Committee Meeting

before

ASSEMBLY HOUSING COMMITTEE

"General discussion concerning the regulations recently adopted by the Council on Affordable Housing to govern the imposition, collection, and use of development fees (24 N.J.R. 242)"

LOCATION: Committee Room 4
Legislative Office Building
Trenton, New Jersey

DATE: May 14, 1992
10:00 a.m.

MEMBERS OF COMMITTEE PRESENT:

Assemblyman John V. Kelly, Chairman
Assemblyman Jose F. Sosa, Vice-Chairman
Assemblyman Steve Corodemus
Assemblyman John Hartmann
Assemblyman Jerry Green
Assemblyman Jimmy Zangari

ALSO PRESENT:

John B. Lee
Office of Legislative Services
Aide, Assembly Housing Committee

Hearing Recorded and Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, 162 W. State St., CN 068, Trenton, New Jersey 08625-0068

New Jersey State Legislature

ASSEMBLY HOUSING COMMITTEE
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REVISED

COMMITTEE NOTICE

TO: MEMBERS OF THE ASSEMBLY HOUSING COMMITTEE

FROM: ASSEMBLYMAN JOHN V. KELLY, CHAIRMAN

SUBJECT: **COMMITTEE MEETING - May 14, 1992**

The public may address comments and questions to John B. Lee, Committee Aide, or make bill status and scheduling inquiries to Norma Morales, secretary, at (609) 984-0231.

The Assembly Housing Committee will hold a meeting **Thursday, May 14, 1992 at 10:00 a.m. in Committee Room 4, in the Legislative Office Building, Trenton**, for general discussion concerning the regulations recently adopted by the Council on Affordable Housing to govern the imposition, collection and use of development fees (24 N.J.R. 242).

Following the meeting and discussion the committee will consider the following bill:

A-1184 Hartmann	Validates certain fees and contributions by developers to municipalities for affordable housing.

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Revised 5/8/92 (Room number change)

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ASSEMBLYMAN JOHN V. KELLY (Chairman): I think we will have some testimony now. Come on up. Do you want to testify on the COAH rules and regulations? Come on up and enlighten us.

D O U G L A S V. O P A L S K I: Thank you, Mr. Chairman. For the record, I am Doug Opalski, Executive Director of the Council on Affordable Housing.

ASSEMBLYMAN ZANGARI: What's your name?

MR. OPALSKI: Doug Opalski. I understand you are entertaining an amendment that would make valid all of the mandatory development fee ordinances that were enacted prior to the Council's rules.

There are only two comments I would offer to you at this stage that might be of help to you, if you intend to pursue that particular policy. One of those is in the statement to the bill, the intent of the legislation -- the amendment -- is to validate all of those ordinances that were enacted prior to the Council's rules. Yet, when I read through the amendment, it's such that those--

ASSEMBLYMAN KELLY: Hold it. We're not doing a bill. I want to discuss the rules and regulations that you promulgated. Forget the bill. The bill comes after.

MR. OPALSKI: Oh, all right; okay.

The Council did not enact the mandatory development fee rule until after the Holmdel Builders decision. What we had in place was a voluntary development fee rule which had withstood a number of challenges. The Council did not want to overregulate, so we waited until the judiciary was able to give us direction and guidelines about the efficacy of that approach.

So, after the decision, which was December 13, 1990, the Council took the charge that came from the Supreme Court decision in Holmdel Builders, with guidelines that came from the Fair Housing Act, and started to pose policies that we were able to get responses to. We went through-- Oh, I guess we started with the preproposal, to which public comments came

forward, and then we had four public hearings, in addition to at least three open public meetings at which the issues were discussed. Then in between those two events, which were the series of public hearings and the Council's public forum on this -- the general regular meetings -- there were at least a dozen task forces, at which the major stakeholders that would be affected by such a rule were participants. The intent of all that was to develop a consensus that was a workable consensus within the context of the Supreme Court decision, the Fair Housing Act, and the rest of the Council's rules.

So you had a workable framework, that whatever came forward would withstand challenges; whatever came forward would be workable; whatever came forward would be supplemental and would allow for towns to carry out their housing elements.

Generally, that is the procedure we followed. We thought it was a rather exhaustive process. I wish we could have come forward with standards quicker. However, as you can imagine, there is a lot of controversy that surrounds this issue, and people had to have their say, and we allowed for that to occur. So, we went through a rather exhaustive process and we felt comfortable that what came out of it was a workable compromise that would be well within the constitutional guidelines that the Court established, and well within the guidelines of the Fair Housing Act. Time will tell.

ASSEMBLYMAN CORODEMUS: I have several questions. The first one I would like to ask is: I understand you use a certain formula for the calculation of affordable housing within any particular municipality. Is is true that the date is 1980 to make a determination on the provision of affordable housing?

MR. OPALSKI: We used the 1980 census data, and then we brought it up-to-date. The point of departure for us was the middle of 1987; through the middle of 1993, is the first certification period. That guideline came from the Fair

Housing Act. So, we established a data base that came from the best available data, the census, and we used whatever other surveys were available that supplemented that. The American Housing Survey supplemented it. We also had building information, building reports, that supplemented it. We also had the projections that came from the Department of Labor, that supplemented it.

So, essentially there are two components of need -- indigenous need -- that essentially derive from the census data, and then prospective need that derives from projections that were available from the Department of Labor.

ASSEMBLYMAN CORODEMUS: Now that you have that information and it has been augmented by other studies, do you feel comfortable with the 1980 date for a determination?

MR. OPALSKI: That was the best data base to build the indigenous need off of, and we didn't find any other data base at the time to rely upon. Similarly, we are using the 1990 census data as a base for the next period of certification.

ASSEMBLYMAN CORODEMUS: The reason I asked the question is-- I'm glad you have some anchor for the 1980 date, in light of the fact that it is not just by the census. But now that you have this continuum of information over a decade, is there any consideration being given to using a different date than 1980? It might appear that some municipalities have actually been prejudiced by using the 1980 date, in that prior to that date, on a voluntary basis, they had been constructing affordable housing -- low-income housing -- and because of this arbitrary date of 1980, that whole slate is wiped clean, and we are looking at a fresh start. They are being forced to provide more than what would be expected of them if they were starting off with virgin territory, so to speak.

MR. OPALSKI: I understand; I better understand your question now. I think it really gets back to the issue of credits; what can be credited against an obligation. When the

Council heard these arguments -- and there was a lot of litigation that surrounded it -- the position was that the data in the '80 census reflects what had occurred to date, and took into account all of the good efforts the towns had made up to that point.

ASSEMBLYMAN CORODEMUS: It did take into account-- I know of a few towns, notably one that borders my district, where the elected representatives of that town feel that they have actually been prejudiced by that, in that they have constructed some 600 or 700 senior citizen homes, and because of this arbitrary 1980 cutoff date, they feel prejudiced by the fact that they are now obligated to provide more affordable housing than before, and never in their -- let's say in their litigation track record, have they ever been accused of excluding affordable housing.

I am wondering if there should be-- If fact, if there is no change, in that I might be submitting legislation to change that date, because I think in this particular situation they have been prejudiced, and perhaps there are other similar situations across the State--

MR. OPALSKI: What the Council has done is to allow for surveys of indigenous need, because we felt that towns might have a better fix on, and a better data base that could supplant the '80 census. So we have come up with a survey that would allow towns to, in fact, come forward and say, "Look, in terms of calculating, or indigenous need, we think this data base has more efficacy, and here is the survey we have done. We have designed it in such a way that it could withstand a Court challenge. Statistically it is significant, and it builds upon a good data base." So, if a town chooses to use that route, they are entitled to do it, and we would consider it.

ASSEMBLYMAN CORODEMUS: The procedure is in place now to do that?

MR. OPALSKI: Yes.

ASSEMBLYMAN CORODEMUS: I am glad to hear that. Could you, after the meeting, give me some specific reference as to where in the Act that is provided for, because I would like to study that further?

MR. OPALSKI: Absolutely, and we certainly would be willing to work with the town involved, in order to see to it that they could take this survey, if they chose to use it, and carry it out.

One of the key components here is that the data that ought to be used is consistent for the entire State -- for the entire State -- and that it is the most accurate data base that one could begin with. It was with that in mind that the Council settled in originally with the 1980 census.

ASSEMBLYMAN CORODEMUS: I can understand that you need some starting point.

Right now, do you have the power to mandate submission of housing elements by municipalities?

MR. OPALSKI: No. Towns come to us voluntarily under the Act, except for towns that are transferred from the Court. If they come from the Court, in that circumstance, and that circumstance only, does the Council have jurisdiction. Now, out of the 176 towns that are in for certification, about 50 of them have come from the Court.

ASSEMBLYMAN CORODEMUS: How about the impact fees after the January-- What is the mandatory/voluntary argument on that point?

MR. OPALSKI: Well, it comes from the Supreme Court's decision. They came to a conclusion that these fees are constitutional. I think you have the decision in your packet. If you look at page 45, under Roman numeral VII, the Supreme Court says it much better than I could. They say: "We determine that under the Fair Housing Act, as well as the zoning power of the MLUL and the police power, that

municipalities, with the approval of COAH, can impose reasonable fees on the development of commercial and noninclusionary residential property, as inclusionary zoning measures to provide lower income housing. Such development fees may be enacted by ordinance and, subject to the approval and certification of COAH, may be included as part of a municipality's housing element and fair share obligation under the FHA.

"Because the FHA does not provide sufficient guidance, the effectuation of such authority appropriately requires the promulgation of rules by COAH that will provide the standards and guidelines for the imposition of use of such development fees."

ASSEMBLYMAN CORODEMUS: Thank you.

MR. OPALSKI: Sure.

ASSEMBLYMAN CORODEMUS: Perhaps, Mr. Chairman, you will allow me to ask questions as--

ASSEMBLYMAN KELLY: Continue.

ASSEMBLYMAN CORODEMUS: I'll give someone else an opportunity, but I would like to ask questions later.

ASSEMBLYMAN KELLY: Mr. Zangari -- Assemblyman Zangari?

ASSEMBLYMAN ZANGARI: I'm listening right now.

ASSEMBLYMAN KELLY: Okay. Does anyone else have any questions? (no response)

Does the Fair Housing Act specifically allow you to mandate submissions?

MR. OPALSKI: The interpretation from the Supreme Court of that Act does, and that is what we were using.

ASSEMBLYMAN KELLY: What was that?

MR. OPALSKI: In terms of housing elements, yes. In terms of mandatory fees, the judiciary interpretation of the Act is what the Council relied upon to come to that policy conclusion.

Were you talking about the housing elements, or were you talking about the fees?

ASSEMBLYMAN KELLY: Both.

A R T H U R B E R N A R D: If I may, my name is Art Bernard. I am the Deputy Director of the Council. No, it doesn't allow us to mandate the submission of a housing element.

ASSEMBLYMAN KELLY: Oh.

MR. BERNARD: It does not.

ASSEMBLYMAN KELLY: It does not?

MR. BERNARD: No.

ASSEMBLYMAN CORODEMUS: Excuse me?

ASSEMBLYMAN KELLY: Go ahead.

ASSEMBLYMAN CORODEMUS: How about the personnel involved with these fees as a result of these Court decisions? Have you been required to enlarge your staff to police the collection of these fees?

MR. OPALSKI: The staff was inadequate to do the job. We were at a level of 19 pesonnel three years ago. We are at a level of 16 personnel now, and we are attempting to cope with the load.

ASSEMBLYMAN CORODEMUS: I'm sorry. Did you say from 19 to 16?

MR. OPALSKI: That's right, and we are attempting to cope with the load.

ASSEMBLYMAN CORODEMUS: So you've lost staff?

MR. OPALSKI: There has been a net loss of staff of three over that time period.

ASSEMBLYMAN CORODEMUS: How has that affected your ability to review submission of plans, collection of fees, the bookkeeping, and all of that?

MR. OPALSKI: One of the things that has happened at the same time, as you well know, is that the economy has cooled down. There are not as many housing elements that have come in, so there seems to be a balance. But what we are doing is

coping with a load that is growing. Right now, there are 30 ordinances that are before us for review.

MR. BERNARD: May I say something?

MR. OPALSKI: Sure.

MR. BERNARD: Just to supplement that, I think it is something we are very concerned about. You know, we are at the point now on the development fees that they are coming in. I think there are something like 30 in now, and others will be referred to us from the Court system. I think we are fairly sure of that. It is one thing to move them through and allow the collection, but to keep up so that we know what is going on is a big job. I think we are very concerned, with the limitations we have had in filling positions and with the limitations I am sure the State budget probably will require, that we will be able to keep up with, you know, what is going on with these fees over time.

ASSEMBLYMAN CORODEMUS: If I may go back to that Holmdel decision for a second, I haven't had the opportunity to pour through the 50-page decision. You have the benefit of that over me. But with the Holmdel decision now, was the result to mandate a housing element? Was that part of the decision?

MR. OPALSKI: No.

ASSEMBLYMAN CORODEMUS: Is there any link, then, between these?

MR. OPALSKI: Yes, absolutely.

ASSEMBLYMAN CORODEMUS: Could you explain that for me?

MR. OPALSKI: The Court saw that the mandatory development fee ordinance is a constituent part of the housing element, and they mention that three or four different times in the decision. They saw a direct linkage between the fee ordinance and the housing element. And indeed, the conclusion they came to was that this is not a tax -- the fees -- but, rather, they are regulatory devices which are the functional

equivalent of inclusionary zoning, so they were able to lessen the standard for it from a rational nexus to a reasonable relationship.

ASSEMBLYMAN CORODEMUS: Thank you.

I live in a very small, highly developed town. I think my town along the shore is, like, 99 percent developed. I think we have one two-acre parcel that is left that can be developed. But we, nonetheless, had to provide a housing element in our master-- I stand corrected. We did provide a housing element, and I know that came at no small expense. I think they had to hire a special planner. This planner, I think, cost somewhere in the neighborhood of $50,000 or $60,000 to do the survey, and all that.

Do you have any idea of the range of fees it has cost different municipalities to comply with this?

MR. OPALSKI: We don't have a survey of that. What we do have a survey of is the cost of going through a Court compliance plan, versus what the cost of going through the COAH administrative process is. The evidence that we have collected shows that it costs about half of what it would cost in Court to go through the COAH process -- at least that.

Cranbury, for example, spent $100,000 in Court through the Urban League suit, without ever having a Court ordered compliance plan. Half of that was spent at COAH and, in fact, getting certification. In the case of Moorestown in Camden County, the costs-- The legal costs alone were $644,000 in Court without a Court compliance plan. At COAH, it was $54,000, or one-twelfth of the cost of the Court process. Part of that, I think, stems directly from the wisdom of the Legislature in requiring mediation to resolve disputes in this process. Mediation has been a very effective tool in doing that, in compressing the time and in compressing the costs to a town, if they were to go through our process versus litigation.

ASSEMBLYMAN CORODEMUS: Could you articulate the benefits to a town such as mine, that is highly developed, with not much prospect of providing any additional housing? What would be the benefit for a town such as mine, which has gone through the exercise of developing a housing element and gone through the expenditure of some $50,000, $60,000?

MR. OPALSKI: There are at least seven benefits that would accrue to the town. You will have maintained control over land use, rather than lay vulnerable to challenges of exclusionary zoning. A lot of towns that choose not to address the issue, for one reason or another -- there may be very good reasons, and cost is certainly a hurdle that has to be overcome--

ASSEMBLYMAN CORODEMUS: Excuse me, I don't mean to be argumentative with you. I am getting a lot of information out of this that I would like to relay back to my district.

MR. OPALSKI: Sure.

ASSEMBLYMAN CORODEMUS: If I may, I would just like to follow up that answer. We are going to maintain control over my town. Now, my town, as I said, is developed. I don't know how much more control we can have, other than razing blocks of existing housing and creating new. What is the control we are attempting to achieve?

MR. OPALSKI: There have been instances where owners of existing properties would choose to build at a higher density and recommend their sites for inclusionary development.

ASSEMBLYMAN CORODEMUS: Well, in my situation -- not to belabor the point -- we are developed.

MR. OPALSKI: Right.

ASSEMBLYMAN CORODEMUS: Now, which developers are we talking about? Which parcels of land are we talking about?

MR. OPALSKI: There may well be property owners who choose to take the existing development on their property and convert that property through demolition and redevelopment into

a higher use. You are subject to that kind of attack over time, whereas if up front you reasonably approach your fair share obligation and use the mechanisms in the Fair Housing Act, the adjustment process, and so on, you then have the presumption of validity; you have a plan in place, one that the Council will help to codefend.

ASSEMBLYMAN CORODEMUS: Forgive me, I interrupted you.

MR. OPALSKI: No, I think that was a very important question. I appreciate the fact that you did.

So, local control over land use is the first benefit. Now, the second-- By the way, related to that is being proactive, rather than reactive to developer suits.

The second is access to housing subsidies that come from the Fair Housing Act. There clearly are priorities given to towns which are in the process and are seeking certification. So your town would have priority access to the funds that would be available through balanced housing funds, and at one time there were also funds made available through HMFA.

ASSEMBLYMAN CORODEMUS: The developer suits that you raise now-- What challenge could they make in a town such as mine that is highly developed, where there is relatively no available land? We're talking about 1 percent or 2 percent of available land. What attacks could they make on my town?

MR. OPALSKI: If the town chose not to address its fair share obligation, they could say that they have ignored, or neglected to address that constitutional need, and they would recommend their properties as part of the solution.

ASSEMBLYMAN CORODEMUS: That answer is that there could be a lawsuit to require existing landowners to do something with their improvements, such as razing that and providing affordable housing? Is that what your answer implies?

MR. OPALSKI: That's right. You may come forward and say, "Well, all right, there aren't suitable sites in the

town. We don't have a sufficient capacity of land to zone to allow the obligation to be met." And we will come and apply for an obligation within the context of that. It may be a zero obligation; it may be two or three units on the remaining parcel. You have those options.

ASSEMBLYMAN CORODEMUS: I represent Deal Borough in Monmouth County. Perhaps the average house cost is about $600,000 there, where the Chief Justice lives. Perhaps the only developable lot is right next to his house. What would the impact be on something like Deal Borough there by Court challenge or under the COAH rules?

MR. OPALSKI: I couldn't prejudge what the courts would do. We would entertain the town coming forward and saying, "Look, we have insufficient vacant land in order to absorb the obligation. We would seek to have a zero obligation." The Council has certified a number of towns at zero. Red Bank had a precredited need of 599 units, and it demonstrated to the satisfaction of the staff and the Council that it didn't have sufficient land to meet any of that obligation.

ASSEMBLYMAN CORODEMUS: See, the whole thrust of my questioning is-- I question the importance of COAH's role in highly developed towns such as mine. I know there are other legislative districts throughout the State that perhaps are largely undeveloped, which may have greater application. I assume there are a lot of our legislative districts, in the northeast, and particularly along the shore corridor, that are very similar to mine; that are 99-plus percent developed.

MR. OPALSKI: Some towns are, for example, approaching situations where redevelopment is becoming more and more feasible -- the Gold Coast in northern Jersey. It may be that part of the redevelopment of the Gold Coast ought to have in mind an inclusionary component that would be for sheltering the new jobs that are being created in that area.

ASSEMBLYMAN CORODEMUS: Are you talking about the bay shore area, from Keyport to Sandy Hook?

MR. OPALSKI: This is in the Hudson County area.

ASSEMBLYMAN CORODEMUS: We call it the Gold Coast where we are. I guess there are two Gold Coasts. (laughter)

MR. OPALSKI: There's platinum, and then there's gold, I guess, yes.

ASSEMBLYMAN CORODEMUS: Okay. I'm sorry. Please continue.

MR. OPALSKI: One of the contingencies that may arise is land ripe for redevelopment, and that will occur over time. One cannot predict when that may be. In certain instances, by policy, you can; in certain others, the market determines it. But the Council then is at least in a position, and those towns are, to at least address what they can within the context of what is being done.

ASSEMBLYMAN CORODEMUS: Perhaps I am not a great visionary, but I don't reasonably foresee a developer coming in and purchasing existing and improved property, particularly along the shore where my legislative district is, at great expense, and razing the improvements and redeveloping it for low-income housing.

