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- Cert. of Marshall Forst  
(Report on ord. nec, Bedanaka)

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Attorneys for Defendants/ The Township of Bernards,  
Committee of the Township of Bernards, and The Township of  
Bernards Sewerage Authority

THE HILLS DEVELOPMENT  
COMPANY,

Plaintiff,

-vs-

THE TOWNSHIP OF BERNARDS in  
the COUNTY OF SOMERSET, a  
municipal corporation of the  
State of New Jersey, THE  
TOWNSHIP COMMITTEE OF THE  
TOWNSHIP OF BERNARDS, THE  
PLANNING BOARD OF THE TOWN-  
SHIP OF BERNARDS and the  
SEWERAGE AUTHORITY OF THE  
TOWNSHIP OF BERNARDS,

Defendants.

: SUPERIOR COURT OF NEW JERSEY  
: LAW DIVISION  
: SOMERSET/OCEAN COUNTIES  
: (Mt. Laurel II) " M " M M

: Docket No. L-030039-84 P.W.

: Civil Action

CP  
: CERTIFICATION OF  
: MARSHALL FROST

I, Marshall Frost, certify as follows:

1. This Certification is submitted in response to an  
Affidavit prepared by Kenneth J. Mizerny.

2. I am a professional planner certified and licensed in  
the State of New Jersey and am a professional engineer licensed

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in the State of New Jersey, an associate of the firm The RBA Group which is an engineering, planning and architectural firm located at 60 Washington Street, Morristown, New Jersey. Prior to September 1983, I was a principal in the firm of Frost Associates, an engineering and planning consulting firm located in Chatham, New Jersey.

3. Since 1976, I have performed consulting services for the Township of Bernards, Somerset County, New Jersey. These services have included specific consulting services for various site plan applications as well as design services for municipal improvements.

4. From the period October 1977 to October 1978 I served as the acting Township Engineer during the period of time the municipality was searching for a permanent Township Engineer.

5. During the period 1978 through 1983 I served as the Township's Professional Planner,

6. In 1979 I initiated work on the preparation of a revised Land Development Ordinance for Bernards Township culminating in the adoption of that ordinance in 1980.

7. In 1981 and 1982, after initial use of the ordinance and reviewing and approving site plans before the Planning Board of Bernards Township, I prepared and initiated and was involved in the adoption of various amendments to the ordinance dated May 13, 1982.

8. In the years 1980 through 1982 I prepared the current Bernards Township Master Plan.

EXPLANATION OF ORDINANCE

9. Based upon my review of Mr. Mizerny's Affidavit as well as the specific questions and comments raised within that Affidavit, I feel it would be of value to indicate the framework within which the ordinance was developed.

10. Bernards Township throughout the 1970's was subject to continuous litigation over zoning and land use issues. Those individual court cases were modified during the course of pretrial discovery and in some cases after trial was underway to reflect the changing requirements of the New Jersey Supreme Court. To a large degree, the various zoning cases were resolved in 1979 and 1980. The cases were resolved either through an out of court settlement prior to a finding by the court, an agreement between the litigants after the court had issued a finding, or through the removal from the court system of the cases after rezoning took place in 1980.

11. Of particular interest in this particular case is the litigation that took place regarding the lands currently owned by the Hills Development Company (formerly the Allen Deane Corporation). During the 1970's a complaint was filed by the

Allen Deane Corporation regarding the then existing zoning for approximately 1050 acres located in the southwest of Bernards Township. As this litigation was approaching trial, extensive discussions took place between representatives of the Allen Deane Corporation and the staff of Bernards Township. As a result of these discussions, an agreement was reached on a technical level regarding a proposed rezoning of large sections of the Township, including the lands owned by Hills Development Company. The elected officials of Bernards Township as well as the officers of the Allen Deane Corporation agreed to enter into a court order embodying the basic principles of those discussions. This, in fact, occurred in March of 1980.

12. The basic thrust of the changes embodied in the 1980 Land Development Ordinance of Bernards Township (as amended in 1982) was a rezoning throughout most of the undeveloped portions of Bernards Township. The new zoning, along with the various design requirements contained in that Land Development Ordinance, were intended to satisfy the then judicial requirements referred to as the Madison Township decision.

13. The basis for changing the zoning in Bernards Township, from the historic process of establishing a housing type and constructing a zoning regulation or regulations to insure the development of that housing type, to the density zoning embodied in the current Land Development Ordinance, was a

series of investigations and studies undertaken by the Township staff as the Township proceeded through the various court cases through the 1970's. In particular, the decision to change to a density type of zoning where overall gross densities were controlled, as opposed to attempting to control the actual housing type, was based upon various economic studies conducted for the Township and undertaken by the Township staff. It became apparent to the Township staff that land values throughout the Township were dictated by the differences in gross densities that were allowed under the previous ordinance as well as by types of housing that could be constructed. Depending upon a developer's opinion of the then current housing market, land values changed rapidly and reflected the developer's opinion of the most salable type of house or, occasionally, a land owner's opinion that increased density could be obtained through litigation. In the Township's opinion, the value of the land should more appropriately be dictated by the natural constraints of the property and limitations to the development resulting from other than arbitrary zoning restrictions.

14. Coupled with the desire to try to place all land values on an equal footing, reflecting a constant level of development throughout the entire town, was the desire to have a Development Ordinance which would allow the Township, through

the site plan review process/ to retain to the greatest extent possible the existing natural features of the Township.

15. By 1980/ the undeveloped portions of the Township exhibited, in a large number of areas, heavy vegetation and moderate slopes. Additionally, many areas of the undeveloped portion of the Township were traversed by water courses which flooded and could have an adverse impact upon development. Consequently, the Township felt it desirable to establish an ordinance which provided significant design flexibility so that during the site plan review process the Planning Board could evaluate the property and, to the maximum degree, allow the developer to develop to the full capacity of his property (as measured in total number of dwelling units), at the same time setting aside significant stands of existing vegetation, allowing the developer to build on his property in areas which were not characterized by moderate or excessive slopes, and allowing the developer to develop his property without encroaching on flood prone and/or wetland areas.

16. The resulting zoning philosophy, the establishment of an overall density for a tract of land along with design flexibility which would allow the developer to match his housing product to the character of the land itself, results in environmental benefits to the Township while at the same time providing a base land value through the undeveloped portions of

the Township. Further, any difference in value of two pieces of property of equal size would be a result of the natural characteristics of the land as opposed to a value artificially induced through the zoning process. Through this procedure the Township hoped that land values would not inflate as rapidly (in 1982 there were over 4000 acres of vacant land within Bernards Township), and construction costs would be reduced resulting in more affordable housing. Finally, the Township felt that the combination of density zoning and the design flexibilities contained within the ordinance, when applied to a specific parcel of land, would allow the developer to most appropriately design for the market as opposed to artificially constructing a product based upon a zoning requirement.

17. The underlying principle of the rezoning was the establishment of the overall densities throughout various zones in the Township. In general terms, those lands within Bernards Township which were located in the low growth districts based upon an evaluation of the Tri-State Regional Guide Plan (the same areas now shown as non-growth in the State Development Guide Plan) were zoned at a density of 2 acres per unit. These non-growth areas were and are located outside the sewer service area for the then proposed expansion of the Bernards Township Treatment Plant. This land, which had previously been zoned for 3 acre single family detached houses on individual lots, was

rezoned to allow for a variety of housing types, retaining an overall gross density of 2 acres per unit but with no net density regulations.

