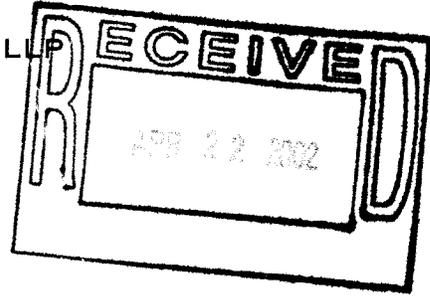


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April 19, 2002

BY CERTIFIED MAIL RRR

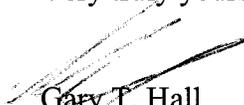
Re: Borough of Emerson Planning Board - Hearing on Proposed Amended Housing Element

Bergen County Planning Board
Attn.: Eric Timsack
One Bergen County Plaza – 4th Floor
Hackensack, New Jersey 07601

Dear Mr. Timsack:

In accordance with the statutory requirements, I enclose a copy of the notice of public hearing to be conducted by the Emerson Borough Planning Board on April 29, 2002 on the enclosed proposed Supplemental Housing Element and Fair Share Plan (April 18, 2002).

Very truly yours,



Gary T. Hall

GTH/cs

Enclosures

cc (w/enc. – notice only):

David N. Kinsey, Special Master
Nylema Nabbie, Esq.
Mark D. Madio, Esq. – Planning Board Attorney
Christine Farrington, Esq. – Borough Attorney
Barbara Looney – Planning Board Secretary

NOTICE OF PUBLIC HEARING
REGARDING AN AMENDMENT TO THE MUNICIPAL
MASTER PLAN IN THE FORM OF AN ADOPTION OF A
SUPPLEMENTAL HOUSING ELEMENT AND FAIR SHARE PLAN
PLANNING BOARD, BOROUGH OF EMERSON, BERGEN COUNTY

TAKE NOTICE THAT THE PLANNING BOARD OF THE BOROUGH OF EMERSON WILL CONDUCT A PUBLIC HEARING FOR THE PURPOSE OF ADOPTING AN AMENDMENT TO THE MUNICIPAL MASTER PLAN IN THE FORM OF A SUPPLEMENTAL HOUSING ELEMENT AND FAIR SHARE PLAN. THE HEARING WILL BE HELD ON MONDAY, APRIL 29, 2002 AT 8 PM IN THE COUNCIL CHAMBERS, BOROUGH HALL, MUNICIPAL PLACE, EMERSON, NEW JERSEY.

A COPY OF THE SUPPLEMENTAL HOUSING ELEMENT AND FAIR SHARE PLAN WILL BE AVAILABLE FOR PUBLIC INSPECTION, DURING REGULAR BUSINESS HOURS IN THE OFFICE OF THE BOROUGH CLERK, BOROUGH HALL, MUNICIPAL PLACE, EMERSON, NEW JERSEY.

BARBARA LOONEY
SECRETARY

PROPOSED

BOROUGH OF EMERSON SUPPLEMENTAL HOUSING ELEMENT & FAIR SHARE PLAN

APRIL 18, 2002

EXECUTIVE SUMMARY

Litigation Context

The Borough of Emerson's fair share housing obligation has been the subject of litigation pending in the Superior Court of New Jersey entitled "Community Developers & Management, LLC v. Borough of Emerson, et al.," (Docket No. BER-L-2734-00) and "Borough of Emerson v. United Water New Jersey, et al.," (Docket No. BER-L-268-01).

Within the context of that litigation, the Borough of Emerson Planning Board adopted a Housing Element and Fair Share Plan in April 2001 as a formal amendment to the Master Plan ("April 2001 Compliance Plan"), which was invalidated after a plenary trial. Pursuant to a written opinion dated October 19, 2001 (the "Decision") (Exhibit A) and an Interim Judgment Dismissing with Prejudice Plaintiff's Builder's Remedy Claim and Directing Remedial Action by Special Master, entered on November 2, 2001 ("Interim Judgment") (Exhibit B), the special master prepared a compliance plan for Emerson as set forth in a report dated December 31, 2001 ("Special Master's Compliance Plan").

The Special Master's Compliance Plan was adopted under protest as set forth in resolutions by the Planning Board and Borough Council. (Exhibits C & D). The adopted Special Master's Compliance Plan and implementing resolutions and ordinances filed with the Court by letter of February 11, 2002. On March 13, 2002, the Court issued a bench opinion that rejected certain municipal objections, but nevertheless declined to approve the Special Master's Compliance Plan and instead directed Emerson to prepare a new compliance plan subject to various restrictions and limitations articulated in the Court's rulings (the "Supplemental Decision") (Exhibit E).¹

This Supplemental Housing Element and Fair Share Plan ("Supplemental Compliance Plan") has been prepared in response to and in accordance with the express mandate of the Supplemental Decision, Decision and Interim Judgment, which collectively define the present scope of Emerson's fair share obligation and impose specific constraints on acceptable means to address that obligation.

Summary of Supplemental Compliance Plan

According to the Council on Affordable Housing ("COAH") the Borough of Emerson has an unadjusted fair share obligation of 74 units. The COAH rules permit municipalities to take a vacant land adjustment when they lack sufficient available, suitable sites to fully address the fair

¹ The transcript contains a typographical error as to the date, which is erroneously listed as March 21, instead of March 13.

share obligation through zoning for inclusionary development. The Decision and Interim Judgment rejected the determination in the April 2001 Compliance Plan that Emerson has an adjusted fair share obligation of 14 units. The adjusted fair share obligation was determined by the Court to be 20 units, based on the realistic development potential ("RDP") of two parcels at gross densities of 14 units/acre (Marek Farm for 18 units and Community Developers parcel for 2 units), resulting in an unmet housing need of 54 units.

The Decision, Interim Judgment and Supplemental Decision established certain restrictions on permissible means to address the judicially-determined adjusted fair share obligation of 20 units. Given those restrictions, this Supplemental Compliance Plan proposes to address this obligation by a combination of a regional contribution agreement and municipally-sponsored alternative living arrangement housing. This Supplemental Compliance Plan includes a Zoning Ordinance Amendment, Development Fee Ordinance Amendments, Affordable Housing Regulations Ordinance, and various agreements and resolutions. The zoning amendments include a Borough-wide inclusionary overlay zone to address Emerson's unmet housing need.

PREFACE

JUDICIAL RULINGS & COURT-MANDATED REQUIREMENTS

Overview

This Supplemental Housing Element and Fair Share Plan ("Supplemental Compliance Plan") has been prepared in the context of pending litigation that resulted in the Decision, Supplemental Decision and Interim Judgment, which judicially define the scope of Emerson's fair share obligation and impose specific constraints on acceptable means to address that obligation. This litigation context and background of prior proceedings is described below.

The April 2001 Compliance Plan

The Borough of Emerson Planning Board adopted a Housing Element and Fair Share Plan in April 2001 as a formal amendment to the Master Plan (the "April 2001 Compliance Plan"). This action occurred within the context of consolidated pending litigation entitled "Community Developers & Management, LLC v. Borough of Emerson, et al.," (Docket No. BER-L-2734-00) and "Borough of Emerson v. United Water New Jersey, et al.," (Docket No. BER-L-268-01). At that time there were significant open issues having major impacts on the required components of the Plan. Specifically, the Court had awarded a conditional builder's remedy requiring inclusion of the Community Developer's site at 44 Emerson Plaza West, but the Court had not yet ruled Emerson's claims that the builder's remedy was barred by the prior improper use of the threat of Mt. Laurel litigation and/or by N.J.S.A. 52:27D-311.1 & 313.1, commonly referred to as the Fanwood Amendment to the Fair Housing Act. The Court also had not ruled on the claim by United Properties Group that Mt. Laurel principles barred the pending condemnation for public open space purposes of the Emerson Woods Parcel and required that property to be included in the realistic development potential ("RDP") calculation for Emerson. These significant open legal issues created substantial uncertainty as to the required scope and components of the April 2001 Plan, and it was believed at that time that after the Court ruled on these major issues Emerson would have the opportunity to revise and refine the compliance plan.

The Court Decision and Interim Judgment

Trial proceedings were conducted in the Superior Court in September 2001, resulting in issuance of a written opinion dated October 19, 2001 (the "Decision"), which invalidated the April 2001 Compliance Plan. The Decision was implemented by an Interim Judgment entered by the Court on November 2, 2001. The Decision did not require inclusion of the Emerson Woods Parcel in RDP, since United Properties Group dropped its objection to the condemnation and abandoned its request to be included in RDP. The principal holdings in the Decision and the Interim Judgment were as follows:

1. Community Developers was not entitled to a builder's remedy, but inclusion of the Community Developer site in RDP was not precluded by the Fanwood Amendment. This site was determined to have a RDP of 2, rather than 1 unit as set forth in the April 2001 Plan.

2. The Marek Farm site was determined to have a RDP of 18 units, rather than 12 units as set forth in the April 2001 Plan.
3. The total RDP was determined to be 20 units, rather than 13 units.
4. The April 2001 Plan was held to be inadequate to address Emerson's adjusted fair share obligation of 20 units.
5. The Court did not allow Emerson to prepare a revised compliance plan based on the judicially determined RDP of 20, but instead directed the special master to prepare a compliance plan for Emerson.

The Special Master's Compliance Plan

In accordance with the Decision and Interim Judgment, the special master prepared a compliance plan for Emerson as set forth in a report dated December 31, 2001 ("Special Master's Compliance Plan"). The Special Master's Compliance Plan provided for the judicially-determined RDP of 20 units to be addressed by the following measures:

1. A regional contribution agreement for 10 units at a cost of \$25,000 per unit, resulting in a total funding requirement of \$250,000.
2. The municipal-sponsored construction of 5 units of age-restricted rental housing on the Community Developers site at a projected cost of \$615,000, which might be offset in part by a potential \$315,000 grant. This project was indicated to include a rental bonus credit of 1 unit, resulting in a total credit of 6 units.
3. Rezoning for inclusionary development at a density of 12 units per acre of a 1.5-acre portion of the Emerson Golf Club property. The 20% setaside requirement would produce 4 affordable units.
4. The Special Master's Compliance Plan also included administrative provisions and regulations, modification of the developer's fee ordinance and an overlay zone directed at the unmet need.

Emerson's Objections and the Supplemental Decision

The Special Master's Compliance Plan was adopted under protest by the Planning Board and Borough Council, consistent with the procedure discussed by the New Jersey Supreme Court in *So. Burlington County N.A.A.C.P. v. Mt. Laurel Township*, 92 N.J. 158 (1983) ("Mt. Laurel II"), and other legal principles to preserve the right to seek judicial review of rulings contained in Decision, Interim Judgment and Supplemental Decision. This action preserved objections to the Decision, which fixed Emerson's RDP at 20, instead of 13, and did not allow Emerson the opportunity to revise the April 2001 Compliance Plan. This action also preserved objections to the Special Master's Compliance Plan, particularly the proposed inclusionary zoning of the Palisade Avenue site, the rejection of any inclusionary zoning for the Marek site, and the requirement for funding a 10-unit RCA, in addition to funding municipally-sponsored affordable

housing.

The implementing resolutions and ordinances were filed with the Court by letter of February 11, 2002. The Court held a hearing to consider Emerson's objections to the Special Master's Compliance Plan on February 27, 2002. On March 13, 2002, the Court issued a bench opinion that rejected certain objections, but nevertheless declined to approve the Special Master's Compliance Plan and instead directed Emerson to prepare a new compliance plan subject to various restrictions and limitations based on the Court's rulings (the "Supplemental Decision"). The principal restrictions on permissible parameters governing the new compliance plan were follows:

1. The use of inclusionary zoning for the Marek site as a means of addressing Emerson's adjusted fair share obligation, which remains unchanged at 20 units.
2. The Court rejected a waiver of the COAH regulation limited the senior housing component to 25% of the RDP as reduced by any RCA. Thus, if a 10-unit RCA remains in the Plan, the senior housing component cannot exceed 2.5 units (25% of 10), thus precluding the proposal in the Special Master's Compliance Plan to construct 5 senior units on the Community Developers site and obtain a total credit of 6 units.
3. The Court did not encourage the use of accessory apartments, indicating that only 1 or 2 might be included if adequately justified.
4. Rezoning the Palisade site need not be included as long as the 4 units to be provided by that site under the Special Master's Compliance Plan are addressed through other acceptable means.

As a result of the constraints imposed by the Decision and Supplemental Decision, the adjusted obligation of 20 units based on RDP cannot be fully addressed by inclusionary zoning. Therefore, use of a RCA and municipally-sponsored affordable housing is essentially unavoidable. This conclusion is based on the fact that absent the ability to obtain any credit for use of inclusionary zoning on the Marek site, inclusionary zoning options are limited to the Community Developers and Palisade Avenue sites, which are not favored as a local planning matter. Moreover, even if these sites were used, the yield would only be about 6 units, leaving a shortfall of another 14 units that would have to be addressed. The alternatives to inclusionary zoning are use of an RCA (at a maximum level of 10 units) and municipally-sponsored affordable housing. In addition, the inability to use the Marek site also restricts the options to address Emerson's rental obligation of 5 units, since the April 2001 Compliance Plan proposed a density bonus for that site as an incentive for rental housing.

This may result in the need for significant additional municipal funding, since Emerson presently has affordable housing funds sufficient for a 10-unit RCA (the maximum allowed) or for at least a portion of the cost of municipally-sponsored affordable housing, but there are insufficient funds for both compliance measures.

PART I

INTRODUCTION

Part I of the April 2001 Compliance Plan provides background on the Mount Laurel II decision and the Fair Housing Act. This portion of the April 2001 Compliance Plan was not invalidated or impaired by the Decision and Supplemental Decision, and thus it is not being modified by this Supplemental Compliance Plan.

PART II

BACKGROUND DATA

Part II of the April 2001 Compliance Plan provides demographic, housing and employment data as required by the Fair Housing Act. This portion of the April 2001 Compliance Plan was not invalidated or impaired by the Decision and Supplemental Decision, and thus it is not being modified by this Supplemental Compliance Plan.

PART III

FAIR SHARE OBLIGATION, CREDITS & ADJUSTMENTS

Part III of the April 2001 Compliance Plan discusses the calculation of Emerson's fair share obligation under the COAH regulations and credits and adjustment to this obligation. The discussion of the initial calculation of Emerson's obligation presented on pages 26 through 29 of the April 2001 Compliance Plan was not impaired by the Decision and Supplemental Decision, and thus it is not being modified by this Supplemental Compliance Plan. As stated therein, Emerson has a total "pre-credited need" fair share housing obligation for 1987-1999 of 74 units, as calculated by COAH. This obligation is all new construction. The Borough has no rehabilitation component.

The portion of Part III concerning credits and adjustments at pages 29 and 30 of the April 2001 Compliance Plan must be modified to comply with the Decision and Interim Judgment as follows:

Credits and Reductions

The Superior Court determined in the Decision and Interim Judgment that Emerson is not entitled to any credits or reductions against its "pre-credited need" of 74 units. A credit for 5 units for a group home in the April 2001 Compliance Plan was rejected by the Court as not being adequately documented.

Realistic Development Potential and Adjusted Fair Share Housing Obligation

The Decision and Interim Judgment invalidated the determination in the April 2001 Compliance Plan that Emerson has a total RDP of 14 units based on a RDP of 1 for the Community Developer site and a RDP of 13 for the Marek Farm site. The Superior Court determined that Emerson has an adjusted fair share housing obligation of 20 units, based on the realistic development potential ("RDP") of two vacant parcels if zoned for inclusionary development at gross densities of 14.0 units/acre with a 20% set-aside for affordable housing: (a) the 6.4 acre Marek Farm on Old Hook Road for a theoretical yield of 18 affordable units and (b) the 0.83 acre Community Developers parcel at Emerson Plaza West for a theoretical yield of 2 affordable units. Based on this determination, Emerson has an unmet housing need of 54 units.

PART IV

COMPLIANCE SITES, MECHANISMS, AND FAIR SHARE PLAN

INTRODUCTION

This Supplemental Compliance Plan proposes to satisfy the Borough of Emerson's judicially-determined adjusted fair share obligation of 20 units through 2 compliance measures: municipally-sponsored construction of affordable alternate living arrangement housing and a regional contribution agreement. The Borough of Emerson will satisfy its unmet housing need portion of its housing obligation with an inclusionary overlay zone and an amended development fee ordinance.

ALTERNATIVE COMPLIANCE MECHANISMS UNDER COAH REGULATIONS

The COAH regulations provide various alternative mechanisms that may be used by a municipality to address its fair share obligation for the provision of new units of affordable lower income housing, including the following:

1. Inclusionary zoning – This compliance mechanism involves zoning privately-owned land for multifamily development subject to an affordable housing setaside requirement of 20% for sale units and 15% for rental units. Inclusionary zoning may also apply to single-family development under some circumstances. (N.J.A.C. 5:93-5.6)
2. Municipally-sponsored construction – All of the housing units produced by this method usually are affordable lower income units. This compliance mechanism normally requires the expenditure of municipal funds to the extent that sufficient funds are not available from a housing trust fund, grants for other governmental entities or other sources. (N.J.A.C. 5:93-5.5)
3. Regional contribution agreements – This mechanism provides allows up to 50% of the municipal obligation to be addressed by funding affordable housing in other qualified municipalities. The current minimum funding rate is \$25,000 per unit. (N.J.A.C. 5:93-5.7 & 6)
4. Alternate living arrangements – This approach allows credits for certain group homes subject to affordability controls for at least 10 years and an agreement with the facility provider or approval for the facility. A municipality may sponsor or otherwise assist with development of this type of affordable housing. (N.J.A.C. 5:93-5.8)
5. Accessory apartments – The COAH regulations allow a credit for up to 10 accessory apartments, subject to various requirements and affordability controls for at least 10 years. (N.J.A.C. 5:93-5.9)
6. Age-restricted housing – The COAH regulations permit age-restricted affordable housing subject to maximum of 25% of the adjusted fair share obligation as reduced by the number of units addressed by any RCA. (N.J.A.C. 5:93-5.14)

RENTAL OBLIGATION

Municipal consideration of the preceding alternative compliance mechanisms must also take into account COAH regulations that require municipal compliance plans to include a rental component addressed at 25% of the adjusted fair share obligation (N.J.A.C. 5:93-5.15). These regulations provide for the rental obligation to be addressed by alternate living arrangements, municipally-sponsored rental housing, accessory apartments, agreements with developers to provide rental housing, or use of a density bonus for rental housing for inclusionary zoning sites subject to a reduced setback rate of 15%.

A rental bonus is provided for rental units if there is firm commitment for construction, resulting in a credit of 2 units for each rental unit up to the 25% rental component. There is a lesser credit of 1.33 units for age-restricted rental units, and a maximum of 50% of the rental obligation can receive credits for age-restricted housing.

INCLUSIONARY ZONING ALTERNATIVES

The April 2001 Compliance Plan identified 2 sites as being vacant and suitable for inclusionary zoning – the Marek Farm and Community Developers parcels. That determination was approved in the Decision, though the Court increased the RDP for both of these sites, as noted above. The Special Master's Compliance Plan included an additional inclusionary zoning site involving in-fill development on a portion of a developed site occupied by the Emerson Golf Club. An evaluation of the potential to use of inclusionary zoning for these sites and other possible sites in Emerson is presented below.

Marek Farm Site

This site is a 6.4-acre parcel located at 650 Old Hook Road (Block 1201, Lot 1), which is currently used as a family farm and farm market. The April 2001 Compliance Plan used a RDP of 10 units/acre for this site, which was increased to 14 units/acre by the Decision and Interim Judgment. However, the Supplemental Decision prohibits any credit for use of inclusionary zoning of this site based on the special master's report and testimony that the owner is not presently interested in developing the property and that off-site improvements would be required to provide sanitary sewer service. Consistent with the dictates of the Supplemental Decision, inclusionary zoning for this site is not being used as a compliance mechanism in this Supplemental Compliance Plan.

Absent the judicially-mandated exclusion of this site, it would be appropriate to give consideration to inclusionary zoning and other development alternatives since the 18-unit RDP of this site constitutes the vast majority of Emerson's adjusted fair share obligation. The current owner's present lack of interest in development may change, and there are no reports and studies documenting any restrictions on the ability to provide sanitary sewer service. The April 2001 Compliance Plan recommending inclusionary zoning at a density of 10 units/acre, which would produce 13 affordable units. It also recommended a density bonus to encourage the provision of rental units by allowing development at a density of 14.5 units per acre, which would produce 14 units based on a 15% rental setback. If use of this site were permissible, it would be appropriate to give further consideration that prior recommendation and alternative densities or development options. The ultimate recommendation would depend on the other compliance components.

Given the restriction in the Supplemental Decision these matters pertaining to this site have not been addressed further in this Supplemental Compliance Plan.

Emerson Plaza West Site

This is a 0.83-acre site at the northern end of Emerson Plaza West (Block 417, Lots 2 & 3) owned by Community Developers & Management, the plaintiff in the Mt. Laurel litigation. It previously contained a single-family residence that was demolished by Community Developers. The April 2001 Compliance Plan used a RDP of 1 for this site, since at that time the Court had awarded a conditional builder's remedy to the owner and development at the presumptive minimum density of 6 units/acre would produce 1 affordable unit. At the same time, Emerson was contesting the builder's remedy entitlement and challenging the use of this site based on N.J.S.A. 52:27D-311.1 & 313.1, commonly referred to as the Fanwood Amendment to the Fair Housing Act. The Decision held that a builder's remedy was barred by the prior improper use of the threat of Mt. Laurel litigation, but rejected Emerson's statutory claim. The Decision also held that this site has an RDP of 2 units that must be addressed by Emerson, though use of this site is optional.

Zoning this site for inclusionary development at the presumptive minimum density of 6 units/acre would produce 5 total units, including 1 affordable unit. The density would have to be doubled to 12 units/acre in order to yield 2 affordable units and a total of 10 units. Inclusionary zoning is not recommended for this site given the minimal potential affordable housing yield and pertinent planning considerations, including the limited site size, adjacent single-family development and access limitations. In addition, even if there were an agreement with the owner to provide rental units, the yield of only 1 or 2 units would not satisfy Emerson's rental obligation.

Emerson Golf Club/Palisade Avenue Site

This site consists of a 1.5-acre portion of property devoted to use as the Emerson Golf Club, which is part of Block 617.01, Lot 7.01. The Special Master's Compliance Plan included inclusionary zoning of this site after the attorney for the owner of the property expressed an interest in such zoning. The special master proposed a density of 12 units/acre, which would produce a total of 18 units, including 4 affordable units. The Supplemental Decision indicated that credit could be obtained for inclusionary zoning of this site, but use of this was not required.