MR. OPALSKI: Art Bernard would like to add to that.

ASSEMBLYMAN CORODEMUS: Sure.

MR. BERNARD: The way the Act is structured, a municipality has a choice whether to come forward or not. Communities typically take a look at what their downside is and up their upside is, and make a choice. So maybe when you look at that-- You look at it and say, "Well, you know, we don't really see where substantive certification does anything for us." And that is your choice. I am interested in the amount of money you spent on your housing element. It makes consulting look better and better every day.

But, having done a housing element, I suppose there are some proposals in that. If you want to implement that and create some affordable housing, you can do that either through us, or you can do it on your own.

ASSEMBLYMAN CORODEMUS: I don't have any question in my mind that this has been a small boom to the planners throughout the State.

Thank you.

ASSEMBLYMAN KELLY: Mr. Opalski, we will excuse you for a minute.

ASSEMBLYMAN ZANGARI: Let me--

ASSEMBLYMAN KELLY: Oh, you want to ask a question?

ASSEMBLYMAN ZANGARI: Yes. How many municipalities are affected by this legislation? What is the dollar amount?

MR. OPALSKI: By the Fair Housing Act?

ASSEMBLYMAN ZANGARI: Yes.

MR. OPALSKI: The Fair Housing Act requires every municipality to address a fair share of its region's need of low- and moderate-income housing. I believe out of 567 municipalities, COAH's current guidelines have indicated that perhaps 40 to 42 have zero precredited need. Then, those that come in may claim adjustments. We haven't seen them all, but the remaining ones certainly can come in and say that they have a zero obligation, as well.

Right now, about half of the municipalities in the State are either before the Council or the Court. The reasons why the others are not coming forward are many. There are at least 250 sewer bans in the State, and many towns don't feel the pressure nor the litigation for acting on this at this point in time. So there may be environmental constraints. There may be market constraints. The market hasn't heated up in that particular area of the State yet.

Right now, about half of the State has entered into this process either voluntarily with us, or involuntarily

through a suit in the courts. If they go through the Court system, we have found that the cost to the town is about twice what it would be if it were in the Council. In some instances, it goes up to 12 times as much.

ASSEMBLYMAN ZANGARI: Where in the Fair Housing Act does it deal with development fees? Could you identify that section for us? You know, we are not able to--

MR. OPALSKI: Right. There is a reference to it under section 10, I believe: "What are the mechanisms a municipality may use in order to address its housing element?" I believe in there there is reference to it. That same reference was cited by the Supreme Court, when it came up with this decision.

ASSEMBLYMAN ZANGARI: This matter is still before the courts?

MR. OPALSKI: Well, the retroactivity is on appeal. That was one of the points I wanted to share with the Committee; that you may want to hear what the Appellate has to say about the six cases before it now, before you come to terms with this amendment. There may be some instructions in there, and it may be enlightening for you in terms of what kinds of guidelines and standards you would like to see in place for that period before our rules.

Now, I think they are on an accelerated schedule, and our DAG tells us that it may well be that they will come up with a decision within a month. So it wouldn't be an inconvenience to see what they have to say.

ASSEMBLYMAN ZANGARI: Would this be more of a matter of administration, not a policy decision; you know, something that would be negotiable between the parties involved, rather than coming to the tabling of legislation not knowing what the Court outcome is going to be?

MR. OPALSKI: Well, I would think you would want to help the process out by taking the uncertainty out of it. I think that is what your statement is in your attendant

amendment. You would want to clarify and make very clear about the validity of those fees, rather than make it more unclear. As far as that goes, I think you would be well served by taking a look at certain sections of this decision. It may help you to structure what kind of minimum guidelines are necessary to pass constitutional muster, so that if the amendment is attacked, it will withstand the attack. That was the reason why the Council got into it. We didn't promulgate a mandatory development (indiscernible), and that was not in litigation. Rather, these fees were concocted locally. Many of them were well-founded. They found themselves litigated, and the Court said the Council was remiss. It didn't complete its rule making; it should go back and redress this issue and, if it does so, and if it doesn't violate these constitutional principles in its guidelines, then those fees can be validated.

I am trying to answer, but I am not sure if I did.

ASSEMBLYMAN ZANGARI: We read between the lines.

MR. OPALSKI: Okay.

ASSEMBLYMAN CORODEMUS: Are you finished now, Mr. Zangari?

ASSEMBLYMAN ZANGARI: Yes.

ASSEMBLYMAN CORODEMUS: Mr. Opalski, the Act is very large, and has a lot of broad impact. Is there any impact on commercial development? If there is, could you tell me? I am not sure what the impact is, the purpose, why you are involved with commercial development. Are there any fees attached, etc.?

MR. OPALSKI: Well, the Court did identify that it is a likely area for exactions, and they identified it for a number of reasons.

ASSEMBLYMAN CORODEMUS: I'm sorry. Did you say, "exactions"?

MR. OPALSKI: Exactions, mandatory development fees on commercial. What they are identifying is that these kinds of uses set in motion a labor force locally that needs to be

sheltered locally; that there is a reasonable relationship between adding shelter for that labor force and using fees from that development to help pay for that shelter. It is not unlike the rational nexus fees that are established in other states -- California, Florida, and elsewhere. You see these in Boston; you see them in San Francisco; you see them in Sacramento, and elsewhere.

I shared with the Committee the 9th Circuit opinion in Sacramento. The U.S. Appellate had validated the use of those fees on commercial property in California in that city. The ceiling that we established here, without any development bonuses, equates with what the standard was in the Sacramento case. So there is a degree of comfort in knowing that what was upheld by the 9th Circuit is the fee level without any bonuses that would apply for commercial property in the State of New Jersey. It is 1 percent of the equalized assessed value on commercial property.

ASSEMBLYMAN CORODEMUS: This is very interesting to me. So I will understand, I would like to walk through it with you again.

Let's assume in my district I am able to cull a manufacturer to move into a depressed area like Asbury Park or Long Branch that really needs an opportunity to provide jobs. So I get someone who is going to establish a plant there, maybe even raze some existing buildings and put a new plant there and provide 250 jobs. Would COAH have any fee impacts on that development?

MR. OPALSKI: It's your choice; it's the town's choice. It is an option available to the town. What we have done in the regulations is to supply that town with guidelines we believe will be sustainable if they are ever challenged, and they will pass constitutional muster. So that town, if it chooses to exact that fee, apply it-- There are options for the town. It may choose to--

ASSEMBLYMAN CORODEMUS: So it is not COAH exacting fees from the individual developer.

MR. OPALSKI: That's right.

ASSEMBLYMAN CORODEMUS: You provide rules and regulations which enable towns--

MR. OPALSKI: Exactly.

ASSEMBLYMAN CORODEMUS: --to assess a fee against the developer for COAH compliance.

MR. OPALSKI: For the implementation of the housing element of that town.

ASSEMBLYMAN CORODEMUS: Okay. I understand that you didn't write the Court decision, nor would you have the ability to write a local ordinance, but wouldn't you agree with me that this has a type of law that perpetuates the problem of chasing business out of New Jersey?

MR. OPALSKI: I don't think so. We had, in our task forces, a number of developers who are very active in New Jersey, and I have also had come in, subsequent to our discussions-- For example, representatives from certain segments of the commercial community in New Jersey came forward and said, "We believe your fees are just about right. They are just about right."

ASSEMBLYMAN CORODEMUS: How long have the municipalities had the ability to assess fees against commercial development?

MR. OPALSKI: For this purpose?

ASSEMBLYMAN CORODEMUS: Yes.

MR. OPALSKI: Since they were promulgated, and that was January 21 of this year.

ASSEMBLYMAN CORODEMUS: So it is rather early then to determine.

MR. OPALSKI: Right.

ASSEMBLYMAN CORODEMUS: Do you have any idea if any towns have taken the opportunity to enact ordinances?

MR. OPALSKI: We just approved three, one of which-- The earliest was Warren Township in Somerset County. We are going to see. It is too early to tell there, as well, what the results will be.

ASSEMBLYMAN CORODEMUS: What are your reporting requirements, mandated or voluntary? I hope you will share that information with me, and with others who are interested. I would like to know, on an interested basis, how this is panning out, because I also sit on the Economic Development Committee. We are trying to foster growth in New Jersey, not chase it away. I am very anxious to hear how this works.

MR. OPALSKI: We are concerned about it, too, for the very reasons that you are. The Council wants to make sure that it is well within a reasonable return on investment; that the investment community will see this as a benefit that will return to them because it will help to shelter the labor force, which otherwise may not be able to afford to live in that area, and would have to commute a long distance. The wages they would have to pay would have to make up for the commuting costs.

For that very reason, a number of firms have moved out of New Jersey, because there wasn't sufficient affordable housing. I guess the classic example is Prudential Insurance Company, which moved from Morris County out into the Allentown area because they were not able to find a sufficient labor pool in the area. There wasn't a sufficient inventory of affordable housing.

We were very sensitive to that when we went through this process. That was our first concern. The second was, with unregulated fees, the fees may be used as another exclusionary device. If they were set too high, they would do just as you predict, but for different motives. What they would essentially do is be a fort to any development coming in at all, and tax uses out of the community, and perhaps out of the State.

We were sensitive to that when we went about establishing these thresholds.

ASSEMBLYMAN CORODEMUS: So far we have been talking about voluntary compliance with the Act. Are there any mandatory provisions in the Act? If so, are there any opportunities to study the fiscal impact on responsible parties, such as local municipalities, for compliance? Do you do that? The reason I ask is because now the Speaker has required that all legislation carry a fiscal note with bills that are submitted, to see what the fiscal impact is on the State of New Jersey's budget. I wonder if you are taking into consideration the municipal budgets, which are equally, if not more greatly, strained right now?

MR. OPALSKI: There isn't, that I know of -- and I am not an attorney -- a mandate in here to do that kind of a fiscal analysis. It would be very illustrative, and I think it ought to be followed up on. I think it is widely held by people in the development community that there is, in fact, a fiscal buttressing of the State, as this Act is implemented. We have seen, over the last six or seven years, something like 14,000 low- and moderate-income units emerge, which otherwise would not be present. That accounts for 10 percent of the building permits that were issued in the last six or seven years, and that is an extraordinary thing. That, in turn, generates a cash flow, a fiscal flow, and a fiscal base for the State, which otherwise would not have occurred.

So, I think if you look at it that way, and analyze it from that comprehensive point of view -- and I would hope that happens -- one could identify the positives, and perhaps, the negatives that need to be minimized.

ASSEMBLYMAN CORODEMUS: Can we move in that direction together to get some type of handle, so to speak, on the fiscal impact and the benefits?

MR. OPALSKI: I would love to see that happen. I think a number of case studies are in order, not just on the economic end, but on the social end of a number of these developments that ought to be followed up on, but for lack of sufficient funds, staff, and time to do it.

ASSEMBLYMAN CORODEMUS: Would that require legislation, or can you do that within your department?

MR. OPALSKI: It would probably require legislation.

MR. BERNARD: Just to supplement that answer, in terms of being sensitive to municipal budgets, one thing we have built into the development fee rule was to allow that, of the money that is collected, the municipality can use up to 20 percent of it for administrative costs, which could include preparation of a housing element. I think that was the Council's way of saying, "Look, we really want you to plan, and we want you to think this thing out. We understand that it costs money. We also understand that it is required, because it is a constitutional mandate. But we want you to do a good job, and we are willing to let you spend some of this money on the planning and the putting together of something that is rational, that we can all be proud of."

ASSEMBLYMAN CORODEMUS: Again, that is great for a district with a lot of developable land. In my district, where we don't reasonably anticipate any developers' funds coming in, or actual development, we are still on the short end.

MR. BERNARD: Okay.

ASSEMBLYMAN CORODEMUS: Thank you.

ASSEMBLYMAN KELLY: I would like to excuse you. Now, don't go away, because we will have more questions.

MR. OPALSKI: Okay.

ASSEMBLYMAN HARTMANN: I've got a question.

ASSEMBLYMAN KELLY: Oh, do you have a question?

ASSEMBLYMAN HARTMANN: Yes.

ASSEMBLYMAN KELLY: He's going to come back, you know. He is not going to get away from us.

ASSEMBLYMAN HARTMANN: I just want to mention--

ASSEMBLYMAN KELLY: Okay.

ASSEMBLYMAN HARTMANN: Why did you set the amount at 1/2 percent to 1 percent for the value of noncommercial?

MR. OPALSKI: A very good question. The Supreme Court -- in that decision you will see it -- saw these fees as the functional equivalent of inclusionary zoning. So, what we did--

ASSEMBLYMAN HARTMANN: As a reasonable regulation?

MR. OPALSKI: That's right, as a reasonable regulation, and one of the tests to pass constitutional muster that these guidelines be reasonable. There is also out there a number of agreements that have been voluntarily entered into, which are predicated on that same standard. So, in terms of equity between those who struck these agreements, in terms of what represents a reasonable standard, that was why we settled in on it.

Having it as a percentage of equalized assessed valuation, the Council felt it was fair because then it would allow for the rewarding of towns which have a very strong market that is based on a percentage. So, towns that are in less pressured markets that may not be as valuable would receive a lowered amount, but under those circumstances the housing costs would probably be lower, as well, in this particular market.

So, there is a relationship between the housing costs that need to be subsidized, and there is a sensitivity to the market.

ASSEMBLYMAN HARTMANN: Shouldn't municipalities be allowed to set their own standard, though?

MR. OPALSKI: Well, that was part of the problem the Court saw, and that was quite literally what the litigation was all about. The Court gave us guidance in establishing that

when they said it was the functional equivalent of inclusionary zoning.

What we did was analyze what the internal subsidies would be, and that relates very much to the recommended thresholds in the guidelines.

ASSEMBLYMAN HARTMANN: Why is the threshold 1/2 percent for noncommercial and 1 percent for commercial? Why is it reasonable for one and not the other?

MR. BERNARD: May I move back a little bit, and get back to why it is 1/2 percent versus 1 percent?

ASSEMBLYMAN HARTMANN: Yes, sure.

MR. BERNARD: I don't think there is anything magical about the 1/2 percent or the 1 percent. You know, it could have been nothing and 1/2 percent; it could have been 2 percent and 3 percent. There were some choices that were made based on what we had in front of us.

One of the things we had in front of us was that communities had been collecting fees, and we took a look at about what size those fees were. I think there was an effort-- There were a couple of things going on. There was a feeling that we wanted communities to be able to keep money as much as possible. The fees, to some extent, were a compromise, based on what had been collected before. But again, they didn't have to be those numbers.

I think there was a belief on the Council that the fees should be relatively small, without some sort of density bonus, or without some sort of compensatory benefit. In that thinking there was a sensitivity to the fact that we are in some difficult economic times; that we didn't want to push jobs out of New Jersey, that type of thinking. There was also thinking that the Court did say that the fees were the functional equivalent of set-asides. And in most set-asides what we see are density bonuses, and part of the deal in

getting a density bonus is that you are providing a subsidy for low- and moderate-income housing.

ASSEMBLYMAN HARTMANN: How many municipalities have collected these, I guess, from 1990? How many will this affect?

MR. BERNARD: How many did it affect? I don't know exactly how many collected fees. The decision said something like 75. I think it might be more like 40. That's my sense.

But just to continue on the answer I was trying to give you: In most inclusionary developments we see around the State, you build the low- and moderate-income housing, and what you have gotten in order to do it is a density bonus, and the Council bought into that. So, where there is a density bonus involved, the fee is much greater. It is 6 percent, which is much more like the subsidy involved in providing low- and moderate-income units.

Now, why is 1/2 percent for one and 1 percent on another? That was a function of the data we had in front of us and the type of agreements we could get from the people who were at these meetings, which included, you know, representatives of municipalities, of the business community, of residential and nonresidential builders, housing advocates.

ASSEMBLYMAN HARTMANN: But, could 1 percent of the residential builders be reasonable, as well?

MR. BERNARD: There is nothing magical about 1/2 percent. I mean, I think the only limitation the Court gave us was that our fees should not be confiscatory.

Now, you also had some questions as to why we set a standard versus allowing the municipalities to set their own standards. I think that was part of the direction the Court gave us. They almost gave us a work program, if you look at the decision. "You will do this, this, this, this, and this." One of the things they said we should develop were standards as to what the fees would be.

ASSEMBLYMAN HARTMANN: I don't say they should set whatever standards they want, because it would get to a point then where that would be exclusionary. On the other hand, some municipalities could charge a reasonable higher fee, perhaps 1 percent instead of 1/2 percent, and the fact that they, I guess from '84 on to 1990, tried to deal with the affordable housing problem, which most municipalities did in this area-- Why should people just be penalized if they, perhaps, collected 1 percent instead of 1/2 percent?

MR. OPALSKI: There are two things I would like to add to what Art said, and they will address your question. One is, the Council's rules always allow for a waiver provision, and there may be good reason, good argument, and good data to support a higher fee level that would demonstrate that those fees are nonconfiscatory.

The second is, if you take a look at what has happened around the country, most other areas have started at a modicum, and have taken that as a point of departure. I have seen cities that have raised those fees very prudently over time so that there is no economic dislocation, which is a common concern that we share with other parts of the country.

It remains for the Council to look at that from time to time and to adjust it to the prevailing market conditions as a point of departure. There is always the ability to adjust, given a waiver.

ASSEMBLYMAN HARTMANN: Just one more point of questioning: You mentioned in court that this has been appealed?

MR. OPALSKI: The retroactivity issue has.

ASSEMBLYMAN HARTMANN: Where are we in the process?

MR. OPALSKI: About a month away from a decision at the Appellate.

ASSEMBLYMAN HARTMANN: At the Appellate?

MR. OPALSKI: Yes.

ASSEMBLYMAN HARTMANN: So that could still go to the -- go higher?

MR. OPALSKI: It may.

ASSEMBLYMAN HARTMANN: Okay. This is fairly contentious.

MR. OPALSKI: It is.

ASSEMBLYMAN HARTMANN: This is New Jersey?

MR. OPALSKI: That's right, six municipalities in New Jersey.

ASSEMBLYMAN HARTMANN: So, if there is one dissent, it is automatically going to go up to the Supreme Court?

MR. OPALSKI: It may.

ASSEMBLYMAN HARTMANN: Well, it has to, if there is one dissent in the Appellate Division. Since it is contentious, there is a good chance. We might be a month away from a decision, but we might be a year, or even more, away from a Supreme Court decision.

MR. OPALSKI: It could be.

ASSEMBLYMAN HARTMANN: So we have a lot of time to, perhaps, wait. Okay. Thank you.

MR. OPALSKI: There may be some instructions from them.

ASSEMBLYMAN KELLY: I want to suspend your testimony, but don't leave. I would like to hear from Alan Mallach, Director, Department of Housing and Development, City of Trenton. Is that right?

A L A N M A L L A C H: Yes.

ASSEMBLYMAN KELLY: Okay.

MR. MALLACH: Thank you, Mr. Chairman, members of the Committee. I am here in the hope that rather than talking just about the development issue, the Committee is interested in some of the broader issues of COAH and the regulation of Mount Laurel housing.

I think that with respect to the development fee issue-- I have been involved in this both as a municipal

official and as an advocate of low- and moderate-income housing. I think -- and I will try to touch on this very briefly --- that the COAH regulations do overreach, if you will, in terms of unnecessary involvement in what municipalities could be doing. I think the requirement--

Again, as I, and many other people, read the Holmdel decision, I think the requirement that municipalities have to participate in the COAH substantive certification process if they want to enact a development fee as a means of meeting their own housing need, is not mandated by the Court decision and, in my opinion, is clearly inconsistent with the underlying statutory structure of the Fair Housing Act.

I think, given the fact -- as the previous witness stated -- that there is no magic about the 1/2 of 1 percent figure or, for that matter, the 1 percent figure, I see no reason why, within certain broad standards of reasonableness, municipalities should not be given the opportunity to set a fee that they consider reasonable, and, since it is clear that the fee does require COAH approval, present whatever documentation is necessary to show that it is reasonable, essentially with the burden being on COAH to argue that it is not reasonable.