18. Additionally/ a portion of the undeveloped lands of Bernards Township was located in the Raritan Basin and, based upon representations of the Allen Deane Corporation that a sewer system would be available, was zoned to a density of 2 units per acre (as opposed to the then existing 3 acre single family zoning). This area again had little or no restriction on the type of housing that could be constructed and had no net density restrictions.

19. In effect, Bernards Township converted more than half of the total area of the town and more than 80% of the undeveloped area of the town from historic single family, individual lot zoning which allowed only single family detached houses as the principal use, to "density" zoning establishing a gross density over the tract, at the same time providing for a number of alternate housing types. While not all housing types could be constructed in the non-growth area (the portion of the Township currently zoned with the density of 1 unit for 2 acres), single family houses on lots of 20,000 square feet as well as multi-family housing could be developed. In that portion of the Township within the Raritan River Basin an even greater flexibility in housing type was provided.

20. Concurrent with the inclusion in the Land Development Ordinance of Bernards Township of the above changes in zoning, previous zoning changes resulting from litigation in the 1970's were also to be included. This included the ability to develop almost 3000 housing units in the lands which were subject to litigation in what is known as the Lorenc case. These lands, located in the south central portion of the Township, had a gross density of approximately 3.25 dwelling units per acre. However, since approximately 50% of the zone in question was located adjacent to the Passaic River and subject to flooding, development on the portion of land not subject to flooding would have an overall density of approximately 6 1/2 units per acre.

21. In addition to the overall density zoning established throughout the Township, and the inclusion of previous zoning established through the litigation process, a series of changes in various design requirements were also incorporated in the new Land Development Ordinance.

22. Because of the sweeping changes in the zoning as well as the fragmented zoning ordinance then in effect as a result of previous court decisions, it was determined by the Township that it would be necessary to rewrite the entire zoning and site plan ordinances into one single Land Development Ordinance.

23. The process of developing a new Land Development Ordinance was a complicated, frustrating, and at times a

somewhat "tense" undertaking. The Township staff developed a working draft of the ordinance for review and discussion. In order to insure that previous zoning and development regulations established in previous litigation would be adhered to, it was necessary to provide draft copies of the ordinance to technical representatives of the earlier litigants. In addition, Allen Deane provided both planning and engineering experts, as well as personnel involved with the actual site planning process to review and critique the draft ordinance. The process, which was originally envisioned to take approximately 60 days, took in the neighborhood of 4 months. Numerous meetings were held between the technical representatives of the Township and Allen Deane Corporation, as well as other meetings between technical representatives of the Township and representatives of previous litigants. It seems unlikely that any Land Development Ordinance had more professional planners and engineers involved in its development than the 1980 Bernards Township Land Development Ordinance. In retrospect, the process was both interesting and stimulating. At the time, it best would be described as a controlled free-for-all with the various professionals involved frequently disagreeing (it was not uncommon to have disagreement between the professionals representing an individual client). The resulting ordinance was then brought before the Planning Board of Bernards Township

and ultimately before the Township Committee for adoption. As a general statement, the ordinance that was produced through the discussions by the various technical experts was adopted intact.

24. As indicated/ some of the main participants in the development of the ordinance were the technical experts provided by the Allen Deane Corporation. The input provided by those experts was both professional and constructive. It would be unrealistic to assume that all of the interested parties in the preparation of a document such as a Land Development Ordinance would be fully satisfied. Nevertheless, in my opinion, the final document represented a consensus of opinion in most areas, compromise in some areas and disagreement in a limited number of areas. In those areas where neither consensus nor compromise existed, in my opinion, the resulting document provided each of the various parties (both developers and the Township) with instances where their desired position was included.

25. This is not intended to indicate that any professional who took part in the process found all elements of the Land Development Ordinance satisfactory. All of the professionals, including myself as a professional representative for Bernards Township, disagreed with the final wording in certain instances. However, in my opinion, the final document treated each of the interested parties in an equitable manner and, most

importantly in my opinion, nothing contained in the document would preclude a land owner from any reasonable use of his land to the extent set forth in the Township's zone plan.

26. In 1982 the Township amended the ordinance to correct certain inconsistencies, errors and unclear wording which had been pointed out by the Township staff and by experts for various developers in the course of working with the document. Additionally, in at least one instance, the ordinance was found to be inconsistent with the court order entered into by Bernards Township and the Allen Deane Corporation. Because of this inconsistency, a substantive change was made in the zoning relating to those lands located in the Passaic River Basin to insure that the intended flexibility in design set forth in the court order was reflected in the Township's ordinance. It is noteworthy that this omission was brought to the Township's attention by the technical representatives of the Allen Deane Corporation, and the technical staff of the Township then presented that information to both the Planning Board and the Township Committee and the problem was rectified with little or no effort or discussion on the part of either Allen Deane or the governing body.

27. In summary, the current Land Development Ordinance which was prepared originally in 1980 and amended in 1982 is a direct result of preliminary studies conducted by the Township,

leading to the conclusion that a major change in the type of zoning within the Township was appropriate. This change, from the standard approach of establishing a specific type of residential housing unit and then zoning for that type of unit, to the approach contained within the ordinance whereby an overall density is established and a wide variety of housing types is permitted, resulted in the resolution of a series of court cases then involving the Township. With the establishment of the basic philosophy of the ordinance and the agreement with that philosophy by various litigants, including the Allen Deane Corporation, a complete rewrite of the Land Development Ordinance for Bernards Township was undertaken with input from the various parties, most significantly the Allen Deane Corporation. A large number of professionals in the engineering and planning professions participated in the discussions that led to the adopted ordinance in a form acceptable in virtually all respects to those involved in the process.

28. In addition to a number of items contained in the ordinance which could not be agreed to in total by the professionals involved in the development of the ordinance, there also exist a limited number of items which are "holdovers" from previous court cases and/or out of court settlements. Taken in the total context of the ordinance, in my opinion, they have either no impact or no significant impact on the ability of

lands to be developed under the regulations set forth in the Land Development Ordinance.

29. Having provided a background and rationale for the Land Development Ordinance of Bernards Township, the points raised in Mr. Mizerny's Affidavit will now be addressed. In my opinion, Mr. Mizerny's conclusion that the ordinance fails to provide a realistic opportunity for lower income housing is incorrect.

#### I. ZONING

30. On pages 2 through 8 of Mr. Mizerny's Affidavit, he summarizes the zoning districts within Bernards Township where residential uses are permitted. While the information presented is frequently correct, there are many instances of inaccuracies of fact or interpretation as well as conclusions.

(A) Mr. Mizerny, in his description of the permitted development for the various residential zone districts in Bernards Township, classifies various types of development using the terms "by right zoning", "residential cluster development option" and "planned residential option". The use of the term "by right zoning" is misleading. More appropriately, the term "background zone" may more accurately define the structure of the ordinance. In addition to the standard single family

detached housing permitted on individual residential lots, 8 of the zones allow cluster development and 7 of the zones allow planned residential development. These options are Permitted Uses. While the ability to use any of the options requires a minimum lot area in excess of that for a single family lot/ the result of the institution of that minimum tract area is no different than having a minimum lot area for a non-residential use. Should the applicant not have the minimum tract area required for the options set forth in the ordinance, the applicant can either develop the property using standard single family housing on individual lots in accordance with the minimum lot areas set forth in the Land Development Ordinance or, in the alternative, could apply for a variance before the appropriate board. If the minimum tract area requirement is complied with, under the structure of the Bernards Township Land Development Ordinance, the use is permitted. Further, because a great deal of the lands within Bernards Township exhibit moderate slopes and a significant degree of vegetation, the use of the options is encouraged in order preserve and protect the environmental characteristics of the property.