Inclusionary zoning is not proposed for this site. The special master's recommendation was not based on a site plan or concept plan showing how the recommended intensity of development could be accommodated appropriately on this site. There are various significant issues that would have to be addressed, including problems associated with the proximity to single-family detached housing and the active club house operation and parking lot, a portion of which would have to be relocated. There also are traffic and access safety issues, particularly in relation to traffic for golf course use and for special functions in the club house.

In addition, use of inclusionary zoning for this site would not readily address Emerson's rental obligation, since use of a density bonus would further exacerbate the site design and land use compatibility concerns. Also, even if 4 rental units could be provided, this would not fully satisfy the rental obligation of 5 units.

Potential Redevelopment Area

A proposal is pending to designate a downtown section of Emerson as an area in need of redevelopment. If that designation is approved, then the Planning Board will proceed with preparation of a proposed redevelopment plan. That plan could include a housing component and affordable housing provisions. Given the timing, use of a site in this area for inclusionary zoning as part of a comprehensive redevelopment plan cannot be considered at this time as part of this Supplemental Compliance Plan. However, consideration should be given in the future to a potential plan amendment in connection with preparation of a redevelopment plan if that planning process moves forward.

Inclusionary Zoning Summary

The Supplemental Decision does not permit Emerson to obtain any credit against its fair share obligation for use of inclusionary zoning on the Marek site. As a result, inclusionary zoning options are limited to the Community Developers and Palisade Avenue sites, which are not deemed to be appropriate for multifamily development at the density recommended previously by the special master. Even if these sites were used at the densities recommended by the special master, the total yield would only be about 6 units, leaving a shortfall of another 14 units that would have to be addressed, of which a maximum of 10 can be addressed by a RCA. In addition, inclusionary zoning for these sites would not address Emerson's 5-unit rental obligation absent use of a density bonus for both sites, resulting in even higher densities, and rental bonus credits would not be available absent a firm commitment for private development of rental housing. Therefore, inclusionary zoning for both sites would still leave the need for an additional site or compliance mechanism.

ACCESSORY APARTMENTS

The April 2001 Compliance Plan proposed the use of accessory apartments as a compliance mechanism. This method was not viewed favorably by the special master, particularly in the specific context of Emerson. The Supplemental Decision did not encourage the use of this mechanism and indicated that it would not be appropriate to request a credit for more than 1 or 2 units for accessory apartments. Under these circumstances, accessory apartments are not proposed as compliance mechanism in this Supplemental Compliance Plan.

MUNICIPALLY-SPONSORED AFFORDABLE HOUSING OR ALTERNATE LIVING ARRANGEMENTS

The Special Master's Compliance Plan proposed the municipally-sponsored construction of 5 units of rental affordable housing for senior citizens on the 0.83-acre Community Developers site at the northern end of Emerson Plaza West (Block 417, Lots 2 & 3). The Borough would acquire this site and convey the property to the nonprofit Housing Development Corporation of Bergen County ("HDC"), which would develop the project. The Housing Authority of Bergen County would then manage this rental property. There was a subsequent determination that this proposal was inconsistent with the COAH regulations, which limit the credit for age-restricted housing to 25% of the adjusted fair share obligation after deducting any units to be addressed by a RCA. Since the Special Master's Compliance Plan included a 10-unit RCA, the COAH regulations would allow credit for only 2 age-restricted units, rather than the 5 units being proposed. Although the COAH regulations include a waiver provision, the Supplemental Decision

indicated that a waiver of this requirement would not be appropriate.

Absent a waiver of the COAH regulations, the most practical options are a municipally-sponsored project to provide 5 family rental units or alternative living arrangements providing at least 5 bedrooms. Either of these approaches would satisfy Emerson's 5-unit rental obligation and also provide 5 rental bonus credits, for a total credit of 10 units. This would allow the balance of Emerson obligation to be addressed by a 10-unit RCA. If the number of rental units were greater than 5, then the total credit would exceed 10 and there could be a corresponding reduction in the number of RCA units. These alternatives were evaluated.

Family Rental Option

Consideration was given initially to modification of the proposal in the Special Master's Compliance Plan to eliminate the age-restriction and develop a 5-unit family rental project, including discussion with the Bergen County Housing Authority. This would involve a firm commitment to develop these rental affordable units, which would entitle Emerson to a rental bonus of 5 units, resulting in a total credit of 10 units towards Emerson's adjusted housing obligation.

Consistent with the COAH regulations, the bedroom mix would be 1 1-bedroom unit, 3 2-bedroom units, and 1 3-bedroom unit. This project would probably require an increased total building mass and more potential land use impacts than the age-restricted housing proposed by the special master. These factors make it difficult to locate a vacant, suitable site for this type of development. The potential cost also would be greater, and Bergen County Housing Authority expressed reservations as to the ability to service a 5-unit family rental project in Emerson.

Alternate Living Arrangement Housing

A proposal to address a portion by Emerson fair share obligation by development of alternate living arrangement housing was presented at a Planning Board meeting on April 4, 2002 by Richard Royse of New Concepts, a non-profit entity. This proposal involved development by New Concepts of group housing for developmentally-disabled persons. The initial proposal was for 5 2-bedroom units. Subsequent discussions indicated that New Concepts would be willing to participate in other development alternatives with a lesser size and number of units and bedrooms. This housing would qualify as an alternate living arrangement under the COAH regulations, which provide for a credit of 1 unit for each bedroom. This type of development would involve a firm commitment to develop these rental affordable units, thus entitling Emerson to a rental bonus of 5 units, which is the maximum available bonus.

This project would be implemented by an agreement between the Borough and New Concepts that would address the COAH requirements for such municipally-sponsored affordable housing construction. Specifically, the Borough has the statutory authority to acquire a site under the Fair Housing Act, and an agreement with New Concepts would provide the administrative mechanism to construct the housing. The agreement will include a pro forma for the project, and the Borough's commitment to fund the project, although some non-municipal grant funding is possible. The construction timetable calls for a construction start within 2 years consistent with the requirement in the COAH regulations.

New Concepts submitted a specific proposal for development of alternate living arrangement

housing on two sites deemed determined to be suitable and acceptable by New Concept. (Exhibit F). These alternate sites are located at Lincoln Boulevard and Emerson Plaza West. They have been evaluated by Emerson's planning consultants, who determined that there are both suitable sites for the proposed alternate living arrangement housing under COAH regulations, though there are some different pros and cons as to each site. (Exhibit G).

REGIONAL CONTRIBUTION AGREEMENT

The Special Master's Compliance Plan provided for the Borough of Emerson to enter into a regional contribution agreement ("RCA") with the Borough of Ridgefield, Bergen County to transfer 10 units of Emerson's fair share obligation at a cost to Emerson of \$25,000 per unit transferred, for a total of \$250,000. Two equal payments would be made, spreading the cost over a period of more than one year. Ridgefield would use the funds for a scattered site housing rehabilitation program. A RCA addressing 10 units of Emerson's adjusted housing obligation of 20 units would be consistent with the 50% cap in the COAH regulations.

Given the limitations on the use of inclusionary zoning noted above, it would be difficult to fully address the 20 fair share obligation with using a RCA. To the extent that an alternate living arrangement project provided a credit in excess of 10 units, a corresponding reduction in the number of RCA units would be possible. That would reduce the RCA cost and allow, and the cost-saving could be applied toward the cost of the alternate living arrangement housing project.

RECOMMENDED COMPLIANCE PLAN COMPONENTS

Based on the preceding discussion of the available alternatives that are consistent with the COAH regulations and the court rulings, the recommended compliance plan is for a combination of a municipally-sponsored alternate living arrangement housing project to provide a credit of at least 10 units and a RCA for not more than 10 units to address the balance of Emerson's 20 unit adjusted fair share obligation.

Since each of the two proposed sites are suitable from a land use planning perspective, the final decision should be based on fiscal and site availability considerations. That decision largely involve public finance, budgetary and other matters that are the responsibility of the Borough Council. Accordingly, both sites are recommended subject to a final implementing decision by the Borough Council, which would include introduction of a Zoning Ordinance Amendment that will make a 100% affordable project development by a nonprofit or a public agency a permitted use on the designated site pursuant to a site-specific overlay zone designation.

That decision also will determine the precise number of units to be addressed by a regional contribution agreement ("RCA") between the Borough of Emerson and the Borough of Ridgefield to transfer up to 10 units of Emerson's housing obligation at a cost to Emerson of \$25,000 per units transferred. Two equal payments will be made, spreading the cost over a period of more than one year. Ridgefield will use the funds for a scattered site housing rehabilitation program.

SUMMARY OF COMPLIANCE PLAN FOR ADJUSTED HOUSING OBLIGATION

Compliance Mechanism	Site Location, Area, and Owner	Affordable Units and Credits
Municipally-Sponsored Housing		8 to 10
Rental Bonus Credits		5
Regional Contribution Agreement with Ridgefield		7 to 5
Total Units and Credits		20

COMPLIANCE PLAN IMPLEMENTATION

Affordable Housing Regulations Ordinance

This Plan includes an Affordable Housing Regulations Ordinance that was adopted previously as Ordinance No. 1191, subject to court approval. (Exhibit H) This provides provisions in conformance to COAH rules, to govern the development, sale, and rental of the new affordable units that will be created in Emerson. Court approval should be requested for Ordinance No. 1191.

Inclusionary Overlay Zone

This Plan recommends a zoning ordinance amendment to establish a Borough-wide inclusionary overlay zone, which is intended to capture affordable housing opportunities, if and when residential development of five or more units is approved, by requiring a 20% set-aside of any such development. This overlay zone is the Borough's principal response to its unmet housing need obligation. The zoning amendment to address the alternate living arrangement proposal should include this provision, which will be similar to the provision in the recommended previously by the special master.

Development Fees and Spending Plan

The Borough currently has collected about \$310,000 in development fees and interest in its Housing Trust Fund. Most of this money was collected from Town and County Developers, developers of Block 905, Lot 3. This was a 25-acre parcel located on Forest Avenue. The property was rezoned from 60,000 square foot, single-family detached lots to ML-10 Single-Family housing with an affordable housing contribution.

In April 2001, the Borough adopted a Development Fee Ordinance that established a Housing Trust Fund in accordance with COAH rules and will produce a projected \$80,000 in additional affordable housing funds during 2002-2008. (Exhibit I) That Ordinance was amended by Ordinance No. 1192, which was adopted subject to court approval. (Exhibit J) Such approval should be requested.

To be authorized to spend the development fees by Superior Court, the Borough will prepare a required spending plan based on the final agreement and decision as to the alternate living arrangement housing project. Under the spending plan, the Borough will responsible for offsetting any shortfall by appropriations from general revenue or bonding.

Summary of Borough Council Implementing Actions

To implement the affordable housing compliance measures in this Supplemental Housing Element and Fair Share Plan, the Borough Council needs to approve ordinances, resolutions and agreements as follows:

- Zoning Ordinance Amendment (to be finalized to address alternate living arrangement project)
- Development Fee Ordinance Amendments (already adopted – court approval required)
- Affordable Housing Regulations Ordinance (already adopted – court approval required)
- Borough of Emerson-New Concepts Affordable Housing Development Agreement (to be finalized based on final decision on alternate living arrangement project)
- Borough of Emerson-Housing Authority of Bergen County Agreement on Affirmative Marketing and Affordability Controls (to be finalized if necessary)
- Regional Contribution Agreement with Ridgefield (to be finalized based on number of

RCA units required by final decision on alternate living arrangement project)

- Resolution Authorizing Execution of the RCA by Emerson (to be finalized based on number of RCA units required by final decision on alternate living arrangement project)
- Escrow Agreement for Development Fees
- Emerson Spending Plan (to be finalized based on final decision on alternate living arrangement project)
- Resolution of Intent to Bond

EXHIBITS

- Exhibit A Written Opinion issued October 19, 2001 ("Decision").
- Exhibit B Interim Judgment Dismissing with Prejudice Plaintiff's Builder's Remedy Claim and Directing Remedial Action by Special Master, entered on November 2, 2001 ("Interim Judgment").
- Exhibit C Resolution of the Planning Board of the Borough of Emerson Adopting Amended Housing Element and Fair Share Plan, adopted January 29, 2002.
- Exhibit D Resolution of the Borough Council of the Borough of Emerson Authorizing Agreements and Other Actions to Implement Amended Housing Element and Fair Share Plan, adopted February 5, 2002.
- Exhibit E Transcript of bench opinion presented on March 13, 2002 ("Supplemental Decision").
- Exhibit F New Concepts development proposals, dated April 18, 2002.
- Exhibit G Site Analysis for Housing/Fair Share Plan, prepared by Heyer, Gruel Associates, dated April 17, 2002.
- Exhibit H Ordinance No. 1191 (affordable housing administration)
- Exhibit I Development Fee Ordinance (No. 1170)
- Exhibit J Ordinance No. 1192 (amendments to development fee ordinance)

EXHIBIT A

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-2734-00

COMMUNITY DEVELOPERS & MANAGEMENT,
LLC,

Plaintiffs,

v.

BOROUGH OF EMERSON AND THE
PLANNING BOARD OF THE BOROUGH OF
EMERSON,

Defendants.

Decided: October 19, 2001

Nylema Nabbie, Esq., (Schepisi & McLaughlin, attorneys)
tried the cause for Plaintiff Community Developers &
Management, LLC.

Gary T. Hall, Esq., (McCarter & English, attorneys) and
Christine Farrington, Esq., tried the cause for Defendants
Borough of Emerson and the Planning Board of the Borough of
Emerson (Docket No. L-2734-00)

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JONATHAN N. HARRIS, J.S.C.

I. INTRODUCTION

Emerson, New Jersey persists as a bastion of exclusionary zoning. It has steadfastly resisted taking affirmative steps to provide realistic opportunities for affordable housing within its borders. It has further failed to enact the necessary legislation to authorize the expenditure of its considerable affordable housing trust funds for regional or local housing needs. The time has come to end this constitutional breakdown. The New Jersey Constitution shall not be permitted to merely remain a vague rumor in Emerson.

This case is a conventional builder's remedy *Mt. Laurel II*¹ action, which until October 19, 2001 had been consolidated with a garden-variety eminent domain proceeding related to lands referred to as Emerson Woods. The condemnation dispute was settled by the contesting parties with their acquiescence to an acquisition for \$7,800,000. In the course of this opinion, for the sake of completeness, I will refer to certain facts related to the condemnation aspect of the case which were developed at the consolidated trial. As such, the details of the case involve several arcane points within the maze which sometimes seems to

¹ So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158 (1983).

characterize the world of affordable housing². Although I conclude that the builder's remedy is not warranted, Emerson shall be required without delay to adopt all affirmative measures-- including meaningful legislation and adequate appropriations-- recommended or made necessary by the Special Master, in order to fulfill its constitutional obligation to provide shelter opportunities for the beneficiary class of unhoused poor.

II. SUMMARY OF THE PARTIES' POSITIONS

Plaintiff Community Developers & Management, LLC (Community Developers) owns an .83-acre now-vacant parcel of land in the Borough of Emerson (Emerson) zoned for single-family development. It proposes to build at least twelve multi-family units on the site including two units devoted to low or moderate income households. Emerson resists the offer on the dual grounds that Community Developers has not acted in good faith because Community Developers: 1) has used the *Mt. Laurel II* doctrine as a bargaining chip and 2) has conducted itself in a manner that would be violative of the New Jersey Fair Housing Act (NJFHA)³.

United Properties Group, Inc. and Emerson Woods, LLC (Emerson Woods) own or control a vacant parcel of 19.38 acres that had been recently approved for 111 townhouse units. This land was the object of Emerson's eminent domain activity, the

² See Home Properties of New York, L.P. v. Ocino, Inc., 341 N.J. Super. 604, 606 (App. Div. 2001).

³ N.J.S.A. 52:27D-301 to -329.

purpose of which was to acquire and conserve the property for open space.

III. PROCEDURAL BACKGROUND

Community Developers commenced its builder's remedy *Mt. Laurel II* action on March 28, 2000. It not only sought vindication of its right to develop its property at a density greater than permitted by existing zoning regulations, but it also urged the court to require Emerson to comply with the constitutional mandate of *Mt. Laurel II* and its progeny. Emerson contested Community Developers' claims and sought to dismiss its builder's remedy assertion.

On June 9, 2000, I granted permission to Emerson Woods to intervene as a party-plaintiff pursuant to R. 4:33-2. The limited purpose of the intervention was to permit Emerson Woods to try to protect its development approvals, which included a substantial monetary contribution towards affordable housing. *Emerson Woods did not specifically seek a builder's remedy.* It already considered its property to be a contributory, albeit not inclusionary, *Mt. Laurel II* site.

On December 15, 2000, I entered an order declaring that Emerson's zoning ordinance was invalid and unconstitutional insofar as it failed to provide a realistic opportunity for the development of affordable housing. I further required Emerson to revise its Master Plan and zoning ordinances to effectuate

compliance with the New Jersey Constitution. To assist Emerson in this endeavor, I appointed professional planner David N. Kinsey, Ph.D. as Special Master and obliged Emerson to complete the necessary remedial administrative and legislative activities no later than March 30, 2001. Additionally, a conditional builder's remedy was granted in favor of Community Developers so that its land would be treated as an inclusionary site in Emerson's forthcoming compliance plan. I reserved for trial Emerson's defense of bad faith. At the time, Emerson had not seriously raised the specter of the possibility of a NJFHA violation being an issue in this case.

On February 16, 2001, I declared that land was a scarce resource in Emerson and I entered an order containing an interlocutory injunction restraining certain land development activities until a final determination could be made concerning Emerson's ability to comply with its *Mt. Laurel II* obligations. In supposed compliance with the order of December 15, 2000, the Emerson Planning Board prepared and adopted an amended Housing Element and Fair Share Plan and the governing body endorsed it by resolution on April 3, 2001.

During the pendency of the builder's remedy *Mt. Laurel II* action, Emerson embarked upon an attempt to acquire the land of Emerson Woods for public open space. On June 14, 2000, Emerson commenced an action to exercise its right of eminent domain in

the Chancery Division. The condemnees resisted the condemnation action, claiming that Emerson was acting in bad faith and that the acquisition would not serve a valid public purpose because it would thwart Emerson's ability to comply with its *Mt. Laurel II* obligations. On January 3, 2001, the eminent domain action was transferred to the Law Division and ultimately consolidated with the builder's remedy *Mt. Laurel II* action for trial. Emerson was permitted to deposit its estimate of the fair market value of the property with the court⁴, but I stayed the filing of a declaration of taking⁵.

Trial commenced on September 24, 2001 and consumed four days. At the opening of the trial, Emerson Woods announced that if it received an incentive density bonus higher than the density it already enjoyed with its vested site plan approval, it would abandon this approval for 111 townhouses, and instead build an inclusionary development with 20% of the units devoted to low and moderate income households. This announcement confirmed a similar offer made in a February 14, 2001 letter to the Special Master. At the immediate conclusion of the trial, Emerson Woods again offered to surrender its current development entitlement in exchange for the right to become a *Mt. Laurel II* inclusionary site at the density recommended by the Special Master so as to

⁴ N.J.S.A. 20:3-18.

⁵ See Borough of Tenafly v. Centex Homes Corp., 139 N.J.Super. 490 (Law Div. 1975).

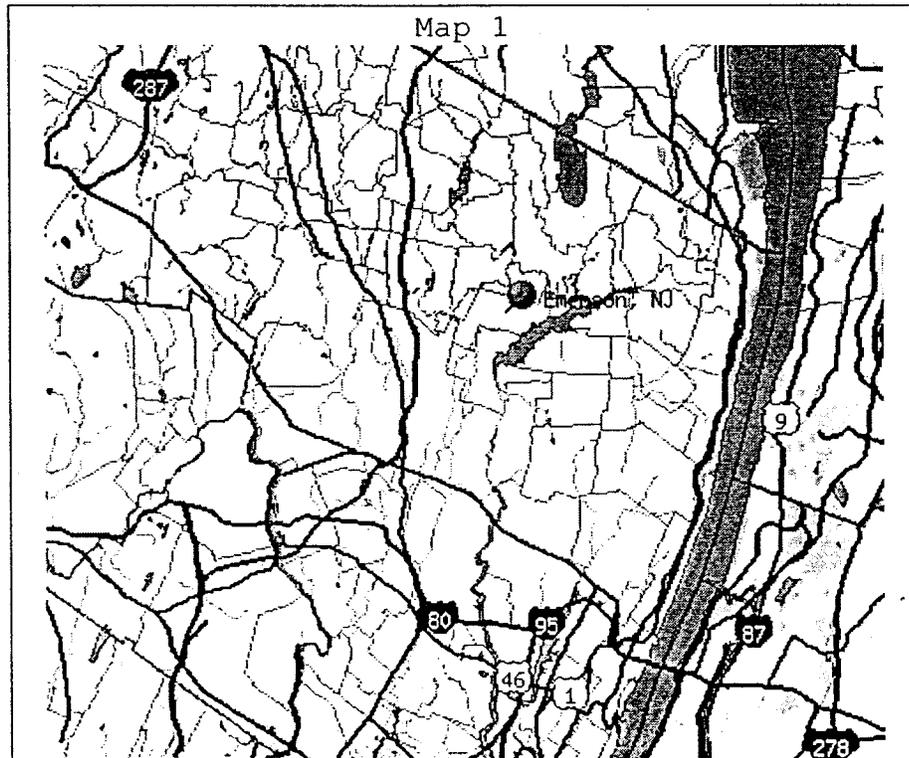
yield approximately 187 units, of which 37 would be devoted to low and moderate income households.

On October 19, 2001 I was informed in open court that Emerson and Emerson Woods had reached a mutually-agreeable resolution of their dispute. Emerson Woods has withdrawn as an intervenor in the builder's remedy *Mt. Laurel II* action and Emerson has dismissed the eminent domain proceeding.

IV. FINDINGS OF FACT

Emerson, New Jersey
(See Map 1)

Emerson is located in central Bergen County, on the west bank of the Oradell Reservoir, approximately one mile east of the Garden State Parkway. It serves as the southern boundary of the Pascack Valley.



Emerson's population in 2000 was 7,197, an increase of 3.8% from the 1990 census. It is estimated that in 2000 there were 2,406 dwelling units, of which 96% were single-family detached units on modestly sized lots. The total land area in the municipality is approximately 1,600 acres (2.5 square miles). Most of Emerson is designated as *Planning Area 1 - Metropolitan Planning Area* in the State Development and Redevelopment Plan, with the exception of watershed/reservoir lands adjacent to the Oradell Reservoir, which are designated as *Planning Area 5 - Environmentally Sensitive Planning Area*.

