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Report of the Committee on Government Operations

The Fair Housing Act, Zoning, and Affordable Housing

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I. The Fair Housing Act, Group Homes, and Zoning¹

A. Introduction

THE FAIR HOUSING ACT (FHA)² continues to provide a vehicle for plaintiffs to challenge provisions of local zoning ordinances. Amendments to the Act in 1988 extend its applicability of equal housing to individuals with handicaps.³ According to the statute, discrimination includes, among other things: refusal to permit reasonable modifications of existing premises necessary for the handicapped individual;⁴ and refusal to make reasonable accommodations in rules, policies, practices, or services.⁵ The Act contains an exemption that provides, "Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."⁶

1. Part I was prepared by Patricia E. Salkin.

2. 42 U.S.C. § 3601-3619 (1988).

3. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 1988, *reprinted* in U.S.C.C.A.N. (102 Stat.) 1619.

4. 42 U.S.C. § 3604(f)(3)(A).

5. *Id.* § 3604(f)(3)(B).

6. *Id.* § 3607(b)(1).

While the FHA defines "handicap" to include a physical or mental impairment that substantially limits one or more major life activities,⁷ the Act stops short of enumerating specific conditions considered to qualify as an impairment. This task has been left to the courts, and has been interpreted to include, among other things, alcoholism and drug addiction.⁸ The Act has been held, in a number of cases, to prohibit discriminatory land-use practices and decisions by municipalities, even where such actions are "ostensibly authorized by local ordinance."⁹

To prove discrimination under the FHA, plaintiffs must demonstrate either intentional discrimination, discriminatory impact, or disparate treatment. To establish a *prima facie* case of discriminatory impact merely requires a showing that the action has a greater adverse impact on a protected group than on others.¹⁰ It is much easier for plaintiffs to prove discriminatory effect, and not motivation. Once plaintiffs establish this, the burden then shifts to the defendant to demonstrate a legitimate, nondiscriminatory reason for the action, and that no less discriminatory alternatives were available.¹¹ A court may grant injunctive relief under the following conditions: (1) the plaintiff is likely to succeed on the merits; (2) the plaintiff is subject to irreparable harm while litigation is pending; (3) the defendant will not suffer substantial harm as a result of the requested injunctive relief; and (4) injunctive relief is in the public interest.¹²

Zoning ordinances across the country may contain provisions that, regardless of intent, have the effect of restricting or prohibiting the siting of group homes for persons with a handicap. These provisions may exist in the form of definitions such as family, group home, or boarding house. Ordinances may also contain certain spatial requirements, such as setback and square footage minimums, which may make it difficult or impossible to site a group home. During the past year, the courts have addressed these issues, as well as public opposition to the siting of group homes.

7. *Id.* § 3602(h)(1).

8. *Oxford House Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 459 (D.N.J. 1992).

9. *Id.* at 458 (quoting *Ardmore, Inc. v. City of Akron*, No. 90-CV-1083, 1990 WL 385236 at *4 (N.D. Ohio, Aug. 2, 1990)); *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991); *Association of Relatives and Friends of AIDS Patients v. Regulations and Permits Admin.*, 740 F. Supp. 95 (D.P.R. 1990); and *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989).

10. *See* *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988).

11. 844 F.2d at 933.

12. *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 181 (3d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987).

B. *Group Homes and the Definition of "Family"*

In *Oxford House v. Township of Cherry Hill*,¹³ the township denied a certificate of occupancy to plaintiffs, a group home for recovering drug addicts and alcoholics which was located in a single family residential district, on the grounds that plaintiffs failed to meet the definition of a "single family" under the local zoning ordinance.¹⁴ The plaintiffs sought a preliminary injunction to prevent the township from enforcing the definition of family to deny them a certificate of occupancy under the FHA. In granting the motion for a preliminary injunction, the court found that plaintiffs demonstrated a likelihood of success under the disparate impact theory by showing that the definition of "family" under the zoning ordinance imposes more stringent requirements on groups of unrelated individuals wishing to live together in a rental property than on individuals related by blood or marriage. In this case, the people who are handicapped by reason of alcoholism or drug abuse are more likely to need the living arrangement provided by Oxford House.¹⁵ The court further found that the defendant neither failed to present evidence establishing a legitimate and nondiscriminatory reason for their action, nor did they meet their burden of establishing that no less restrictive alternative was available.¹⁶