(B)(i) As regards page 5 of Mr. Mizerny's Affidavit, Section C.3.d., it is true that there is a special restriction against public sewerage of PRD-3 developments. This restriction reflects an in-depth analysis of the Bernards Township expanded

sewer capacities, recently certified for operation, and the projected demand for the portion of the Township within the sewer service area. After lengthy study, and public debate, Bernards Township received federal and state funds to expand the treatment facility located in Bernards Township to a maximum of 2.5 million gallons per day. This plant will not have the capacity to service total development within the Township. In recognition of this, Bernards Township received federal and state monies in the form of "a bonus" to include in the design of the plant sludge treatment facilities. This additional capability of the treatment plant was intended to allow for the treatment of septic wastes as it was recognized that a major portion of Bernards Township would not be served by public sewers in the future. Section 512.A of the Bernards Township Land Development Ordinance, On-Site Sanitary Sewer Systems, states "Sewage disposal using septic systems shall be designed in accordance with P.L. 199 and shall be approved by the Bernards Township Health Officer". As such, the Land Development Ordinance recognizes that jurisdiction over approval of on-site disposal in areas where public sewers are not available rests with the Board of Health and not with the Planning Board. Nevertheless, the Planning Board in adopting the 1982 Master Plan states (at page 75), "Historically, sewage treatment in these unsewered areas has been provided by

individual septic systems. Because of soils constraints, percolation is poor, and approvals for new septic systems have been difficult to obtain. Frequently, soils conditions on individual lots are marginal at best, necessitating the installation of expensive systems and often resulting in long-range health and maintenance problems. Because of the overall soils limitations of the area and site-specific difficulties in designing individual septic systems, common septic fields, located in areas with the most appropriate soils conditions, are a desirable alternative to the individual on-site septic system.<sup>11</sup>

(ii) The Master Plan goes on to say (also on page 75), "Historically, government involvement in sewage treatment has been limited to public sewerage systems and public treatment plants. Recently, however, the concept of septic management has received the support of the New Jersey Department of Environmental Protection. To implement a septic management program, a Septic Management District is established, and a local agency, usually a utilities authority, assumes the responsibility as defined by the municipality for septic systems within it. The philosophy behind the program is that septic systems are a permanent part of a municipal sewage disposal system, and that preventive maintenance and monitoring of individual systems is critical to prevent damage to the

environment and to protect the general health of all municipal residents. It is recommended that Bernards Township establish a septic management program/ particularly in areas where innovative means of on-site disposal are implemented."

(iii) Clearly, the Planning Board in developing the Master Plan and the Land Development Ordinance recognized both the inability of the Township's public sewer system to provide sewage disposal for the entire town, and at the same time the need to both approach the problem of on-site sewage disposal in an innovative manner and provide a mechanism for long-term maintenance of such on-site disposal system.

(iv) On page 8 of Mr. Mizerny<sup>1</sup>'s Affidavit under subsection H.2.f., Mr. Mizerny indicates that the ability to obtain a maximum density of 2 dwelling units per acre is subject to the ability of the applicant to provide sewer treatment to the project. Further, he indicates that the same restriction does not apply to the "by right zoning" for single family detached housing. Further, Mr. Mizerny states that there is no density option given for the eventuality that the applicant is not able to provide sewers under the planned residential development options contained within the ordinance.

Technically/ Mr. Mizerny is correct in that a statement relating the ability to develop to the maximum allowable density, to the ability to provide sewerage and/or sewer treatment, should have

been made a general statement as opposed to located under the planned residential option. In any case, the entire comment is probably unnecessary since, without the ability to provide sewerage, either through a sewage treatment plant or by some form of septic, it is difficult to envision any practical use for the land. Coincidentally, it is the principal reason why no density is given in the eventuality that sewerage cannot be provided for the property.

(C) On page 9 of Mr. Mizerny's Affidavit, he sets forth various conclusions. With regard to those conclusions, I feel that the following comments are pertinent.

(i) Conclusion #2 is that no density bonus for low and moderate income housing has been provided. This is clearly not the case since the rezoning that took place in 1980 was a revision to the entire Land Development Ordinance and provided significant increases in density as measured in absolute units. For instance, under the previous (prior to 1980) Land Development Ordinances in Bernards Township, the Hills Development Company (then the Allen-Deane Corporation) was permitted to develop approximately 350 single family houses on lots with a minimum area of 2 acres. With the institution of the rezoning, the Hills Development Corporation is allowed to develop an additional 875 housing units. Further, under the zoning in place on the Hills Development properties, little or

no restriction now exists as to the type of housing unit or the type of ownership that can be constructed. This increase of approximately 250% in the allowable development of the property is clearly a "density bonus" for the tract of land, and was a direct result of Allen Deane's lawsuit which claimed the need for additional density to provide Mt. Laurel I housing.

(ii) Mr. Mizerny indicates that the zoning district prohibits mobile homes. In my opinion, based upon a thorough review of the ordinance as well as the intent of the ordinance at the time it was drafted, the Bernards Township Land Development Ordinance prohibits development of a mobile home park. However, nothing in the ordinance would preclude the use of a mobile home or more appropriately a modular home as an integral part of the development of a housing unit when located permanently upon a foundation.

(iii) Contrary to Mr. Mizerny<sup>1</sup>'s conclusion, "multi-family, the primary dwelling type practical for lower income housing", is permitted as a matter of right in a number of zones. Assuming that the applicant meets a minimum tract area, numerous zones within the municipality permit multi-family development and, in fact, in combination with the characteristic of the land, multi-family development may be the most appropriate type of construction on many of the properties in Bernards Township.

(iv) (a) Mr. Mizerny's 5th conclusion claims that the density of multi-family for 9 units per acre is too low to realistically construct lower income housing units. He then goes on to state that more realistic densities are 16 - 20 units per acre for two story buildings and 20 - 25 units per acre for three story buildings. It may be that Mr. Mizerny has misinterpreted the restriction set forth in the ordinance. On page 200.6 of the ordinance, density is defined as "The total number of dwelling units in a proposed development divided by the total number of acres of the tract of which the proposed development site is a part". This definition is intended to reflect the concept of gross density. The term "net density" is not used within the ordinance and, as such, no net density limitations are established. This elimination of the term "net density" was a specific decision reached in the development of the ordinance since, in my experience, I have never been able to develop a definition of the term which was adequate from either the applicant's or municipality's point of view. Consequently, the Bernards Township Ordinance deals only in the term "density" and reflects the common definition of the term "gross density". Since no net density is set forth in the requirements, the applicant has flexibility to cluster to a very high net density under the requirements of this ordinance. Consequently, the density for the multi-family development area of 9 units per

acre does not impact upon whether or not lower income housing units can be realistically constructed.