Community Developers' site
(See Map 2)

The Community Developers' site is vacant; a single-family dwelling was demolished in 1997 pursuant to a duly issued municipal permit. The land is located at 43 Emerson Plaza West, almost exactly in the center of the municipality, a stone's throw from the railroad station, and adjacent to a variety of residential and commercial uses. It is zoned R-10 Residential Single Family, thereby permitting a density⁶ under the Municipal Land Use Law⁷ (MLUL) of 4.3 units per acre.

The property occupies an area of 34,824 square feet in a generally rectangular shape. Frontage of 40 feet exists at the

⁶ "Density" means the permitted number of dwelling units per gross acre of land to be developed. N.J.S.A. 40:55D-4.

⁷ N.J.S.A. 40:55D-1 to -129.

terminus of Emerson Plaza West. Single-family dwellings occupy lands north and west of the site. South of the site are a mix of residences, offices, retail and commercial uses, and multi-family dwellings. Directly adjacent to and east of the site is a railroad right of way used mainly by New Jersey Transit for weekday commuter rail operations. East beyond the railroad are commercial and retail uses, which comprise Emerson's downtown business area.

Before its demolition, the single-family structure that occupied the property was in a state of wholesale disrepair. The building was grossly overgrown with shrubbery. Glass was missing in many windows. Cracks appeared in the foundation and holes in the wooden framework of the structure were apparent upon even the most cursory observation. Standing water to a depth of over one foot covered the basement. Many floors and interior walls tilted out of alignment. Electric and water utilities were discontinued in 1995. At the time a representative of Community Developers first inspected the property during negotiations for its acquisition in 1996, electricity was provided by an extension cord, which ran to the building from an adjacent property. The only electrical fixture that operated, powered by that extension cord, appeared to be a porch light. The stairways had no railings; mildew and fungus covered the walls where sheetrock had not given way to numerous holes; and none of the toilet

facilities worked. In a word, at the time of its demolition, the dwelling was substandard⁸ and had been so for many years. Indeed, it was uninhabitable as well, although there is some anecdotal evidence to suggest that someone had taken up residence in the dilapidated structure before it was torn down. The decision to demolish, rather than to rehabilitate, was well taken.

Emerson Woods' site
(See Map 2)

The Emerson Woods' site is vacant. It has been a battleground between environmentalists and proponents of development since the 1980s. The land is located on Main Street, approximately 700 feet from the Oradell Reservoir. Evidence presented to the Emerson Planning Board suggested that the property had been cleared for agricultural purposes in the 1890s and remained so until the 1950s when the natural vegetation grew back.

It is undisputed that the property had once been an integral part of the Hackensack Water Company's overall watershed lands, serving either as an unnecessary utility holding or as a protected reservoir buffer. In 1984, the land was removed from watershed designation as part of a much larger parcel. It became potentially developable under a zoning ordinance permitting a

⁸ A substandard housing unit is defined as a unit with health and safety code violations that require the repair or replacement of a major system. A major system shall include weatherization, a roof, plumbing (including wells), heating, electricity, sanitary plumbing (including septic systems), and/or a load bearing structural system. N.J.A.C. 5:93-5.2.

planned commercial development, and remained so for almost a decade. In 1993, as a fraction of a complicated settlement involving former watershed lands surrounding the Oradell Reservoir, the 19.38-acre Emerson Woods' parcel was remaindered when the much larger land of which it was a small part was returned to protected status under the auspices of the Board of Regulatory Commissioners. Today, what remains is zoned R-TH Townhouse, which permits multi-family use at a density of six units per acre.

The property occupies an area of 19.38 acres in an irregular shape. The parties agree that because of wetlands constraints, only 12.93 acres are actually developable. Frontage of approximately 1,900 feet exists along Main Street. Single-family dwellings occupy lands north and west of the site. South of the site are primarily watershed lands and some scattered residences. Directly adjacent to and east of the site are reservoir buffer lands and the Oradell Reservoir.

On December 17, 1998, the property obtained preliminary site plan approval from the Emerson Planning Board for a 116-unit townhouse condominium development. This reflected a density pursuant to the MLUL of six units per acre, which matched the maximum density under Emerson's zoning ordinance. Pursuant to that zoning ordinance, Emerson Woods was required to contribute "an appropriate amount, consistent with Council on Affordable

Housing regulations, to the Borough Affordable Housing Trust.”

The Planning Board resolution approving the preliminary site plan echoed the ordinance. Final site plan approval was granted by the Planning Board on April 1, 1999. Again, Emerson Woods was obligated to contribute to the “Housing Trust Fund as required under the Fair Housing Act.” Amended final site plan approval was obtained on February 15, 2001, which resulted in an altered site plan and a reduction in units from 116 units to 111 units. The resolution granting amended final site plan approval required, for the first time, a specific monetary contribution to “the Borough’s Housing Trust Fund as required under the Fair Housing Act” of “\$4,000 per unit for a total contribution of \$444,000.”

The parties agree that although the actual collection of development fees would probably violate COAH regulations⁹, the amount was based upon the Council on Affordable Housing’s (COAH’s) presumed cost of subsidizing a low or moderate income unit at \$20,000 per unit as reflected in COAH’s regulations¹⁰.

Thus, the parties agree that if a 20% set-aside were required of Emerson’s R-TH zone instead of a monetary contribution, Emerson Woods would be required to provide 22.2 low and moderate housing

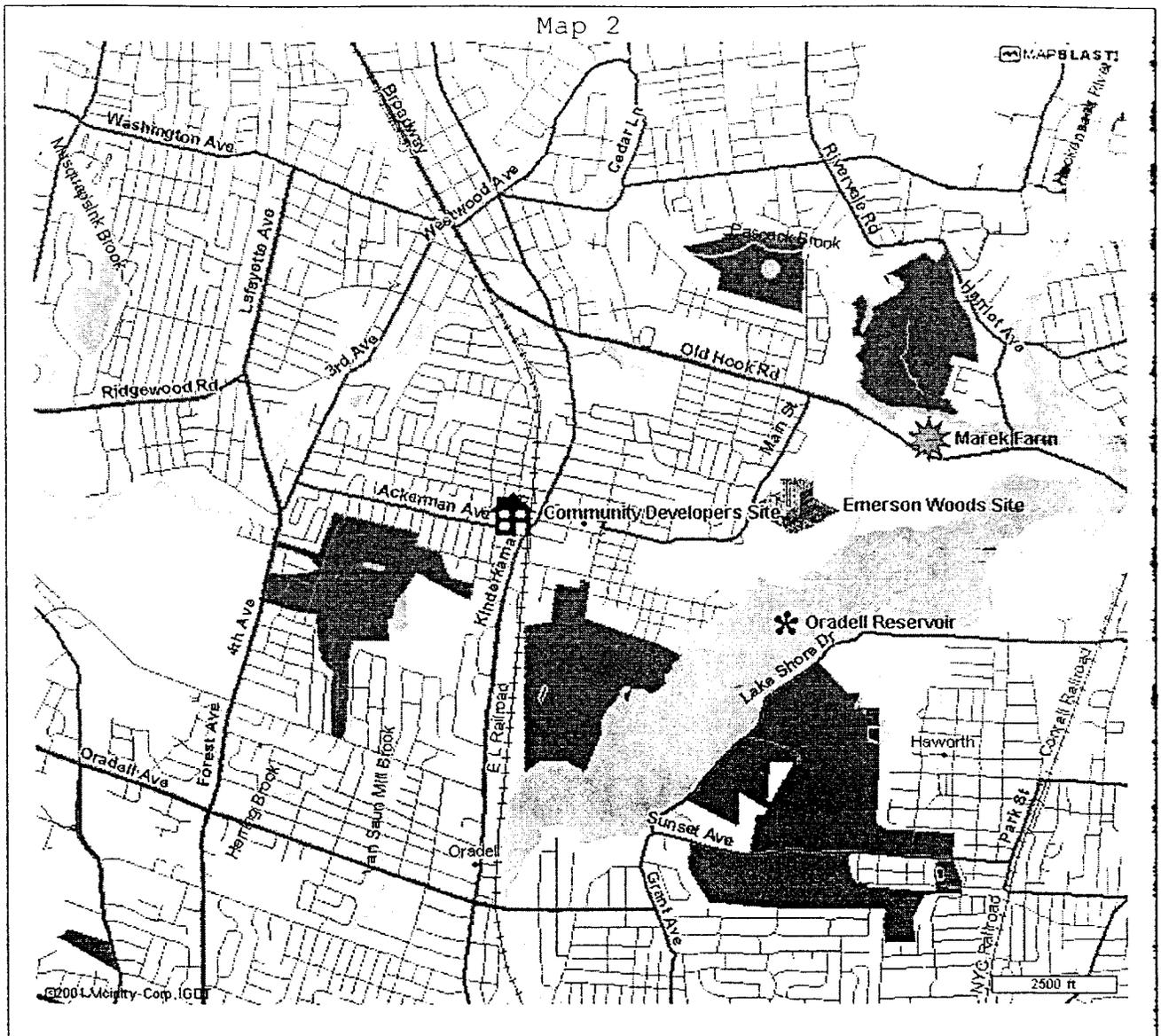
⁹ N.J.A.C. 5:93-8.1 permits the imposition, collection, and expenditure of development fees only through participation in COAH’s substantive certification process, which Emerson has unflinchingly eschewed.

¹⁰ In 1992, COAH clarified that \$20,000 is the average internal subsidy for the set-aside units in an inclusionary development. 24 *N.J.R.* 238 (Jan. 21, 1992). That figure was also the minimum amount acceptable for a Regional Contribution Agreement (RCA). N.J.A.C. 5:93-6.5. Effective January 2, 2001, the minimum amount necessary to transfer an RCA was increased to \$25,000 per unit.

units. Multiplying 22.2 units times \$20,000 produces \$444,000, or \$4,000 per unit. Emerson Woods did not challenge the required contribution, and Emerson did not seek to increase the amount to reflect the current RCA transfer amount of \$25,000.

Marek Farm site
(See Map 2)

As part of the *Mt. Laurel II* builder's remedy action, Emerson had been ordered by me to prepare a realistic plan to satisfy its fair share obligation under the NJFHA. Emerson proposes to utilize property referred to as the Marek Farm as part of the compliance plan presented at trial. This property is located in the northeast corner of Emerson, on Old Hook Road, in the general vicinity of the Emerson Woods' site. It consists of 6.43 acres of active farmland including a farm stand and greenhouse complex known as Old Hook Farm. It suffers no known environmental constraints. The farm is directly adjacent to a recently completed Alterra Wynwood three-story assisted living facility with 106 beds in 96 units. Emerson presented no competent evidence to indicate whether the owner of the land intended to continue to devote it to farming, redevelop it for permitted uses in the zone, or actually build low and moderate income housing. Hearsay statements about the owner's children and their ambitions have no evidentiary significance.



Pre-litigation Activities of Community Developers

Community Developers acquired its site in 1997. After demolishing the residential structure, it immediately applied to the Emerson Board of Adjustment for a use variance¹¹ to permit the establishment and operation of a 16 unit multi-family use on the property. None of the units were proposed for use by low or

¹¹ N.J.S.A. 40:55D-70(3)(1).

moderate income households. The application was withdrawn. In 1999, Community Developers applied anew for a use variance, this time trimming its request to 12 units (and no low or moderate income units whatsoever). The Board of Adjustment denied the application. Emerson claims that at the hearing before the Board of Adjustment on June 16, 1999, Joseph Burgis, Community Developers' expert planning witness, made veiled threats that if the variance were not granted, Emerson might suffer an involuntary builder's remedy, notwithstanding an adverse Board of Adjustment ruling.

Burgis's two references to *Mt. Laurel II* remedies, when read in context, clearly were neither threat-laden, nor capable of objectively being understood as threats. The first discussion of *Mt. Laurel II* came in Burgis's discussion of the deficiencies in Emerson's Master Plan and then-overdue periodic reexamination under the MLUL¹². He modestly opined that a site so close to an operating commuter railroad station and a downtown area is appropriate for high-density residential development. He further urged the Board of Adjustment to "get the mayor and council to address that issue (compliance with the *Mt. Laurel II* obligation)" to avoid being left vulnerable to a builder's remedy action. At no time was the discussion about a builder's remedy connected to Community Developers' plans.

¹² See N.J.S.A. 40:55D-89.

The second reference to *Mt. Laurel II* came in response to an inquiry from a Board of Adjustment member who questioned alternative uses for the Community Developers' site. A dialogue followed in which low and moderate income units, as well as senior housing units, were discussed as being appropriate alternate uses for the site. Burgis's responses to questions were direct and forthright, but were in no way suggestive of Community Developers then harboring a hidden agenda to use *Mt. Laurel II* as a threat to gain a density bonus. Ironically, if Community Developers had applied for the use variance as an inclusionary development with an affordable housing set-aside it would find its instant builder's remedy claim much stronger.

After the Board of Adjustment denied the application, Community Developers pursued an unusual and ill-fated strategy. Rather than litigate the denial, it hired John Schepisi as its advocate to "settle" the dispute. Since no appeal of the Board of Adjustment action had been filed, and nothing by way of a disputed rezoning proposal was being discussed, it is unclear what there was to be "settled." Under the guise of trying to resolve a dispute that apparently did not exist except in the minds of Community Developers' principals, Schepisi--a self-proclaimed political insider--investigated who was perceived as the primary power broker in Emerson. He ultimately concluded that the nucleus of political power in the municipality was Council

President Gina Calogero. He successfully arranged a meeting with her on February 15, 2000 to lobby for a high-density multi-family use on his client's site and discuss how this might help Emerson fulfill Emerson's *Mt. Laurel II* obligations. Schepisi and Calogero chatted about a variety of alternatives including low and moderate income multi-family housing, senior housing, three 2-family dwelling units, and Emerson's exercise of eminent domain to buy Community Developers' land to "make Community Developers whole." Schepisi indicated that litigation was an additional alternative, if Emerson would not negotiate a reasonable use of his client's land. Schepisi did not memorialize his discussions with Calogero in writing and he never communicated his client's proposals to the full governing body in writing. He relied upon Calogero to orally communicate his client's offers to the mayor and council.

On the very evening of her first and only meeting with Schepisi, Calogero reported the encounter to the full governing body. She advised the governing body of the many alternates proposed by Schepisi, including those that did, and those that did not, include a *Mt. Laurel II* component. The governing body decided to take no action on Schepisi's informal petition, and shortly thereafter, Community Developers filed its builder's remedy *Mt. Laurel II* action on March 28, 2000.

V. CONCLUSIONS OF LAW

The overriding issue in a *Mt. Laurel II* case is whether a municipality has created a realistic opportunity for the construction of its fair share of the region's needs for affordable housing¹³. In reviewing a municipality's response to its constitutional duty, the judiciary should conform its decisions wherever possible to COAH guidelines and policy¹⁴. This is to ensure that a uniform and predictable body of law emerges to educate the public and direct its representatives to comply with constitutional doctrine that is now over eighteen years old. The unruly teenager of *Mt. Laurel II* jurisprudence will only mature under the guidance of the rules and regulations of COAH and the occasional firm and steady hand of the judiciary.

In this case, I ordered Emerson to provide a compliant Housing Element and Fair Share Plan by March 30, 2001. As revealed during trial, it has woefully failed to comply. The planning document that Emerson seeks to pass off as *Mt. Laurel II*-compliant is riddled with regulatory deficiencies, substantive errors, and rank speculation. Accordingly, I conclude that the court must invoke the exceptional affirmative remedies of the type outlined in *Mt. Laurel II*¹⁵ and require Emerson to adopt specific amendments to its zoning ordinance and other land use

¹³ Mount Olive Complex v. Tp. of Mount Olive, 340 N.J. Super. 511, 525 (App. Div. 2001).

¹⁴ Hills Dev. Co. v. Bernards Tp., 103 N.J. 1, 22 (1986).

¹⁵ 92 N.J. at 285-286.

regulations as will enable it to finally meet its *Mt. Laurel II* obligations.

Emerson's Fair Share

The threshold step in determining Emerson's compliance with *Mt. Laurel II* requires calculation of its fair share¹⁶. Emerson's current cumulative affordable housing obligation as determined by COAH is 74 units¹⁷. None of these units includes satisfaction of an indigenous need, or rehabilitation component. Rather, the 74 units represent Emerson's pre-credited obligation of its region's present and prospective need, or the so-called inclusionary or new construction component.

COAH rules permit limited credits to be applied to the pre-credited obligation. Credits include units of affordable housing that have already been constructed in or funded by a municipality and reductions for affordable housing opportunities that have been created through zoning¹⁸. Emerson is not entitled to any such credits because it has not demonstrated with any persuasive evidence that there exists affordable housing within the municipality. Vague references to a group home at 19 Spruce Avenue with five beds operated by a nonprofit mental health organization do not provide the required proof under COAH rules to garner even a single credit. There was no competent evidence

¹⁶ Allan-Deane Corp. v. Bedminster Tp., 205 N.J. Super. 87, 105 (Law Div. 1985).

¹⁷ See N.J.A.C. 5:93-2.1 et. seq.

¹⁸ N.J.A.C. 5:93-3.1 et. seq.

of the nature of the facility, the income levels of residents, or the scope of affordability controls, if any, that govern the facility. Thus, Emerson's fair share housing obligation remains 74 new low and moderate income units.

Under N.J.A.C. 5:93-4.1 and -4.2, a municipality may attempt to demonstrate that it does not have the physical capacity to address the housing obligation calculated by COAH. This process involves the identification of all appropriate vacant land in the municipality and the assignment thereto of dwelling unit densities, which produces what COAH calls the municipal realistic development potential (RDP)¹⁹. Another way of expressing this process is to recognize that a land-poor municipality is entitled to a vacant land adjustment or "adjustment due to available land capacity"²⁰. However, in order to obtain this adjustment, the municipality must perform an exhaustive planning analysis and convince COAH or the court, as the case may be, of its clear entitlement to a vacant land adjustment.

In this case, Emerson has not even remotely provided the data required by COAH rules²¹, and as confirmed by the Special Master, the entire adjustment rationale consists of a scant two paragraphs in Emerson's 2001 Housing Element and Fair Share Plan. This failure of proof alone would be sufficient to deny Emerson

¹⁹ N.J.A.C. 5:93-4.1(b).

²⁰ N.J.A.C. 5:93-4.2(a).

²¹ N.J.A.C. 5:93-4.2(a); -4.2(b); -4.2(e).

the right to claim an adjustment due to available land; however, the parties agree that notwithstanding this municipal omission, Emerson, in fact, is deficient in vacant land and is entitled to a vacant land adjustment.

The focus of the RDP calculation in this case is on two parcels of vacant land: Community Developers' site and the Marek Farm site. The land of Emerson Woods is not a factor in the RDP as a result of the settlement. Emerson Woods has withdrawn its offer to construct an inclusionary development on the site. Therefore, it is not appropriate to be included in the RDP calculation because its vested rights earned under the MLUL militate against it ever being realistically developable for an inclusionary development. Additionally, once the municipality successfully completes its acquisition of the land, it would be entitled to exclude the parkland from the RDP pursuant to N.J.A.C. 5:93-4.2(e)(5).

The Special Master concluded that both sites presented realistic opportunities for affordable housing development and included them in Emerson's RDP. Emerson claims that the Community Developers' site should not be included for RDP purposes due to the demolition of the dwelling in 1997 that, according to Emerson, would result in a violation of the NJFHA. The municipality did not assert this position until well into the litigation. In fact, this litigation strategy contradicts the

Planning Board's and governing body's adoption and endorsement of the 2001 Housing Element and Fair Share Plan, which included Community Developer's site in the RDP calculus. All parties concur that Marek Farm should be included in the RDP computation, but they disagree over the appropriate density to be assigned to the site.

It is important to observe that the inclusion of a particular property in the computation of the RDP does not require, according to COAH rules, the municipality to include that land in its ultimate compliance mechanism. N.J.A.C. 5:93-4.2(g) states:

(g) The municipality may address its RDP through any activity approved by the Council, pursuant to N.J.A.C. 5:93-5. The municipality need not incorporate into its housing element and fair share plan all sites used to calculate the RDP if the municipality can devise an acceptable means of addressing its RDP. The RDP shall not vary with the strategy and implementation techniques employed by the municipality.

One of the obvious reasons for this rule is the recognition that a municipality, in the first instance, is generally entitled to legislatively decide how to implement its affordable housing obligation without undue interference by COAH or the court²². For example, absent an obligation to honor a builder's remedy, a municipality may elect to concentrate affordable housing on a

²² See Eastampton Center, LLC v. Tp. of Eastampton, 155 F.Supp.2d 102, 119 (D.N.J. 2001) (unless done in a discriminatory manner, municipalities may control residential growth to promote the public good).

limited number of sites or even a single site, rather than scatter the affordable housing throughout a multitude of locations. Unless there is either no response, or an inappropriate response, from the municipality regarding its compliance mechanism, it will remain entitled to chart its own course as to how to comply with *Mt. Laurel II* and where to implement it. Thus, even where the municipality has merely miscalculated its RDP, the municipality's compliance mechanism is invested with a presumption of validity that must be considered by the court.

The actual calculation of RDP is not subject to arithmetic perfection or mathematical precision. It is based upon an assessment of the competent evidence, both factual and expert, covered with the gloss of COAH rules, and ultimately distilled into a concrete number. It is neither alchemy, nor sleight-of-hand, that results in the RDP. Rather, it emerges from the overarching notion that whatever the development potential is calculated to be, it must perforce be based upon a foundation of realism. The question to be answered is, what is the *realistic* (not necessarily the maximal) development capacity of the land?

The process of computing the RDP is supposed to begin with the municipality creating a map showing all existing land uses²³. Next, the municipality should prepare an inventory of all vacant

²³ N.J.A.C. 5:93-4.2(a).

parcels by block and lot²⁴. Third, the municipality may exclude certain vacant lands from the inventory based upon certain objective conditions²⁵. Fourth, the municipality must presumptively include all other vacant lands and may include underutilized, but not vacant, lands including certain golf uses, nurseries and farms, and nonconforming uses²⁶. In connection with nonvacant land, COAH may request confirmation from the owner indicating the site's availability for inclusionary development²⁷. Fifth, land may be excluded from the inventory by the municipality if it falls within any of the following categories:

1. Constrained agricultural lands.
2. Environmentally sensitive lands.
3. Historic and architecturally important sites.
4. Certain active recreational lands.
5. Certain conservation, parklands, and open space lands.
6. Other sites determined to be not suitable for low and moderate income housing.

The final step in the RDP recipe is to assign a density and set-aside for each parcel that has survived the culling process. The minimum presumptive density shall be six units per acre and the maximum presumptive set-aside shall be 20 percent²⁸. COAH (and the court) shall "consider the character of the area surrounding each site and the need to provide housing for low and moderate income households in establishing densities and set-asides for

²⁴ N.J.A.C. 5:93-4.2(b).