I think an analogy would be: For many years, State law has given permission to charge developers for off-site improvements -- sewers, roads, drainage systems, and the like. There is language in the law that establishes basic ground rules for how those fees are to be determined. If a municipality charges an unreasonable fee, developers have recourse to the courts, which measures them against the ground rules. There is no State agency, to the best of my knowledge, that tells a municipality, "You can charge so much a unit for sewer improvements," because the fact is, cases vary, municipalities vary, and circumstances vary.

A third point not mentioned, is that the COAH rule requires that at least 30 percent of these funds must be spent

in a particular way, rather than giving municipalities the discretion to use them in any reasonable way consistent with an appropriate plan. I don't think anybody disputes that a municipality that wants to enact -- wants to develop an ordinance has an obligation to have a plan in place as to how they are going to spend the money. Common sense dictates as much. But I think it is always fair that the municipality should have the opportunity again to say, "This is how we want to spend the money." Again, if COAH considers it unreasonable, they can then respond to it. But to say in advance that municipalities should spend "X" percent for such and such, "Y" percent for such and such, is, again, I think, excessive.

Finally -- and again, I doubt very much that it will ever happen; it is more, I think, a theoretical than a real potential, at this point -- are the penalties that are set up. In the final version of the bill -- the regulations that were adopted -- they are optional. They are not mandated. The first version of the regulations provided that they be mandatory. In other words, if a municipality failed to meet a quarterly reporting deadline, or something of that sort, they would automatically lose their funds. I want to make it very clear, that language was changed, and the final regulation says that COAH has the discretion to take away their funds, but it does not automatically happen. I doubt very much if COAH would actually take a municipality's funds away from them for having failed to meet a quarterly report deadline. But I think the mere fact that something like that is there, does raise the question.

If I may have your indulgence, I would like to just make a couple of very brief, broader comments about this. I believe that, on balance, COAH has made an effort, since it has been established, to be responsive to municipal concerns. I don't think that COAH has sought to run roughshod over local government or to impose itself unreasonably. I think what has

happened, however, is that COAH has tended -- and I suspect this is probably characteristic of most bureaucracies after they get going -- to approach things in terms of very tightly structured, bureaucratic, rigid frameworks, which have tended, in order to simplify matters, in order to pigeonhole matters, to significantly reduce the opportunity for flexibility and creativity at the local level.

So, while they are certainly not anti-municipal in their efforts to try to structure things, I think they have created a bureaucratic structure, which, I think-- Perhaps the most serious issue is that, while local government is represented in the COAH process, and developers are represented in the COAH process, one group of people who are not represented at any point, in any significant way in the COAH process, are the people for whom this entire process was designed, which are the low- and moderate-income people in need of housing.

So, the process has lost touch. I believe that the ultimate goal is to try to provide decent housing for the citizens of New Jersey. I hope that if this Committee looks at the Fair Housing Act, whether to change it, whether to rearrange it, whether to amend it to add provisions to it, such as Assembly Bill No. 1184, which I think makes absolutely good sense and should not, in my opinion, be delayed in anticipation of what the courts may or may not do-- If the Committee and the Legislature think it makes sense, they should enact it.

I think that as you look at this, please bear in mind that the purpose of this entire process is to provide decent housing for low- and moderate-income people, and to give New Jersey local government the tools, both financial and legal, to try to do the job that at least some municipalities -- and I would certainly include Trenton among them -- actively want to do.

Thank you.

ASSEMBLYMAN KELLY: Do you think COAH has overstepped their authority?

MR. MALLACH: I think that with respect to the development fee regulations, I would suggest that the requirement for substantive certification as a condition of enacting a development fee ordinance-- That specific provision does represent an overstep of the statutory framework.

The others I would characterize, perhaps, as inappropriate or poor judgment, but I do think they are legitimate from a purely statutory standpoint.

ASSEMBLYMAN KELLY: So it is obvious you want to see some changes in this legislation?

MR. MALLACH: Certainly.

ASSEMBLYMAN KELLY: Any questions for Mr. Mallach?

ASSEMBLYMAN HARTMANN: I was thinking you have done a generally fine job in the City of Trenton, and I hope you will continue to come back to testify.

MR. MALLACH: Thank you, Mr. Hartmann. We need all the help we can get.

ASSEMBLYMAN KELLY: Well, I would like you to work on some legislation with us. What do you think of that?

MR. MALLACH: I would be delighted.

ASSEMBLYMAN KELLY: Does anyone else have any questions? Mr. Zangari?

ASSEMBLYMAN ZANGARI: No.

ASSEMBLYMAN KELLY: No -- no one here? (no response) Thank you.

MR. MALLACH: Thank you.

ASSEMBLYMAN KELLY: Now we will have Ed Schmierer, Chairman of the New Jersey State League of Municipalities.

E D W I N W. S C H M I E R E R, ESQ.: Well, not the whole League, Mr. Chairman, just the Subcommittee on Developer Fees, which I guess Bill and the League have been working on for a number of years.

ASSEMBLYMAN KELLY: Okay, I apologize.

MR. SCHMIERER: Thank you.

I would like to echo many of the comments that the previous speaker made about -- first complimenting, in many respects, COAH, for working hard on the developer fee rule, and they did. They included the League of Municipalities in the workshop and the various task forces that were organized following the Supreme Court decision which justified all of these fees. Unfortunately, there were two main issues that the League lost on before COAH, and we would like you to relook at them. Those are the issues of substantive certification and this artificial cap on the level of fees that can be collected.

The League position, through the workshop that we participated in -- or the task force, I guess you would call it -- for several months with COAH was simply this: Developer fees should be made user friendly to communities. They are not mandatory. That is one thing I should point out. If Deal doesn't think they want a developer fee, Deal doesn't have to have one. No town has to have a developer fee. It is completely permissive on any town that wants to work this into their overall affordable housing program.

If you are in a town, however, that decides that the market is correct for this and you want to have a developer fee, our feeling is that you shouldn't have to require those towns to go through the trouble and the cost of hiring a planner and doing all the things that you may have to do in order to file for, and go through, the process of substantive certification. It should be a lot simpler.

Clearly, as Mr. Mallach said, there have to be certain fundamentals that a town has to do. One, you have to have a master plan and a housing element. Of that element, you have to have an affordable housing component showing what you want to do with your money. But once you come up with that, and an overall affordable housing strategy for your community, we

don't see why it is so tough for the municipality, without filing for this formalized substantive certification, to take the plan, and to take the ordinance if they want to collect money under it, and submit it to COAH for review and approval. We even suggested that it should be on the town's nickel each year to perhaps have a planner or a master or somebody COAH is comfortable with, to step in and review what the town did the year before, to make sure that fees are being spent correctly, that the affordable housing effort is going forward, and so on.

As Mr. Opalski indicated, our best guesstimate is that there are about 250 -- at least 250 -- municipalities that are kind of in never-never land right now with regard to the process. A number of towns are before COAH; a number of towns are before the courts, although they are getting less and less as the Mount Laurel judges go out of business. But there are about 250 towns that don't have developers pounding on them to sue them, so they don't need the COAH protection. Nevertheless, they might want to do something that would raise some of these funds to help them with their affordable housing effort.

Our position has been, if you have a small town in Warren County that might have a row of houses on Main Street that need some rehabilitation, and if they can come up with, let's say, $25,000 through developer fees during a given year, they could match, let's say, a Small City Grant loan of $5000 per house to put new roofs on. Why don't we let the town do that? The incentive for them to file for substantive certification and go through the bureaucracy isn't there just to collect money at this level. So they might want to have a developer fee ordinance that is pretty modest, less than the levels we talked about before, just to generate enough money to do some modest rehabilitation on Main Street. But they don't want to get involved with Trenton, and they don't want to get

involved with all the bureaucracy that flows from substantive certification.

Our position -- the League's position -- is, let the town collect the money. As long as there is a plan, it has been given to COAH, COAH has blessed it, and there is a mechanism to monitor it, that ought to be enough. We should not use this carrot of saying, "Well, if you want to collect these fees, you've got to come in to COAH as the be-all and end-all." We think that is a mistake. It discourages towns from moving forward in this regard.

The second item was this artificial "no-magic-to-the-number" 1/2 of 1 percent and 1 percent cap. As Doug indicated, and as we worked in this task force it was clear, COAH was working with this notion, and I think it is a correct one, that the fee is the equivalent of inclusionary zoning. That means that if I am the developer, and I am going to build a housing development that is going to have 20 percent low- and moderate-income housing in my development, I certainly don't pay a fee. I pay my price by building that 20 percent of those units. These other people who are developing in town and using up the land and so on, should contribute, too. We should try to make those contributions kind of balance out. But I don't think it is fair to establish an across-the-State cap for residential and nonresidential at these artificial levels.

For example, one of my clients is Princeton Township. I am the attorney for Princeton Township. We have had an ordinance -- an affordable housing ordinance -- since 1984, and we have collected developer fees since that time. We have done a study in Princeton Township to show that because of the value of land in Princeton Township, which, unfortunately, is high, the cost to subsidize one unit of affordable housing, that is, to buy it down, or for the developer to build and then charge a lesser price, is $42,700 a unit. Okay? That is a study we have done. That is a figure that makes sense in Princeton

Township. It is not the same number in South Brunswick Township, which is just next to us, or Plainsboro, or any other community. It is different throughout the State -- the cost of the subsidy.

Why not let the municipalities, then, set, within reason, what the developer fee should be for that town? I would suggest that they are all going to be different. I think Mr. Mallach's point is a good one.

The Supreme Court, when it handed down the work sheet that Doug talked about, was correct. They didn't say that you had to have some artificial cap or some percentage. They just said the fees can't be confiscatory: You can't be taking people's property; you can't be charging too much and discouraging development. What I am saying is, in each community that level is somewhat different. I know, for example, in Princeton Township, we worked under a fee higher than the COAH limits for five years. We still had people building office buildings; we still had people building houses. But the people who built, let's say, a $600,000 house would contribute $3000 to our affordable housing program, and they really didn't kick about it. The level of the fee was higher than the one that COAH would allow us to collect now. Why should we forgo getting that additional money in for a decent, good, social purpose, and that is to build more affordable housing in the town?

So, those are the two principal issues that we argued hard about during the COAH task force and, frankly, we lost. We ended up with the requirement for substantive certification. We also ended up with this artificial cap, which, as Mr. Hartmann indicated -- or through a question Mr. Hartmann asked -- there is no magic to it. It was just an effort to try to establish some reasonable level.

I would agree, also, with Mr. Mallach that there should be more flexibility on the uses of money. If you look

at the rule, there is a matrix there: Thou shall not spend more than 20 percent on administration; 30 percent on making units more affordable. Sometimes it works; sometimes it doesn't. For example, Princeton Township had a program where we gave down payment assistance to people out of the affordable fees we collected. In other words, when people bought a home, if they were short $2500 to close, we would make a loan to them, and they would pay it back when they sold their unit, at below the interest rate. That made the deal work.

Mercer County has now stepped forward, and they are doing that. We are not spending our money on it any longer. We are going to the Mercer County Improvement Authority, and when we need $2500 for a closing, they are giving us that money. Why tell us in Princeton that we should say to Mercer, "Well, keep your money. We need to spend 30 percent to make things more affordable, and this is one of the ways we are going to do it"? That is the kind of flexibility I think the community should have in figuring out how to spend the money, provided they are spending it legitimately on affordable housing, the plan is submitted to COAH, and COAH checks out the plan. I think that all should follow.

Finally, just on the legislation that is up before the Committee later -- A-1184 -- we certainly support it. In fact, Bill Dressel left me a statement -- which I will leave with you -- on that legislation.

I think it should be clear that the funds collected between, basically, 1985 and 1990 -- the reason they stopped at '90 is, that is when that Supreme Court decision came down -- were collected in good faith for a good purpose, and that was affordable housing.

I have a list here. I think one of the Assemblymen asked a question about: What kind of money are we talking about? What kind of towns collected money? I will leave this, too. We have developed a firm list of about 20 communities

here where we know there has been between $12 million and $14 million collected during 1985 to 1990. We have a list here of those towns, and we have a list of when the ordinance went in and how much has been collected. This was an informal survey the League did recently, just to figure out what is at stake.

Our feeling is that it would be an absolute travesty to have us now turn around, try to find all the developers who contributed this money, and then give it back, or part of it back, at any rate. As long as it is being used for affordable housing purposes, I think we ought to wipe the slate clean. Let us keep the money that has been paid so far, some of which has been spent already by towns, and that is what your bill does -- A-1184. It clarifies that the previously paid money, whether it is above or below the COAH cap-- You can keep that money, provided it is devoted to affordable housing.

So those are the principal points that the League of Municipalities would like to bring to your attention. I would be happy to answer any questions. Thank you.

ASSEMBLYMAN KELLY: Assemblyman Corodemus, go ahead.

ASSEMBLYMAN CORODEMUS: Could you tell me, since 1980, how many low-income housings have been constructed within Princeton?

MR. SCHMIERER: Since 1980?

ASSEMBLYMAN CORODEMUS: Or any date where you have the figures at hand.

MR. SCHMIERER: Well, the Princeton Township fair share number that was struck in 1985 is 275 units. As of today, 140 of those units have been built and people are living in them.

ASSEMBLYMAN CORODEMUS: In Princeton?

MR. SCHMIERER: In Princeton Township. It is called the Griggs Farm Development, as you go out Route 206 on the left-hand side. Of the 140 units, 70 of them are rental

units. We get a bonus for doing those, because it is difficult to find rental units.

ASSEMBLYMAN CORODEMUS: How many were rentals, again?

MR. SCHMIERER: Out of 140 built, 70 are rentals; 70 are low- and moderate-income sales units within the town house development. Okay? It is a total of 280 units that will be built. Fifty percent of them will be for low- and moderate-income people. One-hundred-and-forty are built. Seventy of the 140 are rental units right now.

As I came down today with Deputy Mayor Ellen Souter, we passed Calton Homes, which is constructing right now an additional 60 units of affordable housing -- 60 units that will be constructed this spring and into the summer, and so on. So, those units total 200 of the 275. With the bonus you get under the COAH rules, our number is really up to, like, 215. Then we have done some rehabilitation on one house we took over for a tax foreclosure. We sold that to a lady and her family near the hospital. We are trying to use some of these funds eventually to think about an RCA agreement with the Borough of Princeton, which is right next-door to us.

ASSEMBLYMAN CORODEMUS: What are the prospects for those tenants becoming homeowners?

MR. SCHMIERER: Living in the units? I think they're good. The reason I say that is, Princeton has another development in town which is called Princeton Community Village. That dates back to the 1970s. That is a 237-unit rental project. Most of the people who bought the 70 units in Griggs Farm-- A number of them came from that other rental area. In other words, they lived in Princeton; they rented there. Their kids were in school, and they liked the community. Then they had a shot at buying a house at reasonable prices -- $40,000, $50,000, $30,000, whatever the price was for that individual. A lot of those folks who lived over in the other Princeton Community Village got on the list

and qualified to buy houses in the Griggs Farm Development. That is kind of a trickle down effect. That opened up some other rental housing that was modest, and consequently the whole thing kind of worked pretty well.

ASSEMBLYMAN CORODEMUS: Thank you.

ASSEMBLYMAN HARTMANN: One question: Would you consider that these towns here are in the forefront of trying to address the crisis we are facing in affordable housing now?

MR. SCHMIERER: Well, I know the towns that are listed there, the 20 or so, do have affordable housing plans. They are trying to collect the money to use it for that purpose. In the forefront? Obviously, there are not a lot of urban centers there. Like Alan Mallach pointed out, they are struggling on their own to do it without developer fees. But I would say the list of towns here have made a sincere commitment to trying to implement programs. They are all different, and the level of fees is different, too, but I think, yes, I would agree.

ASSEMBLYMAN KELLY: Mr. Green?

ASSEMBLYMAN GREEN: Mr. Chairman, I am not too familiar with the makeup in Princeton Township, but it is obvious that I consider it one of the better suburban communities in the State. I am amazed when you talk about 140 units, that you are only able to sell 70 of them, and the other 70 you had to rent. Is there a reason why?

MR. SCHMIERER: Oh, yes, that was the plan. In other words, the need in Princeton-- If you look at the Fair Housing Act and the COAH rules, you are encouraged to do rental housing because, in this area in particular, rental housing is -- affordable rental housing is very much in demand. So the plan was to do 140, and then to rent out 70 and sell 70. That was the plan from day go.

ASSEMBLYMAN GREEN: What about the $353,000 you have collected--

MR. SCHMIERER: Right?

ASSEMBLYMAN GREEN: How much of a balance on that do you have?

MR. SCHMIERER: We have it all in the bank. We haven't spent it.

ASSEMBLYMAN GREEN: What's the reason?

MR. SCHMIERER: Well, because there have been these legal challenges to using this money by the developer community ever since we started collecting the money. It was finally resolved in that Holmdel decision in 1990 by the Supreme Court, which frankly surprised everybody, which said, "Yes, you can have developer fees, but you have to do them according to some rules and guidelines," and COAH recently did those guidelines.

ASSEMBLYMAN GREEN: Earlier you made the statement that you have already begun to use some of this money. In which municipalities have you used it? Am I correct, did you say--

MR. SCHMIERER: I'm sorry. The governing body has set funds aside out of the Affordable Housing Trust Account for down payment assistance, and so far about $25,000, or 10 people, have taken advantage of that. That money, however, has been handled through other tax dollars, because we didn't know whether or not we could or couldn't use these funds.

Our hope is that once it is clear that we can use these funds for that purpose, then that advance, if you will, can be refunded by the Affordable Housing Program, which should do it anyway.

ASSEMBLYMAN GREEN: Then would you say your statement pertaining to the fact that you have used some of these funds was misleading, when out of over $350,000 you only used $25,000 of it? Wouldn't you say that would be, like, tokenism, because in reality you haven't really used that money?

MR. SCHMIERER: Mr. Green, we would love to use every penny of it tomorrow. There is no resistance in Princeton to spending the money. Our problem has been legally. But if the

money was spent and then the Supreme Court, or somebody, said, "You shouldn't have collected the money in the first place, and you shouldn't have spent it," then you would have to float a bond or something to repay it. The condition of most communities, including Princeton Township, that just, for example, floated a bond for $7 million to pick up the deficit on the development I talked about, Griggs Farm-- The taxpayers are paying that directly through the taxes they are paying this year in Princeton Township. They would have loved to have taken $354,000 out of that account and put it towards that purpose, but it hasn't been cleared. We haven't been able to do it.

ASSEMBLYMAN GREEN: My position is that I -- and I am only speaking personally -- would prefer to see the Court handle this particular issue. If the Court decision was that illegally the funds were collected and it feels that they should go back to the developer, then we would not be bringing a hardship on anyone -- am I correct? -- since the money has not been spent.

MR. SCHMIERER: Well, I guess other than the taxpayers who wouldn't get to use it for that purpose. I would agree. I think you are giving a windfall to all these companies that have obviously-- You don't have to be a rocket scientist to know they build this into the cost of doing business. This is money that they spent, in some cases, back in 1985, and now we are running around and trying to find them. Half of them are out of business. The certified letters we send come back. We are trying to locate these people to say, "You might be entitled to a refund. Let us know."

ASSEMBLYMAN GREEN: I just want to be very clear, so that when I make my decision it is based upon the fact that I don't want to bring on a hardship to any agency with the State or any local agency. That is my concern in terms of this. If it went against us, would we have to give this money back?

Would it be a hardship in terms of the State bailing out a municipality which has already used these funds, which you say have not been used?

MR. SCHMIERER: No, no. In the first place, I think a number of municipalities have used the funds. A number of municipalities have actually allocated and used those funds. They have done so at their own peril. In other words, if they are going to have to pay them back, they are going to have to pay them back. We could try to find out which of those there are. But I think 1184 -- your Assembly bill -- if you didn't pass that, and we had to give back some money, it would be a hardship, an absolute hardship, on every community that collected them, whether you spent it or not, because that money was collected during the heyday of 1985 to 1990, when building was strong, and developers were paying the money. We are in a different market now, and the likelihood of clicking in $12 million to $14 million again quickly toward affordable housing, is pretty remote.