(b) Further discussion of the 9 units per acre gross density for the multi-family development area under the planned residential development option of the ordinance is warranted. In reviewing the ordinance, definition of the terms "single family development area" and "multi-family development area" should have been included, in light of the fact that tables 403 and 404 set forth maximum densities (gross densities) for both single family and multi-family development areas. While the definition of these two terms may have been obvious at the time of adoption, it is understandable that some misconception as to the use of the terms may exist at this time. Nevertheless, the intent of having the planned residential development divided into two types of development areas was to prevent a specific set of conditions from occurring which are probably remote. As indicated previously, these numbers do not control the net density, and further based upon review of the ordinance, as well as knowledge of developments that have taken place under the ordinance, do not provide a mechanism for a reduction in the total number of dwelling units that can be constructed under the ordinance.

(c) The exception to this would be the development of a relatively small tract of land for multi-family

usage. In those cases, the densities established for the various development areas (either single family or multi-family) reflect set back and buffer requirements contained elsewhere in the ordinance and are intended to provide a reasonable guide to a potential applicant or purchaser of property as to the total amount of dwelling units that could be constructed. In this manner, it would not be necessary for a prospective purchaser of property or a prospective applicant to go through the entire site-plan process to determine the impacts of set backs, design requirements for site improvements and buffers.

(v) (a) In item #6, Mr. Mizerny indicates that the minimum lot size for a single family detached housing is 7000 square feet (the correct figure is 7500 square feet) and for duplexes and twins is 6000 square feet. Mr. Mizerny then indicates that "3200 S.F. lot or less could be used". The square footage is set forth for single family detached and/or duplex or twins included in the ordinance to provide "an appropriate variety of housing types". Further, since the zones where these types of development are permitted are controlled by gross density over the entire tract, land cost per buildable unit is the critical factor, and the land cost per square foot is not a contributing factor as to the type of development that would be constructed. Consequently, to make the comment that the lots are too large without defining what they are too large

for seems inappropriate. If Mr. Mizerny is indicating that he feels that single family houses on 7000 square foot lots are too large to provide housing for low income residences, I would agree. This is not because of the square footage of the lot, but, in my opinion, it is because it is unrealistic to assume that a single family detached house with any reasonable lot area would be constructed by a developer for subsidized housing purposes. The same comment would hold true for twin or duplex houses constructed under this section of the ordinance. However, the Township in preparing the ordinance felt that the institution of the smaller lot sizes (well below the minimum lot size elsewhere required in the town) would encourage housing type not normally found in Bernards Township which could be constructed at a more "affordable price".

(b) Mr. Mizerny<sup>1</sup>'s remaining comment that a "3200 s[quare] f[ee]t lot or less could be used" presumably relates to a maximum lot area that could be associated with a single family or a twin or duplex home in order to provide that housing type for low and moderate income families (in other words to subsidize the housing units). Again, it is my opinion that it is unrealistic to provide low or moderate income housing (with the necessary subsidies) using single family or twins (duplexes). Nevertheless, if a developer wished to provide that type of housing, it can be accomplished under the Bernards

Township Ordinance without any restriction on the amount of square footage on the land.

(c) Mr. Mizerny is incorrect/ however, in his conclusion that the minimum lot size in Bernards Township is 7000 (or even 7500) square feet. In fact, in the PRD-4 option (planned village development) which is permitted in the R-8 zone (which comprises a major portion of Hills Development's property), in that portion of the tract designated as a multi-family development area, the ordinance states (section 403.H.5.b[6]),

"Furthermore, single family detached, twin and duplex houses located in the multi-family development area may be constructed on individual lots and sold separately. There shall be no minimum lot area requirement for said lots, provided that the distance between buildings and the setbacks from private and public streets are in accordance with the standards set forth in section 605.H. and I. Additionally, there shall be no minimum lot area requirements for multi-family units constructed on individual lots and sold separately."

While this provision is not included in all of the PRD development zones of the Township, it is included in a zone that will allow for the construction of over 1200 units, including over 1000 units on lands owned by Hills Development.

(d) This provision was originally not included in the ordinance adopted in 1980 and, as pointed out by

the technical representatives of Hills Development, its absence was not in accordance with the agreed upon conditions of the ordinance at the time that both parties entered into the court order. Consequently, in 1982 Bernards Township amended the ordinance and included this change. With the inclusion of this provision, in my opinion, the total development potential of the R-8 zone could be constructed in the multi-family development area and sold on lots with no size or area restrictions whatsoever.

(e) While the R-8 zone is the only zone in which individual dwelling units, regardless of type, could be constructed under the PRD-4 option on lots with no minimum requirement, the provisions in the PRD-3 option (permitted in the R-3 zone) are similar in result, and differ only from a technical standpoint. Section 403.H.I.a, "Permitted Uses", allows under item (2), "Single-Family detached houses not on individual lots in the Single-Family and Multi-Family Development Areas of the PRD-3 and PRD-4 only". In other words, while extremely small "lots" are not allowed in the single family development area of the R-8 zone or in either the single family or multi-family development areas of the R-3 zone, single family housing is allowed in the single family area and any housing type is allowed in the multi-family areas without an individual lot. This would allow for the construction of a single family

detached condominium without a transfer of title to the individual owners of the property on which the units are located. Consequently, in my opinion, the conclusion that minimum lots sizes of 7500 square feet for single family houses and 6000 square feet for duplexes and twins is too large is totally irrelevant, since approximately 1200 housing units can be constructed in Bernards Township on lots of any size (R-8 zone) and an additional 2000 housing units can be constructed in Bernards Township (R-3 zone) without any lot designation whatsoever.

(vi) In #7 Mr. Mizerny refers to the gross density over the entire tract which establishes the total number of housing units that can be developed. Since the type of construction affects the final cost of the housing, and since there are few if any restrictions which dictate the type of construction to be developed, the statement that "these densities are too low to realistically provide an opportunity for lower income housing" is inappropriate.

(vii) Mr. Mizerny indicates that the PRD-1 development option permits a maximum density of 6 dwelling units per acre (gross density) and there is a limit of 600 dwelling units to be constructed under this option throughout the Township. These statements are correct and, furthermore, all 600 units have been approved by the Planning Board and with the

exception of one project containing the last 64 units under this option, all projects are under construction. The units developed under this option have resulted in a broad range of sale prices. While a number of the units have had prices in excess of \$200,000, one project has included units that will sell for less than \$90,000.

(viii) In item #10, Mr. Mizerny indicates that there is no requirement for low income housing in the PRD-2 zone, and that the density was the result of litigation and settlement. Both statements are correct. However, there is nothing in the ordinance that would preclude the construction of low income housing in the PRD-2 development areas.

(ix) It is assumed that in item #10 Mr. Mizerny is referring to the PRD-4 development option permitted in the R-8 zone. Mr. Mizerny is correct that the gross density is 2 dwelling units per acre and sewer service is required. A majority of this zone is owned by the Hills Development Company. Under the prior zoning, the Hills Development Company land had a permitted use of 167 units of single family detached houses on lots that could be constructed to a minimum of 2 acres in size. Under the zoning that was adopted and is reflected in the current Land Development Ordinance, the Hills Development Company can construct 1001 dwelling units, for a "bonus" of 834 units, and a broad variety of housing types are possible

depending upon the market the developer wishes to provide housing for (including low and moderate income families). While the ordinance does require sewer service/ it is difficult to envision how this will require an additional cost burden to the applicant and it clearly will reduce costs to the occupants of the buildings. As indicated, a majority of the land located within this zone is owned by the Hills Development Company. The Hills Development Company, through the establishment of a separate corporation, has constructed a sewer treatment plant to service their property (located in both Bedminster and Bernards Township). Without discussing the potential cost involved in providing on-site sanitary facilities, the ability to connect the R-8 zone to the sewer treatment facility (already constructed) will allow for a reduction in the allocated cost of the construction of that facility for the housing units in Bedminster (and those in Bernards). Further, the increased usage brought about by connecting the housing in Bernards Township to the treatment plant already constructed in Bedminster would bring about economy in scale and therefore reduce the operating cost associated with each dwelling unit.

