Crestmont Hills, Inc. v. Hillsborough Twp 1-15-(1986)

Transcript of oral argument of above matter

75 pgs

HI0000075

LAW OFFICES
FRANK N. YURASKO
63 ROUTE 206 SOUTH
P.O. BOX 1041
SOMERVILLE, NEW JERSEY 08876

MEMBER N.J.* AND FLA. BAR
CERTIFIED CIVIL TRIAL ATTORNEY*

AREA CODE 201
231-0220

FILE NO.

January 13, 1986

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

Re: Crestmont Hills, Inc. vs. Hillsborough Township
Docket No. L-71562-84
Hiller, et als vs. Hillsborough Township
Docket No. L-10381-84 PW
Stein vs. Hillsborough Township

Dear Ms. McLaughlin:

Enclosed please find 5 copies of transcript of oral argument with regard to the above matter heard before Judge Serpentelli on November 4, 1985. I would appreciate your filing and attaching same as Exhibit E to my Certification in Support of Notice of Motion for Leave to Appeal an Interlocutory Order forwarded to the Appellate Division on or about December 18, 1985.

Very truly yours,

Frank N. Yurasko

FNY/acm
Enclosures

cc: Honorable Eugene D. Serpentelli
Raymond R. Trombadore, Esq.
Ronald L. Shimanowitz, Esq.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. L-10381-85PW

HENRY STEIN, Plaintiff, v. HILLSBOROUGH TOWNSHIP, a Municipal Corporation of the State of New Jersey located in Somerset County, Defendant.	STENOGRAPHIC TRANSCRIPT OF PROCEEDING
CRESTMONT HILLS, INC., a New Jersey Corporation, and HENRY STEIN, Plaintiffs, v. TOWNSHIP OF HILLSBOROUGH, a Municipal Corporation of the State of New Jersey, located in Somerset County, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION-SOMERSET/OCEAN COUNTIES DOCKET NO. L-71562-84
ANATOL HILLER, GERALD MILLER and DAVID L. RAVICH, Plaintiffs, v. TOWNSHIP OF HILLSBOROUGH, a Municipal Corporation of the State of New Jersey, located in Somerset County, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION-SOMERSET/OCEAN COUNTIES DOCKET NO. L-10381-85PW

Place: Ocean County Courthouse
Toms River, New Jersey

Date: November 4, 1985

B E F O R E:

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

Judith R. Mazinke, C.S.R.

T R A N S C R I P T O R D E R E D B Y:

FRANK YURASKO, ESQ.

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

RAYMOND TROMBADORE, ESQ.,
Attorney for the Plaintiff Henry Stein and
Crestmont Hills, Inc.

HUTT, BERKOW & JANKOWSKI, ESQS.,
Attorneys for the Defendants Hiller, Miller
and Ravich
BY: STEWART M. HUTT, ESQ.

FRANK N. YURASKO, ESQ.
Attorney for the Defendant Township of Hillsborough.

THE COURT: All right. This is a motion by the plaintiff, Crestmont to compel preparation of a compliance ordinance and a motion by the Township to transfer this case to the Council on affordable housing, and I have read all of the moving papers and replies.

I think Mr. Trombadore's motion was filed first, but it really -- in terms of the ultimate issue, I suppose we should argue the transfer issue first.

All right, Mr. Yurasko.

MR. YURASKO: If it please the Court, Frank Yurasko appearing on behalf of the Township of Hillsborough.

This is the return date of a transfer of the Township of Hillsborough under Mt. Laurel litigation to the Housing Council.

One issue we have is really what meaning Section 16 of the Fair Housing Act has.

At this point in time virtually all of the matters which have sought transfer have been denied, at least three out of four of those.

I recognize, of course, the unfair irony with regard to some of those matters in that they were extremely old cases, but the situation and the

cases that were granted transfer, one at least dealt with the bad faith situation, I believe, concerning the plaintiffs, and another one was one that was just outside the 60-day period of time.

We have a situation wherein delay, which is one of the factors the Court has given its major consideration to, is really a delay that is built into the Act. It is a delay that is built into the concept of a legislative process to handle these matters before the Fair Housing Council.

I don't think it is proper for the Court to consider that area and that aspect of delay with regard to making a determination.

It's obvious that ipso facto they transfer a case from this Court to the Housing Council is of necessity going to consider some additional period. If it settles, the time could be as little as six months. If it doesn't, that could be 18 months, probably in the area of two years, but that is the given -- that is what has been given to us by the legislature, and outside of other delay, I think that would not be proper for the Court to give consideration to that area of delay that is inherent in the Act.

Now, the test that the legislature has set

up for the Court is one of manifest injustice, and that test is a test that the legislature knew quite well. There was a reason that the legislature put that test into the decision, and that's because it had already had its hand slapped a couple of times by the Supreme Court in 1981 and 1983.

It had recognized that specific language which came out of two cases: One was the case of Gibbons vs. Gibbons. It was a divorce case, but that's of no moment. It was 86 N.J. 515, a 1981 Supreme Court case and the Court in that case said -- the test said it's a final inquiry and it said at page 523 of their opinion, "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."

It's a deleterious and irrevocable aspect that are the essence and elements of the test, and they are to be applied by the party who claims that

they are suffering a manifest injustice.

Now, that case, that decision was cited again by the Supreme Court and utilized by our New Jersey Supreme Court in 1983 in the case of the State Department of Environmental Protection versus Ventron at 94 N. J. 473.

In that case the Court said at page 498: "Conversely, when the legislature has clearly indicated that a statute should be given retroactive effect, the Courts will give it that effect unless it will violate the Constitution or result in a manifest injustice."

Our legislature was clearly concerned, in passing this Act, about those aspects, and, in fact, in one version it required the Attorney General to take what was a potentially unconstitutional aspect of the Act and immediately file a declaratory judgment action to determine its validity and constitutionality.

That section was removed as was the section that it related to, but the Court -- but the legislature did put in the test of manifest injustice relating specifically to the test as it had been applied against their prior legislations in these other matters.

Now, we have to look at that legislative history to understand what they were trying to effectuate, because the first version of the Act or the Bill as it moved along, the Senate Bill 246 contained a number of items for the consideration by the Court of transfer.

Some of these are presently being utilized by this Court in hearing these motions, and I think incorrectly so.

Those standards as set forth in the Bill that was enacted included the age of the case, the amount of discovery or other pretrial procedures that have taken place, the likely date of trial, the likely date by which administrative mediation and review can be completed, and whether the transfer is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing. That was dropped by the legislature.

They eliminated that list, and they subsequently put in Bill 2334, a statement which has been cited to this Court before, and that is, a statement in which they included language that said that a court shall be required, unless a court determines that a transfer of the case -- and this

is the important language -- is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing.

They retained that language and that language should be binding on this Court if that had, in fact, been retained in the final version of the Act, but it was not.

There was substituted language put in and that was eliminated.

So, all these factors were eliminated through legislative history, through legislative determination that they were not to be the test.

What was to be the test was the one they knew they were stuck with, the one they say the cases had to be stuck with: Manifest injustice with regard to this retroactive application of the law.

THE COURT: Why were they stuck with that at all? Why didn't they just say, no denials of transfer? Everybody transferred.

MR. YURASKO: Because they recognized that there were cases -- first of all, for cases under 60 days, they did say that. Cases over 60 days they recognized that there would be cases where it would amount to a manifest injustice under the test

set forth in these other cases, and if they did not provide for that, they felt that their Bill was potential or their Act was potentially to be held unconstitutional.