So, if you can allow the towns to at least keep that money, that is money that does not have to be raised in some other fashion, and can go for a good, social purpose.

ASSEMBLYMAN GREEN: Mr. Chairman, one other question: Again, if this went against what you are trying to accomplish, do you feel we could move along with affordable housing in these particular municipalities without any hardship to them, or without any assistance from the State of New Jersey?

MR. SCHMIERER: Well, I think, obviously the municipalities have an obligation, and they are going to move on with it. I think most municipalities, with some exceptions certainly, are doing it sincerely and trying to move on. I think it would be a real loss to those municipalities to lose that money, and a windfall to the other people to get it back. They are not going to come to this State, I don't think, for money for this purpose. They'll figure out how to implement

their plan. It will take longer, and they won't have as much flexibility and it may not be as creative. They won't have money, for example, for helping with down payment assistance. They may not, other than appropriated in the budget, and you know how tough it is to do that with a local budget now.

So, why not allow the town to keep whatever the money is, and then allocate it for these kinds of purposes that get you where you want to be? That is what I think.

ASSEMBLYMAN GREEN: Thank you very much. Thank you, Mr. Chairman.

ASSEMBLYMAN CORODEMUS: Mr. Chairman?

ASSEMBLYMAN KELLY: Assemblyman Corodemus?

ASSEMBLYMAN CORODEMUS: I don't know if this question is appropriate now, but you brought the bill up tangentially in your conversation. I would like a short summary of what you consider to be the windfall profits to the unavailable builders that contributed over the years. Could you tell me that?

MR. SCHMIERER: Well, the way we see it is as follows: The COAH rule now has this 1/2 of 1 percent and 1 percent cap. Okay. That didn't exist for any towns that collected money. They were doing it according to their own schedule and collections.

ASSEMBLYMAN CORODEMUS: Sometimes greater.

MR. SCHMIERER: Sometimes greater. Let's assume in one town-- Let's say it is greater. Those ordinances, together with a list of all the money collected and who paid it, had to be shipped into COAH by April 20, so a lot of that stuff was shipped into COAH. COAH is now taking a look at who paid. To do the mathematics is pretty simple. You would check and see that is paid. We had to tell COAH what the equalized assessed value was of the unit. You do the math: 1/2 of 1 percent, or 1 percent, and you can see who is high and who is low. Okay.

If somebody overpaid according to the current COAH formula, we have to notify those people. In fact, we have to notify everybody who paid any money, and say, "Give your comments to COAH. There is a possibility that you might be entitled to a refund." If COAH came out and said, as we study these ordinances, "Okay, all the payments up to our level, you can keep, because that is consistent with our rule, but those payments above that level you have to refund--" Our position, just understanding the dynamics of how buildings are built and properties are developed, is, in 1985, when somebody built an office building, let's say, in Princeton Township, and paid a $30,000 developer fee, you can bet dollars to donuts that somehow that was factored into the price that the property owner paid for the building. It had to be. Usually, developers are going to say, "All expenses, fees, associated building permit fees or sewer connection fees, and so on, get factored into the cost of doing business."

ASSEMBLYMAN CORODEMUS: And not a reduction in profit?

MR. SCHMIERER: Pardon me?

ASSEMBLYMAN CORODEMUS: It couldn't possibly be a reduction in profit?

MR. SCHMIERER: It could be a reduction in profit. I'm sure the Builders Association will tell you that that is exactly what has happened. But our feeling is that that is not what happened in the majority of the cases. It was passed along to whoever bought the house, or whoever built the building.

ASSEMBLYMAN CORODEMUS: That's only a subjective assumption on your part.

MR. SCHMIERER: Well, okay, I'll give you some examples. We have done the mailings -- okay? -- to-- We have 82 people in Princeton Township properties who have contributed money. We have mailed letters to all those people. I get phone calls and letters from-- These are not office buildings;

these are individual houses. Okay? I get a phone call from Mrs. Jones, who lives on Bouvant Drive, or wherever it might be. Now, we sent the letter out, care of the developer who pulled the building permits. So it might be the XYZ Construction Company. Mrs. Jones calls me up and says, "Well, I got this certified letter from you guys saying that XYZ Construction might be entitled to a refund. I don't know where XYZ is. I guess I can try to find them. But I have a closing statement here, and when I bought my house in 1987, I paid at the closing $2375. It says, 'Development Fee.' Is that the number?" And I said, "You're absolutely right. That's the number."

ASSEMBLYMAN CORODEMUS: A development fee to whom?

MR. SCHMIERER: To Princeton Township, which was taken out at the closing charged to her column, on her side, not the seller's side, not the builder's side. She paid the fee to Princeton Township. Okay? She said to me, "Why should he be getting this money back? I paid it."

ASSEMBLYMAN CORODEMUS: So you're saying it was a pass-on?

MR. SCHMIERER: It was a cost, right; it was a pass-through cost. And I said to her, "You know, it's a good question. I don't know. Maybe he won't step forward and ask for it, and maybe somehow through the proces, you will be entitled to get back the money you paid." But she is not the developer. She is the owner of the property. She paid that fee. I can give you illustrations of six or seven other people who have had the same response to us.

ASSEMBLYMAN CORODEMUS: In different projects?

MR. SCHMIERER: Different projects, mostly homes. Now, I am not talking about office buildings, mostly homes. It is set forth on the closing statement. To me, that is a windfall to the company which: a) may be out of business; and b), forgot about this '87 money that they paid quite some time

ago. Perhaps I am going to have to find them and send them a check for $2375, that ought to stay in the Affordable Housing Account.

ASSEMBLYMAN CORODEMUS: Since you have that data, why is it not possible to eliminate the windfall situations, if there are fees to be reimbursed?

MR. SCHMIERER: The process with COAH to review these things, in terms of who gives what back, and so on, is just beginning. We will bring that to COAH's attention when we go to our hearing, or meeting, or whatever we are going to do, to try to figure out who gets what back. But the mechanical application of the rule doesn't really address that issue. The mechanical application of the rule defines the deverloper as the person who actually built the unit.

ASSEMBLYMAN CORODEMUS: No other questions, Mr. Chairman, just a statement: I can understand why there is an attack on the nature of building in New Jersey, with all of these so-called soft costs, and why housing outside of the State is far more attractive.

ASSEMBLYMAN KELLY: Does anyone else have a question?

ASSEMBLYMAN ZANGARI: Yes. This $353,000 that you took in-- Are all these units built?

MR. SCHMIERER: Except for one office building, they are all built, yes.

ASSEMBLYMAN ZANGARI: Okay. How about in Lawrence Township, which took in $1,250,000? Are they all built?

MR. SCHMIERER: Yes. See, we are not talking about low- and moderate-income units being built now. These are regular houses. Okay? In other words, as a condition of getting your building permit to go build this town house development, you have to pay so many dollars per unit. Or, as a condition to getting your final approval, you had to pay so many dollars per unit. So, yes, I would say from the list

there, that a majority of the actual houses or office buildings that are not low- or moderate-income housing were built.

ASSEMBLYMAN ZANGARI: Where it says, "Amount collected," these are all unit fees that they collected for low- and moderate-income housing?

MR. SCHMIERER: Yes.

ASSEMBLYMAN ZANGARI: Okay. Is the total collected -- that's the total money collected, okay?--

MR. SCHMIERER: Right.

ASSEMBLYMAN ZANGARI: --that they received and deposited under accounts -- municipality accounts--

MR. SCHMIERER: Or some of them spent.

ASSEMBLYMAN ZANGARI: Okay. Have all the units they have received the fees for been--

MR. SCHMIERER: Built?

ASSEMBLYMAN ZANGARI: --built?

MR. SCHMIERER: I would say a majority of them, yes.

ASSEMBLYMAN ZANGARI: If they are not built, should they be entitled to a refund?

MR. SCHMIERER: Well, if they abandoned the idea of building them, do you mean?

ASSEMBLYMAN ZANGARI: No, if they are not built today, since, you know, they collected a fee structured on the previous town ordinance--

MR. SCHMIERER: Right.

ASSEMBLYMAN ZANGARI: That ordinance today is moot, because, you know, COAH came in, or the Court came in, with a different decision where it would be a lower fee.

MR. SCHMIERER: Right.

ASSEMBLYMAN ZANGARI: Should the builders be entitled to get this refund back?

MR. SCHMIERER: No.

ASSEMBLYMAN ZANGARI: Why? The unit isn't built yet.

MR. SCHMIERER: Well, but they still have their approval to build it, right? In other words, we are assuming that somebody got approval to build a house, or an office building, and they still have the ability to do it. I guess if they abandon the project, don't ever build it, then I guess you ought to give them their money back.

ASSEMBLYMAN ZANGARI: Thank you.

MR. SCHMIERER: Yes.

ASSEMBLYMAN KELLY: Any other questions? (no response)

Let's hear from Mr. Riggs. He may have a different approach to this situation.

J O S E P H R I G G S: What a shock that will probably be.

MR. SCHMIERER: Mr. Chairman, may I leave these comments from Bill Dressel?

ASSEMBLYMAN KELLY: Certainly.

MR. RIGGS: Good morning, Assemblymen. I'm Joe Riggs, Vice-President with the New Jersey Builders Association. We are a trade group that represents a few thousand builders and tradespeople who are responsible for building a good majority of the housing in the State, or at least we used to build the majority of the housing in the State.

With me today is Joann Harkins, who is our Director of Land Use and Planning.

I am going to let the record stand on the testimony that has been submitted to you, and address a few of the comments that I have heard made here previously.

I don't know whether I am happy or sad, because most of what I have heard today, and what I will say, really reopens the essence and the core of the discussions that were held before COAH over the preceding 12 months or so, that followed the Holmdel decision.

Let me say very clearly that we were dead against fees of any sort -- 1/2 percent, 1 percent, or any other kind -- for exactly the reasons that Assemblyman Corodemus mentioned

earlier. It simply drives up the cost of housing; widens the affordability gap in New Jersey, which is already far too much; and it is paid by one of two people -- either the builder or the customer. Either way, we see it as unfair. Certainly if it is the customer, how we, as a society, can rationalize that 15,000, or 20,000, or 30,000, or 40,000 people per year -- however many starts New Jersey is lucky enough, or unlucky enough to have in a particular year -- should absorb the burden of providing the low- and moderate-income housing in this State, is a mystery to me. We have not understood it from day one, and we don't understand it any better after listening again to some of the people who have testified before me advocating that.

We think it is a basic fairness issue. If we intend to truly create a pool of money to provide affordable housing, then do it the right way, and do it through a transfer tax on everyone. When I testified before COAH, four or five or six months ago, at this point, by pure coincidence there was an article in The Star-Ledger that day. The article centered on Alpine, New Jersey. Alpine, New Jersey, was before COAH. In what technical fashion they were before COAH, Doug, I will not try to recount. But the gist of the article was, "Look, Alpine wants an exemption from any fair share obligation for providing affordable housing, because the town is built out."

Well, irony or ironies, Alpine, New Jersey, is the highest per capita income town in the State. And, here you have this town directly and overtly saying, "We don't have any fair share obligation here, because we are all built out." Well, I submit to you, gentlemen, that that is blatantly unfair. Those are not the mechanisms that ought to be able to be utilized by municipalities.

We believe, at this stage of the game, that there is significant argument to reopening the whole fair housing issue. We think COAH has to have teeth, and we think they need

to be able to hold the municipalities' feet to the fire. Our experience with municipalities has been that they have not typically been wide open to inclusionary and significant growth of low- and moderate-income housing within their borders, for a whole variety of reasons. We see, in many respects--

We heard testimony this morning-- I am not sure I understood totally, but I believe I heard testimony that for Princeton to make the numbers work, they had to charge $42,000 a house. Well, that is just wonderful if you are charging $42,000 a house on the number of new construction units you are predicting in order to satisfy the need of the low- and moderate-income homes that are intrinsic to your community. It doesn't seem very fair to us to expect that $42,000 to be borne only by those new people moving into the municipality. We don't understand that at all.

If this issue is to be opened again, we think we better give teeth to COAH. We think we better provide incentives to the private sector in order to get this development to happen, because, trust me when I tell you, it is a significant and legitimate break system on the economy of this State. Someone mentioned Prudential moving to Allendale. It is happening every day, time and time again. Whenever I have this opportunity -- and I am going to take it again -- I ask each of you to sit back and ask yourselves, if you were the chairman of a "Fortune 500" company, and you had to make a decision about where to relocate your company, would you come to New Jersey, or would you not? I think, given the costs that we have built into our system through this type of bureaucracy and this type of attitude, that the answer, in more cases than not, would be "No." I think that as long as the answer in more cases than not is "No," we are not seeing the forest through the trees, and that we better be willing to take a good, long step back and look at the whole process.

I would be happy to answer questions; Joann would be happy to answer questions, relative to the specifics.

ASSEMBLYMAN KELLY: Are you advocating a transfer fee on all real estate to be used, or a portion of that, or increasing that? Is that what you're saying?

MR. RIGGS: Let me say this: We think that would be one heck of a lot fairer than singling out only new construction to deal with this issue. I have a very hard job distinguishing between a person who is moving from Pennsylvania into New Jersey, in that unlikely event-- But, in that event, I have a very hard time distinguishing why that person who is buying a new home from me, or a used home from one of you, should be different. They are bringing the same baggage with them to the State. The same need exists in the State. If we are really serious -- if we are really serious -- about creating a meaningful pool, broaden the base of the tax, and make the tax manageable. And don't kid ourselves, because this is a tax. It isn't anything else; it is a tax, and it is a tax to accomplish a goal.

If we, as a society, decide that that is what we want to do, then that's fine. Decide it; decide it directly, but don't decide it quietly on the backs of a very narrow segment of New Jersey's economy, and market.

ASSEMBLYMAN KELLY: How many other states use this formula they are using now, where only the new homes--

MR. RIGGS: Joann, you probably--

J O A N N H A W K I N S: It is not used statewide anyplace else. It has been used -- not this particular formula; everybody has their own version of it-- Generally, it has been used perhaps in 20 other communities. It is done at a municipal level, primarily in areas such as Boston, San Francisco, and a few other places in California, where you have very different circumstances, where the fee has been imposed almost exclusively on commercial development, not on

residential development. It was because of the extent of commercial development that they were getting into areas such as San Francisco. It is virtually impossible to build housing that anybody can afford without the subsidy.

In New Jersey, we have a different situation, in that generally we have not been able to build housing that the average person can afford, because the zoning precludes it. That is just a different situation.

MR. RIGGS: Mr. Chairman, I might add just one comment I had. I know Mr. Mallach drew a parallel earlier between fees that would be exacted for sewer or water system expansion, and things of that nature, and equated that type of a fee to this type of a fee. I want to point out to the Committee that we see a fundamental difference in those fees.

One is the expansion of a water or sewer line that my development necessitates. So, to the extent that my development necessitates an expansion, then, fine, figure out my fair share of the calculation of that expansion, and that's good. Well, I won't say that it is good, but it's livable and there is rationale and there is fairness in that type of thought process. But to say that there should be a fee exacted from my community for a problem that I didn't create -- it exists in New Jersey at the moment -- in my mind, is a horse of a significantly different color. I think it is very important for the Committee to distinguish between those points.

ASSEMBLYMAN KELLY: Do you have any questions, Mr. Green?

ASSEMBLYMAN GREEN: You mentioned a figure of $42,000.

MR. RIGGS: I was recounting a figure that was mentioned earlier.

ASSEMBLYMAN GREEN: Just in round figures, would you gauge that on a house of about $300,000, or more?

MR. RIGGS: I can't speak to that comment. I was only recounting the testimony of a previous witness. I'm sorry.

You could undoubtedly question Mr. Schmierer again in that regard.

ASSEMBLYMAN ZANGARI: That was on $600,000.

ASSEMBLYMAN GREEN: It's still a lot of money, $40,000 on a half a mil.

What effect has this had on the building industry, in terms of, you know-- If I am going to spend that kind of money, and I am going one on one with a builder, then I want him to itemize exactly what the costs are costing me. At the end, reaction from the public, in terms of-- This has to sit like a sore thumb.

MR. RIGGS: Right, but let me say this: I spend my life, these days, figuring out how to get my costs lower. I am doing that in an environment where my expenses are getting higher, and I am not making money now. I am part of an industry that is reeling. The thought of imposing additional fees on a reeling industry is just, in our minds, patently crazy. If you could conclude that there was rationale to do this type of exaction, if that were a reachable conclusion, which we don't agree with-- But if you could reach that conclusion, for goodness sakes, now isn't the time to do it; not at a time when the industry is on its knees, struggling along trying to get to 15,000 or 20,000 starts on unprecedently low levels. We haven't seen them since the 1930s, for goodness sakes.

So, you know, the quick answer to your question is, customers are rebelling. They are looking for additional discounting. They are not expecting to pay higher fees.

And by the way, again to Mr. Schmierer's point, let me say this to the developers I know who have paid these fees: If they have directly charged their customer on a closing statement so that that cost is understood, then they are most definitely not entitled to the repayment of that money; their customer is. We know who the customers are, so that isn't

going to be any gigantic bookkeeping effort to work through. The example that was quoted earlier-- In my mind, if that happened, then that $2300 was due to the buyer of that home, and not to me, as the developer.

On the other hand, if, because of market circumstances, or whatever, I absorbed it, or because we were suing throughout the Holmdel decision about the legitimacy of these fees in the first place, then I submit to you that that is no windfall. That is returning to me what is rightfully mine in the first place.

ASSEMBLYMAN GREEN: Mr. Chairman, I would just like to make a statement for the record: I happen to be a champion of affordable housing. I know how important it is to have it in the State of New Jersey. But to finance it on the backs of people who want to build a home, is unbelievable.

MR. RIGGS: We agree.

ASSEMBLYMAN GREEN: I think we are going to have to think and we are going to have to look at a whole new structure. It is obvious that in this day and age, when everybody is looking at the bottom line-- In reality, we are taxing people who have worked very hard and want an opportunity to build a home. Not to pass that tax on to everyone-- To me, I think we are hurting ourselves, rather than helping ourselves.

ASSEMBLYMAN KELLY: In other words, you're saying you support a transfer fee of all real estate?

ASSEMBLYMAN GREEN: I'm saying right now that we need to sit down and restructure this whole thing, because it is obvious we have to find a better way of financing affordable homes, rather than taxing people who want to build new homes.

MR. RIGGS: That is quite correct, in our view.

ASSEMBLYMAN KELLY: Mr. Hartmann?

ASSEMBLYMAN HARTMANN: Yes. You mention it is a tax. The Holmdel decision clearly says it is a regulatory measure.

MR. RIGGS: Joann, I will let you speak to the punctuation marks of the Holmdel decision.

ASSEMBLYMAN HARTMANN: Well, I mean, you can play games with the punctuation marks, but the fact is, that is not the role of a tax.

MR. RIGGS: Perhaps it has not been reviewed as a tax in the Holmdel decision, but in the real world, if you are my buyer, one of the two of us is going to pay that fee, Assemblyman Hartmann. I am going to pay it, or you are going to pay it. If the market is good, I am going to pass it through to you. I submit to you that from your perspective, you, as the home buyer, in that instance, are being looked to unfairly. You are being looked to and, in fact, you are being taxed. You can call it a regulatory fee; you can call it an exaction; you can call it an impact fee; you can call it what you will. But in any event, it has been paid, whether it be $2000, half of 1 percent, or some number that others contemplate in this room. Either way, you are paying it; either way, in my view, it amounts to the same thing as a tax.

ASSEMBLYMAN HARTMANN: Do you think most of these problems came from the Mount Laurel decision in general?

MR. RIGGS: Well, I think the Mount Laurel decision was a decision that came about that recognized an absolute need to create affordable housing in New Jersey. We don't think the system has-- A lot of people, starting with COAH, have worked exceedingly hard to ensure that affordable housing gets constructed in the State of New Jersey. But when we look back and--

I am glad you raised the point, because I want Joann and Doug to talk a little bit later to make sure that we are looking at the same numbers, because we think that about 10,000 affordable housing units have been constructed over the last 10 years or so, out of a need of 140,000. So we see a gap of 130,000. Doug made the comment earlier on that 10,000 or

14,000 starts out of 140,000 total starts that had been built, was pretty darned good. From his perspective, I can understand that. From our perspective, when we analyze a need of 140,000, and see that in 10 years we have taken care of 10,000, we've got a heck of a long way to go. And I think you come back to Assemblyman Green's viewpoint of saying, we've got a system that really isn't working. We need to take a look.