(x) Mr. Mizerny's conclusion that "in my opinion Bernards [T]ownship is not affirmatively providing a realistic opportunity for the construction of lower income housing" is simply wrong. Bernards Township provides the opportunity for

the construction of lower income housing and, in fact, has significantly increased the number of housing units that can be developed on any particular tract of land. As indicated previously, in the case of Hills Development, the total increase over their tract of land has been 926 dwelling units or approximately 260%. When the land in the R-8 zone is considered alone, the total increase has been 834 for a total increase of approximately 500%. This "bonus" coupled with the flexibility for housing types established in the ordinance certainly provides a "realistic opportunity for the construction of lower income housing", and represents an affirmative step on the part of the Township.

## II. COST GENERATIVE STANDARDS.

31. Mr. Mizerny, starting on page 10 through page 13, sets forth various areas which, in his opinion, result in unnecessary cost generative requirements. On page 10, Mr. Mizerny indicates that he has presented certain specific provisions of the ordinance indicating that they are "(a) In conflict with the Municipal Land Use Law; (b) Are vague and thus subject to multiple interpretation; (c) Are too discretionary; (d) Are excessive in that they make the applicant go beyond that which is necessary to protect the public health and safety". As a

professional responsible for the development of the ordinance, I offer the following:

(A) I am not of the opinion that the Bernards Township Land Development Ordinance is inconsistent with the Municipal Land Use Law and further, if such inconsistencies do exist, they are only in areas where an attempt was made to provide for greater flexibility in design and/or a simplification of the application and approval process.

(B) If, in fact, there are areas of the ordinance which are vague and subject to multiple interpretation and/or inconsistencies exist, such areas were not intended and are subject to correction. In any case, they are not cost generative.

(C) There are numerous areas where the ordinance is discretionary. In most cases, that discretion lies with the applicant. The ordinance was intended to provide the applicant with the greatest degree of flexibility in the design of the property as the municipality felt was practical. Additionally, there may be certain areas of the ordinance where discretion lies with the Planning Board. In those instances, it is my opinion that to introduce greater specificity would have resulted in a severe restriction on the design potential of the project and, therefore, would not be in the best interest of either the Township or the applicant.

(D) The Land Development Ordinance must provide the framework within which all applicants for various permitted uses and magnitudes of development must be processed. Taken in the context of the multitude of the types of developments that can occur, as well as the levels of sophistication of the applicants, along with past experiences within the Township, requirements which may seem excessive on the surface have been found necessary in order to structure applications that come before the municipality so that they may be processed as quickly as possible in a consistent manner. In my opinion, items which may, on the surface, seem excessive are, in fact, basic requirements for good design practices and do not generate excessive costs.

(E) The first specific item mentioned by Mr. Mizerny on page 10 refers to section 510.A.I.a. and addresses off-street parking requirements. In addition to the design of housing projects, and the review of housing projects for municipalities, I have been actively involved in the management of multi-family condominium projects. Historically, with the exception of housing projects which specifically limit the occupants to either a single residence per unit or to housing for the elderly, experience has indicated that those projects which provide less than 2.5 spaces for a two bedroom unit have inadequate parking. In addition to public safety problems

brought about by the inappropriate number of parking spaces, this has resulted in excessive cost for those associations in an attempt to remedy the situation. The provision for the additional half space per unit (over Mr. Mizerny's requirement) is a minimum first-time cost to the project. When compared with the cost associated with adding additional spaces after the project has been completed, this cost is negligible. Since the Bernards Township Land Development Ordinance provides a number of mechanisms to satisfy the parking requirement, they should not, through the use of proper design techniques, result in an unrealistic impact on the ability to employ cluster development.

(F) Mr. Mizerny indicates that section 512.C. is cost generative. First, section 512.C. was intended to provide a developer with a mechanism to proceed with construction prior to any expansion of the Township sewage treatment facilities. In prior applications before the Township, as well as with testimony before the courts, developers have indicated the need to provide for temporary sewage facilities so they could proceed with the development (an alternative to the carrying charges that would occur while waiting for public sewers). Consequently, the Township put this section in its ordinance at the direction of the court. However, the entire question is moot. Between the time that the ordinance was initially

prepared and the current date, the Bernards Township Sewerage Authority has received the necessary state and federal funding to bring about an enlargement of the sewage facility. This treatment facility is of adequate size to service the entire sewer service area. Based upon studies conducted for the New Jersey Department of Environmental Protection and the federal Environmental Protection Agency, the discharge of effluent into the Dead River is, with the current expansion, at its maximum allowable levels and no further discharge will be allowed. Consequently, since adequate capacity is available for all proposed development within the sewer service area and, since the various documents prepared will not permit additional discharge, the entire section could be appropriately removed.

(G) In number 3 contained on page 11 of Mr. Mizerny's Affidavit he criticizes the setback requirements set forth on table 504. Comparable requirements are set forth in table 503 for lots under the cluster development option and in table 505 for twin and duplex development in the PRD-1, PRD-2 and PRD-3 areas. The intent in the development of these three tables was to provide for flexibility by the developer in establishing individual lots for the construction of single family houses or twin or duplex homes. Further, the intent of the entire ordinance is not to dictate a standard lot size throughout the project but to allow the developer to have the lot area reflect

the topography in the overall development plan. Consequently, it was felt inappropriate to establish rigid minimaums for the various set back and yard requirements. An attempt was made to establish dimensional requirements that reflected the type of lot associated with a particular type of development. Admittedly, the use of these tables has resulted in some confusion by developers and it has been necessary for the technical staff of the Township to explain and/or correct their use. However, the one area that has succeeded has been the introduction of flexibility in the design process. While the lot width and the front yard set back are discretionary, the discretion lies with the developer and not with the Township. At the same time, tables 503, 504 and 505 have successfully eliminated rigid numerical standards to be applied in a "cookie-cutter" fashion throughout a development. Consequently, while the method of establishing dimensional requirements for an individual lot may leave something to be desired, the benefits resulting from this approach appear to outweigh any possible confusion in the manner of presentation.

(H) In item 4 on page 11, Mr. Mizerny reaches the conclusion that it "may" be necessary to increase the height in order to achieve economical construction of lower cost housing. Frankly, there are instances where this has, in fact, been demonstrated and in those instances, the Township has allowed

the building to exceed two and half stories. This has occurred where the topography of the ground is sufficient to allow for the construction of a down hill, lower unit maximizing the use of the building footprint. Examples where the Planning Board has approved, as a matter of course, this type of design include the Spring Ridge project which will ultimately incorporate in excess of 1200 units, and the Countryside development under the PRD-1 option which will ultimately include 150 units. In both cases, the natural terrain of the land was conducive to the construction of 3 stories of dwelling units on the down hill side and in both cases the Planning Board approved such design. Consequently, I would agree that in certain instances it "may be" necessary to increase the height. However, this is not the case in all instances and the ordinance and its application by the Township have adequately addressed the situations in those instances where it "may be" necessary to improve the economics of the project.