²⁵ N.J.A.C. 5:93-4.2(c).

²⁶ N.J.A.C. 5:93-4.2(d).

²⁷ Id.

²⁸ N.J.A.C. 5:93-4.2(f).

each site."²⁹ COAH rules further provide a hypothetical example³⁰ of the calculation of RDP for illustrative purposes.

Before completing the computation of RDP, I must point out that the criteria for inclusion in RDP is not the same criteria used to determine the exclusion or inclusion of a site as part of an ultimate compliance mechanism. N.J.A.C. 5:93-5.3 provides guidance as to which sites are appropriate to be designated for inclusionary development. It includes the requirement that the site be "available, suitable, developable, and approvable, as defined in N.J.A.C. 5:93-1." These criteria do not apply when RDP is computed. Rather, they play a role when the municipality announces which sites it intends to devote to incentive inclusionary zoning or other site-specific affirmative measures to meet the RDP. Thus, the two relevant criteria for RDP purposes are 1)planning concerns and 2)affordable housing needs³¹.

In this case, however, before computing the absolute number for RDP, I must first determine whether the Community Developers' site even belongs in the vacant land inventory. I conclude that it is required to be included for RDP computation.

Community Developers' Site Should be Included in the RDP

Emerson argues that even though it included the Community Developers' site in its court-ordered 2001 Housing Element and

²⁹ Id.

³⁰ Id.

³¹ N.J.A.C. 5:93-4.2(f).

Fair Share Plan, this land should not now be included in the RDP computation because to do so would be a violation of the NJFHA, specifically, N.J.S.A. 52:27D-311.1 and -313.1. This statutory scheme, commonly referred to as the Fanwood Bill, provides that a municipality shall neither be compelled to include in its housing element, nor forced to fulfill its fair share housing obligation through permitting development on certain land where a residential structure has been demolished or is proposed for demolition. If a parcel of land is less than two acres, and its residential structure has not been declared unfit, or was within the previous three years negligently or willfully rendered unfit for human occupancy or use, that parcel is not required to be considered by the municipality for affordable housing purposes. The idea of the legislation is to prevent COAH (and the court) from requiring the demolition of a "perfectly decent residential accommodation"³² to achieve affordable housing objectives. It was never the intent of the NJFHA to require municipalities to demolish or suffer the demolition of existing structures in order to build affordable housing.

Emerson argues that the demolition of the residential structure on the Community Developers' site in 1997 in anticipation of obtaining permission for a higher density residential use, including affordable housing, triggers the

³² Paramus Substantive Cert. No. 47, 249 N.J. Super. 1, 9 (App. Div. 1991)

Fanwood Bill principles. I conclude that the dilapidated structure that was demolished in this case was not the type of residential building that the legislation intended to preserve. The evidence adduced at trial firmly establishes that although the building had never received the municipal imprimatur of being unfit, it was wholly uninhabitable, an eyesore, and dangerous at the time of its demolition. The extensive damage and lack of essential services rendered the building utterly unusable. Furthermore, the evidence confirms that the condition of the building was of long standing and not negligently or willfully rendered unfit within the three years before the demolition. This micro-blighted area is outside the Fanwood Bill. There is no reason why this now-vacant land should be excluded from RDP purposes.

Thus, consistent with the findings of the Special Master, I conclude that the lands of Community Developers and Marek Farm shall be included in the calculation of Emerson's RDP. I adopt the ultimate rationale of the Special Master regarding the computation of Emerson's RDP and therefore conclude that his assignment of densities near the top of the range is rationally supported in the record. The contrary opinion of Emerson's expert is unreliable, incomplete, and inconsistent.

Marek Farm's RDP

Marek Farm consists of 6.43 acres. It is located on an active four lane east-west roadway and lies adjacent to a new multi-family assisted living development. The land is remote from single-family uses, but is in the vicinity of protected watershed lands. Emerson itself recognized that the land could realistically be developed at 14.5 units per acre, but claims that density should only be used if Marek Farm is provided a species of incentive inclusionary zoning that encourages the development of rental units³³ and gives the municipality the benefit of a two for one credit against its RDP³⁴. This would permit a higher density, but a lesser set-aside of only 15% low and moderate income units as permitted by COAH rules³⁵. If development of rental units is not forthcoming, Emerson contends that the RDP density for Marek Farm should not exceed 10 units per acre.

Emerson's proffer is rejected because the nature of RDP determination contemplates realistic development, and does not turn on the nature of the zoning bells and whistles that emerge from the imagination and creativity of the municipality's planner. It is, of course, clear that a municipality may actually zone an inclusionary site with a density under the MLUL that is

³³ N.J.A.C. 5:93-5.15.

³⁴ N.J.A.C. 5:93-5.15(d)(1).

³⁵ N.J.A.C. 5:93-5.15(c)(5).

either greater or less than the COAH density used in RDP calculations. There need not be perfect symmetry between the RDP density and compliance density. However, there must be a sound planning basis to use a lesser density for RDP purposes if it is acknowledged that the site will be realistically developable at a higher density. If the site is realistically capable of supporting 14.5 units per acre in a real-world rental environment, it is certainly capable of supporting that density for RDP purposes. The ultimate preference of the municipality as to MLUL density, based upon a projected type of use, is not a relevant factor in calculating RDP. The key is the realistic development capacity of the land.

The Special Master adopted Emerson's higher density after carefully analyzing the site from a comprehensive planning perspective. He concluded that this site is fully capable and appropriate to support the upper limit of 14.5 units per acre and still blend with the character of the surrounding uses. I conclude that it is most appropriate to use a whole integer to compute the RDP, and 14 units per acre with a 20% set-aside is realistic for the Marek Farm site. This results in 90 units on the site, including 18 low and moderate income units. Under the MLUL, this is a density of 14 units per acre (90 units spread over 6.43 acres).

This density is further supported by the acute need for low and moderate income housing in Emerson. There is not a single unit of affordable housing in Emerson. Its record of compliance with *Mt. Laurel II* is ghastly, embarrassing, and sorely in need of remediation. Its very conduct throughout this litigation confirms the need for affirmative steps to remedy its almost two-decades effort to encourage poor people to live elsewhere. Emerson's 2001 Housing Element and Fair Share Plan was rightly criticized by the Special Master as incomplete and non-compliant with COAH regulations, and it is virtually uninformative. The meager attempt to comply with my Order of December 15, 2000 is emblematic of Emerson's lackluster affordable housing efforts over many years.

The limited opportunities for developing inclusionary affordable housing appear to have been squandered by the municipality at almost every step. Indeed, the recent approval for development of the land adjacent to Marek Farm as an assisted living facility without an inclusionary component is an example of this casual attitude in the face of land becoming a scarce resource. Emerson's 1999 Master Plan reexamination report noted, "a number of sites previously recommended for inclusionary development have since been developed without inclusionary components." Emerson's 2000 Housing Element and Fair Plan specifically noted the loss of the Town and Country parcel of 25

acres on Forest Avenue. This property was suggested in Emerson's 1992 Housing Element and Fair Share Plan to produce at least 12 units of affordable housing on site, and instead generated only conventional single family dwellings at a density of 2.4 units per acre, plus a substantial contribution to Emerson's phantom affordable housing trust fund. Emerson seems to have never missed an opportunity to miss an opportunity for affordable housing.

Although the municipality may be proud of its collection of a substantial principal sum in its affordable housing trust fund, it was conceded at trial that the fund does not comply with COAH regulations and none of that money has been used to build or subsidize even a stick of affordable housing. What has the municipality been waiting for? Why has Emerson not authorized the necessary actions to facilitate the use of even a portion of the \$300,000 in the trust fund? When will there be affordable housing in Emerson? The need for low and moderate income units in Emerson is painfully obvious and critical. This situation is a significant factor in determining the RDP.

Community Developers' RDP

The Community Developers' infill site is located in a transitional area, between single-family development and Emerson's downtown. It abuts a commuter railroad. It is in close proximity to other multi-family uses with densities exceeding the Special Master's recommendation. Keeping in mind the nature of

the diverse uses in the surrounding area and the keen need for low and moderate income housing in Emerson, I conclude that the appropriate density, even for this small site, is 14 units per acre with a 20% set-aside. I believe that an even higher density, approaching the density found in nearby multi-family development, would likewise be realistic. However, I believe that the Special Master's advice in this regard is compelling. This results in 11 units on the site, including two low and moderate income units. Under the MLUL, this is a density of 14 units per acre (11 units spread over .83 acres).

The following Table 1 completes the computation of RDP according to COAH methodology and results in Emerson's RDP of 20 units of low and moderate income housing:

**Table 1:
Summary of RDP Calculation**

Site	Unconstrained Area (In acres)	Units per Acre	Total Units	Set-Aside	RDP Units
Marek Farm	6.43	14.0	90	20%	18
Community Developers	.83	14.0	11	20%	2
TOTAL			101		20

Thus, it is Emerson's burden of proof to demonstrate that it has provided a realistic mechanism through zoning and other affirmative devices to satisfy this fair share of 20 units of low and moderate income housing, together with the unmet need of an additional 54 units under N.J.A.C. 5:93-4.2(h). A review of

Even if a developer satisfies these three prongs, it may still be disqualified from receiving a builder's remedy if it is found that the developer acted in bad faith or has used *Mt. Laurel II* as a bargaining chip:

Laurel II as a bargaining chip:

Care must be taken to make certain that Mount Laurel is not used as an unintended bargaining chip in a builder's negotiations with the municipality, and that the courts not be used as the enforcer for the builder's threat to bring Mount Laurel litigation if municipal approvals for projects containing no lower income housing are not forthcoming. Proof of such threats shall be sufficient to defeat Mount Laurel litigation by that developer.³⁸

Additionally, a builder's remedy may not be forthcoming if the developer has failed--for good reason--in an attempt to secure a variance for non-*Mt. Laurel II* uses:

Finally, we emphasize that our decision to expand builder's remedies should not be viewed as a license for unnecessary litigation when builders are unable, for good reason, to secure variances for their particular parcels (as Judge Muir suggested was true in the Chester Township case). Trial courts should guard the public interest carefully to be sure that plaintiff-developers do not abuse the *Mt. Laurel* doctrine.³⁹

It has been suggested that there may be another way a plaintiff-developer may win the race only to be disqualified for a false start. *J.W. Field Company, Inc. v. Tp. of Franklin*⁴⁰ held,

³⁸ 92 N.J. at 280.

³⁹ 92 N.J. 280-81.

⁴⁰ 204 N.J. Super. 445, 461 (Law Div 1985).

in *dicta*, that if a plaintiff-developer fails to attempt to obtain relief without litigation, it may be denied a builder's remedy. This notion is based upon the Supreme Court's summary statement in *Mt. Laurel II* that "[w]here the plaintiff has acted in good faith, attempted to obtain relief without litigation, and thereafter vindicates the constitutional obligation in Mount Laurel-type litigation, ordinarily a builder's remedy will be granted..." (emphasis supplied)⁴¹. As a result of *J.W. Fields*, municipalities, as here, sometimes defend builder's remedy litigation with the affirmative defense that the developer never made a written overture to the governing body seeking to negotiate an inclusionary development before instituting litigation.

The loss of a builder's remedy to an otherwise-qualifying plaintiff-developer is neither novel, nor shocking. The interests of the absent class--the unhoused poor--for which the litigation is prosecuted, will not be prejudiced as long as the municipality's compliance mechanism is capable of satisfying the ultimate RDP and unmet need. In other words, in some cases, the land of the disqualified plaintiff-developer will be included in the RDP, but it will not be given inclusionary status. Other land in the municipality that is identified as being realistically developable with affordable housing will absorb the disqualified

⁴¹ 92 N.J. at 218.

plaintiff-developer's complement of low and moderate income housing.

In this case, Community Developers satisfies the initial three-prong test for entitlement to a builder's remedy. First, it successfully obtained summary judgment declaring Emerson's development regulations invalid, thereby necessitating rezoning and the appointment of the Special Master. Second, it has offered to provide a 20% set-aside for affordable housing units, which is a substantial contribution to Emerson's nonexistent stock of low and moderate income housing units. Third, the municipality has not demonstrated that because of environmental or other substantial planning concerns Community Developers' site is clearly contrary to sound land use planning, thereby establishing the suitability of the site for affordable housing.

However, the municipality has satisfied me that Community Developers has used the *Mt. Laurel II* doctrine as a bargaining chip in its negotiations with Emerson. Additionally, its failed application for non-inclusionary development at the Board of Adjustment further seals its fate.

Community Developers acquired its site in 1997 and immediately demolished the structure. Within three months of becoming the owner, Community Developers applied to the Emerson Board of Adjustment for a use variance⁴² to develop the site for

⁴² N.J.S.A. 40:55D-70(d)(1).

sixteen market-rate townhouses (and a zero percent set-aside) at a density of 19 units per acre. The application was withdrawn without prejudice. In March 1999, Community Developers reapplied for a use variance, now seeking only twelve market-rate garden apartments (and a zero percent set-aside) at a density of 14.45 units per acre. The Board of Adjustment denied the application and no appeal therefrom was prosecuted. In the absence of proof to the contrary, a Board of Adjustment's decision of denial is presumptively for good reason⁴³. Greater judicial deference is ordinarily given to a use variance denial than to an approval⁴⁴.

The only mention of *Mt. Laurel II* during the Board of Adjustment proceedings was during the presentation of Community Developers' expert planner whose stray references to affordable housing were neither adopted, nor incorporated into the application by Community Developers. I have already determined that those passing comments could not have been objectively considered by anyone to be a threat of *Mt. Laurel II* litigation if the variance were to be denied. Unfortunately, the utter absence of an affordable housing component in its development plans--a strategic decision presumably based upon economic considerations--sinks Community Developers' entitlement to a builder's remedy here.

⁴³ See New Brunswick Cellular v. South Plainfield Bd. of Adj., 160 N.J. 1, 14, (1999); Victor Recchia Residential Const., Inc. v. Zoning Bd. of Adjustment of Tp. of Cedar Grove, 338 N.J. Super. 242, 253 (App. Div. 2001).

⁴⁴ Pierce Estates Corp., Inc. v. Bridgewater Tp. Zoning Bd. of Adjustment, 303 N.J. Super. 507, 515 (App. Div. 1997).

The primary purpose of this variance defense is to prevent the abuse of the *Mt. Laurel II* doctrine. The risk that this defense avoids--whether directly threatened with *Mt. Laurel II* litigation or not--is having a Board of Adjustment inappropriately grant a variance as the course of least resistance to an expensive, time-consuming, and far-reaching *Mt. Laurel II* action. Since Community Developers never sought *Mt. Laurel II*-type housing in its two variance applications, it cannot claim to have been chilled in its efforts to seek vindication of *Mt. Laurel II*'s constitutional mandate. Moreover, I conclude that Community Developers' settlement strategy, concocted only after it was denied a density-enhancing use variance, was to try to strong-arm Emerson into making Community Developers economically whole. This narrow desire for financial benefit, to be funded by the municipality through the exercise of the power of eminent domain or obtained by incentive zoning enacted by the municipality, is exactly the type of developer activity that *Mt. Laurel II* condemns and discourages. Community Developers' last-minute conversion to the cause of affordable housing is simply too fortuitous to warrant a finding of its good faith.

Community Developers is further disqualified from a builder's remedy because to grant it this extraordinary relief would render the judiciary the enforcer of a builder's threat.

When Schepisi met with Calogero on February 15, 2000, Community Developers' primary purpose was to gain a profit-motivated advantage for itself. At worst, the idea was to enlist Emerson to subsidize a break-even scenario for Community Developers. *Mt. Laurel II* recognizes that economic advantages--typically substantial density bonuses--are the engines that drive the construction of affordable housing. However, it is the chore of the judiciary to ensure that *Mt. Laurel II* machinery does not run amok. During his negotiations with Calogero, Schepisi never limited his client's proposal to only *Mt. Laurel II*-type housing. This obviously was because his client was seeking economic relief by any available means. Instead, he engaged in a free-wheeling discussion of a variety of non-*Mt. Laurel II* solutions to his client's problems, that would--in his words--also be a "win-win" for Emerson.

Calogero's subjective perception of Schepisi's overtures is unimportant. The objective nature of those propositions, however, is important. There was no dispute then pending between the parties; therefore, there was nothing for Schepisi and Calogero to settle. Clearly, the interchange unfittingly encouraged Emerson to capitulate to Community Developers' demand for a density bonus or other means to make it whole. The partial satisfaction of Emerson's *Mt. Laurel II* obligations by Community

Developers was merely a convenient righteous cloak in which to wrap Community Developers' true motivation.

When Community Developers purchased the property it rationally could have had no reasonable assurance of development for any use other single-family use. It may not reap a windfall at the expense of the public under the guise of *Mt. Laurel II*, especially in light of its aborted attempts to build non-inclusionary housing, and its last-ditch insistence that it be made whole.

Additionally, Community Developers never wrote to the Emerson governing body about its plans for affordable housing. Its negotiation embodied an *ex parte* meeting with a single member of the governing body, designed to try to convince the Council President to exercise her considerable power and influence in favor of Community Developers' desire to be made whole. I conclude that the failure to engage in a pre-litigation letter-writing campaign with Emerson, *standing alone*, does not disqualify Community Developers from a builder's remedy. I do not believe that *Mt. Laurel II* imposed such a rigid lock-step procedure, and although a writing would likely have avoided the confrontationally conflicting remarks of Schepisi and Calogero at trial, I part company with the *dicta* in *J.W. Field*⁴⁵. I find that in today's post-NJFHA/COAH world, a requirement of written pre-

⁴⁵ 204 N.J. Super. at 461.

suit notification to a governing body is unnecessary and counterproductive. However, in this case, the lack of a memorializing instrument regarding Community Developers' supposed inclusionary intent contributes to my firm conviction that a builder's remedy is not appropriate.

Estoppel

I have considered the argument that Emerson is estopped from asserting the affirmative defense of bad faith against Community Developers because Emerson and its Planning Board adopted and endorsed the 2001 Housing Element and Fair Share Plan and included the Community Developers' site for RDP and compliance purposes. It is a fair argument to suggest that Emerson is playing fast and loose with the court by changing its position regarding Community Developers. However, this conduct does not constitute judicial or other estoppel for the simple reason that Emerson was *required*--by my Order of December 15, 2000--to prepare a plan for *Mt. Laurel II* compliance that included the Community Developers' site. I had granted a conditional builder's remedy, *subject to the defense of bad faith*. Thus, estoppel is wholly inapposite. Indeed, had Emerson's 2001 Housing Element and Fair Share Plan *not* included Community Developers' site, its public officials would have courted contempt proceedings.

Unclean Hands

I have further considered the doctrine of unclean hands on the part of Emerson as an independent basis to purge the bad faith defense. A trial court may, *sua sponte*, recognize and invoke the equitable doctrine of unclean hands in the interests of justice and public policy where justified by the circumstances⁴⁶. The essence of that doctrine, which is "discretionary on the part of the court,"⁴⁷ is that "[a] suitor in equity must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings."⁴⁸ In simple parlance, it merely gives expression to the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit⁴⁹.

It has been contended throughout this trial, by Community Developers as well as by Emerson Woods, that Emerson has not presented even a scrap of genuine government compliance with *Mt. Laurel II*, and that such inaction continues to the present. There is much to be said for these contentions. Just a cursory glance at the chronology of the development of *Mt. Laurel II* jurisprudence reveals the feebleness of Emerson's response to the rule of law.

⁴⁶ Trautwein v. Bozzo, 39 N.J. Super. 267, 268 (App.Div. 1956).

⁴⁷ Heuer v. Heuer, 152 N.J. 226, 238 (1998).

⁴⁸ A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 246 (1949).

⁴⁹ Faustin v. Lewis, 85 N.J. 507, 511 (1981)

On March 24, 1975, the New Jersey Supreme Court proclaimed that the Constitution of New Jersey required certain municipalities to use their power to regulate the use of land to provide housing opportunities for the poor⁵⁰. Eight years later, the Supreme Court acknowledged the sad fact that the vast majority of municipalities in the state had ignored the Court's constitutional mandate and continued to practice exclusionary zoning⁵¹. On July 2, 1985, the NJFHA was adopted; on February 20, 1986, the Supreme Court declared the NJFHA constitutional⁵². Thus, Emerson has been on notice since at least the middle 1980s that it is required to obey the constitutional mandate to provide realistic opportunities for the construction of low and moderate income housing. Although Emerson's 1992 Housing Element and Fair Share Plan recognized the need to rezone certain sites for inclusionary development, no practical efforts were taken to make the dream a reality. Emerson never sought substantive certification from COAH. It was apparently satisfied that its benign neglect would either go unnoticed, or market forces would impel non-inclusionary development to saturate the remaining developable parcels of land and thereby render compliance with *Mt. Laurel II* impossible or, at worst, impracticable. The

⁵⁰ So. Burlington Cty. N.A.A.C.P. v. Tp. of Mount Laurel, 67 N.J. 151 (1975).

⁵¹ So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158 (1983).

⁵² Hills Dev. Co. v. Bernards Tp., 103 N.J. 1, 22 (1986).

approval and development of the assisted living facility next to Marek Farm is a recent example of this unspoken policy.

By 2000, Emerson had adopted a new version of a Housing Element and Fair Share Plan. In it, Emerson acknowledged its COAH-calculated fair share obligation to be 74 units, but claimed five units as credits. It proposed to satisfy the net obligation of 69 units with an RCA program of 12 units, inclusionary development on the Marek Farm site yielding 13 units, and an assortment of ambiguous, incomplete proposals for accessory apartments, an age-restricted public facility, and a possible overlay zone to account for unmet need. Nowhere in the 2000 Housing Element and Fair Share Plan is there any discussion of a vacant land adjustment or RDP. Suffice it to say, as the municipality seems to acknowledge, the 2000 Housing Element and Fair Share Plan was rightly declared noncompliant with *Mt. Laurel II* principles, as well as deviating from COAH regulations.