I don't think, by the way, that charging a fee of 1/2 of 1 percent, or 1 percent is going to make it work suddenly. I think it is time to take a good hard look at the whole equation that we have been analyzing for too long a period of time.

ASSEMBLYMAN HARTMANN: What about the 20 or so municipalities which have collected fees in good faith from developers to try to address the affordable housing problem? It is my feeling that that deals with the problem, and basically it is within reason, I think -- we could argue whether it is reasonable or not -- to retain fees which they collected. How do you feel about that, those particular--

MR. RIGGS: I tried to speak to that earlier, because I am not sure that I accept wholeheartedly the description of, "collected in good faith." I think that in many respects they were collected over violent objection. To the extent that there were instances where they were not collected over violent objection, to the extent that they were collected in conjunction with some type of quid pro quo for additional density, or something of that sort, then perhaps that is a different instance.

But I, as a developer who was attempting to develop in one of the 20 towns that is being discussed, in the majority of cases that I am aware of, objected violently to this. So there wasn't any good faith on my side. I am not saying there was not good faith on a municipality's side in attempting to get affordable housing going. I am just saying that there was not

a mutual transaction there. To the extent that we really want to address the problem, we have to take a far more global view. This piece of dollars we are talking about isn't the answer to this issue.

ASSEMBLYMAN HARTMANN: Well, I agree we have to take a more global view. Again, my bill deals specifically with municipalities which did collect. I would argue they collected in good faith; you might want to disagree with that, and maybe we have to look at that in the future. But again, these municipalities are also suffering during these economic times. Quite frankly, if they would have to return some of the money, which under the new COAH regulations they would, they might face some serious problems, as well.

MR. RIGGS: I guess the problems are a matter of perspective, aren't they? We're here representing our own perspective. We understand the problems we are dealing with day in and day out. These fees were not collected fairly in the first place. In our view, they were not correct, so to now sit back and justify the retention of the fee because it is going to create a hardship on that individual who collected it unfairly in the first place, for me, doesn't wash. I can understand a different view, but for me it doesn't wash.

ASSEMBLYMAN HARTMANN: But, it was legal to collect those fees, was it not?

MS. HARKINS: No.

MR. RIGGS: Go ahead.

MS. HARKINS: If I may respond, Assemblyman Hartmann, everyone knew, at the time that these fees were collected by these municipalities, that there was a very serious question as to whether or not they were legal, and that the whole issue was under challenge, and that it was under litigation from the very earliest stages. So no one collected these fees thinking that they could legitimately do this, and that they would have every right to spend this money. In most cases, the money has been

held in escrow accounts and has not been spent, because they were well aware that there was every possibility that the Court would find that they could not collect that money, and they would have to return it.

ASSEMBLYMAN HARTMANN: But the Court said they could collect the money in Holmdel, did it not?

MS. HARKINS: The Court, only through the COAH regulations-- It said it could only be done in conjunction with regulations adopted by COAH, and that the money that was previously collected was not done that way. It was everybody's understanding, at that point, that the money was to have been returned. Now, of course, that issue is under litigation at a number of levels. It is a very complex legal situation. But nobody collected that money knowing that it was not an issue. Both the developers and municipalities were very clear to that point, and there was every expectation, on everyone's part, that there was a very good possibility that it may have to be returned.

ASSEMBLYMAN KELLY: Anyone else?

ASSEMBLYMAN CORODEMUS: I know you are pressed for time. I have a few questions.

ASSEMBLYMAN KELLY: We'll come back.

ASSEMBLYMAN CORODEMUS: Okay. I am very curious about--

ASSEMBLYMAN KELLY: We are only going to check in, and then come back here. (referring to the quorum call to be taken in the Assembly chamber)

ASSEMBLYMAN CORODEMUS: Okay. I am very curious about your Association's position on different aspects of testimony that was given this morning. The proposition of providing alternate funding for the promulgation of affordable housing to an increased realty transfer fee-- Is that a personal position, or is that your Association's position?

MR. RIGGS: I don't believe we have adopted that as an Association position at the moment. What we have adopted as an Association position for sure, is the unfairness of exacting it on the backs of our segment of the home industry.

ASSEMBLYMAN CORODEMUS: One of the earlier witnesses characterized the refund of the moneys to be a "windfall" profit. I would like you to address that from your Association's position with regard to the practice of collection of money as a pass-through, as an itemization on a closing statement; also, the availability of absent builders.

MR. RIGGS: I responded in general terms to that previously, but I am glad you brought me back home to the point.

To the extent that it has been a direct and itemized pass-through on a closing statement, then, without question, that money would be due to my purchaser. I have passed it through them directly; they paid that fee, right, wrong, or indifferent, and they are the individuals who deserve to have it back.

What we have submitted to you, or what I am submitting to you, is that in the majority of cases that hasn't been the point, because we have been litigating and debating the fairness of this issue. In a great majority of cases, these houses have been sold; they have been sold at the most affordable cost that we could get them produced and sold for, and that cash has been absorbed on the back of the developer. That being the case, if it is unfair, which we believe it is, then that developer is entitled to the return of that money, and it is certainly not a windfall.

To the extent that that developer is out of business, that is certainly testimony to the ludicrousness of thinking about raising fees further.

ASSEMBLYMAN CORODEMUS: Well, that might not necessarily be ludicrous. It is not uncommon for a developer to incorporate for one project, the project is completed--

MR. RIGGS: True, we have been known to do it ourselves.

ASSEMBLYMAN CORODEMUS: Well, it is nothing illegal, or unscrupulous; it is a matter of business practice.

MR. RIGGS: I think in the cases--

ASSEMBLYMAN CORODEMUS: What happens then?

MR. RIGGS: I can't speak to all the specific issues of the fees that were exacted, but I suspect, to the extent that there is a development firm that has been established, has built the particular project, and is debating the legitimacy of the fees, that they have kept that corporation intact, if for no other reason than for the purpose of receiving the return of those fees. If that firm is truly out of existence and unfindable, I think we have really no comment or position on that problem.

ASSEMBLYMAN CORODEMUS: Thank you.

MR. RIGGS: I doubt it will be very much money that will not be traceable.

ASSEMBLYMAN CORODEMUS: You are not in a position to say, out of this shopping list of towns, who has money on deposit and who spent it, are you?

MR. RIGGS: I can't give you direct information. I don't think you can either, Joann, can you?

MS. HARKINS: No.

ASSEMBLYMAN CORODEMUS: Thank you.

ASSEMBLYMAN KELLY: I think we have heard enough of your testimony. It was very enlightening.

MR. RIGGS: You will probably be happy to have me gone.

ASSEMBLYMAN KELLY: No, no.

MR. RIGGS: Thank you very much.

ASSEMBLYMAN KELLY: Jeff Surenian, you have the floor.

J E F F R E Y R. S U R E N I A N, ESQ.: Okay. Mr. Chairman, I will be brief.

I strongly support the legislation. I think it is--

ASSEMBLYMAN KELLY: Which legislation? We are not talking about his bill. What are you talking about?

MR. SURENIAN: Well, that is the bill I am referring to.

ASSEMBLYMAN KELLY: Are you talking about the rules?

MR. SURENIAN: No, no. I am referring to Mr. Hartmann's bill.

ASSEMBLYMAN KELLY: Somehow we are discussing this bill, and we shouldn't be. But, go ahead.

MR. SURENIAN: Okay. I could speak more generally, if you would prefer.

I support legislation that freezes the situation right now. I don't know if it has come across clearly, but the costs to municipalities of compliance are extraordinary. I am familiar with several municipalities that are spending as much as $10 million or more to implement compliance plans. So, when you consider the burdens created by the Mount Laurel doctrine, they are, in fact, very great, and municipalities bear that burden, and at great cost.

The other point I wish to make is that the law is very unsettled, and it has continued to be unsettled. It creates a real problem when a municipality has collected money and you tell the municipality, "Give it back." So I would support anything -- any legislation, if you will -- that would freeze things right now and say, "Okay, from this point forward, this is what the rules of the game will be, but we are not going to require any fees to be given back."

Another point I would like to make is, I participated, very vigorously, in the Council on Affordable Housing process regarding their regulations. I won certain battles; I lost others. There is one requirement in the COAH regulations that has been discussed before that I think is very significant, and I wish to join my voice with that of Ed Schmierer. That point concerns those municipalities that choose to collect mandatory

fees, but do not choose to go forward and formally seek approval of a plan.

It strikes me that from a policy perspective, it is in the interest of affordable housing, and it is certainly in the interest of the municipalities, that those municipalities be permitted to collect those moneys. Naturally, they can't use those moneys for any purpose other than Mount Laurel, but if they are permitted to collect those moneys-- Better for that municipality one day, if it is five years from now or 10 years from now, to have moneys in the bank to create affordable housing programs, than five years from now, 10 years from now, be sued, find themselves in litigation, and have no moneys -- no Affordable Housing Trust Fund moneys to develop and implement a plan.

So, I strongly feel that as a matter of policy, there should not be the requirement in the Council on Affordable Housing regulations that as a prerequisite to collecting fees, the municipality has to adopt a plan and secure Court or Council on Affordable Housing approval of that plan.

I also support the notion that there should be flexibility in the amount of fees, particularly in a voluntary setting. If a developer has a choice of developing his land in accordance with existing zoning or paying a fee, that is more than COAH would permit under their voluntary contribution regulation. Who is harmed if the developer voluntarily elects to select a more attractive development option and pay money? My point is, in certain instances, I think the voluntary fees, in particular, are too low relative to what the builders stand to gain by developing at the greater density, at the more attractive option.

I also think there should be more flexibility in the use of the moneys. I appreciate what the Council on Affordable Housing did in terms of the 30 percent requirement, requiring that 30 percent of the moneys be used to make housing

affordable to a broader range of low- and moderate-income households, but from the municipal perspective that means that if they collect $1 million, there is $300,000 of that that they are not going to be able to devote toward a project, where often municipalities need every last dime, and often they have to resort to taxes and bonding and other such measures to finance those projects.

Those are my comments. If there are any questions, I will be glad to answer them.

ASSEMBLYMAN KELLY: Any questions from any member of the Committee? (no response)

Mr. Surenian, do you favor an increase in a realty transfer fee, rather than this so-called regulatory surcharge? It's not a tax, but it is.

MR. SURENIAN: I just heard it here today. I know that part of the realty transfer fee right now--

ASSEMBLYMAN KELLY: They increased the fee. You couldn't touch what is there already, because that is already dedicated.

MR. SURENIAN: I believe that part of the realty-- If I am not mistaken, part of the realty transfer fee right now is dedicated toward affordable housing purposes. So I think that is fine. In terms of increasing it further, I would have to consider that more. It strikes me that that is not the way to go. It is worth exploring and considering further, though.

I support mandatory fees. It makes sense. Certainly the percentage that is being imposed is not great, and certainly if any developer feels that there has been a taking, and that the municipality has taken so much compared to what the COAH mandatory fees would permit, they have recourse. They can bring an action claiming and asserting that there has been a taking claim.

Are there any other questions?

ASSEMBLYMAN KELLY: Questions? (no response) Thank you, sir.

Is there anyone in the audience who would like to testify? (no response) Mr. Opalski, do you want to rebut anything that was stated?

MR. OPALSKI: I would like to share some clarifications with you, and provide you with some additional data to questions you asked that may be helpful.

The basic policy complaint I heard was the requirement of COAH to ask towns to come forward for certification as a precondition for putting these ordinances in place. It was characterized as an inducement for compliance. The Council chose that policy because of the way in which the Supreme Court came to a decision on this matter, and I shared that with you early in my testimony. I just want to bring you back to that.

There was a legal basis for that to happen, and there was a policy foundation in the Supreme Court decision. Apart from that, there are very good policy reasons why it should occur. I won't go into that with you. I think you have a paper that does that for you. I welcome any comments you might have on it, and I would be glad to comment on that later.

We have some information for you on areas throughout the country that have put into place mandatory development fees, and the list is growing by the week. There are a whole host of--

ASSEMBLYMAN KELLY: Places or states?

MR. OPALSKI: I'll have to check with Mary Brooks, who runs this project nationally, and find out if there are any states. I know that major metropolitan areas throughout the country have done it, and it may well be that states have entertained it, and I will find that out for you and get back to you on it.

I also share with you what the fee structures are for the towns we looked at in New Jersey, before we came to terms

with the threshold. I would also like to share with you a data base that we just had delivered to us yesterday from Rutgers. They did the survey for Fannie Mae last July. In fact, units that have been built, units that have been zoned, units that have been programmed. You need to see that; you need to see that base.

Also in the paper you will find out what the revenue potential of the fee structure is without bonuses. Without bonuses and as per last year's economy, it is estimated that $38 million could have been raised if all towns in the State chose to put in place a mandatory development fee. Now, it is three to four times what the State has now realized from the RTT -- from the realty transfer tax. So there is a substantial capacity out there for additional funds for affordable housing, which otherwise would be very difficult to realize through the RTT.

There may be other points that I missed. Art?

MR. BERNARD: Well, just a couple of things. Mr. Schmierer, in his discussion, posed a question about the requirement that some money be used for down payment assistance.

MR. OPALSKI: Oh, right.

MR. BERNARD: He said, "Well, we've got a mechanism where Mercer County is helping us out with that. If Mercer County is going to do it, why should we have to do it?" I don't think Ed realizes that that is built right into the rule there; that if you have another agency that can do that, you don't have to get involved with it.

There were some questions raised as to the equity of this percentage because in Princeton land values are very high, and in South Brunswick they are lower, so why should the fee be the same? Well, that is why it was based on percentage of equalized assessed value. If values are higher in Princeton, 1/2 percent may be significantly higher in Princeton than in South Brunswick or someplace in South Jersey.

You know, you have gotten some ideas today, and you are talking about proposing -- working on other legislation. We would like to think that we have something to offer as that process continues. So if you have some ideas for legislation, we do, too, and we would be happy to work with the Chairman and the Committee on anything you choose.

ASSEMBLYMAN KELLY: Well, I would hope that we do get you involved, really. Otherwise, it becomes a nightmare, and it is not done properly.

MR. OPALSKI: One of the other comments I heard in the testimony was the question of whether the Council is sensitive to the views of the client; not just trying to represent the stakeholders, but the people who are going to be the beneficiaries of this process -- low- and moderate-income people. One of the reasons for the Council to establish a minimum threshold of money to deepen subsidies on housing was, we are deeply concerned about the ability of households to secure a mortgage and close front-end costs and make a unit accessible to them.

There is only so much you can do through land use in order to make housing affordable. With these fees we can go further. We can begin to get deeper into the need. It was with that sensitivity that the Council considered and put that policy forward. The Council has been very careful to try to weigh the interests of all groups -- the producers, the hosts, where the municipalities choose to come forward with the housing element, and indeed the clients who will be the occupants of these units, many of whom happen to be our own children and our own parents.

So we are deeply concerned about making this process work. Certainly we would like to continue to work with you in improving the process, the basic legislation, and so on, so we can achieve our mutual gain -- or our mutual ends.

Thank you.

ASSEMBLYMAN KELLY: I am just going to ask one question: I think our goal in New Jersey was 140,000?

MR. OPALSKI: Well, the need was. The Council never said it could achieve that. I don't think so. I think what you are going to see--

ASSEMBLYMAN KELLY: What is the need, if it isn't 140,000?

MR. OPALSKI: Well, we're working on that now. Based on the census, it may be lower than that, for a number of reasons. Three-hundred-thousand jobs-- The economic recession has hit New Jersey with the loss of 300,000 jobs. We have lost two congressional seats, which means an out migration of population. The expectation for--

ASSEMBLYMAN HARTMANN: We've only lost one, haven't we?

ASSEMBLYMAN KELLY: Let him speak. Don't interrupt him.

MR. OPALSKI: The expectation for future growth is much less than it was when we originally calculated perspective need.

The second thing that has happened is, the census has shown us that the vacancy rate has doubled in the State since 1980. A number of units that were occupied by people who have moved, are reoccupied by people of low and moderate income. There has been some filtering of those units, and what we may see is that the indigenous need will decrease, as well. We are not complete with that process. We are going through the information to make sure it is correct.

But the need is one thing. What can be achieved is another. If one says, what is the need that needs to be achieved-- We would love to see that, but we all know there are not sufficient dollars, public or private, to do it. It would take $3 billion to meet a need of 145,000. It is not coming out of the public coffers, and it certainly isn't coming out of the economy. What we can do is say that we can at least

address it from a land use point of view, and as the market returns it may be addressed.

Secondly, there are a number of reasons why that need can't be addressed in a six-year period. It has accumulated over decades. Fifty-five percent of the need exists and is already occupied. A lot of it you see around Trenton's older, urban areas. You know, for anyone to expect that it could be addressed in a six-year period, well, that would be almost biblical, for that to occur. It will take decades for us to address it. What we can't do is lose sight of it. What we need to do is to bite off manageable chunks of it. It may be that towns can set up a plan for the addressing of it, and then program and phase in to manageable pieces of it. The Council is now looking at guidelines that would be more realistic with respect to that. Perhaps only a third of the indigenous need can be met in a six-year period.

The courts have done that once before. They allowed for a town to meet its indigenous need over an 18-year period, rather than a six-year period. I think one has to separate what can be achieved from the need, but to equate the two is making an unrealistic expectation of what the economy can deliver, and what, in fact, the public can manage. What we can't do is walk away from acknowledging what has to be done, and that is what our job is.

ASSEMBLYMAN KELLY: Are you going to change requirements to the communities as a result of your survey?

MR. OPALSKI: Are you talking about the new need estimates?

ASSEMBLYMAN KELLY: Right.

MR. OPALSKI: They will be different. They will be different because the data bases are different and the circumstances are different, the economy, and so on.

ASSEMBLYMAN KELLY: Mr. Hartmann, I think we are going to hold your bill because we are going to get a lot of answers here yet. Do you agree or disagree with me?

ASSEMBLYMAN HARTMANN: I have to talk to some of my colleagues and develop that, and go over it more.

ASSEMBLYMAN KELLY: Okay. We are going to hold the bill, and we are going to discuss it. There has been enough information generated here that I think we may hold this bill for a while. We are going to hold the bill. Okay? Anyone disagree with that? (no response)

This meeting is adjourned.

(MEETING CONCLUDED)

APPENDIX

SUPREME COURT OF NEW JERSEY
A-103/104/105/106/107/108/109
September Term 1989

HOLMDEL BUILDERS ASSOCIATION,

Plaintiff-Respondent
and Cross-Appellant,

v,

TOWNSHIP OF HOLMDEL in the County of Monmouth, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HOLMDEL and THE PLANNING BOARD OF THE TOWNSHIP OF HOLMDEL,

Defendants-Appellants
and Cross-Respondents,

and

TOWNSHIP OF CHERRY HILL,

Intervenor-Appellant.

NEW JERSEY CHAPTER OF THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS,

Plaintiff-Respondent,

v.

TOWNSHIP OF SOUTH BRUNSWICK in the County of Middlesex, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK, THE PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK and THE ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF

William H. McCarty, Jr., submitted a brief on behalf of amicus curiae Township of Princeton (Mason, Griffin & Pierson, attorneys; Edwin W. Schmierer, of counsel).

Kenneth E. Meiser submitted a brief on behalf of amici curiae Civic League of Greater New Brunswick and the League of Women Voters (Frizell, Pozycki & Meiser, attorneys).

The opinion of the Court was delivered by

HANDLER, J.