This example of some of the factors utilized by this Court in some of the older cases, there are cases, as I will talk about later, where there are hundreds, if not thousands of pages of transcript with hundreds, if not thousands of exhibits put in, with months of trial that have taken place.

So that might be a test with regard to manifest injustice in those instances.

THE COURT: So that to the extent that there have been positions taken by attorneys or more frequently by public officials that the legislature intended that all cases should be transferred, you would disagree with that because you are saying if that was the case, it would be unconstitutional?

MR. YURASKO: I am saying that the legislature felt it would be, and I felt it would be that if they were to be transferred, that manifest injustice is not the test.

I think the Court could have read into that legislation as they read into this other legislation a test of manifest injustice.

I think that the legislature did not have to say that, and the Court would, of necessity, have read in manifest injustice.

THE COURT: As a matter of fact, it's been suggested that Section B of the Act which deals with cases that are less than 60 days old is unconstitutional because of its failure to provide for exceptions of manifest injustice.

In other words, if a court has inherent power to cure manifest injustice, as you just said and as I agree with, then it would be unconstitutional to deny the Court that right, even on cases that are not 60 days old, because the principle that you are dealing with is that the legislature cannot, by statute, limit the inherent powers of the judiciary under the constitution.

MR. YURASKO: That's based on the test of reliance and estoppel. It's based on the test of reliance, disposition and the like, and if the appropriate case, whether it's 60 days old or six years old stand in that stead, I would think that it could well be argued that the test of manifest injustice must apply in order that that section not be held unconstitutional. But I am not dealing with that section. It doesn't deal with my client or my

position.

THE COURT: No, but what it did is highlight what you are saying about the test of manifest injustice.

The legislature has recognized that it could not take that power away from the judiciary.

The fact that it may not be in a Section B case is irrelevant in this case.

Judge Skillman, by the way, in his now released opinion touches upon that issue.

MR. YURASKO: Yes. In fact, I think that on page 42 of his opinion deals with these very factors in his analysis. He does a legislative analysis in his opinion that deals with looking through these various changes that occurred in the Act and goes back through those, as I did.

THE COURT: The next change to occur was a changing of the wording.

I am not going to necessarily agree with you when you say these standards, because I am not ready to accept the proposition that the only standard is manifest injustice, although Judge Skillman apparently does.

But certainly there was a removal of the words about expediting and facilitating and a

replacement of the term "manifest injustice."

MR. YURASKO: I think there was a recognition in that by the legislature that the delay is inherent in the process, and if that were to have been the test, then no transfer would have been able to be permitted under the terminology.

THE COURT: I know that you have had some contact in this case with the Senate Minority Council, because he keeps calling here about the status of your case, and I wonder whether you have discussed with him -- this is obviously hearsay in any context -- but nonetheless, whether he had any insight on the fact that on the same day that the Bill was amended to remove the expediting and facilitating language and put in manifest injustice, that the accompanying statement which explains the amendment says that they are not removing it, they are putting both in.

MR. YURASKO: I have had no insight. I have had the benefit of his comments which were to the effect that he anticipated that with regard to the pending appeal or proposed appeal by ten municipalities, have thus far been denied and that they are grouping together and that the Senate would be issuing an amicus curiae brief to the point that

the legislature had put in a test of manifest injustice as it related specifically to their knowledge concerning these two specific cases, and that that was the reason that that test was put forward and that that was their only criteria.

Now, as to whether that is what the brief will say, I have not utilized that in my comment here, because obviously it's again not only triple hearsay as to what they say is going to be done and what will actually come to paper may be two different things.

THE COURT: The Senate Majority statement appended to the last version of the Bill says that the Assembly Committee amendments would: No. 5, establish that a court, in determining whether the transfer pending lawsuits to the Council must consider whether or not a manifest injustice to a party to a suit would result and not just whether or not the provision of low and moderate income housing would be expedited by transfer.

Now, with that kind of language, one would have expected that manifest injustice would have just been added into what was there.

MR. YURASKO: But it was not.

THE COURT: And instead of, they bracketed

out the expediting and facilitating and put in manifest injustice.

It seems inconsistent with the statement.

MR. YURASKO: Whether it's inconsistent with the statement or not, which it may well be, if you read that it's inconsistent, that there is no Section 16A in the back. I mean, Section 16A and B. But the Act is the Act and the Act that we have is an Act that says that the one test is the test of manifest injustice, and this other concept, whether at some point or other, they intended to include it and then decided to delete it, obviously they did intend to delete it, and, in fact, did delete it and did so knowingly. I have seen no amendment proposed since then or pending presently to put it back in if, in fact, it was intended to be so.

THE COURT: Well, just so we are clear: The Act does not say the one test is manifest injustice.

MR. YURASKO: Yes, sir.

THE COURT: That is your interpretation.

MR. YURASKO: Yes.

THE COURT: It says in determining whether or not to transfer, the court shall consider whether

or not the transfer would result in manifest injustice to any party to the litigation.

Now, that says in considering whether or not to transfer, you must consider this factor.

MR. YURASKO: Yes, sir.

THE COURT: It doesn't say only this factor. But for purposes of this argument, I am satisfied that we can deal with it on the basis you have hypothicated.

MR. YURASKO: Now, one of the considerations of the Court with regard to the issue of delay is the delay of the production of housing for the poor or low and moderate income housing.

There are units, of course, already under construction. There are, as reported, at least in one newspaper, I think the Courier News reported at one point that there were 7500 units in essence that were at some status of approval, and the pipeline, so to speak, and that that would amount to 19,542 or close to 20,000 additional market units coming on line in those municipalities.

That was not just based on a clear four to one, it was based on facts.

But the point I am making --

THE COURT: It's a nice newspaper, but I

don't know where they got those statistics. They are not available to the Court. I mean, it's a very fine paper, but I know of no such statistics unless some attorney or someone gave them to them.

MR. YURASKO: There are cases that have been settled in this Court. There have been cases that have been settled in the other regional courts that deal with this topic. Those settlements from -- all the way from Bedminster through -- where housing is, in fact, in place, the five municipalities that settled in this Court: Montgomery, Bridgewater, Plainsboro, a couple of others that were settled at the time even after this Act was passed, it came before this Court and had their compliance packages approved and other municipalities as well, there are units for the moderate and low income housing that are at some point in process at this point in time.

Now, I think that Hillsborough has a right to avail itself of a new legislative process that has been established by the legislature, that under the Doctrine of Equal Protection of the Laws, we have a right to look to that.

We would know -- if the matter were turned around and it was a question of taking away the

right to a court hearing, one would not want to see that occur with regard to a situation.

We have a situation where, if you look at the way Mt. Laurel progresses through the courts, it is still a time-consuming process.

It is still a process where this Court and the other judges assigned to this matter had to get their feet wet initially, had to start somewhere with their first cases as counsel will have to start with its first cases.

It is a matter where it's never been deemed to be a matter with no plenary hearing, with no ultimate determination that's going to be on a clear motion basis, in an expeditious fashion that would eliminate constitutional or other rights of the parties in court, nor should it be such a process to eliminate those rights in this case of a municipality in the legislative process.

THE COURT: There have been cases that have never had a plenary hearing except to have the Court approve a compliance hearing.

MR.YURASKO: Yes, but that's the same process that can occur in the Legislative Housing Council. It will simply have settlements occur much like in the way the Court has.

Hillsborough has not been one of those bad-faith municipalities, and I have sat here in this Court. I have heard stories, defenses with regard to the actions of other municipalities.

You have had cases here that relate back almost ten years in municipalities that have fought Mt. Laurel I, fought Mt. Laurel II. That's not Hillsborough, and we are going to be -- if we lose this motion, what we are going to have happen: We are going to be punished for our good faith in meeting Mt. Laurel I.