In *Township of Cherry Hill*, the court ordered the preliminary injunction, although the plaintiffs had not yet exhausted their administrative remedies, by applying to the zoning board of appeals for a use variance.¹⁷ The court, in a footnote, noted that requiring plaintiffs to apply to the zoning board for a variance does not satisfy the requirement of a "reasonable accommodation," since such accommodation means "changing some rule that is generally applicable to everyone so as to make its burden less onerous on the handicapped individual."¹⁸ In the present case, the court found that requiring the plaintiffs to seek a variance is more onerous for plaintiffs than for a majority of applicants,

13. 799 F. Supp. 450 (D.N.J. 1992).

14. *Id.* at 452. *See id.* at 454 n.5 (revealing that the certificate of occupancy was first denied on the grounds of numerous building code violations, all of which were eventually cured). Under the zoning ordinance, "family" is defined as "a single individual doing his own cooking and living upon the premises as a separate housekeeping unit, or a collective body of persons doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage, or other domestic bond. . . ." *Id.* at 455.

15. *Id.* at 461.

16. *Id.* at 462.

17. *Id.*

18. 799 F. Supp. at 462 n.25.

and is contrary to the notion of "reasonable accommodation."¹⁹ In contrast, *Oxford House Inc. v. City of Albany* presented a challenge to the city's Grouper Law.²⁰ The court refused to rely on the *Cherry Hill* footnote, and distinguished it on the facts, stating that unless in the present case, plaintiffs can establish that the need to reside in groups of four or more is handicap related, there is no basis for an "accommodation."²¹ The court did, however, order a preliminary injunction while the plaintiffs applied for the variance, and maintained jurisdiction of the matter pending the outcome of the application.²²

A second, unrelated case involving the definition of family under Cherry Hill's zoning ordinance was decided in the New Jersey Superior Court.²³ Oxford House had been operating two other group homes in the township. The trial court, finding that the residents did not constitute a "family" under the local zoning ordinance, and they were not "handicapped" under the FHA, ordered an eviction of the residents unless Oxford House applied for and received a use variance. The Superior Court found the definition of "family" contained in the ordinance unconstitutional under the state constitution. The court, noting that other federal cases specifically involving Oxford House had found that the residents did fall within the protection of the FHA,²⁴ remanded the case for a full hearing to determine whether the FHA was violated.

C. Particular Groups and the Fair Housing Act

Organizations seeking to site special housing for persons with AIDS or HIV have met with success challenging local zoning ordinances under the FHA. The Courts continue to show no tolerance for discriminatory government actions where the government attempts to use public opposition and pressure as a shield from the real issue. In both 1992 cases, the courts cited to an earlier statement that

a decisionmaker has a duty not to allow illegal prejudices of the majority to influence the decisionmaking process. A . . . discriminatory act would be no less illegal simply because it enjoys broad public support. Likewise, if an official act is performed simply in order to appease the discriminatory viewpoints of private parties, the act

19. *Id.*

20. 819 F. Supp. 1168 (N.D.N.Y. 1993). The Grouper Law provides that no more than three unrelated individuals can occupy the same unit unless they constitute the functional equivalent of a family.

21. *Id.* at 1178.

22. *Id.*

23. *Cherry Hill Township v. Oxford House*, 621 A.2d 952 (N.J. Super. Ct. App. Div. 1993).