(I) In item #5 on page 12, Mr. Mizerny addresses section 605.B. requiring an increase in the buffer next to existing single detached lots. This reflects the fact that on smaller single family lots there is less spatial separation between the existing structure and the proposed development than on larger lots and consequently it is necessary to increase the buffer. Since this situation occurs only in certain limited

instances, the impact on development of the project is minimal. Further, given the flexibility in housing types it is difficult to see how this could have any significant impact on the gross density and clearly would not impact net densities.

(J) In item #6 on page 12, Mr. Mizerny indicates that the requirement set forth in section 605.K.I. for a "compatible architectural theme with variations in design to provide attractiveness to the development" is highly subjective. I would have to agree. Nevertheless, I consider this to be a reasonable planning requirement, and because no particular type of design is required, I cannot envision how this would result in higher unit costs or impact the ability of the developer to develop his property to the limits set forth within the ordinance.

(K) (i) In item #7 on page 12, Mr. Mizerny addresses section 605.K.2. that requires a set back of multi-family housing units of 150 feet from either a zone boundary or an existing single family dwelling. He states that this precludes the possibility of infill multi-family dwellings on small sites. He is correct. This was one of the intents of establishing a set back of that magnitude, and since Bernards Township has the potential for over 7000 multi-family dwelling units, it is not a flaw in the zone plan. The inability to develop multi-family housing on infill properties does not seem

critical at this time. Further, it is unlikely that such infill housing would adequately address either affordable or lower income housing units. Regarding the statement that it severely limits the diversity on larger sites, it is difficult to envision a situation where this would occur, since with few exceptions, the majority of the large sites available for development in Bernards Township are in zones which allow almost complete flexibility in housing types, and since there is no specific restriction on net density. It appears improbable that this restriction will result in an impact on either the amount of development or the type of development which occurs.

(ii) The reason for the 150 foot set back is worth discussing. Multi-family units are usually constructed as part of a building which may be significantly larger in scale than single family housing. Consequently, to reduce the apparent scale of the building when viewed from an existing single family lot or from an area not in a zone which will allow multi-family development, the normal procedure would be to move the building containing the multi-family units further away from the single family structure. The alternative approach would be to require multi-family units to be constructed within buildings of very limited magnitude at a closer distance to the property line of an existing single family house or zone boundary. In my opinion, the latter approach would be more restrictive. Since

the zoning associated with this requirement provides for multi-family housing with extensive design flexibility, it will not limit net densities. The regulations were developed to provide the greatest possible practical separation of different housing types and housing scales for the protection of existing single family residences, while at the same time insuring that the developer would be allowed to develop his property to the maximum set forth in the ordinance.

(iii) Based upon the above discussion and taken in the context of the entire ordinance, it does not appear probable that this set back requirement could in any way preclude the opportunity to develop lower income housing.

(L) (i) In item #8 on page 12, Mr. Mizerny indicates that section 605.D. limits the number of dwelling units to 8 units per building. Further he indicates that this reduces the opportunity for lower income housing since more economically feasible forms of multi-family construction "could" contain 16 - 24 units per building. First, the section indicating the maximum number of units per building, like all of the above-described provisions numbered in the 600's, is contained in Article 600, Design Standards, of the Land Development Ordinance. Section 601 sets forth the purpose of this portion of the ordinance. As set forth in the opening sentences of paragraph A., it states

"the design standards described in this Article represent the Township's requirements for the various items listed. It is recognized that no one set of design standards can be all-encompassing, or anticipate each and every type of development. Consequently, the standards described herein are to be used as benchmarks for improvement design and as criteria for evaluating design. However, these standards are not to be construed to limit or restrict the design of a project. The applicant may request that the standards to be employed be modified. To gain approval of such a modification in the standards to be employed the applicant should demonstrate to the Board that:

1. The resulting change will satisfy the intent of the standard.
2. The resulting change will be designed in accordance with acceptable engineering and/or architectural practices.
3. The resulting change will not have an adverse impact on the Township or the surrounding area.
4. The resulting change will not reduce the useful life of the improvement.
5. The resulting change will not increase the cost of maintenance."

As indicated in the purpose, clearly the ordinance was drafted recognizing variations from the standards were anticipated. One of the areas where variations have been granted is in the number of dwelling units per building. As indicated previously, it has been common practice, where topography dictates that it is appropriate, that three stories of dwelling units have received

approval. At the same time, in each case that this modification has been allowed, the total number of units constructed within the building has been increased in excess of the standard of 8.

(ii) The intent of the standard is to decrease the magnitude of the total building within which the units are contained. Since it is probable that lower income units would be smaller in size, it should be possible to demonstrate that the number of units can be increased without increasing the total magnitude of the building itself. Consequently, various requirements set forth in the purpose for granting of such a change would be satisfied.

(iii) In a specific instance, in which I was involved, where another applicant had originally requested that the maximum number of units be increased from a maximum of 10 (making use of the lower side for living units) to a maximum of 24, it was found that the cost saving per unit was in the magnitude of only \$300. Of course, the amount of such savings will vary from project to project, and may be more, less, or no savings at all. It, therefore, seems appropriate that the Township consider relief of this particular design standard on a project-by-project basis and, if the appropriate information is provided to the Township, allow for an increase in the scale of the project of the buildings over that normally associated with the existing development throughout the Township.

(M) (i) In item #9, Mr. Mizerny refers to section 607.E., stating that this section "requires that granite block curbing be provided along all streets". He failed to indicate, however, that the following paragraph states:

"An alternate form of curbing may be approved by the Board if the applicant can demonstrate to the Board's satisfaction that a substantial cost savings will result and that no loss in the useful life of the curbing and no increase in the maintenance costs will occur. On private streets, the Board may waive the requirements for curbing if the applicant can demonstrate that no adverse impact will occur to the pavement, that drainage will not be impaired, and that the drainage system and facilities can be easily maintained."

(ii) The next paragraph goes on to state:

"On Township streets other than minor streets and on private streets, the Board may waive the requirements for curbing if the street is specifically designed for construction without curbing, if drainage will not be impaired, if there will be no adverse impact to the pavement, if the drainage system can easily be maintained, and if it can be shown that any increased cost in maintenance will be offset by the overall improvement in road design."

The remainder of this section goes on to provide design requirements for both Belgian block and concrete curb.

(iii) The intent of this entire article (Article 600), as well as this section, is to provide the applicant with as much flexibility as possible while maintaining reasonable

design standards. In fact, this particular plaintiff has appeared before the Board and obtained a waiver in the use of curbing on a residential street.

(iv) In the design of streets, drainage is one of the most important considerations which must be addressed. Curbing is an integral part of one method of providing drainage. Curbing can be demonstrated to be a method for reducing long-term maintenance costs associated with both the street pavement as well as the drainage facilities.