We did meet Mt. Laurel I, and in Mt. Laurel I we built a lot of 20,000 and 28,000 units that were occupied by people of low and moderate income.

THE COURT: How can one be punished by abiding by the law?

MR. YURASKO: If people don't abide by the law, and get the same result that the same people who abide by the law get, then relatively speaking, it's punishment by virtue of them not having a differential treatment.

THE COURT: If you are talking about the same result, ten out of the 11 cases I have heard have been denied transfer --

MR. YURASKO: Yes, sir.

THE COURT: -- and the one that was granted was on some very particular facts. So, you would be getting the same result and be treated with respect to the particular facts of your case and receive credit if you deserve credit for compliance, and, as a matter of fact, you have already agreed on those credits.

Secondly, the Supreme Court says that there will be inequities in this process and that that is not a basis for excusing compliance. I mean, the opinion says that expressly.

It says some towns may get off better than other towns, but that doesn't excuse compliance.

So, I am not too sure, while certainly it's commendable that the town has done its job while others have not, that that is any basis for excusing you for not doing it now, and it is certainly not at all related to the question of transfer because you are either going to do your job under the law here or you are going to do it before the Council.

It's just a question of where you comply with the law.

MR. YURASKO: But I think that -- I think the Courts have given consideration in the past with regard to these motions on the good faith of the

municipality.

THE COURT: No, that's incorrect. I have, in each case, rejected arguments of bad faith.

MR. YURASKO: What about bad faith with regard to the plaintiffs? Has the Court dealt with that in the Scotch Plains case?

THE COURT: But that had nothing to do with transfer.

I dismissed the complaint because of non-compliance with Mt. Laurel. But in the transfer context, in every case I have said I will not consider bad faith or conduct even though it may have been there.

MR. YURASKO: Right.

THE COURT: I chose not to do it, although maybe it's appropriate to do it.

MR. YURASKO: In Hillsborough's case it has been in a good-faith situation, and the Court may not deem that to be a relevant consideration.

I think the Township is entitled to the uniformity that will be given and granted by the Council.

Now, the Court can say, well, we have uniformity here, and that may well be to some extent. Council is going to be one Council. There

is going to be nine people. They are going to have to act as one. It's going to be one determination.

We have here, as it is presently set up, three judges, three regions, and to the extent that the judges confer among themselves, that's not a proper judicial function.

You wind up theoretically each region should be operating on the basis of what each judge in each region makes as a determination. So, to some extent there will be differences as your Court has just indicated, Judge Skillman may have reached a different decision in regard to the Act than you might have in his opinion, and those are some of the differences that might occur. That's only a sampling.

There will be undoubtedly more basic differences that theoretically at least would not occur to a council situation.

THE COURT: There have been two and a half years there has been no substantial difference, and what makes you think that nine people are going to agree more readily than three?

As a matter of fact, the composition of the Council is by law structured so that there are divergent interests which is not true.

MR. YURASKO: That's an advantage.

THE COURT: Which is not true under three Mt. Laurel judges necessarily.

MR. YURASKO: That may be an advantage to the overall process. It may be difficult to get a particular decision at a particular moment in time, but it may structure for great uniformity because the uniformity is going to be a result of those divergent opinions culminating in an acceptable, agreeable decision for all of those parties who make up that council.

THE COURT: Isn't that what happens in the three-judge situation? I read Judge Skillman's decision. I say, yes, that sounds pretty good. That sounds right. That sounds right. On this point maybe I disagree, and I write something and Judge Skillman says, yes, maybe on that point I will change my mind. That just happened, by the way, and I modified the methodology I used to come a little closer to what Judge Skillman did with respect to present need, but over two and a half years we have gotten precisely what the Supreme Court thought they would get, and that's continuity and consistency.

MR. YURASKO: Let's nip the argument the

other way: Let's suppose that your position is, or the Court's feeling as may have been inherently expressed in one of your tests, is that the results in the Housing Council may be a different result. Assume that the results of the Housing Council would be less acceptable to the process than you perceive the results in the Court to be.

THE COURT: No. I won't even assume that, because I don't consider that to be relative at all to the transfer.

The legislature set up a method. It has -- and as long as that method is constitutional, the Court has no right to interfere --

MR. YURASKO: Right.

THE COURT: -- with the appropriateness of the decisions of the Council.

MR. YURASKO: And therefore, the test of uniformity on that basis would not really play one way or the other.

In other words, the fact of whether it was more uniform or less uniform would have no moment than the Court.

THE COURT: I agree with you. You raised it. I didn't raise it.

MR. YURASKO: I understand.

Well, you have raised it as one of your 15 topics, one of your 15 areas, and I am going to get to those briefly.

THE COURT: No. Let's get that clear now.

Your brief goes through those 15 factors as though I have utilized them.

I have made it amply clear in every case that I didn't utilize them all or, in fact, even most of them.

All I have done in each case is to say that these are factors suggested by some counsel in some cases that I have made a composite of them.

I have suggested, without expressly saying, that I don't agree with some of them. I have specifically said that I am not using some of them, including the conduct of the parties, and so to list them and say these are Judge Serpentelli's factors is completely inappropriate. They are not. They are factors that counsel uses, not me, and I have chosen to use some of them and not to use others.

So, I think that should be clear.

MR. YURASKO: What about -- I assume then that the one that is cited as the likelihood that the Council will reach a different decision than that

of the Court would not be one that the Court would take into consideration.

THE COURT: That's right.

MR. YURASKO: Because I would deem that to be an improper factor.

THE COURT: I would reject that factor.

MR. YURASKO: I would assume likewise that the Court would reject the factor, even though it's been mentioned on occasion, that the plaintiff's, the failure of the -- the loss of the plaintiff's right to participate in the process before the Council is likewise an improper factor to be considered by the Court since it is inherent in the way the legislature chose to set up the process, just as before the Court, the right to an ex parte order under the rules is a process that was set up with regard to conduct of certain types of matters before the Court.

THE COURT: Well, in a particular case, not in this case, that could be a factor in the right set of circumstances, or at least relate to a factor.

For instance, if you had a case that was 12 years old and you are litigating it for 12 years, and that case was transferred, and the Urban League

could not participate, that might be a factor to be considered, but it isn't in this case.

MR. YURASKO: With regard to the delay aspect, one of the considerations has been the length of time.

If we assume that the matter was to go before the Council and the settlement was reached, then we would be comparing apples to apples.

If we looked at the time to achieve a settlement in court versus the time to achieve a settlement in the Council.

On the other hand, if the matter before the Court requires a trial with respect to the matter as was indicated potentially in the court order previously entered, then in that fact -- in that case there would be a period of time that would be involved before the Court as there would be a period of time involved before the Council.

So that that would not represent a serious factor of delay with regard to a transfer to the Council.

The Fair Housing Act seeks to give the same relief, obtain the same relief for the poor and moderate income families. It has the same goals, and it is merely a legislative versus a

judicial treatment, and there is a preference that our own courts -- that's been set forth in the findings of the Act in its first sections.

In the Supreme Court opinion in Mt. Laurel II, it is quite clear that the Court has stated that there is a preference for legislative handling of these zoning matters, and that it is not for the judiciary to step in unless that avenue is not available and it, in fact, invites, in essence, the legislature to do exactly what the legislature did here which is to create a legislative mode.

Now, I think there is no manifest injustice insofar as the plaintiffs here are concerned.

We do not have some situation with regard to the land that would create a horrible possibility insofar as this fantastic loss with regard to the plaintiffs. We do not have a showing of that type, and I dare say such a showing could not be made.