24. *Id.* at 960 (citing *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991)); *United States v. Borough of Audubon*, 797 F. Supp. 353 (D.N.J. 1991); and *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

itself becomes tainted with discriminatory intent even if the decisionmaker personally has no strong views on the matter.²⁵

In *Stewart B. McKinney Foundation v. Town Plan and Zoning Commission of the Town of Fairfield*,²⁶ the Foundation purchased a two family home in a residential area, which it intended to rent to no more than seven individuals (which was permitted under the zoning ordinance) who were HIV-infected. After significant public opposition to the intended use, the Zoning Commission decided that the proposed use of the property required a special exception.²⁷ The plaintiffs brought suit seeking a preliminary injunction enjoining defendants from enforcing this requirement.²⁸ Plaintiffs alleged, with respect to the FHA, that the special exception requirement is discriminatory on the basis of handicapped status, that it constitutes interference, coercion, and intimidation of, and against, the Foundation because of its aid and encouragement of prospective tenants' rights, and that the special exception requirement constitutes a refusal to make reasonable accommodations.²⁹ In noting that persons with AIDS and the HIV virus are handicapped under the provisions of the Act,³⁰ the court then applied the five-prong test in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*³¹ and found sufficient evidence to show that plaintiff was likely to succeed in proving discriminatory treatment.³² With respect to discriminatory intent, the court noted that it can be proven through circumstantial evidence, including the bowing to political pressure exerted by town residents.³³ Citing to *Huntington Branch, NAACP*,³⁴ the court agreed that "clever men may easily conceal their motivations" and found sufficient evidence to show a disparate impact by requiring the plaintiff to apply for a special exception when non-HIV infected persons did not have to meet such a requirement to establish a residence.

25. *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1212 (D. Conn. 1992), (citing *Association of Relatives and Friends of AIDS Patients v. Regulations and Permits Admin.*, 740 F. Supp. 95, 104 (D.P.R. 1990)).

26. 790 F. Supp. 1197 (D. Conn. 1992).

27. *Id.* at 1205.

28. *Id.* at 1207.

29. *Id.* at 1210.

30. 790 F. Supp. at 1209-10.

31. 429 U.S. 252 (1977). The five-prong test to determine discriminatory purpose involves an inquiry into the following factors: (1) discriminatory impact; (2) the historical background of the decision; (3) the sequence of events leading up to the challenged decision; (4) departures from normal procedural sequences; and (5) departures from normal substantive criteria.

32. 790 F. Supp. at 1211.

33. *Id.* at 1212.

34. 844 F.2d at 935.

*Support Ministries for Persons with AIDS v. Village of Waterford*³⁵ also involved a situation where strong public pressure was exerted to influence local officials not to grant a certificate of occupancy or variance for special housing for homeless persons with AIDS. When plaintiff first expressed its intention to use a fifteen bedroom residence, formally housing a convent and then a novitiate, for such housing, the village passed a local law amending its zoning ordinance to change the definition of a "boarding house," which was a special permit use within the district.³⁶ The amended definition reduced the number of rooms allowed from ten to six, and further restricted such a house, "which is primarily intended to provide accommodation for persons suffering from or recovering from or recuperating from any illness or disease. . . ."³⁷ In holding that the defendants violated the FHA, the court found that a negative inference could be drawn from the fact that some local officials invoked the Fifth Amendment privilege against self-incrimination when questioned about their actions in this case.³⁸ The court further noted that expressions of irrational fear of AIDS and misinformation about the disease were rampant, there was a "firestorm of opposition" by village residents against the project, and that some officials actually admitted that public opposition played a role in their decisions.³⁹ The court also noted that the local law had a disparate impact on people with handicaps, since it had the effect of barring virtually all handicapped people from boarding or rooming housing in the village.⁴⁰ In ordering affirmative relief, the court, in an unusual move, found it necessary to caution the opponents to the project against any "rash, irresponsible behavior against the facility, its staff, and its residents."⁴¹

In *U.S. v. City of Taylor* and *Smith & Lee v. City of Taylor*,⁴² the plaintiffs sought to operate an adult foster care home for twelve elderly who suffer from disabilities in a district zoned single family residential, located in an exclusive section of the city. While state law requires municipalities to allow group homes for up to six residents, plaintiffs challenged the city's decision not to rezone the property to allow for twelve, under the FHA. In finding that the proposed residents of the group home are handicapped under the Act, the court found that the

35. 808 F. Supp. 120 (N.D.N.Y. 1992).

36. *Id.* at 125 (citing Local Law No. 2 of 1990).