In 1975, this Court held that developing municipalities are constitutionally required to provide a realistic opportunity for the development of low- and moderate-income housing. Southern Burlington County NAACP v. Mount Laurel Township, 67 N.J. 151, cert. denied, 423 U.S. 808, 46 L.Ed. 2d 28 (1975) (Mt. Laurel I). In the years following, many municipalities failed to comply with the clear mandate of Mt. Laurel I. The failure to provide the necessary opportunity for affordable housing led to a new legal challenge. We clarified and reaffirmed the constitutional mandate set forth in Mt. Laurel I, imposing an affirmative obligation on every municipality to provide its fair share of affordable housing. Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983) (Mt. Laurel II). We enumerated several possible approaches by which municipalities could comply with the constitutional obligation, including lower-income density bonuses

and mandatory set-asides. We stressed that "municipalities and trial courts are encouraged to create other devices and methods for meeting fair share obligations." Id. at 265-66. Subsequently, the Legislature codified the Mt. Laurel doctrine, including its available compliance measures, by enacting the Fair Housing Act, L. 1985, c. 222; N.J.S.A. 52:27D-301 to -329 (FHA). We have since upheld the constitutionality of the FHA. Hills Dev. Co. v. Bernards Township, 103 N.J. 1, 25 (1986).

The cases that comprise this appeal arise out of attempts by several municipalities to comply with their obligation to provide a realistic opportunity for the construction of affordable housing under our ruling in Mt. Laurel II and the provisions of the FHA. The Townships of Chester, South Brunswick, Holmdel, Middletown, and Cherry Hill all adopted ordinances to provide for low- and moderate-income housing. The ordinances, in varying forms, impose fees on developers as a condition for development approval. The fees are dedicated to an affordable-housing trust fund to be used in satisfying the municipality's Mt. Laurel obligation.

Several builders' associations initiated suits challenging those ordinances, claiming that each was an ultra vires act, exceeding the authority of the zoning and police powers and the Fair Housing Act; an invalid tax in violation of the uniform property taxation requirement of the New Jersey Constitution; a taking without just compensation in violation of both the United States and New Jersey Constitutions; and a denial of due process

and equal protection in violation of both the United States and New Jersey Constitutions. Plaintiff New Jersey Builders Association sought a refund of the monies paid into the Chester Township affordable-housing trust fund plus accrued interest.

The trial courts in each case except Cherry Hill ruled that the ordinance at issue was facially unconstitutional because it imposed an unauthorized tax on a select group of individuals. The trial court in Chester also held that the New Jersey Builders Association lacked standing to seek a refund on behalf of its members. The courts did not address the due-process, equal-protection, and taking claims. In each case except Cherry Hill, they granted summary judgment to plaintiffs. In denying plaintiff's summary-judgment motion in Cherry Hill, the trial court ruled that the ordinance was constitutional and within the scope of municipal power. We denied the unsuccessful defendants' motions for direct certification.

Defendants, and Cherry Hill as intervenor, appealed the grants of summary judgment on the substantive issues, and plaintiff New Jersey Builders Association cross-appealed on the standing issue. Consolidating the cases on appeal, the Appellate Division affirmed each case except Holmdel. The Appellate Division concluded that mandatory provisions for "in lieu" development fees are unauthorized revenue-raising devices. Holmdel Builders Ass'n v. Township of Holmdel, 232 N.J. Super. 182, 193 (App. Div. 1989). As such, it deemed mandatory development fees invalid taxes. It agreed with the trial courts

that shifting a public responsibility to a limited segment of the community violates the State Constitution's rule of uniform taxation. Id. at 193-94. The court further concluded that ordinances requiring mandatory set-asides are valid only if accompanied by zoning incentives, such as a density bonus, that bear a reasonable relationship to the cost incurred in constructing the mandatory-set-aside housing. Id. at 201. The court ruled that a voluntary provision allowing a developer to choose between constructing affordable housing or paying an "in lieu" development fee into an affordable-housing trust fund is valid provided that the fee bears a reasonable relationship to the benefits conferred by the density bonus. Ibid. With respect to the cross-appeal, the Appellate Division determined that a trade organization does not have standing to seek a refund on behalf of its members. Id. at 204.

Accordingly, the Appellate Division ruled that the ordinances of the Townships of Chester and South Brunswick, which require payment of a mandatory development fee, were invalid because they imposed an unauthorized tax. Middletown Township's ordinance was held invalid because one section imposed a mandatory development fee, while another section required a mandatory set-aside without providing a compensating benefit. The court concluded that the voluntary nature of Holmdel's ordinance and its optional provision for an increase in density, giving the developer a compensating benefit, was facially valid; it remanded the Holmdel case for a plenary hearing with respect

to the validity of Holmdel's ordinance as applied. The Appellate Division did not rule on intervenor Cherry Hill's ordinance.

We granted defendants' and intervenor's petitions, as well as the cross-petitions for certification of plaintiffs New Jersey Builders Association and Holmdel Builders Association. 117 N.J. 150, 151 (1989). We also granted motions for leave to submit amicus briefs by the Public Advocate, the Civic League of Greater New Brunswick and the League of Women Voters, and Princeton Township.

This appeal raises two major substantive issues. One is whether there is statutory authority, derived from the FHA, the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -129, and the general police power of government, N.J.S.A. 40:48-2, that enables a municipality to impose affordable-housing development fees as a condition for development approval. That issue raises the related questions whether the development-fee ordinances constitute an impermissible taking of property or violate substantive due process or equal protection. The second major issue is whether affordable-housing development fees are an unconstitutional form of taxation. Finally, if these ordinances are invalid, the appeal presents the issue whether a trade organization has standing to seek a refund on behalf of its members.

I.

Resolution of these several issues requires initially a

presentation of the municipal ordinances involved in this case. It is also important to explain the statutory and administrative framework structured by the FHA within which these ordinances were adopted and the role of the Council on Affordable Housing (COAH or the Council), the administrative agency created under the FHA, in the adoption of local ordinances designed to fulfill a municipal fair-share affordable-housing obligation.

Chester Township's Mt. Laurel obligation is limited to indigenous need. Accordingly, the Township amended its zoning ordinance to address its Mt. Laurel obligation. The purpose of the ordinance is to require all new development to share in the cost of Mt. Laurel compliance. The ordinance creates an affordable-housing trust fund and imposes a mandatory development fee on all new commercial and residential development as a condition for receiving a certificate of occupancy. New developments that are "identified as the type of construction which assists the Township in satisfying its affordable housing obligations under Mt. Laurel II" do not pay the fees. The ordinance specifically states that the purposes of the affordable-housing trust fund are:

> To provide technical and financial assistance where needed, to small lot owners to encourage them to develop quality, low-cost housing;
>
> To develop low-cost housing directly;
>
> To provide assistance to the Township in managing the low-cost housing program;
>
> To provide a working fund of capital to be used as grants, subsidies, or loans as may be

required to help meet the Township's obligation under Mt. Laurel II.

The amount of the fee varies in accordance with the proposed size of the development, ranging from twenty-five cents to seventy-five cents per square foot. Because the Township has determined that rehabilitating existing affordable units is the best way to satisfy its indigenous-need obligation, it does not give developers the option of constructing affordable housing.

South Brunswick Township concluded that "the constitutional obligation to provide affordable housing should apply not merely to those owners of tracts specifically rezoned for meeting this obligation, but rather to the developers of other residential, commercial or industrial property," and therefore adopted a zoning ordinance creating an affordable-housing trust fund. The ordinance imposes development fees on all new commercial and non-inclusionary residential development as a condition for site-plan or subdivision approval. The fees for non-inclusionary residential developments are calculated on the basis of the proposed size of the development. The fees for non-residential developments depend on the type of project involved, ranging from twenty-five to fifty cents per square foot. The municipality's stated purpose in creating the fund is to rehabilitate substandard housing and thus provide its fair share of affordable housing.

Middletown Township determined, in light of the need for affordable housing created by employment and growth patterns, that all new development should share "in the cost of that

portion of the present and future [Mt. Laurel] obligation attributable directly or indirectly to the development." It adopted an ordinance requiring all new major residential-subdivision and site-plan applications to set aside seven percent of the development's total dwelling units for lower-income housing. On residential tracts other than those zoned specifically for inclusionary development, a developer may make a cash contribution to the affordable-housing trust fund in lieu of actually constructing the affordable units. The fee ranges from eighty cents to $1.80 per square foot, depending on the total gross floor area. All non-residential developers are required to pay a development fee into the fund. Density bonuses do not accompany the mandatory set-aside requirement, the fee-in-lieu option, or the mandatory-fee requirement. The trust-fund contributions are to be used to produce affordable housing. Production includes "the construction, rehabilitation, purchase for resale, direct subsidy, land acquisition, or mortgage financing of housing affordable for purchase or rental by lower income households as well as the funding of Regional Contribution Agreements."

Holmdel Township's zoning ordinance, prior to 1986, permitted a maximum density of .8 dwelling units per acre in the R-40A residential zone. In 1986, an amendment to the ordinance re-zoned a portion of the R-40A zone to create an R-40B zone. The R-40B zone downgraded density from .8 to .4 units per acre. A developer may build .6 units per acre, however, if he or she

contributes the equivalent of 2.5% of the purchase price of all units to the municipality's affordable-housing trust fund. The trust fund is used only for "those purposes that produce a direct benefit to the production of either a higher ratio of lower income units in a given project, a reduction in the cost of producing lower income units that shall be passed on to the purchaser or tenant of the unit, or the direct construction of units such as township-sponsored project[s]."

Cherry Hill Township's Mt. Laurel obligation is not limited to indigenous need. The Township claims it is approaching "total build out," and therefore adopted a housing impact-fee ordinance. Building permits are issued only for those developments that pay an impact fee into the affordable-housing trust fund. Inclusionary developments and small, inexpensive, single-family detached houses are exempt from the fee requirement. Otherwise, residential developments are assessed a fee based on the proposed size of the project, and commercial development is assessed a fee based on a percentage of the cost of construction. The trust fund is to be used "at the discretion of the Township for the sole purpose of aiding in the provision or rehabilitation of modest income housing."

In sum, the Townships of Chester and South Brunswick have enacted ordinances that impose a mandatory development fee on all new non-inclusionary developments as a condition for development approval. Their ordinances do not give developers a density bonus in exchange for the development fee. Middletown Township's

ordinance imposes a mandatory development fee on all new commercial development as a condition for development approval. Non-inclusionary residential developers may choose between constructing the affordable housing or paying an in-lieu fee. Density bonuses do not accompany any of the options. Holmdel Township enacted an ordinance that gives developers a density bonus if they contribute to an affordable-housing trust fund. Cherry Hill Township's ordinance imposes a mandatory development fee on all new commercial developments and non-inclusionary residential developments of a sufficient size.

We consider these ordinances in the context of the FHA, which substantially codified the Mt. Laurel doctrine. The Council on Affordable Housing is the agency constituted to implement the FHA. It plays a critical role in the adoption of ordinances that address municipal affordable-housing needs. Every municipality with an affordable-housing obligation must submit to COAH for approval its plan to meet that need. Each of the municipalities involved here has received substantive certification of its housing-plan element following COAH review. The affordable-housing development fees authorized by the ordinances that are the subject of this appeal clearly bear on each municipality's housing-plan element. COAH, however, ruled that the housing-plan element of each municipality was valid aside from those ordinances.

II.

Any inquiry into the validity of development-fee ordinances must inevitably consider the complex factors that contribute to the persistent and substantial shortage of low- and moderate-income housing (hereafter, lower-income or affordable housing). This inquiry necessarily begins with our seminal decisions in Mt. Laurel I and Mt. Laurel II.

The core of those decisions is that every municipality, not just developing municipalities, must provide a realistic, not just a theoretical, opportunity for the construction of lower-income housing. We realized that the solution to the shortage of affordable housing could not "depend on the inclination of developers to help the poor, [but rather must rely] on affirmative inducements to make the opportunity real." Id. at 261. The principal mode of compliance suggested in Mt. Laurel II was mandatory set-asides. We flatly rejected claims that such inclusionary measures amount to a taking without just compensation and an impermissible socio-economic use of the zoning power, concluding that "the builder who undertakes a project that includes a mandatory set-aside voluntarily assumes the financial burden, if there is one, of that condition." Id. at 267 n.30. However, we never envisaged mandatory set-asides as the exclusive solution for the dearth of lower-income housing. In Mt. Laurel II, we encouraged municipalities "to create other devices and methods for meeting fair share obligations." 92 N.J.

at 265-66.

The solutions proposed in Mt. Laurel II to meet the critical shortage of affordable housing were strongly influenced by the Court's perception of the causes of that shortage. We noted that the flight of industry and commerce from urban to suburban areas is largely responsible for the social ill that the Mt. Laurel doctrine is intended to address.

> [S]ince World War II there has been a great movement of commerce, industry, and people out of the inner cities and into the suburbs. At the same time, however, exclusionary zoning made these suburbs largely inaccessible to lower income households. Beside depriving the urban poor of an opportunity to share in the suburban development, this exclusion also increased the relative concentration of the poor in the cities and thereby hastened the flight of business and the middle class to the suburbs. A vicious cycle set in as increased business and middle class flight led to more urban decay, and more urban decay led to more flight, etc.
>
> [Id. at 210 n.5.]

The phenomenon of unfettered non-residential development has exacerbated the need for lower-income housing, and has generated widespread efforts to link such needed residential development to non-residential development. Thus, nationwide, municipalities have attempted to shift the externalities of development to non-inclusionary developers. See, e.g., Alterman, "Evaluating Linkage and Beyond: Letting the Windfall Genie Out of the Exactions Bottle," 34 Wash. U.J. Urb. & Contemp. L. 3, 7 (1988).

The broad concept of linkage describes any of a wide range of municipal regulations that condition the grant of development

approval on the payment of funds to help finance services and facilities needed as a result of development. In the context of developing affordable housing, linkage refers to any scheme that requires developers to mitigate the adverse effects of non-residential development upon the shortage of housing either indirectly, by contributing to an affordable-housing trust fund, or directly, by actually constructing affordable housing. See A. Mallach, Inclusionary Housing Programs: Policies and Practices (1985). The idea of linking community housing goals with non-residential real estate development has inspired new governmental efforts to address the lower-income housing crisis. See Smith, "From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions," 50 Law & Contemp. Probs. 5 (1987); Gallogly, "Opening the Door for Boston's Poor: Will 'Linkage' Survive Judicial Review?", 14 Environmental Affairs 447 (1987).

Affordable-housing linkage ordinances are the most recent phenomenon in this area. See, e.g., Connors & High, "The Expanding Circle of Exactions: From Dedication to Linkage," 50 Law & Contemp. Probs. 69 (1987). Such ordinances link or couple the right to engage in non-residential development to the provision of affordable housing. The ordinances at issue in this appeal are all examples of linkage. Each requires certain developers to help finance the construction of affordable housing either as a condition for receiving permission to build or in order to obtain some type of density bonus. Only Holmdel's

ordinance gives developers the option of actually constructing affordable-housing units.

The linkage trend has gained momentum during the past decade. See Symposium: Land-Use, Zoning, and Linkage Requirements Affecting the Pace of Urban Growth, 20 Urban Lawyer 513 (1988); Bauman & Ethier, "Development Exactions and Impact Fees: A Survey of American Practices," 50 Law & Contemp. Probs. 51 (1987).[1] The fairness and legality of linkage have inspired much debate among legal scholars, the business community, and the judiciary. Proponents, including amicus curiae Princeton Township, forcefully argue that by attracting new residents to an area, commercial developments increase the need for housing in general and thus for affordable housing. To the extent that the additional need for housing is not met with increased supply, housing prices will be pushed upward, exacerbating both the need for, and unattainability of, lower-income housing. Therefore, it is appropriate for municipalities to charge commercial developers

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[1] The most widely known, and most extensively studied, housing-payment programs are the linkage programs in San Francisco and Boston. See, e.g., Tegeler, "Developer Payments and Downtown Housing Trust Funds," Clearinghouse Rev. 679 (Nov. 1984). Both programs give developers the option of either constructing affordable housing units or contributing a fee in lieu of construction into a housing trust fund. San Francisco's program applies to any new development or substantial rehabilitation of more than 50,000 square feet. See Keating, "Linking Downtown Development to Broader Community Goals," APA Journal 133 (Spring 1986). Boston's program applies only to developments greater than 100,000 square feet that require zoning relief. Kayden & Pollard, "Linkage Ordinances and the Traditional Exactions Analysis: The Connection Between Office Development and Housing," 50 Law and Contemp. Probs. 127 (1987).

with a portion of the responsibility for creating more affordable-housing units. Gruen, "The Economics of Requiring Office-Space Development to Contribute to the Production and/or Rehabilitation of Housing," in D. Porter, Downtown Linkages (1985); cf. Surenian, "Mount Laurel II and the Fair Housing Act," 319-23 (NJICLE 1987) (advocating linkage fees in theory but cautioning against fees in practice due to "ineffectiveness of bureaucracy" and propensity of municipalities to evade fair-share obligations). In addition, linkage advocates stress the need to consider the effect of all development on the finite supply of land. Land must be viewed as an essential but exhaustible resource; any land that is developed for any purpose reduces the supply of land capable of being used to build affordable housing. See Major, "Linkage of Housing and Commercial Development: The Legal Issues," 15 Real Estate L.J. 328, 331 (1987). The scarcity of land as a resource bears on the opportunity and means to provide affordable housing. See Hills Dev. Co. v. Bernards Township, supra, 103 N.J. at 61; Tocco v. New Jersey Council on Affordable Hous., 242 N.J. Super. 218, 221 (App. Div.), certif. denied, __ N.J. __ (1990).

Amicus curiae the Public Advocate argues that commercial developers ought not be exempt from the financial burden of Mt. Laurel compliance because their projects, like those of multifamily residential developers, consume land, water, and sewerage capacity that could otherwise be devoted to or held for the satisfaction of the municipality's lower-income-housing

obligation. This Court has implicitly recognized that unrestrained nonresidential development can itself deepen the shortage of affordable housing. Mt. Laurel II, supra, 92 N.J. at 210 n.5.

III.

With that background, we address the issue whether the development-fee ordinances are statutorily authorized. The focal question in this case is whether any statutory grant of power to municipalities can fairly be construed as impliedly authorizing the affordable-housing development fees imposed by these ordinances. We are guided by the principle that municipalities possess "only such rights and powers as have been granted in express terms, or arise by necessary or fair implication, or are incident to the powers expressly conferred, or are essential to the declared objects and purposes of the municipality." Edwards v. Mayor of Moonachie, 3 N.J. 17, 22 (1949). The authority delegated to them, however, is to be construed liberally in their favor. N.J. Const. of 1947 art. IV, § 7, para. 11; Moyant v. Borough of Paramus, 30 N.J. 528 (1959). We thus approach the issue in light of the statutory authority of the FHA, which deals expressly with affordable housing. That explicit authority, however, must be comprehended in terms of the traditional zoning powers of municipalities, as reflected in the MLUL and the general police powers of municipal government. Hence, although it is the FHA that deals directly with affordable

housing, it is instructive to consider initially the zoning and police powers.

A.

The MLUL, which expresses the zoning powers delegated to local government, seeks generally "[t]o encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare." N.J.S.A. 40:55D-2. "It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation." Mt. Laurel I, supra, 67 N.J. at 179.

Affordable housing is a goal that is no longer merely implicit in the notion of the general welfare. It has been expressly recognized as a governmental end and codified under the FHA, which is to be construed in pari materia with the MLUL. See Hills Dev. Co., supra, 103 N.J. at 33-34. See discussion infra at __ (slip op. at 27-31). The FHA specifies that a municipality's zoning power be used to create a housing element "designed to achieve the goal of access to affordable housing to meet present and prospective housing needs, with particular attention to low and moderate income housing." N.J.S.A. 52:27D-310. Also, the municipality must "establish that its land use

and other relevant ordinances have been revised to incorporate" provisions for a realistic opportunity for the development of lower-income housing. N.J.S.A. 52:27D-311a. We thus have no doubt that provision of lower-income housing is one of the purposes of zoning incorporated by reference into the zoning enabling act.