The good faith of the Township in its processing up to this point in time, it's attempting to achieve a settlement with regard to its Mt. Laurel obligation, I think is something that -- whether the Court wants to give it consideration or not, at least it demonstrates the municipality's efforts, that the municipality now desires to avail

itself of a different route that is available, does not say that it will not achieve a settlement in that route to the same extent and for the same benefit of low and moderate income families.

What it has achieved in the other route, however, is something that is most disturbing, and the disturbing part is something that is a short shift in all the discussions about Mt. Laurel, and that is, the builder's remedy.

I have got to say that my daughter, who is in eleventh grade is doing a paper on Mt. Laurel, and we started looking at the numbers. One of the things that she immediately hit on, and she is coming from a completely different perspective than myself, was that if you talk about a builder's remedy and you talk about bonus densities and you talk about extra houses, that those four-for-one extra houses are going to put an awful lot of extra houses in the given economy in order to achieve those low and moderate income houses. By adding those extra middle income houses to the extent of four times the number of Mt. Laurel housing, we have a situation where that has a fantastic impact. It impacts traffic. It impacts education. It impacts numerous things with regard to municipalities,

and that's why a town like Bernardsville, which Mr. Manchester argued in his motion for a transfer, that happens to be the town where I live.

That happens to be the town that my daughter is most aware of. That is the town that chose to attempt to build Mt. Laurel housing without providing the extra houses, and those extra four-for-one houses are what the real impact is.

For Hillsborough, which has had a history, and the Court has copies of the previous Court Decisions that we have taken up to the Appellate Division and what have you with regard to traffic problems, Hillsborough has a history of problems that are generated by increased density for construction and part of that is to add a couple thousand new units, will have a horrendous impact on traffic.

We have fought cases. In fact, Mr. Trombadore's client here in this matter is a client whose predecessor in title we successfully fought in court in order to keep their density low, and we kept their density, I think it was one unit to the acre I think it was in that instance.

THE COURT: I don't know where you are going with this, because presumably if you intend to comply

with Mt. Laurel, you can comply with Mt. Laurel by other than four-to-one densities even now, and you can do that here or before the Council except for the possible exposure to a builder's remedy only to Mr. Trombadore, because Mr. Hutt's client is barred from the builder's remedy, as I understand it, under the existing order.

So, it could only be Mr. Trombadore, and as to that, you have the question of the moratorium on the remedy which, of course, raises constitutional issues as pointed out by Judge Skillman.

If it is an invalid bar, it's an invalid bar before the Housing Council, and so you would have no different position in your conformance before the Housing Council as to the method of conformance as opposed to the number than you would here.

There is no difference at all.

MR. YURASKO: Well, one of the differences is --

THE COURT: And by the way, if the moratorium is valid, then Mr. Trombadore is barred before the Housing Council if it is before the moratorium.

MR. YURASKO: We also are dealing here with an overall area that encompasses more than merely the plaintiff's land, and it attributes to that

potential increased density.

I think the Township has had to step back when it took a look at the opportunity to go before the Housing Council and addressed itself as to where it was going to go.

Now, no -- and I will have to frankly say to the Court, I am sure the question is therefore the Court to ask: What is the Township going to do if we want to proceed with the compliance package?

What is the Township's position going to be with regard to attempting to escape from the prior order and have a trial as to the various issues? I can't answer that.

This has been an issue before the Township Committee.

We are unfortunately right here on the eve of Election Day, which is tomorrow, charges constantly in every instance when we have court litigation fly back and forth, positions get taken, and it's impossible to say, until the smoke settles, until this decision is given, whether it's today or whether it's reserved and given later, but when this decision is given, the municipality has to then make a determination concerning it. That's when that issue is going to have to be heard in the coolness

and calmness following what has been a political campaign, much of which has flown around this particular topic and also around a concept that was only fleeting insofar as this entire matter was concerned, the matter concerning condemnation which was an issue raised and abandoned more than, well, approximately a year ago or back in March or something of that order or magnitude, and yet that has reared its ugly head so to speak.

So, it isn't until that smoke completely settles that obviously the municipality is going to be in a position to make its determination.

I just want to touch basically briefly, I understand these are not the factors you consider, but they seem to be factors mentioned, and since they are going to be most likely mentioned, I would like to put my two cents in mentioning how I see them flow as to whether or not they have impact on the Court's decision or the Court utilizes them or not. I think to the extent that they have been raised gives the appearance at least that they are utilized, and I think they should be addressed.

I think that the age of the case, which is one that we have here, is a young case.

We have a case that is not so complex that

it can't be handled by the Housing Council. It is not one that is at a stage of litigation which is the third factor -- it's still at an early stage of litigation. It's not an extensive discovery, extensive transcript or hearings or trials, and some of these cases, two or three trials down the road that have occurred.

Some of them have had interim appeals been denied and what have you. That is not this case.

Previous determinations. There have been really no previous determinations. There has been the one order that's entered.

The Township's position is it has the right to entertain an escape clause in that order.

The order is drafted. Again, I have to accept the fact that it was drafted by the Council. Maybe it's an order that is drafted a little differently than I might have drafted it, but that's neither here nor there.

It's the Township's position that we have the right to escape from the Township Committee on an order entered, based on the escape clause.

With regard to the factor of relative degree of expertise, obviously the Court has a good deal of expertise.

The Court has honed in very carefully and very sharply over a period of time on this topic and has probably more expertise than any group of people could in the same period of time.

However, that is not to be in my estimation the test, nor can it be the test as to whether there is going to be more expertise in the Council. That's not an issue. I think that is an improper situation.

If the Council was going to be made up of supermen that were fantastic and limited only their entire life to this, that would not be relevant either. That is not the test, because the legislature chose to make it up the way they made it up. That's what I think we, as a defendant, and the Court, as the Court is stuck with.

The evidential record. It is not a case where there is a large evidential record. I think that should play no part.

I think what we discussed earlier, the likelihood that the Council will reach a different decision than the Court.

The question as to harm and the result of delay. The harm and result of delay here is no harm greater than the delay that is envisioned by the

very legislative process. There is no additional harm than that harm which is a built-in delay, and I don't think it's appropriate for the Court to consider that area of delay as being a delay that would give harm worthy of denying the motion.

The loss of the land. That admittedly is not a factor here, at least as far as I read the opposition papers.

In fact, looking at it, if we look at it and look at the factor that a good portion of the land was acquired when it was one unit to the acre, there obviously is going to be somewhat of a windfall or some benefit to the plaintiffs that put them in a position where, if anything, they can hold off and wait a substantial period of time, it would seem to me without having some burden.

To expedite the creation of low and moderate housing. Again, I don't think that is a factor that we discussed that was taken out of the Act.

THE COURT: Let's just stop at that one.

MR. YURASKO: Yes, sir.

THE COURT: You really, truly believe that because that was deleted, that that is not a factor? Do you accept the proposition that the Council is a representative of the class?

MR. YURASKO: I do represent that it is a class. I think it's reversely stated here. I think it's incorrectly stated, and I think the legislature recognized that a transfer to the Council is not in any circumstance likely to expedite the creation of the housing.

The question in my mind is: Will it unduly delay? That's the question.

The other side of the coin: Will it unduly delay? Not will it expedite? Because it's not going to expedite.

THE COURT: I will accept it on your ground, and so if the Court makes a finding in this case, and I understand you may argue with the hypothesis, but if I find in this case that this case can be completed in six months, and as you indicated, that the housing process might take two years, you mean to tell me that is not a relevant consideration?

MR. YURASKO: It won't take six months. It wouldn't take longer than six months if the matter was resolved before the Housing Council in a settled fashion, and it could take longer than six months before this Court, if it went for trial with regard to the issues.