37. *Id.*

38. *Id.* at 133.

39. *Id.* at 134.

40. 808 F. Supp. at 136.

41. *Id.* at 139.

42. 798 F. Supp. 442 (E.D. Mich. 1992).

city violated the Act by refusing to make reasonable accommodations, and in discriminating against present and proposed members of the home.⁴³ Again, in this case, the court looked to the actions of the local officials, and found that all members of the City Council seemed to have agreed in advance on their testimony, since each one testified to the same issues: parking, police, fire problems, and that this was a zoning matter.⁴⁴ The court held that a reasonable accommodation was possible without having to change the zoning ordinance, there was no basis in fact for the concerns raised by the Council, and nothing in the record indicated that such an accommodation would cause a burden to the city or the neighborhood.⁴⁵ The court also found evidence of discriminatory intent. Not only did the court grant injunctive relief, but they awarded monetary damages to Smith & Lee, Inc., in the amount of \$152,000 for lost profits, and imposed a civil penalty against the city in the amount of \$50,000.

The Eleventh Circuit, however, reached a different conclusion with respect to the issue of exemption for local maximum occupancy limitations. In *Elliot v. City of Athens*,⁴⁶ appellants sought to establish a group home for up to twelve recovering alcoholics in a district zoned for single family.⁴⁷ The city zoning ordinance defined family as: "One or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage or adoption, no such family shall contain more than four persons. . . . The term 'family' does not include any organizational or institutional group."⁴⁸ After the city refused to issue an interpretation of the ordinance, or to amend the zoning ordinance so as to permit the intended use, appellants sought relief under the FHA alleging that the city failed to make reasonable accommodations in its rules, policies, or practices, which resulted in handicapped persons being denied the right to reside within single family residential neighborhoods.⁴⁹ The court concluded that the zoning restriction was a maximum occupancy limitation, exempted by the Act, and that such restriction was reasonable.⁵⁰ The court held that the zoning ordinance was reasonable, citing that evidence of disparate impact in this case was extremely weak, while the city demonstrated substantial interests in

43. *Id.* at 446.

44. *Id.* at 447.

45. *Id.* at 448.

46. 960 F.2d 975 (11th Cir. 1992).

47. *Id.* at 976.

48. *Id.* at 976 (citing *ATHENS, GA.*, CODE § 9-1-4 (1987)).

49. *Id.* at 977-78.

50. *Id.* at 978.

controlling density, traffic, and noise in single family districts, and showed that there were other areas within the city where group homes could be sited.⁵¹

In granting a request for a preliminary injunction in *Easter Seal Society of New Jersey v. Township of North Bergen*,⁵² a court again found that local officials acted with discriminatory intent based upon statements made and actions taken by several officials.⁵³ In this case, plaintiff sought to establish a residence for mentally ill, recovering chemical abusers in a single family residential district. The town's refusal to issue plaintiff a building permit, and dismissal of their appeal, led to the FHA suit.

D. Spacing Requirements

While plaintiffs representing group homes have successfully brought challenges under the FHA with respect to minimum space requirements in local zoning ordinances, this was not the case when an individual owner/landlord of a single family home requested a reasonable accommodation. In *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*,⁵⁴ the court declared that an ordinance imposing a 1,000 foot spacing requirement between group homes was facially invalid under the FHA because it, "creates an explicit classification based on handicap with no rational basis or legitimate government interest."⁵⁵ Under the local ordinance, the 1,000 foot requirement was triggered for any facility where permanent care or professional supervision would be present.⁵⁶ The court found that this language singled out, for disparate treatment, those who are unable to live on their own, or those who are "handicapped" under the definition of the FHA.⁵⁷ The court also found discriminatory intent based upon the timing of the ordinance, vocal community opposition, and failure to articulate a legitimate reason for the spacing requirement,⁵⁸ and further held that the township violated the reasonable accommodation provision of the FHA.⁵⁹

With respect to single family homes, however, a Pennsylvania district court said that municipalities are not required to conform their local

51. 960 F.2d at 982.

52. 798 F. Supp. 228 (D.N.J. 1992).