(v) As regards construction costs, the Township has, in the past, advertised road construction projects with concrete curbing specified as an alternate to the granite block curbing. In those instances, the unit price per linear foot for concrete curbing was equal to or greater than that for granite block curbing. In past applications, applicants have indicated a desire to replace the granite block curbing with concrete curbing to reduce its overall construction cost. In those instances, the Township has pointed out to the applicant the information relating to the relative costs of the two types of curbing, and after investigating the situation the applicant has dropped his request. Consequently, the statement that the granite block curbing is more expensive than concrete curbing has not, in the past, in Bernards Township, been correct. Nevertheless, the ordinance does make provision for providing

concrete curbing if it is demonstrated that it is a cheaper form of curbing.

(vi) Mr. Mizerny indicates that "it has long been recognized that curbing in general, and granite block curbing in particular, add to site improvement costs". This statement is not necessarily correct and depends to a large extent on the topography of the terrain where the design occurs and on the drainage problems, that will be encountered. Further, there are many professionals in the design field who do not agree with the statement under any circumstances. In fact, depending upon the type of construction, it is possible that the cost of construction of a road system (including the necessary drainage to service that road system) may be significantly greater if curbing and contained drainage are not provided, and that may result in significant destruction of existing vegetation outside the limits of the roadway proper. Further, experience indicates that road systems constructed without curbing and contained drainage exhibit higher than normal maintenance costs. Depending upon the type of design, construction methods and materials, it is entirely possible, if not probable, that the long-term maintenance cost associated with the construction of roads without curbing when coupled with the original improvement costs may be significantly greater than the combination of construction and maintenance costs associated

with curbed roadways. This becomes particularly important when dealing with lower income housing units where the operating and maintenance costs of the project could have a significant impact upon the ability of the occupant to afford the unit.

(N) (i) In item #10 contained on page 13, Mr. Mizerny indicates that he is not satisfied with the ability to waive items contained in Article 600. He claims that the waiver process "complicates the administration and hearing of the application". In my opinion, this is not the case. Section 303.F. setting forth the requirement of public notice does not require notice of a hearing upon proposed modifications from Article 600. Further, the required information is not extensive and for the most part does not necessitate a formal presentation. Further, because of the administrative procedures, it is frequently possible to address these questions early in the design of the project.

(ii) In item (b), Mr. Mizerny states "The language of the proofs is discretionary for example: 'the change will satisfy the intent of the standard<sup>1</sup>, 'will not have an adverse impact<sup>1</sup>, 'will not reduce the useful life'". While Mr. Mizerny is right in the fact that there is discretion on the part of the Board in evaluating the proofs presented by the applicant, that discretion is intentional. If specific quantitative standards are given, a request may be denied when

the Board is of the opinion that it should be granted. However, when taken in the context as a whole, it is frequently simple to prove that the intent of the standards has been satisfied, that there will be no adverse impact and that the useful life (an item which is frequently documented in publications) will not be reduced.

(iii) With regard to Mr. Mizerny's item (c), "Regardless of what proofs are submitted the board does not have to grant the waiver", Mr. Mizerny wholly ignores the overriding legal obligation upon the Board not to act in an arbitrary or capricious fashion.

(0) (i) In item #11, Mr. Mizerny indicates that section 708 contains requirements for preliminary plats and plans which are excessive when compared with the terminology of the Land Use Law, which says "tentative form for discussion purposes"<sup>11</sup>. The requirements are, in my opinion, justified, and further the ordinance provides a mechanism, at the applicant's option, to deal on a more tentative basis.

(ii) The Land Use Law, and experience in applying it to specific applications both in Bernards Township and elsewhere, have, unfortunately, produced a number of inconsistencies. First, the public hearing requirement at the time of preliminary approval results in numerous questions, objections and comments from the general public. It is

impossible for the planning board to respond to many of these questions and it is impossible for the technical staff to provide guidance to the Planning Board based upon plans that do not have specific engineering information. Further, it is commonly accepted that the applicant is only required to produce for final approval those items shown on the approved preliminary site plans. It is, from a practical standpoint, therefore necessary to address all of the various technical questions in a very specific manner, and it is necessary to address technical questions in a definitive manner at the time the preliminary approval is received.

(iii) Bernards Township, through its Land Development Ordinance, attempts to address this particular problem and at the same time maximize the value of the work done at the time of preliminary approval. While the Municipal Land Use Law does not allow a municipality to require a conceptual or sketch plat submission, Bernards Township does provide the applicant the option of preparing plans in a "tentative" manner to be reviewed on a conceptual basis by the Board. Consequently, as set forth in the requirements in section 707, the applicant may, if he wishes, provide the Township with a "conceptual" plan which is more in line with the common definition of the word "tentative". During the review of the conceptual plan, major concerns relating to development of the

site are addressed and, further, approval of the conceptual plan confers upon the applicant the right to develop in accordance with that approval for a period of time beyond that normally associated with preliminary and final approval.

(iv) Recognizing that the work effort involved in preparing the plans for preliminary approval is significant/ the Township provides the applicant with the opportunity to make use of the preliminary approval to initiate construction thereby reducing the total time on the development of the project. While the drawings may still require additional engineering at the time of preliminary approval, the applicant has the opportunity, and numerous applications have taken advantage of this opportunity, to complete the plans to the satisfaction of the Township Engineer and proceed with construction of site improvements, such as roads, drainage, etc.

(v) While most conceptual plans are not engineered to a sufficient degree, the ordinance even allows, in section 707.E.2., for site improvements to be constructed from conceptual plans if specifically approved by the Planning Board.

(vi) Consequently, while there is substance to Mr. Mizerny's statement that section 708 requires drawings to be "fully" engineered, it is my opinion that the Bernards Township Land Development Ordinance has adequately addressed the problems

associated with approval on a preliminary basis by allowing the developer, at his option, to make a conceptual submission for approval, and also allows the developer to make maximum use of the engineering work at the earliest possible date.

(P) (i) Item #12 on page 14 refers to section 708.F. of the requirements set forth in the Bernards Township Land Development Ordinance/ regarding Environmental Impact Assessments. First, the intent of section 708.F. was not to require repetition and/ in subsection 13 of that section relating to the Environmental Impact Assessment, it states

"The applicant is encouraged to submit each report as a separate chapter of the Environmental Impact Assessment and, as a final chapter, present the information described in section 708.F.13.C. and d. If this procedure is used, repetitious information described below may be deleted if no loss in clarity or continuity occurs."

The intent of this statement was to eliminate the repetition.

(ii) I am in agreement with Mr. Mizerny's statement that the preparation of such a report is relatively costly. However, it is my opinion that the Municipal Land Use Law specifically provides the town with the opportunity to require such a report. Given the practical realities of developing property in an undeveloped municipality such as Bernards Township, and the anticipated interest of local

residents in both the potential development and the preservation of the environment, it is unrealistic to assume that the Township would not require an applicant to prepare an environmental impact assessment as part of its submission for approval. Specific environmental questions may be raised as a result of the environmental impact assessment, which can be addressed during the time of site plan review. Preparation of these reports can and does provide a valuable tool in the use and design of the property in order to adequately address environmental concerns.

(Q) (i) In item #13 on page 14, Mr. Mizerny addresses the requirements of Article 800 of the Land Development Ordinance. Article 800 contains the requirements for submission of design documents for public improvements. Given the broad range of applications that come before the municipality, the variety of capabilities of the design firms submitting those plans, and the number of plans that the board is forced to act upon, on a monthly basis, the need to establish a standard presentation is of paramount importance. To the extent possible, the Land Development Ordinance attempts to establish a standard type of drawing to be submitted to the Township. The Township, encompassing in excess of 24 square miles, is undergoing and will undergo extensive development in the future. The need to have compatible drawings and

information for all of the improvements that will take place, whether they be public or private, are real and can only contribute to the public interest in the future. Without these requirements it was common practice for drawings to be prepared in an unprofessional manner, not meeting normal design requirements. The design standards set forth within the Land Development Ordinance were not developed by the Township itself, but reflect basic drawing standards used by public agencies throughout the State of New Jersey.