THE COURT: I don't know how you can say that.

If the Housing Council has seven months from January 1st to adopt its criteria, you won't even get -- you have got 15 months for mediation for the transfer.

MR. YURASKO: But this is where I see that the Court has an incorrect analysis, in my opinion, in that what the Court is doing is saying that the inherent delay that is inherent in the way the legislative process is made is going to be a factor for consideration, and I say that if the legislative determination of process takes a certain period of time "x," that that is the limit and that you should only be looking beyond what that takes.

If it takes unduly beyond the legislative process, and the fact that it's going to be longer is no different than when people came to the court for the first time and the NAACP and the various groups come in and they say, we come in and we want an answer now based on Mt. Laurel II.

In different cases it's taken a year for certain aspects to be resolved.

Some of the motions have taken some period of time. Some areas of the cases have had to be stretched out, and the point is: Some of these people have been sitting here a year, two years later and not yet with the decision.

Now, that's not the fault of the Court, but it's built in inherently to the court system to the way that's brought in here.

THE COURT: No, I don't agree with it. Part of it is the fault of the Court because we have been understaffed to handle them and that can be cured easily and may be cured easily.

But I think we got away from my question. I understand your argument, that the legislature or the legislation anticipates or has built-in delay, and I accept that.

What we are going to was beyond that, and that is whether that built-in delay is not a factor to be considered when one considers depriving the rights of lower income households, and I take it your answer is no?

MR. YURASKO: My answer is an absolute no, and the reason it's no: Because if that were so, it would not justify transferring any case whatsoever.

THE COURT: You really believe that?

MR. YURASKO: This area of Section 16 would be a fallacy.

THE COURT: Well, that tells me something about Section 16, but I mean, there have been cases

which have been transferred in which Judge Skillman said the relative period of delay in providing affordable housing is about equal, and therefore, I transfer it.

I did the same thing in Scotch Plains.

But Judge Skillman's denial of the three cases said, wait a minute. We are six months away or less from providing affordable housing, and therefore I am not transferring.

To some extent I had said the same thing in the other ten cases. Why? Because of the obvious conclusion that as you said in the beginning, there are cases -- there is housing in the pipeline, and these cases will put more housing in the pipeline, and notwithstanding that, you say, well, I shouldn't consider it.

MR. YURASKO: If the Township had taken a position of fighting this, these Mt. Laurel cases, hammer and tooth, we would be standing here at a juncture in which we would probably still have substantial trial matters to be handled.

THE COURT: But you didn't.

MR. YURASKO: In which then we would be in a position of saying, look, Judge, it's going to take as long here as it would there, and, therefore,

you would be in a position to transfer us when we were in essence in a bad-faith position vis-a-vis Mt. Laurel requirements. We stand here in a good-faith position having come along, now wanting to utilize an avenue that's been open to us by the legislature, and we are going to be told in essence, no, you can't utilize that because the legislature went ahead and created a system that had some delay in it, and we deem that delay to be too long, that extra year, that extra 11 months of delay is such that, gee, if the legislature had squeezed the process a little bit, only gave them two months to organize and a month to appoint these people, if they had done it right away, boy, we would send you right over there because it would be the same six months. Is that the answer?

THE COURT: No. Suppose you try this scenario: You voluntarily complied and abided by the law, and the legislature did nothing. Over the period of two years and a half that have expired, the Court has moved your cases and many other cases to the point where they are just months, a month to six months away from resolution, and resolution meaning the opportunity to build low cost housing. That's the scenario that has occurred.

To say, well, we are being punished because we were good guys is really quite irrelevant. You are good guys, but you are good guys only in the sense that you complied with the law, good guys compared to bad guys, I suppose.

MR. YURASKO: But the bad guys get off better.

THE COURT: Well, we have been through that, and I think we have answered the question of inequities and all those sort of things.

It's not the question that there is inherent delay. There is the question of what has occurred before, and the point of the matter is: Had the legislature acted in June of 1983 and created this, it would have been all over. There would probably never have been an AMG v. Warren, but it didn't. It waited two and a half years, and in the interim a lot of things have happened.

A lot of rights have vested in those lower income people in a lot of municipalities.

MR. YURASKO: If it was probably the first time around, we would not be here ten years around where the case of Hillsborough --

THE COURT: I don't think that has relevance to the motion.

The question here is manifest injustice, as you have said, and what I just said is that a lot of manifest injustice has developed because of a failure to establish a legislative scheme and the legislature recognized it.

They came right out and said it. The governor said it. The statement to the Bill says it, and we have said that we realize that some of the cases are just not appropriate for transfer to the Housing Council. And why? They didn't say that, but the clear implication you get is because they are almost finished.

MR. YURASKO: My position is that we are not one of those cases beyond the 60 days. If we are not one of the cases, then there are really virtually no cases that fall within that purview.

We are now down to the end of the trail of the cases that have been able to move for transfer, and it seems to me that that is not the Hillsborough situation.

When that delay is a relatively small delay, and we are now talking about a period of a year, if we are talking about six months to finish up here, and we are talking about what could be as little as six months before the Council or what

could be as much as 18 months, maybe a year, that seems to me is not of such a substantial nature that it would not, by the Court, raise it up to call it a manifest injustice.

I don't think it's a manifest injustice. I think the adoption of manifest injustice does not require this case to be moved, and I think that the concept of manifest injustice is one that supports the Township's position rather than detracts from it. That's our position.

THE COURT: Let me make one other point. If you care to comment, fine, otherwise I just note it.

There is a substantial amount of your brief devoted to the fact that Hillsborough had a right to escape and continues to have a right to escape from the original order entered in this case, and I want to make it clear to you in case you want to respond, that I believe you did have a right to escape up until November 9, 1984.

The order, while it could have been more explicit, says that the fair share is set.

The defendant claims credits for existing moderate income housing and reserves its right to assert that claim.

The parties shall have until November 9, 1984 to confer on the issue of credits and shall report to the Court by that date.

In the event of agreement as to credit is reached, then this issue shall be reserved for determination by the Court or at the defendant's option this order shall be vacated.

Now, up until November 9th, in my view the defendant could have said, I am sorry, we can't agree. We want the order to vacate.

The defendant didn't do that. The defendant notified the Court that, subsequently, and I will provide the date, that we have agreed on the credits and we have a compliance package, and indeed, before setting the compliance hearing, maybe the Court wants to do such and such a thing.

In fact, the defendant even asked for a compliance hearing at which point the defendant changed its mind, which it is entitled to do, and asked for this transfer.

But there isn't the slightest doubt in my mind, unless -- of course, I invite you to respond to it -- there isn't the slightest doubt in my mind that the escape clause became inoperative at the end of 1984, and I don't know whether you

disagree with that, but that's --

MR. YURASKO: I will respond just briefly.

I obviously am at somewhat of a personal disadvantage, even though I have been Township attorney in Hillsborough for 12 years, I was not the Township attorney that was present when that order was drafted, nor was I involved in the matter during the period of time in which that order was submitted by Mr. Pearl's office, nor that the Court executed it.

Nor again, was I a party to the timing with regard to what happened on November 9th. But it is my position though in looking now in hind-sight, retrospect or whatever, it is my position on behalf of the municipality that there was not a determination -- a judicial determination by court order or otherwise officially embodied with regard to determining the credits to be given that waived the Township's rights to escape, to exercise the escape clause of that builder's remedy order.