53. *Id.* at 234.

54. 804 F. Supp. 683 (E.D. Pa. 1992).

55. *Id.* at 693-94.

56. *Id.* at 690.

57. *Id.* at 694.

58. *Id.* at 696.

59. 804 F. Supp. at 699.

zoning ordinances to the FHA.⁶⁰ The dispute centered on the refusal of the zoning hearing board to grant a variance and/or special exception to the owner of a single family home for an addition to her house for the purpose of providing a wheelchair-accessible, separate floor living arrangement for her brother, a handicapped person. The zoning board denied the request, since the proposed addition would leave a zero side yard clearance when an 8 foot distance was required. Plaintiffs brought a challenge under the FHA, alleging a failure on the part of the zoning board to make a reasonable accommodation, and requested an injunction. In denying the plaintiff's request for an injunction, the court noted that the FHA contains an exemption from application to single family homes,⁶¹ and stated that "[i]f Congress had intended that municipalities conform their zoning ordinances and regulations to make reasonable accommodations for handicapped persons, it could, should, and would have done so."⁶²

E. Conclusion

Municipal and land-use attorneys should become more familiar with the provisions of the FHA, including the 1988 amendments for several reasons. First and foremost, there is an increasing number of lawsuits alleging municipal violations of the Act. Second, municipal attorneys must educate and counsel the elected officials they represent about the FHA, including the proof necessary to establish violations thereof. Nothing is worse than watching as the courts consistently chastise local officials for their blatant behavior of discriminatory intent with respect to zoning and land-use decisions. Although this "not-in-my-backyard" attitude remains a prevalent shield, the FHA is a sword penetrating the veil to ensure that persons with handicaps are afforded an opportunity to live in any community and fully integrate into society.

II. Affordable Housing⁶³

In the judicial arena during 1992, the final chapter was written in one of the more significant cases in the area of affordable housing, *Suffolk Interreligious Coalition on Housing v. Town of Brookhaven* (SICOH).⁶⁴ Once again, the Town of Brookhaven was accused of using its zoning

60. *Pulcinella v. Ridley Township*, 822 F. Supp. 204 (E.D. 1993).

61. See 42 U.S.C. § 3603(b) (1993).

62. 822 F. Supp. at 213.

63. Part II was prepared by John Armentano.

64. 575 N.Y.S.2d 548 (N.Y. App. Div. 1991), *leave app. denied* 602 N.E.2d 233 (1992).

power in an exclusionary fashion. Plaintiff did not accuse the Town of Brookhaven of general exclusionary practices or adopting an ordinance that was facially exclusionary. Rather, the town was charged with abusing its zoning power by denying an application to change the zoning of a parcel from nursing home use to multi-family use. The lower court found that the parcel involved should have been rezoned multi-family in order to allow for affordable housing, even though, for a long time, it had formed a part of a general mini-medical plan for a specific area in the largest town on Long Island. The property, zoned for a nursing home, was surrounded by hospital, nursing home, and professional building uses, and was clearly a use intended in the area. In spite of this clear and comprehensive plan for the parcel, the trial court held that, upon application by a housing group, a change of zone should have been granted to permit the construction of multi-family affordable housing. On appeal, the court held that the town's legislative power and judgment should control, especially since the parcel as zoned, was in accordance with the town's comprehensive plan, and that the town had a need for a nursing home in the area. It was also significant that there were other parcels of land in the town suitable for the multi-family housing being proposed, but that the plaintiff selected this parcel that needed a change of zone and had been part of the medical area plan for a long time. In effect, the court held that the multi-family affordable housing use should not be given preference over another use totally compatible with the comprehensive plan, particularly where there was other land available for the multi-family use. New York's highest court, the Court of Appeals, denied plaintiff's application for permission to appeal and put the case to rest, thus ending years of litigation in the affordable housing arena for the Town of Brookhaven and Long Island. During those years the court of appeals: (1) rejected attempts to import *Mt. Laurel* principles into New York and (2) permitted the towns to not pre-map any land for multi-family housing as a matter of general policy.⁶⁵

The significance of the *SICOH* case is that the court, recognizing that there is no requirement in a particular project to include low-income housing, held that it cannot be said that denial of a request for multi-family rezoning for the purpose of delivering low- and moderate-income housing is arbitrary and capricious, in a situation in which other vacant land already zoned for multi-family use was available. Further, the court held that the Federal Fair Housing Act was not violated,

65. *Suffolk Housing Services v. Town of Brookhaven*, 511 N.E.2d 67 (N.Y. 1987).

because vacant land already zoned for multi-family use existed in the town. Accordingly, the denial of the application for rezoning was not discriminatory.