(ii) As Mr. Mizerny himself indicates, Bernards Township has been subject to, and it is anticipated will be subject to, extensive pressures for development. Applications are reviewed by a number of consultants as well as municipal staff officials and are processed on a rapid basis when compared to many municipalities. Inspection of construction as well as the need to evaluate problems as they occur in the field are extensive in absolute numbers. Consequently, it serves the public welfare to standardize the drawings in a manner compatible with the construction projects the town undertakes through its capital improvement program. Through the standardization it allows for a more timely and less costly evaluation and resolution of problems as they occur. Consequently, the legitimate costs associated with submitting an application to the Township are more than offset by the

resultant increase in the ability to deal with problems as they occur both during construction and after completion of the project.

III. LACK OF AFFIRMATIVE MEASURES TO COMPLY  
WITH THE CONSTITUTIONAL OBLIGATION  
ESTABLISHED BY MT. LAUREL II.

32. On pages 15 and 16 Mr. Mizerny sets forth conclusions regarding the Township's Land Development Ordinance and Master Plan as they relate to Mt. Laurel II. As indicated previously, those documents were written and enacted prior to the publication of the Mt. Laurel II decision. Even so, many of the issues addressed in that decision were addressed in the preparation of the Land Development Ordinance and the Master Plan. Mr. Mizerny is correct in his statement that the ordinance, as it is now constituted, does not contain any mandatory inclusionary provisions with required set asides for lower income housing. However, there is nothing in the ordinance to preclude or impede a developer from providing lower income housing in accordance with the philosophy of Mt. Laurel II. The ordinance does not preclude the use of federal or state housing subsidies and, in fact, the Township has a subsidized housing project for the elderly which was approved long before Mt. Laurel II was published. Consequently, any developer who

wishes to can make use of available subsidy programs and come before the Township with a project for approval by the Board. There is nothing in the ordinance which precludes such approval if the developer so desires.

33. There is nothing in the ordinance which precludes any developer, including Hills Development Company, from making use of the increased densities given to them at the time that this ordinance was passed, to provide for lower income housing, and to establish a method for insuring that such housing will stay affordable.

34. A majority of the undeveloped land in Bernards Township received additional development capability at the time of the passage of this ordinance and its predecessor in 1980. Hills Development Company was one of the prime beneficiaries of this increase in development rights and clearly has the ability to make use of that "bonus" to provide lower income housing. Hills Development obtained that bonus in large part through its allegation in previous litigation that extra density was required to provide Mt. Laurel I housing.

35. Mr. Mizerny indicates that the ordinance does not contain the terms "low/moderate income families" or "low/moderate income housing". Regardless of the terminology used, the ordinance was designed to provide the developer with the greatest degree of flexibility possible in establishing

housing types without imposing upon him any unnecessary costs in the construction process.

36. Contrary to Mr. Mizerny's assertions, the ordinance does contain numerous incentives to encourage the inclusion of lower income housing. First, a majority of the undeveloped property received additional development rights as compared to the previous ordinance, thereby providing an incentive (and a mechanism) to provide housing for lower income families. Further, the ordinance, to the extent practicable, established flexible design standards to allow the developer to make maximum use of various construction methods and designs to reduce the cost of housing, thereby both providing an incentive to construct affordable housing under the court's requirements prior to the decision in Mt. Laurel II and, coupled with the "bonus" brought about by the rezoning, providing an internal subsidy as an incentive for low income housing. In my opinion, the incentives are there to provide for low income housing, even if an absolute requirement is not.

37. The ordinance does not preclude the use of mobile homes if such homes are mounted on a foundation and become permanent structures. What the Township's ordinance does not provide for, either as a permitted use or through design standards, is the construction of a trailer park.

38. Mr. Mizerny indicates that the Master Plan,

specifically the housing element, was adopted after the Land Development Ordinance. He further states that this is contrary to State law. His statement is correct and, in fact, was recognized by both the Township and the courts. At the time of the conclusion/ through an out of court settlement, of the litigation between Bernards Township and the Hills Development Company (then the Allen Deane Corporation) the presiding judge took note of the fact that the municipal Master Plan was not in compliance with the zoning resulting from that out of court settlement (as well as prior litigation) and provided the municipality with a time frame within which to readopt their Master Plan. Admittedly, the time frame within which the municipality finalized its Master Plan exceeded the time period allowed by the courts, but there is no apparent indication that this, in any way, affected development throughout the town. The delay in finalizing the Master Plan was due in large part to the numerous litigation problems which were resolved in 1979 and 1980. However, considerable work on the information contained in the Master Plan had been completed on a technical basis and was the subject of review and discussion by municipal officials before the various court orders were completed. Consequently, the basis for land development within Bernards Township as set forth in the Master Plan was effectively in place prior to the adoption of the Land Development Ordinance and the formal

adoption of the Master Plan and the extensive documentation relating thereto.

39. Finally, the Bernards Township Master Plan was adopted in 1982 before the publication of the Mt. Laurel II decision. The entire housing element and those sections of the Land Development Ordinance reflecting the housing element (as well as other elements of the Master Plan) were intended to provide the opportunity for a variety of housing types and to provide for more affordable housing. While, in my opinion, there is no absolute requirement set forth in the Land Development Ordinance compelling construction of lower income housing, nor does the Master Plan address such absolute requirement, the mechanism exists in those enactments for a developer to make a profit and at the same time provide housing for the lower income population through incentives and internal subsidies.

#### SUMMARY OF CONCLUSIONS

40. Based upon my review of Mr. Mizerny's Affidavit, it is my opinion, with one specific exception, that his conclusions are in error. That exception is that the Bernards Township Land Development Ordinance does not require a mandatory number of low or moderate income housing units. With this exception, it is my opinion that the Bernards Township Land Development Ordinance is

in conformance with the Municipal Land Use Law, is not vague and subject to multiple interpretations but instead provides for an extensive degree of flexibility in development of properties, is only discretionary in the sense that the developer has flexibility in determining how the property should be developed/ and is not excessive. Furthermore, in my opinion, Bernards Township through its rezoning in 1980 (as amended in 1982) provided a "bonus" to owners of land that will result in the construction of in excess of 6000 housing units. Because of this "bonus" land owners are in a position to effect compliance with the requirements of Mt. Laurel II without additional action by the Township. Further, while certain modifications in the design regulations and standards could provide additional assistance in the construction of lower and moderate income housing units, the design regulations and requirements as set forth in the ordinance are not cost generative, nor do they preclude a developer from providing low and moderate income housing in accordance with the Mt. Laurel II decision when the "bonus" is taken into consideration.

41. Finally, in the specific instance of Hills Development Company, the combination of the density bonus received in 1980, coupled with the flexibility of design and non-cost generative requirements clearly allows the Hills Development Company to construct Mt. Laurel housing in accordance with its stated intent prior to the adoption of the Land Development Ordinance.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

  
MARSHALL FROST

Dated: July 6 , 1984