That understanding is not remarkable. Our zoning law "permits any reasonable scheme which comports with the legislative standards and thus leaves ample room for new ideas." Kozesnik v. Montgomery Township, 24 N.J. 154, 169 (1957). Courts consistently have taken an expansive view of the zoning power, subjecting it only to the overarching requirement of serving the general welfare. E.g., Village of Belle Terre v. Boraas, 416 U.S. 1, 39 L.Ed. 2d 797 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L.Ed. 303 (1926). Housing needs are clearly related to the general welfare under the zoning laws. Berman v. Parker, 348 U.S. 26, 33, 99 L.Ed. 27, 38 (1954) ("We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive").

Further, the broad reach of the zoning authority arises from its character as an aspect of local government's police powers. It has repeatedly been acknowledged that the zoning power is part of the police power. E.g., Mt. Laurel II, supra, 92 N.J. at 208; Mt. Laurel I, supra, 67 N.J. at 174. The police power enables a municipality to take such actions "as it may deem necessary and

proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants." N.J.S.A. 40:48-2. A municipality in the exercise of its police power clearly may seek to address housing problems. See, e.g., Dome Realty, Inc. v. City of Paterson, 83 N.J. 212 (1980) (certificate of occupancy could be used to enforce housing standards); Inganamort v. Borough of Fort Lee, 62 N.J. 521 (1973) (rent control); Apartment House Council v. Mayor of Ridgefield, 123 N.J. Super. 87 (Law Div. 1973) (owners of multiple dwellings required to post security with a municipal agency empowered to repair emergency housing conditions), aff'd o.b., 128 N.J. Super. 192 (App. Div. 1974).

In addition to advancing a recognized purpose of zoning, a zoning ordinance must bear a "real and substantial relationship to the regulation of land." State v. C.I.B. Int'l, 83 N.J. 262, 271 n.4 (1980). Defendants here contend that a zoning ordinance imposing a development fee to provide affordable housing can be considered a form of inclusionary zoning and thus bears a real and substantial relationship to the regulation of land. The Appellate Division disagreed, ruling that "[a] mandatory development fee [as opposed to a voluntary-development fee] applied indiscriminately as a price to build within the municipality has no real and substantial relationship to the regulation of land." 232 N.J. Super. at 194-95.

In Mt. Laurel II, we held that inclusionary-zoning devices

that serve the purpose of providing affordable housing within a region bear a real and substantial relationship to the regulation of land and the zoning power. 92 N.J. at 271. The fact that defendants seek to accomplish the general-welfare goal of affordable housing by development fees rather than by mandatory set-asides does not negate a "real and substantial relationship" of such development fees to the regulation of land. Although development-fee measures are not site-specific in the same sense as mandatory set-asides, they implicate land-related regulations because they are specifically designed and applied to aid in the creation of affordable residential housing. See N.J.S.A. 52:27D-312 (municipality may satisfy portion of its fair-share requirement through "regional contribution agreement" with another municipality).

Development fees expressly dedicated to lower-income housing will thus affect "the nature and extent of the uses of land and of buildings and structures thereon," N.J.S.A. 40:55D-2k. As compared with relatively random and rigid set-aside zoning, development fees provide a more flexible and comprehensive approach that will encourage the appropriate use and development of land within a municipality to satisfy that municipality's fair-share housing obligation. Mt. Laurel II, 92 N.J. at 214-15.

We have also required that a zoning ordinance advance an authorized purpose "in a manner permitted by the legislature." C.I.B. Int'l, supra, 83 N.J. at 271 n.4. Plaintiffs argue that

linkage fees constitute an impermissible form of exactions because they seek to require developers to provide for off-site public needs that have not been caused by their developments and furnish them no benefits. See Divan Builders v. Planning Bd. of Wayne Township, 66 N.J. 582, 598 (1975) (developer "could be compelled only to bear that portion of the cost [of off-site improvements] which bears a rational nexus to the needs created by and benefits conferred upon, the subdivision"); New Jersey Builders Ass'n v. Mayor of Bernards Township, 108 N.J. 223, 237 (1987) (municipal authority to charge developers limited "only to improvements the need for which arose as a direct consequence of the particular subdivision or development under review"); see also N.J.S.A. 40:55D-42 (developer can be required "to pay his pro rata share of the cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities" located off-site). Because we have uniformly required a strong nexus between development and off-site improvements, plaintiffs contend that the development fees are prohibited. Although the Appellate Division found that N.J.S.A. 40:55D-42 does not specifically govern the development-fee ordinances at issue in this case, it determined that the development fees were variant forms of off-site exactions and invalid. 232 N.J. Super. at 198.

In the context of off-site improvements, an exaction generally requires developers to supply or finance public facilities or amenities made necessary by proposed development.

See Smith, supra, 50 Law & Contemp. Probs. 5.[2] We have traditionally required a strong, almost but-for, causal nexus between off-site public facilities and private development in order to justify exactions. That nexus achieves two ends. First, it ensures that a developer pays for improvement that is necessitated by the development itself, Divan Builders, supra, 66 N.J. at 601, or is a "direct consequence" of the development, New Jersey Builders Ass'n, supra, 108 N.J. at 237. Second, it protects a developer from paying a disproportionate share of the cost of improvements that also benefit other persons. Longridge Builders, Inc. v. Planning Bd. of Princeton Township, 52 N.J. 348, 350 (1968); see also N.J.S.A. 40:56-27 (special assessments may be imposed on property owners only for unique or special benefits); Meglino v. Township Comm. of the Township of Eagleswood, 103 N.J. 144, 161 (1986) (special assessments in

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[2] The case law on exactions is extensive and varies considerably from state to state, particularly concerning the degree to which the exaction must be related to the needs generated by the development. Different standards can be distilled from the cases litigated in various state courts. The most stringent standard is that of the Illinois Supreme Court, which has allowed only those exactions that are "specifically and uniquely attributable" to the development. Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, ___, 176 N.E.2d 799, 802 (1961). Many states have adopted broader positions, upholding exactions so long as a reasonable connection can be shown between the need for additional facilities and the growth generated by development. See, e.g., Associated Home Builders v. Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606 (1971); Contractors & Builders Ass'n of Pinellas County v. Dunedin, 329 So. 2d 314 (Fla. 1976) (upholding sewer and water impact fees); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (upholding school and park land dedication or in-lieu fee), appeal dismissed, 385 U.S. 4, 17 L.Ed. 2d 3 (1966).

excess of benefit to particular properties violate both enabling legislation and takings clause); McNally v. Township of Teaneck, supra, 75 N.J. 33, 43 (1977) (same).

Those commentators who believe that affordable-housing linkage measures are essentially a type of exaction for off-site improvements generally assume that a similar causal link is required and exists between new commercial space and an increased demand for lower-income housing. See Merriam & Andrews, "Defensible Linkage," 54 J. Am. Plan. A. 199 (1988); Bosselman & Stroud, "Mandatory Tithes: The Legality of Land Development Linkage," 17 Land Use and Envtl. L. Rev. 151 (1986). We do not believe, however, that the development-fee ordinances before us must be founded on a stringent nexus between commercial construction and the need for affordable housing. We find a sound basis to support a legislative judgment that there is a reasonable relationship between unrestrained nonresidential development and the need for affordable residential development. We do not equate such a reasonable relationship with the strict rational-nexus standard that demands a but-for causal connection or direct consequential relationship between the private activity that gives rise to the exaction and the public activity to which it is applied. Rather, the relationship is to be founded on the actual, albeit indirect and general, impact that such nonresidential development has on both the need for lower-income residential development and on the opportunity and capacity of municipalities to meet that need. Inclusionary zoning itself is

based on that relationship. Such zoning measures are designed to reach all land development, to address the potential diminishment of affordable housing, and to encourage within the municipality, the region, and the state the creation of affordable housing. Such governmental measures are thus not analogous to specific off-site infrastructure improvements occasioned by a particular development.

We conclude that the rational-nexus test is not apposite in determining the validity of inclusionary zoning devices generally or of affordable-housing development fees in particular. See Mt. Laurel II, 92 N.J. at 260; In re Egg Harbor Assocs., 185 N.J. Super. 507, 523 (App. Div. 1982) (reasonable relationship, rather than rational-nexus, test appropriate in evaluating validity of land-use requirements), aff'd, 94 N.J. 358 (1983). Inclusionary zoning through the imposition of development fees is permissible because such fees are conducive to the creation of a realistic opportunity for the development of affordable housing; development fees are the functional equivalent of mandatory set-asides; and it is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land, which constitutes the primary resource for housing. Mt. Laurel II, supra, 92 N.J. at 274. Such measures do not offend the zoning laws or the police powers.

B.

The nature and extent of authority to provide affordable

housing under zoning laws and general police powers is inextricably related to the FHA. The FHA takes on added and independent significance in our consideration of the validity of the development-fee ordinances because it deals directly with the provision of lower-income housing.

The FHA does not expressly authorize a municipality to impose development fees as a means to provide lower-income housing. Nevertheless, the FHA confers on a municipality a broad range of general powers, including the authority "to provide for its fair share of low and moderate income housing by means of any technique or combination of techniques which provide a realistic opportunity for the provision of [its] fair share." N.J.S.A. 52:27D-311a. The Appellate Division concluded that the FHA did not authorize mandatory development fees, 232 N.J. Super. at 195, but under certain circumstances did authorize ordinances that include a provision for a voluntary in-lieu development fee. Id. at 196-201.

Because the statute states that a municipality does not have to expend municipal revenue to provide affordable housing, it is evident that the Legislature has determined that affordable housing does not have to be provided directly by local government. N.J.S.A. 52:27D-311d. However, contrary to the finding of the Appellate Division, it does not follow that the Legislature did not impliedly authorize the use by local government of inclusionary-zoning devices such as mandatory development fees to generate affordable housing.

The use of development fees is not countermanded by current regulatory policy. The understanding of legislation by the administrative agency responsible for its implementation can be most instructive in ascertaining legislative intent and statutory meaning. Malone v. Fender, 80 N.J. 129, 137 (1979). Here, deference to the Council's application of the FHA "is especially appropriate because the agency is charged with the implementation of [that] ... innovative legislative response to deal with the statewide need for affordable housing." Van Dalen v. Washington Township, 120 N.J. 234, 246 (1990) (citation omitted). Under the FHA, municipal measures that are simply variants of a COAH-approved method are valid. N.J.S.A. 52:27D-311a. In this case, mandatory development fees are similar to or may be analogized to the voluntary fees currently approved by COAH in certain limited circumstances. See, e.g., N.J.A.C. 5:92-8.4. Mandatory development fees that do not violate COAH requirements and otherwise meet standards of reasonableness are not inconsistent with the FHA. They may be fairly regarded as "other techniques proposed by the municipality." N.J.S.A. 52:27D-311.

The Appellate Division's view was that development fees must be compensated by density bonuses, 232 N.J. Super. at 196-97. However, nothing in the FHA expressly or literally prohibits such uncompensated fees; nor is any such prohibition indicated by the statute's legislative history. That history is germane to a search for legislative meaning. Levin v. Township of Parsippany-Troy Hills, 82 N.J. 174, 182 (1980). Prior to enacting the FHA,

the Legislature proposed various bills to respond to Mt. Laurel II. Those bills reflected legislative concerns, but did not demonstrate any legislative consensus, over the use of density bonuses to meet the Mt. Laurel obligation. For example, the original draft of bill S.2046, which ultimately was amended to become the FHA, included a provision to authorize density bonuses for developers in exchange for set-asides or for in-lieu payments. The subsequent Senate Committee Substitute bill contained no express provision for a fee on new non-inclusionary developments. After enactment of the FHA, the Assembly introduced a bill in 1986, A.2620, that would have expressly authorized the establishment of an affordable-housing trust fund -- not dependent on the grant of density bonuses -- as a condition of site-plan or subdivision approval.

Such unenacted provisions concerning bonuses do not compel any particular conclusion about the Legislature's views on development-fee schemes without bonuses. Enacted legislation may express more generally what was expressed more specifically in proposed legislation. Jersey City Chapter of Property Owner's Protective Ass'n v. City Council of Jersey City, 55 N.J. 86, 95 (1969) (quoting J.R. Christ Constr. Co. v. Willete Assocs., 47 N.J. 473, 480 (1966)). Thus, although the FHA does not specifically authorize development-fee payments without correlative bonuses, this does not necessarily preclude finding such authority by reasonable implication.

Arguments in support of such implied authority for

development fees without bonuses can also be drawn from the analogy between development fees and set-asides. Although we observed in Mt. Laurel II that the mandatory set-aside would have to assure developers "an adequate return on their investments," 92 N.J. at 268, neither Mt. Laurel II nor the FHA explicitly requires that a density bonus accompany a mandatory set-aside. Cf. Van Dalen v. Washington Township, 205 N.J. Super. 308, 342-45 (Law Div. 1984) (holding unconstitutional a mobile-home zoning set-aside that imposed an unfair burden in form of discriminatory subsidies on middle-income residents). As noted earlier, Mt. Laurel II identified two illustrative zoning techniques that a municipality could use to satisfy its constitutional obligation: incentive zoning such as density bonuses and mandatory set-asides. We expressed a preference for mandatory set-asides because that device serves to ensure the provision of affordable housing. 92 N.J. at 267-68. Development fees are the functional equivalent of mandatory set-aside schemes authorized by Mt. Laurel II and the FHA, N.J.S.A. 52:27D-311a(1). This Court has before held in another context that the authority to compel performance implies the authority alternatively to charge a fee to secure performance. See In re Kimber Petroleum Corp., 110 N.J. 69, 74-75 (1988) (DEP's power to compel polluter to initiate clean-up implies power alternatively to exact money from polluter equal to cost of clean-up).

Nevertheless, we do not determine the validity of uncompensated fees as applied by the municipalities in the cases

now before us. It cannot be overstressed that the Legislature, through the FHA, intended to leave the specific methods of compliance with Mt. Laurel in the hands of COAH and the municipalities, charging COAH with the singular responsibility for implementing the statute and developing the state's regulatory policy for affordable housing. Van Dalen v. Washington Township, supra, 120 N.J. 234. Hence, although we conclude that the FHA's broad delegation of authority provides a statutory basis for development fees as permissible inclusionary zoning devices, it remains to COAH in the first instance to develop a comprehensive system of development fees.

C.

We noted at the outset that it was relevant to consider COAH's unique role in the adoption of municipal ordinances that effectuate local fair-share housing plans. See discussion supra at __ (slip op. at 13). In determining the validity of the municipal development-fee ordinances in this case, we must focus on COAH's regulatory responsibility under the FHA. This poses an issue not raised and, understandably, not anticipated by the parties.

Pursuant to the authority delegated by the Legislature, COAH acts as the administrative regulator in the field of affordable housing. The FHA vests the Council with "primary jurisdiction [over] the administration of housing obligations." N.J.S.A. 52:27D-304(a). "The power of the Council is extremely broad."

Hills Dev. Co., supra, 103 N.J. at 32; Van Dalen, supra, 120 N.J. at 245. COAH is vested with wide powers and broad jurisdiction to resolve lower-income-housing problems. Franzese, "Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat," 18 Seton Hall L. Rev. 30, 36-37 (1988). COAH is empowered by the FHA "to decide whether ... proposed ordinances and related planning steps will satisfy a particular community's Mount Laurel obligations." Tocco v. New Jersey Council on Affordable Hous., supra, 242 N.J. Super. at 221. It may require municipalities to preserve land as a scarce resource to meet affordable housing needs. N.J.A.C. 5:91-11.1; Hills Dev. Co., supra, 103 N.J. at 61; Tocco v. Council on Affordable Hous., supra, 222 N.J. Super. at 221, 224. COAH has the duty to determine and adjust a municipality's fair-share obligation. N.J.S.A. 52:27D-307. It has the power to establish "affordable housing programs to assist municipalities in meeting the obligation of developing communities to provide low and moderate income housing." N.J.S.A. 52:27D-321. The Council is authorized to approve the methods of implementing municipalities' housing elements and fair-share plans, N.J.S.A. 52:27D-314, including approval of any regional contribution agreements, N.J.S.A. 52:27D-312.

The breadth of the legislative mandate and the statutory standards creating COAH's regulatory authority comport with the complexity and sensitivity of the subject of affordable housing. COAH has undertaken to define a statutory public policy of affordable housing through the enactment of rules and

regulations. This is consistent with the judicial recognition that agency rulemaking may be necessary both "to inform the public and guide the agency in discharging its authorized function." Lower Main Street Assocs. v. New Jersey Hous. & Mortgage Fin. Agency, 114 N.J. 226, 235 (1989). Administrative rulemaking serves the interests of fairness and due process. Administrative agencies should inform the public and, through rules, "articulate the standards and principles that govern their discretionary decision in as much detail as possible." Crema v. DEP, 94 N.J. 286, 301 (1983). Rulemaking is also important to assure the faithful effectuation of the legislative mandate. DEP v. Stavola, 103 N.J. 425, 436-38 (1986); Department of Labor v. Titan Constr. Co., 102 N.J. 1, 12-18 (1985).

We therefore conclude that agency rulemaking is reasonably required in order to fulfill the legislative purpose of the FHA with respect to inclusionary-zoning measures. We further conclude that COAH's exercise of its rulemaking authority in the area of inclusionary zoning is incomplete because COAH has not yet specifically addressed mandatory development fees as available inclusionary zoning devices. See Lower Main Street Assocs. v. New Jersey Hous. & Mortgage Fin. Agency, supra, 114 N.J. 226.

COAH has adopted regulations governing the grant of substantive certification of a municipality's housing element and fair-share plan. Those regulations authorize certification if

the municipal proposal is "consistent with achievement of the low and moderate income housing needs of the region," N.J.A.C. 5:91-6.1; if it eliminates unnecessary features of land-use ordinances that create higher housing costs, ibid.; and if it provides affirmative measures to make the achievement of the municipality's fair share a reasonable possibility. N.J.A.C. 5:91-10.1. In determining a municipality's ability to satisfy its Mt. Laurel obligation through inclusionary development, "[t]he Council presumptively requires a 20 percent maximum set-aside and a minimum gross density of six units per acre on vacant developable sites." N.J.A.C. 5:92-8.4(c). Under certain circumstances a municipality may deviate from the presumptive requirements. For example, if "the market units are single family detached dwellings [the municipality's agreement] may provide that, in exchange for an increase over existing density, the developer either: construct low and moderate income units as part of an inclusionary development; or pay a voluntary fee to be utilized by the municipality for a [Regional Contribution Agreement] or municipally constructed low and moderate income housing or rehabilitation." N.J.A.C. 5:92-8.4(e).

COAH has not, however, adopted any regulation dealing with mandatory development fees as available inclusionary zoning measures. Nevertheless, we are informed that COAH itself has specifically considered, within the context of municipal fair-share adjustments, the possibility of imposing mandatory development fees. Further, even in the absence of a specific or

detailed regulation, COAH has taken action in these cases that suggests an understanding that these measures are not invalid or ultra vires. COAH has expressly approved the housing elements and fair-share plans of the defendant municipalities, although in granting substantive certification to the municipalities in this case, COAH did not rule on the development-fee ordinances, concluding that the ordinances as such were "not required to implement the fair share plan." However, as we view the matter, each ordinance has a direct and material bearing on the municipality's effort to meet its fair-share affordable-housing obligation. Consequently, the development-fee ordinances were subject to review and certification by COAH as a constituent part of the housing-element plan of the respective municipalities.

Accordingly, we determine that COAH, through its rulemaking procedures, should specify standards for development fees, so that municipalities may consider employing such fees as inclusionary-zoning devices in designing their housing elements under the FHA. Regulatory standards will enable us to determine that persons subject to such ordinances have been reasonably informed of their obligations, and that both municipalities and COAH in the adoption and approval of such ordinances are acting in conformity with the legislative intent of the FHA.

Such regulations will define more precisely the impact and effect of development fees. They presumably will address the types of developments that will be subject to fees, the amount and nature of the fees imposed, the relationship of fees to other

inclusionary-zoning measures such as mandatory set-asides and density bonuses, the conditions for the creation and administration of affordable-housing trust funds, the requirements for the use and application of such funds, and whether a system of development fees should include counterbalancing density bonuses. As already noted, in its current authorization of development fees on residential developers, COAH has determined that a municipality may counterbalance such fees with density bonuses; e.g., N.J.A.C. 5:92-8.4(e). In its consideration of non-residential development fees, COAH might well choose to follow this approach. Because we cannot and should not prognosticate what scheme COAH will devise for non-residential development fees, we do not determine on the present record whether development fees without bonuses might or might not in a particular application be constitutionally objectionable.