In *Sobel v. Higgins*,⁶⁶ a different New York intermediate appellate court upheld an administrative code provision that did not allow an apartment owner to withdraw rent controlled housing units from the market upon a good faith showing that landlord does not want to be in that business. Because the regulation promoted the governmental policy of preserving affordable housing, it had a legitimate governmental purpose, thus shielding it from several constitutional attacks. In this case, we see a different New York intermediate court shielding the goal of affordable housing against constitutional attack, relying on the fact that the owner knew at the time of purchase that the premises were rent controlled. This analysis is consistent with *SICOH*, where the court weighed a charge of exclusionary zoning against the affordable housing interest advanced by a plaintiff, who also knew that the parcel had been zoned as a nursing house for a long time. In *SICOH*, the Court found the availability of other land for multi-family housing and the proven need for a nursing home at the location chosen by the town outweighed the need to build multi-family on that site.

In New Hampshire, the Supreme Court invalidated a zoning ordinance on the ground that it was exclusionary.⁶⁷ The court invalidated the statute on the basis that the ordinance placed an unreasonable barrier to the development of affordable housing. The court did not reach the constitutionality of the ordinance, or whether it complied with the town's overall comprehensive plan. Rather, the decision was grounded upon the thesis that the ordinance did not comply with the zoning enabling legislation, i.e., the ordinance was an invalid exercise of the power delegated to the town pursuant to the enabling statute. Following in the steps of the New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mt. Laurel (Mt. Laurel II)*,⁶⁸ the court granted the plaintiff the "builder's remedy" both to compensate the developer who had invested his time and effort in pursuing the litigation, and as a means to possibly ensure the actual delivery of the low- to moderate-income housing.

Cases emanating out of New Jersey generally deal with implementation of *Mt. Laurel II*. In *Holmdel Builders Ass'n v. Township of Holm-*

66. 590 N.Y.S.2d 883 (N.Y. App. Div. 1992).

67. *Britten v. Town of Chester*, 595 A.2d 492 (N.H. 1991).

68. 456 A.2d 390 (N.J. 1983).

del,⁶⁹ municipalities, under the New Jersey Fair Housing Act, with the approval of the Council on Affordable Housing, may impose reasonable development fees as a form of inclusionary zoning. In other words, reasonable fees on commercial and non-inclusionary residential development may be legally levied (i.e., are not "taxes") in order to provide funding for low-income housing. In *In re Township of Denville*,⁷⁰ the Council on Affordable Housing exercised its powers under *Mt. Laurel II*, and was not required to reject a proposal for low-to-moderate-income housing because it had a potential to unduly concentrate minorities. The court held that: "The doctrine's primary focus is to cure economic discrimination, not to assure that the cure results in economic or racial balance."⁷¹

It should be no surprise that very little is occurring in the affordable housing area, except in New Jersey, which is busy implementing *Mt. Laurel II* on a statewide basis pursuant to a state master plan. Other states, lacking statewide land-use plans, are condemning exclusionary zoning and practices on an ad hoc basis as individual owners or housing groups choose to raise the issue. In light of the weak economic condition of the real estate industry, we can expect few new cases being instituted. During such times the focus will probably shift to the legislative halls where incentives and other bonus-type land-use devices will probably be employed to entice developers to develop land and include meaningful affordable housing.

69. 583 A.2d 277 (N.J. 1990).

70. 588 A.2d 1248, 1251 (N.J. Super. Ct. App. Div. 1991).

71. *Id.* at 1251.