all parties? Certainly, the two most critical issues to be resolved, i.e., sewers and repose, were by no means anything close to being finalized. A second and equally important issue is also presented under the factual pattern outlined above. R. 4:42-2 permits a trial court to direct the entry of final judgment upon less than all of the claims as to all parties if there is an adjudication of a separable claim or upon complete adjudication all the rights and liabilities asserted as to any party. To do so, however, the trial court would have to certify that there is no just reason for delay as outlined therein. The Rule is then quite clear that in the absence of such direction and determination, any Order or other form of decision regardless of how it is couched which adjudicates less than all of the issues does not terminate the action and the Order is subject to revision at any time before entry of judgment adjudicating all the claims. It would appear that the Order of Compliance falls comfortably within the continuing interlocutory nature of its various conditions which are amenable to the trial court's control until entry of a final judgment of compliance as provided in paragraph 10 of that Order.

## POINT III

### The Order of Compliance entered on October 4, 1985 does not have that measure of finality anticipated in the Mount Laurel II decision.

It was the intent of the Supreme Court in Mount Laurel II, 92 N.J. 158 (1983) to conclude in one proceeding, with a single appeal, all questions involved. During the course of its opinion, the Supreme Court modified the role

of res judicata in Mount Laurel cases. It was the intent of the Court that judgments of compliance in Mount Laurel cases should provide that measure of finality suggested in the Municipal Land Use Law requiring re-examination every six years. Thus, compliance judgment in Mount Laurel cases have res judicata effect for a period of six years, the period to begin with the entry of the judgment by the trial court.

Measured against the above standard, the Order of Compliance entered on October 4, 1985 falls far short of what the Supreme Court anticipated in Mount Laurel II. Paragraph 10 of the Order was quite clear in that a judgment of compliance would not be considered by the Court until compliance with the previous nine conditions. Nor would it have been wise to do otherwise since the previous nine conditions included appropriate resolution of sanitary sewer problems requiring cooperation and implementation with and through neighboring Bedminster Township which is not a party to the within litigation. Indeed, paragraph nine of the compliance order so designates the plant expansion in Bedminster Township to be necessary in the public interest to accomodate Mount Laurel housing and as such a critical part of that Order.

## POINT IV

### Anything short of a final judgment of compliance with six years repose is transferable to the Council on Affordable Housing.

Plaintiffs argue that defendant Borough is attempting to renounce an "agreement" which it entered into in violation of its "moral" responsibility. One may question as to its agreement with whom? And again, its moral responsibility to whom? In The Hills the Supreme Court indicated that partial settlements were all provisional and the interests of developers were secondary to the unrepresented poor. It was the benefit to be afforded lower income households through a statewide approach that was the key to a solution to the affordable housing crisis. The losses to be anticipated by plaintiffs in this case are simply not of constitutional dimension and constitute a risk to which builders are regularly exposed in similar pursuits. When comparing plaintiffs to what occurred in the various cases considered in The Hills, their problems appear to be not much different nor the economic impact any more severe. In Cranbury, for example,

litigation commenced prior to Mount Laurel I. In Denville and Randolph actions were commenced in 1978 and after a substantial period of trial a tentative settlement was reached. Thereafter, both municipalities changed their positions in regard to the settlement and decided not to abide thereby. In Bernards Township, clearly, the developer expended substantial sums and entered into numerous contractual arrangements in reliance upon a settlement. In Denville, Randolph, Holmdel Township, Warren Township, Franklin Township, Monroe Township and Piscataway Township all included some form of judgment entitling plaintiffs to builders' remedies. Undoubtedly all relied in good faith upon those judgments and presumably all could have been certified for purposes of appeal pursuant to R. 4:42-2. All however were determined to be interlocutory and accordingly, transferred to the Council.

The only distinction between plaintiffs in this case and the plaintiffs in The Hills is that a compliance hearing was held. During the course of the compliance hearing many problems were explored, conditions imposed and a mechanism established for addressing problems to be resolved before compliance could be achieved. The end result of that process was the submission by defendants of a judgment of compliance with repose which would then attain that level of finality that the Supreme Court anticipated.

In summary, then, it has long been the law that res judicata is applicable only when a final judgment is rendered and the doctrine of collateral estoppel would apply whenever an action is sufficiently firm to be accorded conclusive effect. It is our opinion that the circumstances of Far Hills do not fall within the sweep of the role of res judicata as modified by the Supreme Court in Mount Laurel II (at page 291) in that the measure of finality outlined therein has not yet been achieved. At best, plaintiffs can argue the position of collateral estoppel, however, that doctrine is not mandated by constitution or statute and should not be applied if there are sufficient countervailing interests. In The Hills, (slip op., p. 83), the Supreme Court concluded that under the Fair Housing Act there were countervailing interests in the form of the Council on Affordable Housing's need for flexibility and the State's need for uniformity. Accordingly, it is urged that this case be transferred to the Council.

Respectfully submitted,

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cc: Herbert A. Vogel, Esq.
Robert K. Hornby, Esq.