After I ordered Emerson to adopt amendments to its Master Plan and land development ordinances to effectuate compliance with the New Jersey Constitution and the laws of the State of New Jersey, Emerson still balked. Emerson has not even proposed, much less adopted, any legislation that is consonant with the order of December 15, 2000. The 2001 Housing Element and Fair Share Plan is riddled with incomplete data and is a wholly unsatisfactory response to a conventional *Mt. Laurel II* court-ordered mandatory

injunction. The Special Master has cataloged the deficiencies in Emerson's response to the Court's direction. It is noteworthy that at trial, Emerson did not dispute most of the Special Master's observations. Those deficiencies include:

1. Failure to follow COAH's rules and regulations in computing RDP.
2. Failure to provide documentation and evidential support for taking a five-unit credit against fair share.
3. Miscalculation of RDP.
4. Illogical application of density and set-aside for Marek Farm.
5. Erroneous use of rental bonus for Marek Farm where there is no evidence of compliance with N.J.A.C. 5:93-5.15(b)(5) and (6) relating to an agreement with a developer to build rental units.
6. Incomplete demonstration, in accordance with COAH rules, of how inclusionary sites (Marek Farm and Community Developers) are "available, suitable, developable, and approvable."⁵³
7. Failure to include a draft ordinance delineating the actual design parameters for development of inclusionary sites.
8. Incomplete and inadequate support for the feasibility of using accessory apartments to be used to address Emerson's affordable housing obligation.
9. Noncompliance with COAH regulations regarding Emerson's development fee Ordinance 1170 and Spending Plan⁵⁴.
10. Proffer of vague, conceptual, and largely speculative measures for meeting unmet need.

In analyzing the effect of Emerson's conduct throughout the pertinent period (1983 to today), I am hard pressed to declare its behavior as constituting *clean hands*. However, the test is whether this municipal abdication is shockingly contrary to the public interest so as to constitute *unclean hands*. Additionally, for the doctrine of unclean hands to apply vis-à-vis the

⁵³ N.J.A.C. 5:93-5.3(b).

⁵⁴ N.J.A.C. 5:93-5.1(c)(1) to (6).

builder's remedy analysis, some evidence of an unseemly effect upon Community Developers must be shown. A generalized negative consequence to the public interest is not sufficient in this analysis because Community Developers' loss of a builder's remedy does not automatically prejudice the public interest. Because the rights of the absent class of unhoused poor remain vindicated, the unclean hands doctrine does not outweigh the mischief of Community Developers. In addition, municipal delay in itself, while perhaps an appropriate basis for rejecting an affirmative claim pursuant to the laches doctrine, does not establish unclean hands for purposes of our jurisprudence⁵⁵. After all is said and done, I conclude that the doctrine of unclean hands does not eliminate Emerson's affirmative defense of bad faith. Community Developers is not entitled to a builder's remedy.

Interim Judgment and Mandatory Injunction

An interim judgment shall be entered dismissing Community Developers' claim seeking a builder's remedy, with prejudice. The interim judgment shall further declare that Emerson's land use regulations remain invalid and unconstitutional insofar as they continue past exclusionary practices. The Special Master shall prepare a comprehensive compliance plan (including an appropriate strategy to address the unmet need) for Emerson, together with

⁵⁵ See Borough of Princeton v. Board of Chosen Freeholders of County of Mercer, 169 N.J. 135, 158 (2001).

zoning and planning legislation to satisfy the RDP and all applicable COAH regulations. He shall draft a meaningful Housing Element and Fair Share Plan, as well, together with a fee ordinance and spending plan that is consonant with COAH rules. He shall exercise planning discretion in deciding whether to employ a program of RCAs, accessory apartments, mobile homes, or any other incentive devices to meet the RDP. He shall further determine the most appropriate device to compensate for the lost opportunity to collect \$444,000 which had been earmarked for affordable housing purposes in connection with the Emerson Woods development approval. This plan shall be completed and presented to Emerson's Planning Board and governing body no later than December 31, 2001.

COAH regulations regarding percentages of rental units, mix of bedrooms, array of affordability limits, and distribution of age-restricted units shall be followed where practicable. Height limits of up to sixty feet shall be permitted, except where a lesser height is appropriate in light of sound planning principles.

The Special Master shall regularly consult with designated representatives of Emerson and its Planning Board during the preparation of the compliance plan and he shall take into consideration their constructive criticism. Emerson and its Planning Board shall effectuate the Special Master's compliance

plan no later than February 15, 2002. In default thereof, all development regulations in Emerson shall be permanently invalidated. All land shall be treated as unzoned, not subject to local site plan review, and developable at the will of the developer, subject only to applicable state and federal law, including, of course, the Uniform Construction Code⁵⁶. If Emerson complies, it will be entitled to a six-year judgment of repose. Costs of suit shall be borne by the parties without reallocation. A final judgment shall be entered on or after February 18, 2001.

VI. CONCLUSION

The facts of this case reveal a legacy of cavalier inattention by a succession of Emerson governing bodies that produced a pattern of land use strikingly unfriendly to poor people. Spanning decades, the inaction of Emerson requires an immediate and robust response. Since opportunity has not knocked, it is time to build a door.

The stern result of the interim judgment is necessary so that the character of our State, as reflected in our Constitution, in fact imparts the ways in which we live together, when our relations are touched by the law. Emerson is not immune to that character and it must conform its behavior to the will of all the people. That is the basic justification for *Mount Laurel II*. When that clear obligation is breached, and instructions

⁵⁶ N.J.S.A. 52:27D-119 *et. seq.*

given for its satisfaction, the municipality must prove every element of compliance. It is not fair to require a poor man to prove you were wrong the second time you slam the door in his face.⁵⁷ Our Constitution needs to be more than a whisper to the poor. While Emerson may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages.

⁵⁷ 92 N.J. at 306.

EXHIBIT B

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FILED

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COMMUNITY DEVELOPERS &
MANAGEMENT, L.L.C.,

Plaintiff,

and

EMERSON WOODS, L.L.C., and
UNITED PROPERTIES GROUP, INC.,

Intervenors-Plaintiffs,

vs.

BOROUGH OF EMERSON and
PLANNING BOARD OF THE
BOROUGH OF EMERSON,

Defendants.

And

BOROUGH OF EMERSON,

Plaintiff,

vs.

UNITED WATER NEW JERSEY and
UNITED PROPERTIES GROUP, INC.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-2734-00
DOCKET NO. BER-L-268-01

Civil Action

INTERIM JUDGMENT DISMISSING
WITH PREJUDICE PLAINTIFF'S
BUILDER'S REMEDY CLAIM
AND DIRECTING REMEDIAL
ACTION BY SPECIAL MASTER

THIS MATTER having come before the Court for plenary trial on September 24, 25, 26
on October 4, 2001 on all unadjudicated claims and defenses asserted by the parties in the action

entitled "Community Developers & Management, LLC v. Borough of Emerson, et al.," pending as part of this consolidated action under Docket No. BER-L-2734-00; and the parties having been represented at trial by McCarter & English, LLP (Gary T. Hall, Esq. appearing), attorneys for the Borough of Emerson, Herten, Burstein, Sheridan, Cevasco, Bottinelli & Litt, LLC (Thomas J. Herten, Esq., appearing), attorneys for defendant United Water New Jersey, defendant & plaintiff-intervenor United Properties Group, Inc., and plaintiff-intervenor Emerson Woods, LLC; and Schepisi & McLaughlin (Nylema Nabbie, Esq., appearing), attorneys for plaintiff Community Developers & Management, LLC; and the Court having considered the testimony and evidence presented at trial and the legal arguments of counsel; and the Court having considered the written and oral opinions and recommendations of David Kinsey, the court-appointed special master; and good cause having been shown; and for the reasons set forth in a written opinion issued by the Court, dated October 19, 2001;

IT IS THIS 7 DAY OF NOVEMBER, 2001, ORDERED THAT:

1. The builder's remedy claim asserted by plaintiff Community Developers & Management, LLC is hereby dismissed with prejudice, ~~as being barred by plaintiff's pre-litigation actions that involved the threat of Mt. Laurel litigation in an attempt to obtain non-Mt. Laurel relief, contrary to the express dictates of the New Jersey Supreme Court in So. Burlington Cty. N.A. C.S.P. v. Mt. Laurel Tp., 92 N.J. 158 (1983) ("Mt. Laurel I")~~
2. The claim by defendant Borough of Emerson that inclusion in RDP of the property owned by plaintiff Community Developers & Management, LLC is barred by N.J.S.A. 52:27D-311.1 and 313.1 is hereby rejected, ~~on its merits based on the determination that the residence that previously existed on the property was unfit for human habitation at the time of demolition and it was not negligently or willfully rendered unfit for human habitation within the three years prior to the date of demolition.~~

3. The Borough of Emerson's affordable housing obligation consists of an adjusted fair share obligation of 20 units, based on realistic development potentials of 18 units for the ~~Market~~ ^{MAREK} site and 2 units for the Community Developers site, and a further unmet need of 54 units. The Borough of Emerson's land use regulations remain invalid and unconstitutional under the New Jersey Fair Housing Act, Mt. Laurel II decision and other pertinent case law, since they do not provide a realistic opportunity for satisfaction of this fair share housing obligation.

4. The special master is hereby directed to prepare a comprehensive Mt. Laurel compliance plan to address the Borough of Emerson's adjusted fair share obligation based on the realistic development potential of 20 units and also including additional affirmative measures directed at Emerson's unmet need in accordance with the Court's written opinion dated October 19, 2001. This compliance plan shall be submitted to the Emerson ^{GOVERNING BODY AND} Planning Board by no later than December 31, 2001.

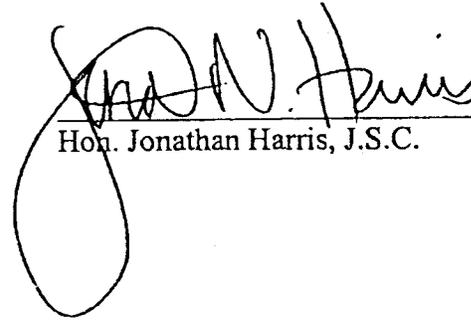
5. The special master shall be guided by the COAH regulations and shall exercise planning discretion as to the components of the required compliance plan, and the special master shall regularly consult with designated representatives of the Borough of Emerson and Emerson Planning Board during preparation of the compliance plan and shall take into consideration their constructive comments.

6. The Borough of Emerson and Emerson Planning Board shall effectuate the special master's compliance plan by no later than February 15, 2002. Compliance with this requirement shall result in entry of a final judgment on or after February 18, 2002, with costs of suit to be borne by the parties without reallocation. This final judgment of Mt. Laurel compliance shall entitle the Borough of Emerson to six years of repose from Mt. Laurel litigation.

7. If the deadline in the preceding Paragraph is not met by the Borough of Emerson, all development regulations in the Borough of Emerson shall be permanently invalidated, and

development may proceed without regard to local land use ordinances, subject only to applicable federal and state laws, including the Uniform Construction Code Act.

8. The Court retains jurisdiction pending further actions by the parties as required by this Interim Judgment.



Hon. Jonathan Harris, J.S.C.

OPPOSED,

ATTACHED TO THIS ORDER,
AND INCORPORATED HEREIN,
IS A CORRECTION (PAGE 32)
TO THE COURT'S OCTOBER 19, 2001
WRITTEN OPINION.

the diverse uses in the surrounding area and the keen need for low and moderate income housing in Emerson, I conclude that the appropriate density, even for this small site, is 14 units per acre with a 20% set-aside. I believe that an even higher density, approaching the density found in nearby multi-family development, would likewise be realistic. However, I believe that the Special Master's advice in this regard is compelling. This results in 11 units on the site, including two low and moderate income units. Under the MLUL, this is a density of 14 units per acre (11 units spread over .83 acres).

The following Table 1 completes the computation of RDP according to COAH methodology and results in Emerson's RDP of 20 units of low and moderate income housing:

**Table 1:
Summary of RDP Calculation**

Site	Unconstrained Area (In acres)	Units per Acre	Total Units	Set-Aside	RDP Units
Marek Farm	6.43	14.0	90	20%	18
Community Developers	.83	14.0	11	20%	2
TOTAL			101		20

Thus, it is Emerson's burden of proof to demonstrate that it has provided a realistic mechanism through zoning and other affirmative devices to satisfy this fair share of 20 units of low and moderate income housing, together with the unmet need of an additional 54 units under N.J.A.C. 5:93-4.2(h). A review of

EXHIBIT C

RESOLUTION

RESOLUTION OF THE PLANNING BOARD OF THE BOROUGH OF EMERSON ADOPTING AMENDED HOUSING ELEMENT AND FAIR SHARE PLAN

WHEREAS, the Planning Board of the Borough of Emerson adopted a Housing Element and Fair Share Plan as an amendment to the Master Plan for the Borough of Emerson after public hearing in April 2001, which included a determination that the Borough of Emerson has an adjusted fair share obligation of 14 units based on the realistic development potential ("RDP") calculation set forth therein; and

WHEREAS, after a plenary trial in the Superior Court in pending Mt. Laurel litigation, Judge Jonathan N. Harris determined that the Borough of Emerson has an adjusted fair share obligation of 20 units based on a RDP calculation using higher residential densities, as set forth in a written opinion dated October 19, 2001 and an Interim Judgment entered on November 2, 2001; and

WHEREAS, pursuant to the requirements of the Interim Judgment special master David Kinsey prepared an amended Housing Element and Fair Share Plan, as set forth in a report dated December 31, 2001 and exhibits annexed thereto; and

WHEREAS, the Planning Board of the Borough of Emerson has conducted a public hearing for the purpose of considering adoption of the amended Housing Element and Fair Share Plan prepared by the special master as an amendment to the Master Plan for the Borough of Emerson; and

WHEREAS, the Interim Judgment requires the Planning Board and the Borough Council to implement the amended Housing Element and Fair Share Plan prepared by the special master by no later than February 15, 2002; and

EXHIBIT D

RESOLUTION NO. 40-02

**RESOLUTION OF THE BOROUGH COUNCIL OF
THE BOROUGH OF EMERSON AUTHORIZING
AGREEMENTS AND OTHER ACTIONS TO IMPLEMENT
AMENDED HOUSING ELEMENT AND FAIR SHARE PLAN**

WHEREAS, the Planning Board of the Borough of Emerson adopted a Housing Element and Fair Share Plan as an amendment to the Master Plan for the Borough of Emerson after public hearing in April 2001, which included a determination that the Borough of Emerson has an adjusted fair share obligation of 14 units based on the realistic development potential ("RDP") calculation set forth therein; and

WHEREAS, the Borough Council previously adopted a resolution endorsing the Housing Element and Fair Share Plan adopted in April 2001; and

WHEREAS, after a plenary trial in the Superior Court in pending Mt. Laurel litigation, Judge Jonathan N. Harris determined that the Borough of Emerson has an adjusted fair share obligation of 20 units based on a RDP calculation using higher residential densities, as set forth in a written opinion dated October 19, 2001 and an Interim Judgment entered on November 2, 2001; and

WHEREAS, pursuant to the requirements of the Interim Judgment Special Master David N. Kinsey prepared an amended Housing Element and Fair Share Plan, as set forth in a report dated December 31, 2001 and exhibits annexed thereto; and

WHEREAS, in accordance with the requirements of the Interim Judgment the Planning Board of the Borough of Emerson adopted the amended Housing Element and Fair Share Plan prepared by the Special Master as an amendment to the Master Plan for the Borough of Emerson after conducting a public hearing on January 29, 2002; and

WHEREAS, implementation of the amended Housing Element and Fair Share Plan prepared by the Special Master requires the approval of various agreements by the Borough Council as set forth therein; and

WHEREAS, the Interim Judgement requires the Planning Board and the Borough Council to implement the amended Housing Element and Fair Share Plan prepared by the Special Master by no later than February 15, 2002; and

WHEREAS, the New Jersey Supreme Court in So. Burlington County N.A.A.C.P. v. Mt. Laurel Township, 92 N.J. 158 (1983) ("Mt. Laurel II"), indicated that municipalities may adopt court-mandated land use and affordable housing regulations and implement affirmative remedies under protest and thus preserve the right to seek further judicial review;

NOW, THEREFORE, BE IT RESOLVED by the Borough Council of the Borough of Emerson, in the County of Bergen and State of New Jersey, this 5th day of February 2002, as follows:

1. In order to implement the amended Housing Element and Fair Share Plan prepared by Special Master David N. Kinsey as set forth in a report dated December 31, 2001 and adopted by the Planning Board as an amendment to the Master Plan of the Borough of Emerson, the Borough Council hereby authorizes and approves execution by the Mayor of the following agreements:

a. Affordable Housing Development Agreement between the Borough of Emerson and the Housing Corporation of Bergen County, in the form annexed hereto.

b. Borough of Emerson – Housing Authority of Bergen County Agreement on Administrative Agent for Affirmative Marketing and Affordability Controls, in the form annexed hereto.

c. Regional Contribution Agreement Between Emerson and Ridgefield for the transfer of ten (10) units at a cost of \$25,000 per unit for total cost of \$250,000, in the form annexed hereto.

d. Escrow Agreement for Development Fees between the Borough of Emerson and the New Jersey Council on Affordable Housing, in the form annexed hereto.

2. In order to implement the amended Housing Element and Fair Share Plan prepared by Special Master David N. Kinsey as set forth in a report dated December 31, 2001 and adopted by the Planning Board as an amendment to the Master Plan of the Borough of Emerson, the Borough Council hereby approves the Resolution by Emerson Borough Council of Intent to Bond for Shortfall, which is annexed hereto.

3. In order to implement the amended Housing Element and Fair Share Plan prepared by Special Master David N. Kinsey as set forth in a report dated December 31, 2001 and adopted by the Planning Board as an amendment to the Master Plan of the Borough of Emerson, the Borough Council hereby authorizes and approves the Emerson Spending Plan, which is annexed hereto.

4. In order to implement the amended Housing Element and Fair Share Plan prepared by Special Master David N. Kinsey as set forth in a report dated December 31, 2001 and adopted by the Planning Board as an amendment to the Master Plan of the Borough of Emerson, the Borough Council hereby authorizes and approves proposed Ordinance Nos. 1190, 1191 and 1192 and acknowledges pursuant to N.J.S.A. 40:55D-62(a) that this action is being taken notwithstanding inconsistency with the current Land Use Element of the Master Plan, since it has not been amended to reflect the amended Housing Element and Fair Share Plan.

5. All of the actions authorized by this Resolution are required by the express mandate of the Interim Judgement entered on November 2, 2001 by Hon. Jonathan N. Harris, J.S.C, in

pending Mount Laurel litigation entitled "Community Developers & Management, LLC v. Borough of Emerson, et al.," (Docket No. BER-L-2734-00), and the adoption of this Resolution to implement adopt court-mandated land use and affordable housing regulations and affirmative remedies being taken under protest consistent with the decision of the New Jersey Supreme Court in So. Burlington County N.A.A.C.P. v. Mt. Laurel Township, 92 N.J. 158 (1983) ("Mt. Laurel II"), and other legal principles to preserve the right to seek judicial review of the rulings contained in written opinion dated October 19, 2001 and the Interim Judgement entered on November 2, 2001 and judicial review of the court-mandated amended Housing Element and Fair Share Plan prepared by Special Master David N. Kinsey as set forth in a report dated December 31, 2001, including but not limited to the rejection of any inclusionary zoning for the Marek property, the requirement for a 10-unit RCA and the excessive density of the Palisade Avenue site, and to preserve the right to request a stay of the effectiveness in whole or in part of agreements, Ordinances and other actions authorized by this Resolution pending such further judicial proceedings.

6. The authorizations provided in this resolution shall not be effective until approved by the Hon. Jonathan N. Harris, J.S.C., in pending Mount Laurel litigation entitled "Community Developers & Management, LLC v. Borough of Emerson, et al.," (Docket No. BER-L-2734-00) and shall be subject to any conditions of such judicial approval, including any stay of the effectiveness in whole or in part of agreements, Ordinances and other actions authorized by this Resolution as may be approved by the Court.

THIS IS TO CERTIFY THAT THIS DOCUMENT
IS A TRUE COPY AS ADOPTED BY THE
BOROUGH COUNCIL OF THE BOROUGH
OF EMERSON, N.J. AT A MEETING HELD

CN 2-5-02
BORO CLERK Darsha J. Soan

-4-

NWK3: 643236.04

EXHIBIT E

COMMUNITY DEVELOPERS v BORO OF EMERSON - March 21, 2002

SHEET 1

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-268-01
APP. DIV. NO. _____

COMMUNITY DEVELOPERS,)
)
Plaintiff,)
)
vs.)
)
BOROUGH OF EMERSON,)
)
Defendant.)

TRANSCRIPT
of
DECISION _____

Place: Bergen County Courthouse
10 Main Street
Hackensack, NJ 07601

Date: March 21, 2002

BEFORE:

HONORABLE JONATHAN HARRIS, J.S.C.

TRANSCRIPT ORDERED BY:

CHRISTINE FARRINGTON, ESQ.,
294 Union St., Hackensack, NJ 07601

APPEARANCES:

NYLEMA NABBIE, ESQ., (Schepisi & McLaughlin)
Attorney for the Plaintiff

GARY P. HALL, ESQ., (McCarter & English)
Attorney for the Defendant

DR. DAVID KINSEY,
Special Master

Kathryn Murray
ELITE TRANSCRIPTS, INC.
28 Catherine Street
Bloomingdale, NJ 07403
(973) 283-0196
Audio Recorded
Operator, _____

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COMMUNITY DEVELOPERS v BORO OF EMERSON - March 21, 2002

SHEET 2

I N D E X

Page

THE COURT

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Court - Decision

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1 THE COURT: This is COMMUNITY DEVELOPERS AND
2 MANAGEMENT VS. BOROUGH OF EMERSON. Docket number L-
3 2734-00. May I have the appearances of counsel.
4 MS. NABBIE: Good afternoon, Your Honor,
5 Nylema Nabbie, Schepisi & McLaughlin, appearing on
6 behalf of the plaintiff.
7 MR. HALL: Gary Hall, McCarter & English, for
8 defendant, Borough of Emerson.
9 THE COURT: And the appearance of the Special
10 Master.
11 MR. KINSEY: David Kinsey, Your Honor.
12 THE COURT: Good afternoon to all ~~counsel~~ and
13 Special Master. Welcome. I make the following
14 findings of fact and conclusions of law.
15 The determinations I am about to make relate
16 to the remediation proposal of the Municipality, as
17 dictated by the Special Master pursuant to the interim
18 judgment in this action, dated November 2nd, 2001,
19 which is based upon my written opinion of October 19,
20 2001.
21 In this Mount Laurel II exclusionary zoning
22 and builders remedy action I have already determined
23 that Emerson officials have relentlessly preserved and
24 exacerbated economic and class segregation throughout
25 the Borough. There appeared to me to be a remarkably

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COMMUNITY DEVELOPERS v BORO OF EMERSON - March 21, 2002

SHEET 3

Court - Decision

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1 consistent and extreme pattern of exclusionary efforts
2 characterized by what appears to be developing again.
3 That is, concentrated native opposition to affordable
4 housing in certain areas of the Borough, and
5 acquiescence in that opposition by Borough officials.
6 In my October, 2001 opinion I catalogued a
7 variety of missed opportunities, failure of will and
8 lack of resolve by governmental actors spanning decades
9 regarding the Borough's obligation to provide a
10 realistic opportunity for low and moderate income
11 housing.