Other orders entered in other courts in other municipalities have not had the builder's remedy included in the summary manner at the initial part of the case, but we are stuck with an order that has that in it, and that is here, and therefore

I am left with only attempting to utilize what I perceive to be an escape clause that is and should be still available to the municipality, though it be a substantial period of time later that we still have not had a remedy or determination embodied as to that issue, and therefore that is the position I take.

THE COURT: Wouldn't that be in the worst of bad faith?

MR. YURASKO: But bad faith is not an issue.

THE COURT: Well, you make me make it an issue.

On September 10th, 1984 the Township Counsel, and I regret it wasn't you, after all I have to deal with whomever, I had --

MR. YURASKO: I am stuck with whatever it is.

THE COURT: -- wrote to me and said, "We have agreed as to the fair share number and as to the credits and offered to submit a consent order."

Thereafter, continuous correspondence with the Court saying, "We are drawing a compliance package, and we will be submitting it to you."

It is submitted.

"As a matter of fact, so far as yourself writing me a letter submitting it and requesting that

immunity be extended so that we can be sure that we have sufficiently complied with the Court's directive on July 15th, 1985," and that is a direct quote.

My letter of a few weeks before, to which you were replying, says, "I am extending, assuming all submissions shall be made by a specified date," and you follow it with a letter within that specified date saying, here it is, Judge. I am requesting that there be additional immunity until you are sure or you are satisfied that we have complied.

Now, how can one in good faith say under those circumstances that the Town was still willing to say, oh, yeah, but we want to pull out two days later, three days because we have an automatic right to pull out under that order.

MR. YURASKO: I am duty-bound to take that position on behalf of my client.

I feel that that position is a position which gives leave to the municipality with regard to the issue of elimination of the builder's remedy aspect and the importance that that may have with regard to the matter under the moratorium, that there is other issues that rise as a result of the way the legislature turned its Act.

So, obviously that is a position I, of necessity, must and do emphatically take on behalf of my client.

I feel, however, I recognize what the Court is saying, and I recognize the aspects of: Has there been reliance? Is the municipality estopped?

I know what the cases are. I know what the Court -- the test of good faith and recognize the other side of that coin, but nevertheless, I think that that is still an issue that the municipality could raise at this late juncture with regard to escaping from that clause since its the only way in which an escape from that order is possible, I dare say.

THE COURT: Well --

MR. YURASKO: I have examined other possible areas of putting it forth.

THE COURT: I even omitted the August 19th letter in which you forwarded the final two items requested by the Court, and you said, and I quote: "Before setting down any formal compliance hearing, it might be appropriate to hold the case management conference."

Even on August 18th, 1985, after the effective date of the Act, the Council was certainly

acting like it was bound by the -- and I mean the Township Council -- was certainly acting as though it were bound by the order.

MR. YURASKO: The Township Committee, when it became cognizant of the legislation and made a determination to avail itself of it, the direction, to me, and the position I take before the Court is that that prior order is still susceptible to vacation in order to move forward in this other process.

THE COURT: By the way, I don't quarrel at all with your right to move for a transfer. Don't get me wrong.

What I am concerned about is the position taken that not only can you move for a transfer, but we are under no order, we still have to try fair share in this case, we still have to try credits. That's not so.

The fact of the matter is: This case is over but for a compliance hearing.

As a matter of fact, everybody has agreed on the credits except the Court, and that would be the subject of a compliance hearing. That's what that order says, and that's what the municipality has told us.

MR. YURASKO: But if it's not agreed, then, and if it is not agreed, then it is something that they could, in essence, trigger the section of the order that says it could be vacated if it is not agreed.

In other words, if there has been no order, and it's not agreed, that is our position and that would be an issue -- obviously the Court has one position, the municipalities have a different position, and that's what makes a ballgame.

THE COURT: No, but you did agree to the credits. You did agree. Your attorney has said we have agreed on the credits, and the only one who hasn't agreed yet is the Court.

Who is to say the Court is not going to agree?

As I understand it, the master is pretty much on the line.

So, who is to say I am not going to agree? And if that's the case, six months is not what is needed for this case. You are maybe talking a couple of months: The filing of final master's report and a compliance hearing which can be done in an expedited fashion in these cases.

I think that the crux of this case is where

it stands, because truly if it had -- if we are at ground zero here and there has to be a trial set forth, I think there is a strong argument that those are the type of cases certainly that should be transferred.

I just wanted to get your understanding of the order. I understand why you raised it.

MR. YURASKO: I think that -- I think there is still a possibility that, depending on the Court's determination today, the municipality may say, all right, now we are going to proceed to attempt to utilize that escape provision and then obviously some decision is made with regard to that, and that leaves some issue that will ultimately have to be dealt with or determined. I don't know.

I can't tell you what is on their mind, because all I am just -- I am just a general litigation counsel, and I take my instructions from the Committee as given.

THE COURT: Let me just put that to rest.

There may be an appeal on that, but there is no question in my mind what the order needs, and I would rule today that that order at the moment includes an escape order, and that can be part of any appeal that might be pursued with respect to this

case.

There is not the slightest doubt, based upon what has transpired since, that the municipality waived it, and if it didn't waive it, it's estopped from waiving it, and there is a great deal of support in that proposition.

All right. I think we have exhausted --

MR. YURASKO: Thank you, your Honor. Exhausted me as well.

THE COURT: Mr. Trombadore.

MR. TROMBADORE: Arguing at this point humbly on the Township's motion to transfer, I will quote your Honor: "The fact of the matter is that this case is over except for the compliance hearing."

Your Honor, given that statement, this is not a case that is appropriate for transfer.

THE COURT: Mr. Hutt.

MR. HUTT: I got to say this, Judge: Your last five minutes would have saved me three hours of work last night.

I frankly -- these two motions are more or less interlocked.

There is no doubt in my mind as to your conclusions on the order. I was very confused by

his brief when I couldn't tell whether he was saying that the transfer motion is the use of the escape clause or whether the escape clause still exists?

THE COURT: Go ahead, Mr. Hutt.

MR. HUTT: Or that he still has the right to think about the escape clause?

The reason I say that is that in all the cases I have been involved in, and there is probably a dozen of them, I have never seen more bad faith than in this situation, because on the one hand they are saying that my client shouldn't get a builder's remedy because this very order is in existence and continues in existence, and because they agree to their fair share and because they agree to the credits. As a matter of fact, technically, and I don't want to argue it at this time, it's a little late this morning. Technically, the order has been expired.

Now, no extension after the sixth extension and the original order contemplated 90 days, and it's almost a year now from the date of the order.

So, I want to raise it at this time on this transfer motion.

I figure later on we would get to the other motion and talk about it.

On the one hand, they say they have immunity, and my client can't get a builder's remedy. On the other hand, they say the immunity no longer exists.

When I was in school, the song said, it had to be this or it had to be that.

THE COURT: You are dating yourself.

MR. HUTT: With these Mt. Laurel cases you have to start young.

MR. YURASKO: Maybe he was in college.

THE COURT: It was something like that, that it had to be this or that.

MR. HUTT: It had to be this or it had to be that. Don't look at her, she wasn't even born yet.

THE COURT: I was looking at Mr. Trombadore.

Excuse me, just a moment. We are off the record.

(Discussion off the record.)

THE COURT: Okay. On the record.

MR. HUTT: As I said, and I agree with Mr. Trombadore and I agree with your conclusion, they have already submitted the compliance package.

Now, again, it's got to be this or that, talking about bad faith.

How can they, on the one hand, say this is the compliance package, this is what we are going to present; and on the other hand, say there is something left to do other than have a compliance hearing. So, in this case probably more so than any case that I participated in can be the smallest, or the fastest because all the Court has to do is determine whether the compliance package they are submitting, although they now say, well, we will maybe change our mind, maybe it won't be our compliance package, but it can't keep going forever.