COAH, in the exercise of sound administrative discretion, should consider the desirability and feasibility of such development fees in the broader context of the State's affordable housing policy. Development fees can be a valuable alternative that some municipalities desire to employ in fulfilling their Mt. Laurel obligations. Moreover, such fees should be considered constituent parts of local housing-elements designed to meet municipal affordable-housing obligations under the FHA. Thus, COAH's regulatory responsibility in this area must be acknowledged. Accordingly, we anticipate that COAH will properly

discharge this responsibility by promulgating appropriate development-fee regulations. In the absence of such regulations, we are constrained to set aside the ordinances at issue in this appeal.

IV.

Plaintiffs present related claims that the development-fee ordinances violate constitutional standards pertaining to the taking of property, due process, and equal protection. These contentions need not be addressed on their merits in view of our determination that municipal inclusionary zoning measures consisting of development fees for lower-income housing must be adopted in accordance with duly promulgated administrative regulations. We nevertheless observe that insofar as those contentions are addressed to the facial validity of the development-fee ordinances in these cases, they do not have merit.

The claims based on alleged violations of due process and equal protection standards by development-fee ordinances do not project new or additional substantive considerations. Because plaintiffs do not allege that they are a member of a suspect class, see New Orleans v. Dukes, 472 U.S. 297, 304, 49 L.Ed. 2d 511, 517 (1976), those contentions can be answered sufficiently, for present purposes, by reference to the validity of those measures as reasonable exercises of statutory zoning and police powers. See discussion supra, at __ (slip op. at 19-27).

Further, central to those several claims is the allegation that development fees are confiscatory. The Appellate Division, believing that the fees were unfair or confiscatory, concluded that those constitutional violations would be rectified if developers received compensatory benefits. 232 N.J. Super. at 201.

In response to similar claims in Mt. Laurel II that mandatory set-asides were confiscatory, this Court stated that "the builder who undertakes a project that includes a mandatory set-aside voluntarily assumes the financial burden, if there is any, of that condition." 92 N.J. at 267 n.30. A developer may be made to bear the economic burdens of providing affordable housing so long as those burdens are not excessive and the project remains profitable. See id. at 279 n.37 (a twenty-percent set-aside may be a "reasonable minimum"); N.J.A.C. 5:92-8.4(c); see also In re Egg Harbor Assocs., supra, 94 N.J. at 358 (specific plan for inclusionary zoning involving a 20% set-aside is "neither arbitrary nor unreasonable," nor an unconstitutional taking). In Mt. Laurel II, we suggested that "[w]here practical, a municipality should use mandatory set-asides even where [federal] subsidies are not available," 92 N.J. at 268, and that mandatory set-asides would be legitimate as long as developers were assured "an adequate return on their investments," ibid.; no density bonuses, compensatory benefits, or subsidies were specifically required.

Since initial authority for promulgating development-fee

regulations lies with COAH, we do not reach the question of when, if ever, compensatory benefits might have to accompany mandatory development fees. As long as the measures promulgated are not confiscatory and do not result in an inadequate return of investment, there would be no constitutional injury. We leave it to COAH to determine initially the level at which fees might become confiscatory.

V.

Plaintiffs' remaining major contention is that the affordable-housing development fees are a form of taxation and, as such, exceed delegated municipal revenue-raising authority in violation of the state constitutional command that all property taxes be levied uniformly. N.J. Const. of 1947 art. VIII, § 1, para. 1.

Municipalities do not have the authority to raise general revenue except through "property taxes imposed pursuant to express and comprehensive legislative provisions." Salomon v. Jersey City, 12 N.J. 379, 384 (1953). If the primary purpose of the fee is to raise general revenue, it is a tax. Daniels v. Borough of Point Pleasant, supra, 23 N.J. 357. If, however, the primary purpose is to reimburse the municipality for services reasonably related to development, it is a permissible regulatory exaction. Ibid.; Bellington v. Township of East Windsor, supra, 17 N.J. at 565 (where primary purpose is regulatory, "it does not necessarily matter that the incidental

result is revenue above the actual cost of supervision and control of the business; that is not enough to render the return a tax for revenue rather than a license fee").

In Daniels, supra, the municipality amended its building code to increase the fee for building permits. The fee was based on the square footage of the proposed structure. The Court invalidated the fees, finding that they did not bear a reasonable relationship to the costs of regulating construction, and concluded "that the purpose of increasing the building permit fees was to raise additional revenue made necessary primarily by increased school costs which were in turn caused by the increase in population resulting from the new buildings." 23 N.J. at 360. In West Park Ave., Inc. v. Ocean Township, 48 N.J. 122 (1966), we considered whether a development exaction could be imposed to create a trust fund for educational purposes. We concluded that the statute regulating subdivisions, N.J.S.A. 40:55-1.21, repealed by L. 1975, c. 291, sec. 80, did not authorize the development exaction for an educational trust fund. Id. at 125-26.

The Appellate Division's reasoning in this case parallels the reasoning in those decisions. It viewed a municipality's obligation to provide lower-income housing as being comparable to its obligation to provide educational resources. 232 N.J. Super. at 193. Because the general public, and not developers alone, must bear the financial burden of providing affordable housing, the Appellate Division concluded that mandatory development fees

are taxes. Ibid.

Unlike public education that was directly at issue in West Park Ave., and indirectly implicated in Daniels, the provision of affordable housing is not a municipal obligation that must be supported through general taxation. The MLUL and FHA require a municipality to use its land-use regulations to create only the realistic opportunity for the development of low- and moderate-income housing. In Mt. Laurel I, we concluded that municipalities and developers had engaged in exclusionary practices that effectively precluded the development of low- and moderate-income housing in the suburbs. Mt. Laurel II required municipalities to use affirmative inclusionary-zoning measures, including mandatory set-asides, to redress affordable-housing needs. 92 N.J. at 267. Thus, a residential developer could be required to set aside a percentage of units to be used for low- and moderate-income housing. The Legislature, in effect, has ratified this principle. The FHA, as well as the MLUL, endorses the use of inclusionary-zoning techniques sanctioned in Mt. Laurel II.

We cannot overstress the similarities between mandatory set-asides and the development-fee ordinances. Because a mandatory set-aside requires a developer to allocate a percentage of units for lower-income housing, the requirement can be viewed as an exaction in kind, and, arguably, as a tax. See Ellickson, "The Irony of 'Inclusionary' Zoning", 54 S. Cal. L. Rev. 1167 (1981) (inclusionary zoning imposes a tax on new construction);

Bonan v. City of Boston, 398 Mass. 315, 496 N.E. 2d 640 (1986) (vacating on procedural grounds lower court holding that linkage fees closely resemble a tax, requiring express statutory authorization); San Telmo Assocs. v. City of Seattle, 108 Wash. 2d 20, 735 P.2d 673 (1987) (ordinance restricting rights of low-income housing owners to convert to non-residential use deemed unconstitutional tax). In Mt. Laurel II, however, we determined that mandatory set-asides as a form of inclusionary zoning were not analogous to a tax. We viewed them as legitimate regulatory measures suitably addressed to the broad goals of zoning. Development fees, to reiterate, perform an identical function.

The Appellate Division also concluded that shifting the public responsibility for providing affordable housing to developers would violate the constitutional rule of uniformity in real property taxation. 232 N.J. Super. at 193-94. If development fees are property taxes, arguably they may be constitutionally vulnerable because they apply to newly developed lands, exempting property that has already been developed, and therefore may lack the requisite uniformity. See New Jersey State League of Municipalities v. Kimmelman, 105 N.J. 422 (1987) (statute prohibiting newly-constructed single-family dwellings from being added to tax-assessment list until certificate of occupancy issued violated constitution). Nevertheless, the putative tax effect of any development fee scheme may turn on the nature and extent to which the property is burdened. Cf. Prowitz v. Ridgefield Park Village, 237 N.J.

Super. 435 (App. Div. 1989) (property tax assessment must account for affordable-housing requirements that limit resale value of units), certif. granted, __ N.J. __ (1990).

Although we do not regard development fees as a form of taxation, we stress that mandatory set-asides do not transgress the uniformity provision by imposing the responsibility of addressing the municipality's affordable-housing problems on developers of residential property. Ordinances that impose that responsibility on developers of commercial property and non-inclusionary residential property stand on the same footing.

In sum, because the development fees are a form of inclusionary zoning and similar to other land-use and related exactions, they are regulatory measures, not taxes.

VI.

Because we have determined that the development fee ordinances in this case were not validly adopted, we must consider plaintiff New Jersey Builders Association's claim that it be refunded the fees paid by its members to Chester Township. We agree with the trial court and the Appellate Division that plaintiff lacks standing to assert that claim. Plaintiff is a trade organization and may not assert individual damage claims on behalf of its members. 232 N.J. Super. at 204 (citing Mill Race Ltd. v. Mayor, Township of Bernards, 230 N.J. Super. 160, 166 (App. Div. 1989)). Although plaintiff does have an

interest in the validity vel non of the ordinances, it is not a party in interest in an action for refund of fees to its individual members. We affirm the Appellate Division's conclusion that the trial court acted properly in dismissing that claim without prejudice to the right of individual members to seek refunds in separate actions.

VII.

We determine that under the FHA, as well as the zoning power of the MLUL and the police power, municipalities with the approval of COAH can impose reasonable fees on the development of commercial and non-inclusionary residential property as inclusionary-zoning measures to provide lower-income housing. Such development fees may be enacted by ordinance and, subject to the approval and certification of COAH, may be included as part of a municipality's housing element and fair-share obligation under the FHA. Because the FHA does not provide sufficient guidance, the effectuation of such authority appropriately requires the promulgation of rules by COAH that will provide the standards and guidelines for the imposition and use of such development fees. We are satisfied that regulatory measures for development fees to be used for affordable housing adopted pursuant to valid rules can address constitutional concerns relating to due process, equal protection, the taking of property, or invalid taxation. In view of the grounds for our decision in this case, contentions based on those concerns need

not be further addressed. Because of the absence of enabling administrative regulations, we hold that the current development-fee ordinances were not validly adopted.

The judgment of the Appellate Division is affirmed in part and reversed in part.

Chief Justice Wilentz and Justices Clifford, Pollock, O'Hern, Garibaldi, and Stein join in this opinion.

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Holmdel Builders Association v. Township of Holmdel
N.J. Chapter of National Association of Industrial and Office Parks v. Township of South Brunswick
N.J. Builders Association v. Township of Chester
Calton Homes, Inc. v. Township of Middletown
(A-103/104/105/106/107/108/109-89)

Argued February 13, 1990 -- Decided December 13, 1990

HANDLER, J., writing for a unanimous Court.

The cases that comprise this appeal arise out of the attempts by several municipalities to comply with their Mt. Laurel II low- and moderate-income housing obligations. The Townships of Chester, South Brunswick, Holmdel, Middletown, and Cherry Hill all adopted ordinances that, in varying forms, imposed fees on developers as a condition for development approval. The fees were dedicated to an affordable-housing trust fund to be used in satisfying the municipality's Mt. Laurel obligations.

Several builders' associations filed suit challenging the ordinances. The trial courts in each case except Cherry Hill ruled that the ordinance in question was unconstitutional because it imposed an unauthorized tax on a select group of individuals. The trial court in Chester also held that the New Jersey Builders' Association lacked standing to seek a refund on behalf of its members.

Holmdel, South Brunswick, Chester, and Middletown appealed to the Appellate Division. Cherry Hill successfully intervened in those appeals. The Appellate Division affirmed each of the appeals except Holmdel, concluding that the various ordinances were unauthorized revenue-raising devices--i.e., invalid taxes. In the Holmdel matter, the case was remanded for a full hearing on the merits of how the ordinance would be applied.

The parties petitioned the Court for certification. All petitions were granted.

HELD: Under the Fair Housing Act, as well as the zoning power of the Municipal Land Use Law and the police power, municipalities with the approval of the Council on Affordable Housing can impose reasonable fees on the development of commercial and non-inclusionary residential property as inclusionary-zoning measures to provide lower-income housing. Effectuation of such authority will abide the promulgation of rules by the Council on Affordable Housing. Because of the absence of enabling administrative regulations, the current development-fee ordinances were not validly adopted.

1. The various ordinances of the municipalities attempted in different ways to establish an affordable-housing trust fund to promote the building of lower-income housing. Chester and South Brunswick imposed a mandatory development fee as a condition of development approval. No density bonus was given. Middletown developers were given a choice of constructing affordable housing or paying an in-lieu development fee. Holmdel gave developers a density bonus if they contributed to an affordable-housing trust fund. Cherry Hill imposed a mandatory development fee on all construction of a sufficient size. (pp. 8-13)

2. The Court's prior Mt. Laurel decisions never envisaged mandatory set-asides as the exclusive solution for the construction of lower-income housing. It is entirely appropriate to link community housing goals with non-residential real estate development. The scarcity of land as a resource bears on the opportunity and means to provide affordable housing. (pp. 14-18)

3. The Municipal Land Use Law (MLUL) governs the zoning power of municipalities. The provision of lower-income housing is one of the purposes of zoning incorporated by reference into the zoning enabling act. The broad reach of zoning authority arises as an aspect of local government's police powers. The fact that municipalities seek to accomplish the general-welfare goal of affordable housing by development fees rather than by mandatory set-asides does not negate a real and substantial relationship of such fees to the regulation of the land, including fees on non-residential development. That relationship is to be founded on the actual, although indirect and general, impact such nonresidential development has on the need for lower-income housing and the ability of municipalities to meet that need. (pp.19-27)

4. The nature and extent of authority to provide affordable housing under zoning laws and general police powers is inextricably related to the Fair Housing Act (FHA). Nothing in the FHA expressly or literally prohibits the imposition of uncompensated development fees. Nevertheless, the Court does not determine the validity of uncompensated fees as applied to the municipalities in the cases now before it. There is a statutory basis under the FHA for development fees; it remains for the Council on Affordable Housing (COAH) to develop a comprehensive system to regulate such fees. (pp.27-32)

5. COAH rulemaking is reasonably required in order to fulfill the legislative purpose of the FHA in respect of inclusionary-zoning measures. COAH's exercise of its authority in this area is incomplete because it has not yet specifically addressed mandatory development fees as available inclusionary zoning devices. COAH should specify standards for development fees. Such standards will enable the courts to determine that the persons subject to development fee ordinances have been reasonably informed of their obligations and that both the municipalities and COAH are acting in accordance with the legislative intent of the FHA. Such regulations will define more precisely the impact and effect of development fees. In the absence of those regulations, the Court must set aside the ordinances at issue in this opinion. (pp. 32-37)

6. The claims of the developers that the ordinances violated constitutional standards pertaining to the taking of property, due process, and equal protection are without merit. The Court leaves to COAH to determine initially the level at which development fees might become confiscatory. (pp. 37-39)

7. Development fees serve the same purpose as mandatory set-asides as a form of inclusionary zoning. They are a legitimate regulatory measure and do not constitute an illegal delegation of the taxing power to municipalities. (pp.39-44)

8. The New Jersey Builders' Association is not a party in interest in an action for the refund of development fees to its members. Accordingly, the Association lacks standing to assert a claim for those refunds. (p. 44)

The judgment of the Appellate Division is **AFFIRMED IN PART** and **REVERSED IN PART.**

CHIEF JUSTICE WILENTZ and JUSTICES CLIFFORD, POLLOCK, O'HERN, GARIBALDI, and STEIN join in JUSTICE HANDLER's opinion.

TESTIMONY BEFORE
THE ASSEMBLY HOUSING COMMITTEE
ON COAH RULES AND REGULATIONS ON DEVELOPMENT FEES
AND ON A-1184 HARTMANN
AMENDING THE NEW JERSEY FAIR HOUSING ACT

Presented by the New Jersey Builders Association
May 14, 1992

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Good Morning, Mr. Chairman and members of the Committee. I am Joe Riggs, Vice President of the New Jersey Builders Association. The NJBA is a trade association of several thousand business owners who provide New Jersey residents with new homes -- usually their most important asset and long term source of financial security.

The New Jersey Fair Housing Act was approved on July 2, 1985. Overall, its purpose and intent was to place the administrative responsibility for the provision of low and moderate income housing in a state agency, the New Jersey Council on Affordable Housing, instead of the courts. It is now apparent that a very imperfect process resulted.

An exceedingly complicated system has evolved. Delays in the mediation, Office of Administrative Law and substantive certification processes are intolerable. Bureaucratic requirements for size, mix and affordability ranges of low and moderate income units have made their marketing all but impossible for anyone other than a few builders. There has been virtually no elimination of cost generating features at the site improvement level so that no cost savings have materialized.

It is more difficult than ever for developers to receive local and state approval for low and moderate income housing development. It could be considered housing's equivalent to the ECRA program -- that is, resources are spent on attorneys and consultants, not on addressing society's problems. It should also be noted that the ongoing poor condition of the state's economy has had a dampening effect.

With a universe of need estimated in excess of 140,000 units, the process has produced fewer than 10,000 units of low and moderate income housing. It is difficult to imagine that, in the absence of the Fair Housing Act, the levels of production would have been much lower.

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Worse yet, from the municipal perspective, the whole process has become a "beat the allocated COAH number" game. The object of the game is to reduce the allocation, accommodate the minimum number of low and moderate income units, and zone all other residential areas to exclude all but the most affluent households. One of the visible players in this game has been the Legislature. Session after session, since COAH produced its fair share allocations, there has been a plethora of bills introduced to amend the Fair Housing Act.

A number of bills have been introduced over the years to provide that certain types of housing, such as military housing or senior citizen housing, will be considered as credits against a municipality's fair share allocation. Other bills provide that units constructed in a certain time period will be credited against the municipality's fair share need. While these bills may appear to be different in substance, the intent of all of these bills is the same -- to reduce the municipality's fair share allocation. All of these bills become creative maneuvering by a municipality to reduce the COAH allocation.

The year before the COAH rule adoption regarding development fees, the Supreme Court in its *Holmdel* decision had found authority in the New Jersey Fair Housing Act for the municipal imposition of development fees. To this day neither the courts nor anyone else has been able to identify the section in this Act where this authority is found.

According to the court decision, municipal authority to impose fees, could only be exercised in accordance with COAH rules and regulations on the collection of fees. Since COAH had not yet adopted any such rules, previously collected fees were invalid and were to be returned. Subsequently, in December 1991, in response to this decision, COAH prepared and adopted regulations governing the collection and use of the development

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fees.

Unfortunately, COAH also inserted itself in the issue of previously collected fees. COAH determined that previously collected fees could be retained if they were collected in the amounts in accordance with COAH rules. Other fees would have to be returned. This whole issue has since been returned to the courts and is under litigation. The adoption of legislation which would retroactively authorize these illegally collected fees should not be considered. It only complicates an already exceedingly complex situation.

For the past five years the NJBA has opposed all attempts to modify the Fair Housing Act and its administrative policies as implemented by the COAH. The Association believed that COAH and the Act should be given an opportunity "to work out the kinks." Unfortunately, the Act and its administrative implementation have been so tampered with as to make the process all but unworkable, meandering far afield from the spirit and intent of the *Mt. Laurel* decisions.

It is our recommendation that the Housing Committee and the Legislature not consider piece meal amendment to the Fair Housing Act. We recommend that the entire Fair Housing Act be reconsidered so that it can return to the basic tenet of the *Mt. Laurel* document.

Among the changes necessary, if the New Jersey Fair Housing Act is to achieve its constitutional objectives are:

- Mandating municipal compliance with the statute and the implementing regulations;
- Establishing rigid performance schedules governing municipal compliance;

- o Providing incentives to induce private sector construction of low and moderate income housing, including density bonuses, cash subsides and other transfers; and
- o Clarifying that developments may be charged only when a compensating benefit (e.g.; density bonus) is conferred.

Barring such changes, the New Jersey Fair Housing Act will fail to meet its constitutional responsibilities and should be repealed.

Thank you for the opportunity to appear before you today.

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