12 I remain dumbfounded, that notwithstanding
13 all of the accumulated history of this State's
14 exclusionary zoning litigation and the perils attendant
15 thereto, that Emerson appears to have overlooked its
16 lessons, and is consigned to repeat the costly blunders
17 of the past.

18 Emerson's entrenchment is again on display in
19 this proceeding, where although it correctly points out
20 the technical errors of the Special Master's compliance
21 plan, it neglects to provide a meaningful alternative
22 to the affordable housing crisis within its borders.

23 Once the Law Division has issued a valid
24 order to remedy the effects of a prior specific
25 Constitutional violation, as here, elected officials

Court - Decision

5

1 are expected to act with dispatch to remedy the wrong.
2 At this point the Constitution itself imposes an
3 overriding definition of the public good. And public
4 officials sworn to uphold the Constitution may not
5 avoid a Constitutional duty by bowing to the political
6 effects of prejudice and self-interest. Defiance at
7 this stage results, in essence, in a perpetuation of
8 the very Constitutional violation at which the remedy
9 is aimed.

10 At the conclusion of the trial I was
11 convinced that it would be a vain and futile act to
12 commit this Constitutional remedy to the very
13 intractable officials who appeared to be incapable of
14 taking meaningful action. Had I done that, given the
15 limited presentation by the Municipality, I believe
16 that we would probably be in the same posture that we
17 are today. That is, perhaps deciding whether a two-
18 site compliance plan consisting only of the community
19 developers land and the Marrick (phonetic) farm
20 presents a pragmatic solution for affordable housing
21 needs within the six-year compliance period.

22 Such a plan would not pass Constitutional
23 muster, and in this scenario the Special Master would
24 have been ordered to take over to devise a plan for the
25 Municipality. Here, it's exactly the opposite. The

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COMMUNITY DEVELOPERS v BORO OF EMERSON - March 21, 2002

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Court - Decision

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1 Special Master has crafted an imperfect compliance
2 plan, and the Municipality now is entitled,
3 notwithstanding my expressed reservations, to give it a
4 shot.

5 The main problem in this case is that the
6 governing body has not yet suggested a viable
7 alternative to the Kinsey compliance plan, and has not
8 countered the factual predicate upon which it was
9 built.

10 To be sure, Emerson challenges Dr. Kinsey's
11 plan on distinct legal grounds, some of which are
12 persuasive and some of which are not. But I am left
13 adrift again by a Municipality that has been content to
14 dispatch New Jersey Constitution to serve as mere
15 background noise in Emerson.

16 On the other hand, my effort to expedite
17 structural reform in the Land Use Practices of Emerson
18 has not paid dividends. The Special Master has done
19 the initial work, albeit imperfectly, and my choices
20 are limited.

21 I could approve the Special Master's plan by
22 granting a waiver under COA regulations. I decline to
23 do that.

24 I could continue the Master to come up with a
25 more finely crafted plan or I could give the governing

Court - Decision

7

1 body what it is clamoring for, and that is an
2 independent opportunity to right the Constitutional
3 wrong. I should warn the governing body, as I warn
4 most litigants, one must be careful what one wishes for
5 because you might just get it.

6 I had intended to employ the Special Master
7 as the remediation vehicle in order to swiftly remove
8 the condition that threatens Constitutional values.
9 The Supreme Court has explained that in institutional
10 litigation the appointment of a Special Master is not
11 to be regarded as a victory for either side. And that
12 the Special Master's value lies in assisting all
13 parties to resolve their differences. While the
14 appointment of a Special Master is discretionary, such
15 appointment is desirable where the Court orders the
16 revision of land use regulations, especially if the
17 revision is substantial and the Municipality's
18 historical posture has been resistant.

19 A Special Master is an expert, a negotiator,
20 a mediator and a catalyst. A person who is designed to
21 help the Municipality select from innumerable
22 combinations of actions that which could satisfy the
23 Constitutional obligation. The appointment of the
24 Special Master is not viewed as punitive in the least.
25 It is not designed to settle scores with recalcitrant

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COMMUNITY DEVELOPERS v BORO OF EMERSON - March 21, 2002

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Court - Decision

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1 Municipalities.

2 Dr. Kinsey has been a particularly apt and
3 able Special Master in trying to remain balanced amidst
4 the awful cross-currents of this case. I do not view
5 his work following the interim judgment as a failure,
6 even though it did not achieve the desired result.

7 Perhaps it was I who was too ambitious and
8 too overly sanguine that the Special Master could
9 propose something that would likely satisfy and work
10 for all interested parties. Having not achieved that
11 goal, I hereby restore the Municipality to the front
12 line of making land use value judgments, but the
13 Special Master will remain Emerson's conscience.

14 By returning to Emerson its zoning authority,
15 I in no way intend to abdicate my responsibility under
16 Mount Laurel II to insure compliance with the New
17 Jersey Constitution.

18 If this effort fails, I will have no choice
19 but to permanently invalidate Emerson's land use
20 regulations or consider the imposition of a stay of all
21 development applications, from the smallest to the
22 largest, until compliance is achieved.

23 Either coercive incentive will be difficult
24 to swallow. But the former has the elegant simplicity
25 of immediately providing a realistic opportunity for

Court - Decision

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1 the construction of low and moderate income units,
2 while the forme will likely only parade a public clamor
3 that may impel government to achieve Constitutional
4 compliance.

5 That's a summary of my conclusions in this
6 case. The specific facts upon which I base that
7 conclusion consist of the following:

8 I, basically, have rendered my opinion
9 backwards. Normally I make my fact finding first and
10 then my conclusions. Here, I've done it the opposite.

11 Dr. Kinsey was invested with extraordinary
12 powers to devise a compliance plan for Emerson. Dr.
13 Kinsey himself has described that investment as almost
14 unique. He pointed out only one other case that he was
15 aware of in which the Judiciary had made that
16 determination. And that, ultimately, did not result in
17 the Master performing what Dr. Kinsey did here.

18 It is a very uncomfortable position for any
19 single individual, any single unelected individual to
20 be placed in, given New Jersey's long tradition of Home
21 Rule, especially as to land use regulations.

22 Under the bright light of the New Jersey
23 Constitution, however, it seemed to me to be
24 appropriate given the bankruptcy of action by the
25 Emerson governing bodies over the years.

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COMMUNITY DEVELOPERS v BORO OF EMERSON - March 21, 2002

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Court - Decision

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1 My rationale for investing the Special Master
2 stemmed from the long-standing litany of inaction and
3 the palpably invidious discrimination that it worked.
4 I took my cue from the variety of institutional
5 litigation case, primarily in Federal Court, including
6 School v. Segregation cases, prison reform cases,
7 mental health provision cases and the like.

8 I was fortified in my decision by the lapse
9 of time that has passed since the New Jersey Supreme
10 Court decided MOUNT LAUREL II. And what I mean from
11 that is I acted deliberately recognizing that the New
12 Jersey Supreme Court did not project or promote the
13 remedy that I created. And, in fact, more
14 traditionally, granted a Municipality, in the first
15 instance, the opportunity to remediate a problem. I
16 viewed the passage of time, from 1983 until the year
17 2001 as sufficient time to wait for the Municipality to
18 act.

19 I also was moved, as I've already indicated,
20 by the facts, the particular facts in this case, and
21 the recognition that it is the rare case that a
22 Municipality need be compelled to act at all. I say
23 that because the vast majority of MOUNT LAUREL II
24 litigation is ultimately resolved.

25 Dr. Kinsey was charged to do an independent

Court - Decision

11

1 assessment, to consult with Municipal Officials,
2 members of the Governing Body, members of the Planning
3 Board, the various advocates in this Court. He
4 conducted one or more informal meetings. He reached
5 out for other resources in the Municipality. Here I'm
6 referring to the United Jersey Representatives who
7 ultimately made available approximately 1.5 acres of
8 land on Palisade Avenue. And he constructed what he
9 believed was a COA and Constitutional compliant plan.

10 I had already determined that the obligation
11 of Emerson, after a full trial on full proofs, was 20
12 units based upon Emerson's realistic development
13 potential. I granted Emerson's request for a lack of
14 land adjustment. One that is countenanced both by
15 Statute and by regulation.

16 For those 20 units that were intended, under
17 MOUNT LAUREL II, to be likely to be constructed within
18 the six-year period of repose that would follow from
19 the conclusion of this case, were the following:

20 A five-unit, age restricted, rental housing
21 development on the property still owned, as I
22 understand it, by Plaintiff, Community Developers.
23 Those five units would be entitled to generate one
24 virtual unit, a credit, an additional unit without
25 actual construction, based upon COA regulations. That

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COMMUNITY DEVELOPERS v BORO OF EMERSON - March 21, 2002

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Court - Decision

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1 component, therefore, was a five-unit development
2 yielding six units towards the realistic development
3 potential.

4 The second component of the plan was an
5 amendment to the Emerson development regulations
6 permitting inclusionary zoning on this newly discovered
7 1.5 acre parcel on Palisade Avenue to be developed with
8 18 units yielding 4 units of low and moderate income
9 housing.

10 The third component was a regional
11 contribution agreement for ten units. The three
12 components adding up to the 20-unit R.D.P.

13 The compliance plan was much more extensive
14 than what I've indicated, but these are the key
15 ingredients that are challenged, or some of them. When
16 I say there are more elements to the compliance plan,
17 I'm not fleshing out the overlay zone, the proviso for
18 unmet need, the spending plan, the tweaking and
19 amendments to the Affordable Housing Trust Fund and the
20 escrow provisions for that. All of which were provided
21 in the compliance plan and none of which have been the
22 target of much, if any, dispute.

23 The Municipality argues that the fatal flaw
24 in Dr. Kinsey's compliance plan, not the only one, but
25 the fatal flaw is that it fails to include the Marrick

Court - Decision

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1 Farm property which was the source of a substantial
2 number of units in the computation of the realistic
3 development potential.

4 On Page 32 of my October 19 opinion, that's a
5 Table One, I had assigned 18 R.D.P. units to Marrick
6 Farm and two R.D.P. units to Community Developers.
7 It's important to remember that the Municipality itself
8 had projected and promoted the Marrick Farm site as an
9 element in the R.D.P., albeit not at the ultimate
10 density that I determine. But there never was a
11 dispute, until this proceeding, as to whether Marrick
12 Farm should be an R.D.P. And the Municipality's
13 position now is since Dr. Kinsey did not include it,
14 and I'll explain why he didn't include it in a moment,
15 then Emerson should be relieved of 18 units of R.D.P.,
16 otherwise it would not be obtaining the statutory and
17 administrative remedy of a lack of land adjustment.

18 I do not subscribe and I do not agree with
19 the Municipality's position that the elimination of
20 Marrick Farm was a flaw. I think and I conclude that
21 it is a correct determination. It is supported by the
22 facts. The Municipality presented no contrary facts to
23 those of Dr. Kinsey. And it is supported
24 philosophically, in my view, under the Statute, meaning
25 the Fair Housing Act and under the regulations. I'll

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COMMUNITY DEVELOPERS v BORO OF EMERSON - March 21, 2002

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Court - Decision

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1 come back to that later.

2 Another flaw the Municipality points out is
3 that the total cost of the compliance plan approaches
4 \$600,000, and the Fair Housing Act bars the forced, the
5 involuntary use of Municipal revenue in meeting a
6 compliance order or a COA order.

7 As it turns out, substantially less than the
8 total projected cost is Municipal money. Most of this
9 money is held in trust by the Municipality. It's
10 somebody else's money. I couldn't help but being
11 struck by the Municipality having no qualms about
12 spending 7.8 million dollars of other people's money,
13 and yet balking at spending upwards of \$160,000 to
14 \$200,000 to meet Dr. Kinsey's compliance plan.
15 Nevertheless, the Statute does seem to prohibit a Court
16 from specifically requiring the use of what are called
17 Municipal revenues.

18 There's something to be said for the
19 Municipal position. The Municipality has pointed out
20 the case of WARREN COUNTY COMMUNITY COLLEGE -- might
21 truly be WARREN COUNTY COMMUNITY COLLEGE AGENCY VS.
22 WARREN COUNTY, as the thought that no court can force a
23 legislator to appropriate or spend money.

24 I'm pausing because I want to choose my words
25 carefully. That case, I believe, expressly recognized

Court - Decision

15

1 that it was not dealing with a Constitutional issue.
2 It was dealing in a dimension of the much more mundane,
3 although it was dealing with Separation of Powers and
4 the equitable extent of the authority of the Court.

5 I have my doubts whether a Court would be
6 hamstrung ala WARREN COUNTY COMMUNITY COLLEGE but I
7 don't ignore a case that was cited SPILLONE (phonetic)
8 VS UNITED STATES, 493 U.S. 265, dealing, not with
9 ordering a Municipality to spend money, but ordering
10 individual governing body members to do something in
11 that regard, and a course of incentive regarding that.

12 This is a very difficult area -- it's an
13 admittedly sensitive area, and it is one for which,
14 while the ironies abound in Emerson, I cannot and will
15 not ignore the proviso in the Fair Housing Act
16 regarding the expenditure of funds as being an order by
17 a Court.

18 The Municipality further points out that, and
19 I hope I've read the argument correctly and I think I
20 have, that the use of Palisades Avenue site is arguably
21 barred by a provision of the Fair Housing Act, N.J.S.A.
22 52:27D-310.1 which prohibits the use of land -- what I
23 should better say is which prohibits the forced use of
24 land that was excluded from R.D.P. for a compliance
25 plan.

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1 I don't believe that that has any
2 applicability here because the 1.5 acres was never
3 excluded. It just wasn't included. And there's a big
4 difference because there is, under the COA regulations,
5 an exclusion process for which this property was never
6 originally involved. So I don't find that that is a
7 defect.

8 And finally, there is a claim that the use of
9 the age-restricted rental housing as a vehicle to
10 produce six units, five real, one virtual, is barred
11 under N.J.A.C. 5:93-6.1b. That and N.J.A.C. 5:93-5.14b
12 limit the number of age-restricted units where a
13 Municipality gets a vacant land adjustment as here, and
14 where it is electing, and I should put that in quotes
15 for this case, to send some units outside the Municipal
16 boundaries through a regional contribution agreement.

17 The formula permits no more than 25 percent
18 of the net of R.D.P. minus regional contribution
19 agreement units. In this case, that would be 20, which
20 is the R.D.P., minus ten, which is the R.C.A. which
21 leaves a net of 10. Twenty-five percent of that is two
22 and a half. Therefore, the maximum would be two age-
23 restricted units yielding two, four, if you round it
24 up, three age-restricted units yielding four, but not
25 enough to satisfy the total R.D.P.

Court - Decision

17

1 And the Municipality is correct that this is
2 a flaw. It was suggested, and I strongly considered
3 that N.J.A.C. 5:93-15.1, that is the waiver provision
4 of the COA regulations, might save the day. That
5 regulation permits the Council, and by inference the
6 Court, to grant waivers if it is determined will foster
7 the production of low and moderate income housing or
8 that such a waiver fosters the intent of, if not the
9 letter of its rules, or where the strict application of
10 the Rule would create an unnecessary hardship.

11 Arguably, the waiver might foster the
12 production of low and moderate income housing, but
13 given other concerns of the Municipality, I think, as a
14 first effort, a waiver would not be employed.

15 Now, let me go back to Marrick Farm and why
16 that is not appropriate for inclusionary zoning.
17 Better said, why it is not an appropriate element or
18 component of the housing element of the COA rules.

19 It is well recognized, in my view, and pretty
20 clear from the COA commentary and regulations as well,
21 that the computation of the realistic development
22 potential and the manner in which that is satisfied,
23 are two separate and distinct computations.

24 We ought not fool ourselves into thinking
25 that there is anything perfect, anything obtaining

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1 mathematical accuracy in computing the fair share
2 obligation of a Municipality. The arcane and
3 convoluted methodology of COA in coming to its first
4 level of pre-credited need is enough to suggest that
5 it's more of an art than a science.

6 The vacant land adjustment is no more precise
7 than that. And the R.D.P., as an adjunct of a vacant
8 land adjustment, doesn't get any more amorphous. But
9 it retains this discretionary, yet linked to objective
10 standards flavor.

11 The R.D.P. is a function of how a site fits
12 into a neighborhood and how acute the need is for low
13 and moderate income housing. The R.D.P., once it is
14 computed, is fixed. I daresay it's inviolate, although
15 that may be going a bit too far. It's certainly
16 challengeable on appeal, and I don't suggest otherwise.

17 Once the R.D.P. is set, the compliance
18 through a housing element can use a variety of
19 techniques to meet that R.D.P. A Municipality can
20 decide to put all of its obligation on one site, for
21 example, and not use a myriad of sites. Or a
22 Municipality, up to a limit, can decide to put those
23 sites out of town using a regional contribution
24 agreement. And most towns do that at some level. The
25 limitation, of course, is 50 percent of the R.D.P.

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1 There are provisions for accessory apartments
2 as a means of achieving R.D.P. And COA encourages many
3 innovative devices. All of that is confirmatory that
4 there need not be an identity of use between R.D.P.
5 sites and housing element sites. And a key ingredient
6 is to get over the threshold of N.J.A.C. 5:93-5.3b
7 which requires the familiar developable, approvable,
8 available and suitable criteria to be demonstrated.

9 In this case Dr. Kinsey has demonstrated that
10 this property is not developable within the meaning of
11 the regulation. And it is probably not available
12 within the meaning of the regulation. ~~That does not~~
13 mean, and the COA rules fairly recognize this, that the
14 property is then removed from R.D.P. There's just no
15 mechanism for that.

16 As to the developability achilles heel, that
17 is, the property has limited or no access to
18 infrastructure. The Municipality claims that may be
19 true, but then it's entitled to a durational adjustment
20 under the COA regulations. I reject that. I reject
21 that where there appears to be, although I can't say
22 with any ultimate supreme certainty, a variety of other
23 available techniques, at little or no cost to the
24 Municipality, none of which have been even remotely
25 presented by the Municipality, but fairly drip out of

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1 the COA regulations in the COA Handbook, to meet an
2 R.D.P.

3 And so I find, from the facts, that Marrick
4 Farm presently is not developable and is not likely to
5 develop within the six-year period of repose. And a
6 durational adjustment is not appropriate, given all of
7 the prior history. It would be the height of inequity
8 to permit such a durational adjustment, given the
9 history that has elapsed.

10 And I will say this; I, both as a believer in
11 precedent, as well as philosophically, believe that the
12 Court must be guided by the principles of the Fair
13 Housing Act. It's not just because the Supreme Court
14 says so; it makes eminent sense.

15 Having said that, and I think I have strayed
16 from the -- I have deliberately strayed from the Fair
17 Housing Act, maybe once in 15 cases. And I'm not even
18 sure that that's accurate. There is an equitable
19 reservoir of Constitutional power that permits the
20 Court to go outside the Fair Housing Act and, in my
21 view, and when I say Fair Housing Act I'm really
22 talking about the regulations thereunder because
23 there's nothing in the Act, specifically, on this, I am
24 satisfied that a durational adjustment in terms of
25 compliance for 20 units, and that's what we're talking

Court - Decision

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1 about, we're not talking about 100; we're not talking
2 about 1,000; we're not talking about any substantial
3 number, would be to further the Constitutional injured.

4 I find that there is a substantial question
5 as to whether Marrick Farm is available. Now, the
6 availability component has to do with title and
7 encumbrances. And while there was no evidence of
8 traditional encumbrances, there is hearsay evidence
9 that the property is not intended or likely to be used,
10 and this comes from Dr. Kinsey's conversations with the
11 representative of Marrick Farm. Now, I held in my
12 October 19th opinion that either stray or hearsay
13 comments -- here it is.

14 "Hearsay statements about the owner's
15 children and their ambitions have no evidentiary
16 significance." That's on Page 13 of the opinion. That
17 was a different issue than what Dr. Kinsey made an
18 inquiry of, and I think it would be grossly
19 inconsistent for me to elevate Dr. Kinsey's
20 conversations, hearsay conversations with Mr. Marrick
21 above that which was sought to be demonstrated during
22 the trial.

23 But that hearsay transformed by an expert's
24 opinion allows the Court to rely upon, to some extent,
25 the expert's opinion. Experts generally can only

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1 create their opinion reblying upon hearsay information.
2 Of course, that hearsay information is generally that
3 which is usually and reliably relied upon by experts.
4 And speaking to property owners is the raw material of
5 planners on an every day basis.

6 And so I don'tt want there to be any
7 misunderstanding here. I'm adopting the opinion of Dr.
8 Kinsey regarding the availability without elevating the
9 hearsay to any conclusiive effect.

10 Besides that, if the hearsay is reliable,
11 that's another reason why Marrick Farm is inappropriate
12 for including in the housing element from an equitable
13 standpoint.

14 It's important to note, again, because this
15 may be a species of judicial estoppel, that the
16 Municipality has always said, or at least I should say
17 at the time of trial and through various situations
18 prior to trial, that Marrick Farm should be included
19 for R.D.P. purposes. And if it's position now is it
20 shouldn't be because we've now learned some information
21 by which it shouldn't be in R.D.P. which I don't agree
22 with, but even if you were, then shame on the
23 Municipality. It's as judicially estopped from now
24 claiming that it ought to get a credit -- I shouldn't
25 say a credit -- an exclusion. It can't have it both

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23

1 ways.

2 And I believe that Marrick Farm, at the
3 present time and for the foreseeable period of the
4 repose, remains unavailable and may not be, unless
5 there be changed circumstances, a component of the
6 housing element.

7 With all of that said, this matter will be
8 remanded to the governing body, as I've already
9 indicated. The Municipality will be given an
10 opportunity to come up with its own plan. It can deal
11 with 20 units in any way that is appropriate. The
12 Special Master will remain available and will be
13 consulted and kept abreast of what is happening. I'll
14 give you time frames and specific parameters in a
15 minute.

16 I would expect, although I am not ordering
17 today, the Municipality to make meaningful use of other
18 people's money, both the trust fund and the variety,
19 although the sources may have dried up significantly,
20 of other funds through grants and loans that would
21 assist the Municipality in providing low and affordable
22 housing.

23 I don't begrudge for one second the fund
24 raising the Municipality developed to save Emerson
25 Woods. But what I'd like is that same talent and

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1 energy to go into satisfying this Constitutional
2 obligation. I don't think that's too much to ask of
3 anyone.