All the Court has to determine is whether the compliance package is appropriate or inappropriate.

In all the other cases you are saying to the town, you are ready to submit a compliance package. We can get one for 90 days, 60 days.

Here they claim they have already submitted it, and as a matter of fact, they rest on their claim in order to bar my client from a builder's remedy, and I can't get a builder's remedy because the town has done everything pursuant to this order, and on the other hand, say, well, you haven't done it yet.

If you haven't done it yet and the order

says if you haven't done it within 90 days, as extended six maybe and now you are doing it the seventh time, then you are not barred from the builder's remedy.

So, as far as the transfer goes, this case is probably the most ripest case to determine in the shortest period of time that no short order should be granted.

I would also like to make one other observation at the beginning of your argument about whether or not manifest injustice includes all those prior drafts that he referred to in his brief, the first draft outlined in the Bill, the five criteria, and then the second one that talked about moving it along expeditiously and then ending up with manifest injustice.

I see nothing inconsistent in the words "manifest injustice," including by implication all of the prior drafts. I think it could well be read that the first one we listed only five criteria, and I was involved in some of the drafting process. So, I know how this came about, and people say, well, there could be other criteria, and in the same change we talk about expeditiously doing it and people saying, well, there could be other

factors other than expeditiously. That's one of the factors.

The other five criteria is one of the factors. So, they nailed onto one word which said manifest injustice which generically could cover the two previous drafts plus many other things because nobody really knows in the abstract what manifest injustice is.

I think it's like you said, nobody can define pornography. You only know it when you see it, and I think the legislature knew you could define all of the factors in any given case whether the transfer should or should not happen, so they used the generic term manifest injustice and then the court decides on a case-by-case factor all the relevant factors and they may vary from case to case as to whether -- or whether or not it shouldn't, and I think by putting in the words "manifest injustice" they struck out as a consideration either the first package of five criteria or the expeditious criteria.

I think they did just the opposite: They included more than just those criteria, but those criteria are inherently in the words "manifest injustice."

THE COURT: Well, I think that is a very good argument. Of course, I think it's the position of some of the legislature that what they meant by manifest injustice was Rule 4 (69) manifest injustice, and whatever that means or has been interpreted to mean under the case law which considers many factors.

Obviously the case law in a different setting in 469 prerogative writ cases may not have been dealing with the expedition of housing, but it may have been dealing with the rights of the parties affected by the decision.

So, to that extent, it may be relevant.

The point of the matter is, I think is to focus on the fact that manifest injustice means nothing. It's got to be interpreted.

Regrettably the legislature did not say that it meant Rule 4 (69) although I am willing to accept it on that ground in terms of -- for the sake of argument, and I think Judge Skillman has indicated in his opinion that he is leaning towards the use of that rule as a general descriptive guideline for the term.

But you have got to define manifest injustice in each case, and that's what Rule 4 (69) says as

well.

All right, Mr. Trombadore, do you want to be heard on your motion?

MR. TROMBADORE: Your Honor, the motion I brought, is for an order asking the standing master to prepare and submit to the Court a finished compliance package.

There is a compliance package presently before the Court where this matter left off last August, was that we were going to have a management conference and then a compliance hearing.

My motion is designed to bring this case back to that point. We seem to have gotten off the track last August, and I felt that the only way to do that would be to put the matter in the hands of the standing master in the hopes that he then would do an independent analysis of all of the materials that have been submitted, including the studies on credits, including the fair share number, all of which have been agreed upon, and including the method of satisfying the fair share number after credits both by virtue of set asides which would come from a rezoning plan that was defined in the conference that we had here on July 2nd, and the balance to be satisfied by a trust fund concept

defined in the papers submitted to the Court.

I think that can be accomplished either by the form of order, which I have requested by my motion, or in the alternative, by setting down a conference, a compliance hearing, a date for a compliance hearing with direction to the master to submit a report prior to that date.

I am not especially concerned about the procedure.

It occurs to me now that it might be more consistent with the way this Court has operated in the past, not to simply order the master to do this, but to say, we will have a hearing.

We have these materials in hand, and we will set a date for that hearing. In the interim we will ask the master to submit his report to us and to counsel.

THE COURT: Mr. Coppola has given to us the status of several matters in which he has been functioning as master principally because he has been swamped with work, and he has informed us in this case that he will have a report, completed report in two weeks.

MR. TROMBADORE: I would ask then in place of pressing the motion --

THE COURT: By the way, I have no direct communication with him, although that kind of communication I do not believe is in any way prohibited under the Rule in terms of status. But this is what he had provided to my law clerk, and that, of course, would have to be confirmed.

I don't know for sure that that is the situation.

MR. TROMBADORE: One way to confirm it would be to put that date in an order, and then set a hearing date two weeks thereafter.

That is specifically what I am going to ask for this morning by way of substitute for the motion that I have already brought, because I think that is as effective a way to bring this matter to a head as well.

THE COURT: All right. Anybody else?

MR. HUTT: Yes, your Honor.

I may be confused on some of the facts. I don't think I am. But as I understand it, the papers that have been submitted to date by the municipality has not been a true compliance package in that there had been discussions for instance between Mr. Trombadore and the municipality as for lack of a better term, I call it the grand plan

where they are switching properties all around.

There is a map that he supplied in his motion papers back and forth, and Mr. Trombadore contends that Mr. Coppola probably initiated the idea.

So, you know what I mean by the grand plan: It's the method in which Mr. Trombadore is now saying he will end up giving 318 Mt. Laurel units if this plan is accepted by the Town.

It's combining all those parcels.

In the compliance package submitted by the Town, there has never yet been in that package an acceptance by the Town, yes, they would do that. There has been discussions, meetings, management conferences, but there has been no position taken by the Town, yes, they will do that.

So, the only thing they submitted to the Court is what I call the financial package which is some of their ideas about the soft second mortgages and so forth and so on. But even if all of that was valid, which we contend it isn't, would not in and of itself supply the fair share number, and I assume by the Court ascertaining the fair share number to be the 600 that was set forth in Mr. Pearl's letter of December 10th, 1984, wherein

he says, "We have agreed that the Township's responsibility will be a total of 600 low and moderate fair share units."

THE COURT: Instead of the 1,009 or whatever the number is. Thousand seventeen?

MR. HUTT: Instead of the thousand seventeen, yes. He says that's the credits. Right.

THE COURT: Yes.

MR. HUTT: There is some variation because lately under their compliance package or in the brief anyhow Mr. Yurasko contends that taking into account credits that that fair share number is 569 just like 30 differs. But for argument's sake, I don't care for the moment whether we are talking about the 569 that have to go or the 600.

Giving him the benefit of the doubt, I don't know how they got it to 569 when in December they said 600.

If they accept it, Mr. Trombadore's grand plan, and I use that as a term of art because, he changed his proposal from the original proposal of lesser acres with higher density, the more acres and lower density, he has it in his certification as -- which one is it? He has it -- what I am referring to, your Honor, maybe you ought to look

at it, is exhibit A attached to his certification, a map, a hand drawn map.

It's in the motion not for the transfer, the other motion.

THE COURT: Right. Okay.

MR. HUTT: You see his certifications and the conversations are that he and the Town met, and this is the proposal that presumably is going to happen.

If you will notice, it says, "Proposed subsidized units 318 dwelling units."

To date, and I think one of Mr. Trombadore's complaints is that there has been nothing in the so-called compliance package submitted to your Honor or to Coppola or to anybody else that says the Town accepts that. Nothing whatsoever.

