

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).

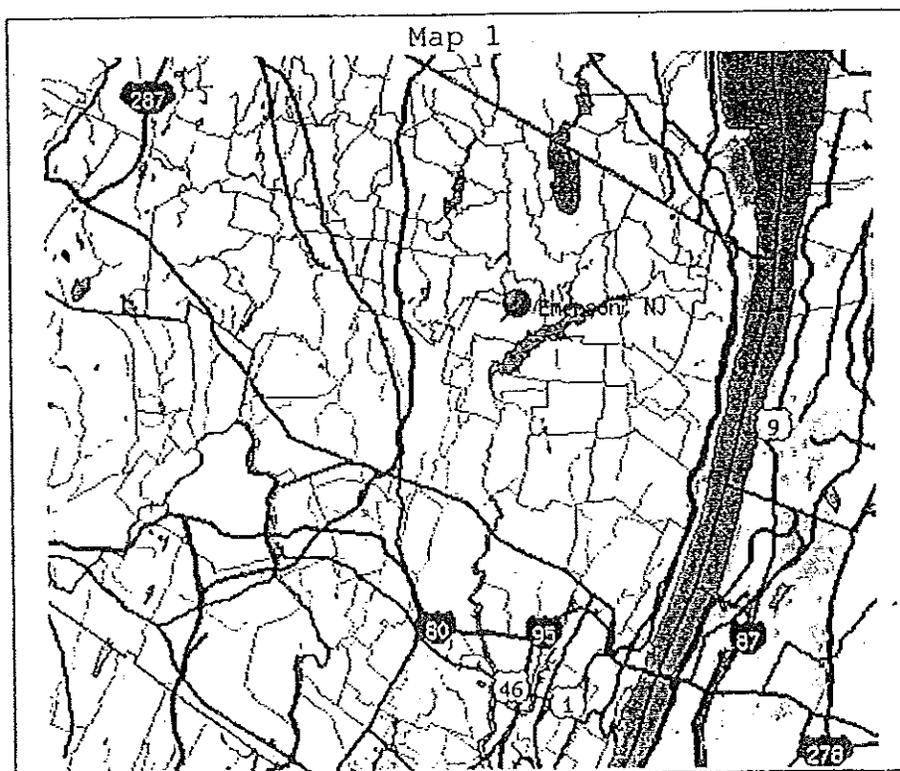
yield approximately 187 units, of which 37 would be devoted to low and moderate income households.

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

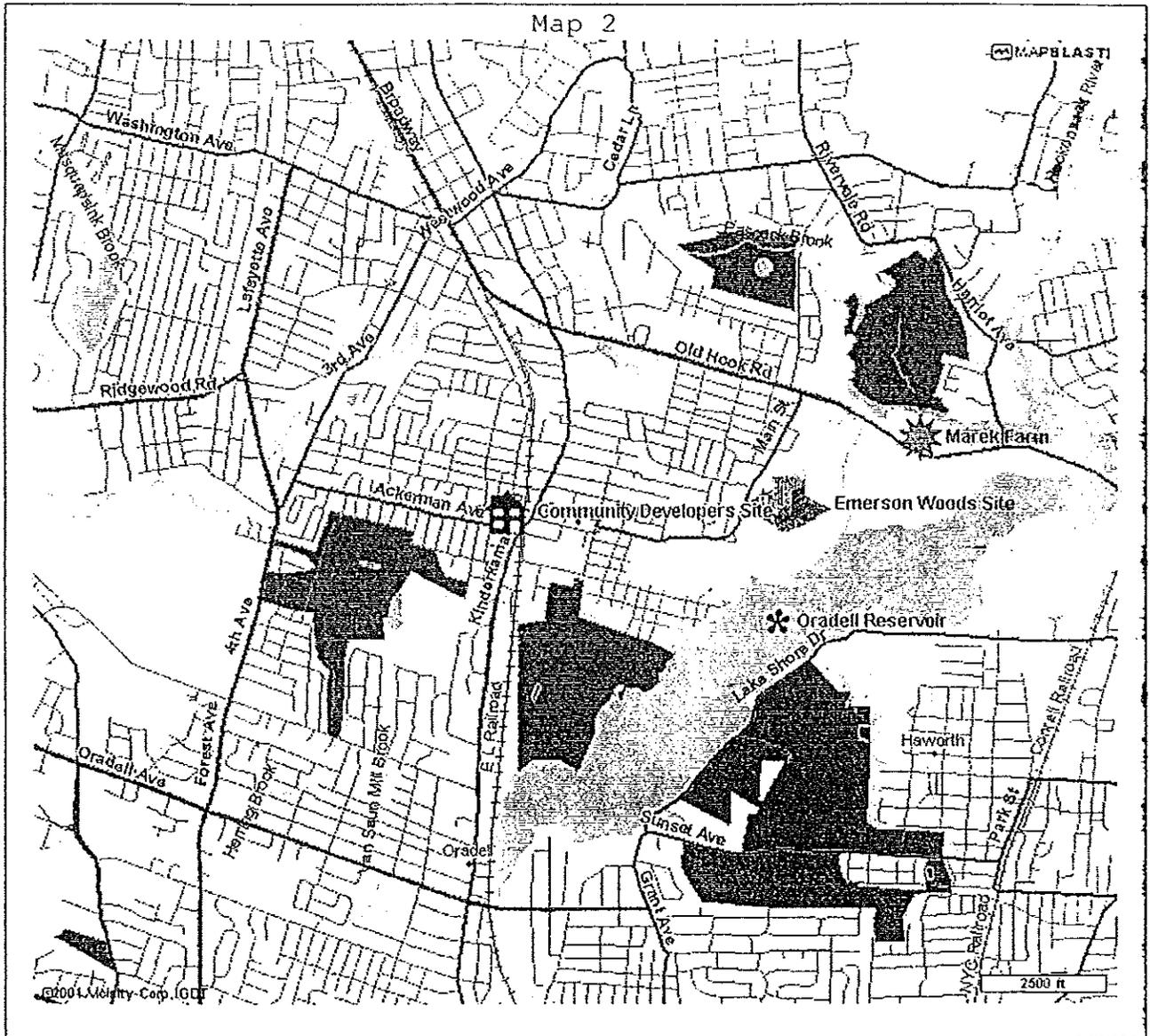
⁹ N.J.A.C. 5:93-8.1 permits the imposition, collection, and expenditure of development fees only through participation in COAH's substantive certification process, which Emerson has unfailingly eschewed.

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
			101		20
TOTAL					

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:

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.