4 Throughout the period of the six years Dr.
5 Kinsey has estimated there's going to be 390,000
6 available. Now he may be right or he may be wrong, but
7 we know this, or at least the Municipality has
8 encountered this, there's \$306,000, and there probably
9 should be some more from missing interest, in the fund
10 right now.

11 So the Municipality will work out ~~its R.D.P.~~
12 using some or all of those funds, some additional funds
13 that the Municipality may wish to use. It will concoct
14 a plan without Marrick Farm, and it will concoct a plan
15 without accessory apartments. Nowhere in this case did
16 the Municipality ever take the position that its
17 housing stock was appropriate for accessory apartments,
18 other than a glib reference in one of the housing
19 elements.

20 Dr. Kinsey's recalcitrance to use accessory
21 apartments, given the sad experience throughout the
22 State, having nothing to do with Emerson, coupled with
23 the failure of the Municipality to come forth it's
24 strongly suggested that accessory apartments are not
25 appropriate.

Court - Decision

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1 Now, having said that, that may be too
2 extreme. It may very well be appropriate for some
3 measure of accessory apartments as a supplement. When
4 I say supplement, meaning real tangible likelihood of
5 development of low and moderate income housing, and
6 maybe one or two, and that's just by illustration --
7 that's not written in stone -- accessory apartments.

8 Because we know that the Municipality is not
9 expected to guarantee that low and moderate income
10 housing is built. It just has to show there's
11 realistic opportunity for it. And I may have been
12 precipitous in suggesting no accessory apartments.
13 There may be a place for a small number of them here.
14 Dr. Kinsey may disagree completely, and when we come
15 back here, and we will come back here, I will listen
16 carefully to him. That is if, and only if, the
17 Municipality decides to employ that device.

18 Now, I wrote out a number of possibilities,
19 and I recognize that I have no monopoly on imagination
20 and creativity in this regard, and as I indicated
21 before, there is numerable combinations that can arise.
22 But it seemed to me that there was some obvious
23 possibilities. And that's all that they are,
24 possibilities.

25 There could be a change on the so-called

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1 Community Developer's site changing from, say age-
2 restricted rentals to family rentals. A change in the
3 density. I suppose the Municipality wouldn't have to
4 purchase the property. The Municipality could just
5 give the zoning incentive to the property,
6 notwithstanding all the hubbub of the builder's remedy.
7 Sometimes a party may want to change its mind.

8 The Municipality can change the R.C.A. mix.
9 Once again, I'm not suggesting the Municipality has to
10 send any units out of town. I suppose I should be
11 gratified that this is a Municipality that didn't want
12 to send -- didn't want to export the poor. But that's
13 an option.

14 The Municipality may want to adjust the
15 density on Palisades Avenue site. It can eliminate
16 Palisades Avenue if you can come up with units
17 elsewhere. But maybe 18 units on that site is too much
18 and maybe I'll pick an arbitrary number, maybe 10 units
19 works.

20 Maybe there's other land lurking about, as a
21 result of all this controversy. Maybe somebody can
22 twist United Water for more land.

23 And in all of this if money is the root of
24 some or all of the Municipality's concern, and I've
25 already expressed my views regarding the Emerson Woods

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1 grant and the pittance of Municipal funds that would
2 have to fund Dr. Kinsey's plan, I can't help but be
3 continued to be struck by the loss of over \$400,000 in
4 money that would have accrued if Emerson Woods had
5 developed.

6 Now there are trade-offs there, to be sure,
7 and the governing body made a value judgment. It's not
8 for me to second guess that value judgment. Open space
9 is a salutary purpose, preservation of open space, the
10 promotion of affordable housing is as well. And I've
11 always viewed that contribution that would have come
12 from Emerson Woods as a loss to the protected class
13 which has not been directly compensated for.

14 Now where that ultimately comes out at the
15 end of this I'm not exactly sure. But I couldn't
16 resist reminding the parties of my concern in that
17 respect.

18 The Municipality, having had since October
19 19th or 20th to start to think about this, and now
20 having an authoritative decision regarding Marrick
21 Farms, will not be entitled to the full 90 days of
22 repose. But it also will not have to adopt ordinances,
23 as it would otherwise have to do. And let me tell you
24 what the Municipality will do.

25 It will consult with Dr. Kinsey and all other

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1 interested parties. That includes the public, that
2 includes the plaintiff, that includes any public
3 interest groups who may have been in contact with the
4 Municipality, and will prepare a housing element and
5 fair share plan and submit it to the Court no later
6 than April 30th, 2002.

7 As of that date, the Planning Board will have
8 adopted the housing element and fair share plan. The
9 Municipality will have introduced the necessary
10 ordinances, but it need not adopt them until after a
11 hearing, and I'm going to give you the date of the
12 hearing. You'll be able to fit these things in.

13 The date of the hearing, the next Court event
14 at which time this plan will be presented in open
15 court, will be May 10th, that is a motion Friday
16 afternoon, at 1:30.

17 The Municipality shall provide copies of the
18 ordinance and housing element to the Master and to the
19 Court no later than May 1st. And the Master will
20 provide his report and recommendations no later than
21 May 8th. That way, if it is approvable, the next order
22 will be to grant a conditional judgment of repose
23 conditioned upon the actual adoption of the ordinance,
24 and I'll certainly take into account the additional
25 work that any plan would need to have done in order to

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1 fulfil it. That is, submitting certain things to COA,
2 if that's the way the plan works out or otherwise.

3 No order is necessary to be submitted as a
4 result of today's proceeding. Essentially, what I'm
5 doing is I am continuing the compliance hearing with
6 these parameters.

7 Dr. Kinsey remains as the Special Master.
8 All other terms and conditions not inconsistent with my
9 decision today of the interim judgment, and of the
10 opinion, remain in full force and effect. Does anybody
11 have any questions?

12 MS. NABBIE: No, Your Honor.

13 MR. HALL: Judge, one clarification, just so
14 I'm clear. The Planning Board action by April 30 on
15 the housing element, that's as we did before, is a
16 formal master plan amendment.

17 THE COURT: That's correct.

18 MR. HALL: Okay.

19 THE COURT: Okay? Mr. Hall, do you have any
20 other questions?

21 MR. HALL: No, thank you. No, I'm sorry,
22 Judge, no.

23 THE COURT: I may have said something that
24 was contradictory. I said that the plan had to be
25 prepared and submitted to the Court by April 3th, and

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1 then I think I may have said something about May 1st.
2 MS. NABBIE: You did. I believe you said the
3 Municipality has to submit the plan to the Special
4 Master.
5 THE COURT: Okay. That's got to be April
6 30th. I want it to be consistent. Everything -- the
7 first submission, so to speak, is April 30th. The
8 Master's response is as I indicated. I would keep the
9 lines of communication open. It may very well be that
10 the Master will have very little objection. I don't
11 know whether Ms. Nabbie's client will have any
12 objections, but we'll have a hearing beginning on the
13 10th of May, and we'll see how this alternative works
14 out.
15 Dr. Kinsey, do you have any questions.
16 MR. KINSEY: No, Your Honor.
17 THE COURT: Okay. That concludes this
18 proceeding. Thank you for your patience. I'll see you
19 on May 10th. Good luck.
20 MR. HALL: Thank you, Judge.
21 MS. NABBIE: Thank you, Judge.
22 (Proceedings Concluded)

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Certification

I, Kathryn Murray, the assigned transcriber,
do hereby certify that the foregoing transcript of
proceedings in the Bergen County, Civil Part, on March
13, 2002, Tape No. 98-02, index number from 4480 to
7275, Tape No. 99-02, index number from 0001 to 1605,
is prepared in full compliance with the current tran-
script format for judicial proceedings, and is a true
and accurate compressed transcript of the proceedings
as recorded.

Kathryn Murray AOC#460 March 27, 2002
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EXHIBIT F

New Concepts

Emerson Housing Alternatives

New Concepts was asked to provide a report on two (2) sites for consideration as a part of the Borough of Emerson's Housing Element and Fair Share Plan. Given the limited timeframe in which the Borough has to consider and submit this plan, the following report is limited compared with other projects previously completed by our Management Team. Our report presents options for each of the two sites, possible funding options and the strengths and limitations of each respective site as well as a development pro forma. It is understood that construction must begin within two years. This fits with the timetable and requirements of the funding sources identified for each of these sites.

Plaza West

This project would be located on .8 acres (Blk 417, Lots 2 & 3) at the end of Plaza West, to the west of and immediately adjacent to the Conrail railroad tracks.

This new construction project would provide for the development of five (5) two bedroom, barrier free, rental units, which would be licensed by the Department of Human Services, Division of Developmental Disabilities as "Community Residences for Individuals with Developmental Disabilities", per NJAC 10:44A. As such, under COAH's guidelines each bedroom would count as a unit. With other bonus credits available to the Borough this project could provide 15 of the 20 total required units.

Individuals that would live in these units would be eligible for services from and as such are referred by the Division of Developmental Disabilities. Given this, we fully expect that all the units will be rented to individuals that meet the low-income guidelines.

Government construction funding that might be accessible for such a project would include the US/HUD 811 Program and HOME Program. While either funding source could be used, the size of the project supports the use of HUD 811 program funds. Supplemental funding alternatives include CDBG and Balanced Housing funds. Both of the US/HUD construction programs allocate funds through a competitive grant process, which occurs annually. This years HUD 811 program funding applications are due the first week of June. Approved funding reservations will be announced in October of this year. The timing required to complete the subsequent stages of approval would project the beginning of construction within 18 months.

To access any of these potential funding sources, New Concepts would have to have site control as defined by their respective HUD program guidelines. This means that New Concepts either owns or has full legal control over the site as to ensure that, should the grant funding be approved the project could be developed within 18 to 24 months.

Therefore, this site (as well as the other site) must be free from legal issues that would limit or delay site control.

The projected construction cost for the housing units themselves is \$495,000. This includes the items such as a hardwired fire alarm system required to meet State Licensing requirements. The remaining cost is almost impossible to estimate until several related questions are answered including but not limited to drainage requirements (given the drainage issues at West and Linwood). The zero runoff drainage requirements and existing street flooding issues (West & Linwood) are of particular importance as is the question regarding the use of one or both lots. If the development is limited to lot 2 the potential costs related to off-site improvements could potentially increase significantly given the obvious necessity to access the site.

Clearly this site is suitable for development. However, given the use of government funding, the population to be served, as well as the need to assure the Court of the feasibility of development it is important to list the strengths and limitations of this site.

Plaza West Major Strengths

- This would provide for the development of five two-bedroom, barrier free apartments thereby fulfilling 15 or the 20-unit obligation for the Borough.
- This is located in a residential area.
- Research to date has found the property to be free from any environmental limitation, which preclude development. A home oil storage tank may be on one site.
- No existing or pre-existing structure is located on lot 2 where the majority, if not all, of the dwelling units would be located.
- This project fits the grant funding guidelines for both the HUD 811 and HOME programs.
- The green space allowed within such a development would be of benefit for the people that would live on the site.

Plaza West Major Limitations

- This project requires off-site improvements (e.g. drainage, potential roadway, etc.) and new construction grant funds are limited to "on-site" improvements. The funding for such off-site improvements should be defined within the grant application for the construction funds.
- The property is currently zoned for single family and we are unaware of any existing guiding Borough ordinances for a project such as this.

- Questions regarding legal appeals that may impact site control have not as yet been answered and would be subject to the actions of the Borough.
- The neighbors have not been afforded the opportunity to participate in the design process, which always proves beneficial in previous developments.
- The development history and related emotional issues surrounding this site.

Lincoln Blvd.

This project would be located on the corner of Lincoln Boulevard and Kenneth Avenue (Blk 419, lots 1 & 2). This project would include the demolition of the two existing structures located on the respective lots. The combined site is approximately 90 X 100.

This new construction project would use a townhouse design providing for three units with a total of eight (8) bedrooms. Two units would be three (3) bedroom with the remaining unit being two (2) bedroom. At least one bedroom in each unit would be on the first floor with the remaining units being on the second. These rental units would be licensed by the Department of Human Services, Division of Developmental Disabilities as "Community Residences for Individuals with Developmental Disabilities", per NJAC 10:44A. As such, under COAH guidelines each bedroom would count as a unit.

The funding options available for this site are the same as the Plaza West site. However, given the size of the property and project this site may lend itself more to the use of HOME construction dollars.

Based upon a rough design the projected construction cost for the housing units is \$396,000 plus demolition and site work costs. We understand that the heating oil tanks were previously removed and as such there should be no ECRA issue with this site. Should the State require a secondary egress from the second floor, this cost will obviously increase. Likewise, the site costs have included some considerations for the yard and plantings thereby improving the site appeal for the residents and those in the neighborhood. This site requires designated parking spaces (anticipate eight 8) to be provided by the Borough on Kenneth Avenue.

This site is suitable for development. However, given the same issues and considerations listed under Plaza West it is important to list the strengths and limitations of this site.

Lincoln Boulevard Strengths

- All work is located on site providing thereby eliminating any major concerns regarding funding for off site improvements.

- Direct walking access to most community goods and services (e.g. stores, shops, restaurants, etc.).
- The expense of improvements for parking and related traffic/access issues is eliminated with the provision of parking on Kenneth Avenue.
- This project converts what may be substandard housing to new construction affordable housing for people with developmental disabilities.

Lincoln Boulevard Limitations

- The property is not directly next to a residential neighborhood.
- The Borough would have to assume responsibility for the relocation of any tenants that would be displaced prior to transferring the property to New Concepts.
- The potential impact on parking for the neighboring restaurant.

Timing & Funding

Either of these projects could be started within the timeframes outlined by the Court. At present there is a HUD 811 application process is underway with projects submissions due the first week in June. The 811 program is more involved in obtaining the necessary funding reservation and subsequent approvals. Likewise, if we miss this year's application, it will be a full year before the next application cycle.

The Bergen County Community Development Office is the contact point for federal HOME funding. Last years allocation was approximately 2.8 million dollars, of which one million is designated for home ownership programs. Again, last year the County awards included a Project at \$434,000. The application process will open this June. The Lincoln Boulevard project seems to lend itself, and as such may be better suited for, HOME funding.

Previously we submitted information about New Concepts, our Management experience, and identified the Architectural firm (DMR Architects) we plan to use for this project. Again, each member of this development team has a proven track record of successfully completing projects such as those contained here.

Finally, the project development costs for each of the alternatives is attached for your review. Should you have any questions please do not hesitate in calling. We thank you for the opportunity to participate in this process and look forward to the possibility of seeing either of these projects through completion and occupancy.

**NEW CONCEPTS
EMERSON HOUSING ALTERNATIVES**

Project: **Plaza West (10 Units)**

Site (Lots 2&3)

Donation

Construction:

Permits	\$ 14,500	
Site Work (On-Site)	52,000	
Construction	<u>495,000</u>	
Subtotal		\$ 561,500

Off-Site Improvements (unknown)**

** Off-Site Improvements are **not** funded through HUD construction programs. The major being issue and unknown cost being that of the services (e.g. drainage, gas, etc.) needed to properly support the site.

Soft Costs (811)

Appraisal	\$ 1,500	
Architect/Engineering	39,305	
Attorney	5,000	
Developers Fee	44,920	
Insurance	4,000	
Survey	<u>3,100</u>	
Subtotal		\$ <u>97,825</u>
	Total Costs	\$ 659,325

The total costs could be off as much as \$100,000 dependent upon issues such as off site improvements and drainage.

**NEW CONCEPTS
EMERSON HOUSING ALTERNATIVES**

Project: **Lincoln Avenue (8 Units)**

Site: Donation

Construction:

Demolition (2hrs)	\$	20,000	
Permits -		8,700	
Site Work		19,000	
Construction		<u>396,000</u>	
Subtotal			\$ 443,700

*Includes Contingency

Soft Costs

Appraisal	\$	1,200	
Architect/Engineer		26,622	
Attorney		2,000	
Developers Fee		44,370	
Insurance		2,500	
Survey*		<u>1,200</u>	
Subtotal			<u>\$ 77,892</u>

Total Costs \$521,592

* Assumes no changes in lots

Capitol Funding

Government Funds	\$	400,000	
(Home, Balanced Housing, etc)			
Gap Financing - New Concepts		<u>121,592</u>	
			\$ 521,592

*Based Upon Land Value (Donation) from Borough

EXHIBIT G

HEYER, GRUEL & ASSOCIATES, PA

Community Planning Consultants

63 Church Street, 2nd Floor

New Brunswick, NJ 08901

732-828-2200 FAX 732-828-9480

E-mail mail@hgapa.com

TO: Emerson Planning Board

FROM: John Fussa, P.P.

RE: Site Analysis for Housing/Fair Share Plan

DATE: April 18, 2002

It is my understanding that the Borough is considering two (2) sites as the potential location of a municipally sponsored low and moderate income housing facility for the developmentally disabled. The sites are the Community Developers parcel (Lots 2 and 3 in Block 417) at Emerson Plaza West and a parcel (Lots 1 and 2 in Block 419) at the intersection of Lincoln Boulevard and Kenneth Avenue. The State Council on Affordable Housing (COAH) rules and regulations require such sites to be *available, suitable, developable and approvable* as defined in N.J.A.C. 5:93-1. The following is a planning analysis of both sites to assist the Board in its deliberations. The analysis focuses on the suitability of each site and assumes that they are available, developable and approvable. For the Board's information, the COAH definition of a suitable site is one that "...is adjacent to compatible land uses, has access to appropriate streets and is consistent with the environmental policies delineated in N.J.A.C. 5:93-4."

Community Developers Parcel

The subject parcel is located at the end of Emerson Plaza West and has a total area of approximately .83 acres. Our analysis indicates that it is a suitable site based upon the COAH definition but is constrained by its isolated location and the physical barrier of the NJ Transit Pascack Valley Line.

1. **Land Use:** The area surrounding the subject parcel is mixed-use in character. There are residential uses to the north, west and south; commercial uses to the south and east; and the NJ Transit Pascack Valley rail line to the east.
2. **Access:** The subject parcel has access from Emerson Plaza West, which connects to the Borough street network. It is located in close proximity to mass transit and is accessible to pedestrians and bicyclists.
3. **Infrastructure:** The subject parcel is served by public water and sewer with opportunity for utility connections.
4. **Environmental:** There are no known steep slopes, wetlands or contaminated areas on the subject parcel.
5. **Downtown Redevelopment:** The subject parcel is located outside the redevelopment study area currently being considered by the Planning Board.
6. **Opportunities/Constraints:** The parcel has certain advantages and disadvantages related to its physical characteristics, location and the surrounding land use pattern as follows.

EXHIBIT H

**AN ORDINANCE TO AMEND AND SUPPLEMENT CHAPTER 290,
ZONING, OF THE ORDINANCES OF THE BOROUGH OF EMERSON,
COUNTY OF BERGEN, STATE OF NEW JERSEY, TO ESTABLISH
AFFORDABLE HOUSING REGULATIONS**

BE IT ORDAINED, by the Borough Council of the Borough of Emerson, in the County of Bergen and State of New Jersey, as follows:

SECTION 1. Chapter 290, entitled Zoning, of the Ordinances of the Borough of Emerson is hereby amended to add a new Article XII to read as follows:

ARTICLE XII Affordable Housing Regulations

290-63. Purpose.

A. This Article is intended to implement provisions of the New Jersey Fair Housing Act, N.J.S.A. 52:27D-301 *et seq.*, and the regulations adopted by the New Jersey Council on Affordable Housing as set forth in N.J.A.C. 93, and the uniform Housing Affordability Controls adopted by the New Jersey Housing and Mortgage Finance Agency at N.J.A.C. 5:80-26 (the "COAH Regulations") by establishing procedures and policies relating to eligibility, marketing and other administrative aspects of housing affordable to low and moderate income households when such housing is authorized or required.

B. In furtherance of the intent of this Article, all terms used herein shall have the definition and meaning as set forth in the COAH Regulations and all provisions herein shall be interpreted in a manner consistent with the COAH Regulations, including future amendments thereto.

290-64. Inclusionary Development.

A. Purpose. This Section sets forth the requirements applicable to low and moderate income housing units where required to be provided as part of either: an inclusionary development in the R-MF-AH Zone, a 100% affordable senior housing project developed as a conditional use in the R-7.5 Zone, or a development subject to the Affordable Housing Overlay Zone. These provisions are intended to implement and be consistent with the COAH Regulations in N.J.A.C. 5:93-7.1 *et seq.*, including any subsequent amendments thereto.

B. Distribution of low and moderate income units.

(1) At least one-half of all units within an inclusionary development shall be affordable to low income households.

(2) At least one-half of all rental units shall be affordable to low income households.

(3) At least one-third of all units in each bedroom distribution, pursuant to C. below, shall be affordable to low income households.

C. Bedroom distribution.

(1) Inclusionary developments that are not restricted to senior citizens shall be structured in conjunction with realistic market demands so that:

(a) The combination of efficiency/studio and one-bedroom units is at least ten percent (10%) and no greater than twenty percent (20%) of the total low and moderate income units;

(b) At least thirty percent (30%) of all low and moderate income units are two-bedroom units; and

(c) At least twenty percent (20%) of all low and moderate income units are three-bedroom units.

(2) Low and moderate income units restricted to senior citizens may utilize a modified bedroom distribution. At a minimum, the number of bedrooms shall equal the number of senior citizen low and moderate income units within the inclusionary development. This standard can be met by creating all one-bedroom units or by creating a two-bedroom unit for each efficiency/studio unit.

D. Establishing rents and prices of units.

(1) The initial sales price of a low and moderate income owner-occupied housing unit shall be established so that, after a down payment of five percent (5%), the monthly principal, interest, property taxes, insurance and condominium or homeowners' association fees, if any, do not exceed twenty-eight percent (28%) of eligible gross monthly income for the appropriate household size as set forth in a schedule adopted by COAH.

(2) For rental units, the rents, including utilities, are to be set so as not to exceed thirty percent (30%) of the eligible gross monthly income for the appropriate household size as set forth in a schedule adopted by COAH. The allowance for utilities shall be consistent with the utility allowance approved by the U.S. Department of Housing and Urban Development for use in New Jersey.

(3) The following criteria shall be considered in determining maximum rent levels and sale prices:

(a) Efficiency units shall be affordable to one-person households.

- (b) One-bedroom units shall be affordable to 1.5-person households.
- (c) Two-bedroom units shall be affordable to three-person households.
- (d) Three-bedroom units shall be affordable to 4.5-person households.

(4) Housing units that satisfy the criteria in paragraphs (3)(a) through (d) above shall be considered affordable.

(5) Median income by household size shall be determined as established by COAH based on a regional weighted average of the uncapped Section 8 income limits published by the U.S. Department of Housing and Urban Development or other recognized standard that applies to the housing unit.