As a matter of fact, these briefs all morning long -- that's what I said about last night -- our Town accepts nothing. They are going by the escape clause. So, there has never been anything submitted to this Court that the Town accepts that proposal of Trombadore's.

The only thing there is in the papers is that they have had a lot of discussions. No resolution by a governing body or anybody else that

they accept this situation.

If they don't accept this situation, then their so-called compliance package which has been submitted to you doesn't include any builder's remedy. It includes then this whole financial stuff, and they would have to come up with the whole 600 units in this financial package.

Now, assuming that they come to the conclusion that they do accept it, then, as I read it, even giving them the benefit of his brief for 569 that he says are left after the credits, I don't know where he gets it from, because the letter said 600, but taking that number, and if he accepted Mr. Trombadore's exhibit A here, which they have not yet done, that would mean 251 left to satisfy because you subtract the 318 from the 569, you get 251 left, and then presumably that financial package which was submitted to the Court, which they have not yet said is their compliance package, they just say it's ideas and this and that, but assuming they say this is it, then we don't have a lien target.

Then, if we have a compliance hearing, we have a compliance hearing on whether or not Mr. Trombadore's plan would work, which I would assume for the moment that I can represent to the Court I

wouldn't contest it.

If he says he would do it, then I assume he will do it. The Town is accepting it and that takes up 318 numbers of the fair share.

Then, the only compliance package that is left is this so-called financial package to see whether that is feasible, and I can tell you, your Honor, we have reports, we got a drafted report in just last week from our expert, Mr. Moskowitz.

MR. YURASKO: I am going to object because, first of all, we are going to contest his right to appear at a hearing. For him to tell us what his expert is telling us is completely improper.

THE COURT: I know what you are saying, but you don't have to get into that. You don't accept it. Go ahead.

MR. HUTT: It's already in the order that we can appear, your Honor.

THE COURT: That's my recollection, but go ahead.

MR. HUTT: What I am saying is: What confuses me is how can we have -- the original motion by Mr. Trombadore I understood which was: They haven't submitted a compliance package. They submitted drafts. They haven't said this is our

compliance package because part of that: This is our compliance package, is that they accept this 318 units of Mr. Trombadore.

THE COURT: In the interest of time, as I understand, Mr. Trombadore is saying whatever they have submitted should be treated as their compliance package.

The expert should review it, and if he thinks it's compliant, fine. If he doesn't, then he will come forward and say so, and the next step would be for somebody to intercede, because the Court deadline has expired except to continue the immunity until the Court makes that decision.

MR. HUTT: No. What I was getting at, your Honor, was that the original motions that were argued, that we are technically supposed to be arguing today, as I understood the motion, was that they have, in fact -- "They" meaning the municipality -- has not, in fact, submitted a compliance package, and one of the reasons he contends that is that they have not, in fact, said they will accept this plan, and that therefore, in the absence of them having made a compliance package, that the expert should be instructed to independently -- in other words, it's now determined they failed to make

a compliance package -- the expert should independently come up with a compliance package.

THE COURT: Assuming he was going to stay here, then it would be simply a matter of saying, all right, here is a compliance date.

MR. HUTT: I am sorry. What?

THE COURT: Here is a compliance hearing date.

Mr. Coppola filed a report by a certain date, and the Court assumes that the Township shall rely upon what is submitted as their compliance package.

If the Township comes back and says no, that isn't it, then we really don't need a compliance date, we need Mr. Coppola to revise the package.

So, we have to find out what their position is, but they don't want to commit to that until they find out what the transfer is.

MR. HUTT: That's the point I was making.

As I see the view, they can't do that either, because, you see, their 90-day immunity, even as extended by the six days, has already expired.

On September 5th -- on August 19th when he wrote and said, I would like a further extension, and his reason was he wanted to see what would happen

in transfer cases, the Court wrote back on September 5th and said, I don't know why you are asking for that, but that's not a reason for an extension, and if you want to, we will sit down and have a management conference. But they never asked for the management conference.

So, this sixth extension has expired too, which means the immunity order is no longer involved. I mean, that's where I am coming from on that point in case you were wondering.

But more importantly, I want to know, after we leave here today, are we going to -- they have to take a position already: Did they submit a compliance package to the Court? And if so, the only compliance package I have seen is this financial package, not Mr. Trombadore's planning, which is fine.

Then we have a hearing on whether this whole compliance package worked to satisfy their fair share and will determine whether it will or it won't.

Is it so absurd on its face that just the financial package with that one unit of builder's remedy, which is what that amounts to, wouldn't work, that we then take, as Mr. Trombadore says,

they haven't submitted a compliance package, Mr. Expert -- Mr. Master, you provide it.

So, I don't know whether we are reviewing something they haven't submitted or whether we are going to have a hearing on what the expert thinks as we did, for instance, in Monroe where Mrs. Lerman is going to prepare her own package. That's what I am confused about.

THE COURT: One last comment.

MR. TROMBADORE: Could I just comment: We have dealt for 12 months with various Township attorneys, with various representatives of the Township, including, at some point, the mayor, at other points the deputy mayor, the Township Administrative Mayor, the Town Planners, and throughout this process we have been told that these people with whom we dealt were, in fact, representing the interest of the municipality.

When we met here on July 2nd, the materials that were presented to the Court, including what Mr. Hutt characterizes as Mr. Trombadore's scheme, were materials presented to the Court by the standing master, Mr. Coppola.

The proposals for rezoning were proposals which were made by him, and, in fact, we were told

in July that this was the Town's package.

Part of the package that was laid out was not only the overall rezoning and set asides, but a very considerable financial contribution by my client toward the construction of a road that was deemed necessary to permit this density be created.

The balance of the package certainly came from the Town.

The concept of a trust fund and the creation of subsidies in kind were not concepts advanced by the plaintiffs in the case or by the intervenors, but by the Township itself.

When that was submitted to the Court in August, with a final documentation, it was submitted as the Township's compliance package.

Now, all that Mr. Hutt is saying is that we have never gotten a resolution from the Township Committee, which says this is our compliance package.

I would submit that that certainly is not the sine qua non of the Township's action.

They are bound, I would submit, by the representation made to the Court or the parties by their counsel.

There is estoppel by representation of

counsel.

There are cases to that effect, and I should think that it's almost academic to talk about whether there was ever a formal resolution.

What we are left with at this point is what we have in most every case, and that is, a compliance hearing to determine what has been put before the Court as acceptable to the Court. If it isn't, the Court then has the further remedy of directing the master to bring that package into line with what is required.

We have done that before, and I am suggesting that we do the very same thing in this case.

THE COURT: Okay.

MR. YURASKO: Your Honor, if I may.

THE COURT: Just briefly. The reporter has been going almost two hours.

MR. YURASKO: I appreciate that.

As far as Mr. Trombadore's motion, it would appear virtually to be superfluous.

If the Court determines that the motion should be denied, then obviously it would appear that a report should be obtained from the master with regard to the package that's been submitted and that there should be, I would think, a case

management conference scheduled to coincide shortly thereafter, the chance to review his comments and then at that case management conference, these matters be resolved and then a compliance date be set up for a hearing if that's the position the Court takes.

THE COURT: All right. All right. Let's take a recess.

Let me just talk to counsel.

(A luncheon recess is taken.)

(The matter is adjourned.)

C E R T I F I C A T E

I, JUDITH R. MARINKE, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, certify that the foregoing is a true and accurate transcript of the proceedings as taken before me stenographically on the date hereinbefore mentioned.

Judith R Marinke

JUDITH R. MARINKE, C.S.R.
Official Court Reporter
License No. XI-00392

Dated: Dec 17 1985

Judith R. Marinke, C.S.R.