(6) The maximum rents of low and moderate income units shall be affordable to households earning no more than sixty percent (60%) of median income. The maximum average rent of low and moderate income units shall be affordable to households earning fifty-two percent (52%) of median income. In determining this average, one rent may be used for a low income unit and one rent may be used for a moderate income unit for each bedroom distribution.

(7) The maximum sales prices of low and moderate income units shall be affordable to households earning no more than seventy percent (70%) of median income. The maximum average rent of low and moderate income units shall be affordable to households earning fifty-five (55%) of median income. In determining this average, low income units must be available for at least two different sales prices and moderate income units must be available for at least three different sales prices.

(8) In an inclusionary development the low and moderate income units shall utilize the same heating type or source as the market units.

(9) If an inclusionary development involves a condominium or homeowners association, the master deed shall provide no distinction between the condominium or homeowners' association fees or special assessments paid by low and moderate income purchasers and those paid by market purchasers.

(10) Rent levels and sales prices may be adjusted periodically based upon adoption by COAH of revised income limits.

E. Phasing of low and moderate income units. In accordance with N.J.A.C. 5:93-5.6(d), low and moderate income housing units within inclusionary developments shall be built in accordance with the following schedule:

Minimum Percentage of
Low and Moderate Income
Units Completed

Maximum
Percentage of Market
Housing Units Completed

0%	25%
10%	25% + 1 unit
50%	50%
75%	75%
100%	90%

290-65. Controls on Affordability.

A. Purpose. This Section is intended to implement the provisions of Subchapter 9 of the COAH Regulations, N.J.A.C. 5:93-9.17 and N.J.A.C. 5:80-26, which establish regulations designed to provide assurance that low and moderate income housing units will remain affordable over time.

B. Administrative Authority. Responsibility for administration and enforcement of this Section shall be vested with the Housing Authority of Bergen County, HAS or other service under contract with the Borough, which shall serve as the Administrative Agent of the Borough, as that term is defined at N.J.A.C. 5:80-26.2. The Administrative Agent shall have responsibility for ensuring the affordability of sales and rental units, including: affirmative marketing; income qualification of low and moderate income households; placing income eligible households in low and moderate income units upon initial occupancy; placing income eligible households in low and moderate income units as they become available during the period of affordability controls; enforcing the terms of the deed restriction and mortgage loan; and any other responsibilities of the Administrative Agent as specified at N.J.A.C. 5:80-26-14(a). The sponsor, developer, or owner shall be responsible for the administrative fee charged by the Administrative Agent, as applicable.

C. Length of Affordability Controls. All low and moderate income units shall be subject to affordability controls for a period of not less than thirty (30) years consistent with N.J.A.C. 5:93-9.17 and N.J.A.C. 5:80-26.

D. Form of Affordability Controls.

(1) All conveyances of newly constructed low and moderate income sales units shall be subject to a deed restriction and mortgage lien in a form consistent with N.J.A.C. 5:80-26.5(c) of the uniform Housing Affordability Controls.

(2) All low and moderate income rental units shall be subject to appropriate deed restrictions consistent with N.J.A.C. 5:80-26.11(d) of the uniform Housing Affordability Controls.

(3) The developer shall submit proposed deed restrictions to the Administrative Agent for review and approval.

290-66. Affirmative Marketing.

A. Purpose. This Section is intended to implement and be consistent with Subchapter 11 of the COAH Regulations, N.J.A.C. 5:93-11. It applies to all new developments in Emerson that contain proposed low and moderate income housing units, including those listed below, and any future developments that may occur:

(1) Emerson Senior Housing, Emerson Plaza West, Block 417, Lots 2 & 3; 5 senior affordable rental units.

(2) Palisade Avenue, Block 617.01, Lot 7.01 (portion); 4 affordable units.

B. Administration. The Housing Authority of Bergen County, HAS or other service under contract with the Borough, shall have the responsibility of administering the Affirmative Marketing Plan as the Administrative Agent. The Borough Administrator shall act as the liaison to the Administrative Agent. The Borough of Emerson is ultimately responsible for administering the affirmative marketing program. The Administrative Agent will income qualify low and moderate income households; place income eligible households in low and moderate income units upon initial occupancy; continue to qualify households for re-occupancy of units as they become vacant during the period of affordability controls; assist with advertising and outreach to low and moderate income households; and enforce the terms of the deed restriction and mortgage loan in accordance with N.J.A.C. 5:93-9. The Bergen County Division of Community Development will provide housing counseling services to low and moderate income applicants, on subjects such as budgeting, credit, mortgage qualification, responsibilities of home ownership rental lease requirements, and landlord-tenant law.

C. Affirmative Marketing Plan. The developer shall be required to prepare and submit to the Administrative Agent for review and approval an affirmative marketing plan for each development with low and moderate income units. The affirmative marketing plan is a regional marketing strategy designed to attract buyers and or renters or all majority and minority groups, regardless of sex, age or number of children, to housing units which are being marketed by a developer/sponsor, municipality and/or designated administrative agency of affordable housing. The affirmative marketing plan will address the requirements of N.J.A.C. 5:93-11. In addition, the affirmative marketing plan prohibits discrimination in the sale, rental, financing, or other services related to housing on the basis of race, color, sex, religion, handicap, familial status/size, or national origin. Emerson is in the COAH-established housing region consisting of Bergen, Hudson, Passaic, and Sussex Counties. The affirmative marketing plan is a continuing program and will meet the following requirements:

(1) All newspaper articles, announcements, advertisements, and requests for applications for low and moderate income units will be submitted to the following newspapers: *The Record*, *Hudson Dispatch*, *Star-Ledger*, and *Herald News*.

(2) The primary marketing will take the form of at least one press release sent to the above newspapers and a paid display advertisement in each of the above newspapers.

Additional advertising and publicity will be done on an "as needed" basis if necessary to identify a sufficient pool of income eligible households.

(3) Advertisements in newspapers will include at least the following information:

- Name of housing development
- Name of sponsor/developer of the housing
- Street address of the housing
- Directions to the housing units
- Range of affordable selling prices/rents
- Size and bedroom type of units
- Applicable household income limits for the unit types offered
- Location where applications for the units may be requested and submitted, including business address, telephone number, fax number, email address (if available), and Web site (if available)

(4) All newspaper articles, announcements, advertisements, and requests for applications for low and moderate income units will be submitted to community-oriented weekly newspapers, such as *The Community Life* and *Pascack Press*, and appropriate religious publications, organization newsletter, community Web sites, regional radio and cable television stations.

(5) Applications, brochures, flyers, and posters used as part of the affirmative marketing program shall be distributed within the region in several convenient locations, including, at a minimum, the Borough Hall, the municipal library, the developer's sales/rental office, senior center, and local places of worship, and the following offices in the housing region: municipal clerks, housing authorities, offices on aging, county libraries, rental assistance office, county welfare or social services board or agency, and community action agencies in the housing region.

(6) Applications shall be mailed to prospective applicants upon request.

(7) The Administrative Agent shall designate community contact persons and/or organizations to aid in the affirmative marketing program, with special emphasis on reaching out to households that are least likely to apply for affordable housing within Emerson's housing region.

(8) A random selection method, specifically a lottery after an established, publicly announced application deadline, will be used to select occupants of the low and moderate income housing created in the Borough of Emerson.

(9) The cost of advertising the availability of low and moderate income units shall be the sponsor's or developer's responsibility.

(10) Households who live or work in the COAH-established housing region (Bergen, Hudson, Passaic, and Sussex Counties) may be given preference for sales and rental

units constructed in Emerson. Applicants living outside the housing region will have an equal opportunity for units after regional applicants have been initially served. Emerson intends to comply with N.J.A.C. 5:93-11.17 on residency preferences.

(11) The cost of advertising the availability of low and moderate income units shall be the sponsor's or developer's responsibility.

(12) Sponsors and developers of low and moderate income housing may assist in the marketing of the affordable units.

(13) The marketing process for available low and moderate income units shall begin at least 120 days before the issuance of either temporary or permanent certificates of occupancy. The marketing program shall continue until all low and moderate income housing units are initially occupied and for as long as affordable units are deed restricted and occupancy or re-occupancy of units continues to be necessary.

(14) The Borough of Emerson and the Administrative Agent shall comply with the monitoring and reporting requirements of N.J.A.C. 5:93-11.6 and 12.1.

D. Marketing for Initial Sales and Rental. Marketing for the initial sales and/or rental of low and moderate income units shall be in accordance with N.J.A.C. 5:93-11.4, and N.J.A.C. 5:80-26.15, which establish the procedures to be followed in screening applicants and verifying incomes.

E. Continuing Marketing. Marketing activities to ensure a pool of income eligible applications shall continue following completion of initial occupancy. Such activities shall be in accordance with the provisions of N.J.A.C. 5:93-11.5.

SECTION 2. Except as hereby amended and supplemented, the Ordinances of the Borough of Emerson shall remain in full force and effect.

SECTION 3. This ordinance shall take effect upon final passage and publication as required by law and approval by the Hon. Jonathan Harris, J.S.C, in pending Mount Laurel litigation entitled "Community Developers & Management, LLC v. Borough of Emerson, et al.," (Docket No. BER-L-2734-00).

THIS IS TO CERTIFY THAT THIS DOCUMENT
IS A TRUE COPY AS ADOPTED BY THE
BOROUGH COUNCIL OF THE BOROUGH
OF EMERSON, N.J. AT A MEETING HELD

ON 2-5-02
DORO CLERK [Signature]

EXHIBIT I

NOTICE is hereby given that the following proposed Ordinance was introduced and passed on first reading at the Work Session/Regular Meeting of the Borough Council of the Borough of Emerson on the 20th day of March, 2001, and that said proposed Ordinance will be further considered for final passage of the meeting of said Borough Council to be held on the 3rd day of April, 2001 at 7:30 p.m., or as soon thereafter as said matter can be held at the Municipal Building, Linwood Avenue, Emerson, New Jersey, at which time and place all persons who may be interested therein shall be given an opportunity to be heard concerning same.

SANDRA A. JOAQUIN
BOROUGH CLERK

DEVELOPMENT FEE ORDINANCE

- 001 - Purpose
- 002 - Definitions
- 003 - Residential Development Fees
- 004 - Non- Residential Development Fees
- 005 - Eligible Exaction, Ineligible Exaction and Exemptions
- 006 - Collection of Fees
- 007 - Housing Trust Fund
- 008 - Use of Funds
- 009 - Expiration of Ordinance

001 Purpose
001-1 The purpose of this Article is to establish standards for the collection, maintenance and expenditure of development fees to be used for the sole purpose of providing low and moderate income housing opportunities and assistance, which are consistent with regulations adopted by the New Jersey Council on Affordable Housing, as set forth in N.J.A.C. 5:93-8 et seq. Accordingly, this Article shall be interpreted within the framework of COAH's development fee regulations. Except as otherwise provided, no ordinance to collect fees shall be in effect until it has been certified by the Court

001-2 Saving Clause
Presently there is in effect Ordinance 290-17.1, part of which authorizes the collection of fees with regard to low and moderate income housing. Until that ordinance, or part thereof, is repealed, nothing herein shall be construed as to prevent the collection of development fees with regard to developer's fees.

002-1 Definitions

COAH - means the New Jersey Council on Affordable Housing

Development Fees - means money paid by an individual, person, partnership, association, company, corporation or other legal entity, for the improvement of property as permitted in the COAH rules.

Equalized assessed value - means the value of a property determined by the municipal tax assessor through a process designed to ensure that all property in the municipality is assessed at the same assessment ratio or ratios required by law. Estimates at the time of issuance of a building permit may be obtained utilizing estimates for construction cost. Final equalized assessed value will be determined at project completion by the municipal tax assessor.

Judgment of repose - means a judgment issued by the Superior Court approving a municipality's plan to satisfy its fair share obligation.

Substantive certification - means a determination by COAH approving a municipality's housing element and fair share plan in accordance with the provisions of the Fair Housing Act and the rules and criteria as set forth herein. A grant of substantive certification shall be valid for a period of six years in accordance with the terms and conditions therein.

003-1

Residential Development Fees

- A. Within all residentially zoned districts, developers shall pay a development fee of one-half of one percent of the (equalized assessed value for residential development/or the coverage amount of the Home Owner Warranty document of a for-sale unit or the appraised value on the document utilized for construction financing for a rental unit) provided no increased density is permitted and the new construction or improvements are not excluded or otherwise exempted under Section 005-1.
- B. If a "d" variance is granted pursuant to N.J.S.A. 40:55D-70d(5), then the additional residential units realized (above what is permitted by right under the existing zoning) will incur a bonus development fee of six percent (6%) rather than the development fee of one half of one percent. However, if the zoning on site has changed during the two-year period preceding the filing of the "d" variance application, the density for purposes of calculating the bonus development fee shall be the highest density permitted by right during the two-year period preceding the filing of the "d" variance application. The fee may be realized on the equalized assessed value or on the coverage amount on the Home Owner's Warranty document for each additional for sale unit or on the appraised value on the document utilized for construction financing for each additional rental unit.

EXAMPLE: If the rezoning permits extra units to be constructed, the fee shall be six percent of the value option selected above for the extra units. On the in initial units, the developer shall pay a development fee of one-half of one percent on the value option selected above.

004-1 Non-Residential Development Fees

- A. Developers within all non-residential zoning districts shall pay a fee of one percent of either the equalized assessed value for non-residential development or the appraised value utilized on the document for construction financing.
- B. If a "d" variance is granted pursuant to N.J.S.A. 40:55D-70d(4), then the additional floor area realized (above what is permitted by right under the existing zoning) will incur a bonus development fee of six percent (6%) rather than the development fee of one percent. However, if the zoning on a site has changed during the two-year period preceding the filing of the "d" variance application, the density for the purposes of calculating the bonus development fee shall be the highest density permitted by right during the two-year period preceding the filing of the "d" variance application. The development fee may be based on either the equalized assessed value for non-residential development or the appraised value utilized on the document for construction financing.

005 - 1 Eligible Exaction, Ineligible Exaction and Exemptions

- A. Developers of low and moderate income units shall be exempt from paying development fees.
- B. Developers of property which upon completion shall be exempt from real property taxation shall be exempt from paying a development fee.
- C. The expansion or improvement of an existing residential structure shall be exempt from the development fee requirement.
- D. The expansion or improvement of a nonresidential structure shall be exempt from any development fee requirement only if it involves the addition of less than 1,000 square feet of floor area.
- E. Any development which involves the complete or substantial replacement of an existing residential or non-residential structure shall be deemed to be new construction regardless of whether the replacement structure is larger than the prior structure. Thus, replacement construction shall not be exempt from the development fee requirement.
- F. Other development shall be exempt from any development fee requirement to the extent provided for by the terms of any other Order entered by the Superior Court in the Mount Laurel litigation involving the Borough of Emerson.

006 -1 Collection of Fees

- A. Developers shall pay up to fifty percent (50%) of the calculated development fee to the Borough of Emerson at the issuance of the building permits. The amount of the development fee shall be based initially on an estimate by the Tax Assessor of the increase in equalized assessed value attributable to the improvements constructed. Prior to requesting a building permit, a developer shall submit to the building department a request for calculation of

the development fee amount which request shall be forwarded to the tax assessor. At the issuance of certificates of occupancy, the amount of the development fee shall be calculated based on the difference in the equalized assessed value of the property before and after the development activity which is subject to the development fee. The amount of the development fee shall be recalculated and the developer shall be responsible for paying the difference between the development fee amount and the amount paid prior to the issuance of the building permit. The developer shall be responsible for paying the difference between the fee calculated at time of issuance of the building permit and paid at issuance of certificate of occupancy. Prior to requesting a certificate of occupancy, the developer shall submit to the Building Department a request for calculation of the development fee amount, which request shall be forwarded to the Tax Assessor. The entire fee may also be paid at the issuance of the certificate(s) of occupancy.

007 - 1 Housing Trust Fund

A. There is hereby created an interest bearing housing trust fund in for the purpose of receiving development fees from residential and non-residential developers, which fund shall be maintained at a financial institution designated by the Chief Financial Officer who shall be responsible for the administration of the housing trust and authorization for any expenditures. All development fees paid by developers pursuant to this ordinance shall be deposited in this fund. No money shall be expended from the housing trust fund unless the expenditure conforms to the spending plan approved by the Superior Court or COAH.

008 -1 Use of Funds

A. Money deposited in a housing trust fund may be used for any activity approved by the Superior Court or COAH for addressing the Borough of Emerson's low and moderate income housing obligation. Such activities may include, but are not necessarily limited to, housing rehabilitation, new construction, regional contribution agreements, the purchase of land for low and moderate income housing, extensions and/or improvements of roads and infrastructure to low and moderate income housing sites, assistance designed to render units more affordable to low and moderate income household and administrative costs necessary to implement the Borough of Emerson's Housing Element and Fair Share Plan. The expenditure of all money shall conform to a spending plan approved by the Court.

B. At least thirty percent (30%) of the revenues collected shall be devoted to render units more affordable unless exempt as per N.J.A.C. 5:93-8-16(c). Examples of such activities include, but are not limited to: down payment and closing cost assistance, low interest loans and rental assistance.

C. No more than twenty percent (20%) of the revenues shall be expended on administrative costs necessary to develop, revise or implement the Housing Element. Examples of eligible administrative activities include personnel, consultant services, space costs, consumable supplies and rental or purchase of

THIS IS TO CERTIFY THAT THIS DOCUMENT
IS A TRUE COPY AS ADOPTED BY THE
BOROUGH COUNCIL OF THE BOROUGH
OF EMERSON, N.J. AT A MEETING HELD
ON April 3 2001
~~BORO CLERK *[Signature]*~~

This Ordinance shall take effect upon final passage and publication
in accordance with the law and subject to approval by the Superior Court in the pending Mount
Laurel litigation involving the Borough of Emerson.

010-1

Effective Date

Except as hereby amended, the Revised General Ordinances of the
Borough of Emerson shall remain in full force and effect.

009-1

Other Ordinances

D. Development fee revenues shall not be expended to reimburse
the Borough of Emerson for housing activities that preceded entry
of a Mount Laurel Compliance Judgment by the Superior Court.

equipment directly associated with plan development or plan
implementation.

EXHIBIT J

ORDINANCE NO. 1192

AN ORDINANCE TO AMEND ORDINANCE NO. 1170, DEVELOPMENT FEE ORDINANCE, OF THE BOROUGH OF EMERSON, COUNTY OF BERGEN, STATE OF NEW JERSEY

BE IT ORDAINED by the Borough Council of the Borough of Emerson, County of Bergen, State of New Jersey, as follows:

SECTION 1. Ordinance No. 1170, §001-2, Savings Clause, is hereby repealed.

SECTION 2. Ordinance No. 1170, §003-1(A), Residential Development Fees, is hereby amended to read as follows:

- A. Within all residentially zoned districts and redevelopment areas that require or permit residential uses, developers shall pay a development fee of one-half of one percent (0.5%) of the equalized assessed value for residential development or the coverage amount of the Home Owner Warranty document of a for-sale unit or the appraised value on the document utilized for construction financing for a rental unit, provided that no increased density is permitted and the new construction or improvements are not excluded or otherwise exempted under Section 005-1 of this Ordinance.

SECTION 3. Ordinance No. 1170, §004-1(A), Non-Residential Development Fees, is hereby amended to read as follows:

- A. Developers within all non-residential zoning districts and redevelopment areas shall pay a development fee of one percent (1%) of the equalized assessed value for non-residential development or the appraised value on the document utilized for construction financing.

SECTION 4. Ordinance No. 1170, §005-1, Eligible Exactions, Ineligible Exactions and Exemptions, is hereby amended to add a new subsection to read as follows:

- G. Developments that have received preliminary or final approval prior to the effective date of this ordinance shall be exempt from paying a development fee, unless the developer seeks a substantial change in the approval or is obligated to make payment pursuant to the terms of a prior court order. Examples of a substantial change include a substantial alteration in site layout, development density, or types of uses within the development.

SECTION 5. Ordinance No. 1170, §007-1(A), Housing Trust Fund, is hereby amended to read as follows:

- A. There is hereby created an interest-bearing housing trust fund for the purpose of receiving development fees from residential and non-residential developers, which fund shall be maintained in a separate account at a financial institution designated by the Chief Financial Officer who shall be responsible for administration of the housing trust fund and authorization for any expenditures. All development fees paid by developers pursuant to this ordinance shall be deposited in this fund. All mandatory contributions paid by developers to the previously established Emerson Low and Moderate Income Housing Trust Fund under §290-17.1(C) of the Borough Zoning Ordinance, together with all accrued interest, shall be transferred to and deposited in the housing trust fund established by this ordinance. No money shall be expended from the housing trust fund unless the expenditure conforms to the spending plan approved by the Superior Court or COAH.

SECTION 6. Ordinance No. 1170, §007-1, Housing Trust Fund, is hereby amended to add a new subsection to read as follows:

- B. If the Superior Court or COAH determines that the Borough is not in conformance with COAH's rules on development fees, currently codified at N.J.A.C. 5:93-8, the Superior Court or COAH is authorized to direct the expenditure of all development fees deposited in the Borough housing trust fund and all development fees paid by developers pursuant to this ordinance, in accordance with N.J.A.C. 5:93-8.18 and N.J.A.C. 5:93-8.19. This authorization is pursuant to this Ordinance, COAH's rules on development fees, and the written authorization with the financial institution that is the depository for the Borough housing trust fund. The Borough shall execute an escrow agreement with COAH and the financial institution where the housing trust fund is maintained to enable COAH to monitor disbursement of collected development fees and direct the expenditure of development fees, after proper notice, hearing, and Court or COAH approval, if the imposition, collection, and/or expenditure of fees does not conform with this Ordinance, COAH rules, or the Court or COAH approved spending plan.

SECTION 7. All ordinances of the Borough of Emerson which are inconsistent with the provisions of this ordinance are hereby repealed to the extent of such inconsistency.

SECTION 8. If any section, subsection, sentence, clause or phase of this ordinance is for any reason held to be unconstitutional or invalid, such decision shall not affect the remaining portions of this ordinance.

SECTION 9. This ordinance shall take effect upon final passage and publication as required by law and approval by the Hon. Jonathan Harris, J.S.C, in pending Mount Laurel

litigation entitled "Community Developers & Management, LLC v. Borough of Emerson, et al.,"
(Docket No. BER-L-2734-00).

BOROUGH OF EMERSON, COUNTY OF BERGEN, STATE OF NEW JERSEY

THIS IS TO CERTIFY THAT THIS DOCUMENT
IS A TRUE COPY AS ADOPTED BY THE
BOROUGH COUNCIL OF THE BOROUGH
OF EMERSON, N.J. AT A MEETING HELD

ON 2-5-08
BORO CLERK *Diana A. Fog*